EMERGING TRENDS IN LITIGATION MANAGEMENT

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Dedication

This book is dedicated with love:

To my father, **the late Charles E. Harris**, my mother, **Deloris B. Harris**, and my two sisters, **Sonya D. Harris,** and **Jennifer B. Harris**.

I also dedicate this book to all the members of the **Harris, Bradley**, **Clark,** and **Taylor** families who left us far too early.

We miss you!

I likewise dedicate this book to my life partner, **Anne D. Harris**, and my former Mayer Brown partner and friend, **John A. Janicik**, who we lost way too soon.

I will end this dedication with my favorite quote:

"*The only way to stop the pain is to stop running*."

—Author Unknown

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Acknowledgments

These are the first acknowledgements I have ever written so please bear with me. Plus, I'm deciding to shoot from the hip rather than doing the lawyer thing and looking at prior precedent to see how I should write them. To the extent possible, I'm also completely erasing from my mind the many acknowledgements that I have read in the past. Here we go:

First, authoring this publication was a ton of work over the past year plus! I couldn't have done it without the generous assistance of the other coordinating authors, Sarah E. Reynolds, who, among other things, helped review, draft, and revise content, and Marjan A. Batchelor, who did all of that and also managed the project. Thank you to the other talented authors who gave their time to help complete this book. As profiled below, they are Samantha Booth, David "Big Dave" Cole, David Dowd, Eric Evans, John Gaidoo, Cristina Henriquez, Vazantha "Vee" Meyers, Mathew Siporin, Allison Stowell, and Tara Trask. I greatly appreciate your timeliness, professionalism, and the care you put into creating superb content. Thank you to the former summer associates who helped early in the process, Nathan Rice and Andrew Spadafora. And a big thank you to Rachel Clingman, Michael Lackey, and Evan Tager; each of you is responsible for me having the opportunity to author this book. Last, but not least, thank you to Joseph Snapper (please get well), and the many authors from the publication, *Litigation Management*, who gave us excellent content to work from.

There were also many other people who helped along the way, and I thank each and every one of you.

About the Authors

Coordinating Authors

Charles E. Harris, II, a partner in Mayer Brown's Litigation & Dispute Resolution group, focuses his practice on a range of areas of paramount importance to the business community, including class actions, arbitration, contract disputes, administrative actions, and privacy and cybersecurity. He has also handled many First Amendment cases alleging defamation and other privacy torts. In addition, as a registered patent attorney, Charles has litigated a number of intellectual property disputes. In practice, Charles has distinguished himself as a versatile lawyer who possesses abilities in many disciplines. For instance, he has prepared matters for trial, tried cases to completion, and argued in appellate courts. Charles has received a number of accolades for his leadership and legal experience. Most recently, the *Lawyers of Color* named him to its inaugural list of "Nation's Best" in the Midwest region. Before joining Mayer Brown, Charles clerked for the late Judge David D. Dowd Jr., of the Northern District of Ohio. Charles is the overall editor of this book. In this capacity, he assembled the co-authors and defined the scope and structure of the publication. Charles also authored Chapter 5, "Management of Class Actions," and he co-authored Chapter 6, Chapter 7, and Chapter 9, with other talented authors. The titles of those chapters, respectively, are "Litigation Against the Federal Government," "Juror Perspectives on Litigation," and "Cybersecurity and Privacy for Litigation Counsel."

Sarah E. Reynolds is a partner in Mayer Brown's Litigation & Dispute Resolution group. Working to match case strategy with client goals, Sarah litigates complex commercial disputes for technology companies. Sarah's technology-related litigation experience includes breach of contract and licensing agreements, false advertising, digital media and advertising, e-commerce, and user-generated content. As an integral member of Mayer Brown's International Arbitration practice, she also represents multinational corporations before domestic and international arbitral bodies, including the JAMS, AAA, ICC, and ICDR. Those disputes range from complex commercial supply agreements to licensing agreements. Sarah's arbitration experience also includes obtaining and defending against judicial review of arbitration awards, and drafting and reviewing arbitration clauses in transaction agreements. Sarah worked closely with Charles E. Harris, II, on the structure and the scope of this publication and she co-authored Chapter 4, "Multidistrict Litigation (MDL)," and Chapter 8, "Domestic and International Commercial Arbitration."

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Samantha C. Booth is an associate in Mayer Brown's Litigation & Dispute Resolution and Appellate practice groups. Samantha's practice focuses primarily on helping companies navigate cutting-edge and evolving consumer protection, data privacy, cybersecurity, and constitutional issues, as well as shaping policy through government-facing litigation. Samantha also routinely publishes and advises clients regarding compliance with cybersecurity regulations, data privacy litigation trends, and data breach response. Though Samantha's practice focuses on clients in the technology sector, she has represented clients across industries—including automotive, healthcare, insurance, and telecommunications. Samantha's experience spans every forum and stage of litigation. She has successfully argued and briefed complex appeals before a variety of federal and state appellate courts, including the U.S. Supreme Court, and has achieved victories for clients through dispositive motions in trial court. Drawing on her past experience as a law clerk for a JAMS arbitrator, Samantha was also a core member of the trial team that achieved a full arbitral award in her client's favor in a breach of contract dispute. Prior to joining the firm, Samantha clerked for Judge Carlos T. Bea on the Court of Appeals for the Ninth Circuit. Samantha co-authored Chapter 9, "Cybersecurity and Privacy for Litigation Counsel."

David Cole, III serves as Senior Litigation Counsel for Adtalem Global Education Inc., and he manages the Company's litigation and Ethics and Integrity matters. Prior to Adtalem, he served as Senior Counsel for litigation at Astellas Pharmaceuticals, where he managed its litigation, conducted investigations across the globe, and served as the regional team lead for the Americas and global team member for Astellas's Anti-Bribery Anti-Corruption program. Prior to Astellas, David was Senior Counsel for litigation at Career Education Corporation (CEC). Before going in-house, David was a lawyer at Mayer Brown LLP. He counseled and defended corporate clients in connection with litigation, government and internal investigations, consumer fraud, securities violations, class actions, and white-collar criminal matters. Before Mayer Brown, he was also a prosecutor for the Illinois Attorney's General Office, Special Litigation Bureau, representing the State as a plaintiff or defendant in civil litigation or as a prosecutor in criminal cases in state and federal court. David co-authored Chapter 1, "Litigation from the In-House Corporate Defendant's Perspective."

David F. Dowd, a partner in Mayer Brown's Litigation & Dispute Resolution Group, is an experienced litigator whose practice has a strong emphasis in government contracting issues and controversies. He advises such clients as those involved in health care, information technology, large military systems, engineering services, and other industries, regarding federal procurements and related issues. His counsel in this area includes commercial items, conflicts of interest, cost allowability issues, defective pricing, contract and subcontract negotiations, contract financing, assignments and novations, leasing, preparation of claims, and procurement fraud. David also handles procurement controversies, as he litigates bid protests and disputes before the Government Accountability Office and the Court of Federal Claims, represents contractors in litigation and arbitrations involving government contracts, and tries federal court litigation focused on contract disputes and alleged fraud. David co-authored Chapter 6, "Litigation Against the Federal Government."

Eric B. Evans is a partner in the Litigation & Dispute Resolution group. He concentrates his practice on complex litigation and intellectual property matters, often focused on large-scale machine learning tools. He also leverages a prior career in

information technology to provide advice on defending AI and machine learning tools, data and information governance, and cybersecurity. He is co-chair of the firm's Electronic Discovery & Information Governance practice and a member of the Information Technology Oversight Committee. Before he attended law school, Eric served as Associate Director of Instructional Technology at Denison University, where he acted as Denison's Digital Millennium Copyright Act agent and enforced and redrafted the university's Acceptable Use Policy for Network Resources. He also designed and deployed highly secure Windows NT and Windows 2000 client images on more than 400 computers located in more than a dozen computing facilities. Eric authored Chapter 3, "Management of e-Data and e-Discovery."

John O. Gaidoo is the lead lawyer for the Global Labor, Employment, & Management Relations Team at Cummins Inc. Cummins Inc. is a global power leader that designs, manufactures, distributes, and services diesel and natural gas engines and powertrain components and does business in more than 190 countries and territories. John regularly engages in litigation, arbitrations, collective bargaining, and other contentious matters. He also spends a significant portion of his time advising and counseling stakeholders across a broad spectrum of labor and employment specialty areas, developing and conducting compliance training, and supporting internal investigations, with a focus on complex, high-risk, and/or non-routine matters. John is a member of Cummins's Legal Leadership Team and in that capacity is responsible for managing and developing a global team of lawyers who support more than 60,000 employees globally. Before joining Cummins, John served in the U.S. Marine Corps, worked as a government contracted engineering technician, and then spent several years as a defense-side labor and employment attorney at the law firm of Baker and Daniels LLP (now Faegre Baker Daniels LLP). John co-authored Chapter 1, "Litigation from the In-House Corporate Defendant's Perspective."

Cristina Henriquez is an associate in Mayer Brown's Litigation & Dispute Resolution group. Before joining Mayer Brown, Cristina was a judicial extern for Judge Edward M. Chen of the Northern District of California and she worked at the American Civil Liberties Union of Northern California. Cristina handles complex civil litigation—both at the trial and appellate level. Cristina also has experience in drafting various motions and briefs in federal and state courts across the country, handling and drafting submissions in arbitrations, presenting oral argument in court, managing document productions, representing clients in bankruptcy cases, representing clients in shareholder meetings, gathering facts, and working with experts. Cristina co-authored Chapter 4, "Multidistrict Litigation (MDL)," and contributed to Chapter 5, "Management of Class Actions."

Vazantha R. Meyers has extensive experience in all matters of discovery and has managed dozens of document review projects in recent years. Previously, she worked as a litigation associate at Mayer Brown LLP. While at Mayer Brown, Vazantha worked in the Electronic Discovery and Records Management Group, providing counsel to corporate clients on discovery and records management issues. Vazantha has developed workflows, documentation, processes, and procedures that successfully create efficient and defensible managed review matters. She has also trained a team of highly skilled managed review professionals, who are proficient in several review tools and methodologies, including the latest analytical tools. As part of her client consultation, Vazantha works with corporate clients to create internal workflows aimed at increasing accountability, while lowering the cost and inconsistency of

managed review across projects. Vazantha co-authored Chapter 1, "Litigation from the In-House Corporate Defendant's Perspective."

Mathew T. Siporin, a partner at the Pullano Law Offices, focuses his practice on helping victims of construction and trucking accidents, defective products, and medical malpractice. Mathew has assisted his clients in securing many multimillion-dollar settlements and verdicts. For instance, he helped a client achieve a $2.5 million jury verdict in a wrongful death of a 90-year-old and played an integral role in obtaining a record-breaking $14 million settlement in a trucking case that rendered his client a paraplegic. Mathew was awarded the Trial Lawyer's Excellence Award in 2014 by the *Jury Verdict Reporter* due to his success in the courtroom. He was also named to the *Law Bulletin's* 2014 "Top 40 Under 40" attorney list, which is bestowed upon less than 1% of the attorneys practicing in Illinois. He was also named to the Illinois Super Lawyer's list in 2016 and selected as a "Rising Star" by Super Lawyers from 2012 through 2015. Mathew authored Chapter 2, "Litigation from the Plaintiff's Perspective."

Allison M. Stowell is a senior associate in Mayer Brown's Dispute Resolution group and a member of its International Arbitration practice. She represents clients in the energy, construction, and banking and finance industries in complex international commercial disputes, concentrating her practice in Latin American disputes. She has appeared in arbitrations administered by the ICDR, ICC, and JAMS. She has also represented U.S. and foreign clients in New York state and federal courts, in actions in aid of arbitration, such as the confirmation and enforcement of arbitral awards and challenges to discovery and forum. Allison co-authored Chapter 8, "Domestic and International Commercial Arbitration."

Tara Trask is founder and president of Tara Trask and Associates, a full-service jury research trial consulting and litigation strategy firm with offices in San Francisco, Houston, and New York. Over her 25-year career, Tara has been involved in over 450 jury trials. As to some notable engagements, Tara assisted Centocor in *Centocor v. Abbott*, the largest patent infringement verdict in U.S. history. She also assisted Oprah Winfrey in *Texas Beef Group v. Winfrey* and ABC in *Food Lion v. ABC*. Tara's practice focuses on all types of complex litigation, including: intellectual property, products liability, wrongful death, mass torts, medical and legal malpractice, insurance, contracts, and securities. She is a frequent author and lecturer on juror psychology and other trial science topics. Tara co-authored Chapter 7, "Juror Perspectives on Litigation." Tara currently serves as the Chair of the ASTC/CJP joint working group and is liaison to the Civil Jury Project at NYU Law School.

*Introduction**

Eric Shinseki, a retired Army general and former secretary of veterans affairs, once famously said: "If you don't like change, you're going to like irrelevance even less." What this concept means for us litigators is that you can only maintain (and ideally increase) your fitness by keeping up with the ever-changing litigation trends and transforming with the times. There are too many emerging trends that are driving change in the litigation practice today to discuss all of them here. Therefore, we focus in this publication on those trends that have a wide-ranging impact across each litigation-related topic we discuss in the various chapters. For instance, advances in technology are having a profound effect on almost all areas of case strategy and how lawyers manage litigation. So, too, are concerns about the rising costs of litigation, new rules and developments in case law, and the apparent shift in the regulatory environment and societal perspectives since President Donald Trump entered the political arena. In keeping with the notion that experience is the best guide to law, this book presents the thoughts of a diverse group of litigators on how they incorporate these various emerging trends into their practice.

Providing a preview of each chapter, Chapter One focuses on in-house counsel. The author of *Litigation Management* developed the original content in this chapter after a roundtable discussion with corporate counsel. This book discusses new trends from the in-house counsel's perspective such as the emergence of new technology to manage litigation costs and the importance of considering diversity and inclusion when promoting counsel internally and selecting outside litigation counsel.

The maxim "know your enemy" applies to Chapter Two. This chapter addresses litigation from the plaintiff's perspective. In particular, it discusses critical emerging issues for the plaintiffs' bar, including recent amendments to the Federal Rules of Civil Procedure and how to use those rules to a plaintiff's advantage.

Like everything else, litigation is more technology-focused that ever. Nowhere is the effect of technology more apparent than in the prevalence of e-discovery. Business once conducted by telephone is now done by email, creating a record of communications whose collection, analysis, and production is a fundamental aspect of every case. Chapter Three surveys the developing issues in e-discovery.

Multidistrict litigation (MDL) is the topic of Chapter Four. Faced with complex claims of a similar nature arising in different jurisdictions, such as those associated with products liability or a disaster, a defendant may seek to have them all adjudicated by a single MDL court. MDL litigation has taken off over the past several years as nearly half of all pending civil cases in federal district courts are now MDLs. This chapter discusses critical issues facing the MDL process like how to stamp out frivolous claims in MDLs and how to incorporate third-party litigation funding into the process.

Chapter Five deals with class action litigation. Although class action suits have waned in recent years with the emergence of MDLs, they remain a powerful vehicle

* The views reflected in this book are those of the authors and are not necessarily those of the authors' law firm, companies, or organizations.

for advancing the interests of plaintiffs by aggregating and enhancing statutory and other types of damages. This chapter analyzes the procedures and practical implications of managing class action litigation and discusses developing issues regarding class actions such as whether class arbitration is still a threat after certain U.S. Supreme Court decisions that arguably set a high bar to reach such arbitration.

Litigation against the U.S. Government can come in many forms—e.g., lawsuits, regulatory and administrative actions, and investigations—regarding a gamut of substantive issues. Chapter Six highlights common features of litigation against the government and describes possible paths for approaching and handling a dispute with state and federal authorities. Some of the most fascinating discussions in a courthouse occur after a trial has concluded, when the jury that has decided the case then discusses it with the lawyers who tried it. With the jury's thinking laid bare, the lawyers can evaluate how they were and were not effective in advocating for their cause. The trick, of course, is to anticipate the jury's thinking before the trial and make the arguments to shape it.

Chapter Seven presents observations on how juries think and work, and what lawyers can do to study potential jurors using social media and other emerging technology. Chapter Seven also coins the phrase "The Donald Trump Effect" to describe the weakening of evidence-based reasoning.

Chapter Eight examines both domestic and international arbitration. In recent years, arbitration has become the preferred forum for many businesses to resolve complex commercial disputes—particularly those disputes arising from cross-border transactions. Entities often prefer arbitration over court as it provides parties a neutral forum to resolve disputes, enforcing an arbitration award domestically and internationally is relatively simple, and arbitration gives parties the flexibility to create a bespoke dispute resolution process tailored to a specific transaction or dispute. This chapter discusses these and other advantages of arbitration, the potential disadvantages, and related issues.

Finally, Chapter Nine discusses a hot-button topic, cybersecurity and privacy. This chapter focuses on how litigation counsel can comply with their ethical and legal requirements to protect client files and other data from unauthorized access and disclosure. Furthermore, the chapter discusses some of the latest regulations that may cover litigation counsel, including the EU General Data Protection Regulation (or GDPR).

CHAPTER 1

Litigation from the In-House Corporate Defendant's Perspective

David Cole, III,[1] John O. Gaidoo,[2] and Vazantha R. Meyers[3]

§ 1.01 Introduction

The era of law firms automatically counting on continued business from their top clients, even those clients they considered their crown jewels, is over. So too is the era of law firm partners making strategic decisions in litigation without meaningful input from in-house counsel. The economic conditions following the downturn in the late 2000s had a dramatic, and quite possibly permanent, impact on the legal economy. As used here, "legal economy" refers to the relationships between law firms and the institutions that comprise their client base. One of the most significant changes brought on by the economic downturn has been a shift of power from the major AmLaw 200[4] law firms to their clients. Specifically, control has shifted from law firms to corporate

legal departments where the influential views of the executive suite, and their desire to reduce legal spend, are directly reflected.

Legal departments have always regarded their legal expenses as a cost of doing business—sometimes, a quite unmanageable one. Plus, in the past, law firms did not put much effort into managing clients' legal costs. But firms' attitudes on managing legal expenses changed with the shrinking demand for legal services during and after the financial crisis of 2007 and 2008. Law firms have become keenly aware that their client base could shrink overnight if they fail to manage legal fees. Consequently, clients' complaints have gained traction, and law firms are now forced to follow the lead of those who pay their bills. Indeed, in-house lawyers have challenged once standard charges in legal bills, from travel costs to new associates' billing hours, and law firms have listened.

It is now clear that the old model—in which law firm partners called the shots and clients listened—will never return. Law firm partners must respect the perspective of in-house counsel supervising litigation with the utmost seriousness or risk losing the client.

At a roundtable in 2009,[5] six in-house litigation attorneys discussed their corporate experience, litigation knowledge, and the challenges they face as in-house attorneys. Although this roundtable was held several years ago, the views the in-house attorneys shared are as relevant today as they were then—and maybe even more so. This chapter discusses many of the matters the in-house counsel discussed at the roundtable, including mitigating litigation risk, managing an in-house legal team, retaining and managing outside counsel and solving the problems of electronic data management and discovery. This chapter also discusses the work life of an in-house litigation attorney.

§ 1.02 Pressing Issues

[1] Cost

One of the most pressing issues in-house counsel face is addressing and controlling the spiraling costs of litigation. Given that in-house legal departments are generally a cost center rather than a revenue center, in-house counsel must attempt to achieve beneficial results economically. This is a primary area of concern: "At the end of the year" we "look at what is spent on litigation. We strive to make that number smaller every year, and that is a big challenge."[6] In-house counsel are an integral part of corporate business teams, and budgeting is often a major focus for these teams. They cannot afford to tolerate exceeding budgets or missing profit targets.[7] Outside counsel is a cost that in-house corporate litigation managers carefully consider; these managers seek outside counsel who will mirror corporate management and cost models, and the most valuable outside counsel provide monetary forecasts and stay within the budgets they provide.

[2] Unpredictability of Litigation

The unpredictable nature of litigation and the expense of e-discovery are two major challenges to budgeting for legal expenses. Litigation is inherently unpredictable. At the outset of most major litigation, the parties do not know all of the facts necessary to accurately assess the prospects of a case, its complexity, and its length. Additionally, the course of litigation depends to a large extent on the strategy and tactics chosen by opposing counsel, choices that are somewhat limited by legal ethics and the

client's resources. Judges can also have an unpredictable effect on litigation via their responses to motions and by their decisions on the scope of discovery. Accordingly, it is often quite difficult, at the start of litigation, to ascertain how much the litigation will cost.

Compounding this uncertainty, e-discovery can be very expensive.[8] One corporate litigator described a lawsuit in which the e-discovery costs exceeded the legal fees,[9] and this experience doesn't appear to be unusual. There are many examples of e-discovery horror stories: An appellate court affirmed an order holding the Office of Federal Housing Enterprise Oversight in contempt for not meeting a discovery deadline after the agency spent $6 million (or nine percent of its entire budget) in a futile attempt to comply with the deadline.[10] In another case, a party was said to have spent $3 million on e-discovery in just five months.[11]

The uncertainty of litigation costs often forces companies to be "reactive" within the very broad outlines of a budget rather than proactive in the sense of planning their expenses well ahead of time. But this attitude can clash with the understandable desire of the corporation's managers to impose strict budgetary discipline throughout the company and to stick with it. General counsel sometimes complain that they are being asked to quantify that which cannot be precisely quantified. This problem is exacerbated in a changing economic landscape, because, as previously discussed, periods of economic difficulty require cost-cutting or at least more predictability of costs.

Furthermore, as the economic situation changes, litigation concerns likewise change and become more challenging to predict and model. According to one corporate counsel, in just one five-to-six-year period the focus shifted from "antitrust and competition-related litigation"[12] to derivative actions and securities cases, resulting from heightened shareholder activism. Each of these types of litigation carries with it its own risks, its own timetables, and its own costs, and when a company does not know what kind of litigation the organization is planning for, it's hard to plan ahead for litigation expenses. In periods of economic success, for example, a company may face intellectual property litigation from parties who believe they had a role in the company's technical prowess or corporate litigation from failed merger partners. In periods of economic hardship, the same company may face shareholder actions and securities cases. It is difficult to imagine how litigation costs will become more predictable anytime soon.

[3] International Law

Counsel at companies with parent or affiliated companies outside the U.S. experience unique legal challenges that result from conducting business internationally. Often, U.S. in-house counsel must work with clients around the world, many of whom are not entirely familiar with American-style litigation and many of whom work in legal regimes that conflict with American litigation principles. For example, discovery of both electronic and paper documents is conducted differently in the European Union ("EU") than the way in the United States.[13] The EU protects personal privacy very stringently under its General Data Protection Regulation ("GDPR").[14] In contrast, in U.S. litigation, all data that are relevant and not privileged, wherever they originated, must be produced before trial, and privacy is a secondary consideration. Although there are "safe harbors"[15] to work out these conflicts, they still present serious pitfalls to companies that operate globally.

In addition, many other nations have legal systems that operate under principles quite different from those to which U.S. counsel are accustomed. In some nations, under-the-table payments to government officials are routine; in the United States, they are considered commercial bribery and warrant criminal prosecution.[16] Another example: In the United States, employment at will is the rule, while in most European nations, an employer generally must provide cause for terminating an employee.[17]

A potential advantage for international companies is using their knowledge of different international standards to make business decisions.[18] For example, if a multinational company is forced to lay off staff, employment law standards in the United States might allow the organization to terminate the employees more readily and with less disruption and litigation cost than if the company attempts to terminate workers in the EU.

[4] Diversity and Inclusion

Diversity and inclusion is now a paramount consideration when legal departments are promoting in-house lawyers and hiring outside counsel. As just one example of this fact, the Diversity Lab, an incubator for innovative solutions that boost diversity and inclusion in the law, developed the "Mansfield Rule" program; this program is named after Arabella Mansfield, the first woman admitted to practice law in the United States, and modeled after the NFL's Rooney Rule. Just recently, the Diversity Lab launched the "Mansfield Rule: Legal Department Edition." Under this edition, participating in-house legal teams must "consider at least 50 percent women, minority lawyers, LGBTQ+ lawyers and lawyers with disabilities as applicants for key leadership roles. Legal departments that sign on are also asked to consider at least 50 percent diverse lawyers for outside counsel hires for new or expanded work."[19] So far, eight legal departments have signed on to be part of this important effort: MassMutual, BASF Corp., Compass Minerals, LendingClub, PayPal, Symantec Corp., thredUP, and U.S. Bank. As one commentator noted, the "participating law departments are definitely on the forefront of diversity initiatives, and hopefully there's enough momentum to get the rest of corporate world on board with this incredibly important cause."[20]

It is also notable that in-house counsel are mandating that law firms provide a diverse team when they submit proposals to act as preferred counsel or to act as counsel on specific cases. Not only that, these in-house lawyers are watching closely to ensure that the diverse outside lawyers who were included on the proposals actually get an opportunity to work on litigation if and when the in-house lawyers retain the law firm that submitted the proposal. It is yet to be seen whether the current diversity and inclusion initiatives will have any lasting effect on the leadership opportunities for diverse lawyers in corporate legal departments and at law firms.

§ 1.03 Managing Outside Counsel Costs

[1] Alternative Fee Arrangements

There are several strategies and actions that legal departments can take to deal with cost issues, such as using alternative billing techniques. Overall, many in-house counsel do not find that traditional billing (i.e., billable hours) in litigation is particularly effective because it creates an incentive, however unspoken, for law firms to bill a

larger number of hours than needed to complete a matter and to charge clients for off-the-shelf work that has previously been completed for another client. Additionally, under traditional billing practices, the client bears most of the risk that litigation will mushroom beyond the expected number of hours. However, the type of alternative arrangement that makes sense for a given matter is situation-specific. The market has not yet created a superior, generally applicable alternative to the billable-hour model.

Devising alternative strategies is difficult for several reasons, one of which is that seemingly similar cases can have starkly different outcomes. Some cases settle after only a couple of months, while others go all the way to trial. This reality inhibits a company's ability to negotiate alternative fee arrangements, such as flat fees for an entire litigation, a monthly retainer, or an annual cap on litigation fees. This is true on the defense side in particular, because the plaintiff normally controls the flow and timing of a case by making motions, seeking discovery, pressing for a trial date, and other steps. It is not easy to predict the steps that a plaintiff's lawyer will take, and U.S. law does not place many constraints on the ability of a party to assert and press claims in litigation.[21]

In addition, alternative fee arrangements often mean that work is moved to a lower-level firm attorney. For a fixed or capped budget, this may mean that little work is done or feedback provided after the cap is reached. In cases with a great deal of money at stake, however, alternative fees can prove valuable. For example, outside counsel may consider representing a company on a contingency fee[22] basis when a large monetary recovery is relatively certain and the economics of using an outside lawyer with a standard hourly billing system does not work for the company.

[2] Phase-Gate Process

A "phase-gate process" (also referred to as a stage-gate process) is a project management tool in which a project is divided into distinct stages or phases. Many companies are experimenting with dividing up aspects of litigation into stages, phases or even tasks. The company can negotiate a fixed or flat fee for each such division of work; dividing the litigation into these discrete parts increases the predictably of expenses given the sample period is shorter, and, for the same reason, it allows in-house counsel (and law firms) to predict the results more accurately. While litigation costs remain a concern, in-house counsel and corporate management would rather know them in advance to avoid surprise. For a traditional phase-gate process, project managers provide a budget (and are allocated funds) for certain defined work, and they provide a status report and recommendations at the end of that stage before obtaining authority and funds to proceed to the next stage. In the context of litigation, a process involves setting a certain fixed fee or budget for defined activities, such as a certain number of motions, depositions, discovery requests, and the like. At the conclusion of one stage, the litigation counsel reports to in-house counsel on the results obtained and the impact on the case assessment and provides recommendations for the next stage. A fixed fee or budget is then negotiated and set for the next stage.

[3] Outside Counsel Guidelines

In-house counsel must keep a close watch on the firm's work and set clear guidelines no matter what type of fee system is used to keep bills reasonable. By providing outside counsel with guidelines, firms know what they can bill, which helps decrease billing issues on the back-end. In addition, providing staffing guidelines controls the

size of a team assigned to a matter and keeps costs down. For example, to limit and define the number and level of attorneys allowed to bill for a case, legal departments sometimes require advance notification if that mix will vary.[23] Professional time also needs to be addressed in the guidelines. There seems to be a proliferation of interesting new titles at law firms, each with its own billable rate. To keep billed professional time under control, the legal department might use an online litigation management program with an e-billing feature with specific guidelines for billing, including professional time.[24] The e-billing feature provides alerts when something occurs outside of the guidelines. In addition, in-house counsel should not be afraid to impose consequences when guidelines are not followed.

[4] Corporate Legal Collaboration Technology

Collaboration technology, also known as collaborative or group software, can help people involved in joint projects accomplish shared goals in a more productive manner. Legal departments are turning to this technology to drive greater efficiency. "In some companies, other corporate functions, such as IT, operations and R&D, have already experienced the benefits of collaboration."[25] Thus, it only makes sense that the technology would make its way to the legal departments and, particularly, to the way in which in-house lawyers manage projects with outside lawyers. For instance, in the litigation world, rather than receiving only an initial budget estimate, there is collaborative software on the market that can provide in-house counsel with real-time data on the costs of a lawsuit throughout the lifecycle of the case. In addition, technology can address the "scheduling of depositions, . . . collaborative approaches to the development of discovery responses, making available product information to a wide variety of stakeholders, consolidating expert information into a single repository and implementing technology to automate the process of creating standard documents" such as discovery responses.[26] Implementing these types technology in a legal department, however, is no simple task. "It's not just going to be plug-and-play and work automatically. It's going to be a painful process."[27] Furthermore, the technology is "going to have to be integrated with the primordial soup of your infrastructure."[28]

§ 1.04 Other Cost Containment Techniques

[1] Arbitration

In today's litigious environment, all companies, especially consumer-facing ones, should consider implementing a mandatory arbitration program and/or class action waiver to improve the predictability of the outcomes in litigation and to mitigate exposure to potentially costly litigation, such as class actions. Generally, the company can extend the program to all types of claims relevant to its industry or business, including personal injury, statutory or employment-related claims.[29] The program's arbitration agreement will require any party to conduct the arbitration under the auspices of an arbitration administrator such as the American Arbitration Association ("AAA") or JAMS, Inc. Please refer to Chapter 8 for a detailed discussion on arbitration.

[2] Outsourcing

Outsourcing, specifically offshore outsourcing, might help control costs. In countries like India, there are vast pools of English-speaking, highly educated employees who

employers pay much lower salaries than law firms pay associates in the United States. As an added benefit, the time difference essentially permits offshore companies to work around the clock.

Companies are now outsourcing legal-based services, such as document review, much in the same way corporations have long outsourced functions like information technology or call centers. Some in-house counsel believe that, because their company as a whole engages in outsourcing for sound economic reasons, the corporate leaders should also expect the legal department to find ways to move some of its business offshore.

Hundreds of legal outsourcing companies have sprung up in India,[30] and companies, such as General Electric, have, at times, spent $3 million a year with Indian vendors on routine legal work.[31] Offshore companies charge their clients between $25 and $90 an hour, even for the most sophisticated jobs they handle,[32] such as document review. A junior lawyer in India who does this work typically earns between $8,000 and $10,000 a year,[33] which is in stark contrast to the salaries of many first-year associates in the United States, who earn considerably more than $100,000.[34]

Although some observers have raised ethical concerns about people who are not licensed to practice law in the United States performing legal-type work,[35] outsourcing vendors in India and elsewhere typically structure their businesses to ensure that all such work is supervised by an attorney admitted to practice in the United States.[36] This arguably obviates the ethical concerns.

A company should supervise the work performed by outsourcing vendors, particularly offshore ones, through a dedicated team responsible for managing that relationship. In some cases, outside lawyers are instructed to use a particular outsourcing vendor and to supervise their work, especially when the legal department is small. In these circumstances, outside lawyers should assist in-house counsel as much as possible in keeping a close eye on the work performed by the outsourcing vendor.

[3] Third-Party Litigation Funding

Litigation funding, also known as legal financing and third-party litigation funding, enables a party to prosecute a civil action without having to pay for it. A third-party funder can pay some or all of the costs or expenses associated with a dispute in return for a share of the proceeds recovered from the dispute (if the plaintiff is successful). If the litigation is unsuccessful, the funder generally bears the loss of its monetary outlay. While litigation funders see legal departments as a "vast, untapped market of potential clients," recent studies "suggest that many legal departments are hesitant" to get on "the increasingly powerful litigation finance train."[37]

For instance, Burford Capital, a global legal funder, surveyed 177 in-house counsel in the United States, the United Kingdom, and Australia, and only 5% said their organization had used litigation finance. A different litigation funder, Lake Whillans Litigation Finance LLC, conducted a survey with the legal news website, *Above the Law*, and it found that 74% of the 276 in-house lawyers in the United States who responded to the survey said they had not worked with a litigation funder. Furthermore, more than 30% of those lawyers indicated that they would never consider using litigation finance. The most common reasons for their reticence were "ethical reservations" and a negative perception of litigation finance.[38] These concerns are certainly valid, as a New York City Bar ethics committee

issued a formal opinion finding that lawyers "may not enter into a financing agreement with a litigation funder, a non-lawyer, under which the lawyer's future payments to the funder are contingent on the lawyer's receipt of legal fees."[39] And the practice "also has drawn fire from the defense bar and the U.S. Chamber of Commerce."[40]

Some observers believe this tide will change. With some law firms boasting about the benefits of litigation finance and litigation funders "ramping up outreach efforts, it's likely that legal departments are slowly becoming more aware of the pros of litigation finance, which can give companies the ability to shift litigation risks to third-party funders."[41] Legal departments are likely to come around if they come to believe that using a litigation funder will not create reputational or ethical issues, and that their respective companies are leaving significant money on the table by not using litigation funders. The in-house lawyers also need to be sure that litigation funders will not try to usurp strategic decisions in the litigation.

[4] Insurance Coverage

There's insurance coverage available to cover all types of risks, from director and officers (D&O) coverage to stand-alone cyber-incident coverage. Purchasing insurance policies to cover such risks can clearly help defray much of the litigation costs for defending lawsuits. But managing litigation where the defense is covered under an insurance policy can be challenging for in-house counsel given the various stakeholders that may participate in deciding the strategy. For instance, the insurance company's claims counsel act for the insurer to manage the litigation costs; under the terms of most insurance policies, the insurer is authorized to retain outside counsel to defend the lawsuit and decide whether to settle a case. When the insurer does pick the outside counsel, it is usually "panel counsel" who the insurer routinely hires to defend cases. These lawyers are often unfamiliar to the in-house lawyers who may question where the panel firm's loyalty lies (i.e., with the insurer that hired them or the company they were hired to defend (the client)). For the claims counsel, hiring panel counsel allows them to keep "control of their claims even when litigation was initiated" so that they are "deciders about whether to settle or litigate."[42]

The best way for in-house counsel to effectively manage litigation defended by an insurer, especially when the insurance policy gives the insurer substantial control over the litigation, is to build a rapport with the claims counsel, and the outside counsel to ensure that both stakeholders properly consider the insured companies views when deciding litigation strategy and making decisions about when or whether to settle a lawsuit. Many of the problems inherent in the relationship among claims counsel, panel counsel, and in-house counsel are not present when the insurance policy or the claims counsel allows the company to select its own outside counsel. If possible, companies should only purchase insurer coverage that permits them to select counsel when the insurer provides defense for a lawsuit.

§ 1.05 Retaining Outside Counsel

[1] Preferred Counsel

With regard to hiring and retaining outside counsel, companies are beginning to place less emphasis on trying to retain the cheapest firm. Instead, they opt to retain preferred firms with proven track records. These firms may not guarantee the lowest

rates on each case, but the incentive to offer generally discounted prices exists due to the long-term relationship and the opportunities for work that come along with it. Also, working with the same firms breeds mutual familiarity. Each knows and understands the other's expectations, so the company does not have to spend time educating the firm on internal processes and procedures. Billing issues are fewer since the firm knows how the company wants to be billed, and the company benefits from the consistency and lack of surprises that may not be the case with an unfamiliar firm.

Working with preferred counsel also provides peace of mind for in-house counsel. The lasting relationship builds trust between the two parties, and the relationship of trust is often more important than the rates. "In-house counsel want to go to people that they trust are going to be completely accurate on their bills. If [in-house counsel] believes there is a problem, then they know that [preferred counsel are] willing to bring that bill down and make some adjustments."[43] At the end of the day, the higher billable rate may wind up being a better value because of that trusted relationship. However, how a firm behaves toward its client regarding rates does affect the trust and length of the relationship. Preferred counsel are often selected through a request for proposal ("RFP") process.

[2] Request for Proposal for Specific Cases

Some companies use a robust bidding process or request for proposal ("RFP") process to retain outside counsel for specific cases; preferred counsel are sometimes included in the RFP process along with firms that are not on the preferred counsel list. Driving the RFP thinking is an internal view at companies that "much of how an in-house counsel department runs itself should be dependent on how the company is run."[44] If a company has a philosophy of soliciting bids for projects to cut costs and increase efficiency, then in-house counsel should employ the same process for hiring legal counsel to handle certain cases.

Using an RFP process to hire counsel for specific cases is sometimes incompatible with the benefits that come with a preferred counsel relationship, such as the willingness of outside counsel to offer alternative fee structures. But the RFP process allows companies to select smaller regional firms to handle cases that do not require the greater resources and associated costs that the larger firms offer. The company must decide if the case is one that necessitates a large investment in a blue-chip law firm or simply an investment in a reliable firm that will provide adequate representation while meeting cost targets. Refining the RFP process is just one way companies are beginning to explore a more strategic litigation strategy.

[3] Tailored Approach

Companies are recognizing that giant firms do not have a monopoly on legal talent. In-house counsel are relying on boutiques and women or minority-owned firms, as the attorneys at those firms are generally "refugees of a large firm: same credentials, same training, same background."[45] Another advantage of targeting smaller firms for certain issues is the markedly different cost structures they can offer in contrast to the larger firms.[46]

A smaller firm may be better-suited to meet a specific need, particularly when there is a desire for a targeted, tailored approach to issues a company faces. Ultimately,

the firm that best articulates a solution to that problem is the one that will get hired, regardless of size or location. "In-house counsel should select the firm that will get traction with the company because it will speak to a particular problem and a particular set of needs that exist at a given moment."[47]

Often general counsel choose to use a larger firm because there is a level of comfort in relying on the well-known firm. However, this does not make it the best approach. The safe choice does not necessarily give the expected results, and even if it does, the client may be unhappy with the high costs.

§ 1.06 e-Discovery

[1] Vendor Challenges

Electronic discovery (or e-discovery) often presents another challenge for corporate counsel.[48] Legal departments may find it difficult to find a good e-discovery vendor.[49] Companies with global operations have the added hardship of finding an e-discovery vendor that understands data privacy rules in other countries.[50] Oftentimes, multiple vendors are considered; however, the results can be hit-or-miss. Even asking law firms to use a specific e-discovery vendor may cause problems. The law firm may be unhappy with the vendor and use that discontent as a reason for raising costs. In-house counsel are faced with the awkward scenario of not knowing whether an issue lies with the law firm or with the vendor, ultimately wasting the company's time and money.

Additionally, when an e-discovery vendor is hired, in-house counsel risk losing control of the process. Because the vendor works on the back-end, counsel may have difficulties finding where the vendor is moving various documents. Adding to the frustration, counsel feel the need to closely monitor the vendor's performance and take an active part in the process of managing the litigation.

One of the ways of keeping control of the efficiency and quality of e-discovery when working with a vendor is to develop processes and procedures that can be monitored by counsel. Counsel should insist on participating in direct communications with the selected vendor and require frequent reporting on all aspects of the e-discovery project.

[2] Using Outside Counsel Vendors

From the outside counsel perspective, it can be ideal to work with e-discovery vendors that know the law firm's system, which can ultimately benefit in-house counsel. Sometimes a standing relationship with a vendor allows the outside counsel to negotiate a lower price for in-house projects. Other times, in-house counsel prefer to develop their own relationships directly with outside vendors. In-house counsel may feel that outside counsel do not have the same incentive as in-house counsel to control costs, and that may come through on the bill. Consequently, in-house counsel often prefer to hire the vendor or have the firm handle the work directly, keeping control of the cost and the project in-house.

[3] In-House Tool

Some companies may choose to develop an in-house e-discovery tool. Litigation-savvy information technology professionals are capable of working on a solution involving

a number of different platforms, including Microsoft SharePoint, that would change the way the company manages documents and has the ability to perform services provided by e-discovery vendors. Because the people who set up the site are in-house, they know what is needed and can communicate easily with the in-house counsel.

In addition to these advantages, the development of an in-house tool as opposed to obtaining the same functionality through typical e-discovery vendors saves significant money. Despite its effectiveness from a budgeting standpoint, there are two problems with this type of in-house tool: the need for manual gathering of data and the live aspect of a platform such as SharePoint. SharePoint and similar systems do not search a company's data files and locate the needed data; rather, they require company employees to engage in the laborious task of locating the data. However, some companies report that they are able to identify the locations in the company of the relevant information and to work primarily with those centers, thus alleviating some of the burden.

Also, SharePoint is a live program located on the company's computer system as opposed to the vendor's system. As a result, the in-house counsel working on the case need to lock down the security aspects of the program so that only the attorneys, paralegals, and IT specialists in the firm have access, as well as the particular company employee whose data are being searched.

Cloud-based processing and hosting tools are also gaining popularity with companies that are attempting to bring a lot of traditional vendor tasks in-house. They allow for the processing and hosting of data inside the company. Outside counsel and vendors are given access to the company's data through a portal, thus allowing the company to control security by keeping the data in place and defining the security and permissions limiting access to that data. While these tools will also save the company money, they also require a dedicated internal team and are limited in the size and complexity of cases that they can handle.

§ 1.07 e-Data

[1] Email Deletion

Although the adoption of email deletion policies varies widely among companies, it's now undeniably a good business practice to implement some routine email deletion policy. Among other things, these policies help companies reduce their data storage burden and establish that the organization deletes emails in the regular course of business; in other words, that it's not deleting emails to conceal harmful information that would be discoverable in litigation.[51] Judges may impose sanctions when a company deletes email evidence relevant to a party's claim or defense with a "culpable state of mind."[52] Regarding discovery, the 2015 amendment to the Federal Rules of Civil Procedure relocated the proportionality concept (i.e., discovery must be "proportional to the needs of the case") to Rule 26(b)[53] to address the "explosion" of information that "has been exacerbated by the advent of e-discovery."[54] But to this point courts have not imposed significant limitations on e-discovery, and many jurists are "skeptical that the 2015 amendments will make a considerable difference in limiting discovery or cutting discovery costs."[55] One issue that may arise with email deletion is when a company, for unexpected reasons, needs to access deleted emails. Companies many times keep backup tapes for limited periods of time to protect themselves in

those instances.[56] Storage limitations, however, often don't permit a company to even keep backup tapes indefinitely.

[2] Databases

The companies participating in the roundtable discussed whether they had in-house databases for document and litigation management. The few that did used e-Track Products[57] or Thomson Reuters Legal Tracker.[58] While the systems are apparently helpful in generating quarterly and year-end reports, their features are limited. For instance, someone must enter important case-related information into the systems manually, including case updates and court rulings, changes to litigation budgets, and invoices outside counsel. However, since the roundtable, there have been advancements in collaborative software and other technology that may allow for data to be automatically uploaded into databases. We discuss collaboration technology at section 1.03[4].

[3] Extranets

The databases discussed above do, however, allow outside counsel to post updates and billing information directly into the company's system. Outside counsel can also post case updates, budget changes, and other information via company extranets. Some companies have firms that host extranet sites for them, but this service can become more of a hindrance than a help. Not only does it create a conflict over whether to use the law firm or the company's system, it also adds the tedious step of logging on to the law firm's system as well as service issues beyond the client company's realm of control.

[4] Data Protection and Cybersecurity

[a] Cross-Border Discovery Under the GDPR

There has been a long-standing tension between European data protection laws and discovery obligations in the United States and elsewhere. As we discuss in Chapter 9,[59] the General Data Protection Regulation ("GDPR")[60] came into force throughout the European Union ("EU") on May 25, 2018. The GDPR replaced existing data protection laws and introduced major changes and additional requirements that have a widespread impact on businesses around the world, irrespective of where they operate. One of the key features of the GDPR is that European data protection laws now apply worldwide. In addition to businesses operating in the EU, organizations located outside the EU have to comply with European data protection law with respect to personal data of EU residents they collected in the course of offering goods or services to individuals within the EU or monitoring of those people.[61] In-house counsel should understand how the regulation affects their company and how they should handle cross-border discovery of personal data during the course of discovery.

The initial concern for in-house counsel when considering a cross-border discovery request is whether or not the data requested is protected under the GDPR. This will often be the case for multinational companies; the data is covered if it's related to "an identified or identifiable natural person" (known as a "data subject")[62] and, as noted above, the company collected the data while offering goods or services to the

data subjects in the EU or monitoring those individuals.[63] If data is protected under the GDPR, as discussed in Chapter 9,[64] the regulation generally prohibits cross-border transfers of the data, unless the transfer is to a jurisdiction deemed "adequate" by the European Commission, an EU institution responsible for proposing legislation; a data exporter puts in place an appropriate safeguard; or an exemption under the GDPR (e.g., consent) applies.[65]

Furthermore, the GDPR "expressly states that orders or judgments by non-EU courts and administrative authorities requiring transfer or disclosure of personal data are not a valid basis for transferring data to third countries."[66] Instead, the GDPR recognizes these orders only "so far as they are based on international agreements or treaties between the third country and the EU or member state, such as the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters."[67] Therefore, companies either need to rely on an appropriate treaty or find other appropriate grounds for transferring and disclosing protected personal data in litigation, "even though none of the existing options is well suited for U.S.-style discovery."[68] In fact, companies "who find themselves in U.S. court or subject to a subpoena will continue to face a Catch-22 between complying with their obligations under U.S. law versus the GDPR—only now the stakes are much higher due to the GDPR's higher fines."[69] This discussion should make plain that in-house counsel must consult experienced outside counsel when cross-border discovery issues arise.

[b] Cloud Computing

By now, most in-house lawyers are familiar with cloud technology from using connected devices in their everyday lives and working with their companies' cloud-based software. In Chapter 9, we discuss the use of cloud technology by both in-house and outside counsel in detail.[70]

[c] Encrypted Communications

For many years, legal ethics committees concluded that using unencrypted email was generally a proper means of communicating confidential information.[71] That view has shifted due to technological changes and rising concerns over cyber threats. In an April 2015 opinion, for instance, the Texas ethics committee concluded that, in some circumstances, it will be prudent for lawyers to use encrypted email or another secured communication channel.[72] The committee offered six examples of when encryption may be appropriate: (1) communicating highly sensitive or confidential information; (2) sending an email to or from an account that the email sender or recipient shares with others; (3) sending an email to a client when it is possible that a third person knows the password to the email account or to an individual client at that client's work email account, especially if the email relates to a client's employment dispute with his employer; (4) sending an email from a public computer or a borrowed computer or where the lawyer knows that the emails the lawyer sends are being read on a public or borrowed computer or on an unsecure network; (5) sending an email if the lawyer knows that the email recipient is accessing the email on devices that are potentially accessible to third persons or are not protected by a password; or (6) sending an email if the lawyer is concerned that a law enforcement agency may read the lawyer's email communication.[73] The ABA also offered guidance. In a May 2017 opinion, the ABA ethics committee stated that "a lawyer may be required to take special

security precautions to protect against the inadvertent or unauthorized disclosure of client information . . . when the nature of the information requires a higher degree of security."[74]

To be sure, it is now standard practice for in-house lawyers to communicate sensitive information, such as information about potential mergers or acquisitions or about the details of patent filings, through encrypted channels. We are likely to see more in-house counsel using more encrypted communications as technologies improve and become more seamless.

§ 1.08 Hiring In-House Counsel

[1] Benefits of Experience

The in-house hiring model often differs from the law firm hiring model, particularly when the firms are hiring candidates out of law school. At that time, candidates have no legal experience, so law firms naturally make hiring decisions based on criteria such as class rank, law school prestige, and law review experience.[75] As discussed further below, corporate law departments rarely hire candidates from law school. Instead, they hire candidates from law firms or other in-house jobs. Thus, they are inherently more focused on candidates' work experience; their ability to think independently, strategically and creatively; their business savvy; and their ability to manage people.[76]

Most corporate law departments look for candidates with five to ten years of experience. At that point in a lawyer's career, their employment track record is more important than their law school class rank. As an in-house counsel explained, "You do not have the flexibility that law firms have to get rid of people quickly if they're not working out, and, as a result of that, you have to be very careful when you make an investment in an employee."[77] While a firm can nurture and develop strong lawyers from within, law departments generally don't have the bandwidth to train young lawyers. Because these departments look at how capable the person will be in the role they need to fill at that moment, experience, especially experience being in-house at another company, is desirable.

[2] Business Sense

Ability to counsel internal clients, intelligence, and core competence in a practice area are essential qualities for an in-house lawyer. But an in-house's business sense is equally important. Indeed, according to one in-house counsel, "There are plenty of smart candidates that know the area of expertise very well but do not have the common sense or business sense that you need in a public company focused on the bottom line to truly be able to be an advisor to our in-house clients. It is that type of common sense, the business sense, the ability to apply what you know in the setting to add value that is hard to find."[78]

Business sense includes the ability to communicate well with people in various roles, from the chief executive officer to the paralegals. Counsel treat hiring litigators differently from hiring other lawyers because "you cannot have a litigation counsel who is not going to be interfacing with the client."[79] Litigators, specifically, need to know how to manage people in crisis situations, as well as possessing many different skill sets.

[3] Finding Management Skills

When hiring, law departments try to determine whether someone who has been at a law firm is likely to have the necessary management skills for an in-house position. Counsel assess the management skills of a candidate through rigorous interviewing and analysis of the prospect's activities. For instance, firm associates can share how they managed other associates, paralegals, and secretaries on a particular piece of litigation or within their practices. Participation and leadership roles in professional organizations, affinity groups, and committees offer clues to a prospect's ability to manage.

Particularly for litigators, prospects with management skills will have taken on more responsibility as they moved up through the ranks. Once they are at the senior associate level, the prospect would be expected to be directing younger lawyers and taking on projects. Such behavior suggests that the candidate is "doing the things that we do in-house."[80] Conversely, a candidate who enjoys writing briefs all day would not be a good fit in-house.

As a real-world example, an in-house counsel recalled the answer a young woman gave to his inquiry about her management experience during an interview. The woman received a call from a partner in the middle of the night asking her to fly to Dallas for a document review. When she arrived, she was the most senior associate on the project. Nobody assigned her the project lead, but she began to think about the project and to interact with the other associates whom she did not know. Because of her leadership, they got the project done. Because of her answer—her demonstration of situational leadership—in-house counsel hired her.

§ 1.09 Managing from Inside

[1] Litigation Manager Standards

"As in-house lawyers rise in the legal department, they become less of a lawyer and more of a manager, making sure that everything is consistently applied."[81] A good lawyer does not always make a good manager. Management is a competency. The good manager takes responsibility for developing people through coaching. Methods of overseeing litigation managers vary from a formalized system to open-office talks.

At some companies, lawyers who are in management positions are held to a very high standard of performance. They are expected to meet set metrics, including financial metrics and performance metrics.[82] Employees often are surveyed to determine satisfaction with the management team. The metrics ensure intense engagement between the managers and their teams.

Instead of metrics, some companies encourage managers to keep a close watch on their teams. For example, a small in-house team may be required to oversee one another and be responsible for one another's work, including overseeing the completion of tasks and reviewing completed items. "Generally, the lead lawyer will go to the executives after a case is over or while a case is ongoing to see how it is going."[83] An informal atmosphere and a hands-on approach make executives and other employees comfortable with discussing any problems.

In contrast to a casual approach, some companies have adopted a more formalized system in which the presidents of the operating companies or divisions solicit

feedback about company departments, including the legal department, from both up and down the chain. Each department, and sometimes members of the board, evaluate the departments. The evaluations incorporate a ranking system and create a score that decides bonuses for managers, including those in the legal department. The whole process is transparent so that managers know how departments ranked them.

With a centralized approach, a litigation team often meets with management to discern the level of satisfaction. Litigation teams using a centralized approach should make efforts "to reduce the amount of bureaucracy as much as possible."[84] This requires a hands-off approach, trying not to micromanage, and an open-office policy. When an issue arises, the team sits down and talks about it, making sure everyone is on the same page.

[2] Recognition Challenges

When discussing management, some in-house lawyers report feeling a sense of dissatisfaction with in-house advancement or recognition systems. Some companies follow a traditional model in which a person advances in the company by management; the more people a person manages, the higher the person's rank and title. However, this might not reward the professional in the law department, since individual contributors might not be considered to be at the same level as a manager. It could hinder rewarding the individual lawyers. This could specifically create a problem in a highly technical group, because a specialist in information technology, for example, who may not be fit for management, is often not rewarded for his or her individual work.

Some companies have moved away from the traditional model to an individual contributor designation. This is a senior counsel, non-management designation that recognizes the specialist. Ideally, through this model, appropriate recognition and reward are bestowed upon the technical guru and the high-quality manager. The issue with this system is that many general litigators who may not fit the designation of a senior individual contributor subject-matter expert might not be compensated accordingly.

§ 1.10 Ethics and Compliance

All in-house counsel, even those that aren't in an ethics and compliance role, should be aware of the fundamental ethics and compliance matters we discuss below.

[1] Ethics Department

Regarding compliance and fraud detection, the majority of companies represented at the roundtable reported that they rely on an ethics department to handle ethical and compliance issues and an international code of conduct to set the rules of compliance. Companies with a global presence cannot afford "not to have an extremely robust compliance function just for self-protection."[85] Companies with huge operations outside of the United States require a lot of compliance managing.

In-house ethics departments vary in size and reporting relationships. At one company, 25 people make up the ethics department, with the head ethics officer reporting to the general counsel. Because of the nature of conducting investigations and variances in regional and country laws, the litigation group works closely with the ethics department. Another company had developed an ethics and compliance group in the

last few years that reports to the general counsel. The hope is that the group, still in its formative stages, will act as a robust gatekeeper for antitrust issues. At another represented company, the person who is dedicated to the ethics compliance group is an auditor rather than a lawyer. The auditor is also responsible for the development of the international code of conduct. However, it is expected that key members of the legal department and the ethics compliance person work together on policies.

[2] Code of Business Conduct

For international companies, a code of business conduct is important to create uniformity throughout the company. The international code of business conduct provides a standard of behavior for all employees regardless of company rank or location. Some companies may decide to set standards across their systems, including affiliated enterprises. Suppliers and vendors need to meet company expectations. High company standards benefit employees: "Compliance with local law may not necessarily be the final analysis. In the area of worker's rights, for example, it may actually raise the operative standards in the local market where we are."[86]

For one company, the international code of business conduct is organized around a dozen or more principles; for another, the international code of business conduct is a stand-alone booklet, roughly 14 pages. The code spells out the company's ethical standards but does not incorporate human resource policies and procedures. The human resource policies are kept separate and administered on a regional or countrywide basis.

[3] Creating a Culture of Compliance

Participants agreed that a culture of compliance from the top down is essential to a company's success. "Employees want to do things right, but there must be a culture of compliance to best ensure this occurs."[87] Companies can face compliance challenges throughout their corporate ranks, from entry-level employees to senior management. And while senior management may be expected to set the tone for the organization, companies should also focus on setting the tone from the middle as well, as management on the ground is often best-positioned to engage employees and enforce a culture of compliance.

Often, corporate lawyers use public cases of fraud indictment to remind upper management of the risks of fraud and the need to closely monitor and enforce compliance throughout the company. The announcement of significant arrests can be seen as an opportunity: "It's a teaching moment where we can go to managers and say the best lessons are learned at somebody else's expense."[88] Counsel can use examples of investigations into industry-specific issues to illustrate their points: "There are several executives at major companies around the world that are in jail right now and that is something you can trumpet to the high heavens to these folks. Don't think it won't happen to you."[89] Making executives aware of people in the same industry who have been caught and punished for corporate malfeasance enforces the culture of compliance. It also helps them realize the importance of their own function and the importance of following the controls that have been put in place to ensure compliance with the law, industry standards and regulations, and company policies. In other words, knowing that "the buck stops with you" serves as an incentive to ensure that things are being done the right way.

Public examples also push a company to develop its own response to ethical and compliance situations. The code of business conduct "can't just become window dressing."[90] "Your company has got to be unequivocal that we'll conduct our internal investigation and if we find wrongdoing, we are going to turn you in ourselves."[91] The participants agreed that companies need checks in place to protect against corporate malfeasance. For example, the ethics group needs to have the power to enforce compliance with company policy and be given the authority to discipline those who violate the same.

[4] Safeguarding Reputation

A clean reputation is important to companies, specifically in consumer business. Brand and reputation are tied together in a consumer-oriented company. "When that reputation begins to become impacted by behaviors or the absence of safeguards or the absence of protocols, that is when problems occur."[92] In addition, the association of a company name with suspicious business practices diminishes the value of that company's brand.[93]

A company's partners also can affect the reputation of a multinational organization. Corporate lawyers struggle with answering how responsible a company will be for its partners and to what standard a company will be held if something goes wrong. One participant shared his experience: "What we have found is that we can have our house in perfect order but if one of our major vendors slips, we may feel the consequences."[94]

§ 1.11 Early-Stage Case Management

At the outset of litigation, in-house counsel should work with their selected outside counsel to evaluate the costs and benefits of litigating the case. A recent government study showed that the vast majority of cases never reach trial—97% of civil cases in state courts in the nation's 75 largest counties were settled or were disposed of before trial.[95] The better the parties are able to assess the strengths and weaknesses of their case, the higher the chances of an early and satisfactory settlement.[96] An early and rigorous evaluation can result in a reduction of unnecessary litigation expenses, better decision making, and an improved ability to identify the causes of the litigation and prevent future claims. An early case evaluation should include at a minimum: (i) a proposed budget estimating costs in each stage of the litigation; (ii) a preliminary evaluation of the strengths and weaknesses of the plaintiff's claims; and (iii) an evaluation of the settlement possibilities for the case. This early evaluation will guide in-house counsel in deciding how to proceed.

[1] Proposed Budget

A litigation budget can take many forms but (at least for engagements based on a straight hourly fee) should include the following information: (i) identify the scope of work to be performed; (ii) identify the core team that will conduct the litigation and estimate the total number of lawyers required; (iii) estimate lawyer costs (estimated number of hours required multiplied by each lawyer's billing rate) at each stage of the litigation (initial fact investigation and case evaluation, motion to dismiss, discovery, experts, dispositive motions, trial, post-trial motions, appeal); and (iv) estimate

expenses accrued at each stage of the litigation. These expenses may include court reporters, transcripts, travel costs, consultant and expert fees as well as data retrieval, searching and hosting costs.

[2] Preliminary Evaluation

In-house counsel should work closely with outside lawyers to develop a preliminary assessment of the strengths and weaknesses of the plaintiff's case (i.e., an early case assessment). This should be a concise statement designed to give management a basis on which to make informed decisions about how to conduct the case. This evaluation will take different forms depending on the nature of the plaintiff's claims, the evidence and facts immediately known, the venue and a host of other factors. However, most assessments include: (i) an introduction, recommendation, and brief summary of relevant facts; a summary of the procedural posture of the case, including what proceedings have taken place and what is pending; (ii) a summary of the legal principles at issue; and (iii) a legal analysis of the strengths and weaknesses of the company's position.

This legal analysis should take into account, among other things: (a) the quality and nature of the evidence for and against the company's position (including documents and witnesses)—because most litigation occurs between parties known to each other, the company may be able to get a good picture of the strengths and weaknesses of the claim from its own files, without first undergoing expensive discovery; (b) the friendliness or hostility of the tribunal; (c) the competence of plaintiff's counsel; and any other germane considerations. In-house counsel should attempt to determine the plaintiff's chance of proving the asserted claims at each stage of the litigation.

Finally, in-house counsel should attempt to determine the total exposure from each of the plaintiff's claims, broken down by the type of recovery sought (compensatory damages, statutory damages, punitive damages, burdensome equitable relief, etc.). A sample early case assessment form is included at section 1.15.

[3] Settlement Possibilities

After building the proposed budget and performing the preliminary evaluation, in-house counsel should be in a position to compare the estimated costs and risk of losing in litigation with the potential amount plaintiffs would accept in settlement. In addition to these purely economic considerations, in-house counsel should also consider the costs and benefits of early settlement. These include the following considerations: (i) early settlement allows management's energy to remain focused on the business, not on preparing for depositions or trial; (ii) settlements can include confidentiality provisions, limiting the public relations or marketing impact of a dispute (alternatively, settlement can suggest to the public that the company is admitting liability, which could have a negative (or positive) public relations effect); and (iii) quick public settlements can encourage similar claims, while vigorously contesting claims could have a deterrent effect.

In-house counsel should reevaluate the above factors at every stage in the litigation. Most often, as evidence develops and early motions are decided, parties are better able to assess the relative risks and projected costs of continuing the litigation.

§ 1.12 Settle or Trial

[1] Case-by-Case Analysis

As discussed in section 1.11, in-house counsel consider many variables when deciding to settle or take a case to trial, and that decision is made on a case-by-case basis. "Each case is a business [decision] based on the cost, based on the impact on the company, and it is non-emotional."[97] For companies, litigation is a risk and business cost, not a business opportunity. Thus, in-house counsel will often conduct a cost-benefit analysis when deciding how to resolve a case. They remind executives that litigation will be difficult, and it is better to have "an understanding of how to manage a dispute before it gets to litigation."[98] Litigation is also uncertain and risky, so counsel must consider the impact a negative outcome may have on the company.

For example, counsel can use the cost-benefit approach when assessing how to resolve a number of nominal cases that, in the aggregate, can be very costly to defend. By settling these types of cases, the company might save money by avoiding the costs associated with disruptive, protracted litigation. This approach can reduce a company's caseload by almost ten percent while cutting future costs.[99]

Because the dynamics of litigation can change, counsel should remain flexible with respect to litigation strategy and resolution. The doors to pretrial resolution may open up if counsel is able to engage in productive discussions with another party before trial. "Part of in-house counsel's job is to get a case into a posture where the company can get the best value for its money. If there comes a point in a case where it makes sense to settle for business reasons, in-house clients need to know that the company should get it resolved as quickly as possible."[100]

[2] Protecting Against Copycat Cases

In-house lawyers often have to take a "trial stance" on certain types of suits "to counter the trend toward many suits being filed seeking quick settlement." To do otherwise would potentially make the company a target for copycat cases. Although litigation may cost more than the potential recovery for the plaintiff, companies fight potential copycat suits "to show folks that we are not going to be any target."[101] The long-term benefit of protecting the company by discouraging future suits is often worth the litigation costs. A company can succeed at fighting copycat personal injury and employment cases by taking a hard stance that it will "fight the bogus cases and develop a reputation in the industry that the company is not a soft target."[102] Plaintiffs' lawyers learn quickly which companies will fight, which ones they can pick on.

[3] Senior Management Support

In-house counsel must rely on the support of senior management in handling litigation. Trust between counsel and the business team is key; the two functions must act as partners. Accordingly, senior management relies on in-house counsel to navigate the company through a wide variety of legal matters, and it needs to trust that in-house counsel will strive to reach outcomes that are in the best interests of the business. Conversely, counsel must trust that senior management is committed to conducting business activities with the highest standards of ethics and integrity. When there is

trust between the two, aligning on litigation strategy becomes an easier proposition. Senior management can also affect litigation strategy. Aggressive senior management may insist on an aggressive litigation strategy, and vice versa. But the key to achieving the best possible outcomes is when both functions trust each other and are aligned on the path forward.

§ 1.13 Life as In-House Counsel

Describing the difference between working in-house and at a law firm, a former in-house lawyer said, "[It's] different in a fundamental way. In the old paradigm, success was winning the case; the new paradigm is selling more product. In-house counsel have to understand that they live and breathe to advance the business objectives of their company and that the people of their company probably view you as a cost center."[103] In-house, lawyers are not considered profit centers the way they are at law firms. Instead, they are considered a necessary cost of doing business.

In-house lawyers need to ensure they are closely aligned with the business and that they are "considered players" by their businesses' senior executives. The goal is to be viewed by the business as a trusted partner who is committed to helping the business achieve its business objectives, ethically and compliantly. In-house lawyers do not have much time to focus on their outside counsel. "And, the truth is, if I have to focus too much [on] what he is doing, he is not the right outside lawyer."[104]

§ 1.14 *Form:* Intake Planning*

Litigation Team	
[CLIENT] Attorneys	**Name(s) (email)**
Firm Attorneys	**Name(s) (email)**
Other Parties/Attorneys	
Related Cases	
Experts	
Vendors/Outsourcing (copy, graphics, court reporters, etc.)	**Preferred provider** **Vendor rate arrangements**
Document Retention Notice	**Custodians**
Communication Plan	
[CLIENT] Team Leader	
Firm Team Leader	**Name** **Email** **Phone**
Preferred Method of Communications and Frequency	

Strategic Considerations	
History of Business Relationship	**Background of project/contract/dispute** **History of business relationship** **Key relationship managers on both sides** **Key decision makers**
Internal and External Business Considerations	**Business units affected** **Importance of continuing relationships (desired or not important)** **Executives/managers/employee groups affected, if any** **Key company initiatives affected** **Media/publicity concerns (internal and external)** **Business considerations (timing, financials, etc.)** **Impact on other litigation (e.g., prior positions taken on the issues)** **Existing work product around the issues (internal, with other firms, other resources such as Legal OnRamp, etc.)** **Unique circumstances (e.g., reduction in force, internal investigations, economic considerations)**
Success Parameters	**Primary business goal** **Business cycle time/timetable** **Recovery/settlement/injunctive or declaratory relief** **Early/strategic resolution opportunities**
Outstanding Issues	
Next Steps (Status Report Timelines using selected technologies, resolution of outstanding issues and meeting dates, etc.)	

* This form can be used at the outset of an engagement to establish goals, set expectations, and communicate strategies.

§ 1.15 *Form:* Early Case Assessment*

Schedule			
Initial Pleading Deadlines	**If plaintiff, file by:** **If defendant, served on:** **Answer due on:**		
Preliminary Case Assessment	**Limitations** **Venue** **Jurisdiction** **Choice of law** **Defenses/dispositive motions/counterclaims**		
Deadlines	**Discovery** **Hearings (e.g., injunction)** **Other**		
Team Contacts	**[CLIENT] Attorneys** ***List*** **Firm Attorneys** ***List*** **[CLIENT] Scheduler** ***Name*** **Firm Scheduler:** ***Name***		
Early Case Assessment			
Discovery Status and Strategy			
Key Legal and Factual Issues			
Strategic Resolution Options			
Opposing Counsel			
Other Parties/Counsel			
Company Fact Witnesses	**Principal Witnesses**	**Interview**	**Depose**
	(Name, Title, Expected Testimony)	Yes/No	Yes/No
	Secondary Witnesses	**Interview**	**Depose**
	(Name, Title, Expected Testimony)	Yes/No	Yes/No

	Ancillary Witnesses	**Interview**	**Depose**
	(Name, Title, Expected Testimony)	Yes/No	Yes/No
	Documents		
Opposing Witnesses	**Principal Witnesses**	**Interview**	**Depose**
	(Name, Title, Expected Testimony)	Yes/No	Yes/No
	Secondary Witnesses	**Interview**	**Depose**
	(Name, Title, Expected Testimony)	Yes/No	Yes/No
	Ancillary Witnesses	**Interview**	**Depose**
	(Name, Title, Expected Testimony)	Yes/No	Yes/No
	Documents		
Third-Party Witnesses	**Principal Witnesses**	**Interview**	**Depose**
	(Name, Title, Expected Testimony)	Yes/No	Yes/No
	Secondary Witnesses	**Interview**	**Depose**
	(Name, Title, Expected Testimony)	Yes/No	Yes/No
	Ancillary Witnesses	**Interview**	**Depose**
	(Name, Title, Expected Testimony)	Yes/No	Yes/No
	Documents		
Expert Witnesses			
Jurisdiction and Court			
Next Steps			

* This form can be used at the outset of an engagement to establish goals, set expectations, and communicate strategies.

Notes

[1] David Cole, III is Senior Litigation Counsel at Adtalem Global Education, Inc.

[2] John O. Gaidoo is Assistant General Counsel, Global Labor Employment & Management Relations, at Cummins Inc.

[3] Vazantha R. Meyers is a Managing Director, Review Operations, at HaystackID.

[4] The AmLaw 200 is published annually by *The American Lawyer* and is a definitive ranking of America's top 200 revenue-grossing law firms.

[5] The Litigation Management Roundtable was held in Houston, Texas, in February 2009. The in-house participants included John Lewis, former Senior Counsel of Litigation, the Coca-Cola Company; William R. Moore, former Senior Counsel, Hewlett-Packard Company; Scott Garber, former Managing Attorney of Litigation, Continental Airlines; Charlene Tsang-Kao, former Associate General Counsel, Solvay North America LLC; Christy

Schweikhardt, former Vice President of Litigation, HCC Insurance Holdings; and Laura Doerre, former General Counsel, Nabors Corporate Services.

[6] Garber, former Managing Attorney of Litigation for Continental Airlines.

[7] Moore, former Senior Counsel at Hewlett-Packard Company.

[8] For a detailed discussion of e-discovery, *see* Ch. 3 *infra*.

[9] *See, e.g.*, Steven J. O'Neill, *The Top 10 Things to Know About Electronic Discovery* (2009), https://attorneyoneill.com/top-10-ediscovery/. *But see* Alberto G. Araiza, Electronic Discovery in the Cloud, 10 Duke L. & Tech. Rev. 8 (Sept. 20, 2011) (indicating that cloud computing will offer significant benefits, including "inexpensive access to seemingly limitless resources that are available instantly, anywhere"; also noting, however, that the then-current Federal Rules of Civil Procedure governing discovery did not effectively apply to clients using cloud computing).

[10] Michael Kozubek, *Court Holds Agency in Contempt for Missing E-Discovery Deadlines*, Law .com (Apr. 1, 2009), https://www.law.com/almID/4dcafadd160ba0ad57001229/?slreturn =20190903170513.

[11] *See* Ralph C. Losey, *E-Discovery: Current Trends and Cases,* 32, Am. Bar. Ass'n (2008) (referring to Ky. Speedway, LLC v. NASCAR, Inc., No. 05–138, 2006 WL 5097354, at *15 (E.D. Ky. Dec. 18, 2006), in which the parties spent "$3 million in expenses in five months for e-discovery alone").

[12] Lewis, former Senior Counsel of Litigation for the Coca-Cola Company.

[13] *See* Ryan Davis, *European Privacy Laws an E-Discovery Stumbling Block*, Law360 (July 23, 2009), http://www.law360.com/articles/112287 (articulating the distinctions between European and U.S. discovery practices and explaining the role that privacy concerns play in each system).

[14] 2016 O.J. (L 119) 1–88; Arjun Kharpal, *Everything You Need to Know About a New EU Data Law That Could Shake Up Big US Tech*, CNBC.COM (May 25, 2018), https://www.cnbc .com/2018/03/30/gdpr-everything-you-need-to-know.html; *Comparison of European and American Privacy Law*, HIPAA Journal (Apr. 25, 2018), https://www.hipaajournal.com /comparison-of-european-and-american-privacy-law/.

[15] *See* Nigel Murray, *Discovery from the European Perspective*, ABA Law Practice Today (Oct. 2008), http://ilta.personifycloud.com/webfiles/productfiles/51/LIT1.pdf ("To bridge the different approaches to privacy between the United States and the EU and to provide a streamlined way for American organizations to operate in Europe, the US Department of Commerce and the EU Commission developed a 'safe harbor' framework, which was approved by the EU in 2000.")

[16] *See* Foreign Corrupt Practices Act, Pub. L. No. 95-213, 91 Stat. 1494 (Dec. 19, 1977); 15 U.S.C. §§ 78m, 78dd-1, 78dd-2, 78ff.

[17] *Compare* Charles J. Muhl, *The Employment-at-Will Doctrine: Three Major Exceptions*, US Bureau of Labor Statistics, (Jan. 2001), http://www.bls.gov/opub/mlr/2001/01/art1full .pdf (reporting that the employment-at-will doctrine is controlling law in almost all jurisdictions in the United States), *with,* Anders E. Reitz, *Labor and Employment Law in the New EU Member and Candidate States*, Am. Bar. Ass'n (2007) (containing a survey of employment laws in European countries, and demonstrating that these nations typically require "good cause" in order to terminate an employee's employment).

[18] Doerre, former General Counsel for Nabors Corporate Services.

[19] Meghan Tribe, *Legal Departments Join Law Firms in Applying the "Mansfield Rule,"* The Am. Lawyer (Apr. 4, 2019), https://www.law.com/americanlawyer/2019/04/04/new-take -on-mansfield-rule-sets-in-house-diversity-goals-405-34624/.

[20] Staci Zaretsky, *Bringing Diversity to the In-House World: Get Ready for the "Legal Department Edition" of the Mansfield Rule,* Above the Law (Apr. 4, 2019), https://abovethelaw.com/2019

/04/bringing-diversity-to-the-in-house-world-get-ready-for-the-legal-department-edition-of-the-mansfield-rule/?rf=1.

[21] *See, e.g.*, Fed. R. Civ. Proc. 8(a)(2) (implementing a "notice pleading" standard, under which a plaintiff must only provide "a short and plain statement of the claim showing that the pleader is entitled to relief"). Under this standard, plaintiffs may assert and press a wide variety of claims without much difficulty. One slight constraint that has been imposed is the result of the U.S. Supreme Court's rulings in Bell Atlantic v. Twombly, 550 U.S. 544 (2007) and Ashcroft v. Iqbal, 556 U.S. 662 (2009), under which the Court imposed a higher threshold of "plausibility" for pleadings.

[22] Contingency fees provide an alternative to the traditional hourly billing structure. Under a contingency fee agreement, outside counsel would only receive payment of legal fees upon achieving a result specified in the fee agreement. This arrangement gives outside counsel a pecuniary interest in the outcome of the litigation and protects clients from potentially having to pay high legal fees for an undesirable outcome.

[23] Schweikhardt, former Vice President of Litigation for HCC Insurance Holdings.

[24] For example, Thomson Reuters Legal Tracker offers litigation management software through which a legal department can audit bills.

[25] Michele C.S. Lange, *The Time Is Now for Corporate Legal Collaboration*, Corporate Counsel (Dec. 7, 2018), https://www.law.com/corpcounsel/2018/12/07/the-time-is-now-for-corporate-legal-collaboration/.

[26] Kenneth Jones, *Applying Technology to Legal Matters to Support the Goals of In-House Counsel*, Corporate Counsel (Apr. 30, 2019), https://www.law.com/corpcounsel/2019/04/30/applying-technology-to-legal-matters-to-support-the-goals-of-in-house-counsel/.

[27] Richard Crow, *How General Counsels Can Successfully Collaborate with Outside Attorneys* (Jan. 18, 2019), https://www.wardandsmith.com/articles/In-House-Counsel-Successfully-collaborating-with-outside-attorneys.

[28] *Id.*

[29] Some hospitals and nursing homes, for example, in an effort to curtail large jury verdicts in malpractice cases, have inserted arbitration agreements in health care admission contracts. Legislation has been introduced in the U.S. Congress to prohibit this practice as it applies to nursing home patients, but, in other industries, the practice will probably be less controversial.

[30] *See, e.g.*, Cassandra Burke Robertson, A Collaborative Model of Offshore Legal Outsourcing, 43 Ariz. St. L. J. 125 (2011).

[31] Cynthia Cotts and Liane Kufchock, *U.S. Firms Outsource Legal Services to India*, The New York Times (Aug. 21, 2007), https://www.nytimes.com/2007/08/21/business/worldbusiness/21iht-law.4.7199252.html ("General Electric sends about $3 million a year in routine legal work to its Indian affiliate.").

[32] *Id.*

[33] *Id.* ("Junior Indian lawyers might earn as much as $8,160 a year, . . . compared with the $160,000 average salary for associates in major U.S. cities.").

[34] *Id.*

[35] *See, e.g.*, Keith Woffinden, *Surfing the Next Wave of Outsourcing: The Ethics of Sending Domestic Legal Work to Foreign Countries Under New York City Opinion 2006–3*, 2007 BYU L. Rev. 483 (2007) (identifying ethical concerns of legal outsourcing, such as: (1) potential unauthorized practice of law; (2) inadequate supervision; (3) concerns regarding client confidentiality; (4) conflicts of interest; (5) billing; and (6) the potential need for client consent prior to outsourcing).

[36] *Id.* at 514–516 (discussing the need for U.S. attorneys to supervise legal work that is outsourced abroad).

[37] Phillip Bantz, *Is Litigation Financing the Next Big Thing for Legal Departments?* Law.com Corp. Counsel (Dec. 10, 2018), https://www.law.com/corpcounsel/2018/12/10/most-legal-departments-arent-using-litigation-finance-is-that-about-to-change/.

[38] *Id.*

[39] N.Y. Comm. on Ethics, Formal Op. 2018-5 (July 30, 2018), https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-2018-5-litigation-funders-contingent-interest-in-legal-fees.

[40] Bantz, *supra* note 37.

[41] *Id.*

[42] Albert Risk Management Consultants, *Litigation Management—Crucial but Confusing*, IRMI Claims Management (Feb. 2010), https://www.irmi.com/articles/expert-commentary/litigation-management-crucial-but-confusing.

[43] Garber, former Managing Attorney of Litigation, Continental Airlines.

[44] Moore, former Senior Counsel at Hewlett-Packard Company.

[45] Lewis, former Senior Counsel of Litigation, the Coca-Cola Company.

[46] *See*, *e.g.*, Shannon Henson, *Midsize Firms Poised to Poach Clients, Partners*, Law360 (Feb. 19, 2009), http://www.law360.com/articles/88103 (explaining that, during the then-recent economic downturn, small- and mid-sized firms benefited from having lean operations that required less overhead and, consequently, could maintain profits while charging lower legal fees than large-sized firms).

[47] Lewis, former Senior Counsel of Litigation for the Coca-Cola Company.

[48] For a detailed discussion of e-discovery, *see* Ch. 3 *infra*.

[49] For a discussion of using e-discovery vendors wisely, *see* section 3.02[6] *infra*.

[50] *See generally* Jim Gill, *Exterro's E-Discovery & Privacy Breakdown* (Oct. 7, 2016), https://www.exterro.com/blog/u-s-data-privacy-laws-challenge-the-e-discovery-process/.

[51] For a detailed discussion of e-discovery, *see* Ch. 3 *infra*. Email that is individually and intentionally archived by a user is usually not deleted.

[52] Dickinson Frozen Foods, Inc. v. FPS Food Process Sols. Corp., No: 1:17-cv-00519, 2019 WL 2236080, at *7 (D. Idaho May 21, 2019); *see also* 18 U.S.C. § 1512(b)(2)(A)–(B) (criminalizing the destruction or concealment "of . . . [an] object's integrity or availability for use in an official proceeding"); Arthur Andersen LLP v. United States, 544 U.S. 696 (2005) (considering the validity of jury instructions issued in a criminal prosecution resulting from the purported destruction of documents as a method of preventing their availability for use at trial).

[53] Federal Rule of Civil Procedure 26(b) sets forth the scope and limits of discovery.

[54] Federal Rule of Civil Procedure 26(b) advisory committee's note to 2015 amendment.

[55] Bhasker v. Kemper Casualty Ins., 361 F. Supp. 3d 1045, 1116 n.27 (D.N.M. 2019); *see also* Benavidez v. Sandia Nat'l Lab., 319 F.R.D. 696, 717 n.9 (D.N.M. 2017).

[56] *See* section 3.02[3] *infra*.

[57] For example, CaseTrack is a Web-based matter management and electronic billing system that is used by in-house legal departments. Products like these can help increase the efficiency and cost-effectiveness of legal departments.

[58] Thomson Reuters Legal Tracker is a system that allows corporations to track management and e-billing of their legal matters.

[59] *See* section 9.06[1] *infra*.

[60] Regulation (EU) 2016/679 ("GDPR").

[61] GDPR, Art. 2, 3, Recital 23.

[62] *Id.*, Art. 4(1). This includes identifier such as a name, an identification number, location data, an online identifier, or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural, or social identity of that natural person.

[63] *Id.*, Art. 3(2).

[64] *See* section 9.06[6] *infra*.

[65] *See id.*, Art. 44.

[66] David Moncure, et al., *The General Data Protection Regulation's Key Implications for E-Discover*y, Legaltech news (Nov. 21, 2016), https://www.law.com/legaltechnews/almID/1202772821212/ (citing GDPR, Art. 48).

[67] *Id.*

[68] *Id.*

[69] *Id.* Parties in U.S. courts are getting some traction shifting costs of limiting discovery under the Federal Rules relying on the requirement to comply with the GDPR. *See*, *e.g.*, In re Hansainvest Hanseatische Investment-GmbH, 364 F. Supp. 3d 243 (S.D.N.Y. 2018) ("Court grants the application with respect to documents held by foreign custodians only to the extent that the Applicants . . . assume the costs of the document production, including the costs of compliance with the GDPR or other applicable European data privacy laws").

[70] *See* section 9.05 *infra*.

[71] *See*, *e.g.*, ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 99-413 (1999); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 11-459 (2011); State Bar of Cal. Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. 2010-179 (2010); Prof'l Ethics Comm. of the Maine Bd. of Overseers of the Bar, Op. No. 195 (2008); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 820 (2008); Alaska Bar Ass'n Ethics Comm., Op. 98-2 (1998); D.C. Bar Legal Ethics Comm., Op. 281 (1998); Ill. State Bar Ass'n Advisory Opinion on Prof'l Conduct, Op. 96-10 (1997); State Bar Ass'n of N.D. Ethics Comm., Op. No. 97-09 (1997); S.C. Bar Ethics Advisory Comm., Ethics Advisory Op. 97-08 (1997); Vt. Bar Ass'n, Advisory Ethics Op. No 97-05 (1997).

[72] Tex. Prof'l Ethics Comm. Op. No. 648 (2015).

[73] *Id.*

[74] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 477 (2017).

[75] Dianne Molvig, *The Right Mix: What Legal Employers Want in New Hires*, Wisconsin Lawyer (Dec. 1, 2017), https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=90&Issue=11&ArticleID=26036.

[76] *See* https://www.goinhouse.com/ (collecting in-house job requirements).

[77] Moore, former Senior Counsel at Hewlett-Packard Company.

[78] Doerre, former General Counsel, Nabors Corporate Services.

[79] Moore, former Senior Counsel at Hewlett-Packard Company.

[80] Garber, former Managing Attorney of Litigation for Continental Airlines.

[81] Garber, former Managing Attorney of Litigation for Continental Airlines.

[82] Legal departments—as cost centers rather than revenue-generators—often are required by management to cut as many costs as possible. Consequently, the lawyers who operate as managers in these legal departments are often held to strict standards with respect to their efficiency and cost management.

[83] Schweikhardt, former Vice President of Litigation, HCC Insurance Holdings.

[84] Garber, former Managing Attorney of Litigation for Continental Airlines.

[85] Moore, former Senior Counsel at Hewlett-Packard Company.

[86] Lewis, former Senior Counsel of Litigation, the Coca-Cola Company.

[87] Schweikhardt, former Vice President of Litigation, HCC Insurance Holdings.

[88] Lewis, former Senior Counsel of Litigation for the Coca-Cola Company.

[89] Garber, former Managing Attorney of Litigation, Continental Airlines.

[90] Tsang-Kao, former Associate General Counsel, Solvay North America LLC.

[91] Lewis, former Senior Counsel of Litigation, the Coca-Cola Company.

[92] *Id.*

[93] "[C]orporations need to protect brand value by meeting consumers' expectations of how companies should behave." Rita Clifton & John Simmons, *Brands and Branding*, The Economist (Oct. 31, 2003) (reviewing best practices for corporate branding, and asserting that the protection of a brand name is essential to a corporation's long-term welfare).

[94] Moore, former Senior Counsel at Hewlett-Packard Company.

[95] *See* U.S. Department of Justice Bureau of Justice Statistics, *Civil Bench and Jury Trials in State Courts, 2005*, http://bjs.ojp.usdoj.gov/content/pub/ pdf/cbjtsc05.pdf.; *see also* Jonathan D. Glater, *Study Finds Settling Is Better Than Going to Trial*, The New York Times (Aug. 7, 2008, at C1.), http://www.nytimes.com/2008/08/08/business/08law.html (finding 80–92 percent of civil lawsuits settle).

[96] For more discussion of pretrial case assessment, *see* section 7.04[3] *infra.*

[97] Schweikhardt, former Vice President of Litigation, HCC Insurance Holdings.

[98] Moore, former Senior Counsel at Hewlett-Packard Company.

[99] Doerre, former General Counsel for Nabors Corporate Services.

[100] Garber, former Managing Attorney of Litigation for Continental Airlines.

[101] *Id.*

[102] Doerre, former General Counsel for Nabors Corporate Services.

[103] Lewis, former Senior Counsel of Litigation, the Coca-Cola Company.

[104] *Id.*

CHAPTER 2

Litigation from the Plaintiff's Perspective

Mathew T. Siporin[1]

§ 2.01 Introduction

While initiating a lawsuit is easy, developing a winning strategy is not. A successful strategy must begin with proper case selection and pre-suit investigation, understanding that the plaintiff has the burden of proof. Once the suit is initiated, trial attorneys must aggressively pursue facts in discovery that support their theories of the case and mitigate any perceived weaknesses. And, during the course of litigation, these lawyers must monitor evolving trends in jury verdicts in relevant jurisdictions to properly assess the settlement and verdict values of each case. They must also constantly stay apprised of changes in the law and in the judiciary. This chapter will focus on the various ways, including those discussed above, that plaintiffs' attorneys can develop and execute a winning case strategy from its inception through trial and beyond.

§ 2.02 Factors to Consider

Litigation management involves constantly assessing risk. From a plaintiff's attorney's perspective, this assessment starts from the time the perspective client first contacts you to ask whether she has a case. The attorney must evaluate the facts and law and formulate an opinion on the likelihood of success at trial throughout the case. Indeed, this probability can change as discovery progresses. Plus, lawyers must constantly balance the likelihood of success against financial factors, such as the litigation expenses they will incur prosecuting the matter and the potential verdict and settlement values. In other words, a successful plaintiff's attorney must constantly be aware of the risk of winning or losing a case and the costs of continuing to prosecute it.

Every individual or corporate client is different. Some clients are more risk averse than others. As a result, educating each client on the various risks is imperative. By constantly educating a client on the risks pursuing a matter may have, the client can make an informed decision that is based on their own personal risk tolerance. Some factors that the plaintiff's attorney, and the plaintiff should consider include the following:

[1] Plaintiff's Objectives, Goals, and Risks

Counsel must understand the client's strategic objectives. For contingent plaintiffs, accurate assessment of potential monetary damages is an obvious necessity. For any plaintiff, however, the strategic objectives may vary beyond monetary results, such as: Is injunctive relief against the defendant required? Is there a business solution that will avoid the litigation costs and risks? Perhaps the plaintiff may also be satisfied with noneconomic goals, such as vindication of its rights or reputation. Identifying the

litigation end goals, therefore, allows the potential plaintiff to balance these rewards against the possible risks.

Assessment of the plaintiff's litigation risks goes far beyond the courtroom. Litigation is often a "bridge-burning" event. In some instances, the target defendant is at arm's length, unknown to the plaintiff. In other situations, the prospective defendants may be acquaintances or business partners. Litigation may damage the relationship between the plaintiff and the defendant, destroy future personal or business dealings between the parties, or upend vendor and supplier relationships. Moreover, plaintiffs should assess the risk of counterclaims, which could expose the plaintiffs to the possibility of incurring additional fees for defending against the claims. In patent cases, for example, a plaintiff may bring a patent suit and then face defendant-filed lawsuits against five of the plaintiff's patents in five different jurisdictions. Other times, a plaintiff may file a case only to learn that it will need the defendant's technology in light of newly emerging next-generation technology. In short, in assessing litigation from a plaintiff's perspective, all risks should be fully examined.

Litigation also drastically affects individuals' and corporations' daily activities, and a good plaintiff's attorney will ensure that the client understands these effects prior to suit. In assessing whether a plaintiff should file suit, counsel should also consider how long litigation may last and how disruptive the litigation may be for the plaintiff's business or life. The plaintiff must identify who ultimately needs to be involved in the case and how litigation will affect the plaintiff's employees, customers, business partners, or family members. Additionally, the potential plaintiff should explore the burdens involved in electronic discovery.[2] Discovery could require maintaining computer systems, restoring backup tapes of massive size, and sifting through millions of emails and electronic documents. Good assessment and communication with the client prior to filing is key.

[2] Who Is the Right Defendant?

Selecting the "right" defendants is crucial. However, identifying who is the "right" defendant is not always obvious."[3] There may, in fact, be multiple entities liable to the plaintiff for damages. The question then becomes whether the plaintiff should name each and every defendant from the outset of the litigation. There is no uniform rule that provides the right strategy for every case. Determining which entities to sue often requires a case-by-case analysis. Sometimes, a particular entity may have more business or marketplace pressures that make it a more attractive target. In other instances, a particular entity may be judgment proof and thus a poor choice to name as a defendant. Plaintiff's counsel must consider the possibility of recovering a judgment from a defendant. Plaintiff's counsel should also factor interests of potential co-defendants when deciding who to name. When particular entities' interests are not aligned and they are both named as co-defendants, each one may "point the finger" at the other during the litigation. If each entity has the assets to pay a potential judgment, this is a strong tactic that can promote successful resolution.

[3] The Right Venue

Selecting the "right" venue to prosecute an action is crucial to the development of a winning litigation strategy. Every venue is not created equal; some provide a plaintiff with a greater chance of success than others. Therefore, knowing which venue is right for the particular case is extremely important.

To be sure, the importance of choosing the "right" place to file suit is readily apparent when looking at statistics. While federal courts may get cases from the filing of a complaint to a jury trial more quickly than state courts, that does not mean federal courts provide the plaintiff with the best opportunity for success. The U.S. Department of Justice reported that plaintiffs prevailed in only 48% of the tort cases resolved by trial in federal district courts between 2002 and 2003.[4] By contrast, in 2005, juries found in favor of the plaintiff in 54% of jury trials in civil cases in state courts around the country, and judges sided with the plaintiff in 68% of bench trials.[5] This data suggest that not only may state court be a slightly better jurisdiction, but also that having judges act as the fact-finders might be more favorable. Particular counties within each state maintain their own statistics on success rates and verdict amounts. If a plaintiff's counsel decides to file a particular case in the state court system, careful attention must be paid to which county provides the client with the best chance of recovery.

In addition to considering which trial court to file suit in, counsel should consider the appellate jurisdiction. A study of the country's 46 largest counties found that, between 2001 and 2005, 15% of civil trials were appealed after trial verdict or judgment, and "the higher the stakes, the greater the likelihood the outcome will be appealed."[6] Thus, choosing to file a case in an appellate district that has a history of affirming damage awards in favor of the plaintiff is an important factor. This is all the more true considering that state "trial court verdicts or judgments that found for plaintiffs were reversed or modified on appeal more often than trial court outcomes favoring defendants."[7] Appellate court precedent may drastically affect not only the plaintiff's likelihood of success in numerous areas of the law, but also whether a plaintiff is foreclosed from bringing a suit. It is important for a plaintiff's lawyer to consider both the general environment for appeals in a jurisdiction and whether any appeals are pending that could have an impact on the plaintiff's pending lawsuit.

[4] The Potential Public Spotlight

One often-overlooked consequence of initiating litigation (or even becoming an unwilling participant as a defendant) is the attention that lawsuits receive in the press. While rarely a reason to not file suit for a plaintiff, this factor should be brought to a client's attention—particularly the management of corporate plaintiffs—to ensure that any newsworthy case aspects are appropriately dealt with in the media or with shareholders. In certain cases, planning for press inquiries is a critical pre-filing component, and everyone who may receive an inquiry must have a firm understanding of what she can (and cannot) say.

Ultimately, the decision to sue is the result of balancing the harm the plaintiff has experienced and the expected litigation rewards against the expense and duration of litigation and the uncertainty of the outcome. Any would-be plaintiff should collaborate with counsel to ensure that both are fully informed on all fronts.

§ 2.03 Counsel and Budgets

[1] Selecting Counsel

One of the most important decisions for any plaintiff is the selection of the trial attorney. Although the ultimate selection will depend upon a variety of factors, two factors should be considered of paramount importance when making the decision: (1) the

actual trial skills of the lawyer and (2) the chemistry between the lawyer and the client. The retention of a skilled trial lawyer is essential, because, should the case proceed to trial, artful advocacy can make the difference between winning and losing. "Chemistry" is important because litigation requires difficult judgment calls. More specifically, good chemistry between the lawyer and the client is essential for an efficient functioning of the relationship and the lawsuit.

Lawyers have differing backgrounds and skills. The most subtle but important distinction is that between the "litigator" and the "trial lawyer." The litigator has mastered the myriad of rules and discovery techniques necessary to prepare for a trial, whereas the trial lawyer has mastered the art of courtroom advocacy. While this distinction may seem unnecessarily fine, when selecting trial counsel for a significant, complex matter, a plaintiff should assume that the case will be resolved in a jury trial and, finally, on appeal.

One standard method used by many entities involved in complex litigation to assist in selecting trial counsel is what is informally known as a "beauty contest." Potential plaintiffs meet with prospective attorneys to discuss, among other things, the attorneys' trial experience, their proposed strategy for the plaintiffs' cases, the plaintiffs' business objectives for the litigation and the attorneys' estimate of litigation costs. The fine line that demarcates the attorney-client relationship must be carefully observed during these meetings, and counsel should address this issue immediately, thus avoiding rendering legal advice until the attorney-client relationship has been established. More specifically, attorneys should not accept any confidential or privileged information from the prospective client unless retention is likely. That said, lawyers do owe a duty to prospective clients when "no client-lawyer relationship ensues."[8] The ABA Model Rules of Professional Conduct provide that lawyers shall not "use or reveal" information they learned from a prospective client, with limited exceptions.[9] Individual states have adopted their own rules that are similar, if not identical, to the ABA Model Rule.[10] Using caution helps attorneys avoid conflicts from future work if they aren't hired.

[2] The Budget: Assessing the Outlay

Plaintiff and their attorneys must engage in early and candid discussions regarding expected litigation costs. A number of factors can contribute to high-cost litigation, including the need for extensive discovery; qualified consulting and testifying experts; and demonstrative exhibits, such as boards, physical models and computer animations to help educate the jury about the complicated aspects of the plaintiff's case. Plaintiffs should assess the potential that a prospective defendant will respond with its own claims. Defending against counterclaims will likely increase the overall costs to the plaintiff. Therefore, the plaintiff must determine whether litigation makes economic sense.

Litigation costs can vary extensively depending on the claims involved, the complexity of the case, the number of parties, the discovery efforts required to take the case to trial, the litigation stakes and the fee arrangement with the plaintiff's attorneys. For instance, perhaps at the more expensive end of the scale, recent data on the average litigation costs for a complex patent infringement claim range from $2 million to $4.5 million.[11] Whether a large or small case, the plaintiffs and counsel should agree on a case budget and come to an understanding that circumstances may arise that require budget revisions. Counsel should prepare an initial budget that itemizes the

anticipated fees and costs for fact discovery, expert discovery, pretrial preparation, and trial. Counsel should also advise clients on various directions the litigation can take that may affect the budget. For example, a motion to transfer may move the plaintiff's case from a speedy jurisdiction to a slow jurisdiction, thus prolonging litigation and the associated costs. Defending against anticipated counterclaims may dramatically affect litigation costs by requiring more resources, additional discovery and experts, and attorney time.

As the litigation proceeds, it is equally important that the attorney keep the client informed on the status of the litigation, predictable costs, and unforeseen events that may not only change the course of the case but that could increase costs. In determining whether attorneys breached their fiduciary duties to their clients by going over budget, courts may consider such factors as whether the attorneys provided their clients with budget projections and updates regarding the status of the litigation.[12] In one such case, the court noted that, even though the law firm did not inform its client when the firm was approaching the limits of its projected litigation budget for the case, the client had not instructed the firm to stay within a particular budget.[13] The court also noted that the firm's budget projections explicitly warned the client of the "difficulty of forecasting legal expenses with any degree of accuracy" and that it was "quite possible that [the] legal fees could be substantially more or less" than the estimate.[14] Although the firm received a judgment against its client, it also likely lost any future work from the client. You may avoid these pitfalls by having frank discussions about the accuracy of estimated budgets and regularly keeping the client informed of events in the litigation that may change the estimates.

Ultimately, the plaintiff must determine whether bringing its claims is worthwhile in light of the known and anticipated costs required to bring litigation and in light of the possibility of unforeseen costs as the litigation proceeds. Direct discussions of the projected budgets must be included in the dialogue between plaintiffs and their prospective counsel before filing suit. Otherwise, a plaintiff could end up spending—or losing—more that it could ever recover in litigation.

§ 2.04 Pre-Suit Investigation and Case Deconstruction

[1] Rule 11 Requirements

Prior to filing suit, counsel must engage in an early investigation of the strengths and weaknesses of a plaintiff's claims. While a case cannot be won based solely on a pre-suit investigation, a case can certainly be lost due to an inadequate one. In fact, the rules of the trial courts mandate pre-suit investigations to prevent frivolous claims being filed. Rule 11 of the Federal Rules of Civil Procedure requires that an attorney bringing claims certify "that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . the claims, defenses, and other legal contentions are warranted by existing law or by a colorable argument for extending, modifying, or reversing existing law or for establishing new law."[15] State courts around the country all have similar requirements. In some jurisdictions, the legislatures have also mandated that experts certify that they have reviewed the facts and believe a meritorious case exists prior to a case ever being filed.

Moreover, factual contentions must have evidentiary support or be likely to have evidentiary support after further investigation or discovery.[16] Therefore, to bring a claim

and comply with Rule 11 obligations, the plaintiff must fully understand and deconstruct the causes of action it is asserting. Under Rule 11, it's insufficient for the attorney to blindly accept facts and conclusions offered by the client.[17] Rather, the attorney signing the pleadings is obligated to conduct a reasonable inquiry.[18] Therefore, if the attorney has access to pertinent information, she is obligated to review it.[19] Failure to comply with any aspect of Rule 11(b) obligations can lead to sanctions by the court.[20]

The Rule 11 pre-suit investigation varies in form for different causes of action. For example, in a cause of action for breach of contract, an attorney may perform an independent review of the agreement that the potential plaintiff claims were breached, evidence available regarding the breach and the case law regarding bringing such a cause of action. In other circumstances, the attorney's Rule 11 obligation is far more substantial.

Patent law is one area that requires extensive Rule 11 pre-suit investigation. In patent infringement actions, Rule 11 requires that the "attorney interpret the pertinent claims of the patent in issue before filing a complaint alleging patent infringement" and that counsel compare the accused inventions with the patents.[21] In these situations, while it is acceptable for an attorney to consult with the client, the ultimate Rule 11 conclusions and evidentiary support must result from an independent evaluation by the attorney.[22]

Indeed, in satisfying the Rule 11 pre-suit investigation obligation, the attorney is not entitled to rely solely on experts or on the client, even if the client is a virtual expert. In one case, for instance, the Federal Circuit questioned the attorneys' pre-suit failure to cut open the heads of accused golf clubs to determine whether they infringed the claimed elements of the asserted patent.[23] Although its client was a virtual expert in golf club design who had shown the attorneys the inside of one of the allegedly infringing golf clubs, the court questioned the reasonableness of the attorneys' pre-suit investigation because their reliance on the client meant they did not have direct knowledge of whether any of the other accused products met the claim elements of the asserted patent.[24]

In another case, attorneys were sanctioned for seeking a preliminary injunction in a false advertising case because of the attorneys' unreasonable reliance on an expert report.[25] The court concluded that the attorneys and the client had "shirked their responsibilities to conduct a reasonable investigation of or inquiry about" the expert's test results, which were later determined to have "no probative value whatsoever."[26] The flaws in the expert's report should have been "readily apparent on any reasonable examination or inquiry," and thus the attorneys' reliance upon it was not objectively reasonable.[27] Moreover, the court found that, because the expert's testimony was based upon "obviously invalid and unreliable test results," the preliminary injunction motion was brought for an improper purpose.[28] The attorneys and the client were therefore jointly sanctioned for the reasonable attorney fees and expenses incurred by the opposing party, not only because of the attorneys' failures under Rule 11 obligations, but also because the client was sophisticated enough to recognize its expert's flawed testing.[29] These are just a few of the many cases demonstrating the importance of thoroughly conducting the pre-suit investigation.

[2] The Plaintiff's Trial Theme

At their core, trial lawyers are story tellers. From the plaintiff's perspective, it is counsel's job to tell the story of what happened to the client and the extent of the damages

incurred in a persuasive and coherent manner. The plaintiff's counsel's goal is to tell the story of its client's case more persuasively than its adversary. This is known as the burden of persuasion. Cases are won and lost based upon the trial lawyer's ability (or inability) to persuasively communicate its client's story to the trier of fact.

One of the best ways to persuasively tell the story of the plaintiff's case is by developing an overall case theme. This theme should fit the facts of the case, highlight the strengths, and minimize any weaknesses. The trial attorney should introduce the theme to the fact-finder during the opening statement and remind the jury of the theme throughout the trial. The trier of fact will have thus heard the theme multiple times before the close of evidence. When jurors begin deliberating, favorable jurors will be armed with a tool (i.e., the case theme) to sway undecided jurors or those who favor the defense.

The most successful themes are usually the most logical, simple, and easy to understand. They also should address all legal issues in the case. Themes often relate to morality and aim to appeal to the judge or jury's sense of justice. For example, did the defendant cheat? Did the defendant lie and steal? Did the defendant accept responsibility for the wrongful conduct? Did the defendant copy the plaintiff's valuable ideas? Does the defendant believe it is above the law and disregard the rules? Developing a good trial theme enables the trier of fact to not only find in the plaintiff's favor, but also to feel confident about that result.

[3] Stepping into the Defendant's Shoes

Plaintiffs can prepare their cases better by objectively analyzing their weaknesses and considering the cases from the defendants' perspective. For example, at the outset of litigation, a plaintiff should consider the potential defenses the defendant may assert, the elements of those adverse claims, the effect of the plaintiff's unfavorable facts, and the defendant's possible trial themes. It's important for the plaintiff to foresee how it may proactively and offensively respond. By analyzing the defendant's case, the plaintiff is in a better position to meet its burdens of proof and persuasion.

Furthermore, a plaintiff should give careful consideration to both the affirmative defenses that the defendant *must* plead and other defenses that the defendant *may* plead.[30] An analysis of the various elements of the defendant's potential defenses will guide the plaintiff in establishing its own case and in developing a case theme that effectively counters whatever arguments the defense may assert.

In addition to affirmative defenses, the plaintiff should know both the compulsory and the potential counterclaims that the defendant may plead. Rule 13 of the Federal Rules of Civil Procedure requires an opposing party to bring a counterclaim in the case if the claim "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim" and "does not require adding another party over whom the court cannot acquire jurisdiction."[31] Furthermore, the Rules allow for permissive counterclaims by a party, which can expose the plaintiff to a broad array of claims against it.[32] Compulsory and permissive counterclaims are an important consideration for a plaintiff prior to filing suit as the exposure the plaintiff may face in litigation can dramatically increase the plaintiff's costs beyond those of litigating its own case. Moreover, a plaintiff must make an early determination of what possible counterclaims it may face to determine a course that not only will prevent the counterclaims from overshadowing its own case, but also will allow the plaintiff to prevail at trial.

[4] Expert and Lay Witnesses

Some cases come down to a "battle of the experts." Expert witnesses are witnesses who possess a degree of education, experience and training on a certain topic, thus allowing them to render an "expert" opinion. Expert witnesses can also help the fact-finder understand the importance of certain technical evidence that lay persons would not otherwise understand.

Depending on the complexity of the technical issues involved in the litigation, counsel may choose to retain a consulting expert as well so that counsel may obtain advice but not produce the expert for litigation.[33] A purely consulting expert can provide significant assistance to the plaintiff's counsel during the course of discovery. The purely consulting expert can assist the attorney in crafting discovery requests and reviewing documents produced as well. However, if the trial attorney plans on calling the expert witness at trial, the adversary would have a right to depose the expert witness.[34]

Furthermore, parties must disclose the identities of testifying expert witnesses early in the case, and each expert must provide written reports detailing her opinions; the basis and reasons for her opinions; the data and information considered by the expert in forming her opinions; any exhibits to be used to summarize or support her opinions; the expert's qualifications, including a list of all publications; compensation paid to the expert for her study and testimony; and a list of all other cases in which the expert testified within the preceding four years.[35]

Selecting the "right" expert for a particular case is obviously significant. The "right" expert should be one who has the appropriate qualifications, training, and experience to explain technical evidence to the jury and is qualified to render an opinion on a material issue in the case. There can be numerous qualified experts available for each case. The deciding fact should usually be which expert the trial attorney believes will present best in front of the jury. The "right" expert should not only be well-qualified, but also should present herself in a credible manner, is likeable, speaks in readily understandable language and explains her opinions in clear fashion. An expert who does not present herself in this way will do little to advance the plaintiff's case. Cases are often lost because the attorney selected the wrong expert.

In making an assessment of experts, counsel should consider whether the testimony sought to be elicited from the expert is of the type that will be allowed in a trial. Rule 702 of the Federal Rules of Evidence provides the basic parameters for admissible expert testimony. That rule incorporates the principles applied by the Supreme Court for admissibility of scientific evidence in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[36] and *Kumho Tire Co. v. Carmichael*.[37] The trial court must act as the "gatekeeper" to determine the reliability of expert testimony.

Plaintiffs must also carefully select the "right" fact witnesses to tell their story. The witnesses they select must be able to provide clear and accurate responses to questions during depositions and trial. They should also be confident enough to withstand cross-examination. While thorough witness preparation is essential, it is likely that questions will arise on cross-examination that were not contemplated in the preparation. The witnesses selected must be sufficiently astute to evaluate the questions and respond effectively. It is also helpful if a witness has a good memory. If more than one person knows certain facts based on personal knowledge and the plaintiff is given an opportunity to pick its witnesses because of a Rule 30(b)(6) notice, the person (or persons) who will be most effective in presenting those facts to the jury should

be selected. In trial, the use of more witnesses does not necessarily correlate to the case's success. The plaintiff must decide who is best-positioned to present its case at trial and use only those individuals as witnesses. Lastly, if the plaintiff needs a new witness line-up at trial, it is likely that the discovery witnesses have done irreparable harm to the plaintiff's case.[38]

A fact witness may provide opinion testimony in certain limited circumstances. According to Rule 701 of the Federal Rules of Evidence, a lay witness may testify to those opinions that are rationally based on the witness's perception, helpful to understanding the witness's testimony or determining the facts at issue and not based solely on scientific, technical, or other specialized knowledge.[39] Rule 701 allows lay witnesses to offer opinion testimony when they personally observe events that cannot otherwise be fully presented to the fact-finder; however, lay witnesses may not express opinions on matters beyond the realm of common experience. As a classic example of permissible opinion testimony from a fact witness, courts usually permit these witnesses to opine on the speed of an automobile.[40] Opinion testimony by lay witnesses must be well founded on personal knowledge of the facts and susceptible to cross-examination.[41] Admission of lay witness opinion testimony rests with the trial court's discretion.[42]

§ 2.05 Venue Considerations

[1] Advantages

It is often advantageous to have the case heard in the plaintiff's own "backyard." The hometown location offers the advantages of reducing plaintiff's expenses, reducing business or work schedule disruptions, familiarity with the court, and possibly the jury's familiarity with the plaintiff. Also, a common belief is that a local jury will be more receptive and sympathetic toward a local plaintiff. Employers and individuals with favorable local reputations are likely to garner some support from local juries. Conversely, a large local employer with a bad reputation can provoke jurors' negative perceptions.

[2] Expedited or Accelerated Dockets in Federal Court

If the plaintiff has a strategic need for a speedy case resolution, a high-speed docket may offer the best solution. Although the common term "rocket dockets" is frequently associated with high-speed courts hearing patent infringement cases in federal court, the practice is becoming more common in other areas. The rocket docket commonly sets firm deadlines that are strictly enforced.[43] The court will also set an aggressive discovery schedule that may limit the scope of discovery, and it rarely grants time extensions. Moreover, the court will often rule on motions from the bench, not take them under advisement. The philosophy behind the rocket docket is that the parties and their counsel must work at a faster pace meet shorter deadlines—and thus the chances for resolution are more likely.

The rocket docket has a number of advantages. First, plaintiffs save costs as their lawyers spend less time litigating the cases.[44] Also, defendants will have less time to develop their trial themes, defenses, and strategic use of witnesses and experts. In some instances, defendants may lose rulings simply by failing to meet the strictly enforced deadlines.[45] Finally, while less time litigating can result in the plaintiff

incurring less costs,[46] an unsuspecting defendant can incur legal expenses more rapidly, which can encourage settlement.

There are also potential disadvantages of a rocket docket. Despite the plaintiff's preparedness, an unexpected substantive defense can arise.[47] In these instances, the rocket docket's speed and limited time to respond will work against the plaintiff. Additionally, access to information can be problematic, as the plaintiff may not have the necessary access to defendant's information and will have very limited time to make discovery challenges before the court.[48] Finally, particularly complicated cases may be difficult to develop in a truncated time frame.[49]

[3] State Courts

Judges in many state trial courts have heavy caseloads. For example, the Circuit Court of Cook County, Illinois had 212,713 newly filed civil cases in 2016 alone, and 318,573 were pending at the end of the year. It took 30 months on average in Cook County for a civil case to reach a jury verdict.[50] If the plaintiff can establish jurisdiction in a state court, it can prolong the litigation's length and increase the case's flexibility. More time from filing to trial can allow a plaintiff to access and review more discovery, and judges may be more amendable to modifying the court's schedule. The plaintiff should, however, consider how prolonging the litigation can potentially increase costs.

Some state courts, however, maintain lighter and more predictable dockets. In these situations, the judge may give particular attention to a case she finds interesting, which can allow the litigation to progress faster and ward off waiting months for hearings to occur or opinions to issue. Caseloads among the states, and among counties within each state, can differ. Consequently, the plaintiff needs to research dockets and be informed of each prospective forum, and weigh this against how it may be best served by the litigation speed.

Of equal importance is analysis of the state court's appellate process. Not every state court system provides the right to an intermediary appeal. For instance, in Virginia, the state appellate court is only authorized to hear appeals as a matter of right from final judgments related to marriage, divorce, custody, support, other domestic relations cases, as well as final decisions from the state Workers' Compensation Commission and other administrative agency decisions.[51] Although the Court of Appeals may also consider petitions from certain criminal cases, only one option exists for an appellant not falling within these categories to appeal from the trial court: petition the state Supreme Court for review.[52] Even then, only a little more than 7% of all petitions for appeal at the Virginia Supreme Court were granted in 2007.[53] In considering the plaintiff's options for post-trial relief, Virginia is one state court that provides scant opportunity for review of the trial court's decisions. A jurisdiction with limited appellate review may be desirable for plaintiffs with jury-friendly trial themes but devastating to plaintiffs who lose at trial or who stand on unstable legal ground.[54]

[4] Rule 1404(a) and Multidistrict Litigation Considerations

For strategic reasons, defendants often seek to transfer cases from the plaintiffs' chosen forum. Under section 1404(a) of the Judicial Code, a "court may transfer any civil action to any other district or division where it might have been brought" for "the

convenience of the parties and witnesses, in the interest of justice, a district."[55] The factors courts generally considered under section 1404(a) are the plaintiff's choice of forum; where the operative facts occurred; the convenience of the parties; the convenience of the material witnesses; the availability of process to compel the appearance of unwilling witnesses; and other considerations affecting the interests of justice.[56] Motions to transfer are left to the discretion of the court, with due consideration given to "the convenience of the parties and witnesses and the ease of access to sources of proof."[57] The burden is on the defendant, when it is the moving party, to establish that there should be a change of forum.[58]

As we discuss in Chapter 4, a court may also transfer a case under the multidistrict litigation (MDL) transfer statute, section 1407 of the Judicial Code.[59] Section 1407 authorizes the Judicial Panel on Multidistrict Litigation (the "Panel") to transfer cases when "one or more common questions of fact are pending in different districts" and upon determination that transferring the proceeding "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions."[60] Please refer to Chapter 4 for a detailed explanation on the Panel and MDLs.

A well-prepared plaintiff should determine in her pre-suit investigation whether a case is subject to jurisdiction in different venues and be prepared to argue that the case is proper in the venue she chose.

§ 2.06 Framing the Case and Writing the Complaint

[1] General vs. Specific Pleading

The Federal Rules of Civil Procedure and many state courts use a general notice-pleading standard, not a specific fact-pleading standard.[61] Under a notice-pleading standard, the complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief."[62] Then again, a plaintiff must plead enough "factual content" to allow the court to "draw the reasonable inference that the defendant is liable for the misconduct alleged."[63] Pleading only general facts may not be the best strategy, even in notice-pleading jurisdictions. For instance, the complaint can be an opportunity for a plaintiff to tell her story to the judge, who may not get an opportunity to hear it until the summary judgment stage. Or, if the plaintiff foresees that the defendant will attempt to transfer the case to another jurisdiction, she may preempt those efforts by specifically pleading facts related to jurisdiction. Specific pleadings can also highlight to the court particular issues that will arise and limit the defendant's themes and theories. The plaintiff should be cautious in its pleading to avoid an excessively verbose claim for relief that is subject to dismissal.[64] The key is for the plaintiff to decide the goals of the complaint. If the plaintiff is simply commencing an action, a short complaint is sufficient. If the plaintiff has other goals, such as an early mediation, then presenting a compelling story in a well-pled complaint may be the better strategy.[65]

Amending the complaint is almost always an option under federal and state rules if a plaintiff doesn't get it right the first time. Under the Federal Rules, a party may amend her pleading once as a matter of course within "21 days after serving it" or "if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier."[66] In all other cases, "a party may amend its pleading only

with the opposing party's written consent or the court's leave."[67] The Federal Rules specify that the "the court should freely give leave" to amend pleading "when justice so requires."[68]

[2] Filing Without Service

A "civil action is commenced by *filing* a complaint with the court."[69] Thus, a party may file a complaint with the court without actually serving the defendant, provided, under the Federal Rules, that the complaint is properly served on the defendant within 90 days; otherwise, the complaint must be dismissed.[70] Delaying the formal service upon the defendant allows the plaintiff the advantage of opening the communication channels for resolution before litigation commences. Filing without service allows the parties to conduct settlement negotiations without the expense of meeting litigation obligations imposed once the plaintiff serves the complaint.

If the parties cannot reach an agreement within 90 days, the first party to file can effectuate service under Rule 4 and obtain the benefit of its original filing date with the court.[71] In some instances, the defendant may file a declaratory judgment or other claims in its preferred forum, along with motions to dismiss, to consolidate the cases or to transfer venue to the defendant's choice of forum. Nevertheless, the first party to file will benefit from the "first-to-file" rule that favors maintaining the action in the forum in which the case was first filed.[72] Filing without service thus allows the first filer to enter into negotiations with the other party, knowing that the case will likely stay in the first filer's chosen forum. Indeed, even if the second to file the complaint was the first to actually *serve* the complaint, the party that was the first to *file* enjoys a presumption that the matter should stay in the first filer's district. Therefore, plaintiffs should review the likely forum's decisions regarding the first-to-file rule and motions to transfer (or consolidate) actions, since each trial court may vary in terms of the factors considered and the weight given to each factor.

[3] Foreign Defendants and Jurisdiction

Foreign defendants are not immune from civil claims in U.S. courts; they may be subject to jurisdiction in the United States when they have the required minimum contacts.[73] Federal Rule of Civil Procedure 4(e) provides, in part, that service is effected when done in accordance with the state law in which the district court is located.[74] But a foreign defendant will sometimes have ample contacts with the United States as a whole while its contacts are "so scattered among states that none of them would have jurisdiction," and therefore no means of service exists.[75] In these instances, personal jurisdiction may be effected by service of process pursuant to Federal Rule of Civil Procedure 4(k)(2).[76]

Generally, a foreign defendant may consent and waive formal summons and complaint service.[77] If a waiver cannot be obtained and the defendant cannot be served locally, service may be made in the foreign country by internationally agreed means.[78] Under the Hague Service Convention, each signatory country must establish a "central authority" to receive and process the service of documents. Additionally, the Convention allows for a variety of other service methods if the foreign country does not object to them, including by mail, through consular and diplomatic channels, and by the methods permitted by the internal laws of the country where the service is to be executed.[79] If service under the Hague Convention is not effective, service may also

be made by direction of the court or by other means as prescribed under the Federal Rules of Civil Procedure.[80]

§ 2.07 Preliminary Motions

As a strategic consideration, counsel should consider whether to seek a temporary restraining order or a preliminary injunction when filing the complaint. Both types of relief are governed by Rule 65 of the Federal Rules of Civil Procedure. As part of such a motion, a plaintiff may also seek to obtain early, expedited discovery. For instance, a court may alter the timing, sequence, and volume of discovery at its discretion, though the party seeking expedited discovery may have the burden of showing good cause to depart from the normal course of discovery practice.[81] In addition, a preliminary injunction often involves an evidentiary hearing with live witnesses, which may become part of the record at trial. The district court is authorized to consolidate trial with a hearing on a preliminary injunction request under Rule 65.[82] For purposes of settlement, a preliminary injunction motion can be helpful; it not only may provide the relief the plaintiff ultimately seeks in an action, but may also encourage settlement sooner. This may be especially true where a court finds in deciding a motion for injunctive relief that the plaintiff is likely to succeed on the merits.

§ 2.08 Discovery: Advantages and Pitfalls

The discovery phase allows plaintiffs to build their cases by collecting evidence required to prove their case and prevail at trial, to support their trial theories and themes, and to gain information about the defense's theories. It also allows the parties to test the fact and expert witnesses and the trial theme. Cases can be won or lost in discovery.

The 2015 amendments to the Federal Rules included an amendment to Rule 26 that narrowed the scope of discovery in federal civil cases. Rule 26(b)(1) now states:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.[83]

Notably, the amendment "restore[d] the proportionality factors to their original place in defining the scope of discovery."[84] What's more, the phrase "reasonably calculated to lead to the discovery of admissible evidence" was deleted because it had been used incorrectly to expand the scope of discovery.[85] But Rule 26(b)(1) still allows for "[d]iscovery of nonprivileged information not admissible in evidence . . . so long as it is otherwise within the scope of discovery."[86]

Despite the narrower scope of discovery under Rule 26, the scope of discovery in federal courts can still be expansive. But plaintiffs face risks when requesting overly broad discovery. As discussed further below, under the 2015 amendments, Rule 26(c) now contains explicit language providing that the court may shift costs for responding to discovery requests. In fact, relying on this rule, "[s]everal courts have ordered

parties to share expenses related to attorney privilege or responsiveness reviews."[87] A broad discovery request can result in an old-fashioned document dump by the defendant of irrelevant documents and information;[88] organizing and reviewing these documents could significantly increase costs for the plaintiff.

On the other hand, aggressively pursuing discovery from the defendant could put the defendant in a bind. Plaintiffs who vigorously pursue enforcement of defendants' discovery obligations can obtain favorable inferences in trial if the defendant fails to satisfy its discovery obligations. In one instance, a court granted sanctions against defendants that failed to produce certain documents and failed to preserve and thoroughly search emails during discovery.[89] After the plaintiffs continually brought the defendants' deficiencies to the court's attention, the court ordered that certain facts be deemed admitted by defendants, that certain evidence be precluded, that defendant's privilege assertions be struck from its privilege logs, and that certain witnesses be struck, in addition to monetary sanctions.[90]

[1] The Rule 26(f) Conference

Under Rule 26, the parties must meet and confer to attempt to agree on a plan for discovery.[91] This conference should be the first step in the plaintiff's efforts to impose suitable limits on scope of discovery and the timing for production. The plan developed from the Rule 26(f) conference provides the parties the first chance to build credibility with the court. Therefore, reasonableness and common sense should govern the plaintiff's approach in conferring on the details of discovery. For instance, a court would likely view as unreasonable a plaintiff's request to cut off discovery after two months in a complex commercial case, the same as it would a defendant's suggestion that the discovery cut-off should be three years later. A smart plaintiff will work with the defendant to present a discovery plan that will exert pressure, but within the bounds of reasonableness.

As part of the conference, the parties may agree to limit the length of depositions, the number of interrogatories or document requests, and the number of experts. Additionally, the parties can address whether the case warrants hiring a special master for complicated discovery disputes. A plaintiff should determine in advance whether it is more advantageous to bifurcate the fact discovery from the expert discovery. Another, often overlooked, issue is the timing of expert reports. Typically, the plaintiff will submit its first report, with the defendant's rebuttal to follow. In complex cases, in which the multiple parties are bearing the burden of proof on separate issues, consideration should be given to simultaneous exchange of expert reports on which the party bears the burden. The Rule 26 conference also requires parties to discuss the implications of electronic discovery.[92]

Therefore, a well-prepared and strategic plaintiff considers the overall discovery plan and ensures the plan is aimed at accomplishing its litigation objectives. Moreover, the plaintiff will ensure that the Rule 26(f) conference furthers those objectives—often in the presence of an unwitting defendant.

[2] Electronic Discovery[93]

A plaintiff should carefully craft discovery requests for electronic information to limit production to relevant data. This prevents excess costs by avoiding document review

costs for millions of irrelevant emails and data.[94] Plus, the plaintiff must consider the client's out-of-pocket expenses, whether outside vendors are necessary, and the disruption to the client's daily business. A frequent issue with electronic discovery today is not whether or not data is discoverable, but which party will bear the associated costs.[95] While *Zubulake v. UBS Warburg LLC*, the seminal case on cost-shifting in electronic discovery disputes, focused on the shifting of expenses arising from compelling production of "inaccessible" electronic data,[96] courts have, over the years, looked beyond accessibility to determine whether to shift discovery costs. In *FDIC v. Brudnicki*, the court noted that, though "*Zubulake* was focusing upon the issue of cost shifting when dealing with inaccessible [electronically stored information], and other courts have required a showing of inaccessibility for cost shifting, other courts have held that Rule 26(c) permits cost shifting as part of enforcing proportionality limits."[97]

Reflecting this development, the 2015 amendment to Rule 26 expressly recognized the courts' capacity to order cost-shifting in the hopes of averting "the temptation [that] some parties may feel to contest" the courts' authority to do so.[98] Specifically, the amendment added subsection 26(c)(1)(B), which permits a court to issue an order, for good cause, to protect a party from "annoyance, embarrassment, oppression, or undue burden or expense," by specifying the terms of discovery, "including time and place or the allocation of expenses."[99] Considering this amendment, courts have found that deciding whether a discovery request warrants cost-shifting based on its burdensomeness turns on the needs of the case; the amount in controversy; the parties' resources; "the importance of the issues at stake; and the importance of the proposed discovery in resolving those issues."[100] To be sure, however, this amendment does not "imply that cost-shifting should become a common practice," and "[c]ourts and parties should continue to assume that a responding party ordinarily bears the costs of responding."[101]

While the costs of producing electronic documents may be great, the cost of not meeting electronic discovery obligations can be far greater, even for a plaintiff.

For example, the 2015 amendments added Rule 37(e) to the Federal Rules to provide a uniform standard for federal courts to apply when considering whether a party failed to preserve electronically stored information: the court may impose measures necessary to cure prejudice to a party if it finds that "electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery."[102] Moreover, if the court determines that a "party acted with the intent to deprive another party of the information's use in the litigation," it may presume that the lost data was unfavorable to the party, instruct the jury that it may or must presume the information was unfavorable to the party or dismiss the action or enter a default judgment.[103] Plaintiffs can avoid unnecessary costs and possible sanctions by taking great care, even before litigation is imminent, to prevent costly discovery by organizing their computer files, including emails, and adopting a document retention policy with an eye toward future discovery obligations.

[3] Depositions

Strategic use of depositions is another method for plaintiffs to effectively develop their story and prove their case. Some say that a case cannot be lost by taking a deposition, but the case can be lost defending one. Witness selection and preparation is

critical. Depositions can be used strategically in a number of ways, from impeaching witnesses, creating video clips to play at trial or providing evidence for summary judgment motions. They can serve as an effective means for plaintiffs to confirm their beliefs and to obtain testimony on the requisite elements of their claims. In other instances, the deposition can be used to discover any unknown facts and information the defendant witnesses intend to offer at trial. Overall, the three reasons to take a deposition are to find out what the defendant will say at trial, pin the defendant down on key facts, and obtain sound bites that comport with the plaintiff's trial theme. Conversely, it is an ineffective use of time and resources to take a deposition if the plaintiff does not have the documents necessary to pin the witness down, is taking a deposition without knowing why it is doing so, has not thought through the use of the deposition at trial or has not asked admissible questions in a manner that will persuade a jury.

Two schools of thought have emerged regarding how parties should approach a deposition—one advocates for thorough cross-examination of the witness and the other suggests holding back and saving the key evidence for trial. While the latter school still exerts considerable influence, the practicalities of modern practice suggest that the former makes more sense today. Busy courts are increasingly devoting fewer days to civil calendars, and trials are becoming increasingly rare. Demolishing a defendant's case in a deposition may set the case in the best possible position for settlement. Moreover, summary judgment motions will require setting out the plaintiff's case and best evidence regardless of deposition strategies.

Strategic use of a deposition under Federal Rules of Civil Procedure 30(b)(6) can also be important to a plaintiff's case. Rule 30(b)(6) allows the requesting party to notice a deposition directed at an organization and requires the responding party to designate "one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf."[104] Topics for the 30(b)(6) deposition can range from issues related to the elements of the plaintiff's or defendant's case to topics regarding document retention and location. For plaintiffs, effective use of Rule 30(b)(6) depositions allows targeted topics without having to depose 20 individuals to get at the relevant information.

Those individuals designated by the organization to testify effectively answer for the organization, and their answers bind the organization to that testimony, and an organization has an obligation to prepare its witnesses to testify regarding the topics for which they are so designated.[105] Unlike individual witnesses, 30(b)(6) witnesses generally have an obligation to seek out and inform themselves of the information sought by the notice. To the extent that a designated witness testifies or fails to testify because of lack of memory or knowledge, the organization may be precluded from later changing its position at trial without being subjected to cross-examination.[106] Moreover, failure of the witness to answer all questions within the topic she is designated may result in a substitute witness being designated or, in some instances, sanctions.[107]

Aside from the 30(b)(6) depositions, individual officers, directors, and employees of an organization may be deposed in their individual capacities[108]—separate and apart from any answers they may give as designated 30(b)(6) deponents.[109]

[4] Other Discovery Tactics

A number of other discovery techniques should also be considered in developing the plaintiff's case. First, targeted interrogatories can assist the plaintiff in identifying key

individuals, legal theories, and the factual basis for the legal theories of the defendant's case. Defendant's interrogatory answers often inform the plaintiff's choice of whom to depose. A request for inspection is another option that allows the plaintiff to inspect another's land, property, methods, or processes.[110] It can also provide an opportunity for the expert to "inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it" to assist the expert in forming his opinion.[111]

Finally, carefully crafted requests for admission can be used for many purposes. Under Rule 36, a party may submit to the opposing party a request for the truth of matters relating to facts, the application of law to facts or opinions about either the facts or the application of the law to facts, and the genuineness of any documents.[112] Requests for admission are useful to narrow the issues for trial and can provide tremendous insight into the opponent's case at an early stage in the proceeding.[113] In addition, requests for admission are often helpful in establishing a foundation for key documents and may streamline the introduction of certain exhibits at trial. If the party refuses to provide sufficient answers to the requests for admission without a justifiable objection, the court may order the party to amend its answer or order that the matter is admitted.[114]

§ 2.09 Settlement

As one commentator aptly put it: "No litigator has achieved fame and glory as a settler of cases."[115] As much as trial attorneys might want to spend their careers trying cases, the economic pressures of continuing to litigate on both parties, in addition to the uncertainty of the result as trial often favors resolution of a case at some point in the lawsuit. That said, the common belief that at least 95% or more of all cases settle is unsupportable. "Although it is probably true that less than 5% of civil cases end with a trial verdict, it is incorrect to assume the inverse—that the remaining 95% settle."[116] Studies on settlement and litigation practices in Hawaii circuit court in 1996 and 2007 may provide the most accurate settlement rates thus far, and observers believe these rates can be extrapolated more broadly to other federal and state courts.[117] The researchers who conducted the study found that, while about 88% of tort cases settle, only 54% of contract, and 55% of "other" cases settle.[118] Thus, the settlement rate for all cases is "probably much closer to 50% or 60% than to 90%."[119]

The same study found that many factors, such as judicial assistance, court-annexed arbitration proceedings or the type of negotiations, could have a significant impact on settlement. Telephone negotiation between lawyers ranked as the most effective means to settle cases. In fact, lawyers ranked telephone negotiation as having twice as much impact as other methods, including face-to-face negotiations between lawyers, judicial settlement conferences, court-annexed arbitration, and face-to-face negotiations among lawyers and parties.[120]

There are several takeaways for plaintiffs from this study. First, they cannot automatically assume that a case will settle, particularly if the suit is not a personal injury case. As we've discussed throughout this chapter, plaintiffs should work to develop their case for trial from the outset of the lawsuit. Still, they should make every attempt to gain leverage for a favorable settlement in the process. Also, plaintiffs should use all available methods to settle a lawsuit (e.g., settlement conference, court-annexed arbitration), but don't overlook the potential effectiveness of a simple telephone call with opposing counsel.

There are a myriad of other factors that bear on the timing and success of settlement. For example, counsel working on a contingency fee basis will naturally seek early settlements. Where the lawsuit is defended by an insurance company, the insurer is often more willing to settle at an early stage, to avoid paying defense costs, than a defendant that is self-insured.[121] The complexity and stage of the case also matters. For example, there are potentially large stakes in class action litigation, and when the court certifies a class (and the defendant is unsuccessful in an interlocutory appeal), the plaintiff can exert significant pressure on a defendant to settle the lawsuit.

The main thing plaintiffs' lawyers should keep in mind is that they should always be building their case for trial, and at the same time, building their leverage for settlement before then.

§ 2.10 Trial

A well-run case has been set up from the start with the trial in mind. Trial is the distillation of the evidence, woven into a cohesive theme. Each piece of evidence or testimony presented to the jury should have a place in the trial theme that supports the plaintiff's ultimate legal theories.

Trial requires meticulous planning and preparation. Plaintiffs and defendants alike are best-served by painstaking planning and organization. Anticipating what evidence is to be used with which witness, how that evidence helps prove the case or enhances the trial theme, and organizing the evidence in a way that makes it easily accessible is essential to maintaining the flow of trial. The party that fumbles for documents, is unable to operate courtroom technology or otherwise appears disorganized will instantaneously lose credibility with the jury. Pretrial preparation is therefore essential.

Once at trial, the plaintiff should present a trial theme to the jurors. Research shows that attorneys are most effective in persuading jurors when they create a theory and theme that fits into a story model. In fact, one study found that 90% of jurors develop an understanding of the case by using some sort of story model.[122] Presenting the plaintiff's case as a story helps jurors understand all the information and leads the jurors to only one conclusion. As noted, the best trial themes and stories call upon the jurors' sense of morality or justice, and make the jurors feel confident about a result that favors the plaintiff.[123]

The plaintiff must also be mindful of the television environment from which its jurors enter the courtroom. For instance, the *CSI* effect has drastically raised jurors' expectations of the types of evidence prosecutors offer in trials.[124] Although this coined phrase is limited to forensic evidence in criminal trials, the greater implications may be significant in civil trials. The juror's television habits may establish preconceived expectations of how the trial should be conducted. Thus, it is important to establish with the jury, early on, exactly what the plaintiff is required to prove and how it intends to prove it. Plaintiffs should not make a promise about evidence that they cannot keep.

The opening statement is a crucial element to the plaintiff's case. It is the first impression a jury will receive of the case, the facts and, ultimately, the story the plaintiff has to tell against the backdrop of the trial theme. The plaintiff may lose credibility in the jury's eyes if promises made in the opening statement are not fulfilled throughout the course of the trial.

Finally, the plaintiff is served best by establishing a good rapport with both the jury and the court personnel. Jury rapport must come through the case presentation. Juries are very attentive to courtroom activities—from the case presentation, to courtroom decorum and interactions with opposing counsel, down to the shoes the plaintiff is wearing. These observations all can influence the jury's judgments and ultimate assessment of the plaintiff's case. The team that appears as a winning team in terms of teamwork and coordination often is the winning team in the end.

Equally important is the treatment of court personnel. It always serves the plaintiff's attorneys to be professional, polite, and courteous to court personnel. Although getting on the good side of court personnel may not actively help the plaintiff's case, getting on their bad side could result in difficulties in getting things done. At the end of the day, when the parties and the jurors have left, the only people remaining in the courthouse talking with the judge are the court personnel. What is said in court and how court personnel are treated matters, in a very real sense.

§ 2.11 Preserving Arguments for Appeal

Planning for trial necessarily means planning for post-trial proceedings. Preserving objections for post-trial motions or an appeal can make or break a case. Failure to make timely objections and motions means a party with an unfavorable trial court judgment has no recourse and must live with the consequences. A well-prepared plaintiff, however, will balance the demands of trial with the need for preserving post-trial options. As discussed below, several avenues are available to preserve a party's argument for appeal.

[1] Objections and Offers of Proof

Failure to make objection to an issue generally results in waiving that argument on appeal. Objections may be made to virtually everything that occurs at trial, from the admission of evidence, to witnesses, to jury instructions. Ordinarily, a party does not preserve its arguments for appeal unless it has made a contemporaneous objection at the time the objectionable subject matter is introduced.[125] In some instances, such as objecting to jury instructions, the Federal Rules of Civil Procedure specifically instruct when and how to make a timely objection.[126] Because objections must generally be made quickly, the plaintiff must be prepared.

Not every piece of objectionable evidence should prompt the plaintiff to object at trial. Instead, a plaintiff must make tactical decisions prior to the start of trial about those objections that it *can* make and those objections that it *should* make. This is particularly true when the plaintiff's case is before a jury, as juries undoubtedly make assumptions about parties that repeatedly and unnecessarily object at trial, and what those objections may say about the strength of the objecting party's own case. By making selective objections that are consistently sustained, however, the plaintiff sends a message to both the judge and the jury about its own competency.

Selectivity in objecting, however, must be balanced against the importance of preserving arguments for appeal. Failure to make evidentiary objections in the district court ordinarily results in those objections being waived for the purposes of appeal.[127] Prior to trial, therefore, plaintiffs' counsel must evaluate and identify the evidence that is most damaging to one's case and to determine the appropriate legal basis for

objecting to that evidence. Likewise, anticipating the objections that will be lodged against the plaintiff's own evidence will place the plaintiff at an advantage in ensuring that its case is fully presented.

Offers of proofs, on the other hand, must be made to preserve appeal arguments regarding the exclusion of evidence.[128] When the court sustains an objection to the admission of evidence, the party offering the evidence may make an offer of proof—informing the court of the substance of the evidence that was excluded from admission. Offers of proof are necessary whenever the substance of the excluded evidence is not apparent from the context of the question.[129] In this way, the party making the offer of proof preserves its claim of error for appeal and allows for more effective appellate review.[130]

[2] Judgments as a Matter of Law

Two motions are critical to a party's rights on appeal. Formerly known as directed verdicts or judgment notwithstanding the verdict,[131] the motion for judgment as a matter of law ("JMOL") and renewed motions for JMOL ask the court to determine that a reasonable jury does not have a legally sufficient basis to find for the opposing party on a particular issue.[132] A motion for JMOL can be made either at the close of the plaintiff's case on liability or at the close of all evidence.[133] If the court determines that there exists no evidence upon which the jury could properly return a verdict in the non-movant's favor, then the movant is entitled to have the question removed from the jury and decided as a matter of law.[134] If the court does not grant the Rule 50(a) motion and the jury reaches an unfavorable verdict, the movant may renew its motion for JMOL under Rule 50(b).[135] The renewed JMOL motion must be made no later than 28 days after entry of judgment.[136] If properly made, the renewed motion allows the court to take several actions. The court may allow the judgment to stand if a verdict was returned, order a new trial, or direct entry of judgment as a matter of law.[137]

The plaintiff can reasonably expect the defendant to make a motion for JMOL and, if the defendant has asserted counterclaims, the plaintiff should make its own motion for JMOL. The importance of JMOL motions is not just a matter for the immediate trial court outcome, but is also critical to appeal. Failure to make a motion for JMOL under Rule 50(a) means that the party waives both its right to file a renewed post-verdict motion under Rule 50(b) and its right to raise an argument against the sufficiency of the evidence on that issue on appeal.[138]

[3] Motions for a New Trial

Although renewed motions for judgment as a matter of law may allow for a new trial, to avoid waiver of any issue on appeal, it is prudent that a losing plaintiff alternatively move for a new trial under Rule 59 when it submits its renewed motion for JMOL.[139] Rule 59(a)(1) provides that the court may grant a new trial on all or some of the issues, to any party under certain conditions.[140] A party must submit a motion for a new trial no later than 28 days after the entry of judgment.[141] Notably, the court may also sua sponte "order a new trial for any reason that would justify granting one on a party's motion."[142]

Motions for new trials commonly require that the movant show prejudicial error. For instance, motions for new trials based upon the submission of erroneous jury

instructions must establish that (1) the movant made a proper and timely objection to the jury instructions, (2) those instructions were legally erroneous, (3) the errors had prejudicial effect, and (4) the movant requested an alternative instruction that would have remedied the error.[143] In particular, the first and fourth requirements, requiring timely objection and requesting an alternative instruction, are specifically addressed by Rule 51.[144] Such a situation highlights the importance of preparing for objections. In this instance, a plaintiff that fails to object to jury instructions may waive its right to move for a new trial, and thus may also waive the issue on appeal.[145]

§ 2.12 Conclusion

Litigation is not an exact science, and even the best plaintiff's attorney cannot predict every pitfall that a case may present. Identifying the overall objective of the case at the outset, however, allows careful consideration of whether that objective can be met through initiating a lawsuit. By carefully and continuously assessing its case from all perspectives, a plaintiff is better-positioned to seize opportunities and respond to obstacles. In this regard, the plaintiff is best served by a forward-looking strategy that develops and incorporates strong case themes all along the road to trial. The approach of the winning plaintiff must involve preparedness and meticulous execution of the plaintiff's strategy throughout the entire case, from initial pre-suit investigation to post-trial motions for appeal.

Notes

[1] This chapter was drafted and edited by Mathew T. Siporin, a partner at the Chicago law firm of Pullano Law Offices PC, where he specializes in litigating personal injury litigation, including products liability, aviation, trucking, and construction accidents in state and federal courts.

[2] *See* section 2.08[2] *infra*. For a more thorough discussion of electronic discovery, *see* Ch. 3 *infra*.

[3] Many jurisdictions have a rule that allows a plaintiff to file a petition before initiating a lawsuit to learn the "identity of one who may be responsible in damages." Ill. Sup. Ct. R. 224(a)(1).

[4] Press Release, Bureau of Justice Statistics, *Number of Federal Tort Trials Fell by Almost 80 Percent from 1985 Through 2003* (Aug. 17, 2005), http://www.ojp.usdoj.gov/archives/pressreleases/2005/fttv03pr.htm.

[5] Bureau of Justice Statistics, *Tort, Contract and Real Property Trials*, https://www.bjs.gov/index.cfm?ty=tp&tid=451#related_links (last visited Dec. 26, 2019).

[6] Bureau of Justice Statistics, *Approximately 15 Percent of State Civil Trials Are Appealed According to Justice Department Report* (July 6, 2006), https://ojp.gov/newsroom/pressreleases/2006/BJS07062006.htm.

[7] *Id.*

[8] Model Rules of Prof'l Conduct R. 1.18(b) (Am. Bar. Ass'n 2019).

[9] *Id.*

[10] *See*, *e.g.*, Ariz. Ethics R. 1.18; Ark. R. of Prof'l. Conduct 1.18; Colo. R. of Prof'l. Conduct 1.18; Del. Lawyers' R. of Prof'l. Conduct 1.18; Idaho R. of Prof'l. Conduct 1.18; Ind. R. of Prof'l. Conduct 1.18; La. R. of Prof'l. Conduct 1.18; N.H. R. of Prof. Conduct 1.18; N.C. R. of Prof'l. Conduct 1.18; Ohio R. of Prof'l. Conduct; 1.18; Ore. R. of Prof'l. Conduct 1.18; Utah R. of Prof'l. Conduct 1.18; Wyo. R. of Prof. Conduct 1.18.

[11] AIPLA, *2005 Report of Economic Survey*, at 22, 109–110 (2005).

[12] McGuire, Craddock, Strother & Hale, P.C. v. Transcontinental Realty Investors, Inc., 251 S.W.3d 890 (Tex. Ct. App. 2008) (reversing grant of JNOV, because sufficient evidence existed to support the jury's finding that the law firm did not breach any fiduciary duty owed to its client by exceeding its projected litigation budget).

[13] *Id.* at 897.

[14] *Id.* at 896 (internal quotations omitted).

[15] Fed. R. Civ. P. 11(b)(2). *See*, *e.g.*, Chien v. Barron Capital Advisors, LLC, No. 3:09–cv–1873, 2011 WL 6004580, at *1 (D. Conn. Dec. 1, 2011), *aff'd,* 509 F. App'x 79 (2d Cir. 2013) (legal standard for sanctions under Rule 11(b)(2) of the Federal Rules of Civil Procedure requires that legal contention "must be or border on the frivolous"; to constitute frivolous legal position for purposes of Rule 11 sanctions, it must be clear that there is no chance of success; whether argument or claim is frivolous is judged by standard of objective reasonableness); Balthazar v. Atl. City Med. Ctr., 279 F. Supp. 2d 574, 594 (D.N.J. 2003), *aff'd,* 137 F. App'x 482 (3d Cir. 2005) (imposing sanctions against plaintiff's counsel because plaintiff's claims had no basis in law or fact); Chi. Reg'l Council of Carpenters Pension Fund v. FAC Constr. & Design, Inc., No. 11–CV–04303, 2011 WL 6369792, at *2 (N.D. Ill. Dec. 15, 2011) (to determine if sanctions are warranted, district court must consider underlying dispute from two perspectives; first, in subjective review of facts, there must be finding of "good faith" (i.e., that paper is not interposed to harass); second, there must be reasonable inquiry into both fact and law—legal theory must be objectively warranted by existing law, and lawyer must believe that complaint is well grounded in fact).

[16] Fed. R. Civ. P. 11(b)(3). *See*, *e.g.*, Macken ex. rel. Macken v. Jensen, 333 F.3d 797, 800–801 (7th Cir. 2003) (holding that plaintiff and her counsel were required to establish evidentiary support for jurisdictional amount in controversy prior to filing in federal court and that plaintiff may not file federal suit with no basis for an assertion that stakes exceed $75,000). *Cf.* CQ Int'l Co., Inc. v. Rochem Int'l, Inc., USA, 659 F.3d 53, 63 (1st Cir. 2011) (it is not necessary that investigation into facts be carried to the point of absolute certainty for litigant to satisfy duty under Rule 11 to conduct reasonable inquiry into facts and law; rather, it is sufficient if factual contention will likely have evidentiary support after reasonable opportunity for further investigation or discovery).

[17] *See*, *e.g.*, Hendrix v. Naphtal, 971 F.2d 398, 400 (9th Cir. 1992) (holding that blind reliance on a lay client's ability to decide the legal question of domicile is not a reasonable inquiry under Rule 11).

[18] *See* Fed. R. Civ. P. 11(b).

[19] *See* Belleville Catering Co. v. Champaign Mkt. Place, LLC, 350 F.3d 691, 692–693 (7th Cir. 2003) (finding that reliance on lease agreement's erroneous corporation description as a Missouri corporation does not meet the reasonable inquiry requirement when counsel could have readily accessed the reliable sources directly).

[20] *See* Fed. R. Civ. P. 11(c).

[21] Antonious v. Spalding & Evenflo Cos., 275 F.3d 1066, 1072–1074 (Fed. Cir. 2002).

[22] *Id.* at 1072.

[23] *Id.* at 1074–1076.

[24] *Id.* at 1075–1076.

[25] Ideal Instruments, Inc. v. Rivard Instruments, Inc., 243 F.R.D. 322 (N.D. Iowa 2007).

[26] *Id.* at 342.

[27] *Id.* at 343.

[28] *Id.* at 345–346.

[29] *Id.* at 348. During a Rule 11 analysis, the plaintiff must necessarily consider its burden of proof and its burden of persuasion. Typically, plaintiffs bear the burden of proof to show that the defendants meet each element of the claims they assert to recover the remedy they seek.

[30] Fed. R. Civ. P. 8(c) (noting that a party must state affirmative defenses, including accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, *res judicata*, statute of frauds, statute of limitations, and waiver); *see*, *e.g.*, Sherman v. Winco Fireworks, Inc., 532 F.3d 709, 715 (8th Cir. 2008) (quoting First Union Nat'l Bank v. Pictet Overseas Tr. Corp., 477 F.3d 616, 622 (8th Cir.2007)) ("Generally, failure to plead an affirmative defense results in a waiver of that defense."). *But cf.* Matthews v. Wis. Energy Corp., Inc., 642 F.3d 565, 570 (7th Cir. 2011) (rule that forfeits affirmative defense not pleaded in answer (or by earlier motion) is not to be applied rigidly; failure to plead affirmative defense in answer works forfeiture only if plaintiff is harmed by defendant's delay in asserting it).

[31] Fed. R. Civ. P. 13(a)(1).

[32] Fed. R. Civ. P. 13(b).

[33] *See* Fed. R. Civ. P. 26(b)(4)(D).

[34] *See* Fed. R. Civ. P. 26(b)(4)(A).

[35] *See* Fed. R. Civ. P. 26(a)(2)(B).

[36] 509 U.S. 579 (1993).

[37] 526 U.S. 137 (1999).

[38] Suggestions on how to avoid this outcome can be found in section 2.08[3] *infra*.

[39] *See* Fed. R. Evid. 701.

[40] *E.g.*, Fisher v. Central Cab Co., 945 A.2d 215, 217–220 (Pa. Super. Ct. 2008) ("we conclude the trial court properly admitted Ms. Winfrey's testimony regarding the speed of the Fisher vehicle").

[41] *See* Teen-Ed Inc. v. Kimball Int'l Inc., 620 F.2d 399, 403 (3d Cir. 1980) (plaintiff's accountant did not require expert qualification to testify about lost profits because of his personal knowledge and perception); Lee v. Metro. Gov't of Nashville and Davidson Cty., 432 F. App'x 435, 446 (6th Cir. 2011) (physician's testimony that he noticed unusual long-stemmed mushrooms in arrestee's stool that looked like hallucinogenic mushrooms was admissible as lay witness opinion on excessive force claim regarding use of electroshock weapon, since physician's testimony on that issue had been based on his personal experience and not on the basis of his medical expertise); Farner v. Paccar, Inc., 562 F.2d 518, 529 (8th Cir. 1977) (witness with 30 years of experience in trucking business could testify as to the use of safety chains either as a lay witness offering an opinion based on knowledge and perception or as an expert with specialized knowledge).

[42] If a trial court deems that a lay witness's opinion testimony actually qualifies as expert testimony, grounds exist for striking the witness. There are exceptions to this rule, however, particularly as applied to employees of the party providing testimony. In those cases, individuals who are not retained or specially employed to provide expert testimony in the case, or whose duties as an employee do not regularly involve giving expert testimony, may testify as such without having to submit an expert report. Fed. R. Civ. P. 26(a)(2)(B).

[43] Alisha Kay Taylor, What Does Forum Shopping in the Eastern District of Texas Mean for Patent Reform?, 6 J. Marshall Rev. Intell. Prop. L. 570 (2007).

[44] *See* Brian T. Foley, *Catch a Ride on the Rocket Docket*, Conn. Law Tribune, at 4 (Oct. 7, 1996); T. S. Ellis, III, *Judicial Management of Patent Litigation in the United States: Expedited Procedures and Their Effects*, 9 Fed. Cir. B.J. 541, 542 (2000).

[45] *Id.*

[46] *Id.*

[47] James Myers, *"Rocket Docket" for the Defense*, Legal Times, at 27 (Dec. 11, 1995) (describing disadvantages to the plaintiff in a particular rocket docket).

[48] *Id.*

[49] *Id.*

[50] 2016 Annual Report of the Illinois Supreme Court, at 15, http://www.illinoiscourts.gov/SupremeCourt/AnnualReport/2016/2016_Statistical_Summary.pdf (last visited June 13, 2019).

[51] Va. Code Ann. § 17.1-405.

[52] Va. Code Ann. § 17.1-410.

[53] Virginia 2007 State of the Judiciary Report, Virginia Supreme Court, A-1, http://www.courts.state.va.us/courtadmin/aoc/judpln/csi/sjr/2007/state_of_the_judiciary_report.pdf (last visited June 13, 2019) (noting that only 208 petitions for appeal were granted of the 2,634 petitions filed with the Virginia Supreme Court in 2007).

[54] *See, e.g.*, SuperValu, Inc. v. Johnson, 276 Va. 356, 666 S.E.2d 335 (2008) (reversing a jury award of $16 million for claims of constructive fraud and intentional infliction of emotional distress when evidence was not sufficient to meet the legal claims alleged by the plaintiff).

[55] 28 U.S.C. § 1404(a).

[56] Am. Eagle Outfitters, Inc. v. Tala Bros. Corp., 457 F. Supp. 2d 474, 477 (S.D.N.Y. 2006).

[57] Russian Media Group, LLC v. TV Russia Network, Inc., No. 3:00CV1769, 2001 WL 34118027, at *3 (D. Conn. June 13, 2001).

[58] *Id.*

[59] 28 U.S.C. § 1407. *See* Ch. 4 *infra*.

[60] 28 U.S.C. § 1407(a). *See, e.g.*, In re A-Power Energy Generation Sys., Ltd. Sec. Litig., MDL No. 2302, 2011 WL 6288399 (J.P.M.L. Dec. 15, 2011) (centralization under § 1407 in Central District of California would serve convenience of parties and witnesses and promote just and efficient conduct of litigation, because subject actions shared factual issues arising from allegations that defendants issued materially false and misleading statements and/or omitted to state material facts relating to company's finances and business prospects; centralization would eliminate duplicative discovery, prevent inconsistent pretrial rulings on class certification and other pretrial issues, and conserve resources of parties, their counsel and the judiciary); In re Laughlin Prods., Inc., Patent Litig., 240 F. Supp. 2d 1358, 1358–1359 (J.P.M.L. 2003) (finding that centralization under § 1407 was necessary in order to eliminate duplicative discovery, prevent inconsistent pretrial rulings, and conserve the parties' resources).

[61] *E.g.*, *Compare* Ariz. R. Civ. P. 8(a)(2) *with* Fed. R. Civ. P. 8(a)(2). *But see* Marshall v. Burger King Corp., 856 N.E.2d 1048, 1053 (Ill. 2006) ("Illinois is a fact-pleading jurisdiction").

[62] Fed. R. Civ. P. 8(a)(2).

[63] Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

[64] *See, e.g.*, Sparrow v. United Air Lines, Inc., 216 F.3d. 1111, 1116 (D.C. Cir. 2000) (noting that, in some cases, it is possible for a plaintiff to plead too much and plead himself out of court by alleging facts that render success on the merits impossible).

[65] In addition, plaintiffs should draft the complaint in a way to overcome a potential motion to dismiss. Fed. R. Civ. P. 12. Have the proper parties been named or are other necessary or indispensable parties required? *See* Fed. R. Civ. P. 19 and 20.

[66] Fed. R. Civ. P. 15(a)(1)(A) and (B).

[67] Fed. R. Civ. P. 15(a)(1)(B).

[68] Fed. R. Civ. P. 15(a)(2).

[69] Fed. R. Civ. P. 3 (emphasis added). *See, e.g.*, Local Union No. 38, Sheet Metal Workers' Int'l Ass'n v. Pelella, 350 F.3d 73, 82 (2d Cir. 2003) (finding that the first step to invoking the judicial process is instituted when a plaintiff files a complaint).

[70] Fed. R. Civ. P. 4(m).

[71] Fed. R. Civ. P. 4(m).

[72] Abbott Labs v. Johnson & Johnson, Inc., 524 F. Supp. 2d 553, 557 (D. Del. 2007) ("Where proceedings involving the same parties and issues are pending simultaneously in different federal courts, the first to file rule requires the dismissal of the second-filed suit absent exceptional circumstances.").

[73] *See* Asahi Metal Indus. Co. v. Superior Court of Cal., Solano Cty., 480 U.S. 102 (1987); Int'l Shoe Co. v. Washington, 326 U.S. 310, 316–320 (1945).

[74] Fed. R. Civ. P. 4(e). *See, e.g.*, Webster Indus. v. Northwood Doors, Inc., 244 F. Supp. 2d 998, 1005–1006 (N.D. Iowa 2003) (finding that, if service is proper under the rules of one qualifying state, the court need not consider the law of another qualifying state nor conduct any "choice of law" analysis).

[75] *See* ISI Int'l Inc. v. Borden Ladner Gervais, LLP, 256 F.3d 548, 551 (7th Cir. 2001).

[76] Fed. R. Civ. P. 4(k)(2). *See, e.g.,* Touchcom, Inc. v. Bereskin & Parr, 574 F.3d 1403 (Fed. Cir. 2009).

[77] Fed. R. Civ. P. 4(d).

[78] Fed. R. Civ. P. 4(f). *See, e.g.*, R. Griggs Grp. v. Filanto Spa, 920 F. Supp. 1100, 1103 (D. Nev. 1996) (finding that "service of process upon individuals in foreign countries is governed by the methods set forth by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents").

[79] Fed. R. Civ. P. 4(f). *See, e.g., R. Griggs Grp.,* 920 F. Supp. at 1100, 1103–1105.

[80] Fed. R. Civ. P. 4(f)(2). *See, e.g.,* Forum Fin. Grp. v. President & Fellows of Harvard Coll., 199 F.R.D. 22, 23 (D. Me. 2001) (authorizing service upon foreign defendant by certified mail sent to his American attorney); Marks v. Alfa Grp., 615 F. Supp. 2d 375 (E.D. Pa. 2009) (analyzing whether method of service of a complaint was prohibited by the law of Liechtenstein, a country not a party to the Hague Convention); Rio Props. v. Rio Int'l Interlink, 284 F.3d 1007 (9th Cir. 2002) (discussing analysis for determining appropriate alternative service under Rule 4(f)). *Cf.* Michnovez v. Blair, LLC, No. 10–cv–110, 2011 WL 5239239 (D.N.H. Oct. 31, 2011) (plaintiffs had burden of proving effective service but failed to cite any Pakistani law, which left court without any basis for determining that way in which plaintiffs attempted to serve corporation was means of service "prescribed by [Pakistan]'s law for service in [Pakistan] in an action in [Pakistan's] courts of general jurisdiction," as required by Fed. R. Civ. P. 4(f)(2)(A)).

[81] *See* Fed. R. Civ. P. 26(b)(2) and 26(d); Qwest Commc'ns Int'l, Inc. v. Worldquest Network, Inc., 213 F.R.D. 418 (D. Col. 2003) (noting that good cause may be shown where a party seeks a preliminary injunction with consideration given to the scope of the requested expedited discovery). *See also* Monsanto Co. v. Woods, 250 F.R.D. 411 (E.D. Mo. 2008) (detailing "good cause" versus "preliminary injunction style" analyses for granting expedited discovery). Parties may also seek expedited discovery in certain *ex parte* circumstances when there is particular urgency for information, opposing parties have incentive and capacity to hide assets, or an adverse party is in default. *See* Ayyash v. Bank Al-Madina, 233 F.R.D. 325 (S.D.N.Y. 2005) (foreign defendants had motive and capacity to hide assets within the United States and discovery process would permit time for them to do so).

[82] Fed. R. Civ. P. 65(a)(2).

[83] Fed. R. Civ. P. 26(b)(1). Before the 2015 amendment, Rule 26(b)(1) stated, in pertinent part: "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."

[84] Fed. R. Civ. P. 26 advisory committee's note to 2015 amendment.

[85] *Id.*

[86] *Id.*

[87] United States ex rel. Bibby v. Wells Fargo Bank, N.A., No. 1:06-CV-0547, 2016 WL 7365195, at *2 (N.D. Ga. May 26, 2016).

[88] *See, e.g.*, Pass & Seymour, Inc. v. Hubbell, Inc., 255 F.R.D. 331, 334 (N.D.N.Y. 2008) (noting the "disfavor shown by courts to the dumping of massive quantities of documents, with no indexing or readily apparent organization, in response to a document request from an adversary"). *See also*, *e.g.*, WWP, Inc. v. Wounded Warriors Family Support, Inc., 628 F.3d 1032 (8th Cir. 2011) (court denied defendant's request that plaintiff, nonprofit corporation that offered charitable services to injured veterans and their families, produce "all documents relating to or evidencing any donations received" by it from 2002 to present; request was overly broad and unduly burdensome, and thus district court did not abuse its discretion in denying defendant's motion to compel such discovery in action alleging deceptive trade practices under Nebraska law; defendant was not operating in United States, and request sought donor information without regard to source or location, request related to tens of thousands of donors, and request was not reasonably calculated to lead to discovery of admissible evidence because defendant had not asserted counterclaim for unjust enrichment seeking return of any misdirected donations).

[89] Watchel v. Health Net, Inc., 239 F.R.D. 81, 92–97 (D.N.J. 2006).

[90] *Id.* at 104, 106–108.

[91] *Id.* at 109.

[92] Fed. R. Civ. P. 26(f)(3)(C). *See*, *e.g.*, Covad Commc'ns Co. v. Revonet, Inc., 254 F.R.D. 147 (D.D.C. 2008) (discussing parties' failure to confer regarding documents produced in electronic form).

[93] *See* Ch. 3 *infra* for a more in-depth analysis of electronic discovery.

[94] *See*, *e.g.*, Tibble v. Edison Int'l, No. CV 07–5359, 2011 WL 3759927 (C.D. Cal. Aug. 22, 2011), *aff'd,* 520 F. App'x 499 (9th Cir. 2013) (court approved award to defendant of $530,000 for cost of producing 537,955 pages of electronic documents in response to plaintiffs' requests; award included cost of using expertise of computer technicians in unearthing computerized data).

[95] *See*, *e.g.*, Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. 2003) (analyzing cost-shifting relating to the discovery of electronic data); *see also Tibble*, 2011 WL 3759927 (awarding to producing party substantial costs associated with discovery of electronic data).

[96] *See Zubulake*, 217 F.R.D. at 318.

[97] 291 F.R.D. 669, 676 (N.D. Fla. 2013).

[98] *See* Fed. R. Civ. P. 26 advisory committee's note to 2015 amendment.

[99] *Id.* at 26(c)(1)(B).

[100] Oxbow Carbon & Minerals LLC v. Union Pac. R.R. Co., 322 F.R.D. 1, 10 (D.D.C. 2017) (collecting cases).

[101] Fed. R. Civ. P. 26 advisory committee's note to 2015 amendment.

[102] Fed. R. Civ. P. 37(e)(1).

[103] Fed. R. Civ. P. 37(e)(2).

[104] Fed. R. Civ. P. 30(b)(6).

[105] *See*, *e.g.*, Murphy v. Kmart Corp., 255 F.R.D. 497, 505 (D.S.D. 2009) (noting that a party is obligated to prepare witnesses to testify so that they may give complete, knowledgeable and binding answers on behalf of the corporation).

[106] United States v. Taylor, 166 F.R.D. 356, 363 (M.D.N.C. 1996).

[107] *See, e.g.*, Black Horse Lane Ass'n, L.P. v. Dow Chem. Corp., 228 F.3d 275, 304 (3d Cir. 2000) ("when a witness is designated by a corporate party to speak on its behalf pursuant to Rule 30(b)(6), 'producing an unprepared witness is tantamount to a failure to appear' that is sanctionable under Rule 37(d)"); State Farm Mut. Auto. Ins. Co. v. New Horizont, Inc., 250 F.R.D. 203 (E.D. Pa. 2008) (ordering sanctions and a new Rule 30(b)(6) witness to be produced for failure to prepare originally designated witness); Nacco Materials Handling Group, Inc. v. Lilly Co., No. 11–2415, 2011 WL 5986649 (W.D. Tenn. Nov. 16, 2011) (court held that sanctions were appropriate when it had ordered the company to produce 30(b)(6) representative, but the company failed to produce a deponent that was either knowledgeable about all topics or adequately prepared; the opposing party was given leave to redepose the company's corporate representative; the court cautioned the producing company to adequately prepare its corporate representative, and, as a sanction, the company was required to bear court reporter and transcript costs of first deposition and the deposing company's attorney fees and expenses incurred during actual taking of first deposition; in addition, the deposed company was warned that further failure to comply with 30(b)(6) deposition requirements would lead to additional sanctions); Prokosch v. Catalina Lighting Inc., 193 F.R.D. 633 (D. Minn. 2000) (ordering a substitute Rule 30(b)(6) witness when designated witness was unable to answer questions).

[108] *See*, *e.g.*, Cummings v. GMC, 365 F.3d 944, 953 (10th Cir. 2004) (noting that an individual's testimony may be sought pursuant to Federal Rule of Civil Procedure 30(a)(1), even if the individual is also an officer or director of the entity that is the subject of a 30(b)(6) deposition).

[109] In addition to other required disclosures, the disclosure obligations of Federal Rule of Civil Procedure 26, requiring the parties to identify individuals likely to have discoverable information, go a long way in identifying key depositions. Fed. R. Civ. P. 26(a)(1)(A)(i).

[110] Fed. R. Civ. P. 34(a). *See*, *e.g.*, Albany Bank & Tr. Co. v. Exxon Mobil Corp., 310 F.3d 969, 974 (7th Cir. 2002) (discussing land inspections); White v. Graceland Coll. Ctr. for Prof'l Dev. & Lifelong Learning, 586 F. Supp. 2d 1250, 1261–1265 (D. Kan. 2008) (discussing requests for physical inspection of hard drives).

[111] Fed. R. Civ. P. 34(a)(2). *See*, *e.g.*, Lykins v. CertainTeed Corp., No. 11–2133–JTM–DJW, 2011 WL 6337631 (D. Kan. Dec. 19, 2011) (holding that plaintiff's request for inspection of defendant company's manufacturing plant properly sought information relevant to plaintiff's allegations that sump-pit waste water was being pumped into the municipal sewer and that defendants had knowledge of it; further, defendants failed to show that plaintiff's proposed inspection of the plant would pose such a safety risk that plaintiff should not be permitted to inspect the plant); G.D. v. Monarch Plastic Surgery, P.A., 239 F.R.D. 641, 649–650 (D. Kan. 2007) (ordering certain procedures be followed for inspecting, testing, and evaluating the computer's hardware, software, and operating system); Macort v. Goodwill Industries-Manasota, Inc., 220 F.R.D. 377, 379 (M.D. Fla. 2003) (limiting scope of property inspection to those areas of the building related to plaintiff's claim).

[112] Fed. R. Civ. P. 36(a)(1). *See*, *e.g.*, Booth Oil Site Admin. Group v. Safety-Kleen Corp., 194 F.R.D. 76, 80 (W.D.N.Y. 2000) (discussing use of requests for admission under Rule 36).

[113] *See* Xcel Energy, Inc. v. United States, 237 F.R.D. 416, 420 (D. Minn. 2006) (holding that requests for admission allow the narrowing of issues, permit facilitation in case presentation, and provide notice with regard to opinions and factual assertions that will be presented).

[114] Fed. R. Civ. P. 36(a)(6). *See*, *e.g.*, In re Heritage Bond Litig., 220 F.R.D. 624, 626–627 (C.D. Cal. 2004) (ordering that requests for admissions be deemed as admitted). *But see* Midwest Oilseeds, Inc. v. Limagrain Genetics Corp., 231 F. Supp. 2d 942, 953 (S.D. Iowa 2002), *aff'd,* 387 F.3d 705 (8th Cir. 2004) (declining to dismiss defendant's claim because its late admissions did not prejudice the plaintiff and the merits of the action would be subserved).

[115] Stephen S. Ashley, *Strategy, Tactics, and Procedure, Bad Faith Actions: Liability & Damages* § 10:35 (2d ed. Sept. 2018).

[116] Elizabeth Kent & John Barkai, Let's Stop Spreading Rumors About Settlement and Litigation, 19-Feb Haw. B.J. 14 (2015).

[117] *Id.* at *15. ("The patterns of state and federal court civil filings and trial rates are rather similar.").

[118] *Id.* at *1. "Other" cases include "agency appeal, condemnation, construction defects, declaratory judgment, foreclosure, foreclosure of agreements of sale, jury demand from district court, and the [Hawaii] Judiciary's general category of 'other.'" *Id.*

[119] *Id.* at *21.

[120] *Id.* at *18.

[121] John Dwight Ingram, *A Liability Insurer's Duty to Defend in Illinois*, 83 Ill. B.J. 195, 198 (Apr. 1995) ("Since the cost of defending the underlying suit and/or seeking a declaratory judgment will probably be substantial, economic reality may dictate settlement of the claim against the insured, especially if it can be done at an early stage of litigation.").

[122] *See* John A. Call, *Making the Research Work for You*, 32 Trial 20 (April 1996).

[123] *See* section 2.04[2] *supra*.

[124] Mark A. Godsey & Marie Alou, She Blinded Me with Science: Wrongful Convictions and the "Reverse CSI-Effect," 17 Tex. Wesleyan L. Rev. 481 (2011); Hon. Donald E. Shelton et al., An Indirect-Effects Model of Mediated Adjudication: The CSI Myth, the Tech Effect, and Metropolitan Jurors' Expectations for Scientific Evidence, 12 Vand. J. Ent. & Tech. L. 1 (Dec. 16, 2009); Andrew P. Thomas, The CSI Effect: Fact or Fiction, 115 Yale L. J., Pocket Part 70 (2006). For further discussion of the *CSI* effect, *see* section 7.02[3] *infra*.

[125] *See, e.g.,* Taylor v. McKee, 649 F.3d 446 (6th Cir. 2011); Menlo Logistics, Inc. v. W. Express, Inc., 269 F. App'x 715, 719 (9th Cir. 2008).

[126] Fed. R. Civ. P. 51(c) (noting how and when a party must make an objection to jury instructions to be considered proper and timely).

[127] *See, e.g.,* Freeland v. Enodis Corp., 540 F.3d 721, 738 (7th Cir. 2008); Craig Outdoor Advert., Inc. v. Viacom Outdoor, Inc., 528 F.3d 1001, 1020 (8th Cir. 2008).

[128] Fed. R. Evid. 103(a).

[129] Fed. R. Evid. 103(a)(2).

[130] *See id.*

[131] *See* Syngenta Seeds, Inc. v. Delta Cotton Co-operative, Inc., 457 F.3d 1269, 1274 n.1 (Fed. Cir. 2006) (treating motions for a directed verdict and judgment notwithstanding the verdict as motions for judgment as a matter of law).

[132] Fed. R. Civ. P. 50(a); Fed. R. Civ. P. 50(b). *See also* Fed. R. Civ. P. 52(c) (providing for the court in a non-jury trial to enter judgment against a party after the party has been fully heard on an issue based upon partial findings).

[133] *Compare* Fed. R. Civ. P. 50(a)(1) ("if a party has been fully heard . . ."), *with* Fed. R. Civ. P. 50(a)(2) ("A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury.").

[134] Markman v. Westview Instruments, Inc., 52 F.3d 967, 975 (Fed. Cir. 1995), *aff'd*, 517 U.S. 370 (quoting Jamesbury Corp. v. Litton Indus. Prods., Inc., 756 F.2d 1556, 1560 (Fed. Cir. 1985)).

[135] Fed. R. Civ. P. 50(b).

[136] *Id.*

[137] *Id.*

[138] Osorio v. One World Techs. Inc., 659 F.3d 81, 87–88 (1st Cir. 2011); Flowers v. S. Reg'l Physician Servs. Inc., 247 F.3d 229, 238 (5th Cir. 2001).

[139] *See* Fed. R. Civ. P. 59(a).

[140] Fed. R. Civ. P. 59(a)(1).

[141] Fed. R. Civ. P. 59(b).

[142] Fed. R. Civ. P. 59(d).

[143] *See* Seachange Int'l, Inc. v. C-COR, Inc., 413 F.3d 1361, 1381 (Fed. Cir. 2005).

[144] See Fed. R. Civ. P. 51.

[145] *See* Fed. R. Civ. P. 51(c). *See also* Cash v. Cty. of Erie, 654 F.3d 324 (2d Cir. 2011); Farley v. Nationwide Mut. Ins. Co., 197 F.3d 1322, 1329 (11th Cir. 1999).

CHAPTER 3

Management of e-Data and e-Discovery

Eric B. Evans[1]

§ 3.01 Managing the Costs and Risk of e-Data

[1] Records Retention Programs or 100% Archiving?

Business entities may choose the records management methods best suited to their particular needs. Over 20,000 federal, state, and municipal statutory and regulatory retention requirements exist at the general business level,[2] including obligations and guidelines imposed by the U.S. Code,[3] the Code of Federal Regulations,[4] state-level statutory requirements,[5] agency letter opinions,[6] and professional standards published by industry groups.[7] Business entities must maintain records for the period imposed by such laws and regulations,[8] and then they are given the choice of either continuing retention or purging documents not subject to current or pending litigation matters.[9] In the context of litigation, the requirements clearly impose the implementation and monitoring of document preservation programs to avoid claims of spoliation and the improper loss of potentially relevant information.[10]

A business may decide to adopt a "save everything" approach in order to alleviate any concern of violating legal retention requirements—or it may take no action on records retention and be left with a de facto "save everything" approach as employees reflexively retain documents on the off chance they may consult them in the future. However such an approach arises, a business entity may avoid the need to train employees on records retention practices and procedures and will in many cases possess documents should litigation arise. But "saving everything" imposes substantial document storage costs and burdens along with the business and litigation risks of certain data preservation, severely outweighing any perceived benefits of 100% data archiving.

Alternatively, a records management program can help business entities control costs and manage risks while also abiding by legal records retention requirements. An effective records management program should be designed to achieve: (1) the retention of all necessary business records; (2) the retention of all records required by statute, regulation, or contract; (3) allowing users to access and retrieve business records efficiently; (4) preventing destruction of records that may serve as potentially responsive documents once litigation and/or government investigation will be reasonably anticipated; and (5) providing destruction procedures for records with "expired" retention periods. Although developing an effective records management program can be a complicated and time-consuming task that requires a fully committed team of employees, ranging from users to IT personnel to key managers, the program will greatly benefit business entities in this emerging era of electronic data and records.

Courts have endorsed the validity of records management programs that call for the proper destruction of documents upon their expiration. The Supreme Court has acknowledged that document retention and destruction policies are common in the business world.[11] The Court commented that "it is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances."[12] The Court acknowledged that when used properly, document retention policies serve as useful business tools.[13]

But any document destruction under a records management policy must be reassessed and, in many cases, suspended when the reasonable threat of litigation arises: "once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a litigation hold to ensure the

preservation of relevant documents."[14] Here too, the court acknowledged that document retention policies are useful and valid tools for entities; however, the policies must be implemented and followed properly in order to avoid spoliation claims.[15]

Electronic mail (or email) attracts the most attention in discussions of electronic records retention.[16] Organizations may take several different paths in an effort to control email communications under their records retention program, including the deletion of all emails after a certain time (a "purge" program), the retention of all emails regardless of content, and a program that manages the email by only retaining business related emails for a specified period of time that is determined by the content of each email and attachment.

Ultimately, when deciding whether to save business records, the entity should remember that, as a general rule, in determining whether a document should be kept, or is required to be kept, the record's content, as opposed to the medium in which it's stored (i.e., whether it is an email, paper copy, facsimile, instant message, text file, or a Web site) should be the focus.[17]

Email volume is growing rapidly and, unchecked, may impose significant risks. Simply purging emails after a set amount of time may, for example, expose the business to the risk of spoliation. Saving all emails in a vast, undifferentiated archive may alleviate the risk of spoliation and lack of regulatory compliance, but is extremely costly in the context of litigation, making it almost impossible to retrieve efficiently what is needed. In addition, saving unneeded emails exposes a company to unnecessary risk. The best approach is to filter emails so that they are managed by a records management or archival system that permits both single instance storage and the application of retention periods with the proper destruction of expired records. Otherwise, any email retained by the company for longer than necessary, intentionally or not, may be legally discoverable.

Email serves as merely one example of how a records retention program can affect a business. Ultimately, a 100% document retention policy should probably be avoided. Records retention programs can save a business money, help it operate more effectively, and help avoid unnecessary litigation over documents that are decades old.

[2] Maintaining Security of e-Data

Along with the rise of electronic data production and retention, there is increased concern about data security, largely involving consumer data privacy and the Internet.[18] Over the Internet, consumers can, among other activities, shop, complete personal banking transactions, reserve vacation travel and accommodations, and apply for jobs. Each activity calls for the dissemination of private, personally identifiable information, including, for example, name, address, credit card number, bank routing and account numbers, and Social Security number. Once such information is disseminated, malicious third parties may access the information and "steal" another's identity.

The concern about identity theft and the unintended third-party access to personally identifiable information led both federal and state legislatures to enact data security laws. Among the federal statutes that regulators and enforcers use to achieve greater levels of e-data security are: (1) the Fair Credit Reporting Act ("FCRA");[19] (2) the Federal Trade Commission Act, Section 5 ("FTCA");[20] (3) the Health Insurance Portability and Accountability Act of 1996 ("HIPAA");[21] (4) the

Gramm-Leach-Bliley Act ("GLB");[22] and (5) the Children's Online Privacy Protection Act of 1998 ("COPPA").[23]

State regulators have also addressed security breach and identity theft concerns by enacting data breach notification laws. The data breach laws require business entities to securely maintain personally identifiable information, and, in some cases, securely dispose of such information.[24] Consumers must be notified when security breaches occur.[25] State law governing privacy is likely to continue to develop rapidly. For example, California recently passed the California Consumer Privacy Act ("CCPA"), which goes into effect on January 1, 2020, that substantially extends privacy protections for California residents.[26] While the CCPA has already been amended and may well be amended further before it goes into effect, other states—and potentially the federal government—have shown indications that they may follow California's lead and adopt privacy statutes.

Internationally, the concept of privacy, with regard to the control of personal information disclosure, is quite different from that of the United States. For example, in the United States, some tax return information, such as home value, is public information. However, in some other countries, privacy rights would be violated by the publication of such information.[27] More in-depth regulations and a greater sense of privacy protection exist abroad, especially in European Union ("EU") countries. In 1998, the European Commission's Data Protection Directive (95/46/EC) went into effect.[28] Basically, the directive prohibited the transfer of personal data to non-EU countries that do not meet the "adequacy standard" for privacy protection. In 2016, the EU replaced the Data Protection Directive with a new EU-wide regulatory framework: the General Data Protection Regulation ("GDPR").[29] The GDPR is intended to harmonize data privacy laws across Europe as well as give greater protection and rights to individuals. The GDPR was published in the EU Official Journal in May 2016, and came into force on May 25, 2018.[30] When doing business abroad, either while operating in EU countries or sending data back to the United States while working remotely in an EU country, the stricter EU privacy standards will likely apply. Under EU law, privacy rights and laws follow the data.

[3] Using e-Vendors Intelligently

Generally, records management solution vendors and e-discovery management vendors fall into five basic categories: (1) consulting/professional services; (2) data collection/processing; (3) data recovery/forensics; (4) hosting/review/production/delivery; (5) other litigation support-related services.[31] In all areas, vendors should be chosen based on a variety of factors that suit the specific needs of the business or litigation file at hand, or both. Considerations about quality, timeliness, pricing, expert witness capabilities, defensible processing protocols and technology, and processing capacity should be carefully researched and balanced when using e-vendors for each specific task. Vendors may provide services in multiple categories, as listed. However, the categories show a general breakdown of the tasks performed by vendors.

In a consulting and professional services role, a vendor can, for example, provide testimony as a Rule 30(b)(6) witness,[32] analyze the business's IT infrastructure, assess preservation issues, and recommend plans for discovery.[33] Vendor recommendations and plans as related to preservation issues and discovery plans should be considered by counsel when developing the overall litigation strategy. Vendor witnesses can help

counsel and the courts understand the intricacies of an IT system and how, for example, documents are saved and preserved within a company's system.

Data collection and processing vendors can assist with email processing, data filtering, data and file management, data harvesting, redaction services, and review services or software. Vendors can assist with the preservation of metadata, the processing of various file types (especially for email), keyword and phrase taxonomy, search methods, document relationships, foreign language capabilities, de-dupe capabilities, and email string processing. Services offered by vendors in this area can also be considered document management solutions, email archiving solutions, and data classification solutions. Each such solution involves some form of data collection or processing, or both.

Data recovery and forensics vendors offer services such as legacy data restoration, backup system solutions, reverse engineering, corrupted/deleted/hidden/encrypted data recovery, damaged media restoration, unlocking password protected files, and mirror imaging hard drives. Vendors retained for assistance in this area may be called to testify about their procedures and methodology. Therefore, all such procedures should be defensible, and alteration of source data should be avoided.

Hosting, production, review, and delivery service vendors offer data and Web site hosting, review of and support with Web site management, and production services. Business considerations when working with vendors in this area include: Web capability and accessibility, export capabilities, capacity limitations, data verification, native format documents, image processing, training, online review capability, production media types, reporting capabilities, and foreign capabilities.[34] Vendors with services in this area assist heavily with the document production phase of discovery as well.

Other litigation and support-related service vendors offer services such as scanning, copying, OCR, coding, and conceptual organization. Vendors in this area help organize and classify documents for e-discovery production. Given the important responsibilities placed on these vendors, quality assurance procedures are key. Accuracy with coding and statistical analysis as well as a defensible methodology remains important for vendors operating in this area.

Overall, vendors offer a variety of services. No case is one size fits all. One vendor may successfully partner with a client for one litigation matter. A second litigation matter, however, may not fall within that vendor's area of expertise. Partnering with many vendors and remaining open-minded to find the vendor best suited to the needs of a specific case is highly recommended.

§ 3.02 Management of the Costs and Risks of e-Discovery in Litigation and Investigations

[1] Impact of Federal Rules of Civil Procedure and Federal Rules of Evidence

[a] Overview

On December 1, 2015, several amendments to the Rules of Civil Procedure went into effect, reshaping the civil discovery process and e-discovery in particular. Indeed, in

his Year-End Report on the Federal Judiciary, Chief Justice John Roberts noted that the most recent amendments to the Federal Rules of Civil Procedure were intended to: (1) encourage greater cooperation among counsel; (2) focus discovery on what is truly necessary to resolve the case; (3) engage judges in early and active case management; and (4) address serious new problems associated with vast amounts of electronically stored information.[35]

The notes to the amended Rules (the Notes) also acknowledge the explosion in information and Electronically Stored Information ("ESI"), as well as advancements in technology. For instance, the notes to amended Rule 26(b)(1) state that "[c]omputer based methods of searching such information continue to develop, particularly for cases involving large volumes of electronically stored information," and "[c]ourts and parties should be willing to consider the opportunities for reducing the burden or expense of discovery as reliable means of searching ESI become available."

[b] Scope and Proportionality

Among other amendments,[36] Rule 26(b)(1) was amended to make clear that discovery is limited to information that is relevant to any party's claim or defense and "proportional to the needs of the case." It thus clarified that the proper scope of discovery does not include the case's general subject matter or information "that is reasonably calculated to lead to the discovery of admissible evidence." Thus, the "reasonably calculated to lead to the discovery of admissible evidence" language has been removed from the rule in favor of proportionality language. As the Committee explained, the adjustment to Rule 26(b)(1) is intended to "prompt a dialogue among the parties and, if necessary, the court, concerning the amount of discovery reasonably needed to resolve the case." Recent cases have discussed this new emphasis on "proportionality" and have noted that the proportionality requirement is not a new one, but pre-existed the 2015 Amendments. Even so, the amendments serve to reinforce the importance of proportionality, or, as one court noted, "it serves to exhort judges to exercise their preexisting control over discovery more exactingly."[37]

[c] Failure to Preserve ESI

The 2015 Amendments now provide more guidance for a court on how to craft relief for a failure to preserve ESI. Relief is available only when ESI has been lost because of a party's failure to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery. A court may grant relief only upon a finding that the other party suffered "prejudice" from the loss of information, and the court may order "measures no greater than necessary to cure the prejudice."[38] As for reasonable steps to preserve, and alluding to routine auto-deletion functions that many electronic systems now have, the advisory committee's note states that

> [d]ue to the ever-increasing volume of electronically stored information and the multitude of devices that generate such information, perfection in preserving all relevant electronically stored information is often impossible. As under the current rule, the routine, good-faith operation of an electronic information system would be a relevant factor for the court to consider . . . although the prospect of litigation may call for reasonable steps to preserve information by intervening in that routine operation.[39]

The note also states that when information is lost, "substantial measures should not be employed to restore or replace information that is marginally relevant or duplicative."

A court may impose drastic sanctions (for example, an adverse jury instruction or dismissal) only if it finds that a party acted with an *intent* to deprive the other party from using the information in the litigation. As the Notes explain, this amendment rejects earlier cases that had authorized adverse-inference instructions on a finding of mere negligence or gross negligence.

[d] Other Discovery Rules

Other significant amendments that affect e-discovery issues are worthy of note.

[i] Early Permissible Document Requests

Rule 26(d)(2) was amended to permit the parties to serve document requests under Rule 34 before the Rule 26(f) conference related to discovery planning. This now allows (but does not require) parties to address issues presented by the document requests at the 26(f) conference. The requests are considered served at the conference and parties must respond within 30 days of the conference. Also at the Rule 26(f) conference, the parties must address on ESI preservation and the form or forms in which it should be produced, and the discovery plan submitted by the parties must address issues of ESI preservation.

[ii] Promotion of Early Case Management

Rule 16 was amended to promote earlier case management and court intervention by encouraging a live scheduling conference with all parties present (rather than by mail, which was allowed under the earlier rule) to occur at the earlier of 90 days after any defendant has been served (reduced from 120 days) or 60 days after a defendant has appeared (reduced from 90 days). To encourage the efficient resolution of discovery disputes without the delay and burdens attending a formal motion, the notes to the amended rules also allow the court to issue an order that "before filing a motion for an order relating to discovery the movant must request a conference with the court."

More generally, and also consistent with the proposed rules' emphasis on increasing dialogue between the parties (and early intervention by the court if needed), Rule 1 calls upon the parties and the court to cooperate to ensure that the rules are employed to promote efficiency.

[iii] Objection with Specificity

Rule 34(b)(2), relating to document requests, now provides that a party must make specific (rather than boilerplate) objections, state whether it is withholding any responsive documents based on an objection, state whether it is producing copies of documents or ESI instead of permitting inspection, and specify the reasonable time when production will be completed.

The rules do not altogether eliminate the reality of asymmetric discovery. The Notes acknowledge that one party may have more information than another ("information

asymmetry") and will therefore often bear a heavier burden in responding to discovery. But the amendment's focus on cooperation and proportionality in e-discovery provides a springboard from which to engage with the other side early in discovery. The Notes also encourage active judicial management of discovery to resolve disputes.

[e] Federal Rule of Evidence 502

Rule 502 was enacted as a result of privilege issues presented by e-discovery. The rule formalizes a subject matter waiver of attorney-client and work product privileges through voluntary disclosure, but includes an exception for "inadvertent disclosure."[40] Rule 502(a) provides that voluntary disclosure of attorney-client privilege or work product information "extends to an undisclosed communication or information in a federal or state proceeding only if: (1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together."[41] A subject matter waiver is imposed in situations in which fairness requires further disclosure of related, protected information, in order to avoid misleading the opposing party to their detriment.[42]

However, Rule 502(b) provides an exception to this general rule for inadvertent disclosure if (1) the disclosure was inadvertent; (2) the disclosure was made in connection with federal litigation or administrative proceedings; and (3) the holder of the privilege took reasonable precautions to prevent disclosure and prompt measures, once he knew or should have known about the disclosure, to rectify the error.[43] Further, Rule 502(c) provides that when the disclosure is made in a state proceeding and is not the subject of a state-court order concerning a waiver, the disclosure does not operate as a waiver in a federal proceeding if the disclosure: (1) would not be a waiver under the rule if it had been made in a federal proceeding; or (2) is not a waiver under the law of the state where the disclosure occurred.[44–45]

Under Rule 502, clawback and quick peek agreements are binding on third parties who were not a party to the case if the agreement is incorporated into a federal court order.[46] Overall, the rule tries to resolve longstanding disputes over inadvertent disclosure and selective waiver and tries to help limit the costs of an ESI discovery review.

[2] Managing the Risks of Privilege Waiver

Reviewing client documents to avoid the production of privileged information has always been part of the discovery process, but the massive proliferation of electronic information has caused privilege review to become an increasingly daunting and expensive task. Even inadvertent production of privileged material can create a risk of waiver of the claimed privilege.[47] The costs of conducting a page-by-page privilege review in the new e-world can be astronomical, but there may be no viable alternative to performing a carefully conducted privilege review.

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[b] Different Judicial Approaches to Privilege Waiver

American courts generally adhere to three different approaches when considering whether the inadvertent production of a privileged document will affect a waiver of privilege over the document itself and over the subject matter addressed by the document.

A small number of courts take a *lenient* approach, holding that inadvertent disclosure of a privileged document does not affect waiver of privilege with respect to that particular document and, perforce, cannot affect a broad subject matter waiver.[55]

The majority of courts adhere to a *middle ground* approach, holding that inadvertent disclosure of a privileged document may affect waiver of privilege with respect to that document.[56] Courts in these jurisdictions will consider such factors as the reasonableness of precautions taken to prevent disclosure, the time taken to rectify error, and fairness to the parties to determine whether privilege was waived.[57] The extent of waiver, if found, is left to the court's discretion, but is often limited to the document that had been inadvertently disclosed.[58]

A minority of courts takes a *strict* approach, holding that inadvertent disclosure of a privileged document constitutes waiver of privilege with respect to that particular document and also with respect to the entire subject matter addressed by the document.[59]

[c] Using Non-Waiver Agreements to Minimize Risk

Non-waiver agreements reduce the risk of the unintentional waiver of privilege by inadvertent disclosure. Such agreements are made between parties to litigation prior

to the commencement of discovery, often during the meet and confer process. One type of agreement, the so-called "clawback" agreement, allows the producing attorney to demand that inadvertently produced information be returned because it is privileged. This happens when lawyers turn over electronic information before reviewing it for privileged information or when they have performed a review but overlooked privileged information. Federal Rule of Civil Procedure 26(b)(5) provides parties with a procedure for the clawback of privileged information.[60] If the producing party turns over information subject to privilege it must request the opposing party to return, sequester, or destroy the information, including all copies. The receiving party is prevented from using or disclosing the information until the claim is resolved. The receiving party may also submit the information to the court under seal to determine if the information is in fact privileged. The receiving party must also seek the return of any information it disseminated before learning of the privilege claim.

Another type of agreement is the "quick peek" agreement, which establishes a procedure whereby the producing party supplies the requesting party with access to all of its documents, after which the requesting party designates the documents it desires be copied and produced. Only then does privilege review commence, and only of those materials so designated. Although such non-waiver agreements have been increasingly employed in litigation, according to one court, they are far from "risk-free."[61] For example, the agreements are not recognized in certain jurisdictions and, even in jurisdictions that do recognize them, there is a question about whether they are effective against third parties who may argue that the production waived the privilege regarding them.[62] It is very important, particularly in the middle ground and strict jurisdictions, for such agreements to be entered as orders of the court. If the court has ordered the production of a document, the producing party has a far stronger argument that there was no voluntary waiver of any applicable privilege.[63]

[d] Selective Waiver of Privileged Corporate Information: The McNulty Memo

On December 12, 2006, the Department of Justice released what has come to be known as the McNulty Memo.[64] The memo makes it clear that the Department of Justice should seek a waiver of privileged corporate information, including the attorney-client and work product privileges, only in rare circumstances. Before a prosecutor requests a waiver, he must seek approval directly from the Deputy Attorney General who must personally approve each waiver request. Both the waiver request and the authorization must be in writing. In order to support the request, prosecutors must show a "legitimate need" for the information by showing:

(1) the likelihood that and the degree to which the privileged information will benefit the government's investigation;

(2) whether the information sought can be obtained in a timely and complete fashion by using alternative means that do not require a waiver;

(3) the completeness of the voluntary disclosure already provided; and

(4) the collateral consequences to the corporation in requesting a waiver.

Prosecutors may not hold a refusal to waive the privilege against a company in deciding whether to charge the company. Prosecutors must also establish a legitimate need for the waiver and submit a written request for approval to seek investigative

facts obtained by corporate counsel in their own internal investigation of corporate wrongdoing. The U.S. Attorney has to consider the request in consultation with the Assistant Attorney General of the Criminal Division. If the request is approved, the U.S. Attorney must communicate the request to the company in writing. Prosecutors are prohibited from considering the advancement of attorney fees to employees in the charging decision.

Companies must carefully consider whether to waive their privileges because doing so can have serious collateral consequences. Waiver of the privilege with regard to the government can lead to waiver with regard to third parties in any related civil litigation. Numerous parties have argued for selective waiver or holding that waiver with regard to the government does not waive the privilege with regard to third parties. However, only the Eighth Circuit has adopted selective waiver with regard to the attorney-client privilege.[65] The Fourth Circuit, while rejecting selective waiver of attorney-client communications and fact work product, upheld the protection of opinion work product disclosed to the government.[66]

[3] Managing the Costs and Risks of Backup Tapes

Disposing of backup tapes is crucial given the dramatic implications that Rule 26(b)(2) has for discovery.[67] The rule requires parties to draft initial disclosures or to respond to discovery requests by identifying any source of electronically stored information that may have responsive information, but is not reasonably accessible owing to undue burden or cost. Therefore, companies are required to disclose the existence and extent of their backup tapes to the court and to opposing parties when they contain "potentially responsive" electronically stored information.[68] Companies may also be required to search or sample otherwise inaccessible backup tapes pursuant to court order if an opposing party can show good cause.[69] Owing to the excessive costs associated with restoration and attorney review of backup tapes, which can contain millions of typewritten pages each, companies should do everything possible, keeping in mind any pre-existing preservation obligations, to limit the number of backup tapes.

[a] Disaster Recovery Backup Versus Archival Tapes

Understanding the difference between disaster recovery, or backup tapes, and archival tapes is essential for discovery purposes. According to one noted authority:

> "Backup Data is information that is not presently in use by an organization and is routinely stored separately upon portable media. Backup data serves as a source for recovery in the event of a system problem or disaster. Backup data is distinct from 'Archival Data.'"[70]

> "Archival Data is information that is not directly accessible to the user of a computer system but that an organization maintains for long-term storage and record-keeping purposes. Archival data may be written to removable media such as a CD, magneto-optical media, tape or other electronic storage device, or may be maintained on system hard drives or network servers."[71]

As the definition suggests, disaster recovery tapes, or backup tapes, go stale as soon as a new set is made. Once stale, these tapes can and should be disposed of or

recycled, absent a litigation hold. Archival tapes, on the other hand, are designed for long-term retention and should only be disposed of when legal, regulatory, and business retention obligations have expired. Thus, as companies create and deploy procedures for backup tapes, it is important to emphasize that archival tapes should be treated differently and in accordance with record retention schedules and policies.

[b] The Backup Rotation Cycle

In light of the Federal Rules' discovery requirements,[72] the following example of a backup tape rotation cycle should be considered by companies:

- Adopt and rigorously implement a company-wide policy clearly stating the company backup tape rotation period and the procedures used to cycle active tapes through rotation and destruction;
- Shorten the backup tape cycle if a company currently keeps tapes longer than 35 days (five weeks), unless there is some specific business purpose or litigation hold that requires a longer period;
- Require that special backups (e.g., snapshots prior to server upgrades) be distinguished from disaster recovery backup tapes, and be destroyed as soon as maintenance is complete and the installation is stable;
- Strictly limit the retention of tapes to the period specified in the backup tape policy, unless a litigation hold is in place that applies to a certain tape;
- Give appropriate notice to IT personnel that the newly adopted four or five week rotation cycle is intended to replace, not supplement, *all* old backup practices;
- Prohibit freelance backup practices such that IT personnel must present a concrete purpose for creating nonstandard backup tapes and senior IT personnel must sign-off on such tapes before they are created;
- Require approval from senior IT personnel and in-house legal before a backup tape may be used to fulfill a restore request from an employee or client.

A company that lacks records management policies stating the specific length of its backup tape rotation cycle should create and execute a company-wide policy as soon as possible. Having a specific and uniform backup tape rotation cycle is important, but it is meaningless without proper implementation.[73] Until a specific rotation cycle is put into operation, a company is only creating more and more non-current backup tapes that will need to be audited.

Once in effect, auditing and other compliance techniques should be employed to ensure backup tapes are kept only as long as the backup tape policy permits, unless a litigation hold applies to a tape. Generally speaking, litigation holds always supersede standard records management practices, including customary disaster recovery tape cycles in those rare instances when holds must extend to them.[74]

Special backup tapes are a unique category of backup tape that are created for a limited and temporary purpose, such as snapshot tapes made when reconfiguring applications, during server migration, or during server upgrades. Special backup tapes should be immediately destroyed once they are no longer required for the project for which they were created unless, of course, they are subject to a litigation hold.

[c] Labeling and Tracking Tapes

Once backup tape policies and cycles are in place, all tapes, whether disaster recovery or archival, should be labeled and tracked. An effective and organized labeling and tracking system should include: (1) the use of tracking or inventory software with the capability to track all of a company's tapes; (2) the use of barcodes or another computerized scanning system; and (3) detailed labeling and a comprehensive inventory. Companies should use tracking and inventory backup software that allows them easily to know where their backup tapes are and what they contain. In addition, each tape should have information on the tape label (or the company may choose to use the inventory) regarding the specific contents of each tape and the record retention categories that apply to the tape. For example, the description of data should be detailed to a level such that if a company received a document request for "all of Sally Smith's emails from October 2006," the company would know exactly where to find them. A concrete expiration date should also be included on the label and in the inventory.

There should be procedures to require that tapes be added to the inventory and labeled immediately upon creation. These procedures will help ensure that all of a company's archival and live backup tapes are identified and accounted for at all times, facilitating disclosure under Rule 26(b)(2).[75] Companies should also have clear procedures covering backup and archival tapes inherited during mergers or acquisitions. These tapes should be analyzed and, subject to the company's policy, added to the company's inventory immediately upon the merger or acquisition. Related procedures should guarantee that all of an acquired company's tapes are accounted for, including those that may be stored off-site.

Keeping a detailed inventory and knowing what types of tapes it has at all times will help a company prevent a situation in which it owns unique format tapes that it cannot read or restore. For example, some companies have kept older VAX or Wang tapes that no one in the company is able to read. Not only do these companies lack inventories that contain information on these tapes, but also they did not keep the technology required to read them. Beyond just being inaccessible, many of these tapes may be entirely unreadable or readable only by outside vendors at great expense to a company. Thus, if a company must retain legacy data for business or litigation hold purposes, procedures should be in place to either maintain hardware and software that is converted or migrate data to a readable format, such as PDF.

[d] Disposition of Non-Current Backup Tapes as They Expire

If a company has accumulated a group of non-active disaster recovery backup tapes no longer part of a backup rotation cycle, it is important under the Federal Rules of Civil Procedure[76] that the company determine if any of the tapes have expired (that is, are no longer needed for business, regulatory, or litigation purposes). If so, they should be properly destroyed. In order to accomplish this, a company should have in place policies and procedures that: (1) allow IT personnel to know when tapes expire; (2) document the disposition procedures; and (3) grant definitive disposal authority to a small number of senior individuals.

IT personnel should routinely identify and dispose of expired tapes that are not part of a backup rotation cycle. A well-created inventory database, combined with sound labeling, will make identification of such expired tapes easier. A company should also

have in place procedures for identifying, segregating, and storing tapes subject to litigation holds and for disposing of such tapes once holds are lifted. Once the expired tapes are identified (for example, on a daily or weekly basis), IT personnel should be responsible for disposing of them. However, a documented process for disposal should be in place.

A company should have a company-wide Disposal/Destruction Authorization Form that is consistent with the company's records management practices. This form should be signed by both in-house counsel *and* records management before actual disposal takes place, and a copy of the form should be kept on file. A small number of individuals within the company should have ultimate disposal authority. These people should be responsible for signing off on all disposal decisions, using the proper authorization form, before disposal, and should be ultimately responsible for ensuring that all disposals are made in accordance with company policy, including the policies that all companies should have governing destruction/retention requirements, and litigation holds. Although it may sound tedious, having a paper trail to account for the disposal of expired tapes is key to success in future litigation.

[e] Cloud Services

Companies should also track and manage employees' use of third-party storage providers, often called "cloud services." These providers, like Dropbox, Box.net, and Google Drive, provide free or inexpensive access to online storage residing on third-party servers. Employees, left to themselves, may use these services to create backup copies of business documents and, in some cases, entire computing environments. Effective technology and information governance policies are essential to maintaining control over a company's business documents by preventing this sort of employee use of cloud services.

As part of such a technology and information governance policy, companies should consider establishing an enterprise-wide relationship with a third-party storage provider. Any such agreement should be carefully negotiated to ensure that the vendor provides sufficient control over employee-managed accounts to permit the company to access, preserve, and collect information that may be subject to a retention or collection obligation. If the agreement does not include these provisions, a company may have to take burdensome additional steps.

[4] Managing Risks in Data Collection

In the e-data world, data must be collected quickly in order to avoid potential risks for litigation, such as data deletion or alteration. When performing data collection, it is important to begin with the end in mind (i.e., knowing the scope and goals of the project), because such knowledge is pertinent to accomplishing each collection step along the way. After the information is secured, it should be maintained in a secure location with a chain of custody established. Such records may be useful later in litigation, especially if questions arise regarding the authenticity of the data collected.

Perhaps most important, original material should not be worked on when collecting data. Original documents must maintain authenticity, accuracy, and reliability for potential use in court. Data can be altered merely by opening the document: for example, the metadata field "date accessed" in Microsoft Word changes each time the

document is opened. Reviewing attorneys must be educated about the importance of working with copies when reviewing collected documents.

A collection plan should include a communications plan, general expectations, a timeline, conflict strategy guidelines, and the ability to document results in a central repository. All parties involved in data collection should routinely communicate and meet deadlines in order for the project to advance. Establishing conflict resolution procedures before such instances arise will help work through problems and allow for a more efficient collection.

Two main types of collection methodologies exist, broad and targeted collections. In a broad collection, all data are collected, which makes the collection very comprehensive. However, broad collections likely will be overly inclusive and become complicated. On the other hand, targeted collections identify specific criteria, processes, and technological methods, which makes the collection more controlled, produces more relevant results, and creates a defensible process. Targeted collections can involve a substantial investment of time and effort in the planning and execution phases.

An entity should work with knowledgeable persons in the IT, legal, and regulatory departments in order to tailor a collection plan best suited to the company's needs and the specific needs of the current case. A well-designed and executed collection program helps establish credibility to defend any scrutiny aimed at collection methods.

[5] Managing Costs Through Data Filtering or Sampling: Reducing the Volume of Data Before Document Review

[a] Effective Employment of Filters

Reviewing large sets of documents to determine relevancy and privilege in preparation for document production can be extremely expensive. One way to limit the amount of documents for review is through data filtering. Data filtering narrows the universe of documents to a smaller, more manageable set. The fewer data for review, the less time and money that will be spent on document review. Data filtering can reduce the number of documents for review by over 85%.[77] Some of the most common data filtering techniques are:

- **Custodian filtering:** Isolating the files associated with key custodians determined relevant to the case.
- **Time and date filtering:** Targeting discrete periods of times determined particularly relevant to the case. Electronic documents contain various dates that can be used for filtering, such as date created, date modified, and date accessed. Emails can be filtered by the date sent or by the date received.
- **File size filtering:** Capturing files within a certain size range in order to isolate midsized files from extremely large files. For example, access database files and excel files can be very large and lead to thousands of pages to review. Through filtering, these types of files may be able to be removed from the data set or set aside. A determination of whether these files need to be reviewed may be made by obtaining a list of the names of the individuals who created or modified these files. File size filtering presumes that system and application files have been removed.

- **File type filtering:** Limiting the review to targeted file types (i.e., .doc, .xls, .pdf, .msg).
- **Keyword searching:** Applying a set of keywords and terms to identify and segregate potentially responsive information for further review. Only information responsive to the specific keywords or terms will be captured in the search. The search can be set up to filter for only potentially responsive items, filter out non-responsive items, pre-categorize potentially privileged items based on attorney and/or firm name, or pre-categorize potentially relevant information by issue. Keyword searches can be too broad in some cases and too narrow in others. Therefore, it is recommended that an agreement be reached with opposing counsel regarding the search terms.
- **De-duplication:** Identifying documents that are duplicates or near-duplicates of one another and eliminating the duplicate documents from the document universe to be reviewed. The duplicates or near-duplicates can be brought back into the data set for production purposes. In identifying exact duplicates, each file is assigned a unique identifier or "digital fingerprint" that can be used to compare it with all other files. Files with the same "digital fingerprint" are considered exact duplicates. Depending on the requirements of the case and agreements with opposing counsel, near-duplicates can be identified using a combination of metadata fields and text. For example, if two files have different modification dates or content, they may be considered near-duplicates. Whether or not these near-duplicates are presented initially to reviewers can depend on the volume of data, the needs of the case, the capabilities of the data processing vendor, and agreements with opposing counsel. Duplicates may be searched for (1) within a custodian (only duplicate documents within the possession of one individual custodian will be removed), (2) across the entire production (duplicate documents across all custodians will be removed), or (3) across the production for non-email files and within the custodian for email. Because there are many variables to consider in de-duplication, the scope, parameters, and specifications should be adequately defined before de-duplication occurs.

[b] Data Analysis and Reporting: Evaluating the Metrics

Reports can be produced that identify the metrics and success rates relating to the previously described filtering techniques.[78] These reports can demonstrate how successful or unsuccessful certain filters were and be used to refine or change search terms or techniques. The reports can identify problems with the data set or technique used and can even identify anomalies. For example, in a marketing case one would expect to locate numerous power point presentations. If the filters returned few, there may be a problem. In a product liability case, if the search term does not return hits for the product name, there is a problem. A result like this may indicate that code names were used and different search terms are required. Reports can also provide a basis for estimating time and cost for review, which in turn can lead to further refinements of the review methodology.

[c] Sampling

Sampling a portion of the data set is a method favored by some to help evaluate whether relevant information is likely to be found within the data set. A data sample

may be limited to certain custodians, certain backup tapes, certain time periods, or other logical parameters. A sample may reveal that the desired information is not present on the source, and, therefore, processing and reviewing the entire data set are unnecessary. Sampling is most often used when one party is requested to restore a large amount of data on backup tapes or other inaccessible media. Instead of spending the time and money to restore all of the tapes, parties may devise a procedure to sample a portion of the tapes and seek court approval. Sampling may show what the tapes have to offer and the time and cost required to restore the tapes.[79]

The committee notes to Rule 26(b)(2)(B) specifically contemplate sampling.[80] Under the rule, a party need not provide discovery of information from sources that are not reasonably accessible because of undue burden or cost.[81] However, even if the responding party is able to establish undue burden or cost, the court may still order discovery if the requesting party can show good cause.[82] The requesting party may need discovery of the disputed information in order to disprove the responding party's assertion that the information is not reasonably accessible.[83] This can be accomplished by sampling the information contained on the sources identified as not reasonably accessible. The requesting party may also need discovery in order to show the court good cause for the production.[84] Sampling may allow the parties to determine what information the inaccessible sources contain, whether the information is relevant, how valuable it may be to the litigation, and the burdens and costs of accessing the data.

Sampling is also a method used to refine search techniques and reduce the costs of discovery.[85] Sampling may reveal that very few files on a data source contain responsive information, which may weigh against further, more comprehensive searching.[86]

A disadvantage of sampling is that without strategic thought and planning to establish the sampling parameters, the parties may be left with results that are incomplete, inconclusive, misleading, or all three. Results that are incomplete or misleading may cause the parties to make decisions and reach agreements that later are shown to have been based on flawed assumptions. Unless the sampling methodology is statistically sound, which may require the assistance of a statistician and the ability to obtain true random samples, any results from the sample should be viewed with caution. Decisions based on sampling results should be subject to further review, negotiation, refinement, and adjustments if necessary.

[6] Using Vendors Wisely

Before searching for vendors to use in litigation, the scope of the electronic discovery project must be determined. The vendor evaluation process begins with a request for information ("RFI") to identify vendors with general capabilities for completing the project. Then, a request for proposal ("RFP") asks vendors to submit proposals tailored to the specific project. Finally, a decision matrix should be created to compare proposals and vendor capabilities.[87] "Considerations in evaluating vendor software and services include the defensibility of the process in the litigation context, the cost, and experience of the vendor."[88] The size and scope of the ESI in the case should dictate how to approach the vendor process while remaining reasonable regarding costs and capabilities of all parties involved. Ultimately, the party is responsible for document preservation and production, not the vendor. Therefore, the vendor process employed should be easily understood and defensible.[89]

When considering potential vendors, three main areas should be examined: (1) the company, (2) the personnel, and (3) the service.[90] When looking at the vendor's stability and quality, how long the vendor has operated, the financial outlook of the vendor, history and performance information, and client references should be considered.[91] The vendor should also have proof in writing of insurance, licenses, pricing methods, confidentiality guarantees, privilege or conflicts issues, or both, and non-collusive bidding assurances.[92] In addition, the vendor should have a safe and secure physical plant/office location, thus ensuring that information provided by clients remains safeguarded at all times.[93]

The vendor's personnel and product/service also should be analyzed. The vendor's staff should be educated and dedicated, having ample time to devote to each active project. Client references and the rate of employee turnover can often expose such information.[94] Staff should be experienced and include experienced project managers, which can be learned about through past performance testimonials and employee data.[95] The work product quality also will be dictated largely by the staff's abilities. Again, client references should highlight the level of work product, and quality assurance procedures may validate and verify vendor work product.[96] The vendor should also have appropriate disaster recovery safety measures in place, coupled with maintenance and support staff to assist with service and work product throughout the project.[97] Evaluating vendors is a time-consuming process. However, when the appropriate vendor is matched with a project, the discovery process will run effectively and efficiently.

[7] Managing the Cost of Document Review

[a] Taking It All In-House

In-house document review has become increasingly difficult with the proliferation of ESI. Large document productions are commonplace, but they can potentially cripple law firm resources when performed in-house. An extraordinary amount of time and money can be spent staffing such projects, and the rate of return for firms may not be as high as if the review were outsourced.[98] Keeping document review in-house, however, can help reduce a few risks associated with document review, such as quality assurance and consistency problems.[99] An in-house document review allows the reviewing attorneys working on the case to become intimately familiar with a client's files, which can be useful if and when a case goes to trial. The supervising attorneys can better manage in-house reviews than outsourced reviews, especially given an ability to oversee the process in-person.

[b] Digital Discovery Consultants

Digital discovery consultants are another option to help tackle ESI document review. Digital discovery consultants can help set up a document review team, assigning a project manager, creating a case contact list, drafting timelines, and initiating initial meetings among the parties. Many e-discovery consultants also offer services involving development of search terms, establishment of data parameters, determination of applicable software programs, and setup of in-house databases. Attorneys may want to develop their own search terms and establish their own data parameters. Such services, however, are routinely being offered by consultants.

[c] Using Contract Attorneys or Offshore Outsourcing, or Both

Contract attorneys and offshore outsourcing are rapidly becoming the wave of the future in the document review arena. Contract attorneys can review documents at cheaper rates than can firm attorneys, which provides the client with significant savings.[100] Easily accessible Internet and telecommunications technologies make communications costs and logistics very reasonable with contract attorneys, even when the reviewers operate offshore in places such as India.

Forrester Research estimates that about 35,000 U.S. lawyer jobs are expected to be shipped out, 60% to 70% to India. By 2015, Forrester anticipates as many as 79,000 legal jobs could be outsourced.[101] Document review is one of the most popular tasks to outsource.

Commentators list several factors in favor of using offshore attorneys:

(1) Indian lawyers do not need much additional training to do standard legal work such as reviewing documents because their legal system, like that of the United States, is rooted in British common law.

(2) There are significant cost savings. Well-educated Indian attorneys often earn $12,000 to $18,000 per year, while entry-level American law school graduates often draw salaries in excess of $100,000.

(3) Because of the time difference, U.S. firms can assign tasks at the end of their business days, and Indian lawyers can complete the work overnight, having it ready for the outsourcing party the next morning.

(4) There is not an appreciable difference between outsourcing to Indian attorneys and using contract attorneys in the United States for temporary assignments.

(5) Contract attorneys, whether American or foreign, are usually doing document review by choice, whereas law firm associates often are not.[102]

Commentators also list several disadvantages to using offshore attorneys:

(1) Ethical issues can be raised by lower quality work, the increased risk of malpractice, the exploitation of Indian workers by hiring them at cut rates, lack of supervision, and possible fee-splitting with non-lawyers.

(2) Sending client materials internationally can lead to confidentiality and security concerns.

(3) The use of foreign attorneys increases the risk of conflicts in representation.

(4) For some foreign attorneys, English is still a second language. Comprehension is not always good and quality can suffer as a result.

(5) The logistics involved in training and supervision increase significantly when using offshore attorneys.

(6) Some believe that the time difference, lower work quality, inability to manage the work force directly, and possible malpractice issues, would mitigate any cost savings.

(7) Unless the outsource firm has a physical presence in the United States, lawyers who use such firms may not have any recourse in U.S. courts if something goes wrong.[103]

[d] Technology-Assisted Review

Attorney review can be a time-consuming process and a reviewer's fatigue can lead to misidentification and misclassification. In order to meet tight discovery deadlines and reduce fatigue, legal teams have adopted methods other than human review.

[i] Simple Pattern-Matching Searches

A commonly used process to identify a subset of potentially responsive or privileged documents without having physically to review every document is to use search terms, also known as pattern-match searching. Search terms and phrases have many limitations but can be effective when used judiciously to create subsets of documents for further human review.

Pattern-matching search engines match strings of letters to strings of letters, ignoring context and meaning. For example, a search on the word "check" with the intent to find references to financial instruments will return results for all instances of "check," regardless of the meaning of the word in context. Results may also include "check" meaning "take a look at," "rain check," "hold back," and other contexts. This problem is most noticeable among words that occur frequently and have multiple meanings.

There are techniques to maximize benefits from a pattern-matching search, such as avoiding long lists of search terms and overly broad search terms. For example, searching a company's information for the company's name would return a large number of results, most potentially irrelevant to the case. Proximity searches can reduce the number of results returned. In a pharmaceutical litigation case, for instance, searching for the name of the drug at issue in the litigation within five words of an adverse event could limit the number of hits returned (e.g., "drug name" w/5 "adverse event").

A constant concern in using simple pattern-match searching is that relevant information may be left behind. It is helpful to conduct searches that take word variations into account. For example, a wild card or term expander or both can ensure that a search for "manag!" would return results for manage, managed, manager, management, etc. or a search for "Anders*n" would return results for Andersen and Anderson. When searching emails, it is important to remember that names and addresses can appear in various ways (e.g., John Smith; Smith, John; johnsmith; J. Smith; jsmith; etc.). Nicknames and abbreviations should also be considered.

To further refine searches, reviewers can search only across some custodians, only in some folders, only in some metadata fields, only on some dates, etc. The order of operators in Boolean searches (OR, AND) should also be considered when designing searches. Using "OR" will return a larger number of results than using "AND." Parenthesis and quotation marks can also be used to streamline and focus searches.

[ii] Alternative Technologies, Processes, and Methodologies

More frequently, document review teams are seeking the benefit of more sophisticated alternative technologies, processes and methodologies to speed the review process and control escalating costs. Particularly when faced with reviewing large amounts of data, for which a document-by-document human review is neither feasible nor cost-effective, consideration of alternative technologies becomes an imperative. These alternatives can include concept search technologies, clustering and foldering technologies, statistical enhancers, and technology-assisted human review. Currently available alternative technologies are not perfect, but neither is the human review. Reviewers are prone to inconsistencies and inaccuracies due to human error. Alternative technologies seek to improve accuracy, consistency, and efficiency as compared to a document-by-document human review. Following is a brief overview of a few categories of alternative technologies.

[A] Concept Search Engines

Concept search engines interpret context and meaning of a document. In the query/search stage, concept search technologies interpret the query and its meaning, then search for that meaning in the document database. Concept searching can be a powerful method for retrieving subsets of conceptually similar documents for further human review. Unlike keyword search systems that match exact words or phrases, concept search engines attempt to account for different ways in which people express similar ideas.

Generally, concept-based searching organizes unstructured information by mapping associations between each word and other words in large sets of documents, to create context in which the words are used. Keyword searching can require skillful use of Boolean operators like "AND" and "OR," whereas concept searching allows users to enter a natural language query or paste paragraphs from a relevant document and retrieve a list of related documents, ranked by probable relevancy.

[B] Thesaurus-Enhanced Search Engines

Thesaurus-enhanced search engines rely on thesaural groups to return results. For example, with a query term "monitor," thesaural groups may include track, trace, manage, lizard, iguana, ship, usher, supervisor, CRT, viewer, or screen. Thesaurus-enhanced search engines can be useful in retrieving topical document sets. Because of the ambiguity of word meanings, however, thesaurus-enhanced search engines may return results that are not relevant to the issue.

[C] Clustering/Foldering Technologies

Clustering/foldering technologies are designed to both group similar documents together and provide an improved platform for technology-assisted human review. These technologies seek to statistically classify, categorize, cluster, and/or folder similar documents together for presentation to a human reviewer in logical groupings. These technologies have demonstrated the potential to both speed the human review process and enhance quality and consistency of the human review by allowing the reviewers to analyze related documents together. When used properly, reviewers are

able to make more consistent calls about a particular issue because most documents related to that issue will be reviewed at or about the same time.

[D] Statistical Enhancement with Pattern-Matching

Statistical enhancement with pattern-matching technologies takes advantage of statistical methods, artificial intelligence algorithms, and human processes to recognize documents related to specified topics, based upon the probability of occurrence of words determined to be relevant to the topic. Probabilities can be calculated by associating a human-assigned document topic with words that are likely to occur in a document related to the topic. In some technologies and processes, relevance judgments are used to create a judgment or probability matrix of words as relevant to identified topics.

A simple example would be text that has been assigned the topic baseball likely would have large numbers of occurrences of the words "ball," "bat," "hit," "field," "strike," etc. Thus, when searching for the topic "baseball" in unreviewed documents, documents with high numbers of the associated words will be recognized as being about "baseball." Such documents can be retrieved from a document database and automatically coded as relevant to the topic "baseball."

Some technologies/processes deploy a method to find more documents that are similar to a human-reviewed document. Users may be able to use complex search terms or even text to search the database of unreviewed documents for more documents similar to the reviewed document. The retrieved documents can then be coded manually or automatically in the same manner as the reviewed document.

English words can have multiple meanings, and the problem of word-meaning ambiguity is significant. Word-meaning ambiguity can lead to poor relevancy and completeness results, in pattern-match searching, thesaurus-enhanced searching, and in some statistically based search algorithms. Experience indicates, however, that these advanced technologies are more feasible, cost-effective, and accurate with large volumes of documents than a human review.

[e] Document Review Under the GDPR

As mentioned above in Section 3.01[2], the EU recently reformed its data protection regulations. The new General Data Protection Regulation (GDPR) took effect on May 25, 2018. The GDPR applies to all "processing" of "personal data" of EU citizens and residents ("data subjects"). The GDPR defines "personal data" as "any information relating to an identified or identifiable natural person." This definition covers work email addresses, phone numbers, email messages, and, in general, anything that can be tied to a "data subject." The GDPR limits collecting and "processing" of personal data of EU data subjects. There is no exception for EU data subjects employed by U.S. companies.

In general, the GDPR prohibits processing or transferring of personal data to a non-EU country that does not offer "adequate protection" for the personal data without the clear, verifiable, and revokable consent of the data subject. The GDPR includes exceptions to this prohibition on processing and transfer, including the "establishment, exercise or defence of legal claims." But the scope and effectiveness of these exceptions is not yet established.

Obligations under the GDPR follow the personal data. Any company (or law firm) that discloses personal data to a third party may be liable if that third party violates the GDPR. In litigation, for example, this rule may apply to opposing counsel, co-counsel, e-discovery providers, and experts, among others.

Generally speaking, if a client controls personal data subject to the GDPR, determining whether that personal data is in-scope for discovery is a first step in shaping discovery responses. If the client does control personal data subject to the GDPR, the next step is to define the scope of the issue by answering these questions:

(a) Where and in what format does the personal data reside?

(b) How much personal data is implicated?

(c) What are the client's GDPR compliance policies?

(d) Who is the client's Privacy (Compliance) Officer responsible for the personal data?

(e) Does the client have EU privacy counsel?

This information will shape the GDPR compliance plan.

Further, early in discovery, determine whether securing data custodians' consent to processing and transfer is advisable. Consent documents should precisely describe the personal data and any potential onward transfer. In addition, when imposing a litigation hold, find out whether EU data subject custodians have requested deletion of or access to their personal data. If they have, and their request has been acted on, that may have implications for document preservation. Similarly, a comprehensive litigation hold should address requests for deletion of or access to personal data.

As the parties move past the scheduling conference and into discovery, staged or phased discovery may be desirable. Depending on the case, it may be possible to defer production of EU personal data until key milestones have passed. Most importantly, EU personal data should not be produced until a protective order is in place. But staging based on procedural milestones may be appropriate as well. For example, after class certification or after a plaintiff's claims have survived summary judgment. Whenever EU personal data is produced, the producing party should seek a protective order or electronic discovery protocol that allows for special protection of the personal data. For example, data security requirements for the receiving party and its vendors and experts are desirable, as are requirements that the data be encrypted both in transit and at rest. Where possible, seek agreement that the personal data can be anonymized. Breaking the link between the data and identifiable data subjects would avoid most GDPR issues. But anonymization may not be appropriate in all cases

[8] Form of Production

In order to determine the appropriate form of production for a particular matter, numerous considerations should be balanced. Rule 34 governs the form, and, as a default, requires electronically stored information to be produced as it is ordinarily maintained in the normal course of business.[104] The form of production for a particular case essentially is a question of relevance, because the appropriate form depends on the information being sought.[105] For example, in some cases, only the information as it appeared on the computer screen may be relevant. In other cases, though, metadata

may contain relevant information, and changes to the document may be essential to a case.[106] Further, different forms of production may be appropriate for different discovery requests within the same case. Only the parties know the appropriate form of production for all aspects of their case. Therefore, the parties should meet and confer and agree on such matters rather than leaving the decision to a judge.[107] Four main forms of production are paper,[108] TIFF,[109] native,[110] and searchable PDF.[111]

[a] Paper

Production in paper format in the "e-data world" is basically a lost cause. Paper format production remains somewhat viable in very small productions (e.g., less than 5,000 pages). However, the prevalence of ESI makes such a production a rare occurrence.[112] The amount of electronic data created and stored is growing by 60% each year and by 2011, it is estimated there will be 1,800 exabytes of electronic data in existence (an exabyte is equal to 1 billion gigabytes).[113] For an illustration of the vast quantities of information that must be examined in a typical litigation, one need look no further than the standards of measure. A humble floppy disk can hold up to 1.44 megabytes, the equivalent of 720 typewritten pages of plain text. A CD-ROM can hold up to 650 megabytes, or 325,000 typewritten pages. One gigabyte, or 1,000 megabytes, is the equivalent of 500,000 typewritten pages. Backup tapes can be measured in terabytes. One terabyte can hold up to 500 billion typewritten pages. Any document production involving 500 billion typewritten pages is a fruitless endeavor.

[b] TIFF

Production in TIFF format presents numerous advantages, and is the form favored by many. Among the advantages are:

(1) TIFF files cannot be inadvertently modified when producing and reviewing them;

(2) ability to Bates Number (sequentially number) the documents in the production;

(3) TIFF files are readily compatible with common document review systems used by attorneys, including Ringtail™;

(4) TIFF files can be easily and readily searched during attorney review; and

(5) attorney-client privilege information can be easily redacted from TIFF files.

TIFF is perhaps the most secure and most user-friendly form of production, as related to "common" discovery requests.

One downside to production in TIFF format, though, is that all of the information that exists in native files may not be captured, such as certain metadata fields. However, the advantages of production in TIFF far outweigh any disadvantages.

[c] Native

Many of the advantages of TIFF production can be listed as disadvantages of native file production. For example, native format files are altered merely by opening the files, which creates authentication, security, and integrity issues.[114] Inadvertent modification

of native files during the review and production process is highly possible, as well. Native files cannot be Bates numbered, and removing privileged information is much more challenging than in TIFF format. Native file format is not as conducive to searching during attorney review as is TIFF. Review in native file format may also be more costly, because, for example, vendor processing is required to extract metadata, to stage native files for review, and to explode email archive files (.pst, .nsf).

Despite the many perceived advantages of TIFF as compared to native file production, a party may still demand production in native format when propounding discovery requests. Initial native file review and subsequent conversion of responsive files to TIFF may be a good compromise when parties disagree about the form of production. Ultimately, the form of production is an issue over which parties should agree outside of the judge's presence.

[d] Searchable PDF

A searchable PDF ("PDF") file is a scanned document that has been processed via optical character recognition, and the entire file can be searched for occurrences of a word or phrase. PDF files provide similar advantages to TIFF files: (1) easily searchable; (2) more secure than native format, as the image presented in PDF form is static; (3) Bates numbering capabilities; and (4) redaction capabilities.

[9] Shifting the Costs of e-Discovery

It is presumed that the responding party must bear the expense of complying with discovery requests.[115] Rule 26(c) of the Federal Rules of Civil Procedure gives federal courts discretion to issue an order to protect the responding party from undue burden or expense by "conditioning discovery on the requesting party's payment of the costs of discovery."[116] The factors to be considered by the court before exercising its cost-shifting discretion are:

(1) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(2) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(3) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.[117]

An order shifting costs may only be granted on the motion of the responding party and for "good cause" shown.[118] Additionally, some courts have suggested that the burden of proof is on the responding party when cost-shifting is being sought as a remedy.[119]

[a] The *Rowe Entertainment* Test

The world of electronic data has changed the discovery playing field, making it a place where a production can require thousands of hours to retrieve and review data,

incurring monetary costs in the stratosphere. As a result, courts have sought to develop a test that determines the circumstances in which costs can be shifted and the proportion of the cost to be shifted to the requesting party.[120]

In the *Rowe Entertainment* case, the court developed an eight-factor test for cost-shifting.[121] The factors are:

- the specificity of the discovery requests;
- the likelihood of discovery of critical information;
- the availability of such information from other sources;
- the purposes for which the responding party maintains the requested data;
- the relative benefit to the parties of obtaining the information;
- the total cost associated with production;
- the relative ability of each party to control costs and its incentive to do so; and
- the resources available to each party.[122]

[b] The *Zubulake* Test

In 2003, the court in *Zubulake v. UBS Warburg*, while acknowledging that the *Rowe* test had served as the "gold standard" in cost-shifting cases, argued that the test was incomplete.[123] Specifically, the *Rowe* test was criticized for failing to include factors required by current Rule 26(b)(2)(c)(iii) of the Federal Rules of Civil Procedure, which called for "consideration of 'the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.'"[124] In order to repair these omissions, the *Zubulake* court created a new seven-factor test:

(1) the extent to which the request is specifically tailored to discovery information;

(2) the availability of such information from other sources;

(3) the total cost of production, compared to the amount in controversy;

(4) the total cost of production, compared to the resources available to each party;

(5) the relative ability of each party to control costs and its incentive to do so;

(6) the importance of the issues at stake in the litigation; and

(7) the relative benefits of the parties obtaining the information.[125]

Further, the court explained that not all of the factors were to be given the same weight in terms of importance.[126] The first two factors were deemed the most important, with the next three factors ranking next in importance. Factor six will rarely come into play, but, when it does, it has the potential to be the dominant factor. Factor seven was deemed the least important consideration.[127]

The court further qualified the consideration of cost-shifting. It found that before the test is even applied, there are two other areas of consideration, creating a three-step analysis in determining cost-shifting. The first step is to look at the format of the discovery. If the information is in an accessible form, the usual rules of discovery apply

with the responder paying costs. In the court's words, "[a] court should consider cost-shifting *only* when electronic data is relatively inaccessible, such as in backup tapes." (emphasis in original)[128]

The second step of analysis is to determine which data may be found on the inaccessible media.[129] The court suggested requiring the producing party to restore and produce a sample. Only after these two steps of analysis have been taken is the seven-factor test to be applied.[130]

In a subsequent case involving the same parties, the court had to decide how much of the cost should be shifted and did so by applying the seven-factor test and determining which factors did or did not favor shifting costs.[131] In this particular instance, the court found the first four factors weighed against cost-shifting, factors five and six were neutral, and factor seven favored cost-shifting.[132] Because the application of the factors was deemed to be only slightly against cost-shifting, the court found that some cost-shifting was appropriate.[133] The court noted that the amount shifted could not be so much that it impeded the rights of litigants to bring a viable claim.[134]

[c] Sedona Guidelines

The Sedona Conference is a nonprofit research and educational institute dedicated to the advanced study of law and policy in the areas of antitrust law, complex litigation, and intellectual property rights.[135] In 2004, as part of its Working Group Series, the Conference issued a set of principles for electronic document production.[136] These Sedona Guidelines differ from Rule 26(b)(2) provisions. Under Rule 26(b)(2), a court may, for example, on a showing of good cause by the requesting party, order discovery of inaccessible information, leaving the responding party with the cost burdens associated with such a production.[137] However, under the Sedona Guidelines, "[i]f the data or formatting of the information sought is not reasonably available to the responding party in the ordinary course of business, then, absent special circumstances, the costs of retrieving and reviewing such electronic information should be shifted to the requesting party."[138] The comments provided in the Guidelines show that only extremely special circumstances should prevent cost-shifting in burdensome cases.[139] The Guidelines urge cost-shifting when production costs are extraordinary.[140]

The Guidelines' commentary points out that "cost-shifting cannot replace reasonable limits on the scope of discovery."[141] Courts should not use cost-shifting as an alternative to sustaining a responding party's objection to undertaking unreasonable ESI preservation and production methods.[142] Courts should "discourage burdensome requests that have no reasonable prospect, given the size of the case, of producing material assistance to the fact finder."[143] The commentary recognizes the potential size, scope, and burden associated with large ESI preservation and production requests, and the fact that many such requests are highly unreasonable and will likely not further a case.[144]

[10] National e-Discovery Counsel: A Valued Member of the Litigation Team

When helping a business with e-discovery matters, a national e-discovery counsel team works to promote accuracy, consistency, and efficiency throughout the e-discovery life cycle. The team should, among other things:

(1) coordinate with in-house and outside counsel for defensibility and compliance with a company-wide litigation readiness program;

(2) develop an effective motion practice uniform for all cases involving ESI;

(3) develop and monitor case-specific e-discovery strategies; and

(4) identify and deploy technology and vendor solutions best suited to case needs.

A national e-discovery counsel strives for consistency in all matters in the areas of litigation hold procedures, compliance checks, defensibility and proof kits, and experts. "Regular" litigation counsel may not have the time or experience to provide effective and efficient service and advice on e-discovery matters, which is why a team specifically devoted to such issues can greatly benefit a company. Businesses should be aware of the latest developments in e-discovery, including vendor selection, technology solutions, and developing case law. National e-discovery counsel can promote such an awareness for the business and help educate and provide support for employees on records retention and e-discovery matters.

§ 3.03 Management of e-Data in Litigation

[1] Effective and Defensible Litigation Hold Procedures

When litigation, government investigations, or third-party subpoenas are pending or reasonably anticipated, a legal duty arises to preserve potentially relevant evidence and suspend routine disposition practices.[145] The obligation to preserve arises when a party has notice, either actual or implied by the circumstances, that material in its custody or control is relevant to reasonably anticipated litigation involving that party.[146] This legal duty is separate from the obligation to retain business records pursuant to the company's document retention program, because this duty requires that all relevant materials be preserved, regardless of whether they constitute records.[147] For example, an email exchange from one employee commenting on another's dress usually is not a business record. However, if a litigation hold were in place because of a sexual harassment lawsuit, such an email would have to be preserved.

The duty to preserve electronic evidence may attach before litigation begins and there are sanctions for the failure to preserve that evidence.[148] "The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation."[149] Anyone who anticipates being a party or is a party to a lawsuit must not destroy unique, relevant evidence:[150]

> "Sanctions may be imposed against a litigant who is on notice that documents and information in its possession are relevant to litigation, or potential litigation, or are reasonably calculated to lead to the discovery of admissible evidence, and destroys such documents and information. While a litigant is under no duty to keep or retain every document in its possession once a complaint is filed, it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery request."[151]

When a party reasonably anticipates litigation, a company must suspend its routine record retention program and issue a written litigation hold.[152] The party should take reasonable steps to preserve potentially relevant documents.

A preservation notice should be issued when a concrete set of facts and circumstances would lead to a conclusion that litigation or an investigation is imminent or should otherwise be expected. One recommendation is that companies implement a process by which they anticipate such circumstances and evaluate them to determine whether routine disposition practices should be suspended.[153] The legal department should have a separate checklist of circumstances by which it considers whether a preservation obligation has been triggered, the steps needed to identify the scope of the obligation, and the measures that must be followed to meet the obligation.[154]

The notice should be issued to all "key players," that is, those individuals likely to control, possess, or have access to relevant materials or information about the matter.[155] Thus, the company must identify the persons who should receive the preservation notice. Reasonable efforts should be made to reach appropriate custodians of affected records and individuals who may have other relevant materials.[156]

When determining who should issue the preservation notice, courts generally place much responsibility on a company's senior management.[157] Courts have found companies at fault when senior management failed to communicate preservation notices or failed to take an active role in establishing the company's records retention policy, which should include preservation notice and litigation hold procedures and guidelines.[158] And counsel appears to have an affirmative duty to ensure that corporate senior management does its job. As noted in *Zubulake V*, "[a] party cannot reasonably be trusted to receive the 'litigation hold' instruction once and to fully comply with it without the active supervision of counsel."[159] Six years later, the Second Circuit reiterated this duty, sanctioning plaintiffs in part for placing preservation decisions in employees' hands without adequate counsel supervision.[160] The court then noted that not every employee would require hands-on attorney supervision, but that attorney oversight of the process is important.[161]

When issued, the preservation notice should inform an entity's personnel about the need to preserve relevant materials. The notice should include enough factual information about the pending or potential lawsuit, investigation, or subpoena for recipients to determine whether they possess potentially relevant materials. The notice also should describe the types of materials to be preserved and alert recipients to the potential ramifications of noncompliance with the notice. When considering what is necessary to meet discovery obligations, the entity should avoid issuing overly expansive preservation notices, which impose unnecessary and costly burdens and can complicate and even impair the preservation and collection of relevant materials. Preservation notices should be tightly crafted to fulfill all legal obligations while avoiding any added costs and burdens.

[2] Computerized Litigation Repositories to Manage Documents, Depositions, and Images

Computerized litigation repositories are often used to manage documents, depositions, and images in complex litigation cases. Such repositories help yield the greatest efficiency in managing a complex litigation case.

[a] Imaging Paper Documents: Justifying the Expense

Although imaging paper documents for inclusion in a litigation database may seem costly, the process saves users money in the end and allows for more efficient and effective management of a case. To populate a database, hard copy documents must first be scanned. The scanning process only creates a digital image of the physical paper. Thus, in order to achieve full text search capabilities, the scanned documents must undergo an OCR (Optical Character Recognition) process. An example of the cost of such a process is

(a) 1box = 2,500 pages;

(b) 2,500 pages per box = 625 documents per box (assuming an average of four pages per document);

(c) scanning = $.12 per page;

(d) OCR = $.05 per page;

(e) coding = $.74 per document;

(f) scanning and OCR = $425 per box (scanning, OCR, and coding = $887.50 per box).

Imaging documents can become costly. However, such costs are justified when considering the potential benefits, such as the fact that coding, filtering, and de-duplicating will reduce attorney review time. Once documents are imaged, attorney review can occur from any location, not simply in an office conference room. The ability to work with imaged files also aids trial tactics, because visual aids can be easily created from imaged files. When analyzing whether to image documents, a cost-benefit analysis should be performed, because such an analysis will likely show that imaging paper files not only saves money, but also provides for successful case management.

[b] General Evaluation of Litigation Databases

In general, litigation databases come with many features and potential service elements. For example, some databases are Web-based document repositories, while others do not serve as a collaborative platform for users in several locations. When trying to find the database best suited to a particular case, many features should be considered. Data security may be one of the most important considerations, because a case may become compromised after a breach in security. Web-based repositories should be located securely behind a firewall with access to case information and documents granted on a user-specific basis. All users may not have access to all data. At the same time, the database should remain easily accessible. Web-based repositories, for example, allow for easy access on the Internet. When no Internet access is available, the entire electronic case file can be duplicated onto a standalone laptop. Other key features include a fully searchable index, and the ability to Bates number documents, group related documents, highlight and extract relevant information from documents, and provide general efficient and effective case management of the documents.

[c] Use of Non-Law Firm Vendors

The two main categories of vendors that work with computerized litigation repositories are (1) data collection and processing vendors and (2) other litigation support-related

service vendors.[162] Together, the vendors will, among other services, help manage the data, process various file types, assist with data filtering, assist with keyword/phrase taxonomy, provide scanning and OCR services, code documents, and help organize the files.[163] Again, finding a vendor with adequate data security, with efficient and responsive support staff and project managers, and who produces quality work product will best benefit the litigation project.

[3] Project Management

A good e-discovery process is important, but it is only a starting point for a successful e-discovery project. Sound project management is critical to the success of any e-discovery project. In managing the e-discovery process it is important to consult, communicate, coordinate, measure, adjust, and document.

[a] Consult

The project manager should consult with members of the team, including IT, to develop an initial assessment of the project. The manager should also work with the stakeholders to define the specifications and scope of the project. During this consultation period, the initial opportunities for technical and operational efficiencies should be identified. Potential issues that might arise in the project should also be identified.

[b] Communicate

The project manager should establish formal and informal lines of communication and set communication boundaries. Emergency communication processes should also be established.

[c] Coordinate

During this phase of the project, any acquisitions should be planned. Training needs of the review team should be discussed and any training should be scheduled. Planning and reporting meetings should also be scheduled.

[d] Measure and Adjust

During the project, the scope of the project should be reviewed and adjustments should be made if the scope has been expanded or reduced. The project manager should also determine if the number of reviewers and the review tools are adequate. Depending on whether the scope or the resources have changed, the budget and timeline should be reviewed and adjusted properly.

[e] Document

Every phase of the project should be properly documented. Operational, legal, and client reports should be drafted at every phase of the project. A final report should also be drafted at the end of the project. Proper documentation will ensure that the processes and the project are defensible in court if ever questioned. Proper documentation can also be used to evaluate the success of the processes used and of the project as a whole. It can also be used to plan for future projects.

§ 3.04 The Ethics of e-Discovery: What Is Reasonable and Defensible?

The proliferation of electronically stored information (ESI) in today's business world poses new ethical challenges and risks for attorneys. In order to avoid judicial sanctions, ethical violations, and malpractice claims, attorneys need to understand the intricacies involved with ESI and propounding and requesting such evidence during discovery.[164]

First, counsel must be competent. Some jurisdictions impose a duty of e-discovery competence directly, through ethics opinions.[165] But even without a formal opinion, all states' ethics rules require attorneys to educate themselves and their clients about e-discovery issues, because courts hold counsel to very high standards when e-discovery issues arise.[166] For example, clicking on the single version of a file can change its access data. Therefore, a copy of the file should be made before opening it. Second, an attorney's duty of candor requires that she avoid making false statements to the court, which can easily occur without a proper understanding of a client's IT system and ESI preservation and production procedures.[167] Third, an attorney must be fair. He must ensure the preservation of discoverable ESI and avoid raising frivolous discovery demands and production issues.[168] Ultimately, counsel wants to avoid spoliation claims against a client, which could result in sanctions imposed upon the attorney.

Attorneys in this e-discovery age face numerous ethical dilemmas, such as clients being forced to disclose privileged communications regarding the preservation of electronic records, attorneys becoming witnesses regarding such communications, and clashing interests between attorney and client during discovery disputes.[169] E-discovery and ethics converge most notably in the area of data preservation, as spoliation claims and sanctions are frequent issues presented before courts today. It is important that counsel oversee and monitor clients' compliance with discovery obligations.[170] "Counsel must oversee compliance with the litigation hold, monitoring the party's efforts to retain and produce the relevant documents. . . . [C]ounsel must become fully familiar with her client's document retention policies, as well as the client's data retention architecture. . . . [C]ounsel must also make sure that all backup media which the party is required to retain is identified and stored in a safe place."[171] In sum, counsel has a continuing duty to ensure that all sources of discoverable information were properly preserved and produced.[172]

Notes

[1] Eric B. Evans is a partner in the Litigation & Dispute Resolution practice in Mayer Brown's Palo Alto office and he is also the West Coast co-chair of the firm's Electronic Discovery & Information Governance practice.

[2] Zasio Enterprises, *Versatile Retention 7 User Manual* 3 (2007).

[3] *See, e.g.,* 29 U.S.C. § 211; 29 U.S.C. § 1027.

[4] *See, e.g.,* 29 C.F.R. § 516.5; 29 C.F.R. § 1602.14.

[5] *See, e.g.,* Cal. Corp. Code § 1501; *Colo.* Rev. Stat. § 7-116-101; 12 N.Y. Comp. Codes R. & Regs. § 142-2.6; Wash. Rev. Code § 296-17-35201.

[6] IRS Rev. Proc. §§ 91-595.01, 5.06.

[7] National Fire Protection Association 59A: Standard for the Production, Storage, and Handling of Liquefied Natural Gas (LNG) § 6.6.2.

[8] *See generally,* Donald S. Skupsky, *Recordkeeping Requirements: The First Practical Guide to Help You Control Your Records . . . What You Need to Keep and What You Can Safely Destroy!* (1989).

[9] *See generally id.*

[10] Arthur Andersen LLP v. United States, 544 U.S. 696 (2005).

[11] *Id.*

[12] *Id.*, 544 U.S. at 704.

[13] *Id.*

[14] Broccoli v. Echostar Commc'ns Corp., 229 F.R.D. 506, 510 (D. Md. 2005).

[15] *Id.*

[16] Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., No. 502003CA005045XXOCAI, 2005 WL 679071 at *1 (Fla. Cir. Ct. Mar. 1, 2005), *amended*, 2005 WL 4947328 (Fla. Cir. Ct. Mar. 1, 2005). *See also, e.g.,* In re Refco Securities Litigation, 759 F. Supp. 2d 342 (S.D.N.Y. 2011) (holding certain emails not discoverable because irrelevant, privileged, and protected work product).

[17] Lori Ashley, Bryant Duhon & Robert F. Williams, *Winning with Electronic Records Management* (2004) (supplement pamphlet to AIIM E-Doc Magazine); Carl D. Liggio, James G. Derouin & J. Edwin Dietel, *After the Storm: A Post-Enron Look at Document Retention Policies*, 20 No. 8 ACCA Docket 27 (2002).

[18] *See* Mark G. Milone, *Information Security Law: Control of Digital Assets* (Law Journal Press 2006); Charlene Brownlee & Blaze D. Waleski, *Privacy Law* (Law Journal Press 2006).

[19] 15 U.S.C. §§ 1681 *et seq*.

[20] 15 U.S.C. § 45.

[21] Health Insurance Portability & Accountability Act of 1996, Pub. L. No. 104-191, 104th Cong., 42 U.S.C. §§ 201 *et seq.*

[22] 15 U.S.C. §§ 6801 *et seq*.

[23] 15 U.S.C. §§ 6501 *et seq*.

[24] *See, e.g.,* Cal. Civ. Code §§ 1798.80 *et seq*.; Conn. Gen. Stat. Ann. § 36a-701b.

[25] *See, e.g.*, 815 Ill. Ann. Stat., Ch. 530, § 10.; Minn. Stat. Ann. § 325E.61.

[26] Cal. Civ. Code §§ 1798.100 *et seq*.

[27] *See* Sarah Gordon, *Privacy: A Study of Attitudes and Behaviors in the US, UK and EU Information Security Professionals*, Symantec Security Response White Paper (2003), https://www.symantec.com/avcenter/reference/privacy.attitudes.behaviors.pdf.

[28] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Official J. of the European Communities of 23 November 1995 No L. 281 p. 31, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:EN:HTML (last visited Nov. 4, 2019).

[29] https://eur-lex.europa.eu/eli/reg/2016/679/oj/eng.

[30] *See* Official Journal of the European Union, L 119, May 4, 2016, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2016:119:TOC.

[31] *See* The Sedona Conference®, *Best Practices for the Selection of Electronic Discovery Vendors: Navigating the Vendor Proposal Process*, at 20 (July 2005).

[32] Fed. R. Civ. P. 30(b)(6) provides that a party may name "as the deponent a public or private corporation, a partnership, an association, a governmental agency. . . . The persons so designated must testify as to matters known or reasonably available to the organization." The 30(b)(6) witness deposition is becoming a common technique of adversaries to large data-producing entities.

[33] *See* The Sedona Conference®, *supra* note 31, at 21.

[34] *See id.*

[35] *2015 Year-End Report on the Federal Judiciary* (Dec. 31, 2015), https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf.

[36] Other Federal Rules of Civil Procedure amended as part of the 2015 amendments include Rule 4 (summons), Rules 30, 31, and 33 (depositions and interrogatories), and Rule 55(c) (setting aside final default judgments).

[37] Robertson v. People Mag., No. 14-cv-6759 (PAC), 2015 WL 9077111, at *2 (S.D.N.Y. Dec. 16, 2015); *see also* Vay v. Huston, No. 14-cv-769, 2016 WL 1408116, at *5 (W.D. Pa. Apr. 11, 2016) (holding that it was "mindful" of the recent changes and "particularly regarding proportionality" and stating that "[a]mong the considerations a Court must now consider are: (1) the importance of the issues at stake in the action; (2) the amount in controversy; (3) the parties' relative access to relevant information; (4) the parties' resources; (5) the importance of the discovery in resolving the issues; and (6) whether the burden or expense of the proposed discovery outweighs its likely benefit") (citing Fed. R. Civ. P. 26(b)).

[38] Fed. R. Civ. P. 37(e).

[39] Fed. R. Civ. P. 37(e) advisory committee's note to 2015 amendment.

[40] *See* Fed. R. Evid. 502(b).

[41] Fed. R. Evid. 502(a)(1)–(3); Report of the Advisory Committee on Evidence Rules (May 15, 2006).

[42] *Id.*

[43] Fed. R. Evid. 502(b).

[44–45] Fed. R. Evid. 502(c).

[46] Fed. R. Evid. 502(e).

[47] *See, e.g.,* Carter v. Gibbs, 909 F.2d 1450 (Fed. Cir. 1990), *superseded by statute sub nom*, In re EchoStar Commc'ns Corp., 448 F.3d 1294 (Fed. Cir. 2006).

[48] *See* Fed. R. Evid. 502(b).

[49] Fed. R. Evid. 502(a)(1)–(3); Report of the Advisory Committee on Evidence Rules (May 15, 2006).

[50] *Id.*

[51] Fed. R. Evid. 502(b).

[52–53] Fed. R. Evid. 502(c).

[54] Fed. R. Evid. 502(e).

[55] *See, e.g.,* Eisenberg v. Gagnon, 766 F.2d 770 (3d Cir. 1985), *superseded by rule*, Mielo v. Steak 'n Shake Operations, Inc., 897 F.3d 467 (3d Cir. 2018); Corey v. Norman, Hanson & DeTroy, 742 A.2d 933 (Me. 1999).

[56] *See, e.g.,* State *ex rel.* Allstate Ins. Co. v. Gaughan, 508 S.E.2d 75 (W. Va. 1998).

[57] *Id.*

[58] *See generally id.*

[59] *See, e.g.,* Texaco Puerto Rico, Inc. v. Dep't of Consumer Affairs, 60 F.3d 867 (1st Cir. 1995); *Carter*, 909 F.2d at 1450.

[60] Fed. R. Civ. P. 26(b)(5).

[61] *See* Hopson v. Mayor of Baltimore, 232 F.R.D. 228, 235 (D. Md. 2005).

[62] *Id.*

[63] *Id.* at 241–245.

[64] *U.S. Deputy Attorney General Paul J. McNulty Revises Charging Guidelines for Prosecuting Corporate Fraud*, Dep't of Justice (Dec. 12, 2006), http://www.usdoj.gov/opa/pr/2006

/December/06_odag_828.html. The memo is so named for then U.S. Deputy Attorney General Paul McNulty who issued it. The McNulty Memo superseded the Principles of Federal Prosecution of Business Organizations, also known as the Thompson Memo, which had much looser rules for getting waivers of privileged corporate information. The Thompson Memo came under severe constitutional attack in United States v. Stein, 435 F. Supp. 2d 330 (S.D.N.Y. 2006). As a result, the Department of Justice changed the rules by promulgating the McNulty Memo.

See, e.g., United States v. Balsiger, No. 07-CR-57, 2010 WL 3239340 (E.D. Wis. June 5, 2010) (discussing Thompson and McNulty Memos and rejecting defendants' contention that Thompson and McNulty memoranda had intended effect of forcing corporations to waive attorney-client and work product privileges against their will in order to avoid financial ruin).

[65] Diversified Industries v. Meredith, 572 F.2d 596, 611 (8th Cir. 1978) (*en banc*).

[66] In re Martin Marietta Corp., 856 F.2d 619, 623 (4th Cir. 1988).

[67] Fed. R. Civ. P. 26(b)(2).

[68] Fed. R. Civ. P. 26(b)(2)(B).

[69] *Id.*

[70] The Sedona Conference®, *The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age*, at 91 (Sept. 2005), https://thesedonaconference.org/sites/default/files/publications/Guidelines%20for%20Managing%20Information%20and%20Records%20in%20the%20Electronic%20Age%202005.pdf.

[71] *Id.* at 91.

[72] *See* section 3.02[1] *supra.*

[73] Although an established backup tape rotation cycle only applies to disaster recovery tapes, companies should not overlook the fact that archival and off-line storage tapes should also be thoroughly addressed in separate records management policies.

[74] Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 218 (S.D.N.Y. 2003).

[75] *See* section 3.02[1][d] *supra*.

[76] *See* section 3.02[1] *supra*.

[77] Mary Mack, *A Process of Illumination: The Practical Guide to Electronic Discovery* 70 (2004).

[78] *See* section 3.02[5][a] *supra.*

[79] Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. 2003).

[80] Fed. R. Civ. P. 26(b)(2)(B) advisory committee's note to 2015 amendment.

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] "A responding party may satisfy its good faith obligation to preserve and produce potentially responsive electronic data and documents by using electronic tools and processes, such as data sampling, searching, or the use of selection criteria, to identify data most likely to contain responsive information." The Sedona Conference®, The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production, at viii (Jan. 2004).

[86] *Id.; see also Zubulake*, 217 F.R.D. at 324; Tulip Computs. Int'l B.V. v. Dell Comput. Corp., No. CIV.A. 00-981-RRM, 2002 WL 818061 (D. Del. Apr. 30, 2002); Yingling v. eBay, Inc., No. C 09-01733 JW (PVT), 2010 WL 373868 (N.D. Cal. Jan. 29, 2010) (producing party asserted that document request would require it to review and categorize all communications between company and its more than 88 million active users over a period of four years, i.e., hundreds of millions of records, making such request overly burdensome;

court found, however, that discovery was relevant and company neglected to state whether it was possible for it to formulate search queries to search its multiple proprietary systems, thus narrowing scope of responsive documents; court thus ordered parties to further meet and confer on producing party's capabilities (or lack thereof) to respond to document requests and to determine whether production of sampling of responsive documents would be appropriate); McPeek v. Ashcroft, 202 F.R.D. 31 (D.D.C. 2001)*; cf.*, In re Amsted Indus., Inc. "Erisa" Litigation, No. 01 C 2963, 2002 WL 31844956 (N.D. Ill. Dec. 18, 2002).

[87] *See* The Sedona Conference®, *supra* note 85, at 28 cmt. 6.d.

[88] *Id*; *see generally* The Sedona Conference®, *supra* note 31.

[89] The Sedona Conference®, *supra* note 31, at 2.

[90] *Id*. at 5–9.

[91] *Id.* at 5–6.

[92] *Id.* at 11

[93] *Id.*

[94] *Id*. at 11–12.

[95] *Id*. at 12.

[96] *Id.* at 6–7, 10–12.

[97] *Id*. at 6, 11, 13–14.

[98] *See generally* Julie Triedman, *Temporary Solution*, The Am. Lawyer (Sept. 1, 2006), https://www.law.com/almID/900005461461/Temporary-Solution/?slreturn=20191004174841.

[99] *See generally* Nicolas Economou, *Of Litigators and Butterflies: The Quest for a Quantum Leap in Large-Scale Document Review* , 6 Digital Discovery & E-Evidence: Best Practices and Evolving Law, No. 7 (July 2006).

[100] Triedman, *supra* note 98.

[101] *India to Grab 35K US Law Jobs by 2010*, The Economic Times (Sept. 2, 2005).

[102] *See generally* Zachary J. Bossenbroek & Puneet Mohey, *Should Your Legal Department Join the India Outsourcing Craze?*, ACC Docket 22, No. 9, 46–68 (Oct. 2004), https://www.acc.com/resource-library/should-your-legal-department-join-india-outsourcing-craze; *Law Firms Send Case Work Overseas to Boost Efficiency*, The Washington Times (Sept. 26, 2005), https://amp.washingtontimes.com/news/2005/sep/25/20050925-102112-4588r/; Geanne Rosenberg, *Offshore Legal Work Continues To Make Gains*, The Nat'l L. J. (Mar. 29, 2004).

[103] *Id*.

[104] *See* Fed. R. Civ. P. 34.

[105] Kenneth J. Winters, *Considerations for Selecting a Form of Production*, LexisNexis Applied Discovery (Summer 2004), www.lexisnexis.com/applieddiscovery/lawlibrary/whitePapers/ADI_FS_FormOfProduction_Withers.pdf.

[106] *Id*.

[107] *Id*.

[108] *See* section 3.02[8][a] *infra.*

[109] *See* section 3.02[8][b] *infra.*

[110] *See* section 3.02[8][c] *infra.*

[111] *See* section 3.02[8][d] *infra.*

[112] *See* Craig Ball, *Pitfalls and Protocols of EDD Production*, Law Tech. News (July 14, 2006), https://www.law.com/almID/1152781528932/?id=1152781528932.

[113] Lucas Mearian, *Study: Digital Universe and Its Impact Bigger Than We Thought: IT Organizations Will Need to Transform Their Existing Relationships with Business Units*,

Computerworld (Mar. 11, 2008), http://www.computerworld.com/s/article/9067639/Study_Digital_universe_and_its_impact_bigger_than_we_thought.

[114] Winters, *supra* note 105.

[115] Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978).

[116] *Id.* at 358; *see also* Spears v. City of Indianapolis, 74 F.3d 153, 158 (7th Cir. 1996) (trial court has "considerable discretion" in determining cost-shifting).Tibble v. Edison Int'l, No. CV 07-5359, 2011 WL 3759927 (C.D. Cal. Aug. 22, 2011) (court approved award to defendant of $530,000 for cost of producing 537,955 pages of electronic documents in response to plaintiffs' requests; award included cost of using expertise of computer technicians in unearthing computerized data).

[117] Fed. R. Civ. P. 26(b)(2)(C).

[118] Fed. R. Civ. P. 26(c)(1)(B).

[119] Zubulake v. UBS Warburg LLC, 216 F.R.D.280, 283 (S.D.N.Y. 2003); Wiginton v. CB Richard Ellis, Inc., 229 F.R.D. 568, 573 (N.D. Ill. 2004).

[120] *See, e.g.*, *Zubulake*, 216 F.R.D. at 314; Rowe Entm't, Inc. v. William Morris Agency, Inc., 205 F.R.D. 421 (S.D.N.Y. 2002); *McPeek*, 202 F.R.D. at 31.

[121] *Rowe Entm't*, 205 F.R.D. at 429.

[122] *Id.* In *Rowe*, the plaintiff made a broad request for production of emails, requiring the producing party to access its backup tapes. Using the above factors, the court in *Rowe* was able to determine that cost-shifting in that particular instance was appropriate. *Id.* at 433. Specifically, the court found the discovery requests were extremely broad, there was no evidence that the emails plaintiffs were seeking were likely to provide highly helpful evidence, there was no evidence the defendants accessed their backup tapes or deleted email in the normal course of business, the electronic data were of no benefit to the defense of the claim, the cost of discovery was substantial, and the plaintiffs had the power to control the costs by limiting the discovery requests. *Id.* at 430–432. *See also* Murphy Oil USA, Inc. v. Fluor Daniel, Inc., No. Civ. A. 99-3564, 2002 WL 246439 at *1 (E.D. La. Feb. 19, 2002) (using the *Rowe* test, cost-shifting was appropriate).

[123] *Zubulake*, 217 F.R.D. at 320.

[124] *Id.* at 321(quoting former Fed. R. Civ. P. 26(b)(2) (current Fed. R. Civ. P. 26(b)(2)(C)(iii)) (nonsubstantive language changes were made to this part of the Rule subsequent to the court's decision).

[125] *Id.* at 322.

[126] *Id.* at 323.

[127] *Id.*

[128] *Id.* at 324.

[129] *Id.*

[130] *Id.*

[131] *Zubulake*, 216 F.R.D. at 289.

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] *See* The Sedona Conference® at https://thesedonaconference.org/.

[136] The Sedona Conference®, *supra* note 85.

[137] *See* Fed. R. Civ. P. 26(b)(2).

[138] The Sedona Conference®, *supra* note 85, at 44.

[139] "Absent special circumstances, costs of electronic discovery involving extraordinary effort or resources to restore data to an accessible format should be allocated to the requesting

party. For example, restoring deleted data, disaster recovery tapes, residual data, or legacy systems may involve such extraordinary efforts or resources." *Id.*

[140] *Id.*; *see also* Thomas Y. Allman, *The Sedona Production Principles And The Proposed Federal Rules Addressing E-Discovery*, 2005 Fed. Cts. L. Rev. 3 (Feb. 2005).

[141] The Sedona Conference®, *supra* note 85, at 45.

[142] *Id.*.

[143] *Id.*; *see also* Stallings-Daniel v. Northern Trust Co., No. 01 C 2290, 2002 WL 385566 at *1 (N.D. Ill. Mar. 12, 2002) (denying request for discovery where "[n]othing in the documents produced justifies an intrusive and wholly speculative electronic investigation into defendant's email files").

[144] The Sedona Conference®, *supra* note 85, at 45.

[145] *See generally Zubulake*, 220 F.R.D. at 212; The Sedona Conference®, *supra* note 85, at 11.

[146] *See, e.g.*, Silvestri v. Gen. Motors Corp., 271 F.3d 583, 591 (4th Cir. 2001) ("The duty to preserve material evidence arises not only during litigation but also extends to that period before litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.") (citing Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1998)) (emphasis added); Wagoner v. Black & Decker (U.S.) Inc., Civ. No. 05-1537, 2006 WL 2289983, at *3 (D. Minn. Aug. 8, 2006) (same); Cedar Petrochemicals, Inc. v. Dongbu Hannong Chem. Co., 769 F. Supp. 2d 269, 289 (S.D.N.Y. 2011) (obligation to preserve arises when a party has notice that the evidence is relevant to litigation or should have known that the evidence may be relevant to future litigation); Rimkus Consulting Grp., Inc., v. Cammarata, 688 F. Supp. 2d 598, 612 (S.D. Tex. 2010) (same); Dillon v. Nissan Motor Co., 986 F.2d 263, 268 (8th Cir. 1993) (duty to preserve evidence exists when a party knows or should know that the evidence is relevant to imminent litigation); E*Trade Sec. LLC v. Deutsche Bank AG, 230 F.R.D. 582, 591 (D. Minn. 2005) (anyone who anticipates being party or is party to lawsuit must not destroy unique, relevant evidence that might be useful to an adversary); Fada Indus., Inc. v. Falchi Bldg. Co., L.P., 730 N.Y.S.2d 827 (N.Y. Sup. Ct. 2001) (noting that where a party is on notice that litigation is likely to commence, the duty to preserve evidence may arise prior to the filing of a complaint).

[147] *See Zubulake*, 220 F.R.D. at 212.

[148] *Id.*

[149] *Zubulake*, 220 F.R.D. at 212, 216. (internal citation omitted); *see also, e.g.*, Cacace v. Meyer Marketing (MACAU Commercial Offshore) Co., No. 06 Civ. 2938, 2011 WL 1833338 (S.D.N.Y. May 12, 2011) (sanctions are not warranted just because information is lost; evidence must be shown to have been "relevant"; "When evidence is destroyed in bad faith (i.e., intentionally or willfully), that fact alone is sufficient to demonstrate relevance" (quoting from Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 431 (S.D.N.Y. 2004)); however, when destruction is negligent, relevance must be proven by party seeking sanctions; relevant in this context means something more than probative enough to satisfy Fed. R. Evid. 401. Instead, party seeking adverse inference must adduce sufficient evidence from which reasonable trier of fact could infer that destroyed or unavailable evidence would have been of nature alleged by party affected by its destruction).

[150] Zubulake, 220 F.R.D. at 212, 216.

[151] *Id.* (internal citation omitted).

[152] Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec. LLC, 685 F. Supp.2 d 456, 466 (S.D.N.Y.2010), *abrogated on other grounds by* Chin v. Port Auth. of New York & New Jersey, 685 F.3d 135 (2d Cir.2012).(holding that after the final *Zubulake* opinion issued in 2004, the failure to issue a written litigation hold when the duty to preserve has attached supports a finding of gross negligence).

[153] The Sedona Conference®, *supra* note 70, at 43–44 cmt. 5.d.

[154] *Id.* at 43 cmt. 5.b.

[155] *Pension Committee*, 685 F. Supp. 2d at 465 (holding that after 2004, failure to identify all of the key players and to ensure that their electronic and paper records are preserved supports a finding of gross negligence); *Zubulake*, 220 F.R.D. at 212, 218; *see also Zubulake*, 229 F.R.D. at 432–434 ("To the extent that it may not be feasible for counsel to speak with every key player, given the size of a company or the scope of the lawsuit, counsel must be more creative. It may be possible to run a system-wide keyword search; counsel could then preserve a copy of each 'hit.' Although this sounds burdensome, it need not be. . . . The initial broad cut merely guarantees that relevant documents are not lost.").

[156] *Pension Committee*, 685 F. Supp. 2d at 465 (holding that failure to obtain records from *all* employees (some of whom may have had only a passing encounter with the issues in the litigation), as opposed to key players, likely constitutes negligence).

[157] *See, e.g.*, Danis v. USN Commc'ns, Inc., No. 98 C 7482, 2000 WL 1694325, at *1 (N.D. Ill. Oct. 23, 2000) (fining CEO $10,000 for destruction of documents despite fact that he had delegated the preservation task to in-house counsel).

[158] In *Zubulake*, 229 F.R.D. at 422, 439, the court ordered monetary sanctions and an adverse inference instruction for the willful destruction of emails presumed to be relevant. The court found that counsel had failed to communicate the litigation hold order to all the "key players" involved in the litigation and had not ascertained each of the key players' document management habits. This decision emphasized the need for counsel to communicate to the client its discovery obligations and to identify sources of discoverable information once that duty attaches. It also stressed the importance of issuing preservation notices and the need to reiterate regularly the obligation to preserve relevant information as well as the need for counsel continually to monitor compliance. Once counsel has taken these necessary steps, "the party is fully on notice of its discovery obligations."*; see* also In re Prudential Ins. Co. of Am., 169 F.R.D. 598, 604, 612, 614 (D.N.J. 1997) (requiring senior management to notify employees of the pending litigation, provide them with a copy of the court order, and advise them of their potential civil or criminal liability for noncompliance).

[159] *Zubulake*, 229 F.R.D. at 422, 433.

[160] *Pension Committee*, 685 F. Supp. 2d at 473 (holding that the litigation hold standard was not met because the instruction placed "total reliance on the employee to search and select what the employee believed to be responsive records without any supervision from counsel").

[161] *Id.* at 473 n.68.

[162] *See* The Sedona Conference®, *supra* note 31.

[163] *Id.*

[164] *The 'Bray & Gillespie' Saga Ends with an Incredible Story of a Phone Call*, e-Discovery Team (Jan. 12, 2010), https://e-discoveryteamtraining.com/section-5/sec-5-mod-j/; *see also* Model Rules of Prof'l. Conduct R. 1.1 (Am. Bar Ass'n 2019) ("competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation").

[165] *See, e.g.,* Ca. Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. 2015-193 ("Attorney competence related to litigation generally requires, among other things, and at a minimum, a basic understanding of, and facility with, issues related to e-discovery, including the discovery of electronically stored information.").

[166] *Id.*; *see generally Zubulake*, 229 F.R.D. at 422.

[167] *See* Model Rules of Prof'l. Conduct R. 3.3 (Am. Bar Ass'n 2019) ("a lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer").

[168] *See* Model Rules of Prof'l. Conduct R. 3.4 (Am. Bar Ass'n 2019) (discussing fairness to the opposing party and counsel and noting that "a lawyer shall not unlawfully obstruct another party's access to evidence").

[169] Marie L. Mathews & Brigitte M. Gladis, *Ethical Considerations in E-Discovery: Avoiding Malpractice Claims* (Apr. 11, 2018), https://www.law.com/njlawjournal/2018/04/11/ethical-considerations-in-e-discovery-avoiding-malpractice-claims/

[170] *Zubulake*, 229 F.R.D. at 422.

[171] *Id.* at 432–434.

[172] *Id.*

CHAPTER 4

Multidistrict Litigation (MDL)

Sarah Reynolds and Cristina Henriquez[1]

> "In an age of increasing skepticism regarding the use of class actions in our legal regime, the modern multidistrict litigation (MDL) process embodied in 28 U.S.C. § 1407 is emerging as the primary vehicle for the resolution of complex civil cases."
>
> The Honorable Eldon E. Fallon (2008)[2]

> "[T]he need to centralize and thus economize the pretrial aspects of related civil cases filed across the country has never been greater."
>
> The Honorable James F. Holderman (2012).[3]

In 1968, Congress passed the multidistrict litigation ("MDL") transfer statute, section 1407 of Judicial Code,[4] which codified procedures to enhance the efficient management of multiple related cases pending in different judicial districts by consolidating the cases before a single judge. While, for years, these procedures remained largely unused, the MDL device has become more prevalent and a vital means to resolve complex litigation. As one commentator succinctly put it, "MDL, once thought to be an obscure, technical device, has now become the centerpiece of nationwide mass tort litigation in the wake of the decline of the tort class action."[5] In this chapter, we introduce the federal MDL procedures and discuss a similar state regime; consider statistics and trends in MDL litigation; describe the Judicial Panel on Multidistrict Litigation (the

"MDL Panel" or "Panel") and the MDL process; examine arguments that parties may advance to the Panel and, as much as we can predict, the likelihood of success; discuss the MDL practice and appellate review; discuss the role of the transferee court and other related considerations; and consider whether the MDL process needs reforms.

§ 4.01 Introduction to Federal MDL Procedures and Litigation

In the early 1960s, federal courts attempted to manage multidistrict litigation on an ad hoc basis by transferring cases or assigning judges between districts. Then came the "Electrical Equipment Cases." After the criminal prosecutions of multiple electrical equipment manufacturers for price fixing, plaintiffs filed some 2,000 antitrust civil suits in 35 federal districts over a 12-month period.[6] For the most part, the cases involved many of the same parties and operative facts, and, therefore, massive duplication of pretrial discovery was looming. The Electrical Equipment Cases demonstrated that the procedural devices in existence at the time were inadequate to adjudicate this flood of cases in an effective way.[7] "Had some procedures not been developed to enable the courts to handle this massive litigation efficiently, these cases could have become so overburdening as to jeopardize the effective administration of the entire federal system."[8]

To address this threat, in 1962, Chief Justice Earl Warren established a Coordinating Committee for Multiple Litigation of the U.S. District Courts (the "Coordinating Committee"). The Coordinating Committee held frequent conferences with the judges handling the Electrical Equipment Cases and "recommended a national discovery program to replace independent discovery" in the different districts.[9] The judges successfully achieved consolidated pretrial proceedings through "cooperation and coordination."[10] While the judges were pleased with this result, the weaknesses of the Coordinating Committee became apparent. The process was inefficient, as often 30 or more district judges had to "coordinate their personal schedules to convene in one location to discuss problems and meet with counsel. In addition, the voluntary process hinged upon complete agreement among the judges."[11] It became clear that informal coordination between judges would not provide a long-term means to administer massive, complex multidistrict litigation.

Accordingly, Congress passed section 1407 to establish formal procedures for the efficient management of multidistrict litigation. A passage from a House Judiciary Committee report on the statute underscores this legislative intent: "The objective of the legislation is to provide centralized management under court supervision of pretrial proceedings of multidistrict litigation to assure the 'just and efficient' conduct of such actions."[12] The Coordinating Committee's work was a vital precursor to this legislation. Indeed, a key feature of section 1407 is its creation of the MDL Panel, an offshoot of the Coordinating Committee. As we discuss throughout this chapter, section 1407 empowers the Panel to decide whether to transfer multiple cases to a single judge for pretrial processes based on factors outlined in the statute and other criteria the Panel has developed through its decisions.

Notably, many of the bedrock legal principles governing the MDL Panel's operations are rooted in decisions made during the first two years after the passage of section 1407. Experience demonstrates that those early cases still exert significant influence on the MDL Panel's decisions, primarily because (i) the statute itself provides few details about when transfer is warranted; and (ii) the MDL Panel seems to consider much of

its decision-making to be so fact-bound and specific to the circumstances before it that prior common law decisions carry less precedential weight than one might expect.

§ 4.02 MDL Overview

Although this chapter focuses on the federal MDL rules, a number of states have enacted some version of statewide MDL procedures.[13] The following discussion of Illinois's multidistrict litigation practice serves as an example of state rules and procedures.

[1] State MDL Practice

Illinois Supreme Court Rule 384 became effective on November 1, 1990. Under this rule, the Illinois Supreme Court may "on its own motion or on the motion of any party," transfer to one court for "consolidated pretrial, trial, or post-trial proceedings" any actions pending in trial courts in different judicial circuits that involve "one or more common questions of fact or law."[14] The Illinois Supreme Court may use its transfer power if "consolidation would serve the convenience of the parties and witnesses and would promote the just and efficient conduct of such actions."[15] Rule 384's committee comment acknowledges that, while the Illinois rule was modeled after section 1407, there are distinct differences from the federal statute.[16] For example, unlike section 1407, Rule 384 allows for consolidation where actions raise common questions of law (as well as common questions of facts). Also, Rule 384 "provides for the transfer of the related cases, where appropriate, for trial or post-trial proceedings and not just for transfers for pretrial proceedings."[17] "Another major departure from the federal procedures set forth in section 1407 is that transfers in Illinois will be made by the supreme court and not a judicial panel."[18]

[2] Federal MDL Practice

On the federal side, the inquiry about whether to bring together multiple cases before a single judge for pretrial purposes under section 1407 commences either on the motion of a single litigant or, less often, by *sua sponte* order of the MDL Panel.[19] After initiation, the parties must file briefs directly addressing whether transfer is proper under the statute. If consolidation is contested, the MDL Panel will schedule an oral hearing, if requested, on its bimonthly hearing calendar. Hearings usually last between two and two-and-a-half hours. A typical load of 15 to 20 motion hearings on the calendar provides each lawyer a very brief time for oral argument.[20]

An MDL docket is created when the MDL Panel grants a section 1407 transfer, by issuing a "transfer order" and identifying the transferee court. All litigants in cases pending in districts outside of the transferee court will receive notice that the cases are being transferred to the transferee district. These cases, along with any cases already pending in the transferee court, make up the newly constituted MDL docket. As discussed in more detail in section 4.10, if the MDL panel learns of any other related cases (or "tag-along" actions), it issues a conditional transfer order ("CTO"). A CTO does not immediately result in transfer of the related actions; that occurs after the CTO becomes final—which takes at least seven days.[21] If a party files an objection to transfer within seven days, that party has additional time to brief the issue.[22] The MDL Panel will then consider whether the CTO should be made permanent. In virtually all instances, no objection to the CTO is entered, and the tag-along matter is swept into the MDL

docket after seven days. However, it is significant that the CTO does not become final immediately upon issuance because, in the interim, the court in which the matter was originally filed (the "transferor" court) retains jurisdiction over the case.

For both original matters and tag-along cases, the central question for advocates and the MDL Panel under section 1407 is whether cases filed in different federal district courts should be consolidated before a single federal judge to maximize efficient adjudication. If the MDL Panel concludes that efficiency warrants transfer, it assigns the cases to a single judge, the "transferee" court, for pretrial purposes. When pretrial matters are completed, the statutory scheme assumes that the transferred actions will be remanded back to the original "transferor" court, if the action is still pending. In practice, that rarely happens—"less than 3 percent of the cases ever exit the MDL court. Instead, most of the cases are either settled or resolved in the MDL proceeding, meaning that, as in most federal litigation, pretrial proceedings are the whole ballgame."[23]

§ 4.03 Prevalence of Multidistrict Litigation

[1] Requests for Transfer

Since 1973, parties have filed over 2,500 motions to transfer actions under section 1407.[24] The number of motions peaked in 2009 with 121, but the quantity has faded considerably most years since then—parties filed only 56 motions in 2018. The number of motions filed yearly has not been at its current level since the early 2000s.[25] Even though the number of requests for section 1407 consolidation has started to decline, the number of actions the Panel centralized has increased the past two years. For instance, the number of motions filed in 2015 and 2016 was, respectively, 82 and 73; the number of civil actions the Panel centralized in those years was 427 and 375, respectively. In contrast, parties, respectively, filed 59 and 56 transfer motions in 2017 and 2018, and the Panel consolidated 615 and 710 actions in those years.[26] The individual dockets in the MDLs generally don't comprise a huge number of cases. Of the active 248 MDL dockets as of September 2018, fewer than 60 have more than 100 pending actions and only a little more than 20 have 1,000 pending actions.[27]

[2] Parties Are Finding It Tougher to Win Motions to Transfer Under Section 1407

While the rate at which the MDL Panel granted requests for section 1407 transfers was quite high at one point, that is no longer so. In the 1970s, the grant rate on new dockets (as distinct from tag-along cases) was low, approximately 50%, though in some years the rate was much higher (85% in 1972).[28] But during the early 2000s, 67% to 87% of the transfer requests in new dockets were granted.[29] The tide has now shifted. For instance, looking at the five years between the beginning of 2014 and the end of 2018, plaintiffs filed 359 new motions to transfer and the Panel granted only 154—about 43%.[30] The type of cases centralized in MDLs has remained consistent. The Panel centralized 30 new MDLs in the 12-month period ending in September 1018. Twenty-one of the cases were evenly split among antitrust, products liability, and "miscellaneous" MDLs (including three data security breach dockets and a national prescription opiate docket). Sales practices and intellectual property MDLs totaled another seven. And the two remaining MDLs involved a contract dispute and a common disaster arising from the release of acidic, mine-impacted water.[31]

[3] The Majority of Actions Filed in Transferee Courts Are Terminated in Transferee Courts

The MDL Panel's statistics on MDLs show that, of the 626,916 civil actions consolidated in MDLs before October 2017, 477,732 were terminated and the only 16,598 were remanded to transferor courts.[32] In other words, a mere 3.4% of the actions were remanded. And during the 12-month period ending in September 2018, of the 46,188 civil actions in MDLs that year, 22,133 were closed, and only 130 cases were remanded to transferee courts.[33] That is less than 1% of cases.

§ 4.04 Factors for Granting a Section 1407 Transfer

Section 1407 enumerates three statutory factors for the MDL Panel to consider in deciding whether to grant a transfer—i.e., whether the actions the moving party seeks to centralize involve common questions of fact and if so, whether transfer will convenience the parties and witnesses and promote the just and efficient conduct of the litigation by allowing a single judge to preside over pretrial proceedings. Beyond these statutory factors, the Panel considers a host of other factors that are derivatives of the judicial efficiency factor. We discuss each factor below.

[1] Common Issues of Fact

Centralization of actions under section 1407 does not require a "complete identity or even a majority of common factual issues."[34] It is generally enough that actions "arise from a common factual core,"[35] and those facts are "sufficiently complex or numerous."[36] Rather than rejecting cases that raise some plaintiff-specific factual issues, the Panel leaves it to the transferee judges to (i) employ methods to efficiently manage litigation that involves common and individual issues, such as allowing "discovery with respect to any non-common issues to proceed concurrently with discovery on common issues," and (ii) determine the "extent and manner of coordination or consolidation" in such litigation.[37] However, actions may be unsuitable for transfer where they primarily raise individualized fact issues.[38] Also, as discussed at length in section 4.05, the Panel has consistently interpreted section 1407 as not granting it the authority to transfer particular issues in a case. If, for instance, common liability issues exist in multiple cases but damages are unique to each, the Panel will usually not order transfer.[39]

[2] Convenience of Parties and Witnesses

The "convenience of the parties and witnesses" was a late addition to section 1407.[40] Although the Senate Report for section 1407 confirms that the Panel should consider this factor in deciding whether to transfer actions, this legislative history also makes clear that the "main purpose of transfer for consolidation or coordination of pretrial proceedings is to promote the ends of efficient justice."[41] Still, the Panel has generally "required that transfer offer some meaningful reduction in overall inconvenience before it will order transfer."[42]

The Panel has traditionally "sought to maximize the convenience of all the parties and witnesses, taken as a whole," and "rejected attempts to consider the convenience of individual parties and witnesses to the exclusion of others."[43] This distinction is captured neatly in an off-cited excerpt from *In re Library Editions of Children's Books*.[44]

There, the Panel rejected the plaintiffs' argument that, as people "of limited means," they "should not be compelled to travel to a distant forum" to litigate:

> Of course it is in the interest of each plaintiff to have all of the proceedings in his suit handled in his district. But the Panel must weigh the interests of all the plaintiffs and all the defendants, and must consider multiple litigation as a whole in the light of the purposes of the law.[45]

To be sure, when the Panel considers the factor at hand separately from the others, it typically does so in assessing the appropriate transferee court. For instance, the Panel recently held that the "District of South Carolina is an appropriate transferee forum" because "[o]ne action . . . is pending there, and the district is conveniently located for a number of parties and potential witnesses in the southeastern region of the country."[46] Likewise, "the Panel had decided to entrust . . . litigation to the Southern District of New York, where 39 constituent actions and 51 potential tag-along actions are pending," noting that the district "is conveniently located for many parties and witnesses."[47] Yet, the Panel has concluded at times that, even if the transferee forum is inconvenient, "there is usually no need for the parties and witnesses to travel to the transferee district for depositions or otherwise" and the "judicious use of liaison counsel, lead counsel and steering committees will eliminate the need for most counsel ever to travel to the transferee district."[48]

[3] Just and Efficient Conduct of Litigation

Judicial efficiency is an overarching principle that guides the MDL Panel's decision-making under section 1407. An early study in the *Harvard Law Review* makes this point plainly: "Where the Panel finds that consolidation will promote judicial efficiency, arguments based on the . . . finding required by section 1407—that consolidation be for the convenience of the parties and witnesses—are unlikely to succeed."[49] Thus, while parties should pay attention to all three statutory factors under section 1407, they may not all determine the outcome of a motion to transfer.[50] Prudent advocates should focus heavily on whether consolidated pretrial proceedings would promote efficiency given the facts of the particular case before the MDL Panel. Also, as noted above, the MDL Panel considers a host of factors that are not delineated by section 1407 but are considered derivatives of the judicial efficiency factor. The most common of these considerations are discussed below as well as other considerations.

[a] Avoidance of Repetitive, Wasteful Discovery

The MDL Panel generally finds that transfer under section 1407 will eliminate duplicative discovery such that centralization is appropriate when the factual issues that will arise in discovery are numerous, common, and relevant to all of the actions at issue.[51] One example is a case in which the Panel ordered that five separately filed personal injury suits be consolidated for pretrial purposes.[52] The cases shared common allegations regarding a design defect in some of an automaker's larger passenger vans that caused them to roll over at an unusually high rate. The MDL Panel observed that "[c]entralization under Section 1407 is thus necessary in order to eliminate duplicative discovery," before listing several other reasons also favoring transfer.[53]

The MDL Panel has generally approved transfer for those cases that would require discovery in far-reaching locations.[54] The assertion that factual or legal claims are primarily local in nature and require local management of discovery, rather than transfer, has not been particularly persuasive to the MDL Panel: "It may be true that transfer for coordinated or consolidated pretrial proceedings as to local issues might not serve the convenience of the parties and their witnesses but it seems clear that such transfer for coordinated or consolidated pretrial proceedings relating to the common questions of fact would indeed serve the convenience of the parties and their witnesses."[55]

[b] Avoidance of Inconsistent Judicial Determinations

Whether inconsistent judicial determinations can be avoided is also relevant to deciding whether transfer would aid the just and efficient conduct of litigation.[56] Avoiding conflicts in parallel litigation is maybe most important when there are multiple, parallel, putative class actions. For example, in one case,[57] six different actions were filed in four different district courts. Five of the six brought their claims on behalf of a putative nationwide consumer class. After finding that the actions shared common facts—whether the defendant misled the public regarding the presence of derivatives in its food product—the MDL Panel had little difficulty in concluding that centralization under section 1407 was necessary to prevent, among other things, "inconsistent pretrial rulings (particularly with respect to the issue of class certification)."[58] The MDL Panel has held that centralization may prevent inconsistent rulings with respect to many other matters that judges often decide during the course of litigation, including patent claim construction,[59] injunctive relief,[60] discovery, privilege, *Daubert* issues,[61] and preemption,[62] to name a few.

Notably, when the Panel denies a motion to centralize actions because the risk of inconsistent rulings is slight, it will often "encourage the parties to employ various alternatives to transfer"—in particular, voluntary cooperation and coordination among the parties and the involved courts—to "minimize the risk of . . . inconsistent pretrial rulings."[63]

[c] Conservation of Party, Counsel, and Judicial Resources

When transferring actions under section 1407, the Panel frequently comments that centralization will "conserve the resources of the parties, their counsel and the judiciary."[64] This factor is "implicit in many of the Panel's decisions" and it "elaborate[s] on the statutory requirement that transfer advance the just and efficient conduct of the litigation."[65] The Panel almost always considers this criterion together with other factors discussed in this section, not as a stand-alone factor.[66]

[d] Complexity of the Factual Issues

The MDL Panel is more likely to grant a transfer under section 1407 when the case raises complex factual issues.[67] Complexity takes on greater import when parties are only seeking to consolidate a few actions. In these instances, the Panel requires a greater showing of potential benefit from the proposed transfer.[68] The general rule applicable to these situations is that the moving party must show "that the common questions of fact are so complex and the accompanying common discovery so time-consuming as

to overcome the inconvenience to the party whose action is being transferred and its witnesses."[69] This holding was drawn from the legislative history of section 1407:

> If only one question of fact is common to two or three cases pending in different districts there probably will be no order for transfer, since it is doubtful that transfer would enhance the convenience of parties and witnesses or promote judicial efficiency. It is possible, however, that a few exceptional cases may share unusually complex questions of fact, or that many complex cases may share a few questions of fact. In either of these instances substantial benefit may accrue to courts and litigants through consolidated or coordinated pretrial proceedings.[70]

Although the subject matter of a case may increase the complexity of factual questions, subject matter alone is not likely to be determinative of transfer.[71] The nature of the industry involved, however, may trigger transfer if it increases the overall complexity.[72] Also, competing requests for class designations can trigger transfer because of the potential for conflicting rulings that may redefine and complicate the relevant factual and legal questions; but this is not determinative, either.[73]

[e] Other Considerations

Once the statutory requirements are met, the type of case is not particularly relevant to the decision to transfer. The following types of cases are likely to be transferred, however, given their potential for satisfying the above factors: securities—particularly multiple class actions; antitrust; patent infringement and validity; trademark and copyright; class actions—including those with potentially overlapping or conflicting class designations or conflicting claims regarding class representation; mass disaster; products liability; mass tort products liability; labor; employment and discrimination; environmental; insurance sales practice; and *qui tam* (whistleblower) cases arising out of the same fraud.

The number of actions involved in a case may be relevant. Specifically, the MDL Panel looks to see if there is at least one case pending in the proposed transfer district, how many actions are pending in that district, the size of the litigation, and the familiarity of the transfer judge with the issues in the case.[74] No minimum number of actions is required for transfer, but more actions increase the likelihood of transfer.[75] This is not to say the MDL Panel will not consolidate a small number of actions. Although the Panel has refused to transfer one case to join another single case,[76] there are also numerous instances in which the Panel has done exactly that.[77] Indeed, there is no discernible trend in overall approval or denial of transfer motions involving few cases, either over time or in more recent decisions.[78] Unfortunately, the Panel has become less likely, in its more recent decisions, to explain its reasoning for or against transfer, choosing instead to cite older cases that provide some analysis. This renders predictability in current actions difficult.

§ 4.05 Limitations on the Panel's Section 1407 Transfer Authority

[1] No Involvement in Substance or Merits of Case

The MDL Panel's direct involvement in a case effectively ends once it transfers actions. Section 1407 does not give the MDL Panel any power to decide procedural or

substantive issues in the transferred litigation. It reserves those matters for the transferee judge to decide, although one knowledgeable observer noted that the Panel often remains informed and informally involved in an MDL even after concluding its formal statutory role.[79]

[2] Must Transfer Entire Case

As introduced in section 4.04, the MDL Panel lacks authority under section 1407 to transfer individual issues (or parties).[80] For instance, the Panel lacks authority to bifurcate cases by transferring liability issues for pretrial resolution but not damage issues. This limitation on the Panel's transfer power must be distinguished from its recognized authority to transfer one or more entire claims, while remanding other claims that are appropriate for section 1407 consolidation back to the transferor court.[81] Indeed, section 1407(a) expressly states that the Panel "may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded."[82] The distinction between the Panel's power to transfer entire claims and its inability to transfer individual issues means the Panel lacks a power equivalent to that of district courts under Federal Rule of Civil Procedure 42—i.e., to "order a separate trial of one or more separate issues."[83]

[3] Transfer for Pretrial Purposes Only

Another limitation on the MDL Panel's transfer authority is that consolidation is only for pretrial proceedings, not trial. Section 1407 authorizes the Panel to transfer cases to a transferee court "for coordinated or consolidated pretrial proceedings," but the Panel must remand an action "at or before the conclusion of . . . pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated."[84] While transferee courts initially accepted that this language limited their power over transferred cases to managing pretrial matters, a custom known as "self-transfer" developed whereby these courts would invoke section 1404(a) to transfer such cases to themselves for trial.[85] The Panel's Rules of Procedure in fact explicitly authorized this practice.[86]

The self-transfer practice ended abruptly with the Supreme Court's decision in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, holding that a transferee court conducting pretrial proceedings has no authority to assign a transferred case to itself for trial.[87] Construing section 1407's text, the Court held that it could not be read to allow "a transferee court's self-assignment to trump the provision imposing the Panel's remand duty."[88] Several legislative efforts to overrule this decision failed.[89] For instance, a version of the Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 1999 would have permitted centralization for all purposes, including trial, but that language was struck from the bill.[90] However, as discussed in section 4.11, parties often waive their *Lexecon* rights—i.e., the right to have their action transferred to the transferor court at the end of pretrial proceedings—to remain in the transferee court for trial. The waivers in this context are called *Lexecon* waivers.

[4] Cases Must Be Pending in More Than One Judicial District

Section 1407(a) requires that cases involving one or more common questions of fact be pending in different judicial districts.[91] A fortiori, the MDL Panel lacks authority

to consolidate related cases pending within a single judicial district. Many times, district courts' local rules provide for consolidation before one judge when there are one or more related matters pending within one district. As one example, Middle District of Florida Local Rule 1.04 states: "If cases assigned to different judges are related because of . . . a common question of fact . . . , a party may move to transfer any related case to the judge assigned to the first-filed among the related cases."[92] In fact, there seems to have been "an expansion of the MDL model to district-wide MDLs, where all cases relating to a particular event are assigned to a single federal judge. This was accomplished by local district court rule in the case of Hurricane Katrina in New Orleans in August 2005 and by federal statute in the case of the 9/11 plane crashes into the World Trade Center in New York City."[93]

[5] Limited to Federal Cases

Finally, perhaps the most significant limitation on the MDL Panel's transfer power under section 1407 is one that is obvious but important to acknowledge: The Panel's authority to transfer is limited to cases pending in federal courts. Actions pending in state court are beyond the Panel's reach. But the Panel can transfer cases that a party has removed from state court to federal court.[94] As a result of congressional acts, such as the Class Action Fairness Act of 2005, that expand the federal court's subject matter jurisdiction,[95] more actions are potentially subject to Panel oversight under section 1407.

§ 4.06 Factors That May Weigh Against the MDL Panel Granting a Section 1407 Transfer

[1] Case in Advanced Stage

The stage of litigation is an important factor in the Panel's decision to centralize actions. For instance, the MDL Panel may refuse to transfer actions when the parties have completed considerable discovery in one or more cases.[96] In one case, the Panel concluded that "the fact that discovery has been completed in one of the two actions before us, and thus that action is nearing trial, diminishes any benefits that could be gained by Section 1407 proceedings."[97] Furthermore, "widely varying procedural postures of the actions" may "weigh against centralization."[98] In denying a motion to transfer, the Panel explained that, "while the Hawaii action was only recently commenced, the consolidated action in California is . . . quite advanced. The presiding judge ruled on a motion to dismiss" as well as "a motion for class certification" and "recently gave preliminary approval to a partial class settlement. Discovery in the California action is essentially over, whereas it has not yet even begun in the Hawaii action."[99]

Also, proceedings may be so far advanced that transfer would be improper. For example, the Panel held that centralization would neither serve the convenience of the parties and witnesses nor further the just and efficient conduct of this litigation where "[f]our of the five actions . . . are at a significantly advanced stage. Classes have been certified in those four actions, and fact discovery has been completed (or is nearing completion) in three of them. The fifth action . . . has been stayed pending the resolution" of two of the actions.[100] It makes sense, given that centralization is only for pretrial purposes, that cases nearing the end of the pretrial stage, and thus approaching the trial stage, are sometimes unfit for transfer.[101]

[2] Parties Cooperating on Discovery or Successfully Coordinating Pretrial Matters

While it doesn't happen often, parties sometime persuade the MDL Panel that the purposes of section 1407 would not be advanced—or not measurably so—by pretrial consolidation because the parties are already working well together. This was the case in *In re Cable Tie Patent Litigation*.[102] This multidistrict litigation consisted of four actions, three pending in the Northern District of Illinois and one pending in the Eastern District of Wisconsin. The parties involved in the two Illinois actions "already demonstrated their ability and willingness voluntarily to cooperate concerning pretrial matters" and the opponents of transfer "expressed their desire to continue these cooperative efforts."[103] Therefore, the Panel held that "suitable alternatives to Section 1407 transfer, some of which counsel in this litigation may already have utilized, exist in order to minimize the possibility of duplicative or unreasonable discovery in the future."[104]

The Panel provided several examples (most of which could apply in other cases) of how the parties in *In re Cable Tie Patent Litigation* could reduce the risk of duplicative discovery and inefficiency: "the parties may request from the appropriate district courts that discovery completed in either of the more advanced Illinois actions and relevant to any of the other actions be made applicable to those actions"; "the parties could seek to agree upon a stipulation that any discovery relevant to more than one action may be used in all those actions"; "notices for a particular deposition could be filed in all actions, thereby making the deposition applicable in each action"; "any party could seek orders from the courts before whom the actions are pending to direct the parties to coordinate their pretrial efforts"; and "the parties could seek stays of the Wisconsin action and the most recently filed Illinois action pending a resolution of the two Illinois actions which are nearing trial."[105] Obviously, the benefits of the parties' cooperation in one case must inure to the benefit of those in other, related cases; otherwise, the need for consolidation of all cases under section 1407 for efficient pretrial proceedings may still be perceived as necessary.

[3] Transfer Would Not Facilitate Greater Efficiency

As we highlighted in section 4.04, in planning strategy to avoid transfer, lawyers should concentrate on the question of whether transfer would improve the "just and efficient conduct of the litigation." Advocates against transfer must demonstrate not only that the parties are willing to work cooperatively, but also that existing procedural mechanisms established by the trial court have already shown great capacity for managing the pretrial proceedings efficiently and fairly for all parties—both in that case and in all related cases. This, of course, is a tall order. Certainly, the greater the number of related cases, the harder it will be for one trial judge in a single case to coordinate effectively pretrial matters in all of the other pending cases. As the current Chief Judge of the MDL Panel has noted, "The greater the number of cases and the greater number of common parties, the more likely it is that centralization will create significant efficiencies."[106] By contrast, the MDL Panel regarded the number as "minimal" when only two actions were pending, and further concluded that alternatives to section 1407 transfer existed to help minimize duplicative discovery and to avoid inconsistent pretrial rulings.[107]

[4] Other Reasons Not to Transfer

The Panel will, of course, deny transfer where the basic criteria under section 1407 are not satisfied—*i.e.*, actions lack common questions, transfer would not be for the convenience of the parties and witnesses, and the just and efficient conduct of litigation would not be advanced by transfer. While not in itself determinative, "unanimous opposition of the parties to transfer" may help persuade the Panel to deny a section 1407 motion.[108] Other things that may be relevant for the Panel are whether the trial court has denied a section 1404 transfer motion[109] and whether such a motion is currently pending before the trial court: "If the Section 1404(a) motions . . . are granted, all the actions in this litigation will be for all purposes in a single district. Since any such result would eliminate any need for our action under Section 1407, the Panel has concluded to deny transfer under Section 1407 at this time."[110]

§ 4.07 Arguments the MDL May Not Consider

[1] Motions Are Pending in Transferor Court

The existence of pending motions before the transferor court, including a motion to remand, is generally not a proper basis to deny transfer.[111] The presumption is that the transferee court is competent to rule on any pending motions after transfer. Besides, the Panel has frequently pointed out that because the transferor court retains jurisdiction to rule on pending motions until transfer is ordered (or, in the case of tag-along actions, the conditional transfer order (CTO) is made permanent), there is no reason to delay transfer while pending motions are resolved. A transferor court that wants to rule on a pending motion before transfer may do so.[112]

[2] Effect of Law of a Particular Jurisdiction

The MDL Panel doesn't consider what law the transferee court might apply or the effect of that application when deciding whether to transfer actions. In the seminal case on this issue, the MDL Panel issued a CTO, and the plaintiff filed an objection. The plaintiff asked the Panel to deny transfer because "the transferee court would apply the statute of limitations law of the transferee circuit rather than the transferor circuit" (the case was timely under the limitations period of the transferor circuit).[113] The Panel rejected this objection, stating that, "[w]hen determining whether to transfer an action under [s]ection 1407, . . . it is not the business of the Panel to consider what law the transferee court might apply."[114] Later decisions confirm that the Panel has not departed "from this longstanding practice."[115] Besides, transferee judges routinely apply the laws of one or more jurisdictions.[116]

§ 4.08 Appeal

[1] Review of Transfer Decisions by the MDL Panel

Section 1407(e) provides that "[n]o proceedings for review of any order of the panel may be permitted except by extraordinary writ" of mandamus.[117] A party must file a writ to review a Panel decision "issued prior to the order either directing or denying transfer" in the circuit court "having jurisdiction over the district in which a hearing

is to be or has been held," while a writ to review "an order to transfer or orders subsequent to transfer" must be filed in the circuit court having jurisdiction over the transferee district.[118] A party cannot seek review of "an order of the panel denying a motion to transfer."[119]

[2] No Review of Transferee Court Decisions by the MDL Panel

The transferee court decisions, such as an order granting or denying class-action certification, are generally subject to review in the circuit court with jurisdiction over the transferee court—i.e., the same as non-multidistrict litigation.[120] The MDL Panel lacks any appellate review of transferee court decisions and is usually careful to avoid exercising even the appearance of oversight.[121] The one situation where the Panel may border on review is when it evaluates a transferee court's recommendation to remand an action to the transferor court before the conclusion of pretrial proceedings. Under section 1407(a), the Panel, not the transferee court, makes all remand decisions.[122] The Supreme Court has held that the Panel lacks any discretion to deny remand once all pretrial proceedings end.[123] But the Panel has some review authority over a transferee court's decision-making when the court recommends remand before pretrial proceedings conclude.[124] In deciding whether to follow such a remand suggestion, the Panel "has consistently given great weight" to the recommendation of the transferee judge.[125]

§ 4.09 The Role of a Transferee Court

[1] Powers of a Transferee Court

It is generally accepted that a section 1407 transfer is effective upon filing of the MDL Panel's order with the clerk of the transferee district court.[126] At that point, the transferor court no longer has jurisdiction; instead, the transferee court has complete pretrial jurisdiction, including the authority to certify classes and order discovery.[127] Indeed, discovery has been cited as one of the primary reasons for the need of MDLs in today's world: "Without the centralized control of an MDL transferee judge, the cost of duplicative discovery and e-discovery in each case consolidated as an MDL action for pretrial purposes would be a significant detriment to each case's litigants and justice in America as a whole."[128]

A transferee court generally has the authority to decide any pretrial motions, including dispositive ones, such as motions for summary judgment, motions for judgment on the pleadings, and motions for judgment approving settlement or dismissal.[129] As Judge John Grady explained, "[i]f the transfer is to serve the legislative purpose of § 1407, the transferee judge must have the same authority that any pretrial judge has to enter orders that will ensure the relevance of the pretrial proceedings to the conduct of any trial that occurs after remand to the transferor court."[130] Transferee judges also suggest to the Panel when to remand a case.[131] Some relevant considerations for the transferee judge (and the Panel) when deciding whether actions are ripe for remand are whether common issue discovery has been completed, whether all common pretrial issues have been resolved such that the individual cases are ready for individual resolution, and whether the transferee judge believes that it is possible to achieve a global settlement if remand is deferred.[132]

The decisions of a transferee court are generally given substantial deference by transferor courts. One scholar said it would be proper for a transferor judge to expand or build upon the orders of a transferee judge, but "it would be improper to permit a transferor judge to overturn orders of a transferee judge."[133] He explained that, if "transferor judges were permitted to upset rulings of transferee judges, the result would be an undermining of the purpose and the usefulness of transfer under Section 1407 for coordinated or consolidated pretrial proceedings because those proceedings would then lack the finality . . . requisite to the convenience of witnesses and parties and to efficient conduct of actions."[134] Still, transferor courts are not necessarily bound by a transferee court's pretrial rulings: "Under [exceptions to] the law of the case doctrine and general principles of comity, a successor judge has the same discretion to reconsider an order as would the first judge."[135]

[2] Limitations of a Transferee Court

The biggest limitation on a transferee court is probably that centralization is only for pretrial proceedings. Section 1407 specifies that each action transferred under that section "shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred."[136] Previously, transferee judges found—and the Panel encouraged—a solution: "self-transfer" under section 1404. However, as discussed at length in section 4.05, the Supreme Court held "the straightforward language imposing the Panel's responsibility to remand . . . bars recognizing any self-assignment power in a transferee court."[137]

Yet only a relatively small number of cases transferred under section 1407 are remanded back to the transferor court. Why? The main reason is that a transferee court's power to rule on dispositive motions, coupled with the fact that most cases settle, means that there are only a few cases that need to be remanded.

That said, there are still ways for transferee judges to retain control of a case after pretrial proceedings have ended. For example, parties could waive remand;[138] if the parties consent, the transferor court could transfer the case back to the transferee court;[139] the transferee judge could follow an action to the transferor court after obtaining an intercircuit or intracircuit assignment; or the parties could refile with the transferee court.[140]

§ 4.10 The Mechanics of MDLs

This section describes how parties commence an MDL, how cases become part of an MDL, and generally how parties and the transferee court manage the MDLs from start to finish. As one commentator put it, "the key virtue of the MDL is that i[t] collects most parties in a single organized proceeding in order to facilitate a global settlement."[141]

[1] How MDLs Are Commenced

The MDL panel may initiate a proceeding to transfer under section 1407,[142] but that is rare. Most often a party in an action subject to transfer initiates the proceeding by filing a motion with the Panel.[143] The Panel will then notify all interested parties and set a briefing schedule and oral argument on the motion (as necessary).[144] As we discussed in detail in section 4.04, the Panel will grant a section 1407 motion when civil cases pending in different districts involve "one or more common questions of fact," and

the Panel determines that centralization "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions."[145] Once the Panel grants a motion to create an MDL, it assigns a federal district judge to preside over the consolidated proceeding.[146] The Panel's choice of the district court and judge is not "guided by any particular set of factors; they are not cabined by statute or by the Multidistrict Rules of Procedure."[147] In fact, the transferee judge and court "need not already have one of the consolidated cases on their docket, though parties may lobby the Panel for a specific court or judge on that basis."[148] The Panel sometimes chooses judges for their experience with similar cases. Also, the "condition of a potential transferee court's docket appears relevant, as do the distribution of MDLs throughout the country, the location of relevant evidence, and the 'willingness and motivation' of the potential transferee judge."[149]

The MDL doesn't end with the initial transferred cases. As discussed in section 4.02, a "tag-along" case refers to an "action pending in a district court" that "involves common questions of fact with either (1) actions on a pending motion to transfer to create an MDL or (2) actions previously transferred to an existing MDL."[150] A party (or counsel) in an MDL must "notify the Clerk of the Panel of any potential tag-along actions."[151] Once the Panel is notified of the potential tag-along action, it will review the complaint and docket to confirm that the case is appropriate for the MDL and, if so, issue a conditional transfer order ("CTO").[152] A party can oppose the CTO by filing an opposition and motion to vacate.[153] Failure to respond to the CTO is treated by the Panel as the party's acquiescence.[154] Alternatively, plaintiffs can bypass the transfer process and file their case directly into the MDL court if the defendant waives objections to personal jurisdiction or venue. This is known as "direct filing."[155]

[2] MDL Management

Deciding on the appropriate leadership structure and selecting the right lawyers to fill the positions is undeniably "one of the first and most important case-management tasks" for transferee judges.[156] MDLs can have thousands of parties and counsel,[157] and transferee courts don't have the bandwidth to deal with them all. Therefore, these courts appoint a limited number of lawyers to serve on the plaintiff's "leadership team." To be sure, given that the "purpose of consolidation is to permit a trial convenience and economy in administration, . . . a failure to designate lead counsel would be inefficient and counter to the very idea of MDLs"; thus, "the litigation is run in many ways by a relatively small number of counsel appointed to the case-management committees established by the court."[158]

Attorneys appointed to the leadership team act for their clients as well as other counsel and parties.[159] "MDL judges have total discretion to designate various leaders or committees among the involved attorneys—they are not required to use any particular titles or assign any particular duties."[160] Furthermore, these judges generally have complete control over what lawyers to assign to roles in the MDL.[161]

Transferee judges should assess the needs of the litigation to establish the appropriate leadership structure, considering such factors as the nature of the claim, the number of cases, and the variety and complexity of interests involved. Leadership teams typically include lead counsel, liaison counsel, trial counsel, and counsel committees.[162] "Lead counsel" formulate, and present, "positions on substantive and procedural issues."[163] For example, they present arguments—written and oral—to the MDL court,

manage and ensure compliance with the schedule, conduct depositions, and work with opposing counsel on other discovery.[164] "Liaison counsel" is basically an administrative role. They may distribute an up-to-date, comprehensive service list of all plaintiffs' attorneys, serve as the point of contact between the court and the plaintiffs' leadership, and ensure that all orders entered by the court and all papers filed by the defendants are timely distributed to all plaintiffs' attorneys.[165] "Trial counsel," as the name implies, are the main attorneys at trial, and they coordinate other members of the trial team.[166]

There are many possible counsel committees (and subcommittees). For instance, in complex cases, it's common to have an executive and steering committee. The executive committee is usually chaired by the plaintiffs' lead counsel and is responsible for overseeing the activities of the plaintiffs' counsel in the MDL.[167] The steering committee is often composed of a broader set of attorneys who coordinate the day-to-day aspects of the litigation, including conducting discovery.[168] The subcommittees may include electronically stored information (manages the receipt, production, organization, and review of ESI), early vetting (oversees the process of collecting and producing certain basic information about each plaintiff's claims), and law and briefing (prepares the plaintiffs' pleadings, motions, and responsive briefs).[169] Additionally, the transferee judge may appoint a defense leadership team in cases involving numerous defendants and may create joint committees for all parties, such as a joint settlement committee.[170]

All in all, the leadership team assumes control of the litigation by initiating and conducting discovery. They also "act as spokespersons for all plaintiffs, call counsel meetings, examine and depose witnesses, coordinate trial teams, select cases for bellwether trials, submit and argue motions, and negotiate proposed settlements."[171] Even though plaintiffs retain individual counsel, attorneys with whom they have no relationship may make important decisions in their cases. Because of this, in MDLs, "non-class mass litigation often resembles class actions in the sense that numerous plaintiffs depend on counsel with whom they have no meaningful individual relationship and whose loyalty is directed primarily to collective interests."[172]

In many instances, attorneys can apply to take a role on the plaintiffs' leadership team.[173] No matter how the transferee judge selects the attorneys for the team, there is often "intense competition for appointment by the court as designated counsel."[174] While participating on the leadership team "entails an enormous amount of work," as discussed below, "it can also come with a huge payoff—certainly larger than the contingency fee expected from representing one or even several individual plaintiffs—because attorneys who do work for the common benefit of the group typically receive a portion of every single plaintiff's payout."[175] For example, in *In re Zyprexa Products Liability Litigation*, the district court "instituted several attorney compensation protocols," including "a cap on attorneys' fees and the creation of a common benefit fund—generated by a three percent set-aside from funds from all settlements and judgments—to compensate members of the [steering committee] for their work on behalf of all of the MDL plaintiffs."[176] Serving on the leadership team can also benefit lawyers professionally, because doing so in one MDL is a credential that makes the next transferee judge more likely to appoint a lawyer to the team in a later MDL.[177]

[3] Bellwether Trials

Almost every new MDL uses a "bellwether" regime; securing consents for these trials (i.e., *Lexecon* waivers) is now a critical part of transferee courts' case management

agendas.[178] The term bellwether comes from the ancient practice of belling a wether (a male sheep) selected to lead his flock. The ultimate success of the wether selected to wear the bell rested on whether the flock had confidence that the wether would not lead them astray.[179] In the MDL context, bellwether cases "are representatives selected from the 'flock' of cases consolidated in front of the transferee court and tried front-to-back."[180] Bellwether trials are mostly "information-gathering tools."[181] Their results bind only the parties that participate but not the other parties in the MDL. However, a transferee court's findings can foreclose parties involved in the trials from subsequently relitigating issues under the collateral estoppel doctrine.[182] The plaintiffs' lawyers appointed to the leadership team usually try the bellwether trials, not the attorneys of record in particular cases.[183]

There are many reasons to employ this process. Discovery for bellwether trials provides useful information that may be applicable to other cases. For instance, discovery may reveal "factual information and information on the strengths and weaknesses of expert witnesses and their testimony, the credibility of fact witnesses, the admissibility of particular evidence, and other valuable information."[184] Likewise, "[b]ellwether trials enable the parties to test different theories of liability and defenses, observe the witnesses, and try out different messages and trial tactics in front of real juries."[185] Their reactions to the evidence may provide useful information on the settlement value of the cases, which could dictate the ultimate outcome of the entire litigation. Stated differently, the purpose of bellwether trials is to "produce a sufficient number of representative verdicts" to "enable the parties and the court to determine the nature and strength of the claims, whether they can be fairly developed and litigated on a group basis[,] and what range of values the cases may have if resolution is attempted on a group basis."[186] Another by-product of bellwether trials is the coordinating attorneys' creation of "trial packages." These packages can be distributed to litigants and local counsel when an MDL is dissolved and individual cases are remanded to transferor courts for trial.[187] Trial packages usually include the key documents produced in discovery, background information, expert reports, deposition and trial testimony, biographies of potential witnesses, transferee court rulings and transcripts, and the coordinating attorneys' work product and strategies, among other helpful material.[188]

For the bellwether trials to produce reliable information to use for other cases, "the specific plaintiffs and their claims should be representative of the range of cases. . . . Test cases should produce a sufficient number of representative verdicts and settlements to enable the parties and the court to determine the nature and strength of the claims, whether they can be fairly developed and litigated on a group basis[,] and what range of values the cases may have if resolution is attempted on a group basis."[189] Accordingly, "representativeness" is a "core element" that must be present for a bellwether trial "to achieve its value ascertainment function for settlement purposes or to answer troubling causation or liability issues common to the universe of claimants."[190] Put another way, the "utility of a bellwether verdict depends on whether the tried claim is a truly representative test."[191] MDL courts generally employ one of three methods for the bellwether selection: randomly selecting test cases from a pool of cases, allowing the parties to select the bellwether plaintiffs, or having the court select them. Also, courts have adopted a hybrid approach where bellwether cases are selected by the parties from a pool of cases that were selected randomly or by the court.[192]

Bellwether trials do have their limitations. A transferee court can never "account for all the unique features of all claims in the MDL," even if it conducts several of

them "in an attempt to account for claims of different strengths."[193] Plus, relying on the "results of bellwether trials to evaluate settlement offers can over- or undervalue individual claims, and there is no telling which is occurring more often."[194] Put simply:

> Bellwether trials are not perfect predictors. Even if the transferee court conducts multiple bellwether trials that are representative of several subgroups of claims, the most useful bellwether cases for the greatest number of plaintiffs are not the extraordinary claims. So although the process of trying bellwether cases facilitates global settlement, by design it does not account for the unique characteristics of a particularly weak or strong claim.[195]

[4] Settlement

As we discussed in section 4.03(3), the vast majority of MDL cases are terminated by the transferee court through settlement or dispositive motions. The jurisdiction of this court extends to settlement as the terms "coordinated and consolidated" contained in section 1407(a) have been deemed to include settlement negotiations in MDLs.[196] Transferee judges are typically active in encouraging and negotiating global settlements.[197] Also, as one commentator noted, their role "has increasingly moved towards that of a 'global settlement administrator,' who oversees the resolution of state and federal claims as well as private claims not yet filed."[198] "[S]ome judges perceive failure to achieve a global settlement as a failure."[199]

Neither section 1407 nor the Federal Rules of Civil Procedure include any requirement that the court review a global settlement. Nevertheless, transferee judges have taken a "measure of control over settlement[s]" in MDLs, and "[i]ndividual claimants opt in to the resulting settlement, accepting its structure and oversight by the MDL court."[200] Although a federal court does not have jurisdiction "over state claims and claims not filed before the court, a plaintiff can contractually agree to the power of the district court by opting into the global settlement."[201] A plaintiff's decision to participate in the "mass settlement overseen by the MDL court" effectively "becomes a substitute for class certification."[202] Transferee courts have sometimes required a plaintiff's original attorney to withdraw where the plaintiff opted out of the global settlement.[203] Parties who aren't interested in participating in the global resolution can "reach private, sometimes confidential, settlements that can be overseen through the administration of the transferee court."[204] These private settlements generally don't require court approval.[205]

A final point is that the aggregate settlement rule under Model Rule of Professional Conduct 1.8(g) applies to global settlements in MDLs. Thus, a lawyer who represents two or more clients "shall not participate in making an aggregate settlement of the claims of or against the clients . . . unless each client gives informed consent, in a writing signed by the client."[206] Furthermore, the "lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement" (i.e., the amount each client will receive in the settlement).[207]

[5] Attorneys' Fees

Under the "American Rule," with limited exceptions, the prevailing litigant is not "entitled to collect a reasonable attorneys' fee from the loser."[208] Likewise, attorneys for

winning parties must usually look to their own clients to pay attorneys' fees. But the Supreme Court has long recognized an equitable exception to this rule "known as the 'common fund doctrine' or the 'common benefit doctrine,'"[209] under which courts create a fund "for legal services beneficial to persons other than a particular client, thus spreading the cost of the litigation to all beneficiaries."[210] This doctrine was originally, and probably still is, most commonly used to award attorneys' fee in class actions.[211] However, as "class actions morph into multidistrict litigation, . . . the common benefit concept has migrated into the latter area."[212] No text in section 1407[213] expressly carves out an exception to the American Rule for courts to create common benefit funds in MDLs. Courts have held that this authority derives from their "its 'managerial' power over the consolidated litigation,"[214] broad principles of equity and quantum meruit and the settlement agreement terms.[215]

Common benefit funds are financed by requiring defendants to hold back a portion of the damage or settlement award recovered by plaintiffs.[216] Plaintiffs' attorneys who provided a common benefit to plaintiffs, such as attorneys appointed to the plaintiffs' leadership team, may then request an allocation from the fund. More specifically:

> To compensate appointed counsel, courts set up common benefit funds from which they will later withdraw lead counsel's fees and costs. They also enter orders requiring some portion of all claim payments, including settlements and judgments arising after cases are transferred back to their original jurisdictions, to be paid into the common benefit funds. The "common benefit fee" comes from the fee that would be paid to the claimant's selected attorney—not from the claimant's portion. In this way, MDL splits the attorney fee the plaintiff agreed to at the outset between retained counsel and appointed counsel. The contingent percentage of the plaintiff's recovery remains the same, but the retained counsel must share that percentage with the [leadership team].[217]

While the use of common benefit funds is now commonplace in MDLs, the methods of calculating the amount of attorneys' fees to award, and how to allocate the fees among the plaintiff's attorneys differ. Through the history of MDLs, courts have employed three approaches when assessing the amount of attorneys' fees to award from the common benefit fund: (1) the lodestar method, (2) the percentage method, or (3) a blended method that combines the two approaches.[218] Under the lodestar method, a court multiplies "the reasonable hours expended on the litigation by an adjusted hourly rate" to produce a multiplier, whereas the percentage method "compensates attorneys who recovered some identified sum by awarding them a fraction of that sum."[219] For the blended approach, the fees are based on a reasonable benchmark percentage of the fund verified by a lodestar cross-check.[220] In allocating fees, courts must "conform to 'traditional judicial standards of transparency, impartiality, procedural fairness, and ultimate judicial oversight.'"[221] They may consider input from lead attorneys, but ultimate discretion lies with the transferee court,[222] whose cost awards are subject to abuse of discretion review by the appellate court.[223]

MDL courts cannot relinquish their responsibility to closely scrutinize fee awards.[224] However, they frequently appoint special masters to recommend or evaluate the evidence supporting the allocation of attorneys' fees.[225] At the outset of an MDL, attorneys should investigate their judge's stance on attorneys' fees and the prevailing law in the particular circuit as that information may affect their strategy in the litigation.

§ 4.11 Other Considerations and MDL-Related Issues

[1] Choice of Law

We begin with the basic principle that, in an action based on diversity of citizenship, a federal court must apply the substantive law of the state in which it sits, including that state's choice of law rules.[226] The majority of diversity cases transferred to an MDL are filed in, or removed to, federal courts and transferred to the MDL by the Panel.[227] In such cases, "the MDL court must apply the law of the transferor forum, that is, the law of the state in which the action was filed, including the transferor forum's choice-of-law rules."[228] Plaintiffs who reside in the MDL court's judicial district might file their diversity cases in the MDL court. In these instances, "the MDL court must apply its own state law," including the choice of law principles of the state in which it sits. But what choice of law rules apply when plaintiffs who do not reside in the MDL district nonetheless "direct file" their diversity cases directly into the MDL? The majority of courts "have stated that it is appropriate to apply the choice of law rules of the 'originating' jurisdiction (i.e., where the case would have [been] brought but for the [case management order] permitting direct filing), rather than the choice of law rules of the MDL Court."[229]

[2] Circuit Splits

When there are circuit splits on the interpretation of federal law, which interpretation should the transferee court follow? In a decision in the 1970s, the Panel suggested that the transferee court should apply the interpretation of federal law that was adopted in the circuit in which the case was filed.[230] More recently, however, then-Judge Ruth Bader Ginsburg authored a decision in *In re Korean Air Lines* holding that a transferee court should apply the law of the circuit where it sits when interpreting federal law: "[W]e deal here . . . with a transfer under 28 U.S.C. § 1407 . . . We have held . . . that the law of a transferor forum on a federal question . . . merits close consideration, but does not have stare decisis effect in a transferee forum situated in another circuit."[231] Most courts have followed the holding in *In re Korean Air Lines*.[232]

[3] The New Class Action?

In recent years, the MDL has become more attractive for resolving complex litigation, particularly because of the difficulty of meeting class certification requirements.[233] In other words, in MDLs, plaintiffs obtain the perceived benefits of aggregation, including the push for a global settlement, without meeting the demanding requirements of the class certification. Some judges have used the explanation that MDLs are "quasi-class actions" to justify their assertion of certain powers, such as reviewing settlement agreements and attorneys' fees.[234]

[4] *Lexecon* Waivers

In section 4.10, we introduced the common practice of "direct filing"—i.e., a plaintiff filing a related case directly in the MDL district. Direct filing is not *per se* impermissible, at least under the MDL Panel's rules.[235] But this custom raises complicated "jurisdictional, venue, or related issues."[236] It also creates other oddities when "cases are eventually transferred to the plaintiffs' home districts for trial, as the traditional

'transferor'/'transferee' roles will be reversed."[237] To avoid these tricky issues, promote judicial efficiency, and "eliminate the delays associated with transfer of cases" into an MDL, parties often stipulate to waiving personal jurisdiction or venue objections to direct file complaints.[238]

A separate but related issue arises when discovery concludes and the MDL court needs to transfer the direct-filed action for trial "to a federal district court of proper venue."[239] As we first discussed in section 4.05, parties can avoid the transfer to the proper district court by waiving their right under section 1407 to have the matter remanded for trial—a "*Lexecon* waiver." This term arose as a result of the Supreme Court's decision in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*.[240] There, the Court reversed a Ninth Circuit decision that affirmed a transferee court's transfer to itself—under the transfer provision of section 1404(a)[241]—of a tag-along case that the Panel had transferred to it from another district. The Court held that the transfer was improper, basing its decision on a strict reading of section 1407, and stating that the statute "not only authorizes the Panel to transfer [cases] for coordinated or consolidated pretrial proceedings, but obligates the Panel to remand any pending case to its originating court when, at the latest, those pretrial proceedings have run their course."[242]

§ 4.12 Is MDL Reform Needed?

Many observers believe that MDL reform is much needed. As of early 2019, nearly half of the pending civil cases in district courts are MDLs (i.e., of 315,523 pending cases, 151,530 are MDLs).[243] The focus on the MDL process and whether it's working as intended has thus escalated. And stakeholders are calling for major reform. According to the U.S. Chamber Institute for Legal Reform, "MDL proceedings are morphing from a procedural device that is intended to create efficiencies . . . into lawsuit magnets."[244] Plaintiffs' counsel use "aggressive advertising and highly sophisticated client recruitment strategies" to attract and file claims in MDLs with "dubious merit."[245] Because MDLs have, by design, "tended to prioritize global issues over individual ones, plaintiffs' counsel have successfully warehoused meritless claims and shielded them from judicial scrutiny in a way they never could if all the cases were being tried individually."[246] In fact, it is estimated that "between 30–40 percent" of cases "filed in any MDL turn out (often at the settlement stage) to be unsupportable."[247] Plaintiffs have ostensibly used the strategy of bringing and hiding non-meritorious cases in MDLs to deceptively inflate the size of MDLs and ultimately extract windfall settlements from corporate defendants.[248]

It's problematic that there are no formal mechanisms to stamp out frivolous claims in MDLs. Plus transferee courts aren't always using effective case management techniques to eliminate these claims. Below we discuss ad hoc procedures that courts employ to address the issues outlined above and some proposed legislative and judicial fixes. We also discuss the use of litigation funders in MDLs and how one transferee judge has responded to requests to disclose the financiers.

[1] Plaintiff Fact Sheets and *Lone Pine* Orders

Many transferee courts are using plaintiff fact sheets and *Lone Pine* orders as case management tools to streamline litigation and eliminate unfounded claims. First, fact sheets require plaintiffs at the outset of litigation to satisfy a minimum evidentiary threshold before proceeding to discovery. In *In re Silica Products Liability Litigation*,

the transferee court required "all Plaintiffs in recently-transferred actions" to "submit sworn Fact Sheets within 60 days from the date of transfer by the Panel."[249] "The Plaintiff's Fact Sheet required each Plaintiff to submit specific information about when, where and how each Plaintiff alleged he or she was exposed to silica dust," and "also required detailed medical information concerning each Plaintiff's silica-related injury."[250]

The concept of a *Lone Pine* order originated from the decision of a New Jersey state court issuing a case management order in *Lore v. Lone Pine Corp*.[251] *Lone Pine* orders are designed to assist in the management of complex issues and reduce the burden on defendants and the court in mass tort litigation, essentially requiring plaintiffs to produce a measure of evidence to support their claims at the outset.[252] Although no federal rule or statute requires or even explicitly authorizes the entry of these orders, *Lone Pine* orders are used "routinely" in MDLs, particularly in mass tort cases.[253] The factors courts typically consider when deciding whether to enter a *Lone Pine* order include (1) the posture of the action, (2) the peculiar case management needs presented, (3) external agency decisions impacting the merits of the case, (4) the availability and use of other procedures explicitly sanctioned by federal rule or statute, and (5) the type of injury alleged by plaintiffs and its cause.[254]

In addition to requiring plaintiff fact sheets and entering Lone Pine orders, the U.S. Chamber Institute for Legal Reform suggests that MDL courts also should consider "phased or sequenced discovery, as well as random selection of cases for dispositive pretrial briefing, including *Daubert* motions and motions for summary judgment," to "ensure that the individual claims at issue in an MDL proceeding are carefully considered before the parties rush to settlement or spend large sums of money trying cases."[255] Also, although certainly not the primary reason to employ it, the bellwether process, which we discuss at length in section 4.10, serves as another device to eliminate frivolous cases. Plaintiffs will often voluntarily dismiss frivolous cases if they are chosen for a bellwether trial.[256]

[2] Advisory Committee on Civil Rules

In November 2017, the Advisory Committee on Civil Rules[257] formed a subcommittee to discuss the promotion of efficient and effective MDL actions. Several legal industry groups submitted ideas to the committee, three of which garnered considerable attention. First, the Lawyers for Civil Justice proposed revising Rule 26(a)(1) to require that each plaintiff disclose with particularity, within 60 days after filing the case or the MDL transfer, exposure to the alleged cause and specific injury. The rule would also require plaintiffs to submit documentation substantiating both exposure and injury. This rule would, in effect, codify the plaintiff fact sheet that many courts require.[258] Other commenters suggested that the transferee judges use Rule 11 sanctions liberally to deter plaintiffs from filing frivolous lawsuits[259] and that they enter *Lone Pine* orders requiring plaintiffs to submit an affidavit from an independent physician to support their theories of injury or damages.[260] As of this writing, the Advisory Committee has not acted on any of the proposed suggestions.

[3] The Class Action Fairness Act of 2017

In February 2017, Representative Bob Goodlatte introduced a bill in the House called the Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency

Act of 2017 (the "Bill"). The House passed the Bill a month later, and, shortly thereafter, it was received in the Senate, read twice, and referred to the Committee on the Judiciary. But the Bill has stalled since then.[261] At any rate, the Bill would have some key implications for MDLs. First, it would codify the *Lone Pine* regime, requiring that any plaintiff in an MDL "make a submission sufficient to demonstrate that there is evidentiary support (including but not limited to medical records) for the factual contentions in plaintiff's complaint regarding the alleged injury, the exposure to the risk that allegedly caused the injury, and the alleged cause of the injury."[262] This submission "must be made within the first 45 days after the civil action is transferred to or directly filed in the proceedings."[263] The transferee judge must enter an order determining whether or not the submission is sufficient within 90 days after the submission deadline and dismiss the action without prejudice if the submission is found to be insufficient. "If a plaintiff in an action dismissed without prejudice fails to tender a sufficient submission within the following 30 days, the action shall be dismissed with prejudice."[264]

The Bill also states that a plaintiff in an MDL "shall receive not less than 80 percent of any monetary recovery obtained for those claims by settlement, judgment, or otherwise, subject to the satisfaction of any liens for medical services provided to the plaintiff related to those claims."[265] This provision would effectively limit attorneys' fees to 20% in MDLs, a far cry from the 30% or more attorneys for plaintiffs in MDLs routinely receive today.[266]

[4] Third-Party Litigation Funding in MDLs

Litigation funding, also known as legal financing and third-party litigation funding, enables a party to prosecute a civil action without having to pay for it. A third-party funder can pay some or all of the costs or expenses associated with a dispute in return for a share of the proceeds recovered from the dispute if the plaintiff is successful. If the litigation is unsuccessful, the funder generally bears the loss of its monetary outlay. Plaintiffs' attorneys are now using litigation funders in MDLs to pay a portion or all of their attorneys' fees and expenses in return for part of the contingency fee the attorneys might recover.

Several jurisdictions have recently passed rules requiring plaintiffs to disclose third-party litigation funder arrangements. For instance, the Northern District of California revised its Standing Order, effective November 2018, to provide that, "in any proposed class, collective, or representative action, the required disclosure" under the district's Local Rules "includes any person or entity that is funding the prosecution of any claim or counterclaim."[267] In April 2018, Wisconsin was the first state to pass a law requiring parities to "provide to the other parties any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action."[268] Also, in November 2017, the Advisory Committee on Civil Rules announced that it was considering a proposed rule change that would amend Rule 26(a)(1)(A) to require for initial disclosure "any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from, any proceeds of the civil action."[269]

Over the past year, judges in at least three MDLs have ordered the disclosure of litigation funders, but only for inspection by the judges themselves, not the parties.

In the most recent one, Judge M. Casey Rodgers entered an order instructing plaintiffs' counsel to disclose in their applications for the leadership team "all financial arrangements that you have made, or anticipate making, to fund your firm's financial contributions (e.g., arrangements between plaintiffs' attorneys, banks, vendors, or third-party financiers)."[270] In another recent MDL, Judge Paul Grimm ordered plaintiffs' counsel to disclose in their application for a leadership role "whether you anticipate using third party litigation funding."[271] Judge Grimm gave plaintiffs' counsel the option to submit this information "under seal or *ex parte*."[272] Finally, Judge Dan Polster ordered any attorney in the MDL that may have obtained third-party litigation funding to share of copy of his order with any funder and to submit to the court for *in camera* review (1) a letter describing the financing and (2) two sworn statements, one from counsel and one from the funder, affirming that the arrangement does not create any conflict of interest for counsel, undermine counsel's obligation of vigorous advocacy, affect counsel's independent judgment, give the funder any control over the litigation strategy or settlement decisions, or affect party control of the settlement.[273] The court rejected the requested discovery into the litigation funding arrangements "[a]bsent extraordinary circumstances."[274] Litigation funders around the country applauded Judge Poster's ruling,[275] but his decision and others like it may soon be undercut by legislators or the judicial rules.

Notes

[1] Sarah Reynolds is a partner and Cristina Henriquez is an associate in the Palo Alto office of Mayer Brown LLP.

[2] Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, Bellwether Trials in Multidistrict Litigation, 82 Tul. L. Rev. 2323, 2324 (2008).

[3] Hon. James F. Holderman, Sua Sponte: A Judge Comments, 38 No. 4 Litig. 27 (2012).

[4] 28 U.S.C. § 1407.

[5] Andrew D. Bradt, The Long Arm of Multidistrict Litigation, 59 Wm. & Mary L. Rev. 1165, 1168 (2017).

[6] Phil C. Neal & Perry Goldberg, The Electrical Equipment Antitrust Cases: Novel Judicial Administration, 50 A.B.A.J. 621, 621–622 (1964).

[7] *For instance*, consolidation under Federal Rule of Civil Procedure 42 was unhelpful because the cases at issue were brought in different district courts. And transfer under § 1404(a) of the Judicial Code was insufficient to achieve transfer of all cases to a single court. 28 U.S.C. § 1404(a).

[8] Stanley A. Levy, Complex Multidistrict Litigation and the Federal Courts, 40 Fordham L. Rev. 41, 41 (1971), https://ir.lawnet.fordham.edu/flr/vol40iss1/2/.

[9] *Id.* at 42.

[10] *Id.*

[11] Blake M. Rhodes, *The Judicial Panel on Multidistrict Litigation: Time for Rethinking*, 140 U. Pa. L. Rev. 711, 714 (1991), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3686&context=penn_law_review.

[12] H.R. Rep. No. 90-1130, at 2 (1968).

[13] *See, e.g.*, Cal. Civ. Proc. Code §§ 404-404.9 (2006); Cal. R. Ct. 6.1(a); Cal. R. Ct. 1501; Conn. Gen. Stat. Ann. § 51-347b; Ill. Sup. Ct. R. 384; Md. R. 2-327(d)(1); Md. R. 2-327(d)(3); Mass. Trial Ct. R. XII; N.H. Super. Ct. R. 113; N.J. Super. Tax & Surrogate's Ct. Civ. R. 4:38-1; N.J. Super. Tax & Surrogate's Ct. Civ. R. 4:60-16; 22 N.Y. Comp. Codes R. & Regs., § 202.69 (2006); Okla. Const., Art. VII, §§ 4, 6; Ore. Rev. Stat. § 32L(1)(L); Pa. R. Civil Proc. 213;

Tex. R. Jud. Admin. § 13.10; Va. Code Ann. §§ 8.01-267–8.01-267.9 (2000 & Supp. 2006); W. Va. Code § 56-9-1; W. Va. Trial Ct. R. 26.01(c). For a good general overview of these state procedures, *see* Yvette Ostolaza & Michelle Hartman, *Overview of Multidistrict Litigation Rules at the State and Federal Level*, 26 Rev. Litig. 47, 70–75 (Winter 2007).

[14] Ill. Sup. Ct. R. 384.

[15] *Id.*

[16] *Id.* comm. cmt.

[17] *Id.*

[18] *Id.*

[19] 28 U.S.C. § 1407(c); *see also* David F. Herr, *Multidistrict Lit. Manual* § 4:4 (2019) ("[T]he Panel has infrequently exercised its power to initiate transfer proceedings where there have been no related cases before it.").

[20] *See* John G. Heyburn II, A View from the Panel: Part of the Solution, 82 Tul. L. Rev. 2225, 2225–2226 (2008).

[21] J.P.M.L. R. 7.1(b), (h).

[22] *Id.*, Rules 7.1(c), (f).

[23] Bradt, *supra* note 5, at 1165, 1169.

[24] U.S. Judicial Panel on Multidistrict Litig., *Calendar Year Statistics*, pp. 3–5 of 11 (2018), https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Calendar_Year_Statistics-2018.pdf.

[25] *Id.* at p. 3 of 11.

[26] *Id.*

[27] U.S. Judicial Panel on Multidistrict Litig., *Statistical Analysis of Multidistrict Litig. Under 28 U.S.C. § 1407, Fiscal Year 2018*, pp. 1–43 (2018), https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical_Analysis_of_Multidistrict_Litigation-FY-2018.pdf.

[28] *See* Heyburn, *supra* note 20, at 2225, 2229.

[29] *Id.* John Heyburn guessed that these high rates may reflect a presumption by MDL Panel judges in favor of section 1407 transfers, or merely the sophistication of parties requesting transfer by not bringing marginal cases to the MDL Panel.

[30] *Calendar Year Statistics*, *supra* note 24, at p. 3 of 11.

[31] *Statistical Analysis, supra* note 27, at p. 3 of 74.

[32] *Id.* at p. 5 of 74.

[33] *Id.*

[34] In re Darvocet, Darvon and Propoxyphene Prods. Liab. Litig., 780 F. Supp. 2d 1379, 1381 (J.P.M.L. 2011).

[35] In re Blue Cross Blue Shield Antitrust Litig., MDL No. 2406, 2017 WL 6759056, at *1 (J.P.M.L. Oct. 4, 2017). Product liability cases, for instance, typically involve plaintiff-specific (or non-common) factual issues. Still, centralization may be appropriate when the actions allege a common defect involving similar products manufactured by the same company. *Id.*

[36] In re Linear Gadolinium-Based Contrast Agents Prods. Liab. Litig., 341 F. Supp. 3d 1381, 1382 (J.P.M.L. 2018) (hereinafter *In re Gadolinium-Based Contrast Agents*).

[37] In re Kugel Mesh Hernia Patch Prods. Liab. Litig., 493 F. Supp. 2d 1371, 1373 (J.P.M.L. 2007). In other words, it is "the province of the Panel to decide whether in the first instance the litigation should be transferred for coordinated or consolidated pretrial proceedings," while it is "the province of the transferee judge to determine whether and to what extent the pretrial proceedings should be coordinated or consolidated." In re Equity Funding Corp. of Am. Sec. Litig., 375 F. Supp. 1378, 1384 (J.P.M.L. 1973).

[38] *In re Gadolinium-Based Contrast Agents*, 341 F. Supp. 3d at 1382.

[39] *See*, *e.g.*, In re San Juan, Puerto Rico Air Crash Disaster Litig., 316 F. Supp. 981 (J.P.M.L. 1970). *But cf.,* In re Denture Cream Prods. Liability Litig., 624 F. Supp. 2d 1379 (J.P.M.L. 2009) (transfer of actions does not require complete identity or even majority of common factual or legal issues as prerequisite to transfer; centralization in instant case would have salutary effect of placing all actions in docket before a single judge who could formulate a pretrial program that: (1) would allow discovery with respect to any non-common issues to proceed concurrently with discovery on common issues; and (2) ensure that pretrial proceedings would be conducted in a manner leading to a just and expeditious resolution of all actions to the overall benefit of the parties).

[40] S. Rep. No. 90-454, at 2 (1967).

[41] David F. Herr, *Multidistrict Litig. Manual* § 5:5 (2019).

[42] *Id.*

[43] *Id.*

[44] 297 F. Supp. 385 (J.P.M.L. 1968).

[45] *Id.* at 386; s*ee also, e.g.*, In re Wells Fargo Wage & Hour Emp't Practices Litig. (No. III), 804 F. Supp. 2d 1382, 1384 (J.P.M.L. 2011) (court indicated that it was aware that centralization is often less than convenient for some parties, but held that, in this case, any inconvenience was outweighed by benefits of § 1407 proceedings; centralization would place all actions and any later-filed related actions before a single judge who could formulate a pretrial program that: (1) would allow discovery with respect to any non-common issues to proceed concurrently with discovery on common issues; and (2) ensure that pretrial proceedings were conducted in a manner leading to the just and expeditious resolution of these actions to the overall benefit of the parties).

[46] In re Allura Fiber Cement Siding Prods. Liab. Litig., 366 F. Supp. 3d 1365, 1366–1367 (J.P.M.L. 2019).

[47] In re Merrill Lynch & Co., Inc., Research Reports Sec. Litig., 223 F. Supp. 2d 1388, 1390 (J.P.M.L. 2002).

[48] In re Nissan Motor Corp. Antitrust Litig., 385 F. Supp. 1253, 1255 (J.P.M.L. 1974). Furthermore, the Panel has long held that convenience of counsel "is not by itself a factor to be considered under [s]ection 1407" unless the "inconvenience of counsel would impinge on the convenience of the parties or witnesses." In re Anthracite Coal Antitrust Litig., 436 F. Supp. 402, 403 (J.P.M.L. 1977).

[49] *The Judicial Panel and the Conduct of Multidistrict Litig.*, 87 Harv. L. Rev. 1001, 1008 (1974); *see also* Herr, *supra* note 19, at § 5:1 (noting that the Panel's decisions "reflect a willingness to impose significant burdens on individual litigants and their counsel in order that the overall burden and expense of the litigation to all parties might be reduced").

[50] Herr, *supra* note 19, at § 5:3 (citing three factors as "bare minimum" requirements and noting that, "[a]nalytically, they play an especially minimal role in proceedings before the Panel").

[51] *E.g.*, In re Lead Contaminated Fruit Juice Prods. Mktg. & Sales Practices Litig., 777 F. Supp. 2d 1353, 1355 (J.P.M.L. 2011); In re Eliquis (Apixaban) Prods. Liab. Litig., 282 F. Supp. 3d 1354, 1356 (J.P.M.L. 2017).

[52] In re Ford Motor Co. E-350 Van Prods. Liab. Litig. (III), 374 F. Supp. 2d 1353 (J.P.M.L. 2005).

[53] *Id.* at 1354.

[54] *See* In re MLR, LLC, Patent Litig., 269 F. Supp. 2d 1380, 1381 (J.P.M.L. 2003) (hereinafter *In re MLR*) (streamlining and planning for concurrent discovery of unique and common issues requires transfer); In re First Nat'l Bank, Heavener, Oklahoma (First Mortgage Revenue Bonds) Sec. Litig., 451 F. Supp. 995, 997 (J.P.M.L. 1978) (hereinafter *In re First Nat'l Bank*) (time-consuming discovery because of complexity of the common facts resulted in transfer); In re Multidistrict Private Civil Treble Damage Antitrust Litig. Involving IBM,

302 F. Supp. 796, 798 (J.P.M.L. 1969) (hereinafter *In re IBM*) (worldwide discovery of company's technological and economic data necessitated transfer).

[55] In re Multidistrict Civil Antitrust Litig. Involving Photocopy Paper, 305 F. Supp. 60, 61–62 (J.P.M.L. 1969) (inconvenience due to local nature of markets, practices and witnesses overcome by convenience relating to common questions of fact). *But see* In re Brandywine Assocs. Antitrust & Mortg. Foreclosure Litig., 407 F. Supp. 236, 238 (J.P.M.L. 1976) (case involved primarily local factual, legal, and administrative issues that would not benefit from mere remand of local discovery issues and thus transfer was unnecessary).

[56] *See, e.g.*, In re Avandia Marketing, Sales Practices & Prods. Liability Litig., 528 F. Supp. 2d 1339 (J.P.M.L. 2007). *See also, e.g.*, Fischer v. Saberhagen Holdings, Inc., No. C09-5385RJB, 2009 WL 4110391, at *1 (W.D. Wash. Nov. 19, 2009) ("Cases that have considered § 1407 and its purposes indicate that the purposes include the just, speedy and inexpensive determination of the action, avoiding repetition and duplicative discovery, and avoiding injury to like parties caused by inconsistent judicial treatment.").

[57] In re McDonald's French Fries Litig., 444 F. Supp. 2d 1342 (J.P.M.L. 2006).

[58] *Id.* at 1343.

[59] *E.g.*, In re Rivastigmine Patent Litig., 360 F. Supp. 2d 1361 (J.P.M.L. 2005); In re Papst Licensing Digital Camera Patent Litig., 528 F. Supp. 2d 1357 (J.P.M.L. 2007).

[60] *E.g.*, In re Clean Water Rule: Definition of "Waters of the United States," 140 F. Supp. 3d 1340 (J.P.M.L. 2015).

[61] *E.g.*, In re Johnson & Johnson Talcum Powder Prods. Mktg. Sales Practices & Prods. Liab. Litig., 220 F. Supp. 3d 1356, 1358 (J.P.M.L. 2016).

[62] *E.g.*, In re Onglyza (Saxagliptin) & Kombiglyze XR (Saxagliptin & Metformin) Prods. Liab. Litig., 289 F. Supp. 3d 1357 (J.P.M.L. 2018).

[63] In re Mansfield Oil Co. of Gainesville, Inc., Contract Litig., 672 F. Supp. 2d 1371, 1372 (J.P.M.L. 2010). In those rare cases in which cooperation between the parties has failed, the MDL Panel may invoke transfer as a means of putting the parties under the control of one judge: "[V]oluntary cooperation among counsel could eliminate the potential problems involved in this litigation. But . . . , all attempts to secure such cooperation have met with failure. In this situation transfer of the New York action under Section 1407 is appropriate. It is therefore ordered that the action . . . be transferred to the Eastern District of Pennsylvania pursuant to Section 1407." *See* In re CBS Licensing Antitrust Litig., 328 F. Supp. 511, 512 (J.P.M.L. 1971) (hereinafter *In re CBS*).

[64] In re Brimonidine Patent Litig., 507 F. Supp. 2d 1381, 1381 (J.P.M.L. 2007).

[65] Herr, *supra* note 19, at § 5:29 (collecting cases) (internal quotation marks omitted).

[66] *See*., *e.g.*, In re Am. Gen. Life & Accident Ins. Co. Indus. Life Ins. Litig., 175 F. Supp. 2d 1380 (J.P.M.L. 2001); In re High Sulfur Content Gasoline Prods. Liab. Litig., 344 F. Supp. 2d 755 (J.P.M.L. 2004); In re Air Crash Near Castellon, Spain, on Oct. 10, 2001, 296 F. Supp. 2d 1372 (J.P.M.L. 2003); In re Oilily Fair & Accurate Credit Transactions Act (FACTA) Litig., 545 F. Supp. 2d 1375 (J.P.M.L. 2008).

[67] *See* In re StarMed Health Personnel, Inc., Fair Labor Standards Act Litig., 317 F. Supp. 2d 1380, 1380 (J.P.M.L. 2004) (hereinafter *In re StarMed*) (transfer approved to coordinate rulings regarding whether the actions should proceed collectively); *In re IBM*, 302 F. Supp. at 798–799 (complex trade secret issues require consolidated rulings). *But see* In re Nutella Marketing & Sales Practices Litig., 804 F. Supp. 2d 1374 (J.P.M.L. 2011) (centralization for pretrial proceedings in three actions, pending in two districts, alleging misrepresentations in a food product manufacturer's marketing practices, was not necessary for convenience of parties and witnesses or just and efficient conduct of litigation; any shared factual questions among actions were not sufficiently complex or numerous as to justify transfer); In re Raymond Lee Org., Inc. Sec. Litig., 446 F. Supp. 1266, 1268 n.5 (J.P.M.L. 1978) (transfer denied because inconsistent class actions determinations are unlikely where the second action

covers a later time period than the first); In re Eli Lilly & Co. (Cephalexin Monohydrate) Patent Litig., 446 F. Supp. 242, 244 (J.P.M.L. 1978) (hereinafter *In re Eli Lilly*) (transfer denied because collateral estoppel will make the holding in one patent action dispositive in the other two actions); In re Wyeth Patent Infringement Litig., 445 F. Supp. 992, 993 (J.P.M.L. 1978) (hereinafter *In re Wyeth*) (same).

[68] Herr, *supra* note 19, at § 5:18.

[69] In re Multidistrict Civil Antitrust Actions Involving the Distribution of Scotch Whiskey, 299 F. Supp. 543, 544 (J.P.M.L. 1969) (hereinafter *In re Scotch Whiskey*).

[70] S. Rep. No. 90-454, at 4–5 (1967).

[71] *Compare In re CBS*, 328 F. Supp. at 512 (antitrust–transfer approved), *with In re Scotch Whiskey*, 299 F. Supp. at 544 (antitrust–transfer denied). *Compare* In re Clark Oil & Refining Corp. Antitrust Litig., 364 F. Supp. 458 (J.P.M.L. 1973) (hereinafter *In re Clark Oil*) (antitrust class action–transfer approved), *with In re First Nat'l Bank*, 451 F. Supp. at 997 (securities class action–transfer approved) *and* In re Royal Am. Indus., Inc. Sec. Litig., 407 F. Supp. 242 (J.P.M.L. 1976) (hereinafter *In re Royal Am.*) (securities class action–transfer denied). *Compare* In re Amoxicillin Patent & Antitrust Litig., 449 F. Supp. 601, 603 (J.P.M.L. 1978) (hereinafter *In re Amoxicillin*) (patent–transfer approved), *with In re Eli Lilly*, 446 F. Supp. at 243 (patent–transfer denied). *Compare In re StarMed*, 317 F. Supp. 2d at 1381 (Fair Labor Standards Act case–transfer approved), *with* In re Pan Am. World Airways, Inc. Maternity Leave Policy Litig., 414 F. Supp. 1232, 1233 (J.P.M.L. 1976) (EEOC case–transfer denied).

[72] *See, e.g.*, In re Capital One Bank Credit Card Terms Litig., 201 F. Supp. 2d 1377 (J.P.M.L. 2002) (banking industry); *In re Amoxicillin*, 449 F. Supp. at 603 (pharmaceutical and biochemical industries); *In re IBM*, 302 F. Supp. at 798–799 (software and hardware industries). *But see*, *In re Wyeth*, 445 F. Supp. at 993 (finding the technology involved in the bottle-making industry was not sufficiently complex).

[73] *Compare In re Clark Oil*, 364 F. Supp. at 459 (finding class designation competition relevant), *with In re Royal Am.*, 407 F. Supp. at 244 (finding consultation and coordination between courts).

[74] Herr, *supra* note 19, at § 5.16.

[75] *Id.* at § 5.18.

[76] *See* In re Bratton, 206 F. Supp. 2d 1366 (J.P.M.L. 2002).

[77] *See, e.g.*, Herr, *supra* note 19, at § 5.18 n.3.

[78] For comparatively recent cases, *compare* In re Circular Thermostat Antitrust Litig., 370 F. Supp. 2d 1355 (J.P.M.L. 2005) (two antitrust actions alleging anticompetitive practices transferred), *In re StarMed* (two employment actions for overtime pay transferred) *and In re MLR*, (three patent validity actions transferred), *with* In re Indian Tribes Contract Support Costs Litig., 383 F. Supp. 2d 1380 (J.P.M.L. 2005) (three actions for contract costs denied transfer), In re Nat'l Park Service Winter Use Management Litig., 374 F. Supp. 2d 1347 (J.P.M.L. 2005) (two use of land actions denied transfer) *and* In re Plasma Display Panels Patent Litig., 196 F. Supp. 2d 1378 (J.P.M.L. 2002) (two patent actions denied transfer).

[79] Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation?* Toward a Maximalist Use of the Multidistrict Litigation Panel's Transfer Power, 42 Tul. L. Rev. 2245, 2273 (2008).

[80] *See, e.g.*, In re A. H. Robins Co., 610 F. Supp. 1099 (J.P.M.L. 1985).

[81] *See* 28 U.S.C. § 1407(a).

[82] *Id.*

[83] Fed. R. Civ. P. 42; *see also* In re Plumbing Fixture Cases, 298 F. Supp. 484, 489–490 (J.P.M.L. 1968). Regarding the legislative intent here, the MDL Panel stated:

> There are other clear indications that Congress did not intend to permit the Panel to partition the issues in a single claim for relief and to assign powers of supervision and decision of the separate parts to two courts to be exercised contemporaneously.

> By authorizing the Panel to transfer "civil actions" (not parts thereof) for coordinated or consolidated pretrial proceedings and by limiting the Panel's powers of separation and remand to claims, cross-claims and counter-claims or third-party claims, Congress has made it "impossible to read the section as excising" the powers to determine the class action questions from the order of transfer.
>
> *Id.* at 490 (internal citations omitted).

[84] 28 U.S.C. § 1407(a).

[85] *See*, *e.g.*, In re Multidistrict Civil Actions Involving the Air Crash Disaster Near Hanover, N.H., on Oct. 25, 1968, 342 F. Supp. 907, 908 (D.N.H. 1971); Axis Reinsurance Co. v. Geostar Corp., No. 09–12608, 2009 WL 2776999 (E.D. Mich. Aug. 27, 2009) (§ 1407 only permits transfer for pretrial proceedings, including dispositive motions, while § 1404 permits transfer of entire case, including trial itself).

[86] *See* former Rule 14(b) of Procedure for the Judicial Panel on Multidistrict Litigation (28 U.S.C. § 1407(b) (1990)).

[87] 523 U.S. 26, 32–43 (1998).

[88] *Id.* at 35.

[89] *See*, *e.g.*, Federal Courts Improvement Act of 2000, H.R. 1752, 106th Cong. (1999) (would permit consolidation for all purposes); Judicial Improvement Act of 1999, S. 248, 106th Cong. (1999).

[90] H.R. Rep. No. 106-276, Section-by-Section Analysis (1999). (The legislation "would simply amend [section] 1407 by explicitly allowing a transferee court to retain jurisdiction over referred cases of a consolidated action for trial, or refer the cases to the respective transferor districts, as it sees fit.").

[91] 28 U.S.C. § 1407(a).

[92] M.D. Fla. Local R. 1.04.

[93] *See* Edward F. Sherman, *The MDL Model for Resolving Complex Litigation if a Class Action Is Not Possible*, 82 Tul. L. Rev. 2205 (2008). For a more complete discussion of this phenomenon, *see* Robin J. Effron, Disaster-Specific Mechanisms for Consolidation, 82 Tul. L. Rev. 2423 (June 2008).

[94] In re Multidistrict Civil Antitrust Actions Involving Antibiotic Drugs, 299 F. Supp. 1403, 1405 (J.P.M.L. 1969) ("'The fact that the cause is in the district court by removal from a state court has no bearing on a motion to transfer (under 28 U.S.C. 1404(a)). Once removed, the action proceeds as if it had been brought in the federal court originally.' We see no reason why this rule is any less applicable to transfers under 28 U.S.C. 1407.") (quoting Chicago R.I. & P.R. Co. v. Igoe, 212 F.2d 378, 382 (7th Cir. 1954)).

[95] Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of Title 28 of the U.S. Code); *see also*, *e.g.*, Multiparty, Multiforum Trial Jurisdiction Act of 2002, Pub. L. No. 107-273, 116 Stat. 1758, 1826 (same).

[96] *See*, *e.g.*, In re Raymond, 446 F. Supp. at 1266, 1268 (J.P.M.L. 1978).

[97] *Id.*

[98] In re Lloyds Bank PLC Int'l. Mortg. Serv. Loan Litig., 997 F. Supp. 2d 1352, 1353 (J.P.M.L. 2014).

[99] *Id.*

[100] In re Allianz Life Ins. Co. of N. Am. Deferred Annuity Mktg. & Sales Practice Litig., 517 F. Supp. 2d 1364, 1365 (J.P.M.L. 2007). *See also, e.g.*, In re Schneider Nat'l Carriers, Inc. Wage & Hour Emp't Practices Litig., 763 F. Supp. 2d 1373, 1374 (J.P.M.L. 2011) ("Given that there are only two actions pending in two adjacent districts, all responding parties oppose centralization, and the coordinated Northern District of California actions are at a more advanced stage of proceedings, movants have failed to convince us that Section 1407 transfer would be appropriate at this time.").

[101] In re Molinaro/Catanzaro Patent Litig., 464 F. Supp. 966, 969 (J.P.M.L. 1979) (denying transfer because two of three cases already were in advanced pretrial stages, had benefited from consolidation, and no parties claimed that remaining discovery concerned the central issue of common fact); In re Raymond Lee Org., Inc. Sec. Litig., 446 F. Supp. 1266, 1268 (J.P.M.L. 1978) (denying transfer where discovery was already completed in one of the two actions, thus ruling out any benefit from transfer); In re Multidistrict Civil Antitrust Litig. Involving Photocopy Paper, 305 F. Supp. 60, 62 (J.P.M.L. 1969) (denying transfer where trial was to begin shortly in one action, others had almost completed discovery, and remaining actions lacked complex common facts).

[102] 487 F. Supp. 1351 (J.P.M.L. 1980).

[103] *Id.* at 1354.

[104] *Id.*

[105] *Id.*

[106] Heyburn, *supra* note 20, 2225, 2238–2239.

[107] In re Bank of Am. Fiduciary Accounts Litig., 435 F. Supp. 2d 1349 (J.P.M.L. 2006).

[108] *See*, *e.g.*, In re "Lite Beer" Trademark Litig., 437 F. Supp. 754, 755–756 (J.P.M.L. 1977).

[109] In re Am. Fin. Corp. Litig., 434 F. Supp. 1232 (J.P.M.L. 1977).

[110] In re Multidistrict Litigation Involving Deering Milliken Patent, 328 F. Supp. 504, 505–506 (J.P.M.L. 1970).

[111] *See* In re Asbestos Prods. Liab. Litig. (No. VI), No. 875, 1996 WL 143826, at *1 n.1 (J.P.M.L. Feb. 16, 1996) (emphasizing that transferor court retains jurisdiction to rule on any pending motions, including remand motions, even after conditional transfer order has issued).

[112] *See*, *e.g.*, Albert Fadem Tr. v. Worldcom, Inc., Nos. 02 Civ. 3288, 02 Civ. 3416, 02 Civ. 3419, 02 Civ. 3508, 02 Civ. 3537, 02 Civ. 3647, 02 Civ. 3750, 02 Civ. 3771, 02 Civ. 4985, 2002 WL 1485257, at *2 (S.D.N.Y. July 12, 2002) (filing of motion before Judicial Panel does not require transferor court to defer consideration of motions for consolidation and appointment of lead plaintiff); *see also*, *e.g.*, Clark v. BHP Copper, Inc., No. C10–1058, 2010 WL 1266392 (N.D. Cal. Mar. 30, 2010) (court indicated that it had discretion to stay proceedings in case pending possible transfer to multidistrict litigation *or* to rule on pending motion to remand; in this case, court held that it was necessary to remand case because removal was improper).

[113] In re Gen. Motors Class E Stock Buyout Sec. Litig., 696 F. Supp. 1546, 1547 (1988).

[114] *Id.*

[115] In re Boehringer Ingelheim Pharm., Inc., Fair Labor Standards Act (FLSA) Litig., 763 F. Supp. 2d 1377, 1378 n.1 (J.P.M.L. 2011).

[116] In re Nat'l Arbitration Forum Antitrust Litig., 682 F. Supp. 2d 1343, 1345 (J.P.M.L. 2010).

[117] 28 U.S.C. § 1407(e). The standard for obtaining a writ is high. To qualify for mandamus relief, parties must show they have "no other adequate means to obtain relief" and their "right to the writ is clear and indisputable." FedEx Ground Package Sys., Inc. v. U.S. Judicial Panel on Multidistrict Litig., 662 F.3d 887, 890 (7th Cir. 2011). Moreover, "only exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion will justify the invocation of this extraordinary remedy." *Id.* (quoting Cheney v. U.S. Dist. Court for Dist. of Columbia, 542 U.S. 367, 380 (2004)).

[118] 28 U.S.C. § 1407(e).

[119] *Id.*

[120] For a more detailed discussion, *see* David F. Herr, *Annotated Manual for Complex Litig.* §§ 15.11, 15.12 (4th ed. May 2019) ("There are few special rules applicable to appellate practice in complex litigation. In many ways, complex litigation involves issues that are especially unlikely to be reviewed on appeal. . . .").

[121] *See* In re Data Gen. Corp. Antitrust Litig., 510 F. Supp. 1220, 1226–1227 (J.P.M.L. 1979).

[122] 28 U.S.C. § 1407(a) ("Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred.").

[123] Lexecon, Inc. v. Milberg Weiss Bershad, Hynes & Lerach, 523 U.S. 26, 34–35 (1998).

[124] J.P.M.L. R. 10.1(b); *see also*, *e.g.*, In re Patenuade, 210 F.3d 135, 146 (3d Cir. 2000).

[125] *See* 28 U.S.C. § 1407(a) ("Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred.").

[126] Stanley A. Weigel, *The Judicial Panel on Multidistrict Litigation,* Transferor Courts and Transferee Courts, 78 F.R.D. 575, 576 (1978).

[127] *Id.*

[128] Holderman, *supra* note 3, at 27.

[129] Weigel, *supra* note 126, at 582–583; *see also* In re African-Am. Slave Descendants Litig., 471 F.3d 754, 757 (7th Cir. 2006) (emphasizing the authority of transferee courts to decide "a host of pretrial motions, many of which, whether or not formally dispositive, can shape the litigation decisively"); In re Korean Air Lines Co., Antitrust Litig., 642 F.3d 685, 700-701 (9th Cir. 2011) ("But when it comes to motions that can spell the life or death of a case, such as motions for summary judgment, motions to dismiss claims, or, as here, a motion to amend pleadings, it is important for the district court to articulate and apply the traditional standards governing such motions. A total disregard for the normal standards of assessing these critical motions would improperly subject MDL cases to different and ad hoc substantive rules.") (ruling that the transferee court abused its discretion when it denied plaintiff's motion for leave to amend to add new claims).

[130] In re Factor VIII or IX Concentrate Blood Prods. Litig., 169 F.R.D. 632, 637 (N.D. Ill. 1996).

[131] The process for remand under the Panel's rules of procedure is that the Panel will issue a Conditional Remand Order ("CRO") upon the suggestion of the transferee judge—or upon motion by one or more of the parties or at the Panel's own initiative—that the case is ready for remand. J.P.M.L. R. 10.2(a) ("Upon the suggestion of the transferee judge or the Panel's own initiative, the Clerk of the Panel shall enter a conditional order remanding the action or actions to the transferor district court . . . (i) The Panel may, on its own initiative, also enter an order that the parties show cause why a matter should not be remanded." (internal footnote omitted)); *see also* Edward F. Sherman, When Remand Is Appropriate in Multidistrict Litigation, 75 La. L. Rev. 455, 462–469 (2014) ("It is the Panel's responsibility to remand cases.").

[132] Sherman, *supra* note 131, at 462–469.

[133] Weigel, *supra* note 126, at 577.

[134] *Id.*

[135] In re Ford Motor Co., 591 F.3d 406, 411 (5th Cir. 2009) (internal quotation marks omitted).

[136] 28 U.S.C. 1407(a).

[137] *Lexecon,* 523 U.S. at 26, 40.

[138] *See* In re Carbon Dioxide Indus. Antitrust Litig., 229 F.3d 1321, 1326–1327 (11th Cir. 2000) (parties urged the transferee court to try the case, stipulated that venue was proper, and failed to raise objections to remand until the day of jury selection); *but see* Armstrong v. LaSalle Bank Nat'l Ass'n, 552 F.3d 613, 616–618 (7th Cir. 2009) (mere participation in pretrial proceedings in the transferee court does not constitute waiver).

[139] Charles A. Wright et al., 15 Fed. Prac. & Proc. Juris. § 3866.2 n.26 (4th ed. 2019) ("the possibility of doing this is enhanced by a 2011 amendment to § 1404(a), which permits transfer even to a district that is not a proper venue and which does not have personal jurisdiction over the defendant if (1) the court finds that it is warranted by the statutory factors in § 1404(a) and (2) all parties consent").

[140] Heyburn, *supra* note 20, at 2225, 2233 n.47.

[141] *See* Andrew D. Bradt, The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation, 88 Notre Dame L. Rev. 759, 791 (2012).

[142] 28 U.S.C. § 1407(c)(i).

[143] *Id.* § 1407(c)(ii); *see also* J.P.M.L. R. 6.2(a).

[144] J.P.M.L. R. 6.2(b).

[145] 28 U.S.C. § 1407(a).

[146] *Id.* § 1407(b).

[147] Martin H. Redish & Julie M. Karaba, One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism, 95 B.U. L. Rev. 109, 120 (2015).

[148] *Id.* (internal footnote omitted).

[149] *Id.* at 120–121 (internal footnote omitted) (quoting Bradt, *supra* note 141, at 787). Martin Redish and Julie Karaba aptly noted that:

> Prior to consolidation, most of the parties' disagreements have tended to focus on where the consolidation will take place; parties have preferred particular venues and district judges. When lobbying for transfer to a specific district, parties may not argue about applicable district and circuit law in potential courts (which may be more favorable to the plaintiffs or the defendants in a given set of facts); they are limited to administrative and convenience arguments. Plaintiffs might strategically file cases in a particular district and then argue that the Panel should assign the MDL to that district because cases are already pending there. If those cases have advanced further in the discovery process, such that a particular presiding judge appears to be leading the pack of cases to be transferred, this strategy might prove effective. On the other side, defendants might argue that creation of an MDL is premature or that, because only a few plaintiffs' lawyers are involved, the parties can informally coordinate the cases without formally consolidating them.
>
> Redish & Karaba, *supra* note 147, at 121 (internal footnotes omitted).

[150] J.P.M.L. R.1.1(h).

[151] *Id.* R. 7.1(a).

[152] *Id.* R. 7.1(b). An interested party may file a motion to transfer if the Panel does not enter a CTO.

[153] *Id.* R. 7.1(c), (f).

[154] *Id.* R. 7.1(d).

[155] Bradt, *supra* note 141, at 794.

[156] Duke Law School Center for Judicial Studies, *Standards and Best Practices for Large and Mass-Tort MDLs*, at 33 (Dec. 19, 2014), https://judicialstudies.duke.edu/sites/default/files/centers/judicialstudies/standards_and_best_practices_for_large_and_mass-tort_mdls.pdf; *see also* Hon. Stanwood R. Duval, Considerations in Choosing Counsel for Multidistrict Litigation Cases and Mass Tort Cases, 74 La. L. Rev. 391, 395 (2014) ("[C]hoosing counsel is probably one of the most critical decisions a judge makes in an MDL or mass tort case.").

[157] *See, e.g.*, In re Zyprexa Prods. Liab. Litig., 594 F.3d 113, 116 (2d Cir. 2010).

[158] Redish & Karaba, *supra* note 147, at 122 (citations and internal footnote omitted).

[159] David F. Herr, *Annotated Manual for Complex Litigation* § 10.221 (4th ed. 2019).

[160] Redish & Karaba, *supra* note 147, at 122–123; *see also* Pretrial Order No. 4, Plaintiff Leadership Structure, In re 3M Combat Arms Earplug Prods. Liab. Litig., No. 3:19-md-2885 (N.D. Fla. Apr. 19, 2019), ECF No. 76 (order setting forth the procedure for appointing the leaders, including the application process); Charles Silver & Geoffrey P. Miller, The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal, 63 Vand.

L. Rev. 107, 118–119 (2010) (commenting that MDL judges could "pick the lawyers they want[] because the standards governing appointments of attorneys to managerial positions are extremely weak").

[161] Redish & Karaba, *supra* note 147, at 123.

[162] Herr, *supra* note 159, at § 10.221.

[163] *Id.*

[164] *Id.*

[165] *See*, *e.g.,* Pretrial Order No. 4, *supra* note 160, at 5.

[166] Herr, *supra* note 159.

[167] Pretrial Order No. 4, *supra* note 160, at 6–7.

[168] *Id.* at 7–8.

[169] *Id.* at 9–10.

[170] *Standards and Best Practices for Large and Mass-Tort MDLs*, *supra* note 156, at 37; Pretrial Order No. 4, *supra* note 160, at 6–11.

[171] Elizabeth Chamblee Burch, Judging Multidistrict Litig., 90 N.Y.U. L. Rev. 71, 87–88 (2015).

[172] Howard M. Erichson, A Typology of Aggregate Settlements, 80 Notre Dame L. Rev. 1769, 1774 (2005).

[173] *E.g.*, Pretrial Order No. 4, *supra* note 160.

[174] Herr, *supra* note 159, at § 10.224.

[175] Redish & Karaba, *supra* note 147, at 124.

[176] 594 F.3d 113, 115 (2d Cir. 2010).

[177] Redish & Karaba, *supra* note 147, at 124–125.

[178] Emery G. Lee et al., *The Expanding Role of Multidistrict Consolidation, in Federal Civil Litigation: An Empirical Investigation*, at 5 (2010) ("Bellwether trials have emerged as a primary mechanism for evaluating and resolving mass tort litigation in the multidistrict litigation context.").

[179] In re Chevron U.S.A., Inc., 109 F.3d 1016, 1019 (5th Cir.1997).

[180] Jeremy Hays, The Quasi-Class Action Model for Limiting Attorneys' Fees in Multidistrict Litig., 67 N.Y.U. Ann. Surv. Am. L. 589, 626 (2012).

[181] Redish & Karaba, *supra* note 147, at 126.

[182] In re Ampicillin Antitrust Litig., M.D.L. Dkt. No. 50, 1981 WL 2008 (D.D.C. Jan. 22, 1981).

[183] Fallon et al., *supra* note 2, at 2323, 2338.

[184] Monique C.M. Leahy, Use of Bellwether Trials in Mass Tort Litig., 156 Am. Jur. Trials 219, § 1 (2019).

[185] *Id.* Federal courts have the authority to conduct trials of bellwether cases (i.e., "bellwether trial") under Federal Rule of Civil Procedure 42(b). Also, an MDL court can try a case where venue is improper if the parties waive their objections; such waivers are known as "*Lexecon* waivers."

[186] Herr, *supra* note 159, at § 22.315. Also, "[t]he information the parties gain through bellwether trials serves several collateral purposes: it enables both sides of the case to produce 'trial packages' to be used by local plaintiff's and defendant's counsel in future cases; it enables parties to attempt to structure an aggregate resolution of the underlying mass of cases; and it enables the court to have a better understanding of the controversy it is managing." 4 Newberg on Class Actions § 11:12 (5th ed. 2019) (internal footnotes omitted).

[187] Fallon, *supra* note 2, at 2339.

[188] *Id.*

[189] Herr, *supra* note 159, at § 22.315 (internal footnotes omitted).

[190] *In re Chevron*, 109 F.3d at 1019.

[191] Redish & Karaba, *supra* note 147, at 127.

[192] Nicholas N. Deutsch & Jennifer E. Spencer, Trends in Selecting Bellwether Trials in Multidistrict Litigation, 34 No. 16 Westlaw J. Toxic Torts 1 (2016).

[193] Redish & Karaba, *supra* note 147, at 127.

[194] *Id.*

[195] *Id.* at 128.

[196] In re Wilson, 451 F.3d 161, 169–172 (3d Cir. 2006) (internal quotation marks omitted); In re Patenaude, 210 F.3d 135, 142 (3d Cir. 2000).

[197] Redish & Karaba, *supra* note 147, at 129.

[198] Amy L. Saack, Global Settlements in Non-Class MDL Mass Torts, 21 Lewis & Clark L. Rev. 847, 855 (2017).

[199] Redish & Karaba, *supra* note 147, at 128–129.

[200] Margaret S. Thomas, Morphing Case Boundaries in Multidistrict Litig. Settlements, 63 Emory L.J. 1339, 1362 (2014).

[201] Saack, *supra* note 198, at 856–857.

[202] Thomas, *supra* note 200, at 1377.

[203] *E.g.*, In re Vioxx Prods. Liab. Litig., 574 F. Supp. 2d 606, 609 (E.D. La. 2008). The global settlement agreement in *In re Vioxx Products Liability Litigation* is often cited as an example of an innovative agreement:

> In the *Vioxx* MDL, the JPML transferred all Vioxx lawsuits to the Eastern District of Louisiana. Vioxx was a prescription drug designed to relieve pain and inflammation; it was removed from the market after a clinical trial indicated that it increased the risk of heart attack and stroke. The MDL included claims from nearly every state and included personal injury and wrongful death claims, medical monitoring claims, and purchase claims. The Negotiating Plaintiffs' Counsel, comprised of six members appointed by the court, negotiated the settlement on behalf of all claimants.
>
> The Master Settlement Agreement stated that by "submitting an Enrollment Form, the Enrolling Counsel affirms that he has recommended . . . or will recommend . . . to 100% of the Eligible Claimants represented by such Enrolling Counsel that such Eligible Claimants enroll in the Program." If a claimant failed or refused to enroll in the settlement, the agreement required, to the extent permitted by the Model Rules of Professional Conduct, that counsel take all necessary steps to disengage and withdraw from representation. The settlement was structured as an "opt in" agreement, contingent on 85% of claimants opting in. These two terms combined "made it practically impossible for a claimant to decline the offer," by forcing claimants to choose between opting in to the settlement or losing representation. Within a year, 99.79% of eligible claimants enrolled in the settlement.
>
> Saack, *supra* note 198, at 866 (citation and internal footnotes omitted).

[204] *Id.* at 852.

[205] *Id.*

[206] ABA Model Rule of Prof'l Conduct 1.8(g).

[207] *Id.*

[208] Pa. v. Del. Valley Citizens' Council for Clean Air, 478 U.S. 546, 561 (1986) (internal quotation marks omitted).

[209] Eldon E. Fallon, Common Benefit Fees in Multidistrict Litig., 74 LA. L. Rev. 371, 374–375 (2014); *see also* Trs. v. Greenough, 105 U.S. 527, 537–538 (1881); Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975).

[210] In re Vioxx Prods. Liab. Litig., 760 F. Supp. 2d 640, 647 (E.D. La. 2010).

[211] *Id.*

[212] *Id.*

[213] 28 U.S.C. § 1407.

[214] In re Genetically Modified Rice Litig., No. 4:06 MD 1811 CDP, 2010 WL 716190, at *4 (E.D. Mo. Feb. 24, 2010), *aff'd,* 764 F.3d 864 (8th Cir. 2014).

[215] In re Avandia Mktg., Sales Practices & Prods. Liab. Litig., 617 F. App'x 136, 143 (3d Cir. 2015).

[216] *See* Pet. for Writ of Certiorari, Phipps Grp. v. Downing, 135 S. Ct. 1455 (2015) (No. 14-786), 2014 WL 7477017.

[217] Redish & Karaba, *supra* note 147, at 130 (internal footnotes omitted).

[218] Fallon, *supra* note 209, at 381.

[219] *Id.* Courts may in "'rare' and 'exceptional' cases" adjust the lodestar upward or downward "using a 'multiplier' based on factors not subsumed in the initial calculation." In re Volkswagen "Clean Diesel" Mktg., Sales Practices, and Prods. Liab. Litig., MDL No. 2672, 2017 WL 1352859 (N.D. Cal. Apr. 12, 2017) (quoting Hensley v. Eckerhart, 461 U.S. 424, 434 (1983)). Those factors may include "the quality of representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment." In re Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 941–942 (9th Cir. 2011) (quoting (citing Hanlon v. Chrysler Corp., 150 F.3d 1011, 1029 (9th Cir. 1998)).

[220] *See*, *e.g.*, Jones v. Dominion Res. Servs., Inc., 601 F. Supp. 2d 756, 758 (S.D. W.Va. 2009).

[221] In re Vioxx Prods. Liab. Litig., 802 F. Supp. 2d 740, 772 (E.D. La. 2011) (quoting In re High Sulfur Content Gasoline Prods. Liab. Litig., 517 F.3d 220, 234 (5th Cir. 2008)).

[222] Fallon, *supra* note 209, at 387. District courts derive authority to establish these structures from their equitable powers.

[223] *E.g.*, In re San Juan Dupont Plaza Hotel Fire Litig., 111 F.3d 220, 228 (1st Cir. 1997) ("District court orders awarding costs normally are reviewed only for abuse of discretion.").

[224] Redish & Karaba, *supra* note 147, at 130.

[225] *E.g.*, In re Vioxx Prods. Liab. Litig., MDL No. 1657, 2013 WL 1856035 (E.D. La. Apr. 30, 2013) (instead referring matter to special master to make a recommendation on an appropriate allocation of attorneys' fees).

[226] Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496–497 (1941).

[227] In re Vioxx Prods. Liab. Litig., 478 F. Supp. 2d 897, 903 (E.D. La. 2007).

[228] *Id.* A district court must generally apply the choice of law rules of the state in which it sits in order to determine which state's substantive law applies.

[229] Wahl v. GE, 983 F. Supp. 2d 937, 943 (M.D. Tenn. 2013), *aff'd,* 786 F.3d 491 (6th Cir. 2015); *accord* In re Watson Fentanyl Patch Prods. Liab. Litig., 977 F. Supp. 2d 885, 887–888 (N.D. Ill. 2013); In re Gen. Motors LLC Ignition Switch Litig., 14-MD-2543, 2017 WL 3382071, at *7 (S.D.N.Y. Aug. 3, 2017).

[230] In re Plumbing Fixtures Litig., 342 F. Supp. 756 (J.P.M.L. 1972).

[231] In re Korean Air Lines Disaster of Sept. 1, 1983, 829 F.2d 1171, 1176 (D.C. Cir. 1987).

[232] *See*, *e.g.*, Eckstein v. Balcor Film Inv'rs, 8 F.3d 1121, 1128 (7th Cir. 1993) (stating that, when federal law is not uniform, the transferee court should apply the interpretation of law of the transferor forum); In re MTBE Prods. Liab. Litig., 241 F.R.D. 435, 439 (S.D.N.Y. 2007) (holding that the standards for class certification of a transferor court should apply because "whether to certify an action on behalf of a class under Rule 23 is not merely a pretrial issue").

[233] *See*, *e.g.*, Sherman, *supra* note 93, at 2205.

[234] *See*, *e.g.*, *In re Vioxx Prods. Liab. Litig.*, 574 F. Supp. 2d at 611.

[235] *See* J.P.M.L. R. 7.2(a) ("Potential tag-along actions filed in the transferee district do not require Panel action. A party should request assignment of such actions to the Section 1407 transferee judge in accordance with applicable local rules."); In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig., MDL No. 2046, 2011 WL 1232352, at *4 (S.D. Tex. Mar. 31, 2011) ("The JPML's rules expressly provide for joining direct filings with the MDL cases under a court's local rules without transferring through the JPML.") (citing J.P.M.L. R. 7.2(a)).

[236] *In re Heartland Payment Sys.*, 2011 WL 1232352, at *4.

[237] In re Vioxx Prods. Liab. Litig., 478 F. Supp. 2d 897, 904 n.2 (E.D. La. 2007).

[238] *Id.* at 903.

[239] In re Takata Airbag Prods. Liab. Litig., __ F. Supp. 3d __, MDL No. 2599, 2019 WL 2180688, at *9 (S.D. Fla. May 3, 2019) (citation omitted; relying on 28 U.S.C. §§ 1391, 1404(a)).

[240] 523 U.S. 26 (1998).

[241] 28 U.S.C. § 1404(a).

[242] *Lexecon*, 523 U.S. at 34.

[243] Judge Information Center, *Multidistrict Litigation Creates Large Caseloads for Some Judges*, https://trac.syr.edu/tracreports/judge/548/.

[244] U.S. Chamber Institute for Legal Reform, *MDL Proceedings, Eliminating the Chaff*, at 1 (Oct. 2015), https://www.instituteforlegalreform.com/uploads/sites/1/MDL_Proceedings_web.pdf.

[245] *Id.*

[246] *Id.*

[247] J. Maxwell Heckendorn & Steven E. Swaney, *Meritless Claims Create Inefficiencies in Multidistrict Litigation* (Feb. 12, 2019), https://www.natlawreview.com/article/meritless-claims-create-inefficiencies-multidistrict-litigation.

[248] U.S. Chamber Institute for Legal Reform, *MDL Proceedings*, *supra* note 244, at 1. Attorneys should be careful about filing non-meritorious tag-along cases in the hopes they will be "swept into the MDL where a global settlement will be reached, allowing them to obtain a recovery without the individual merit of their case being scrutinized as closely as it would if it proceeded as a separate individual action." In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig., 4:08–MD–2004, 2016 WL 4705827, at *1 (M.D. Ga. Sept. 7, 2016). Chief Judge Clay D. Land of the Middle District of Georgia lamented that this "phenomenon produces the perverse result that an MDL . . . becomes populated with many non-meritorious cases that must nevertheless be managed by the transferee judge—cases that likely never would have entered the federal court system without the MDL." *Id.* Judge Land suggested that transferee judges should, at a minimum, be aware that they "may need to consider approaches that weed out non-meritorious cases early" and that the liberal "use of Rule 11 will help." *Id.* at *2.

[249] 398 F. Supp. 2d 563, 567 (S.D. Tex. 2005).

[250] *Id.* at 576.

[251] No. L-33606-85, 1986 WL 637507 (N.J. Super. Ct. Nov. 18, 1986). The plaintiffs in that case had sued over 400 defendants that were customers of a landfill alleging toxic tort exposure injuries and reduced property values. The case management order required the plaintiffs to offer specific proof regarding their alleged exposure, reports of physicians regarding causation and specific information substantiating each claim of property damage. Plaintiffs could not satisfy the burden imposed by the order, and their cases were eventually dismissed.

[252] *See* Steering Comm. v. Exxon Mobil Corp., 461 F.3d 598, 604 n.2 (5th Cir. 2006); Acuna v. Brown & Root Inc., 200 F.3d 335, 340 (5th Cir.2000) ("*Lone Pine* orders are designed to

handle the complex issues and potential burdens on defendants and the court in mass tort litigation."); McManaway v. KBR, Inc., 265 F.R.D. 384, 385 (S.D. Ind. 2009) ("The basic purpose . . . is to identify and cull potentially meritless claims and streamline litigation in complex cases.") (quoting Baker v. Chevron USA, Inc., No. 1:05-CV-227, 2007 WL 315346, at *1 (S.D. Ohio Jan. 30, 2007)); *see also* Abrams v. Ciba Specialty Chems. Corp., No. 08-00068, 2008 WL 4710724, at *2 (S.D. Ala. Oct. 23, 2008); Ramos v. Playtex Prods., Inc., No. 08 CV 2703, 2008 WL 4066250, at *5 (N.D. Ill. Aug. 27, 2008); Abbatiello v. Monsanto Co., 569 F. Supp. 2d 351, 353 n.3 (S.D.N.Y. 2008); In re Vioxx Prods. Liab. Litig., 557 F. Supp. 2d 741, 743 (E.D. La. 2008), *aff'd,* 388 F. App'x 391 (5th Cir. 2010); Burns v. Universal Crop Prot. All., No. 4:07-CV-00535, 2007 WL 2811533, at *1 (E.D. Ark. Sept. 25, 2007); Morgan v. Ford Motor Co., No. 06–1080, 2007 WL 1456154, at *1, 7 (D.N.J. May 17, 2007).

253 *In re Vioxx*, 557 F. Supp. 2d at 744 ("In crafting a *Lone Pine* order, a court should strive to strike a balance between efficiency and equity."). Courts citing authority for *Lone Pine* orders typically rely on the broad permission bestowed by Federal Rule of Civil Procedure 16. *See Acuna*, 200 F.3d at 340 ("In the federal courts, such orders are issued under the wide discretion afforded district judges over the management of discovery under Fed. R. Civ. P. 16."); *McManaway*, 265 F.R.D. at 385 ("*Lone Pine* orders are permitted by Rule 16(c)(2)(L) of the Federal Rules of Civil Procedure which provides that a court may take several actions during a pretrial conference, including 'adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems. . . .' Fed. R. Civ. P. 16(c)(2)(L)") (citation omitted)); *Ramos*, 2008 WL 4066250, at *5 (same); *Morgan*, 2007 WL 1456154, at *5–6 (noting, among other provisions, several potentially applicable provisions of Rule 16); 6A Charles A. Wright et al., Fed. Prac. & Proc. § 1525 (3d ed. 2019).

254 *See, e.g.*, *Steering Comm.*, 461 F.3d at 605 ("Particularly in this case, where the district court has been careful to manage the litigation efficiently through the judicious use of consolidated summary judgments and other tools such as *Lone Pine* orders, we will not second-guess the district court's discretionary judgment that a class action would not provide a superior method of adjudication."); *McManaway*, 265 F.R.D. at 385 ("Hence, '[s]ome courts have entered [*Lone Pine*] orders *only* after a state or federal agency has issued a report that either provides much of the information called for in the order or undercuts the plaintiffs' claims for personal injuries.'") (citation omitted)); *Abrams*, 2008 WL 4710724, at *5 ("[S]ince this case is going to proceed with a test group, the use of a Lone Pine order will not advance the goal of focusing the parties' attention and efforts on the efficient resolution of the test case."); 2 Lawrence G. Cetrulo, Toxic Torts Litigation Guide § 13:49 ("*Lone Pine* orders are most appropriate in those cases where there is a serious issue over what medical condition or disease, if any, can be causally related to the toxic agent exposure alleged by each plaintiff.") (citation omitted)); Shane A. Anderson & Ted W. Simon, Defending Pesticides in Litig. § 10:9 (2018) ("Many courts have applied the Lone Pine case management approach in complex cases involving product identity and exposure issues.").

255 U.S. Chamber Institute for Legal Reform, *MDL Proceedings*, *supra* note 244, at 15.

256 *Id.* at 22.

257 This committee is comprised of a group of federal judges, lawyers, law professors, and other practitioners who are appointed by the Chief Justice of the U.S. Supreme Court to propose revisions to the Federal Rules of Civil Procedure.

258 Lawyers for Civil Justice, *MDL Practices and the Need for FRCP Amendments: Proposals for Discussion with the MDL/TPLF Subcommittee of the Advisory Committee on Civil Rules*, at 4 (Sept. 14, 2018), https://www.uscourts.gov/sites/default/files/suggestion_18-cv-x_0.pdf.

259 Meeting of the Advisory Committee on Civil Rules, at 147–148 (Nov. 1, 2018).

260 Duke Law School Center for Judicial Studies, *MDL Standards and Best Practices* 89–90 (Sept. 11, 2014), https://judicialstudies.duke.edu/sites/default/files/centers/judicialstudies/MDL_Standards_and_Best_Practices_2014-REVISED.pdf.

[261] *Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017*, H.R. 985, 115th Cong. (2017–2018), https://www.congress.gov/bill/115th-congress/house-bill/985?q=%7B%22search%22%3A%5B%22fairness+in+class+action+litigation%22%5D%7D.

[262] *Id.* § 105(i).

[263] *Id.*

[264] *Id.*

[265] *Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017*, *supra* note 261, § 105(l).

[266] *See*, *e.g.*, In re Managed Care Litig. v. Aetna Inc., MDL No. 1334, 2003 WL 22850070 (S.D. Fla. Oct. 24, 2003) (awarding 35.5%); Order and Final Judgment, In re Terazosin Hydrochloride Antitrust Litig., 1:99–md-01317 (S.D. Fla. Apr. 19, 2005), ECF No. 1557 (awarding 33.33%).

[267] U.S. Northern District of California, Notice Regarding Civil LR 3-15, https://www.cand.uscourts.gov/news/210.

[268] Wis. Stat. 804.01(2)(bg).

[269] Meeting of the Advisory Committee on Civil Rules, at 345 (Nov. 7, 2017) (emphasis omitted), https://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-november-2017.

[270] Pretrial Order No. 4, Plaintiff Leadership Structure at 3, In re 3M Combat Arms Earplug Prods. Liab. Litig., No. 3:19-md-02885 (N. D. Fla. April. 19, 2019), ECF No. 76.

[271] Case Management Order Regarding Model Leadership Applications for the Consumer Track at 2, In Re Marriott Int'l Customer Data Sec. Breach Litig., No. 8:19-md-02879 (Apr. 11, 2019), ECF No. 171.

[272] *Id.*

[273] In re Nat'l Prescription Opiate Litig., No. 1:17-MD-2804, 2018 WL 2127807, at *1 (N.D. Ohio May 7, 2018).

[274] *Id.*

[275] *See*, *e.g.*, Alison Frankel, *Litigation funders blast U.S. Chamber, GCs for disclosure push*, On the Case (Feb. 21, 2019), https://www.reuters.com/article/legal-us-otc-litfunding/litigation-funders-blast-u-s-chamber-gcs-for-disclosure-push-idUSKCN1QA2Z4.

CHAPTER 5

Management of Class Actions

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§ 5.01 Introduction

The word "management" in the class action context is at least a triple entendre. First, it could refer to the judicial role as manager at each stage of a class action. The court must decide whether a proposed class representative meets the prerequisites and other requirements to maintain a class action; whether to certify a lawsuit as a class action; how to define the putative class; who to appoint as class counsel; the method for notifying absent class members; whether to approve a class settlement; and many other matters that affect the conduct of the proceeding.

Management could also denote the manageability of a proposed class action—i.e., whether a court can fairly and efficiently conduct a trial in an action or if its magnitude and complexity prevent a fair adjudication. A court will reject class treatment if it finds sufficient evidence of unmanageability. As discussed further below, the concept of manageability is incorporated in the predominance class action requirement, which requires the existence of common issues of fact and law that predominate over individual issues. Manageability can also be a consideration in other elements for class treatment.

Lastly, management could refer to responsibilities of both putative class and defense counsel in handing a class action. In addition to the considerations that apply generally to litigation management, there are unique statutes, rules, and case law that govern the conduct of the class action, both before a case is certified as a class action and thereafter.

Moreover, counsel for the class represent the interests of tens of thousands of class members (and often more), which requires a distinctive set of legal and administrative skills. Class certification, in turn, poses enhanced risks and financial exposure to defendants whose counsel, too, require a special skill set.

This chapter will examine relevant case law, as well as the statutory and rule-related provisions governing the management of class actions by courts, and putative class and defense counsel. The chapter will also examine many practical matters counsel should consider when managing class actions.

§ 5.02 Rule 23(a) Prerequisites for Class Certification

Class actions are an exception to the usual rule that litigation is conducted by and on behalf of the individual parties.[2] To justify this exception, every proposed class must satisfy four prerequisites under Federal Rule of Civil Procedure 23(a) and, as discussed in section 5.03, prove that the action fits into a category under Rule 23(b).[3] The Rule 23(a) criteria are: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.[4] The prerequisites are universally known, respectively, as numerosity, commonality, typicality, and adequacy. Most states have enacted rules of civil procedure establishing similar criteria to maintain a class action in their courts.[5] Also, many courts impose an implicit Rule 23(a) requirement known as "ascertainability."[6] We discuss all of these requirements in detail below.

The Supreme Court indicated that Rule 23(a) does not set forth a mere pleading standard. Rather, a plaintiff seeking class certification must affirmatively demonstrate its compliance with each prong of Rule 23(a) by a preponderance of the evidence (i.e., the party must be prepared to prove that there are sufficiently numerous parties, common questions of law or fact, etc.). Furthermore, a court evaluating a motion for class certification is obligated to probe behind the pleadings when necessary and conduct a "rigorous analysis" to decide whether a plaintiff satisfied *each* of the Rule 23 certification requirements discussed below.[7] Potential class counsel should confirm that a class meets the prerequisites before filing a class action, and defense counsel should generally challenge any class that does not meet them early in the lawsuit.

[1] Numerosity

Referring to the first prong of Rule 23(a)(1) as "numerosity" is somewhat of a misnomer. The rule is devoid of any numerical minimum for class certification.[8] Rather, as noted above, it requires that "the class is so numerous that joinder of all members is impracticable."[9] In other words, the rule calls for courts to engage in a fact-based analysis as to the difficulties of achieving joinder, and class size is just one consideration. To be sure, there is no definite standard as to what size class satisfies Rule 23(a)

(1).[10] However, one commentator collecting cases found that, generally, classes numbering "fewer than 21 fail to meet the numerosity requirement," classes with "more than 40 members" satisfy the requirement, and classes with "between 21 and 40 members are given varying treatment. These mid-sized classes may or may not meet the numerosity requirement depending on the circumstances of each particular case."[11]

While, in the past, numerosity had not generally been an onerous requirement to satisfy, it has been given "real teeth" in recent years.[12] This more stringent attention is largely due to the Supreme Court's admonition in *Wal-Mart Stores, Inc. v. Dukes*[13] that a "party seeking class certification must . . . be prepared to prove that there are in fact sufficiently numerous parties." Since *Dukes*, courts have made clear that a party cannot rely on conclusory allegations that joinder is impractical or on speculation as to the size of the class to prove numerosity.[14] Instead, a plaintiff must produce sufficient evidence to establish numerosity by a preponderance of the evidence.[15] Furthermore, some courts have said that the inquiry into impracticability should be particularly rigorous when the putative class consists of fewer than 40 members.[16]

Courts consider a variety of factors when analyzing whether joinder is impracticable, including judicial economy arising from the avoidance of a multiplicity of actions; the geographic dispersion of class members; the size of each plaintiff's claim; the financial resources of the class members; the ability of claimants to institute individual suits; and requests for prospective injunctive relief.[17]

[2] Commonality

Rule 23(a)(2) requires a plaintiff to establish that "there are questions of law or fact common to the class."[18] The Supreme Court recognized in *Dukes* that the text of Rule 23(a)(2) is "easy to misread, since '[a]ny competently crafted class complaint literally raises common questions.'"[19] But a plaintiff's mere recitation of questions that happen to be shared among class members is insufficient "to obtain class certification."[20] Instead, commonality requires the plaintiff to demonstrate that the class members have suffered the same injury.[21] This does not simply mean that the class members all suffered a violation of the same provision of law. The class members claims must "depend upon a common contention . . . of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[22]

The key to commonality is "not the raising of common 'questions' . . . . but, rather, the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation."[23] The essential point is the need to have conduct common to members of the class.[24] Common answers will generally not lie where the defendant's allegedly injurious conduct differs from plaintiff to plaintiff.[25] But, where the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members, there may be a common question.[26]

[3] Typicality

Rule 23(a)(3) requires plaintiffs to establish that "the claims or defenses of the representative parties are typical of the claims or defenses of the class."[27] The Supreme Court explained in *Dukes* that the commonality and typicality requirements of Rule 23(a) tend to merge.[28] "Both serve as guideposts for determining whether under the

particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence."[29] However, typicality, derives its separate legal significance from its ability to "screen out class actions in which the legal or factual position of the representatives is markedly different from that of other members of the class even though common issues of law or fact are present."[30]

The proper consideration for assessing typicality includes three distinct, though related, concerns: (1) the claims of the class representative must be generally the same as those of the class in terms of both (a) the legal theory advanced and (b) the factual circumstances underlying that theory; (2) the class representative must not be subject to a defense that is both inapplicable to many members of the class and likely to become a significant focus of the litigation; and (3) the interests and incentives of the representative must be sufficiently aligned with those of the class.[31]

Stated another way, measures of typicality include "whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct."[32] Relatedly, a court should not certify a class if there is a danger that absent class members will suffer if their representative is preoccupied with defenses unique to it.[33]

[4] Adequacy of Representation

Under Rule 23(a)(4), a plaintiff seeking to represent the class must show that he or she will "fairly and adequately protect the interests of the class."[34] Courts consider two threshold issues when examining adequacy: (1) the representatives must have common interests with absent class members and (2) it must appear that they will vigorously prosecute the interests of the class through qualified counsel.[35] The adequacy inquiry serves to uncover conflicts of interest between named parties and the class they seek to represent;[36] in fact, Rule 23(a)(4) requires that the class members have interests that are not antagonistic to one another.[37] The "linchpin of the adequacy requirement is the alignment of interests and incentives between the representative plaintiffs and the rest of the class."[38] Additionally, courts consider whether class counsel are qualified, experienced, and generally able to conduct the litigation.[39]

An intra-class conflict must be "fundamental"—i.e., one going to the specific issues in controversy—to defeat a motion for certification.[40] Such a conflict exists "where some party members claim to have been harmed by the same conduct that benefitted other members of the class."[41] In this situation, the representatives cannot vigorously prosecute the interests of the class through qualified counsel, because their interests are actually or potentially antagonistic to, or in conflict with, the interests and objectives of other class members.[42] A corollary principle is that putative class counsel may not represent an entire proposed class if subgroups within the class have interests that are significantly antagonistic to one another.[43]

[5] Ascertainability

Many courts recognize an implicit requirement under Rule 23(a) that a plaintiff moving for class certification must show that the proposed class is "sufficiently definite

that its members are ascertainable."[44] That said, there is an ongoing debate among circuit courts about the nature and extent of the ascertainability requirement. To satisfy the ascertainability requirement, a plaintiff must: (1) define a class that is currently and readily identifiable with reference to objective criteria and (2) propose a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.[45] Said differently, a plaintiff must show that "class members can be identified without extensive and individualized fact-finding or 'mini-trials.'"[46] This preliminary assessment merges with, but is separate from, Rule 23(c)(1)(B)'s requirement that a court's class certification order "must define the class and the class claims, issues, or defenses."[47]

The ascertainability requirement serves several important objectives: First, at the start of a class action, ascertainability and a clear class definition allow potential class members to identify themselves for purposes of opting out of a class. Second, it ensures that a defendant's rights are protected by the class action mechanism. Third, it ensures that the parties can identify class members in a manner consistent with the efficiencies of a class action.

§ 5.03 Satisfying the Alternative Requirements of Rule 23(b)

A class action must be maintainable under one of three alternatives under Rule 23(b)(1), (2) or (3) in addition to satisfying the Rule 23(a) requirements.[48] Rule 23(b)(1) and Rule 23(b)(2) authorize "mandatory" class actions under which potential class members don't have an automatic right to notice or a right to opt out of the class.[49] On the other hand, Rule 23(b)(3), designed to accommodate claims for money damages,[50] requires notice to the class members, including the member's right to opt out of the class, and specifies the factors that a court must consider in determining whether common issues predominate.[51] We discuss each alternative below.

[1] Inconsistent, Varying, and Dispositive Adjudications

Rules 23(b)(1)(A) and (b)(1)(B) authorize class certification when, respectively, separate actions by or against individual class members would create a risk of "incompatible standards of conduct" for the defendant[52] or, as a practical matter, "be dispositive of the interests" of nonparty class members or "substantially impair or impede their ability to protect their interests."[53] So subsection (b)(1)(A) concerns the rights of the defendant, while subsection (b)(1)(B) concerns the rights of unnamed class members.[54]

Rule 23's advisory committee's note provides guidance on both subsections of Rule 23(b)(1). Regarding subsection (b)(1)(A), the notes explain that class treatment is particularly useful when a party seeks injunctive relief "such that a large number of persons are in a position to call on a single person to alter the status quo, or to complain if it is altered, and the possibility exists that the actor might be called upon to act in inconsistent ways."[55] For example, "actions by individuals against a municipality to declare a bond issue invalid or condition or limit it" or "individual litigations of the rights and duties of riparian owners, or of landowners' rights and duties respecting a claimed nuisance" may both create a possibility of incompatible adjudications.[56] Some courts have held that subsection (b)(1)(A) does not apply to classes seeking monetary relief.[57]

A class is properly certified under subsection (b)(1)(B) only if "the shared character of rights claimed or relief awarded entails that any individual adjudication by a class

member disposes of, or substantially affects, the interests of absent class members."[58] Examples include "when claims are made by numerous persons against a fund insufficient to satisfy all claims,"[59] "lawsuits by shareholders to declare a dividend, claimants seeking finite trust assets, or beneficiaries suing a retirement plan administrator."[60]

[2] Classwide Injunctive or Declaratory Relief

Rule 23(b)(2) authorizes class treatment when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."[61] The Supreme Court clarified in *Dukes* that the "key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'"[62] Thus, Rule 23(b)(2) applies only when a single injunction or declaration would provide relief to each member of the class. It neither permits class certification when "each individual class member would be entitled to a different injunction or declaratory judgment" nor "when each class member would be entitled to an individualized award of monetary damages."[63] Said differently, plaintiffs may not combine any claim for individualized relief with their classwide injunction.

[3] Predominance and Superiority

To obtain Rule 23(b)(3) class certification, the court must find that "the 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."[64] Thus, Rule 23(b)(3) requires a showing of predominance and increased efficiency (i.e., superiority).

Predominance. Rule 23(b)(3)'s predominance criterion is more stringent than commonality and typicality under Rule 23(a).[65] This inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation."[66] Common issues of fact and law predominate if they have a "direct impact on every class member's effort to establish liability and on every class member's entitlement to injunctive and monetary relief."[67] Conversely, common issues will not predominate over individual questions if, "as a practical matter, the resolution of [an] overarching common issue breaks down into an unmanageable variety of individual legal and factual issues."[68] In other words, "[c]lass certification hearings should not be mini-trials on the merits of the class or individual claims."[69]

The predominance "inquiry is especially dependent upon the merits of a plaintiff's claim, since the nature of the evidence that will suffice to resolve a question determines whether the question is common or individual."[70] The Supreme Court has noted that an individual question is "one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof."[71] Courts should not certify a class if it seems most of the plaintiff's claims have highly case-specific factual issues.[72]

Superiority. A court must evaluate whether a class action is superior under Rule 23(b)(3) by examining four factors: (1) "the class members' interests in individually controlling the prosecution or defense of separate actions"; (2) "the extent and nature

of any litigation concerning the controversy already begun by or against class members"; (3) "the desirability or undesirability of concentrating the litigation of the claims in the particular forum"; and (4) "the likely difficulties in managing a class action."[73] Accordingly, courts must compare the merits of proceeding as a class action under Rule 23 against alternative methods of resolving the dispute.[74]

§ 5.04 Other Considerations Before Filing a Class Action

Before filing a class action, proposed class counsel should confirm, at a minimum, that a named plaintiff satisfies the standing requirements of Article III of the U.S. Constitution and that the suit is not barred by the relevant statute of limitations or statute of repose. We discuss these matters and an additional consideration (i.e., personal jurisdiction).

[1] Satisfying Standing Requirements

The doctrine of standing arises from Article III, which limits the subject matter jurisdiction of federal courts to "Cases" and "Controversies."[75] To establish Article III standing, a plaintiff must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision."[76] Injury in fact is the "foremost" of standing's three elements. The Supreme Court reiterated in *Spokeo, Inc. v. Robins*[77] that, to show injury in fact, a plaintiff must suffer "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical."[78] An injury is particularized when it affects "the plaintiff in a personal and individual way,"[79] and a concrete injury is one that "actually exist[s]"—i.e., is "real," rather than "abstract."[80]

As the party invoking federal jurisdiction, the plaintiff bears the burden to establish standing.[81] Each element "must be supported . . . with the manner and degree of evidence required at the successive stages of the litigation."[82] Furthermore, the court has a duty to ensure that standing exists at each stage of and throughout a case.[83]

The standing requirement doesn't change in the class action context. "[N]amed plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent."[84] Stated differently, named plaintiffs "without personal standing cannot predicate standing on injuries suffered by members of the class but which they themselves have not or will not suffer."[85] Accordingly, if none of the "named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants" as to a specific claim, "none may seek relief on behalf of himself or any other member of the class" with respect to that claim.[86] Defendants should generally challenge the standing of a named plaintiff at the pleading stage as a successful challenge can result in complete dismissal of the suit or a significant narrowing of the claims.

While it is well established that a named plaintiff must have standing to bring claims on behalf of a putative class, it is less clear whether unnamed class members' standing must be established prior to class certification. Indeed, there is arguably a circuit split on this issue.[87] Most federal courts of appeals have held that, at the class certification stage, a putative class satisfies standing if at least one named plaintiff meets the

requirement; absent class members need not have standing to certify the class.[88] But courts also recognize that a class member may recover damages or obtain the benefit of injunctive relief only if the class member establishes standing before the entry of judgment.[89]

Therefore, even in jurisdictions that do not require absent class members' standing to be proven prior to class certification, "whether absent class members can establish standing may be exceedingly relevant to the class certification analysis required by Federal Rule of Civil Procedure 23."[90] For instance, in *Cordoba v. DIRECTV, LLC*, the Eleventh Circuit held that the individualized proof required to establish the standing of unnamed class members presented a "powerful problem" under Rule 23(b)(3)'s predominance factor.[91] Thus, the court held that district courts must consider under Rule 23(b)(3) before certification "whether the individualized issue of standing will predominate over the common issues . . . when it appears that a large portion of the class does not have standing . . . and making that determination for these members of the class will require individualized inquiries."[92]

Courts following the majority rule also address absent class members' standing at the class certification stage via the class definition. For example, in *Kohen v. Pacific Investment Management Company*, the Seventh Circuit held that "a class should not be certified if it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant."[93]

A minority of circuit courts have explicitly refused to certify a class in which absent members lack standing. In *Denney v. Deutsche Bank AG*,[94] the Second Circuit stated that "[t]he filing of a suit as a class action does not relax [the] jurisdictional requirement" that a plaintiff must have standing. Therefore, "no class may be certified that contains members lacking Article III standing."[95] Similarly, in *Avritt v. Reliastar Life Insurance Company*, the Eighth Circuit, citing *Denney*, stated that "a class cannot be certified if it contains members who lack standing."[96]

All in all, as for Article III standing at the class certification stage, defendants should generally focus on establishing that the proffered definition of the class is overly broad and purports to include absent class members who may not have suffered an injury in fact—and raising individualized issues relating to proof of standing in connection with the predominance inquiry. Plaintiffs, on the other hand, may seek to avoid some of the standing issues highlighted above by ensuring the named plaintiffs are litigating harms identical to those suffered by the other putative class members and defining the proposed class (as much as possible) to limit it to those who suffered a concrete harm. Also, some plaintiffs have sought to avoid federal standing requirements by attempting to bring class actions in state courts where Article III does not apply, although those courts often may have similar standing requirements.

[2] Statutes of Limitation and Statutes of Repose

Statutory bars can be divided into two categories: statutes of limitations and statutes of repose.[97] While both types of statutes "are mechanisms used to limit the temporal extent or duration of liability for tortious acts," each serves a distinct purpose.[98] First, statutes of limitations are designed at encourage plaintiffs to diligently prosecute their known claims. Accordingly, limitation periods begin to run when the cause of action "accrues"—i.e., "when the plaintiff can file suit and obtain relief."[99] In personal injury cases, for example, this will usually be "when the injury occurred or was

discovered."[100] Statutes of repose, on the other hand, are enacted to give more explicit and certain protection to defendants. These statutes "effect a legislative judgment that a defendant should be free from liability after the legislatively determined period of time."[101] Therefore, the statutes of repose begin to run on "the date of the last culpable act or omission of the defendant."[102]

In *American Pipe and Construction Co. v. Utah*,[103] the Court held that statutes of limitations can be tolled to promote fairness and equity. Statutes of repose, however, are usually not subject to equitable tolling given that their purpose is to create an absolute bar on a defendant's liability. Rather, tolling is only permissible under a statute of repose when "there is a particular indication that the legislature did not intend the statute to provide complete repose but instead anticipated the extension of the statutory period under certain circumstances."[104] Tolling in this context is a question of statutory intent.

Applying these principles in the class action context, the Court held in *American Pipe* that the filing of a class action tolls the applicable statute of limitations for all persons covered by the class complaint, and members of a class that fails to gain certification can timely intervene as individual plaintiffs in the still-pending action.[105] The Court also applied the *American Pipe* rule to putative class members who, after denial of class certification, "prefer to bring an individual suit rather than intervene."[106] The Court recently held, however, that the *American Pipe* rule only tolls a putative class member's individual claims—it does not allow a putative class member to file a new class action after the statute of limitations has expired.[107] But when a named plaintiff has been disqualified from representing the class (e.g., the class representative settled his or her individual claims), an amended complaint substituting new class representatives "relates back" to the date of the original complaint for purposes of the statute of limitations.[108]

[3] Additional Considerations

Personal jurisdiction is rooted in the due process. The Supreme Court recognizes two types: general jurisdiction and specific jurisdiction.[109] "For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home."[110] A court with such jurisdiction may hear any claim against that defendant, even if all the incidents giving rise to the claim occurred in a different State.[111] For a court to exercise specific jurisdiction, there must be "an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation."[112] Therefore, "specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction."[113]

The court restated and applied the specific jurisdiction principles in *Bristol–Myers Squibb Co. v. Superior Court of California*.[114] There, a group of plaintiffs living outside of California filed a mass tort suit in California state court against a nonresident drug manufacturer alleging defects with pharmaceutical products.[115] While the company had engaged in substantial activities in California, the nonresident plaintiffs had not purchased, used, or suffered injuries from the drug in California.[116] The Court held "there must be an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is

therefore subject to the State's regulation."[117] The mere fact that "other plaintiffs were prescribed, obtained, and ingested [the drug] 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."[118]

There's now a split of authority as to whether *Bristol–Myers* should be read to hold that federal courts lack personal jurisdiction over the claims of non-forum putative class members. Courts holding that *Bristol–Myers* does not apply to class actions have cited to two primary reasons. First, in a mass tort action like *Bristol–Myers*, "each plaintiff is a real party in interest to the complaints; by contrast, in a putative class action, one or more plaintiffs seek to represent the rest of the similarly situated plaintiffs, and the 'named plaintiffs' are the only plaintiffs actually named in the complaint."[119] These courts also emphasize that Rule 23's requirements "supply due process safeguards not applicable" in *Bristol-Myers*' "mass tort context."[120] Other courts have relied on the absence of limiting language in *Bristol–Myers* to hold that it applies to class actions as well;[121] the Court stated in general terms that due process requires a "connection between the forum and the specific claims at issue."[122] One court concluded, "it is more likely than not based on the Supreme Court's comments about federalism that the courts will apply" *Bristol-Myers* "to outlaw nationwide class actions in a form . . . where there is no general jurisdiction."[123]

While no circuit court has considered whether *Bristol-Myers* applies to class actions as it does to mass tort actions, several circuit courts will have the opportunity to resolve that question shortly. Plaintiffs bringing a class action should consider this potential jurisdictional issue when deciding where to file a class action.

§ 5.05 Commencing the Class Action[124]

The class representatives and the claims they assert on behalf of the class play a critical role in class actions, particularly at the outset of a suit.[125] These claims "shape and define the litigation, the complaint, and the policy, pattern, or practice claims asserted on behalf of the class," and their "individual circumstances will determine jurisdiction and venue."[126] The class representatives must have standing, and their individual claims must withstand a motion to dismiss. Also, those claims must support the prerequisites for class certification under Rule 23(a) and one of the three provisions under Rule 23(b).[127] Accordingly, when commencing the class action, class counsel should give careful consideration to who they select as class representatives, assuming they have a choice, and what claims the representatives assert on behalf of the class.

[1] Choosing the Appropriate Class Representative

A crucial early decision for class counsel is ensuring that the proposed class representatives are similarly situated to the other members of the class, that their interests are typical of the rest of the class, and that they can fairly and adequately represent all the other members of the class. In other words, the class representatives' interests should be "sufficiently aligned with those of the class members" for purposes of the Rule 23 analysis (e.g., such as having suffered the same type of losses under similar circumstances), and they should not have a conflict of interest with the other class members.[128] Beyond the requisites for certification, the class representative should be able to understand and articulate the class claims, participate in discovery, work closely with class counsel, participate in the settlement process,

and "competently, responsibly and vigorously prosecute" the putative class action.[129] Therefore, "counsel should give careful attention to these issues in the selection of named plaintiffs, to the extent real choices are available."[130] Doing so may reduce the number of defenses asserted by opposing counsel concerning, among other things, the adequacy of the class representatives,[131] predominance or the need for subclasses.[132]

[2] Drafting the Class Complaint

The contents of the class action complaint are largely dictated by the Rule 23 requirements. Class counsel should also review the Class Action Fairness Act of 2005[133] before drafting a complaint. To articulate the best claims that will survive a class certification motion, it's important to carefully define the core or common issues of the putative class. If possible, the class should avoid claims that involve individual reliance or particularized causation. Instead, they should focus on claims that encompass a broad scope of the issues, because, as discussed in section 5.02, courts will deny certification when the non-common issues of multiple plaintiffs intertwine with or predominate over the common issues.[134] Therefore, the class should attempt to allege one central legal issue when seeking class certification.

It is important to recognize, however, that there will be individual issues.[135] Many times, asserting individual claims will be unavoidable. A class representative may seek immediate injunctive relief or individual monetary relief. In this case, it is important not to diminish or cloud the claims common to the class controversy.

The class must also decide whether to assert various theories of liability that will lead to a similar result or whether a single theory of liability that is applicable to all class members is more beneficial. A more complex complaint, obviously, affords the defense a greater opportunity to assert added challenges to class certification.

[3] Claims to Avoid

As a general matter, the class should avoid asserting claims that raise "significant individualized questions going to liability."[136] For instance, courts often deny class certification where claims require a showing of individual reliance or materiality.[137] Courts have, however, certified a class where the elements are "determined using objective criteria that apply to the entire class and do not require individualized determination."[138] Common causes of action that courts have held don't lend themselves to class certification due to their reliance or materiality elements, including fraud,[139] breach of express warranty,[140] breach of fiduciary duty,[141] and negligent misrepresentation.[142] The class should also avoid bringing multistate consumer protection claims. More recently, courts have held that class certification is inappropriate where class claims are governed by laws of multiple jurisdictions.[143]

[4] Use of Subclasses

Rule 23(c)(5) authorizes courts to divide a class "into subclasses that are each treated" as a separate class.[144] Courts often employ subclasses when class members have distinct claims.[145] Subclasses may be appropriate when (1) the class includes identifiable separate groups with differing interests[146] or (2) there is a need to differentiate plaintiffs based on the degree of damage suffered by them.[147]

A court may suggest subclassing but has no obligation to do so.[148] And, even if a court decides subclassing is appropriate, the party seeking class certification bears the burden of constructing subclasses and "is required to submit proposals to the court."[149] Courts also have some "flexibility to certify subclasses as the case progresses and as the nature of the proof to be developed at trial becomes clear."[150] In addition, they may "certify subclasses with separate representation of each" when a conflict of interest develops within a class.[151]

[5] Bifurcation of Liability and Damages

Rule 42(b) authorizes a court to "order a separate trial of one or more separate issue" for "convenience, to avoid prejudice, or to expedite and economize."[152] More specifically, for class certification, Rule 23(c)(4) provides that, "[w]hen appropriate, an action may be . . . maintained as a class action with respect to particular issues."[153] Courts often recognized that "Rule 23(c)(4) does not relieve Plaintiffs of their burden to show predominance" and that "Rule 23(c)(4) may not be used to circumvent the predominance requirement of Rule 23(b)(3)."[154] However, in recent years, some courts have exercised their discretion under Rule 23(c)(4) to bifurcate the predominance analysis for liability issues when deciding whether to certify a class while reserving all damages issues for individual determination.[155] Moreover, courts have bifurcated the liability and damages phases, even where defendants cannot establish aggregate damages nor present a common method for determining individual damages.[156]

§ 5.06 Judicial Management of Class Actions

Both proposed class and defense counsel should develop a plan to manage a class action from the inception of case. Generally, the plaintiff's management plan is designed to drive the case toward a classwide settlement or judgment as quickly and efficiently as possible. On the other hand, the defendant typically designs its case management plan to dispose of the class action—either actually or effectively—via motion, settlement or trial. Regardless, it is critical that both counsel understand the judicial tools and rules within which their plan must operate.

As a preliminary matter, the Class Action Fairness Act of 2005 ("CAFA") broadened federal court jurisdiction over class actions. Under CAFA, a defendant may invoke federal jurisdiction, subject to certain exceptions and exclusions, if a class has more than 100 members, the parties are minimally diverse and the amount in controversy exceeds $5 million.[157] Studies have shown that "CAFA has caused the number of diversity class actions filed in and removed to the federal courts to increase appreciably."[158] Because many class actions are now heard in federal court due to CAFA, this section outlines the management-related rules and tools at the disposal of federal judges that shape and guide counsel's development of a successful case management plan for the pre-settlement and pretrial phase of a class action.

Judicial management of a class action begins soon after an action is filed, or removed to, federal court, most typically in an initial case management conference under Federal Rule of Civil Procedure 16.

At the Rule 16 conference, the court is likely to consider, at a minimum (1) whether to hear and determine threshold dispositive motions, namely, motions that do not require extensive discovery, before hearing and determining class certification motions (*e.g.*,

challenges to jurisdiction and venue, motions to dismiss for failure to state a claim, and motions for summary judgment); (2) whether to appoint interim class counsel during the period before the court decides class certification; (3) whether and how to obtain information from parties and their counsel about the status of all related cases pending in state or federal courts, including pretrial preparation, schedules and orders, and the need for any coordinated activity; and (4) whether the parties need discovery to decide whether to certify the proposed class.[159]

In light of the potential of duplicative pending class actions in other courts, the *Pocket Guide for Judges*[160] instructs federal judges "[a]t the outset of any class action" to "consider entering a standing order that requires counsel to inform the court promptly of any related class actions."[161]

As discussed further in section 5.07, the court may also order pre-certification discovery—or request the parties to agree upon a pre-certification discovery plan—"when the facts relevant to any of the certification requirements are disputed . . . or when the opposing party contends that proof of the claims or defenses unavoidably raises individual issues."[162] The *Manual for Complex Litigation* advises that the court "should encourage counsel to confer and stipulate as to relevant facts that are not genuinely disputed, to reduce the extent of precertification discovery, and to refine the pertinent issues for deciding class certification."[163]

Pursuant to Rule 26(f), counsel should be prepared to submit a detailed pre-certification discovery plan. "The plan should identify the depositions and other discovery contemplated, as well as the subject matter to be covered and the reason it is material to determining the certification inquiry under Rule 23."[164] Discovery of unnamed or absent members of a class or proposed class requires a demonstration of need, whether in the pre-certification or post-certification period.[165]

Merit-based discovery in the post-certification period of a class action is similar to discovery in other complex civil litigation. The increased scope and stakes involved, however, affect the time and financial resources necessary to conduct discovery in a class action. Therefore, the parties in a class action—and their counsel—should be prepared to spend significant time and money in the discovery phase of those class actions.

§ 5.07 Discovery in the Pre-Certification Period

The judge presiding over a proposed class action has the discretion to permit discovery in the pre-certification period relevant to whether the requirements for a class action are met.[166] Discovery prior to certification of the class may be necessary when the parties dispute the facts relevant to the certification requirements.[167] For instance, the parties may need pre-certification discovery when the defendant opposes certification on the grounds that proof of the claims or defenses will unavoidably raise individual issues.[168] In addition, the court may permit pre-certification discovery into whether the named plaintiff (or class counsel) can meet the requirement that class representatives fairly and adequately protect the interests of the class.[169]

Accordingly, discovery in the pre-certification period will ordinarily be limited to certification issues, with discovery related to the merits of the allegations reserved for after the certification decision is made.[170] However, there isn't "always a bright line between the two. Courts have recognized that information about the nature of

the claims on the merits and the proof that they require is important in deciding certification."[171] The *Manual for Complex Litigation* suggests that allowing merit-based discovery during the pre-certification period "is generally more appropriate for cases that are large and likely to continue even if not certified."[172] "On the other hand, in cases that are unlikely to continue if not certified, discovery into aspects of the merits unrelated to certification delays the certification decision and can create extraordinary and unnecessary expense and burden."[173]

§ 5.08 The Certification Decision

Rule 23(c)(1)(A) provides that, "at an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action."[174] The *Manual for Complex Litigation* explains that "early practicable time" is when "the court has sufficient information to decide whether the action meets the certification criteria of Rules 23(a) and (b)."[175] The *Pocket Guide for Judges*[176] further explains that judges "should feel free to ignore local rules calling for specific time limits; such local rules appear to be inconsistent with the federal rules and, as such, obsolete."[177] Courts, in fact, have discretion to hear and decide motions to dismiss or for summary judgment, even before deciding whether to certify a class.[178] Indeed, the *Pocket Guide for Judges* advises that the most efficient practice is to rule on such motions before addressing class certification, because ruling on class certification may prove to be superflouus.[179] Only the named parties, however, are bound by dispositive rulings made prior to certification.[180]

Courts may need to hold an evidentiary hearing in making the certification decision when a party challenges the factual basis for a class action.[181] But, when "there is disagreement over the legal standards but not over the facts material to the certification decision, . . . a hearing may be limited to argument over whether the certification requirements are met."[182]

Rule 23(c)(1)(B) provides that an order that "certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g)."[183] As a general proposition, the counsel selected must "fairly and adequately represent the interests of the class."[184] In making the selection, the court must consider (1) the work that the counsel has performed in "identifying or investigating potential claims in the action";[185] (2) counsel's experience in handling similar matters,[186] (3) counsel's "knowledge of the applicable law,"[187] and (4) "the resources that counsel will commit to representing the class."[188]

The *Pocket Guide for Judges* outlines five approaches the court may employ in selecting class counsel: (1) "the single-lawyer model"—*i.e.*, when "the lawyer who filed the case will be the only logical choice for appointment as class counsel"; (2) "private ordering"—*i.e.*, when in "high-stakes, high-profile class action litigation, entrepreneurial plaintiff attorneys . . . compete to play the lead role" and "attempt to resolve the competition by 'private ordering,' that is, by agreeing to divide the labor, expenses, and fee"; (3) "selection by the judge," based on the factors itemized in Rule 23(g)(1) above; (4) the "empowered plaintiff model" required for securities class actions by the Private Securities Litigation Reform Act,[189] involving the court's selection of "an 'empowered' lead plaintiff (presumably one with sizable claims), who, in turn, has the right to select and retain class counsel, subject to [the judge's] approval"; and (5) "competitive bidding," which is disfavored.[190]

Upon appointment, class counsel should make sure to request and obtain guidance from the court regarding the form and content of records that the court will require in support of fee and expense award applications.

Courts are also charged with appointing one or more representatives of the class and any subclass.[191] In this vein, "[t]he judge must ensure that the representatives understand their responsibility to remain free of conflicts and to vigorously pursue the litigation in the interests of the class, including subjecting themselves to discovery."[192]

§ 5.09 Appeal of Class Certification Ruling

Rule 23(f) authorizes circuit courts to hear an interlocutory appeal of "an order granting or denying class-action certification."[193] To perfect the appeal, a party must "file a petition for permission to appeal with the circuit clerk *within 14 days*" after the court enters the order granting or denying certification or "*within 45 days* after the order is entered if any party" is the United States or one of its officers or employees.[194] In *Nutraceutical Corporation v. Lambert*,[195] the Supreme Court held that the time limits under Rule 23(f) are "not amenable to equitable tolling," because, among other reasons, Federal Rule of Appellate Procedure 26(b), which generally permits extensions of time, includes "this express carveout: A court of appeals 'may not extend the time to file . . . a petition for permission to appeal.'"[196] An appeal under Rule 23(f) doesn't stay the district court action unless "the district judge or the court of appeals so orders."

§ 5.10 Post-Certification Case Management

After certification of a class and before resolution of the class action by trial or otherwise, the court's role in managing the suit is primarily centered on the broad administrative powers granted to it by Rule 23(d). Specifically, in "conducting an action under this rule, the court may issue orders" that (1) determine the course of proceedings or prescribe measures to prevent undue repetition or complication (2) give appropriate notice to some or all class members of the status of the action and their opportunity to participate in it (3) impose conditions on the representative parties or on intervenors and (4) require that the pleadings be amended to eliminate allegations about representation of absent persons, among issuing orders dealing with other procedural matters.[197]

Rule 23(c)(2) governs the provision of notice to members of the class. For classes certified under Federal Rule 23(b)(1) and 23(b)(2), "the court *may* direct appropriate notice to the class."[198] For classes certified under Rule 23(b)(3), "the court *must* direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."[199] The notice to members of a 23(b)(3) class "must clearly and concisely state in plain, easily understood language," (1) the nature of the action; (2) the definition of the class certified; (3) the class claims, issues, or defenses; (4) that a class member may enter an appearance through an attorney if the member so desires; (5) that the court will exclude from the class any member who requests exclusion; (6) the time and manner for requesting exclusion; and (7) the binding effect of a class judgment on members under Rule 23(c)(3).[200] The notice may be by "United States mail, electronic means, or other appropriate means."[201] Many notice plans are utilizing several types of media to notify class members, including social media campaigns, radio advertising, email notices, direct mailings, and posters.[202]

Furthermore, the court has the authority under Rule 23(d) to manage communications among parties, counsel, and class members.[203] The court may impose sanctions or other curative measures "to ensure the integrity of the proceedings and the protections of the class."[204] The court also has the responsibility to establish appropriate procedures for members to opt out of the class, but "[c]ounsel should maintain careful records of who has opted out and when, both to comply with Rule 23(c)(3) and for use in allocating and distributing funds obtained in the litigation for the class."[205]

In addition to regulating communications, the court may limit post-certification discovery directed to class members other than the named plaintiffs. The authors of the *Manual for Complex Litigation* opine that such post-certification discovery "should be conditioned on a showing that it serves a legitimate purpose," because one of the "principal advantages of class actions over massive joinder or consolidation would be lost if all class members were routinely subjected to discovery."[206] The *Manual for Complex Litigation* further advises that, in setting appropriate limits, "a judge should inquire whether the information sought from absent class members is available from other sources and whether the proposed discovery will require class members to obtain personal legal counsel or technical advice from an expert."[207]

§ 5.11 Forum Selection for Class Actions

Class action litigation can involve unique forum selection issues and strategies. Choosing a forum in a class action may be a critical element in the lawsuit. In fact, in nationwide class actions implicating the substantive law of multiple states, the class certification determination and defendant's liability may turn on the application of forum state's choice of law rules and substantive law. To be sure, when a plaintiff's claims rest on state law, courts employ the choice of law rules of the forum state or the state in which a federal district court sits.[208] Plaintiffs shouldn't ignore forum selection when commencing a class action given the advantage they could gain from a state or forum's certification practices and choice of law approaches. Defendants, by the same token, should review their options for dismissing or transferring cases in unfavorable forums.

[1] Substantive State Law and Application of Choice of Law in Class Actions

The choice of law issues facing a trial court are intricate, and the consequences can be profound for the parties. The Supreme Court has held that the due process and the full faith and credit clauses limit the situations in which a court may apply its own substantive law (or that of the forum) to the entire class: a state "must have a 'significant contact or a significant aggregation of contacts' to the claims asserted by *each member of the plaintiff class*" that creates state interests to apply its law to the claim of each member of the class such that application of that law is "neither arbitrary nor fundamentally unfair."[209]

The question of whether a court can constitutionally apply the law of a single state to an entire class is often a key issue. This is because, in class actions governed by multiple state laws, variations in those laws may conflict in a "material way"[210] and, thus, swamp any common issues and defeat predominance.[211] A plaintiff seeking to certify a nationwide class must therefore "provide an 'extensive analysis' of state law variations to reveal whether these pose 'insuperable obstacles.'"[212] And the court must

then "consider how variations in state law affect predominance."[213] "The issue can only be resolved by first specifically identifying the applicable state law variations and then determining whether such variations can be effectively managed through creation of a small number of subclasses grouping the states that have similar legal doctrines."[214]

[2] Federal Court Jurisdiction in Class Actions Not Governed by the Class Action Fairness Act

It is well known that federal courts are courts of limited subject matter jurisdiction, which possess only the power authorized by the Constitution and federal statutes. Article III, section II of the Constitution and Title 28, section 1331 of the Judicial Code[215] permit courts to exercise jurisdiction over civil actions "arising under the Constitution, laws, or treaties of the United States," also known as federal question jurisdiction.[216] Such jurisdiction is available for plaintiffs pleading causes of action created by federal law, such as 42 U.S.C. § 1983, and for certain state law claims that implicate significant federal issues.[217]

Title 28, section 1332(a) of the Judicial Code provides the other common ground for federal courts to exercise jurisdiction—i.e., general diversity jurisdiction. District courts have original jurisdiction over civil actions between citizens of different states "where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs."[218] These courts may hear a class action under section 1332(a) only if there is "complete diversity," meaning "all class representatives were diverse from all defendants" and "at least one named plaintiff satisfied the amount in controversy requirement of more than $75,000."[219] The Supreme Court has interpreted Title 28, section 1367 of the Judicial Code to require that the claims of the named plaintiffs who don't satisfy the amount-in-controversy be "part of the same case or controversy as the claims of plaintiffs who do allege a sufficient amount" for a court to properly exercise supplemental jurisdiction over all claims.[220]

[3] Federal Court Jurisdiction Under the Class Action Fairness Act

As an preliminary matter, the Class Action Fairness Act of 2005 ("CAFA")[221] "does not supplant traditional diversity jurisdiction; it supplements it."[222] As discussed in section 5.06, with certain exceptions, CAFA grants federal courts original jurisdiction over actions where (1) the suit constitutes a "class action," (2) "the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs"; (3) CAFA's minimal diversity requirements are met (e.g., "any member of a class of plaintiffs is a citizen of a State different from any defendant") and (4) there are at least 100 members of the putative class.[223]

Title 28, section 1453(b) of the Judicial Code, established under CAFA, enables removal of state court class actions that satisfy the criteria outlined above to federal court.[224] This provision eliminates three of the traditional limitations on removal, namely, "(1) the rule that, in a diversity case, a defendant cannot remove a case from its home forum; (2) the rule that a defendant cannot remove a diversity case once it has been pending in state court for more than a year; and (3) the rule that all defendants must consent to removal."[225] Section 1453(b) does otherwise modify the substantive and procedural requirements for removing a state court lawsuit to federal court under sections 1441 (i.e., the removal statute) and 1446.[226]

Even if a class action satisfies the CAFA criteria discussed above, various exceptions can force remand. First, a court *may* refuse to exercise jurisdiction over a removed class action when the defendants and more than one-third, but fewer than two-thirds, of the members of the proposed class or classes are citizens of the state where the action was originally commenced.[227] The court must consider the following factors when deciding whether to remand the action: (1) whether the class action claims concern matters of interstate or national interest; (2) whether those claims are to be governed by the laws of the state where the class was originally commenced or by the laws of another state; (3) whether the class action complaint was pled to avoid federal jurisdiction; (4) whether the original forum state had a "distinct nexus" with the class members, the harm alleged in the complaint or the defendants; (5) whether the number of plaintiff class members who are citizens of the original forum state is substantially greater than the number of plaintiff class members who claim citizenship in another state; and (6) whether, during the three years prior to commencement of the class action, one or more other class actions asserting the same or similar claims were filed on behalf of the same named plaintiffs or on behalf of others.[228]

Also, under the "local controversy" exception, a court *must* remand a removed class action to state court, even if it satisfies CAFA's jurisdictional prerequisites, where (1) more than two-thirds of all the members of the proposed plaintiff classes are citizens of the state where the action was originally commenced (2) the proposed class members seek relief from at least one defendant whose conduct forms a "significant" part of their claims and who is a citizen of the state where the action was originally commenced (3) the proposed class members suffered their principal injuries because of the conduct of each defendant in the state where the action was originally commenced *and* (4) no other class action asserting the same or similar factual allegations against any of the defendants had been filed on behalf of the same plaintiffs or on behalf of other persons over the three years before the action's commencement.[229] Similarly, under the "home-state controversy" exception, a court *must* decline to exercise jurisdiction over a class action where "two-thirds or more of the members of all proposed plaintiff classes . . . , and the primary defendants, are citizens of the State in which the action was originally filed."[230] While there is no precise definition of "primary defendants," some courts have construed the words "to capture those defendants who are directly liable to the proposed class, as opposed to being vicariously or secondarily liable based upon theories of contribution or indemnification."[231]

[4] Proper Venue for Federal Court

Title 28, section 1391(b)(2) of the Judicial Codes provides that a plaintiff may bring a civil action in any judicial district within a state where, *inter alia*, "a substantial part of the events or omissions giving rise to the claim occurred."[232] Whether before or after class certification, the claims of absent class members can never make an otherwise-impermissible venue permissible.[233] "Rather, in a class action, the 'events' in question are only those involving the named plaintiffs."[234] Stated differently, courts base their determination of proper venue on the named plaintiff, not unnamed or absent putative class members. To hold otherwise would mean that "a nationwide class action could be transferred to any district in the country, thus abrogating the venue statute altogether."[235] Additionally, many courts have held that "*all* named plaintiffs to a class action must satisfy the venue requirements."[236]

§ 5.12 Classwide Arbitration

[1] The Class Arbitration Jurisprudence

Several seminal Supreme Court decisions have shaped the present-day class arbitration landscape. To begin, today's class arbitration is very different than the bilateral arbitration Congress contemplated when it enacted the Federal Arbitration Act ("FAA") in 1925; indeed, Rule 23 wasn't promulgated until 1938,[237] and the "modern class action practice" didn't emerge until "the 1966 revision of Rule 23."[238] The court underscored the "fundamental" changes "brought about by the shift from bilateral arbitration to class-action arbitration" in *Stolt–Nielsen S.A. v. AnimalFeeds International Corp*.[239] and again in *AT&T Mobility LLC v. Concepcion*.[240] In these cases, the court cautioned that (1) a class arbitrator no longer resolves a single dispute between two parties, but, instead, resolves many disputes between multiple parties,[241] (2) the presumption of privacy that applies in bilateral arbitrations doesn't apply in some class arbitrations,[242] (3) the arbitrator's award in class arbitration no longer purports to bind just the parties to the arbitration agreement, but also adjudicates the rights of absent parties,[243] (4) class arbitration sacrifices the informality of arbitration and makes the process slower and more costly,[244] (5) class arbitration requires procedural formality that Congress didn't envisioned when it passed the FAA,[245] and (6) arbitration is "poorly suited to the higher stakes of class litigation" as it increases risks to defendants with only a limited appellate review.[246]

These differences between bilateral and class arbitration, and the parties' corollary right to agree to individualized bilateral arbitration, underpin some the key Supreme Court decisions regarding class arbitration. For instance, in *Stolt–Nielsen*, the Court held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so."[247] The Court said that the "differences between bilateral and class-action arbitration are too great for arbitrators to presume . . . that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings."[248] Relying on this principle, the *Concepcion* court held that class arbitration waivers in form contracts are enforceable.[249] The Supreme Court reiterated this rule in *American Express Co. v. Italian Colors Restaurant*,[250] holding that courts cannot invalidate arbitration agreements on the ground that they don't permit class arbitration, even when individualized arbitration would be cost-prohibitive. And, most recently, in *Epic Systems Corp. v. Lewis*,[251] the Court held that the individualized nature of arbitration proceedings is one of its "fundamental attributes."[252] In reaching this decision, the Court noted that "Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings."[253]

One other Supreme Court decision, and the question of whether a judge or arbitrator decides if an arbitration agreement authorizes class arbitration, are also important to the present class arbitration framework. In *Oxford Health Plans LLC v. Sutter*,[254] the Court held that courts should not disturb an arbitration award so long as the arbitrator made a "good faith attempt" at interpreting the contract in question. In this case, the Court found that the arbitrator construed "the contract (focusing, per usual, on its language), and did find an agreement to permit class arbitration."[255] Courts may "vacate an arbitral decision only when the arbitrator strayed from his delegated task of interpreting a contract, not when he performed that task poorly."[256]

The question of who decides the availability of class arbitration was not an issue in *Sutter*, because "the parties agreed that the arbitrator should decide" if "their contract authorized class arbitration."[257] While the Supreme Court hasn't considered this question, "every federal court of appeals to reach" it (including the Third, Fourth, Sixth, Seventh, Eighth, and Eleventh Circuits) has held that the question of whether an arbitration agreement permits class arbitration is an issue of arbitrability for a court, not an arbitrator, to decide—unless the parties clearly and unmistakably delegated that question to an arbitrator.[258] These courts conclude that the availability of class arbitration involves gateway questions of arbitrability, such as whether the parties agreed to arbitrate, which are generally for judicial determination.[259]

[2] Organizational Rules

The two major arbitration administrators in the United States, the American Arbitration Association ("AAA") and JAMS, both established special procedures for class arbitration. The AAA rules, called the "Supplementary Rules for Class Arbitrations,"[260] became effective October 8, 2003, and the JAMS rules, known as the "JAMS Class Action Procedures,"[261] became effective May 1, 2009. The AAA rules state that, once appointed, "the arbitrator shall determine as a threshold matter, in a reasoned, partial final award . . . whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class."[262] The AAA calls this interim award the "Clause Construction Award." Similarly, the JAMS rules provide that, once appointed, the arbitrator "shall determine as a threshold matter whether the arbitration can proceed on behalf of or against a class" and "set forth his or her determination . . . in a partial final award."[263] Both the AAA and JAMS rules bar an arbitrator from considering "the existence" of those rules as a "factor either in favor of or against permitting" classwide arbitration,[264] and both rules permit immediate court review of the clause construction award.[265]

In most other respects, the AAA and JAMS rules track Rule 23. For example, under the AAA rules, the arbitrators must "determine whether the arbitration should proceed as a class arbitration" after satisfying themselves that the arbitration clause authorizes class treatment.[266] In so deciding, the arbitrator considers the same criteria enumerated in Rule 23(a) and 23(b)(3), such as whether "there are questions of law or fact common to the class" and whether those questions "predominate over any questions affecting only individual members."[267] The arbitrator must set forth her determination "in a reasoned, partial final award," and this award is also subject to immediate court review.[268] One unique aspect of the AAA rules, however, is that the "presumption of privacy and confidentiality in arbitration proceedings" does not "apply in class arbitrations."[269] Quite the contrary, the AAA's class arbitration dockets are available on the Internet.[270]

[3] Status of Class Arbitration

Some observers predicted that *Stolt–Nielsen* and *Concepcion* would effectively end class arbitration, presumably because *Stolt–Nielsen* set a high bar for a court or arbitrator to find that an arbitration provision authorizes classwide arbitration and *Concepcion* sanctioned the use of class action waivers. While empirical data suggest that these and other decisions had a chilling effect on class arbitration, class arbitrations continue. Studies show that, before *Stolt–Nielsen*, arbitrators were liberal in

construing arbitration agreements to permit class arbitrations. A pre-*Stolt–Nielsen* study shows "arbitrators permitting class arbitration in roughly 90% of cases," and "AAA's own accounting shows that its arbitrators affirmatively ordered class arbitration in 70% of arbitrations, and denied it in only in 5%"; the rest involved stipulations.[271] This ratio decreased exponentially post-*Stolt–Nielsen*.

Out of 64 AAA Clause Construction Awards arbitrators issued between April 2010 and December 2015, arbitrators authorized class arbitration in 29 awards (i.e., 45% of the time).[272] Also, out of 22 AAA Clause Construction Awards reviewed that arbitrators issued between January 2017 and February 2019, an arbitration clause permitted class arbitration in 13 awards (59% of cases) and that the provision did not authorize class treatment in nine awards.[273]

This data shows that, while class arbitrations are still alive, the Supreme Court decisions discussed in section 5.12(1) have reduced their frequency. This trend will likely continue given the line of recent cases holding that the judge, not the arbitrator, should decide whether an arbitration agreement authorizes class arbitration.

§ 5.13 Judicial Management of Class Action Settlements

District courts act as fiduciaries of the class, subject to the "high duty of care that the law requires of fiduciaries."[274] Consistent with this duty, Federal Rule of Civil Procedure 23(e) mandates that the court approve settlements of "claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement."[275] This rule "protects unnamed class members 'from unjust or unfair settlements affecting their rights when the representatives become fainthearted before the action is adjudicated'" or they secure a settlement of their individual claims.[276] Rule 23(e) does not require court approval for settlements with putative class representatives that resolve only their individual claims prior to class certification.[277]

A class action settlement approval procedure typically occurs in two stages: (1) preliminary approval, where prior to notice to the class, a court makes a preliminary evaluation of fairness and (2) final approval, where notice of a hearing is given to the class members and class members are provided the opportunity to be heard on the question of final court approval.[278] We discuss both stages below.

[1] Preliminary Approval

At the preliminary approval stage, the parties submit the proposed settlement to the court to make a "preliminary fairness evaluation."[279] Several amendments to Rule 23(e) became effective in December 2018; these revisions largely codified existing case law.[280] For instance, as for the preliminary fairness analysis, Rule 23(e)(1) states that a court must decide that, following notice to the class and a final fairness hearing, it would likely (1) approve the settlement upon considering the "fairness" factors under Rule 23(e)(2)[281] and (2) certify the proposed class for settlement purposes under the criteria set out in Rule 23(a) and at least one of the subsections of Rule 23(b).[282] If the settlement satisfies the two elements set forth above and "the parties' proposed method of giving notice satisfies the requirements set out in Rule 23(c)(2)(B), the court will preliminarily approve the settlement[283] and must then "direct notice in a reasonable manner to all class members who would be bound" by the proposal.[284]

[a] Rule 23(e)(2) Fairness Factors

Rule 23(e)(2) sets out the circumstances in which a court may approve a class settlement that would "bind class members."[285] A court may only approve such a settlement "after a hearing and only on finding that it is fair, reasonable, and adequate."[286] The text of Rule 23(e)(2) provides that, to make this determination, a court must consider (1) whether the class representatives and class counsel have adequately represented the class; (2) whether the proposal was negotiated at arm's-length; (3) whether the relief provided for the class is adequate, taking into account (i) the costs, risks, and delay of trial and appeal, (ii) the effectiveness of any proposed method of distributing relief to the class, (iii) the terms of any proposed award of attorneys' fees, and (iv) any agreements made in connection with the proposal; and (4) whether the settlement treats class members equitably relative to each other.[287]

The specific considerations in Rule 23(e)(2), also part of the 2018 amendments to Rule 23(e), weren't intended "to displace the various factors that courts have developed in assessing the fairness of a settlement."[288] The 2018 advisory committee's note explains that the "goal of this amendment is not to displace any factor, but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve" the settlement.[289] Accordingly, some courts consider their legacy fairness factors when analyzing a proposed settlement.[290]

[b] Certifying a Class for Settlement Purposes

As discussed in section 5.02, Rule 23(a) prescribes four threshold requirements for all class actions that parties must satisfy: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation.[291] The parties must also "show that the action is maintainable under Rule 23(b)(1), (2), or (3)."[292]

In *Amchem*, the Supreme Court cautioned that a court must ensure that the parties satisfy the requisites of Rules 23(a) and (b), regardless whether the court is deciding if it will conditionally certify a class for settlement or for litigation; this inquiry must be separate from the court's fairness review under Rule 23(e).[293] The Court also held that in the context of a request for settlement-only class certification, considerations other than whether the case, if tried, would present intractable management problems, "demand undiluted, even heightened, attention."[294] In other words, the "safeguards provided by Rule 23(a) and (b) class-qualifying criteria, . . . are not impractical impediments . . . in the settlement-class context."[295] Besides, federal courts "lack authority to substitute for Rule 23's certification criteria a standard never adopted—that if a settlement is 'fair,' then certification is proper."[296]

If a court does decide to certify a class, it must define the class claims and issues and appoint class counsel.[297] Finally, when "appropriate, a class may be divided into subclasses that are each treated as a class under this rule."[298]

[2] Final Approval

The fairness hearing, discussed in more detail at section 5.16, gives supporters of the proposed settlement the chance to present evidence to establish that the proposed settlement is "fair, reasonable, and adequate." The hearing also provides an opportunity for the court to hear from objectors to the settlement and other class members.[299] Under Rule 23(e)(5), any class member may object. An objection must "state whether

it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection."[300]

Once the parties move for final approval, the court takes a closer look at the settlement, taking into consideration objections and other further developments to make the final fairness determination under Rule 23(e).[301] Final approval also requires that the court review whether the class satisfies the requirements of Rules 23(a) and (b) and that it consider whether the parties provided the best practicable notice to the class members.[302] Adequate notice is "critical to court approval of a class settlement under Rule 23(e)."[303] Many settlements are proposed before class certification. Because a settlement negotiated before class certification creates a greater potential for a breach of the fiduciary duty class representatives and class counsel owe to the class, "such agreements must withstand an even higher level of scrutiny for evidence of collusion or other conflicts of interest than is ordinarily required under Rule 23(e) before securing the court's approval as fair."[304]

Still, there's a "strong judicial policy in favor of class action settlement,"[305] and some courts have held that a settlement should be accorded an initial presumption of fairness where "'(1) the settlement negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected.'"[306] The court must also ensure that the settlement does not discriminate on the basis of geography—viz., that it does not provide "for the payment of greater sums to some class members than to others solely on the basis that the class members to whom the greater sums are to be paid are located in closer geographic proximity to the court."[307]

§ 5.14 The Preliminary Hearing

As discussed in section 5.13(1), at the preliminary approval stage, the court examines materials the parties submit to determine whether it is likely to find that the proposed settlement terms are "fair, reasonable, and adequate."[308] Some courts hold a preliminary approval hearing, while others do not. In the latter case, courts may find, especially when no class members object, that the "parties' briefings" are "suitable for determination without a preliminary hearing."[309] Although the court must conduct a "rigorous inquiry" at the final approval stage, "to grant preliminary approval, the court must now consider whether it "will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal."[310]

[1] Filing a Statement for the Proposed Settlement

The Federal Rules don't provide specific guidance on the information parties must include in a submission for a proposed class action settlement. Rule 23(e)(1)(A) simply states that the "parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class."[311] In other words, the parties must provide information to persuade the court that (i) the proposed settlement is fair considering the factors in Rules 23(e)(2) (and any fairness factors developed by case law) and (ii) the class can be certified for settlement purposes under Rule 23(a) and 23(b) where the class has not already been certified.[312] Therefore, in practice, motions requesting that the court preliminarily approve a proposed settlement should track the fairness factors in one section of the filing and the requirements of Rules 23(a) and 23(b) in a separate section.[313]

Also, Rule 23(e)(3) directs the parties to "file a statement identifying any agreement made" regarding the settlement.[314] *A Pocket Guide for Judges* suggests the court also require the parties to "provide the full settlement agreement as well as an informative summary of other agreements, such as settlement agreements for claims similar to those of class members; side understandings about attorney fees; and agreements about filing future cases, sealing of discovery, and the like."[315]

[2] Appointment of Advisors

While the court must decide whether to preliminarily approve a settlement, it can appoint "an adjunct: a magistrate judge, guardian *ad litem*, special master, court-appointed expert, or technical advisor, to help obtain or analyze information relevant to the proposed settlement."[316] For example, the court "might retain a special master or a magistrate judge to examine issues regarding the value of nonmonetary benefits to the class and their fairness, reasonableness, and adequacy."[317]

§ 5.15 Notice Requirements

Rule 23(e)(1)(B) mandates that the court "direct notice in a reasonable manner to all class members who would be bound" by a settlement.[318] Rule 23(c)(2)(B) provides that, when a court orders notice under Rule 23(e)(1)(B), it "must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."[319] The parities may provide notice by "United States mail, electronic means, or other appropriate means."[320] The notice must "clearly and concisely" state in layman's terms (1) the nature of the action, (2) the definition of the class certified, (3) the class claims, issues or defenses, (4) that a class member may enter an appearance through an attorney, (5) that the court will exclude from the class any member who requests exclusion (6) the time and manner for requesting exclusion; and (7) the binding effect of a class judgment on members.[321] These notice requirements are designed to satisfy due process by apprising unnamed class members of "the pendency of the action and afford them an opportunity to present their objections."[322] Before approving a class settlement, a court must examine whether adequate notice was issued to class members.[323]

§ 5.16 The Final Approval (or "Fairness") Hearing

Under Rule 23(e)(2), the court must hold a fairness hearing before deciding whether or not a proposed settlement is "fair, reasonable, and adequate."[324] At these hearings, courts hear from counsel for the settling parties and those objectors (or their counsel) who requested the opportunity to present argument. The hearing is the "day in court" for class members who want to voice their positions.[325] Most courts set time limits for participants to address the court.[326]

[1] Settling Parties, Objectors, and Unrepresented Class Members

Often, courts will engage in a group examination to address the class members' concerns in a timely and efficient manner.[327] In particular, courts allow objectors and unrepresented class members to raise their concerns both before and during the hearing. The court may also consider written objections at the hearing.

Class member attendance at fairness hearings is infrequent, and objections are usually negligible. A 1996 study conducted by the Federal Judicial Center found that, "only about a quarter to a half of the class representatives attended the fairness hearing."[328] The study also found that "in about half of the class actions, not a single member filed a written objection."[329] Another study found that "objections occurred in less than one in a thousand class actions in which a published opinion was available."[330] According to the Federal Judicial Center, written objections most frequently challenge the requested attorneys' fees and the benefits the settlement provided to class members. Objectors also argue, at times, that the settlement favors some subgroups over others.[331]

[2] Nonmonetary Relief

The court may consider remedies that don't have an apparent cash value during the fairness hearing. The Class Action Fairness Act of 2005, for instance, requires heightened judicial scrutiny of coupon settlement.[332] As such, when evaluating the benefits of coupon settlements, courts consider the fairness factors under Rule 23(e)(2) and case law, in addition to "whether the proposed coupons are transferable; have a secondary market in which they can be discounted and converted to cash; compare favorably with bargains generally available to a frugal shopper; and are likely to be redeemed by class members."[333] Courts consider the typical fairness factors when evaluating other nonmonetary relief, such as an injunction.[334]

[3] Evaluating the Adequacy of the Settlement Agreement

The court should have already conducted a "rigorous analysis" to determine whether the class met the requisites for class certification under Rule 23 at the final approval stage.[335] The court should, however, reconsider the requirements under Rules 23(a) and 23(b) if there are "changes that would affect the class certification findings."[336] The court should also reevaluate "whether notice to the class was adequate" under Rule 23(c).[337] Of course, as discussed in section 5.14, the court must also determine that the settlement is "fair, reasonable, and adequate" considering the factors enumerated in Rule 23(e)(2), along with any jurisdiction-specific fairness factors.[338] At the final approval stage, "the court takes a closer look at the settlement, taking into consideration objections and other further developments in order to make the final fairness determination."[339] Furthermore, when settlement takes place before formal class certification, settlement approval requires a "higher standard of fairness" to ensure that the class representatives and their counsel do not receive a disproportionate benefit at "the expense of the unnamed plaintiffs who class counsel had a duty to represent."[340]

§ 5.17 Types of Class Action Settlements

There are many variations of monetary and nonmonetary class settlements. For the purposes of this discussion, we will focus on two frequently used types of settlements when the proposal allows for monetary recovery: claims-made and common-fund settlements.

[1] Claims-made and Common-fund Settlements

Claims-made settlements are common in consumer cases where class members "can be difficult to identify and have little interest in participating in the case."[341] In this

scenario, class members must file a claim form to share in the settlement proceeds, and funds may go unclaimed. If the parties negotiated a fixed settlement amount, those unclaimed funds may go to a court-approved *cy pres* recipient or, in rare cases, revert to the defendant. But revisionary settlement structures are disfavored.[342] On the other hand, common-fund settlements are typical in antitrust, securities, and mass tort actions. A class recovery in these suits "will divide the common fund on a pro rata basis among all who timely file eligible claims, thus leaving no unclaimed funds."[343]

While much of the available data on the claims rates in claims-made cases is anecdotal, most observers agree that claims rates in these cases are relatively low.

[2] Unclaimed Settlement Funds and *Cy Pres*

The term "cy pres" is derived from the French expression *cy pres comme possible*, which means "as near as possible."[344] The doctrine originated to save testamentary charitable gifts that would otherwise fail.[345] That is, if the testator had a general charitable intent, the court would look for an alternate recipient that will best serve the gift's original purpose.[346] With class settlements, *cy pres* refers to the parties' plan for the "next best use" of settlement funds that cannot be distributed to class members or remain unclaimed following distribution.[347] The Third Circuit has described the traditional *cy pres* distribution in the class action context as follows:

> When class actions are resolved through settlement, it may be difficult to distribute the entire settlement fund, after paying attorneys' fees and costs along with fund administration expenses, directly to its intended beneficiaries—the class members. Money may remain unclaimed if class members cannot be located, decline to file claims, have died, or the parties have overestimated the amount projected for distribution for some other reason. It may also be economically or administratively infeasible to distribute funds to class members if, for example, the cost of distributing individually to all class members exceeds the amount to be distributed. In these circumstances, courts have permitted the parties to distribute to a nonparty (or nonparties) the excess settlement funds for their next best use—a charitable purpose reasonably approximating the interests pursued by the class.[348]

All told, courts approve *cy pres* payments when actual funds are non-distributable or where the proof of individual claims would be burdensome or distribution of damages would be costly.[349] But *cy pres* must be the "next best distribution" of settlement funds, meaning that it must bear a "substantial nexus to the interests of the class members" (i.e., it "must account for the nature of the plaintiffs' lawsuit, the objectives of the underlying statutes, and the interests of the silent class members").[350]

[3] Settlement Administration

Judges may appoint a claims administrator or special master to: hold settlement funds, administer the distribution procedures, and oversee implementation of an injunction.[351] The administrator or special master may be responsible for reviewing claims and deciding whether to allow claims that are "late, deficient in documentation, or questionable for other reasons."[352] The claims procedure may call for documents only or an in-person hearing. The procedure may also allow an appeal of a decision to disallow a claim, which

may require review by a disinterested person or the court.[353] The *Manual for Complex Litigation* indicates that the administrator should file periodic reports to the court that include "information about distributions made, interest earned, allowance and disallowance of claims, the progress of the distribution process, administrative claims for fees and expenses, and other matters involving the status of administration."[354]

§ 5.18 Attorneys' Fees

Rule 23(h) permits a court, in a certified class action, to award "reasonable" attorneys' fees and nontaxable costs that are authorized by law or by the parties' agreement.[355] The movant must file a claim for the award by motion under Rule 54(d)(2) at a time the court establishes, and notice of this motion must be served on all parties. For motions by class counsel, again, notice must be directed to class members in a reasonable manner.[356] Both a class member and the parties from whom payment is sought may oppose the motion. The court may either hold a hearing pursuant to Rule 52(a) or refer issues related to the amount of award to a special master or magistrate judge as provided in Rule 54(d)(2)(D).[357]

Courts generally use one of two methods to arrive at an amount of attorneys' fees—i.e., the percentage method (also known as the percentage-of-fund method) or lodestar method. We discuss each below.

[1] Percentage Method

For the percentage approach, a reasonable fee is based on a percentage of the fund bestowed on the class.[358] This method is designed to "allow courts to award fees from the fund 'in a manner that rewards counsel for success and penalizes it for failure.'"[359] When considering the reasonableness of a fee request under this approach, courts consider the size of the fund created and the number of persons benefited, the presence or absence of substantial objections by class members to the settlement terms or the requested attorneys' fees, the skill and efficiency of the attorneys involved, the complexity and duration of the litigation, the risk of nonpayment, the amount of time devoted to the case by plaintiffs' counsel, and awards in similar cases.[360] They may also consider (1) the value of benefits accruing to class members attributable to the efforts of class counsel as opposed to the efforts of other groups, (2) the percentage fee that would have been negotiated had the case been subject to a private contingent fee agreement when counsel was retained, and (3) any "innovative" terms of settlement.[361] Some courts have set a percentage "benchmark" (e.g., 25%) for the award of attorneys' fees in common-fund cases.[362]

The court need not apply the factors listed above in a formulaic way; rather, what's important is that, in all cases, the court engages in a "robust assessment[] of the fee award reasonableness factors."[363] Also, the common-fund doctrine provides that an attorney who recovers "a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fees from the *fund as a whole*."[364]

[2] Lodestar Method

Courts often use the "lodestar method" in class actions brought under fee-shifting statutes, such as federal civil rights, securities, antitrust, copyright, and patent acts. Congress authorized the award of fees under these statutes to ensure compensation

for counsel undertaking socially beneficial litigation.[365] Courts also have the discretion, however, to use the lodestar method when a settlement produces a common fund.

The lodestar figure is calculated by multiplying the number of hours the prevailing party's counsel reasonably expended on the litigation (as supported by adequate documentation) by a reasonable hourly rate for the region and for the experience of the lawyer. While the lodestar figure is "presumptively reasonable," courts may "adjust it upward or downward by an appropriate positive or negative multiplier reflecting a host of 'reasonableness' factors, 'including the quality of representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment.'"[366] Most important among these factors is the benefit obtained for the class, and the Supreme Court has instructed courts to "award only that amount of fees that is reasonable in relation to the results obtained" when the success in a class action was limited.[367]

Courts often perform a "lodestar crosscheck" to ensure that the fee award calculated under the common-fund method is fair and reasonable.[368] "Using the percentage method, cross-checked by the lodestar method, reduces the risk that the amount of the fee award either overcompensates counsel in relation to the class benefits obtained or undercompensates counsel for their work."[369] Notwithstanding the method a court employs, "a fee award is reasonable only if it is proportionate to the actual value created for, and received by, the class."[370]

[3] Protection Against Loss by Class Members

The Class Action Fairness Act of 2005 requires that, if the court approves a "proposed settlement under which any class member is obligated to pay sums to class counsel that would result in a net loss to the class member," it must make a "written finding that nonmonetary benefits to the class member substantially outweigh the monetary loss."[371] Thus, a court will only in rare occasions approve a settlement that calls for any class member to pay a greater amount in attorneys' fees than it would recover from the settlement.

Notes

[1] Charles E. Harris, II is a partner in the Litigation & Dispute Resolution group in Mayer Brown's Chicago office and he is a member of the firm's Consumer Litigation & Class Actions practice.

[2] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 348 (2011).

[3] *See* Marcus v. BMW of N.A., LLC, 687 F.3d 583, 590–591 (3d Cir. 2012).

[4] Fed. R. Civ. P. 23(a).

[5] *E.g.*, 735 ILCS 5/2-801; N.Y. CPLR § 901(a).

[6] Davis v. Cintas Corp., 717 F.3d 476, 483 n.1 (6th Cir. 2013).

[7] *Dukes*, 564 U.S. at 353–354 (holding that evidence provided by members of putative class of Title VII plaintiffs failed to rise to level of "significant proof" that company had general policy of discrimination and thus failed to satisfy commonality requirement).

[8] In re Modafinil Antitrust Litig., 837 F.3d 238, 249 (3d Cir. 2016).

[9] Fed. R. Civ. P. 23(a)(1).

[10] 7A Fed. Prac. & Proc. Civ. § 1762 (3d ed. 2005) (collecting cases in which numerosity was satisfied with as few as 25 putative class members, but not satisfied with as many as 350,

and explaining that this inconsistency "graphically demonstrates that caution should be exercised in relying on a case as a precedent simply because it involves a class of a particular size").

[11] 5 *Moore's Federal Practice* § 23.22[1][b] (Matthew Bender 3d ed. 2006).

[12] Mielo v. Steak 'n Shake Operations, Inc., 897 F.3d 467, 484 (3d Cir. 2018) (quoting Robert H. Klonoff, The Decline of Class Actions, 90 Wash. U. L. Rev. 729, 768 (2013)).

[13] 564 U.S. at 351 (quoting Gen. Tel. Co. of S.W. v. Falcon, 457 U.S. 147, 161 (1982)).

[14] *E.g.*, *Mielo*, 897 F.3d at 486; Young v. Nationwide Mut. Ins. Co., 693 F.3d 532, 541 (6th Cir. 2012).

[15] *Marcus*, 687 F.3d at 595.

[16] *E.g.*, In re Modafinil Antitrust Litig., 837 F.3d at 250.

[17] Olson v. Brown, 284 F.R.D. 398, 407 (N.D. Ind. 2012).

[18] Fed. R. Civ. P. 23(a)(2).

[19] 564 U.S. at 349.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Dukes*, 564 U.S. at 350.

[24] Suchanek v. Sturm Foods, Inc., 764 F.3d 750, 756 (7th Cir. 2014).

[25] *Id.*

[26] *Id.*

[27] Fed. R. Civ. P. 23(a)(3).

[28] *Dukes*, 564 U.S. at 349 n.5 (quoting *Falcon*, 457 U.S. at 157–158).

[29] *Id.*

[30] 7A Fed. Prac. & Proc. Civ. § 1764 (3d ed. 2018).

[31] In re Schering Plough Corp. ERISA Litig., 589 F.3d 585, 599 (3d Cir. 2009).

[32] Torres v. Mercer Canyons Inc., 835 F.3d 1125, 1141 (9th Cir. 2016) (quoting Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992) (internal quotation marks omitted)).

[33] *Hanon*, 976 F.2d at 508.

[34] Fed. R. Civ. P. 23(a)(4).

[35] Vassalle v. Midland Funding LLC, 708 F.3d 747, 757 (6th Cir. 2013) (quoting In re Am. Med. Sys., Inc., 75 F.3d 1069, 1083 (6th Cir. 1996)).

[36] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625 (1997).

[37] Stout v. J.D. Byrider, 228 F.3d 709, 717 (6th Cir. 200).

[38] Dewey v. Volkswagen Aktiengesellschaft, 681 F.3d 170, 183 (3d Cir. 2012).

[39] *Stout*, 228 F.3d at 717.

[40] In re Flag Telecom Holdings, Ltd. Sec. Litig., 574 F.3d 29, 35 (2d Cir. 2009); *see also* Valley Drug Co. v. Geneva Pharmaceuticals, Inc., 350 F.3d 1181, 1189 (11th Cir.2003).

[41] *Valley Drug Co.*, 350 F.3d at 1189 (11th Cir. 2003).

[42] *Id.* (quoting In re HealthSouth Corp. Sec. Litig., 213 F.R.D. 447, 456 (N.D. Ala. 2003)).

[43] *In re* Cmty. Bank of N. Virginia Mortg. Lending Practices Litig., 795 F.3d 380, 393 (3d Cir. 2015). Proposed class representatives are sometimes deemed inadequate because they are ill-informed about the litigation, have too close a relationship with putative class counsel, or there are other doubts about their ability to serve as a fiduciary for the class.

[44] Jamie S. v. Milwaukee Pub. Schs., 668 F.3d 481, 502 (7th Cir. 2012). *But see* Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1124 n.4 (9th Cir. 2017) ("we have addressed the

types of alleged definitional deficiencies other courts have referred to as 'ascertainability' issues . . . through analysis of Rule 23's enumerated requirements").

[45] *Marcus*, 687 F.3d at 593–594.

[46] Carrera v. Bayer Corp., 727 F.3d 300, 307 (3d Cir. 2013) (internal quotation marks omitted).

[47] Fed. R. Civ. P. 23(c)(1)(B).

[48] Fed. R. Civ. P. 23(b)(1)-(3).

[49] Fed. R. Civ. P. 23(c)(2).

[50] *Dukes*, 564 U.S. at 362 ("individualized monetary claims belong in Rule 23(b)(3)").

[51] *Id.*; *see also* Fed. R. Civ. P. 23(b)(3).

[52] Fed. R. Civ. P. 23(b)(1)(A).

[53] Fed. R. Civ. P. 23(b)(1)(B).

[54] McDonnell–Douglas Corp. v. U.S. Dist. Court for Cent. Dist. of Cal., 523 F.2d 1083, 1086 (9th Cir. 1975).

[55] Fed. R. Civ. P. 23(b)(1)(A) advisory committee's note to 1966 amendment (quoting Louisell & Hazard, Pleading and Procedure: State and Federal 719 (1962)).

[56] *Id.*

[57] Russell v. Kohl's Department Stores, Inc., No. ED CV 15-01143, 2015 WL 12748629, at *3 (C.D. Cal. Dec. 4, 2015).

[58] Ortiz v. Fibreboard Corp., 527 U.S. 815, 834 (1999).

[59] Fed. R. Civ. P. 23(b)(1)(B) advisory committee's note to 1966 amendment.

[60] *Russell*, 2015 WL 12748629, at *4.

[61] Fed. R. Civ. P. 23(b)(2).

[62] *Dukes*, 564 U.S. at 360 (quoting Richard A. Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U.L. Rev. 97, 132 (2009)).

[63] *Id.* at 361.

[64] Fed. R. Civ. P. 23(b)(3).

[65] Comcast Corp. v. Behrend, 569 U.S. 27, 33 (2013); *Amchem Prods.*, 521 U.S. at 615 (quoting Fed. R. Civ. P. 23 advisory committee's note to 1966 amendment).

[66] Tyson Foods, Inc. v. Bouaphakeo, __ U.S. __, 136 S. Ct. 1036, 1045 (2016).

[67] Ingram v. Coca–Cola Co., 200 F.R.D. 685, 699 (N.D. Ga. 2001).

[68] Andrews v. Am. Tel. & Tel. Co., 95 F.3d 1014, 1023 (11th Cir. 1996), *abrogated on other grounds* by Douglas Asphalt, 657 F.3d 1146 (11th Cir. 2011).

[69] Unger v. Amedisys Inc., 401 F.3d 316, 321 (5th Cir. 2005).

[70] In re Constar Int'l Inc. Sec. Litig., 585 F.3d 774, 780 (3d Cir. 2009) (internal quotation marks omitted).

[71] *Bouaphakeo*, 136 S. Ct. 1045 (internal quotation marks omitted).

[72] *See Andrews*, 95 F.3d at 1023.

[73] Fed. R. Civ. P. 23(b)(3)(A)–(D).

[74] *See*, *e.g.*, Hanlon v. Chrysler Corp., 150 F.3d 1011, 1023 (9th Cir. 1998).

[75] U.S. Const. Art. III, § 2.

[76] Spokeo v. Robins, 136 S. Ct. 1540, 1547 (2016).

[77] *Id.* (quoting Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 103 (1998)).

[78] *Id.* at 1548 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)) (internal quotation marks omitted).

[79] *Id.* (quoting *Lujan,* 504 U.S. at 560) (internal quotation marks omitted).

[80] *Id.* at 1548 (quoting various dictionaries). In *Spokeo*, the plaintiff's putative class action alleged that Spokeo willfully violated the Fair Credit Reporting Act ("FCRA") by publishing incorrect information about the plaintiff and the putative class; the case turned on whether bare procedural violations of the FCRA could satisfy the concreteness element of injury-in-fact. The Court concluded the *Spokeo* plaintiff could not "allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." *Id.* at 1549.

[81] *Id.* at 1547.

[82] *Lujan*, 504 U.S. at 561.

[83] Schumacher v. SC Data Ctr., Inc., 912 F.3d 1104, 1105 (8th Cir. 2019).

[84] Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 40, n. 20 (1976) (quoting Warth v. Seldin, 422 U.S. 490, 502 (1975)).

[85] Rosen v. Tennessee Comm'r of Fin. and Admin., 288 F.3d 918, 928 (6th Cir. 2002). Without the standing requirement discussed above, "a plaintiff would be able to bring a class action complaint under the laws of nearly every state in the Union without having to allege concrete, particularized injuries relating to those states" and "drag[ ] defendants into expensive nationwide class discovery, potentially without a good-faith basis." In re Magnesium Oxide Antitrust Litig., Civ. No. 10–5943, 2011 WL 5008090, at *10 (D.N.J. Oct. 20, 2011).

[86] A & M Gerber Chiropractic LLC v. GEICO Gen. Ins. Co., 925 F.3d 1205, 1211 (11th Cir. 2019) (quoting O'Shea v. Littleton, 414 U.S. 488, 494 (1974)).

[87] *See* In re Deepwater Horizon, 753 F.3d 516, 521 (5th Cir. 2014) (Clement, J., dissenting) (noting that the different approaches to absent class member standing, "sometimes used by the same circuit, reveal the deep confusion in this area of class action standing").

[88] Neale v. Volvo Cars of N. Am., LLC, 794 F.3d 353, 367 (3rd Cir. 2015) ("Quite simply, requiring Article III standing of absent class members is inconsistent with the nature of an action under Rule 23"); DG ex rel. Stricklin v. Devaughn, 594 F.3d 1188, 1198 (10th Cir. 2010) ("Rule 23's certification requirements neither require all class members to suffer harm or threat of immediate harm nor Named Plaintiffs to prove class members have suffered such harm"); Kohen v. Pac. Inv. Mgmt. Co. LLC, 571 F.3d 672, 676 (7th Cir. 2009) ("What is true is that a class will often include persons who have not been injured by the defendant's conduct. . . . Such a possibility or indeed inevitability does not preclude class certification"); *see also* Cordoba v. DIRECTV, LLC, 942 F.3d 1259, 1273 (11th Cir. 2019) (noting that if the defendant's "argument depended on the proposition that all class members must prove their standing before a class could be certified, that argument would be wrong").

[89] Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1051-53 (2016) (Roberts, C.J., concurring)

[90] *Id.*

[91] *Id.*

[92] *Id.* at 1277.

[93] *Kohen*, 571 F.3d at 677; *see also* In re New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6, 28 (1st Cir. 2008) ("[T]he district court would need enough information to evaluate preliminarily whether the proposed model will be able to establish, without need for individual determinations for the many millions of potential class members, which consumers were impacted . . . and which were not."); Oshana v. Coca-Cola Co., 472 F.3d 506, 514 (7th Cir. 2006) (affirming the denial of class certification when "[c]ountless members of [the] putative class could not show any damage" resulting from the defendant's actions). The Eleventh Circuit noted that a class defined so broadly as to "include uninjured class members increases the potential liability for the defendant and induces more pressure to settle the case, regardless of the merits." *Cordoba*, 942 F.3d at 1276.

[94] 443 F.3d 253, 263 (2d Cir. 2006)

[95] *Id.*

[96] 615 F.3d 1023, 1034 (8th Cir. 2010). Some district courts have criticized *Denny* and *Avritt* purportedly not providing clear guidance on how they should apply the rule articulated in those cases. *See, e.g.*, Tomassini v. FCA US LLC, 326 F.R.D. 375 (N.D.N.Y. 2018), reconsideration denied, No. 314 CV 1226, 2018 WL 5842995 (N.D.N.Y. Nov. 8, 2018).

[97] Cal. Pub. Emps.' Ret. Sys. v. ANZ Secs., Inc. (CalPERS), 137 S. Ct. 2042, 2049 (2017).

[98] *Id.* (quoting CTS Corp. v. Waldburger, 134 S. Ct. 2175, 2182 (2014)).

[99] *Id.*

[100] *Id.*

[101] *Id.* (quoting *Waldburger*, 134 S. Ct. at 2183).

[102] *Id.* (quoting *Waldburger*, 134 S. Ct. at 2182).

[103] 414 U.S. 538, 554–555 (1974).

[104] *CalPERS*, 137 S. Ct. at 2050.

[105] *Am. Pipe*, 414 U.S. at 554–559.

[106] Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 350 (1983).

[107] China Agritech v. Resh, 138 S. Ct. 1800, 1806–1808 (2018).

[108] Phillips v. Ford Motor Co., 435 F.3d 785, 788 (7th Cir. 2006).

[109] Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011).

[110] *Id.* at 924.

[111] *Id.* at 919.

[112] *Id.* (internal quotation marks and brackets omitted).

[113] *Id.*

[114] 137 S. Ct. 1773 (2017).

[115] *Id.* at 1777–1778.

[116] *Id.* at 1781–1782.

[117] *Id.* at 1780 (alteration in original; internal quotation marks and citation omitted).

[118] *Id.* at 1781 (emphasis in original; alteration added).

[119] Molock v. Whole Foods Mkt., Inc., 297 F. Supp. 3d 114, 126 (D.D.C. 2018) (denying motion to dismiss on this ground).

[120] *Molock*, 297 F. Supp. 3d at 126.

[121] *E.g.*, Chavez v. Church & Dwight Co., No. 17 C 1948, 2018 WL 2238191, at *10 (N.D. Ill. May 16, 2018) ("Nothing in Bristol-Myers [Squibb Co. v. Superior Court, 137 S. Ct. 1773 (2017)] suggests that its basic holding is inapplicable to class actions.").

[122] *Bristol-Myers*, 137 S. Ct. at 1781.

[123] DeBernardis v. NBTY, Inc., No. 17 C 6125, 2018 WL 461228, at *2 (N.D. Ill. Jan. 18, 2018).

[124] While this section primarily discusses Rule 23, the same discussion is applicable to most state rules setting forth the requirements for class actions.

[125] Thomas J. Henderson, *Practical Considerations in Selecting Class Representatives, and Managing Their Expectations in Litigation and Settlement*, 10 Emp. Rts. & Emp. Pol'y J. 531, 532 (2006).

[126] *Id.*

[127] *Id.*

[128] In re Terazosin Hydrochloride Antitrust Litig., 220 F.R.D. 672, 693 (S.D. Fla. 2004).

[129] Liberty Lincoln Mercury, Inc. v. Ford Marketing Corp., 149 F.R.D. 65, 78 & n.23 (D.N.J. 1993).

[130] Henderson, *supra* note 120, at 532. The authors recognized in this article that circumstances "may not always permit choices among prospective named plaintiffs, particularly

where there are administrative prerequisites or fear or reluctance among the affected class. In the absence of a truly qualified named plaintiff, the only choice may be not to file; avoiding the risk of damaging the interests of the class or a ruling making certification more difficult until a suitable candidate is presented."

[131] Mersay v. First Republic Corp. of Am., 43 F.R.D. 465 (S.D.N.Y. 1968).

[132] Aguirre v. Bustos, 89 F.R.D. 645 (D.N.M. 1981).

[133] Pub. L. No. 109-2, 119 Stat. 4 (2005).

[134] Harding v. Tambrands Inc., 165 F.R.D. 623 (D. Kan. 1996).

[135] Freeman v. Great Lakes Energy Partners, L.L.C., 785 N.Y.S.2d 640 (N.Y. App. Div. 2004); Ackerman v. Price Waterhouse, 683 N.Y.S.2d 179 (N.Y. App. Div. 1998).

[136] Klay v. Humana, Inc., 382 F.3d 1241, 1260 (11th Cir. 2004), abrogated in part on other grounds by Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639 (2008).

[137] Sandwich Chef of Texas, Inc., Inc. v. Reliance Nat'l Ins. Co., 319 F.3d 205, 219 (5th Cir. 2003) ("[C]ases that involve individual reliance fail the predominance test."); Simon v. Merrill Lynch, Pierce, Fenner & Smith, 482 F.2d 880, 882(5th Cir. 1973) ("If there is any material variation in the representations made or in the de-grees of reliance thereupon, a fraud case may be unsuited for treatment as a class action.").

[138] In re Dial Complete Mktg. and Sales Practices Litig., 312 F.R.D. 36, 61 (D.N.H. 2015) (quoting McCrary v. Elations Co., LLC, No. EDCV 13–00242 JGB OP, 2014 WL 1779243, at *14 (C.D.Cal. Jan. 13, 2014)).

[139] *Sandwich Chef,* 319 F.3d at 211 ("Fraud actions that require proof of individual reliance cannot be certified as Fed. R. Civ. P. 23(b)(3) class actions because individual, rather than common, issues will predominate."), *cert. denied*, 540 U.S. 819 (2003); Kline v. Taukpoint Realty Corp., 754 N.Y.S.2d 899 (N.Y. App. Div. 2003).

[140] Gale v. International Business Machines Corp., 781 N.Y.S.2d 45 (N.Y. App. Div. 2004).

[141] Owen v. Regence Bluecross Blueshield of Utah, 388 F. Supp. 2d 1335, 1341–1342 (D. Utah. 2005).

[142] Ford v. Sivilli, 770 N.Y.S.2d 414 (N.Y. App. Div. 2003).

[143] *E.g.*, Phillips v. Sears, Roebuck & Co., 2008 WL 2003186, at *6 (S.D. Ill. May 8, 2008) ("[t]he Seventh Circuit has put an end to most multistate consumer class cases").

[144] Fed. R. Civ. P. 23(c)(5).

[145] Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

[146] Boucher v. Syracuse Univ., 164 F.3d 113 (2d Cir. 1999).

[147] In re Sulzer Hip Prosthesis and Knee Prosthesis Liab. Litig., No. 1:01-CV-9000, 2001 WL 1842315 (N.D. Ohio 2001).

[148] *See* U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 408 (1980).

[149] *Id.*

[150] Marisol A. v. Giuliani, 126 F.3d 372, 379 (2d Cir. 1997).

[151] Kohen v. Pac. Inv. Mgmt. Co. LLC, 571 F.3d 672, 680 (7th Cir. 2009).

[152] Fed. R. Civ. P. 42(b).

[153] Fed. R. Civ. P. 23(c)(4).

[154] Taylor v. CSX Transp., Inc., 264 F.R.D. 281, 297 (N.D. Ohio 2007) (quoting Snow v. Atofina Chems., Inc., No. 01-72648. 2006 WL 1008002, at *9 (E.D. Mich. Mar. 31, 2006) (internal quotation marks omitted)).

[155] In re Deepwater Horizon, 739 F.3d 790, 817 (5th Cir. 2014); In re Whirlpool Front–Loading Washer Prods. Liab. Litig., 722 F.3d 838, 860 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014); Butler v. Sears, Roebuck & Co., 727 F.3d 796, 800–801 (7th Cir. 2013).

[156] *See, e.g.,* Mullins v. Direct Digital, LLC, 795 F.3d 654, 671–672 (7th Cir. 2015).

[157] 28 U.S.C. §§ 1332(d)(2), (5)(B).

[158] Emery G. Lee III & Thomas E. Willging, The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals, 56 U. Pa. L. Rev. 1723, 1762 (June 2008).

[159] *Annotated Manual for Complex Litigation* § 21.11 (4th ed. May 2018).

[160] Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges* (3d ed. 2010).

[161] *Id.* at 10–11.

[162] *Annotated Manual for Complex Litigation*, *supra* note 154, § 21.14.

[163] *Id.*

[164] *Id.*

[165] *Id.*, §§ 21.14, 21.41.

[166] *See* Spano v. The Boeing Co., 633 F.3d 574, 583 (7th Cir. 2011) (quoting Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 676 (7th Cir. 2001) ("Before deciding whether to allow a case to proceed as a class action, therefore, a judge should make whatever factual and legal inquiries are necessary under Rule 23.")).

[167] *Annotated Manual for Complex Litigation*, *supra* note 154, § 21.14.

[168] *Id.*

[169] Beverly J. Westbrook, *Discovery for Purposes of Determining Whether Class Action Requirements Under Rule 23(a) and (b) of the Federal Rules of Civil Procedure Are Satisfied*, 24 A.L.R. Fed. 872 (1975).

[170] *Annotated Manual for Complex Litigation*, *supra* note 154, § 21.14.

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] Fed. R. Civ. P. 23(c)(1)(A).

[175] *Annotated Manual for Complex Litigation, supra* note 154, § 21.133.

[176] Rothstein & Willging, *Managing Class Action Litigation*.

[177] *Id.* at 9.

[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] *Annotated Manual for Complex Litigation*, *supra* note 154, § 21.21.

[182] *Id.* (citations omitted).

[183] Fed. R. Civ. P. 23(c)(1)(B).

[184] Fed. R. Civ. P. 23(g)(1)(B).

[185] Fed. R. Civ. P. 23(g)(1)(A)(i).

[186] Fed. R. Civ. P. 23(g)(1)(A)(ii).

[187] Fed. R. Civ. P. 23(g)(1)(A)(iii).

[188] Fed. R. Civ. P. 23(g)(1)(A)(iv).

[189] Pub. L. No. 104-67, 109 Stat. 737 (1995).

[190] Rothstein & Willging, *Managing Class Action Litigation,* at 7–8.

[191] *Annotated Manual for Complex Litigation*, *supra* note 154, § 21.26, observing that "[t]he Private Securities Litigation Reform Act (PSLRA) requires that a class representative act

independently of counsel, be familiar with the subject matter of the complaint, and authorize initiation of the action. In other kinds of class actions as well, courts have required that representatives be knowledgeable about the issues in the case. This does not necessarily require legal experience or expertise on the part of the representative, who is usually a layperson."

[192] *Id.*

[193] Fed. R. Civ. P. 23(f).

[194] *Id.* (emphasis added).

[195] 139 S. Ct. 710, __ U.S. __, at 715 (2019).

[196] *Id.* (quoting Fed. Rule App. Proc. 26(b)(1)).

[197] Fed. R. Civ. P. 23(d)(1)(A)–(E).

[198] Fed. R. Civ. P. 23(c)(2)(A) (emphasis added).

[199] Fed. R. Civ. P. 23(c)(2)(B) (emphasis added).

[200] Fed. R. Civ. P. 23(c)(2)(B)(i)–(vii).

[201] Fed. R. Civ. P. 23(c)(2)(B).

[202] *See*, *e.g.*, Pollard v. Remington Arms Co., LLC, 896 F.3d 900, 906 (8th Cir. 2018).

[203] *Annotated Manual for Complex Litigation*, *supra* note 154, § 21.33 (4th ed. May 2018) ("Once a class has been certified, the rules governing communications apply as though each class member is a client of the class counsel. . . . Defendants' attorneys, and defendants acting in collaboration with their attorneys, may only communicate through class counsel with class members on matters regarding the litigation. Communications with class members in the ordinary course of business, unrelated to the litigation, remain permitted.").

[204] *Id.*

[205] *Id.* § 21.321.

[206] *Id.* § 21.41.

[207] *Id.* (internal citations omitted).

[208] *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941).

[209] Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818, 821 (1985) (emphasis added).

[210] *Phillips Petroleum*, 472 U.S. at 816.

[211] Castano v. Am. Tobacco Co., 84 F.3d 734, 741 (5th Cir. 1996); *accord* Georgine v. Amchem Prods., Inc., 83 F.3d 610, 627 (3d Cir. 1996) (holding that predominance was defeated, in part, by the number of differing state legal standards applicable to the controversy), *aff'd sub nom. Amchem Prods.*, 521 U.S. at 591, 624.

[212] Spence v. Glock, Ges.m.b.H., 227 F.3d 308, 313 (5th Cir. 2000) (quoting Walsh v. Ford Motor Co., 807 F.2d 1000, 1017 (D.C. Cir. 1986)).

[213] *Castano*, 84 F.3d at 740. A court's failure to engage in an analysis of state law variations is grounds for decertification. *Id.* at 741–744 (court abused its discretion in certifying class where plaintiffs had failed to properly address variations in state law such that conclusion of predominance was based on speculation); *Spence*, 227 F.3d at 316 (court abused its discretion in certifying class where plaintiffs had failed to carry their burden of providing an extensive analysis of applicable law).

[214] *Walsh*, 807 F.2d at 1017 (citation omitted).

[215] 28 U.S.C. § 1331.

[216] Mims v. Arrow Fin. Servs., LLC, 565 U.S. 368, 377 (2012) (quoting 28 U.S.C. § 1331).

[217] Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 312 (2005).

[218] 28 U.S.C. § 1332.

[219] Lewis v. Verizon Commc'ns, Inc., 627 F.3d 395, 398 (9th Cir. 2010) (citing Exxon Mobile Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 549–551 (2005)).

[220] *Exxon Mobile Corp.,* 545 U.S. at 549 (discussing 28 U.S.C. § 1367).

[221] Pub. L. No. 109-2, 119 Stat. 4 (Feb. 18, 2005).

[222] Holt v. Noble House Hotels & Resort, Ltd., Case No. 17cv2246, 2018 WL 539176, at *3 (S.D. Cal. Jan. 23, 2018) (citing Serrano v. 180 Connect, Inc., 478 F.3d 1018, 1021 n.4 (9th Cir. 2007)).

[223] 28 U.S.C. §§ 1332(d)(2), (d)(5)(B).

[224] 28 U.S.C. § 1453(b).

[225] Palisades Collections LLC v. Shorts, 552 F.3d 327, 331–332 (4th Cir.2008) (citing 28 U.S.C. §§ 1441(b), 1446(b)) (internal citation omitted).

[226] *See* 28 U.S.C. § 1453(b). To remove an action from state to federal court, a defendant "shall file in the district court . . . for the district and division within which such action is pending a notice of removal . . . containing a short and plain statement of the grounds for removal." *Id.* § 1446(a). A defendant must generally file the notice of removal "within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading." *Id.* § 1446(b).

[227] 28 U.S.C. § 1332(d)(3).

[228] 28 U.S.C. §§ 1332(d)(3)(A)–(F).

[229] 28 U.S.C. § 1332(d)(4)(A)(ii).

[230] 28 U.S.C. § 1332(d)(4)(B).

[231] Vodenichar v. Halcon Energy Props., Inc., 733 F.3d 497, 504 (3d Cir. 2013) (collecting cases).

[232] 28 U.S.C. § 1391(b)(2). A plaintiff may also commence the class action where "any defendant resides." *Id.* § 1391(b)(1). And, if there is no district where an action may otherwise be brought, a plaintiff may bring the action in "any judicial district in which any defendant is subject to the court's personal jurisdiction." *Id.* § 1391(b)(3).

[233] In re Bozic, 888 F.3d 1048, 1054 (9th Cir. 2018).

[234] *Id.* at 1053 (citing Abrams Shell v. Shell Oil Co., 343 F.3d 482, 490 (5th Cir. 2003) (explaining that "all named plaintiffs to a class action must satisfy the venue requirements"); 2 *Newberg on Class Actions* § 6:36 (5th ed.) ("The analysis of where a substantial part of the events took place, in a class action, looks to the events concerning the named plaintiffs' claims, not all of the class members' claims.")).

[235] In re Bozic, 888 F.3d at 1053.

[236] *Abrams Shell,* 343 F.3d 490 (emphasis added); *see also* Dukes v. Wal-Mart Stores, Inc., No. C01–2252, 2001 WL 1902806, at *9 (N.D. Cal. Dec. 3, 2001) ("The Court adopts here the general rule that each plaintiff in a class action must individually satisfy venue."); Bywaters v. United States, 196 F.R.D. 458, 464–465 (E.D. Tex. 2000) ("[T]he relevant venue question in a class action is whether venue is proper as to the parties representing, and 'in effect standing in for the absent class members.'").

[237] *See* Neale v. Volvo Cars of N. Am., LLC, 794 F.3d 353, 363 (3d Cir. 2015).

[238] *Ortiz v. Fibreboard Corp.,* 527 U.S. 815, 833 (1999).

[239] 559 U.S. 662, 673 (2010).

[240] 563 U.S. 333 (2011).

[241] 559 U.S. at 686.

[242] *Id.*

[243] *Id.*

[244] 563 U.S. at 348.

[245] *Id.* at 349.

[246] *Id.* at 350. Lamp Plus v. Varela, 139 S. Ct. 1407 (2019) (following *Stolt-Nielsen* and *Concepcion*, the Court held that "Courts may not infer from an ambiguous agreement that parties have consented to arbitrate on a class-wide basis.")

[247] 559 U.S. at 684.

[248] *Id.* at 687.

[249] 553 U.S. at 345–348.

[250] 570 U.S. 228 (2013).

[251] 138 S. Ct. 1612, 1622 (2018).

[252] *Id.*

[253] *Id.* at 1619.

[254] 569 U.S. 564, 568 (2013).

[255] *Id.* at 571.

[256] *Id.* at 572.

[257] *Sutter*, 569 U.S. at 566.

[258] Herrington v. Waterstone Mortgage Corp, 907 F.3d 502, 507 (7th Cir. 2018) (collecting cases).

[259] *E.g.*, *id.*

[260] Am. Arbitration Ass'n, Suppl. Rules for Class Arbitrations (2003), https://www.adr.org/sites/default/files/Supplementary%20Rules%20for%20Class%20Arbitrations.pdf.

[261] JAMS, JAMS Class Action Procedures (2009), https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Class_Action_Procedures-2009.pdf.

[262] Am. Arbitration Ass'n, Suppl. Rules for Class Arbitration, *supra* note 256 at R. 3.

[263] JAMS Class Action Procedures, *supra* note 257 at R. 2.

[264] Am. Arbitration Ass'n, Suppl. Rules for Class Arbitration, *supra* note 256 at R. 3; JAMS Class Action Procedures, *supra* note 257 at R. 2.

[265] *Id.* at R. 3; JAMS Class Action Procedures, *supra* n.25 at R. 2.

[266] Am. Arbitration Ass'n, Suppl. Rules for Class Arbitration, *supra* note 256 at R. 4(a).

[267] *Compare id.* at R. 4(a), (b), *with* Fed. R. Civ. P. 23(a), 23(b)(3).

[268] *Id.* at R. 5(a).

[269] *Id.* at R. 9(a).

[270] Am. Arbitration Ass'n, Class Arbitration Case Dockets, https://www.adr.org/ClassArbitration.

[271] Alyssa S. King, Too Much Power and Not Enough: Arbitrators Face the Class Dilemma, 21 Lewis & Clark L. Rev. 1031, 1044 (2017).

[272] *Id.* at 1043.

[273] *Reviewed AAA Clause Construction Awards*, www.adr.org.

[274] Kaufman v. Am. Express Travel Related Servs. Co., 877 F.3d 276 (7th Cir. 2017) (quoting Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 279 (7th Cir. 2002)).

[275] Fed. R. Civ. P. 23(e).

[276] *Amchem Prods.,* 521 U.S. at 591, 623 (citing 7B Wright, Miller, & Kane § 1797, at 340–341).

[277] *See* Fed. R. Civ. P. 23(e) advisory committee's note to 2003 amendment.

[278] *See* In re LIBOR-Based Fin. Instruments Antitrust Litig., No. 11-CV-5450, 2016 WL 7625708, at *2 (S.D.N.Y. Dec. 21, 2016) (citing In re NASDAQ Mkt.-Makers Antitrust Litig., 176 F.R.D. 99, 102 (S.D.N.Y. 1997)); *see also* In re Initial Pub. Offering Sec. Litig., 243 F.R.D. 79, 87 (S.D.N.Y. 2007) ("Review of a proposed class action settlement generally involves a two-step process: preliminary approval and a subsequent 'fairness hearing.' The court first

must review the proposed terms of settlement and make a preliminary determination on the fairness, reasonableness and adequacy of the settlement terms.").

[279] David F. Herr, *Ann. Manual Complex Lit.* § 21.632 (4th ed. May 2018). "Preliminary approval of a class action settlement, in contrast to final approval, is at most a determination that there is what might be termed 'probable cause' to submit the proposal to class members and hold a full-scale hearing as to its fairness." Menkes v. Stolt–Nielsen S.A., 270 F.R.D. 80, 101 (D. Conn. 2010) (quoting In re Traffic Executive Association–Eastern Railroads, 627 F.2d 631, 634 (2d Cir. 1980)); *see also* 4 *Newberg on Class Actions* § 13.10 (5th ed. 2017) ("Preliminary approval is thus the first stage of the settlement process, and the court's primary objective at that point is to establish whether to direct notice of the proposed settlement to the class, invite the class's reaction, and schedule a final fairness hearing. . . . the general rule is that a court will grant preliminary approval where the proposed settlement is neither illegal nor collusive and is within the range of possible approval.").

[280] The amended rules "shall govern in all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings then pending." Order Amending Federal Rules of Civil Procedure (Apr. 26, 2018), 324 F.R.D. 904, 905.

[281] *See infra* section 5.13(1)(a).

[282] Fed. R. Civ. P. 23(e)(1)(B).

[283] Fed. R. Civ. P. 23(e)(1) advisory committee's note to 2018 amendment.

[284] Swinton v. SquareTrade, Inc., No. 4:18-CV-00144, 2019 WL 617791, at *4 (S.D. Iowa Feb. 14, 2019).

[285] Fed. R. Civ. P. 23(e)(2).

[286] Fed. R. Civ. P. 23(e)(2).

[287] Fed. R. Civ. P. 23(3)(2)(A)–(D).

[288] *Swinton*, 2019 WL 617791, at *5.

[289] Fed. R. Civ. P. 23(e)(2) advisory committee's note to 2018 amendment.

[290] *See*, *e.g.*, *Swinton*, 2019 WL 617791, at *5; Hays v. Eaton Group Attorneys, LLC, No. 17-88, 2019 WL 427331, at *9 (M.D. La. Feb. 4, 2019).

[291] *Amchem Prods.*, 521 U.S. at 613 (quoting Fed. R. Civ. P. 23(a)).

[292] *Id.* at 614.

[293] Denney v. Deutsche Bank AG, 443 F.3d 253, 270 (2d Cir. 2006).

[294] *Amchem*, 521 U.S. at 620.

[295] *Id.* at 621.

[296] *Id.*

[297] Fed. R. Civ. P. 23(c)(1), (g).

[298] Fed. R. Civ. P. 23(c)(5).

[299] Herr, *Ann. Manual Complex Lit.*, *supra* note 276, at § 21.634.

[300] Fed. R. Civ. P. 23(e)(5)(A).

[301] Brown v. Jonathan Neil & Assocs., Inc., No. 1:17-cv-00675, 2019 WL 636842, at *2 (E.D. Cal. Feb. 14, 2019).

[302] *Hanlon*, 150 F.3d at 1011, 1019–1022.

[303] *Id.* at 1025

[304] Radcliffe v. Experian Info. Solutions Inc., 715 F.3d 1157, 1168 (9th Cir. 2013) (quoting In re Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 946 (9th Cir. 2011)).

[305] Ehrheart v. Verizon Wireless, 609 F.3d 590, 595 (3d Cir. 2010).

[306] Becker v. Bank of N.Y. Mellon Trust Co., N.A., No. 11-6460, 2018 WL 6727820, at *4 (E.D. Pa. Dec. 21, 2018) (quoting In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 535 (3d

Cir. 2004)); *see, e.g.,* Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 113, 116 (2d Cir. 2005) ("A 'presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery'") (quoting *Manual for Complex Litigation, Third,* § 30.42 (1995)).

[307] 28 U.S.C. § 1714.

[308] Fed. R. Civ. P. 23(e)(1), (2).

[309] Bui v. Sprint Corp., No. 2:14-cv-02461, 2016 WL 727163, at *4 (E.D. Cal. Feb. 24, 2016); *see also* Herr, *Ann. Manual Complex Lit.*, *supra* note 276, at § 21.632 ("In some cases, this initial evaluation can be made on the basis of information already known, supplemented as necessary by briefs, motions, or informal presentations by parties.").

[310] In re Payment Card Interchanges Fee and Merchant Discount Antitrust Litig., 330 F.R.D. 11, 28 (E.D.N.Y. 2019).

[311] Fed. R. Civ. P. 23(e)(1)(A).

[312] Fed. R. Civ. P. 23(1)(B).

[313] *E.g.*, Mem. of Law in Support of Lead Plaintiffs' Unopposed Mot. for an Order Preliminarily Approving Class Action Settlement and Authorizing Dissemination of Notice of Settlement, In re Stericycle, Inc. Sec. Lit., No. 1:16-cv-07145 (N.D. Ill. Feb. 25, 2019), 2019 WL 923386.

[314] Fed. R. Civ. P. 23(e)(3).

[315] Rothstein & Willging, *Managing Class Action Litigation*, at 13–14 (citing Herr, *Ann. Manual of Complex Lit.*, *supra* note 276, at § 21.631).

[316] Herr, *Ann. Manual Complex Lit.*, *supra* note 276, at § 21.644.

[317] *Id.*

[318] Fed. R. Civ. P. 23(e)(1)(B).

[319] Fed. R. Civ. P. 23(c)(2)(B).

[320] *Id.*

[321] *Id.*

[322] *Eisen*, 417 U.S. at 156, 174 (internal quotation marks omitted).

[323] Parks v. Portnoff Law Assocs., 243 F. Supp. 2d 244, 249 (E.D. Pa. 2003).

[324] Fed. R. Civ. P. 23(e)(2).

[325] Rothstein & Willging, *Managing Class Action Litigation*, at 32.

[326] *Id.*

[327] Rothstein & Willging, *Managing Class Action Litigation,* at 32.

[328] *Id.* at 31.

[329] *Id.* (citing Theodore Eisenberg & Geoffrey P. Miller, The Role of Opt–Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues, 57 Vand. L. Rev. 1529 (2004)).

[330] *Id.*

[331] *Id.*

[332] 28 U.S.C. § 1712; *see also* 4 William B. Rubenstein, *Newberg on Class Actions* § 12.12 (5th ed. 2017) ("Notwithstanding CAFA's virtual restatement of existing law, courts across a number of circuits have held that [CAFA] requires heightened judicial scrutiny of coupon-based class action settlements.") (collecting cases).

[333] *Id.* (quoting Rothstein & Willging, *Managing Class Action Litigation*, at 18).

[334] Hazlin v. Botanical Labs., Inc., No. 13-cv-0618, 2015 WL 11237634, at *4 (S.D. Cal. May 20, 2015).

[335] *See* section 5.02.

[336] Rodriguez v. Danell Custom Harvesting, LLC, 327 F.R.D. 375, 383–384 (E.D. Cal. 2018).

[337] Hunter v. Beshear, No. 2:16-cv-798, 2018 WL 564856, at *7 (M.D. Ala. Jan. 25, 2018).

[338] *See* section 5.13(1)(a).

[339] *Rodriguez*, 327 F.R.D. at 384.

[340] *Id.* (quoting Lane v. Facebook, Inc., 696 F.3d 811, 819 (9th Cir. 2012) (internal quotation marks omitted)).

[341] Michael J. Puma & Justin S. Brooks, Navigating Developing Challenges in Approval of Class and Collective Action Settlements, 28 ABA J. Lab. & Emp. L. 325, 334 (Winter 2013).

[342] In re Chrysler-Dodge-Jeep Ecodiesel Mktg., Sales Practices, and Prods. Liab. Litig., No. 17-md-02777, 2019 WL 536661, at *8 n.6 (N.D. Cal. Feb. 11, 2019).

[343] In re Packaged Ice Antitrust Litig., No. 08–MDL–01952, 2011 WL 6209188, at *15 (E.D. Mich. Dec. 13, 2011) (quoting 3 *Newberg on Class Actions*, § 8:45 (4th ed.2002)).

[344] In re Airline Ticket Comm'n Antitrust Litig., 268 F.3d 619, 625 (8th Cir. 2001).

[345] *See* Stewart R. Shepherd, Damage Distribution in Class Actions: The Cy Pres Remedy, 39 U. Chi. L. Rev. 448, 452 (1972).

[346] *See id.*

[347] In re Baby Prods. Antitrust Litig., 708 F.3d 163, 169 (3d Cir. 2013).

[348] *Id.* at 168–169.

[349] Six (6) Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1305 (9th Cir. 1990).

[350] New York State Teachers' Ret. Sys. v. Gen. Motors Co., 315 F.R.D. 226, 241 (E.D. Mich. 2016) (quoting Nachshin v. AOL, LLC, 663 F.3d 1034, 1036 (9th Cir. 2011)).

[351] Herr, *Ann. Manual Complex Lit.,* note 276, at § 21.661.

[352] *Id.*

[353] *Id.*

[354] *Id.*

[355] Fed. R. Civ. P. 23(h).

[356] Fed. R. Civ. P. 23(h)(1).

[357] Fed. R. Civ. P. 23(h)(2)–(4).

[358] In re Gen. Motors Corp. Pick–Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 818–819 (3d Cir.1995). The "common-fund doctrine" authorizes such an award. Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980).

[359] In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283, 333 (3d Cir. 1998) (quoting In Re Gen. Motors Corp., 55 F.3d at 821).

[360] Rowe v. E.I. DuPont de Nemours and Co., No. 06-1810, 2011 WL 3837106, at *18 (D.N.J. Aug. 26, 2011).

[361] *Id.* (quoting In re AT & T Corp., 455 F.3d 160, 165 (3d Cir. 2006)).

[362] *E.g.*, In re Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 942 (9th Cir. 2011) ("courts typically calculate 25% of the fund as the 'benchmark' for a reasonable fee award, providing adequate explanation in the record of any 'special circumstances' justifying a departure").

[363] *Rowe*, 2011 WL 3837106 at *18 (quoting In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 301 (3d Cir. 2005)).

[364] *Van Gemert*, 444 U.S. at 478 (emphasis added).

[365] *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d at 942.

[366] *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d at 941–942 (quoting Cunningham v. Cnty. of Los Angeles, 879 F.2d 481, 488 (9th Cir. 1988); *Hanlon*, 150 F.3d at 1011, 1029).

[367] Hensley v. Eckerhart, 461 U.S. 424, 440 (1983).

[368] Turk v. Gale/Triangle, Inc., No. 2:16–cv–00783, 2017 WL 4181088, at *4 (E.D. Cal. 2017).

[369] In re Heartland Payment Sys, Inc. Customer Data Sec. Breach Litig., 851 F. Supp. 2d 1040, 1073 (S.D. Texas 2012).

[370] *Id.*

[371] 28 U.S.C. § 1713.

CHAPTER 6

Litigation Against the Federal Government

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§ 6.01 Introduction

The federal government is both omnipotent and omnipresent. With approximately 2.8 million civilian employees, the government is the nation's largest employer.[2] For reference, Wal-Mart has about 2.2 million employees globally, with 1.5 million in the United States.[3] The government's total receipts amount to approximately $3.45 trillion and its expenditures $4.15 trillion.[4] There isn't a facet of our life that's not influenced by the government. Given the government's ubiquity—and authority—the potential for wrongdoing, whether perceived or real, is immense. Thus, there must be some recourse. In the seminal decision, *Marbury v. Madison*,[5] Chief Justice Marshall observed that "[t]he government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy [against it] for the violation of a vested legal right."[6] Likewise, President Abraham Lincoln acknowledged that it is "as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private parties."[7] Yet, in the early years of the nation, "[n]o court exercised standing jurisdiction over claims against the U.S. government, whether for contract, tort or even the payment of 'just compensation' due on a taking of property under the Fifth Amendment."[8] Indeed, it has been settled since at least the mid-1800s that the United States is immune from suit unless it consents to be sued. This is known as "sovereign immunity."[9]

Over the years, however, Congress has passed many statutes, of a general and specific nature, in which the United States consented to suit in federal court for money damages and injunctive relief. These statutes thus "waive" the government's sovereign immunity. In *United States v. Shaw*, the Supreme Court remarked that "[a] sense of justice has brought a progressive relaxation by legislative enactments of the rigor of the immunity rule. As representative governments attempt to ameliorate inequalities as necessities permit, prerogatives of the government yield to the needs of the citizen."[10] Broadly speaking, this chapter examines certain statutes waiving the United States' sovereign immunity the plaintiffs regularly rely on to seek redress against the government. In particular, the next section of the chapter covers suits against the government for money damages. It sets out the history of the Court of Federal Claims and discusses some common claims plaintiffs bring in that court. The chapter then discusses select statutes that waive the government's sovereign immunity, and lawsuits to obtain injunctive relief against the government. Finally, the chapter touches on state sovereign immunity.[11]

§ 6.02 Actions for Money Damages

[1] The United States Court of Federal Claims

In the early to mid-1850s, Congress satisfied monetary claims against the United States by enacting private bills (i.e., a bill that provides a benefit to a specific person).[12] As that process became more cumbersome, in 1855, Congress created the Court of Claims to "hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States."[13] But the court operated merely as an advisory body, making recommendations to Congress, which had final say over whether to pass a private bill to effectuate a decision.[14] This process proved increasingly unworkable to resolve a growing number of Civil War claims. In 1863, at the

urging of President Lincoln, Congress authorized the Court of Claims to enter final judgments.[15]

In 1982, Congress split the Court of Claims into an appellate tribunal and trial court. The trial division of the court became the Claims Court.[16] Congress merged the appellate division of the court with the Court of Customs and Patent Appeals to create the Court of Appeals for the Federal Circuit (the "Federal Circuit").[17] In 1992, Congress renamed the Claims Court, the "Court of Federal Claims."[18] Today, the Court of Federal Claims now consists of 17 judges appointed by the President and confirmed by the Senate for 15-year terms. Judges who have completed their terms may continue to hear cases as senior judges.[19] The Federal Circuit has exclusive jurisdiction to hear appeals from the Court of Federal Claims, from certain administrative agencies, and claims arising under certain statutes.[20] We begin by discussing several important aspects of the Court of Federal Claims.

[a] The Tucker Act

The jurisdiction of the Court of Federal Claims to hear suits against the United States is limited: As we discussed in section 6.01, "[t]he United States, as sovereign, is immune from suit save as it consents to be sued."[21] "The Constitution does not refer to sovereign immunity, and the rules pertaining to the defense are judge made."[22] Critically, a waiver of immunity cannot be implied but must be "unequivocally expressed."[23] The Tucker Act, the principal statute governing the Court of Federal Claims' jurisdiction, waives sovereign immunity for "any claim against the United States founded either upon the Constitution, or any Act of Congress [i.e, a statute] or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."[24] The Tucker Act has two companion statutes that also waive sovereign immunity. The Little Tucker Act gives district courts "original jurisdiction, concurrent with the [Court of Federal Claims]" of any "civil action or claim against the United States, not exceeding $ 10,000 in amount."[25] And, as discussed below, the Indian Tucker Act confers jurisdiction on the Court of Federal Claims to hear any claim brought by Native American tribes against the United States that "is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe."[26]

These statutes do not create substantive rights; they are purely jurisdictional provisions that operate to waive sovereign immunity for claims premised on other sources of law (e.g., statutes or contracts).[27] A claimant must identify that separate source of substantive law that creates the right to money damages to establish jurisdiction.[28] The test for determining whether a source of law can support jurisdiction is whether it can be "fairly be interpreted as mandating compensation by the Federal Government for the damages sustained."[29] This is referred to as the requirement for a "money-mandating" source of law.[30]

[b] Statute of Limitations

The statute of limitations applicable to the Court of Federal Claims is "jurisdictional."[31] Section 2501 of the Judicial Code provides that "[e]very claim of which the [Court of Federal Claims] has jurisdiction shall be barred unless the petition thereon is filed within *six* years after such claim first accrues."[32] Thus, where a statute conferring the substantive right to bring suit in the Court of Federal Claims has a shorter or longer

statute of limitations for private parties, the six-year limitations period applicable to the Court of Federal Claims will generally trump the statutorily prescribed period.[33] It is generally stated that a claim "first accrues" when all the events have occurred which fix the alleged liability of the defendant and entitle the plaintiff to institute an action.[34] The "proper focus, for statute of limitations purposes, 'is upon the time of the [defendant's] *acts*, not upon the time at which the *consequences* of the acts became most painful."[35] A claim doesn't accrue unless the claimant knew or should have known that it existed.[36] To demonstrate ignorance of a claim, a claimant must show either that the federal government "has concealed its acts with the result that plaintiff was unaware of their existence or [that plaintiff's] injury was 'inherently unknowable' at the accrual date."[37] Whether the pertinent events have occurred is determined under an objective standard; "a plaintiff does not have to possess actual knowledge of all the relevant facts in order for the cause of action to accrue."[38]

[c] Rules of the Court of Federal Claims

The Court of Federal Claims has adopted its own rules of procedure under the authority Congress bestowed in section 2503(b) of the Judicial Code.[39] These rules incorporate and are based on the Federal Rules of Civil Procedure applicable to civil actions tried by a U.S. district court sitting without a jury.[40] In fact, for ease of reference to comparable rules, chapter titles and numbers of rules of the Court of Federal Claims are identical to chapter titles and numbers contained in the Federal Rules of Civil Procedure.[41] Local rules applicable only in Court of Federal Claims actions are set forth in Titles X and XI of rules or in separate appendices.[42] Appendix A of the rules outlines case management procedures that may be modified by a judge "[f]or the purpose of promoting the efficient administration of justice."[43]

[d] Class Actions

Class actions in the Court of Federal Claims are governed by the court's Rule 23 (the "COFC Rule").[44] This rule is largely modeled on Federal Rule of Civil Procedure 23, but there are significant differences between the two rules. In the main, like Federal Rule 23, the court may certify a class action under COFC Rule 23 if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.[45] Also, the court must find that the United States has acted or refused to act on grounds generally applicable to the class, "that the 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 . . . adjudicating the controversy."[46]

However, "[b]ecause the relief available in this court is generally confined to individual money claims against the United States, the situations justifying the use of a class action are correspondingly narrower than those addressed" in Federal Rule 23.[47] For instance, COFC Rule 23 does not accommodate the factual situations redressable through declaratory and injunctive relief contemplated under Federal Rule 23(b)(1) and (b)(2).[48] Also, unlike the Federal rule, the court's rule contemplates only opt-in class certifications, not opt-out classes. Opt-out classes are "viewed as inappropriate . . . because of the need for specificity in money judgments against the United States, and

the fact that the court's injunctive powers—the typical focus of an opt-out class—are more limited than those of a district court."[49] Finally, the Court of Federal Claims' Rule 23 does not contain a provision comparable to Federal Rule 23(f), providing that a court of appeals may permit an appeal from an order granting or denying class-action certification.[50] Still, the Court of Federal Claims may certify questions to the Federal Circuit under section 1292(b) or 1295 of the Judicial Code.[51]

[2] Waivers of Federal Sovereign Immunity

[a] Bid Protests

Federal agencies obligated $500 billion through contracts for products and services in fiscal year 2017.[52] Procurement statutes and regulations, such as the Competition in Contracting Act of 1984 ("CICA")[53] and Federal Acquisition Regulations System ("FAR"),[54] establish mostly uniform standards for how agencies acquire goods and services. The procurement statutes also provide limited waivers of sovereign immunity to allow contractors to "protest" (i.e., object to) solicitations and contract awards when federal agencies fail to comply with procurement laws. A protest can be lodged in three different venues: (1) the procuring agency, (2) the Government Accountability Office ("GAO"), or (3) the Court of Federal Claims.[55] While these forums share some common features, such as using the same definition of "interested party" to govern who may file a valid protest,[56] the procedures and available remedies vary in each one. Also, parties that disagree with the outcome of a bid protest before a procuring agency or GAO can often still file protests before the Court of Federal Claims, but the reverse route (filing a protest with a procuring agency or GAO after an adverse decision in the Court of Federal Claims) is generally impermissible due to timeliness requirements for filing at the agency and GAO.[57]

[i] Protests Before the Procuring Agency

Provisions of FAR authorize an actual or prospective bidder (or offeror) to file an agency-level protest based on an alleged impropriety in a solicitation or contract award.[58] Before filing a protest, federal procurement policy encourages parties to try to resolve concerns through "open and frank" discussions with the contracting officer.[59] Should those talks prove unsuccessful, the procuring agencies must provide a means for "inexpensive, informal, procedurally simple, and expeditious" resolution of a protest.[60] The relevant FAR provisions require that a party file a protest either before bid opening or the closing date for receipt of proposals (for protests regarding solicitation defects) or "no later than 10 days after the basis of protest is known or should have been known, whichever is earlier" (for protests concerning evaluation and award decisions).[61] The protests must be "concise and logically presented" and include a detailed statement of the legal and factual grounds for the protest and a statement regarding the form of the requested relief.[62] Only an "interested party" (i.e., an "actual or prospective offeror" with a "direct economic interest"[63]) may file a protest, and all information establishing that the protester is an interested party must be included in a protest.[64]

If the agency receives a timely protest, it must stop the award or suspend its performance until the protest is resolved, unless the agency determines that there are "urgent and compelling reasons" not to enter a stay or it concludes that moving

forward with the contract is in the best interest of the government.[65] The parties may exchange information, but no discovery process is required. The agencies must try to resolve agency protests within 35 days after the protest is filed, and their decision must be "well-reasoned, and explain the agency position."[66] In the first instance, the contracting officer considers all protests.[67] The agency may provide for an independent review of the contracting officer's decision, but this additional review doesn't extend GAO's timeliness requirements. Thus, "any subsequent protest to the GAO must be filed within 10 days of knowledge of initial adverse agency action."[68] The agency may provide the same relief that GAO is authorized by law to recommend,[69] which, as discussed below, includes cancelling or reissuing a contract or solicitation.[70]

[ii] Protests Before GAO

GAO has the authority to hear bid protests involving many different government agencies.[71] Today, the agency's jurisdiction to adjudicate protests primarily arises from CICA, which expressly authorizes "interested parties"[72] to file protests.[73] CICA also authorizes GAO to "prescribe such procedures as may be necessary to the expeditious decision of protests."[74] GAO's bid protest procedures state that an interested party "may protest a solicitation . . . ; the cancellation of such a solicitation or other request; an award or proposed award of such a contract; and a termination of such a contract [in some instances]."[75] The time for filing protests involving problems with the solicitation are generally based on when the impropriety arises, while all other protests must be filed no later than 10 days after the basis of the protest is known or should have been known, whichever is earlier.[76] Untimely protests are generally dismissed.[77]

GAO must notify the federal agency involved in the protest within one day after the receipt of a protest.[78] The agency's receipt of that notice starts its 30-day clock to submit a complete report in response to the protest.[79] This report must include "the contracting officer's statement of the relevant facts . . . , a memorandum of law, and a list and a copy of all relevant documents . . . not previously produced."[80] Assuming it receives notice from GAO of a protest within specified time periods, an agency must generally suspend a contract award and performance of a contract during the pendency of a protest unless it finds that performance of the contract is in the best interests of the United States or "urgent and compelling circumstances" won't permit waiting for GAO's decision.[81] This is known as an "automatic stay," which an agency can "override" by preparing a written determination in accordance with the statute.[82] While GAO does not have legal authority to reverse an automatic stay override or to review the decision, the Court of Federal Claims, "upon a motion from an interested party, can review an agency's decision to override the stay" and "reverse the agency's decision . . . through the issuance of a temporary restraining order or preliminary injunction."[83]

GAO has 100 days after the submission date of the protest to issue a final decision. For any protest GAO has found is suitable for expedited treatment, it must issue a final decision within 65 days.[84] If GAO decides a solicitation, proposed award, or award doesn't comply with an applicable statute or regulation, it may recommend that the procuring agency: refrain from exercising any of its options under contract; redo the competitive bidding process for the contract immediately; cancel the solicitation (in some instances); issue a new solicitation; terminate the contract; award a contract consistent with the legal requirements; implement any combination of recommendations above; or implement other recommendations GAO finds are necessary to promote

compliance with procurement statutes and regulations.[85] GAO may also recommend that the agency pay the protester's attorneys' fees and costs associated with the protest filing.[86]

GAO recommendations have some teeth notwithstanding that they are nonbinding on the procuring agency. GAO must report promptly to Congress any case in which an agency fails to implement fully its recommendation. The report must include a detailed analysis of the procurement and recommendation as to whether Congress should consider private relief legislation, legislative rescission or cancellation of funds, further investigation or taking other action.[87] In practice, "executive agencies almost always implement the GAO recommendations, and the [Court of Federal Claims], while not bound by the GAO interpretations of law, 'gives due weight and deference to the GAO recommendations' when assessing challenges from parties unhappy with the outcome of a GAO bid protest."[88]

[iii] Protests Before the Court of Federal Claims

The Tucker Act expressly waives sovereign immunity for bid protests. In 1996, the Administrative Dispute Resolution Act ("ADRA")[89] expanded the Tucker Act to give the Court of Federal Claims *exclusive* jurisdiction to "render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation."[90] The protester must show she is an "interested party"; the Federal Circuit has interpreted the Tucker Act's interested party requirement by using the same definition of that term discussed above.[91] Protesters may file lawsuits with the Court of Federal Claims after filing protests with the procuring agency or GAO.[92] However, in contrast to proceeding before the procuring agency and GAO, commencing a bid protest in this court does not result in an automatic stay.[93] Instead, parties may request that the procuring agency voluntarily impose a stay or request that the court issue an appropriate temporary restraining order or preliminary injunction (both extraordinary remedies).[94]

The Court of Federal Claims reviews agency decisions when considering a bid protest, not GAO's recommendation (if any) to the extent the protest previously was litigated at GAO. Consistent with the Administrative Procedure Act, the court may only set aside a solicitation or award if it holds that an agency action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.[95] Said differently, the court's task is to determine whether (1) the procurement official's decision lacked a rational basis, or (2) the procurement procedure involved a violation of regulation or procedure.[96] The court "generally requires the procuring agency to provide the full administrative record associated with the protested procurement, including all of the agency's correspondence with the protestor and the contractor that won the procurement contract as well as internal evaluations of contract offers."[97]

The court "may award any relief that [it] considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs."[98] Also, unlike a procuring agency decision or GAO recommendation, the court's ruling is legally binding and may be enforced through contempt of court, among other legal powers.[99] Although a protest isn't subject to specified time limits at the Court of Federal Claims (apart from the general six-year limitations period generally applicable at the Court), protests typically are brought well before

the end of this six-year period, and the Court can bar claims on equitable grounds (e.g., laches, equitable estoppel) when, for instance, a "protester's delay in filing was unreasonable and prejudicial to the agency or other parties."[100] The Court does not have a statutory deadline to issue decisions regarding protests, and often takes somewhat "longer to issue a ruling on the merits of a protest than the procuring agency and GAO."[101] As noted above, the Federal Circuit has jurisdiction over an appeal from a final decision of the Court of Federal Claims. [102,103]

[b] Contract Claims

Congress waived the government's sovereign immunity with respect to claims relating to certain executive agency contracts via the Contract Disputes Act ("CDA").[104] In particular, the CDA covers any express or implied contract made by an executive agency[105] for the procurement of non-real property; the procurement of services; the procurement of construction, alteration, repair, or maintenance of real property; or the disposal of personal property.[106] Under the CDA, a party to a contract with the federal government covered by the CDA (i.e., a "contractor"[107]) must first submit a written claim[108] within six years after it accrued to the contracting officer for a decision.[109] As outlined in FAR,[110] an executive agency head must appoint a contracting officer to, among other things, make "determinations and findings" related to contracts.[111] The contracting officer must issue a "final decision" regarding the claim within 60 days after receipt of the claim, or, if the claim is over $100,000, the officer may notify the contractor of a reasonable time within which a decision will be issued.[112] A contractor can contest the contracting officer's final decision by either filing an appeal to the appropriate board of contract appeals[113] within 90 days after receiving the contracting officer's decision or bringing an action in the Court of Federal Claims within a year after the decision.[114] A contracting officer's findings of fact are not binding on the court;[115] generally, the Court of Federal Claims engages in a *de novo* review of the claim.[116]

While the Federal Circuit hears and decides appeals from decisions of the Court of Federal Claims, certain boards of contract appeals and other tribunals outside the area of government contract disputes, most of the court's docket is appeals from the Patent and Trademark Office and patent and trademark cases from the federal district courts. Of the 1,365 appeals pending in the Federal Circuit as of May 31, 2019, only 22 were from the boards of contract appeals, and 121 were from the Court of Federal Claims. Thus, a little more than 10% of the appellate court's docket is government contract-related disputes.[117]

[c] Military Pay Claims

As noted above, the Tucker Act serves as a waiver of sovereign immunity and a jurisdictional grant, but it does not create a substantive cause of action.[118] A claimant must establish that "a separate source of substantive law . . . creates the right to money damages."[119] The Military Pay Act[120] provides that source, conferring "on an officer the right to the pay of the rank he was appointed to up until he is properly separated from the service."[121] Accordingly, the Military Pay Act "provides for suit in [the Court of Federal Claims] when the military, in violation of the Constitution, a statute, or a regulation, has denied military pay."[122] Most military party cases that end up in the Court of Federal Claims began as a challenge to an administrative decision by an administrative Armed Forces Correction and Review Board.[123] Although not mandatory, exhaustion

before a correction board is encouraged because it establishes an administrative record that can be reviewed by the court.[124] When reviewing such an administrative decision affecting military pay, the Court of Federal Claims generally applies the traditional administrative standard: the decision will be upheld unless it is arbitrary, capricious, or in bad faith, or unsupported by substantial evidence, or contrary to law.[125]

[d] Indian Claims

[i] Historical Tribal Claims

As noted above, in 1855, Congress created the Court of Claims to "hear and determine all claims . . . with the government of the United States."[126] In the 1863 amendment to the original enactment creating the Court of Claims, Congress excluded claims by Indian tribes.[127] As a result, it eventually confronted a "vast and growing burden" resulting from the large number of tribes seeking special jurisdictional acts that would allow the tribes to assert their complaints in the Court of Claims.[128] In 1946, Congress responded by passing the Indian Claims Commission Act ("ICCA"),[129] which created the now-defunct Indian Claims Commission ("ICC"). The ICC was a quasi-judicial body authorized to hear all tribal claims against the United States that accrued before August 13, 1946; its findings were subject to appellate review by the Court of Claims.[130]

The ICCA granted the ICC jurisdiction over a variety of tribal claims against the United States, including "claims which would result if the treaties, contracts or agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity."[131] The remedies available under the ICCA were exclusive, and the district courts were deprived of subject matter jurisdiction.[132] Congress limited the period for filing claims with the ICC to five years. Any claim that accrued before August 13, 1946 and was not filed with the ICC by August 13, 1951 could not "thereafter be submitted to any court or administrative agency for consideration," nor could such a claim "thereafter be entertained by the Congress."[133]

[ii] Indian Tucker Act

As noted above, the Indian Tucker Act, which originated under the ICCA, conferred jurisdiction on the Court of Claims to hear claims presented by Native American tribes for claims accruing after August 13, 1946 that would otherwise be cognizable in the court if the claimants weren't Indian tribes.[134] Again, the Indian Tucker Act, like the Tucker Act, does not create substantive rights; it's a jurisdictional provision that operates to waive sovereign immunity.[135] Two Supreme Court cases, both titled *Mitchell v. United States* ("Mitchell I" and "Mitchell II"),[136] are "path marking precedents" on the requirements to state cognizable a tribal claim under the Indian Tucker Act.[137] As a threshold matter, an Indian tribe bringing a claim must identify a source of law that imposes specific fiduciary duties on the United States that aren't "limited" or "bare" and allege that the government has failed to faithfully perform those duties.[138] If that threshold is satisfied, the court must then determine whether the relevant source of law "can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties [the governing law] impose[s]."[139] While "the undisputed existence of a general trust relationship between the United States and the Indian people" can

reinforce the conclusion that the statute in question imposes fiduciary duties,[140] that relationship alone is insufficient to support jurisdiction under the Indian Tucker Act. "Instead, the analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions. Those prescriptions need not, however, expressly provide for money damages; the availability of such damages may be inferred."[141]

[e] National Childhood Vaccine Injury Act

In 1986, Congress established the National Vaccine Injury Compensation Program to provide a no-fault system to compensate people who suffer vaccine-related injuries and deaths thought to be caused by vaccines.[142] A petition seeking compensation under the National Childhood Vaccine Injury Act (the "Vaccine Act") is filed in the Court of Federal Claims, after which the clerk of court forwards it to the chief special master for assignment to a special master.[143] The special master to whom the petition is assigned issues a decision on such petition with respect to whether compensation is to be provided under the Vaccine Act Program and the amount of such compensation.[144] The Vaccine Act provides that "the special master . . . may award an amount of compensation to cover petitioner's reasonable attorneys' fees and other costs" if the special master finds that "the petition was brought in good faith and there was a reasonable basis for the claim for which the petition was brought."[145]

If a party files a motion for review of a decision of a special master, the Vaccine Act grants the Court of Federal Claims jurisdiction to review the record of the proceedings before the special master and authority, upon such review, to (a) uphold the findings of fact and conclusions of law of the special master and sustain the special master's decision, (b) set aside any findings of fact or conclusion of law of the special master found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law and issue its own findings of fact and conclusions of law, or (c) remand the petition to the special master for further action in accordance with the court's direction.[146] The court "review[s] a decision of the special master . . . [to] determine if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'"[147] The applicable standard of review is abuse of discretion in Vaccine Act cases contesting a special master's attorneys' fees award.[148]

[f] Other Claims

The claims highlighted above are not intended to be a comprehensive list of all disputes falling under the Court of Federal Claims' jurisdiction. The claims against the government the court receives include illegal exaction claims, takings claims under the Fifth Amendment of the U.S. Constitution, claims for patent and copyright infringement against the government, and federal tax refund claims. Vaccine cases comprise a substantial part of the Court of Federal Claims' docket. There were 1,237 such cases filed in fiscal year 2018 and only 987 cases included in other categories during the same period. Of the 987 cases, there were 434 contract-related cases, 323 takings cases, 57 tax cases, 53 military cases, and 8 patent or copyright cases.[149]

§ 6.03 Statutory Claims

We will discuss several statutes below that waive sovereign immunity and grant federal district courts jurisdiction over certain categories of claims against the United States.

[1] Federal Tort Claims Act

The Federal Tort Claims Act (the "FTCA"),[150] enacted by Congress in 1946, was designed primarily to remove the government's sovereign immunity from suits in tort.[151] It gives district courts exclusive jurisdiction over claims against the United States for "injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission" of a federal employee "acting within the scope of his office or employment."[152] The statute requires claimants to exhaust their administrative remedies before bringing suit. In particular, it states that "[a]n action shall not be instituted . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency."[153] The requirement of an administrative claim is jurisdictional and thus must be strictly adhered to.[154] "The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim."[155] FTCA imposes a two-year statute of limitations on all tort claims against the United States,[156]and it begins to run from the time the plaintiff knows both the existence and the cause of his injury.[157]

FTCA lists exceptions to its waiver of sovereign immunity.[158] When an exception applies, immunity remains, and federal courts lack jurisdiction.[159] Two exceptions—the "discretion function" and "intentional tort" exceptions—are often litigated. Regarding the former, the United States is not liable for any claim based on "the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government."[160] Courts apply a two-prong test to determine whether an agency's conduct falls within this exception.[161] First, they determine if the conduct was discretionary (i.e., whether the conduct was "a matter of judgment or choice for the acting employee").[162] Conduct is not discretionary if a statute, regulation, or policy specifically prescribes a course of action for an employee to follow.[163] If the conduct was discretionary, courts then consider whether the conduct required the exercise of judgment based on considerations of public policy.[164] The government's conduct is protected as a discretionary function if both elements are met.[165] The first clause of the provision containing the intentional tort exception excludes claims against the United States "arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."[166] However, the provision's second clause waives sovereign immunity for certain of those torts when they arise from the acts or omissions of federal law enforcement officers.[167]

[2] Title VII of the Civil Rights Act of 1964

In 1961, President John F. Kennedy issued Executive Order 10925, which obligated the government "to promote and ensure equal opportunity for all qualified persons, without regard to race, creed, color, or national origin, employed or seeking employment with the Federal Government and on government contracts."[168] In 1964, Congress passed Title VII of the Civil Rights Act, which prohibited employment-based discrimination in the private sector.[169] But the original version of the statute did not provide an administrative or judicial remedy for employment discrimination by the government. Congress plugged that hole in 1972 when it enacted the Equal Employment Opportunity Act, which waived the defense of sovereign immunity against discrimination suits initiated against the United States.[170]

Before bringing a claim, however, a federal employee must exhaust all administrative remedies. First, employees "who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age, disability, or genetic information must consult a Counselor" within 45 days of the act "to try to informally resolve the matter."[171] The employee may file a formal complaint with the agency's Equal Employment Opportunity (the "EEO") office if the counselor does not resolve the matter.[172] The employee has 15 days to do so after receiving notice from the counselor of their right to file a complaint.[173] The agency is then required to conduct an impartial and appropriate investigation of the complaint within 180 days of its filing.[174] Once the EEO office issues a final decision, the employee has the right to appeal the decision to the Equal Employment Opportunity Commission (the "EEOC")[175] or to file an action in the district court.[176] If the employee appeals to the EEOC, it must do so within 30 days after receiving the agency's final decision.[177] On the other hand, the district court has subject matter jurisdiction to hear an action challenging a decision if the action is filed within 90 days of the agency's final action, assuming no appeal is filed with the EEOC, or within 90 days of receipt of the EEOC's final decision on an appeal (or 180 days if the EEOC fails to act).[178] A complaint may be dismissed as untimely if it is not filed within the 90-day time period.[179]

[3] Clean Water Act and Clean Air Act

In the environmental realm, the United States has made itself amenable to suits in two key instances. First, the Clean Water Act (the "CWA") establishes the basic structure for regulating discharges of pollutants into the waters in the United States and regulating quality standards for surface waters.[180] The CWA provides a limited waiver of sovereign immunity. Specifically, it waives sovereign immunity for any government department or agency and their agents and employees "having jurisdiction over any property or facility" or "engaged in any activity resulting . . . in the discharge or runoff of pollutants," by requiring that they comply with "all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution."[181] Also, any citizen may bring a civil action against the United States or "any other governmental instrumentality or agency . . . who is alleged to be in violation of [] an effluent standard or limitation" or "an order issued by the Administrator [of the Environmental Protection Agency] or a State with respect to such a standard or limitation."[182] These waivers of immunity are sometimes called, respectively, the federal facilities and citizens suit provisions of the CWA. The Clean Air Act (the "CAA") is designed to control air pollution.[183] The CAA contains federal facilities and citizens suit provisions that are similar, if not identical, to the relevant portions of those provisions in the CWA.[184]

[4] Freedom of Information Act

Congress passed the Freedom of Information Act in 1966 (the "FOIA") "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny."[185] The statute provides that, absent exceptions, "each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules . . . , shall make the records promptly available to any person."[186] The FOIA waives the government's sovereign immunity such that district courts have jurisdiction "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from

the complainant." [187] Unlike the review of other agency action that must be upheld if supported by substantial evidence and that is not arbitrary or capricious, the FOIA expressly places the burden on the agency to sustain its action and directs the district courts to determine the matter *de novo*.[188] Federal jurisdiction to order disclosure is dependent on a showing that an agency has improperly withheld agency records.[189] Unless each of these criteria is met, a "district court lacks jurisdiction to devise remedies to force an agency to comply with the FOIA's disclosure requirements."[190]

§ 6.04 Actions for Injunctive Relief

Before 1976, "it was nearly impossible to get an injunction against the United States."[191] Injunctions were at times available against government officials, but "courts used the sovereign immunity doctrine and the principle of indispensable parties to dismiss actions against officials that crossed the line into suits against the government."[192] But, in 1976, Congress revised the Administrative Procedures Act (the "APA") to effect a limited waiver of the government's sovereign immunity and bar its use of the indispensable party doctrine in the present context. The APA provides that "[a]n action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party."[193] The statute also specifies that it does not confer "authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."[194] The APA adds a further limitation: "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."[195] As one court explained, "[t]he APA's waiver is thus tempered by no fewer than three restrictions on suit: (1) the action cannot be for money damages;[196] (2) the action cannot be expressly or impliedly forbidden by another statute; and (3) the action cannot be one for which adequate remedy is available elsewhere."[197]

§ 6.05 State Sovereign Immunity

Although this chapter concentrates on statutes that waive the United States' immunity to lawsuits, states are also immune from suit. State sovereign immunity encompasses two different types. First, the Eleventh Amendment states that "the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State."[198] As interpreted by the Supreme Court, "an unconsenting State is immune from suits brought in *federal courts* by her own citizens as well as by citizens of another State."[199] Second, even before the ratification of the Constitution, States enjoyed a broader sovereign immunity that applies against all private suits, whether brought in a *state or federal court*.[200] Neither type of protection is absolute. States may elect to waive either species of immunity in federal or state court.[201] Also, in limited circumstances, Congress can abrogate a state's sovereign immunity under its enforcement power in section 5 of the Fourteenth Amendment.[202] The requirements for abrogation and waiver are rigorous. Before Congress can waive a State's sovereign immunity under the Fourteenth Amendment, it "must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct."[203] Generally,

courts will deem a State to have waived its immunity "only where stated 'by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.'"[204] Likewise, in deciding whether Congress has properly abrogated the states' Eleventh Amendment immunity, courts have required "an unequivocal expression of congressional intent to 'overturn the constitutionally guaranteed immunity of the several States.'"[205]

A suit against a state agency or department is considered a lawsuit against the state under the Eleventh Amendment and is, thus, barred.[206] This constitutional ban also applies to suits against "state officials when 'the state is the real, substantial party in interest.'"[207] For state officials, the general rule is that "relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter."[208] A suit brought against a state official in her official capacity generally isn't considered "a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself."[209] The Supreme Court created an exception to this general rule in *Ex parte Young*.[210] Under this exception, the Eleventh Amendment is not a bar to suits for prospective relief against a state officer acting in her official capacity.[211] Thus, a court is permitted to award prospective injunctive or declaratory relief against a state official, but not retrospective relief such as monetary damages for past wrongs.[212] The *Ex parte Young* exception "ensures that state officials do not employ the Eleventh Amendment as a means of avoiding compliance with federal law."[213]

The Eleventh Amendment, however, does not bar claims against state officials in their personal capacities. The distinction between official and individual capacity suits depends on "the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury."[214] As articulated in *New Orleans Towing Association v. Foster*, "the performance of official duties creates two potential liabilities, individual-capacity liability for the person and official-capacity liability" for the state.[215] Suits brought against a state official in her official capacity "generally represent only another way of pleading an action against an entity of which an officer is an agent."[216] On the other hand, personal capacity suits "seek to impose individual liability upon a government officer for actions taken under color of state law."[217] An official sued in her official capacity has the same immunity as the state (i.e., sovereign immunity), while an official sued in her personal capacity, although deprived of sovereign immunity, may assert personal immunity defenses such as objectively reasonable reliance on existing law or qualified immunity.[218]

Nevada Department of Human Resources v. Hibbs[219] serves as a good example of a case in which the Supreme Court determined that Congress properly abrogated a state's sovereign immunity pursuant to its power under section 5 of the Fourteenth Amendment. In *Hibbs*, the court considered whether a male state employee could recover money damages against Nevada for the state's alleged discriminatory noncompliance with the family-care leave provision of the Family and Medical Leave Act of 1993 ("FMLA").[220] The Court held that Congress made its intention to abrogate unmistakably clear in the text of the FMLA, and correctly exercised its authority under section 5 to enact narrowly tailored, prophylactic legislation proscribing gender-based discrimination in the administration of leave benefits.[221] Similarly, in *Fitzpatrick v. Bitzer*,[222] the Court held that Congress properly exercised its power under section 5 when it enacted the amendment to Title VII of the Civil Rights Act that authorized federal courts to award money damages against a state government found to have

subjected a person to employment discrimination on the basis of "race, color, religion, sex, or national origin."[223]

States have, of course, abrogated their own sovereign immunity. For example, in the early 1970s, the Illinois General Assembly abolished state sovereign immunity,[224] and replaced it with the Illinois State Lawsuit Immunity Act. The legislation states that, except as stated in the Illinois Court of Claims Act (the "ICCA")[225]and other specified statutes, "the State of Illinois shall not be made a defendant or party in any court."[226] The ICCA, in turn, provides that the Illinois Court of Claims[227] has exclusive jurisdiction to hear various matters, including all "claims against the State for damages in cases sounding in tort."[228] Similarly, in 1951, the North Carolina General Assembly enacted the North Carolina Tort Claims Act to effect a limited waiver of the state's sovereign immunity for negligence claims: "The North Carolina Industrial Commission[229] is hereby constituted a court for the purpose of hearing and passing upon tort claims" against all "departments, institutions and agencies of the State. The Industrial Commission shall determine whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority."[230] A party seeking to file a lawsuit against a state, its agencies or any of its agents or employees should carefully review any applicable statutes or case law regarding the scope of a state's abrogation of its sovereign immunity (or lack thereof) before commencing the action.[231]

Notes

1 David F. Dowd and Charles E. Harris, II are partners in the Litigation & Dispute Resolution group at Mayer Brown LLP, and Marjan A. Batchelor is an associate in Mayer Brown LLP's Litigation & Dispute Resolution group.

2 Bureau of Labor Statistics, Employment, Hours, and Earnings from the Current Employment Statistics survey, https://data.bls.gov/timeseries/CES9091000001 (last visited July 26, 2019).

3 *Company Facts*, Walmart, https://corporate.walmart.com/newsroom/company-facts (last visited July 26, 2019).

4 Bureau of Labor Statistics, Federal Government Receipts and Expenditures (fiscal year 2016), https://www.bls.gov/emp/tables/federal-government-receipts-expenditures.htm.

5 Marbury v. Madison, 5 U.S. 137 (1803).

6 *Id.* at 163.

7 Cong. Globe, 37th Cong., 2d Sess., App. at 2 (1862), reprinted in Hoyt, *Legislative History*, 1 United States Court of Claims Digest XIII (1950).

8 Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 Geo. Wash. Int'l L. Rev. 521, 526 (2003).

9 *See*, *e.g.*, United States v. Lee, 106 U.S. 196 (1882); United States v. McLemore, 45 U.S. 286, 288 (1846). "The Constitution does not refer to sovereign immunity, and the rules pertaining to the defense are judge made." Helen Hershkoff, *Jurisdiction and Related Matters*, 14 Fed. Prac. & Proc. Juris. § 3654 (4th ed. April 2019).

10 U.S. 495, 501 (1940).

11 The use of the term "government" in this chapter refers to the federal government unless we specify otherwise.

12 *See* United States v. Mitchell, 463 U.S. 206, 212–213 (1983) ("Mitchell II").

[13] Act of February 24, 1855, ch. 122, § 1, 10 Stat. 612 (1855).

[14] *Id.* at §§ 7–9, 10 Stat. 613–614; Wilson Cowen, Philip Nichols & Marion T. Bennett, *The United States Court of Claims: A History, Part II*, at 171, reprinted in 216 Ct. Cl. 1, 20–21, (1978).

[15] Act of Mar. 3, 1863, ch. 92, § 3, 12 Stat. 765. Congress also gave the court authority over all "set-offs, counter-claims, claims for damages . . . or other demands whatsoever on the part of the government . . . against any claimant against the government." 28 U.S.C. § 250(2) (1946 ed.).

[16] Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (1982).

[17] *Id.*

[18] Federal Courts Administration Act of 1992, Pub. L. No. 102-572, Title IX, § 902, 106 Stat. 4506 (1992).

[19] 28 U.S.C. §§ 171, 172, 178.

[20] *See* 28 U.S.C. § 1295.

[21] United States v. Sherwood, 312 U.S. 584, 586 (1941).

[22] Hershkoff, *supra* note 9.

[23] United States v. King, 395 U.S. 1, 4 (1969).

[24] 28 U.S.C. § 1491.

[25] 28 U.S.C. § 1346(a)(2). In a class action, a claimant satisfies the Little Tucker Act's amount-in-controversy limitation when the "claims of individual members of the clas[s] do not exceed $10,000." United States v. Will, 449 U.S. 200, 211 n.10 (1980).

[26] 28 U.S.C. § 1505.

[27] United States v. Navajo Nation, 556 U.S. 287, 290 (2009) (internal citations omitted); *see also* United States v. Testan, 424 U.S. 392, 398 (1976) ("The Court of Claims has recognized that the Act merely confers jurisdiction upon it whenever the substantive right exists." (internal citations omitted)).

[28] Fisher v. United States, 402 F.3d 1167, 1172 (Fed. Cir. 2005).

[29] *Mitchell II*, 463 U.S. at 217 (internal citations and quotation marks omitted).

[30] Kentera v. United States, No. 16-CV-1020-JPS, 2017 WL 401228, at *4 (E.D. Wis. Jan. 30, 2017) (internal citation omitted).

[31] Hopland Band of Pomo Indians v. United States, 855 F.2d 1573, 1576–1577 (Fed. Cir. 1988).

[32] 28 U.S.C. § 2501 (emphasis added).

[33] *E.g.*, United States v. W. Pac. R.R. Co., 352 U.S. 59 (1956) (lawsuits by carriers against United States to recover tariff charges were subject to the applicable six-year statute of limitations, rather than to a two-year period in the Interstate Commerce Act applicable to actions against private shipper).

[34] SKF USA, Inc. v. U.S. Customs and Border Prot., 556 F.3d 1337, 1348 n.15 (Fed. Cir. 2009).

[35] Fallini v. United States, 56 F.3d 1378, 1383 (Fed. Cir. 1995) (quoting Del. State Coll. v. Ricks, 449 U.S. 250, 258 (1980)).

[36] Kinsey v. United States, 852 F.2d 556, 557 n.* (Fed. Cir. 1988).

[37] Japanese War Notes Claimants Ass'n v. United States, 373 F.2d 356, 359, 178 Ct. Cl. 630 (Ct. Cl. 1967).

[38] *Fallini*, 56 F.3d at 1380.

[39] 28 U.S.C. § 2503(b).

[40] Introduction to Rules of the U.S. Court of Federal Claims.

[41] Thomas J. Kelleher, Jr., Brian G. Corgan & William E. Dorris, *Construction Disputes Prac. Guide with Forms* § 16.22 (2002).

[42] *See* Rules of the U.S. Court of Federal Claims, titles X & XI, apps. A–J.

[43] *Id.*, app. A.

[44] *See* U.S. Court of Federal Claims Rule ("Rule") 23.

[45] Rule 23(a).

[46] Rule 23(b).

[47] Rule 23 committee notes.

[48] *Id.*

[49] *Id.*

[50] *Compare* Rule 23, *with* Fed. R. Civ. P. 23(f).

[51] 28 U.S.C. § 1292(b), 1295.

[52] Fed. Procurement Data Sys., https://www.fpds.gov/fpdsng_cms/index.php/en/ (last visited Aug. 5, 2019).

[53] CICA was originally enacted as part of the Deficit Reduction Act of 1984, Pub. L. No. 98-369, §§ 2701–2753, 98 Stat. 494, 1175–1203 (1984) (codified as amended in scattered sections\ throughout the U.S.C.; *see*, in particular, 10 U.S.C. § 2304 and 41 U.S.C. § 3301).

[54] 48 C.F.R. §§ 1.000-9905.506-63 (2019).

[55] 41 U.S.C. § 1303; 10 U.S.C. § *et seq.*; 51 U.S.C. § 20113 (procuring agency); 31 U.S.C. § 3551 *et seq.* (GAO); 28 U.S.C. § 1491(b) (Court of Federal Claims). GAO is an independent, non-partisan agency headed by the Comptroller General of the United States that "investigate[s] all matters related to the receipt, disbursement, and use of public money." 31 U.S.C. § 712(1).

[56] 31 U.S.C. § 3551(2) (GAO); 48 C.F.R. § 33.103(d)(4) (2017) (procuring agency); Bilfinger Berger AG Sede Secondaria Italiana v. United States, 97 Fed. Cl. 96, 134 (2010) (Court of Federal Claims).

[57] Congressional Research Services ("CRS"), *Government Contract Bid Protests: Analysis of Legal Processes and Recent Developments*, R45080, at 2 (Nov. 28, 2018) (hereafter, "*Government Contract Bid Process*"), https://fas.org/sgp/crs/misc/R45080.pdf (citing Dave Nadler, *Top Ten Things Every Government Contractor Should Know About Bid Protests*, ACC (Nov. 7, 2013), http://www.acc.com/legalresources/publications/topten/ttegcskabp.cfm).

[58] 48 C.F.R. § 33.103.

[59] *Id.* § 33.103(b).

[60] *Id.* § 33.103(c). These procedures are intended "to resolve agency protests effectively, to build confidence in the Government's acquisition system, and to reduce protests outside of the agency." *Id.* § 33.103(d).

[61] *Id.* § 33.103(e).

[62] *Id.* § 33.103(d)(1),(2).

[63] *Id.* § 33.101; *see also* 31 U.S.C. § 3551(2) ("The term 'interested party'" "with respect to a contract or a solicitation or other request for offers . . . means an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract.").

[64] *Id.* § 33.103(d)(2)(vii).

[65] *Id.* § 33.103(f). The purpose of this "automatic stay" is to ensure that agencies have sufficient opportunity to remedy legal violations before the contract moves forward. *Government Contract Bid Process*, *supra* note 57, at 3.

[66] 48 C.F.R. § 33.103(g), (h).

[67] *Id.* § 33.102(a). There are "no comprehensive publicly available data on protests before procuring agencies; agency protest decisions are not published; and the relevant FAR provisions, which stress speed and simplicity, provide limited guidance for how agencies are

expected to implement these 'informal' protest procedures." *Government Contract Bid Process*, *supra* note 57, at 3.

[68] *Id.* § 33.103(d)(4) (citing 4 CFR § 21.2(a)(3)).

[69] 48 C.F.R. 33.102(b).

[70] *See* 31 U.S.C. § 3554(b).

[71] *Government Contract Bid Process*, *supra* note 57, at 4 (citing U.S. Gov't Accountability Office, Gao-18-510sp, *Bid Protests at Gao: A Descriptive Guide*, 10th ed., at 4 (2018) (hereinafter, GAO Bid Protest Guide)).

[72] There are some nuances to an interested party explained in the CRS Report:

> The term "interested party" has the same meaning for the purposes of a GAO bid protest as it does for a protest before the procuring agency, i.e., the contractor must be "an actual or prospective bidder" with "a direct economic interest" in the challenged procurement action. Thus, contractors who simply desire to bid for a contract can qualify as an "interested party" when they challenge a pre-award solicitation. However, GAO often will limit post-award protests to parties that both bid on the contract and were next in line to win the contract, unless the challenging party raises a claim that, if ultimately successful, would allow it to jump ahead of multiple parties. Additionally, potential subcontractors generally do not qualify as interested parties because they are not "actual or prospective bidder[s] or offeror[s]."
>
> *Government Contract Bid Process*, *supra* note 57, at 5.

[73] 31 U.S.C. § 3552(a).

[74] 31 U.S.C. § 3555(a).

[75] 4 C.F.R. § 21.1.

[76] *Id.* § 21.2(a)(1), (2).

[77] 4 C.F.R. § 21.2(b).

[78] 31 U.S.C. § 3553(b)(1). The protester also must send a copy to the agency. 48 C.F.R. 33.104(a)(1) (Under the applicable regulation, a protester is required "to furnish a copy of its complete protest to the official and location designated in the solicitation or, in the absence of such a designation, to the contracting officer, so it is received no later than [one] day after the protest is filed with the GAO.").

[79] *Id.* § 3553(b)(2).

[80] The agency must, as a general matter, include "bid or proposal submitted by the protester; the bid or proposal of the firm which is being considered for award, or whose bid or proposal is being protested; all evaluation documents; [and] the solicitation, including the specifications; the abstract of bids or offers." 4 C.F.R. § 21.3(d). Furthermore, in certain instances, a party may file a request that another party produce relevant documents, or portions of documents, that are not in the agency's possession. *Id.*

[81] *See* 31 U.S.C. § 3553(c), (d).

[82] *See* 31 U.S.C. § 3553(c), (d).

[83] *Government Contract Bid Process*, *supra* note 57, at 6.

[84] 31 U.S.C. § 3554(a)(1), (2).

[85] *Id.* § 3554(b)(1).

[86] *Id.* § 3554(c).

[87] 31 U.S.C. § 3554(e).

[88] *Government Contract Bid Process*, *supra* note 57, at 7 (quoting CMS Contract Mgmt. Servs. v. Mass. Hous. Fin. Agency, 745 F.3d 1379, 1385 (Fed. Cir. 2014)).

[89] Pub. L. No. 104-320, 110 Stat. 3870 (1996) (codified at 28 U.S.C. § 1491).

[90] 28 U.S.C. § 1491(b)(1). The ADRA initially granted federal district courts concurrent jurisdiction over bid protests, but, when Congress did not act to extend that jurisdiction, it lapsed. Pub. L. No. 104-320, § 12(d), 110 Stat. 3870, 3875 ("The jurisdiction of the district courts of the United States over the actions described in section 1491(b)(1) of title 28, United States Code (as amended by subsection (a) of this section) shall terminate on January 1, 2001, unless extended by Congress.").

[91] Am. Fed'n of Gov't Emps. Local 1482 v. United States, 258 F.3d 1294, 1302 (Fed. Cir. 2001) ("The term Congress did choose to define standing under § 1491(b), 'interested party,' is a term that is used in another statute that applies to government contract disputes, the CICA."); 31 U.S.C. § 3551(2)(A).

[92] *Government Contract Bid Process*, *supra* note 57, at 9.

[93] *Id.*

[94] *Id.* (citing Mansanto Co. v. Geerston Seed Farms, 561 U.S. 139, 142 (2010) ("[A]n injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course.")).

[95] Palladian Partners, Inc. v. United States, 783 F.3d 1243, 1252 (Fed. Cir. 2015); *see also* 28 U.S.C. § 1491(b)(4) ("In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5."); 5 U.S.C. § 706(2) ("[H]old unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.").

[96] *Palladian Partners,* 783 F.3d at 1252 (quoting Savantage Fin. Servs. v. United States, 595 F.3d 1282, 1285–1286 (Fed. Cir. 2010)).

[97] *Government Contract Bid Process*, *supra* note 57, at 8 (citing Fed. Ct. R. App'x C, 8).

[98] 28 U.S.C. § 1491(b)(2).

[99] *Government Contract Bid Process*, *supra* note 57, at 8 (citing 28 § 2521(b)(3) ("The United States Court of Federal Claims shall have power to punish by fine or imprisonment . . . disobedience or resistance to its lawful writ, process, order, rule, decree, or command.")).

[100] *See id.* at 10.

[101] *Id.*

[102] 28 U.S.C. § 1295(a)(3).

[103] The CRS Report provides a concise explanation of some of the advantages and disadvantages of bringing a bid protests in the various forums:

> Generally, protests before the procuring agency and GAO tend to be resolved faster and less expensively than challenges before the [Court of Federal Claims ("COFC")] because they are subject to specific resolution timetables and less formal procedures. Additionally, parties that file a protest with either the procuring agency or GAO generally gain the benefit of an automatic stay that bars an agency from awarding or implementing a contract while a protest is pending. In contrast, while filing a protest with the COFC is frequently more time-consuming and expensive and does not trigger an automatic stay, protests before the COFC have the potential to result in legally binding and conclusive judicial decisions and orders. Procuring agency decisions and GAO bid protest recommendations, on the other hand, are not legally binding. Furthermore, interested parties that disagree with GAO or procuring agency decisions generally can still bring claims before the COFC, whereas the reverse route is generally not permitted.
>
> Another important distinction among the forums is that the scope of discovery is potentially broader in a protest before the COFC because the court generally reviews the entire administrative record of a procurement. In contrast, procuring agencies generally are not compelled to produce documents, and GAO typically reviews only those documents that are relevant to the particular protest. Furthermore, while GAO

and the procuring agency are limited to a finite list of statutorily authorized remedies, the COFC may "award any relief that the court considers proper" with the exception of certain monetary relief.

Government Contract Bid Process, *supra* note 57, at 10–11.

[104] 41 U.S.C. § 7101 *et seq.*

[105] The term "executive agency" includes executive departments, such as the Department of State, the Department of Defense and the Department of Justice, certain of the Armed Forces, and certain independent establishments of the executive branch. 41 U.S.C. § 7101(8).

[106] *Id.* § 7102(a).

[107] *Id.* § 7101(7). Absent privity of contract, a subcontractor may not bring a CDA claim directly against the federal government unless the prime contractor sponsors the claim. United States v. Johnson Controls, Inc., 713 F.2d 1541, 1557 (Fed. Cir. 1983). Generally, a subcontractor may only present a claim through the prime contractor, with the prime contractor's consent and cooperation and in the prime contractor's name. Erickson Air Crane Co. of Wash. v. United States, 731 F.2d 810, 814 (Fed. Cir. 1984).

[108] The implementing regulation to the CDA, the Federal Acquisition Regulations System, defines "claim" as a "written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract." 48 C.F.R. § 2.101.

[109] 41 U.S.C. §§ 7103(a)(1), (4). "In enacting the CDA, Congress required contractors to file all claims with the contracting officer to provide the Government with an opportunity to settle the case or otherwise avoid unnecessary litigation." AAI Corp. v. United States, 22 Cl. Ct. 541 (1991) (internal quotation marks omitted).

[110] 48 C.F.R. 1.000 *et seq*. FAR is the government-wide regulation that generally applies to acquisitions by executive branch agencies.

[111] *Id.* § 1.602-1; *see also* 7101(8) (the term "contracting officer . . . means an individual who, by appointment in accordance with applicable regulations, has the authority to make and administer contracts and to make determinations and findings with respect to contracts"); 41 U.S.C. §§ 1702(a), (b)(3)(F) ("The head of each executive agency . . . shall appoint or designate a non-career employee as Chief Acquisition Officer for the agency" to, among other things, advise the "executive agency on . . . ensuring the compliance of the contracts and contracting activities of the agency with such policy.").

[112] 41 U.S.C. §§ 7103(f)(1)–(3). "Failure by a contracting officer to issue a decision on a claim within the required time period is deemed to be a decision by the contracting officer denying the claim." *Id.* § 7103(f)(5).

[113] The CDA established four administrative boards of contract appeals: the Armed Services Board, the Civilian Board, the Tennessee Valley Authority Board, and the Postal Service Board. 41 U.S.C. §§ 7105(a)–(d). In general, the Armed Services Board hears appeals from "a decision of a contracting officer of the Department of Defense, the Department of the Army, the Department of the Navy, the Department of the Air Force, or [NASA] relative to a contract made by that department or agency." *Id.* § 7105(e)(1)(A). The Civilian Board hears appeals "from a decision of a contracting officer of any executive agency (other than the Department of Defense, the Department of the Army, the Department of the Navy, the Department of the Air Force, [NASA], the United States Postal Service, the Postal Regulatory Commission, or the Tennessee Valley Authority) relative to a contract made by that agency." *Id.* § 7105(e)(1)(B). The Tennessee Valley Authority Board hears appeals from "a decision of a contracting officer relative to a contract made by its agency." *Id.* § 7105(e)(1)(D). And, finally, the Postal Service Board hears appeals from "a decision of a contracting officer of the United States Postal Service or the Postal Regulatory Commission relative to a contract made by either agency." *Id.* § 7105(e)(1)(C).

[114] *Id.* §§ 7104(a), (b).

[115] *See id.* § 7103(e).

[116] *See id.* §7104(b)(4).

[117] United States Court of Appeals for the Federal Circuit, *Year-to-Date Activity as of May 31, 2019*, http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/YTD-Activity-May-2019.pdf (last visited July 26, 2019).

[118] Jan's Helicopter Serv., Inc. v. Fed. Aviation Admin., 525 F.3d 1299, 1306 (Fed. Cir. 2008).

[119] *Id.*

[120] 37 U.S.C. § 204.

[121] Holley v. United States, 124 F.3d 1462, 1465 (Fed. Cir. 1997).

[122] Antoneilis v. United States, 723 F.3d 1328, 1331 (Fed. Cir. 2013). Military pay claims generally arise in four types of cases: (1) challenges to involuntary retirement, separation, or discharge, (2) claims for military disability or retirement benefits, (3) collateral attacks on court martial proceedings or challenges to the imposition of non-judicial punishment for minor criminal offenses, and (4) other statutory pay or benefits claims. U.S. Court of Federal Claims Bar Ass'n, *Deskbook for Practitioners*, 32 (5th ed. 2008) (hereafter, "*Deskbook*"), http://cfcbar.org/upload/Deskbook%20(final).pdf.

[123] *Id.* at 39; *see also* 10 U.S.C. §§ 1552, 1553.

[124] *See Deskbook, supra* note 122, at 39.

[125] Heisig v. United States, 719 F.2d 1153, 1156 (Fed. Cir. 1983); *see also* Chappell v. Wallace, 462 U.S. 296, 303 (1983).

[126] Act of February 24, 1855, ch. 122, § 1, 10 Stat. 612 (1855).

[127] March 3, 1863, ch. 92, § 9, 12 Stat. 767.

[128] H.R. Rep. No. 1466, 79th Cong., 1st Sess. 6 (1945).

[129] Repealed, but previously codified at 25 U.S.C. §§ 70-70w.

[130] Navajo Tribe of Indians v. New Mexico, 809 F.2d 1455, 1460 (10th Cir. 1987).

[131] 25 U.S.C. § 70a(3) (1976) (repealed).

[132] Oglala Sioux Tribe v. United States, 650 F.2d 140, 142–143 (8th Cir. 1981).

[133] 25 U.S.C. § 70k (repealed).

[134] 28 U.S.C. § 1505. The Indian Tucker Act applies to "tribe[s], band[s], or other identifiable group[s] of American Indians" and not to individual tribal members. *Id.*; *see also* Tsosie v. United States, 825 F.2d 393, 401 (Fed. Cir. 1987) ("[A]n Indian tribe can sue on a treaty under 28 U.S.C. § 1505 and an individual Indian can sue under 28 U.S.C. § 1491").

[135] *Testan*, 424 U.S. at 392, 400.

[136] United States v. Mitchell, 445 U.S. 535 (1980) ("Mitchell I"); *Mitchell II*, 463 U.S. 206 (1983).

[137] United States v. Navajo Nation, 537 U.S. 488, 502 (2003).

[138] 463 U.S. at 216–217, 219. The trust relationship between the government and Indian tribes is a creature of statute, United States v. Jicarilla Apache Nation, 564 U.S. 162, 175 (2011); statutes and regulations that create only a limited or "bare" trust relationship between the United States and the Tribes do not impose fiduciary obligations that would give rise to money damages. *Mitchell I*, 445 U.S. at 546.

[139] *Id.* at 219.

[140] *Id.* at 225.

[141] *Navajo Nation*, 537 U.S. at 506 (citing *Mitchell II*, 463 U.S. at 217 n.16) ("the substantive source of law may grant the claimant a right to recover damages either expressly or by implication" (internal quotation marks and citation omitted)).

[142] 42 U.S.C. § 300aa-10 *et seq.*

[143] 42 U.S.C. § 300aa-11(a)(1). There are two methods for a petitioner to demonstrate causation. First, causation is presumed if a petitioner shows by a preponderance of the evidence, through medical records or expert testimony, that the injury is one listed on the "Vaccine Injury Table," 42 U.S.C. § 300aa-14(a), and that the injury arose within the time provided by the table. Capizzano v. Sec'y of Health & Human Servs, 440 F.3d 1317, 1319–1320 (Fed. Cir. 2006). Alternatively, in a case where the alleged injury is not listed on the table, a petitioner must establish causation in fact. Pafford v. Sec'y of Health & Human Servs., 451 F.3d 1352, 1355 (Fed. Cir. 2006); Shyface v. Sec'y of Health & Human Servs., 165 F.3d 1344, 1350–1351 (Fed. Cir. 1999).

[144] 42 U.S.C. § 300aa-12(d)(3)(A).

[145] *Id.* § 300aa-15(e)(1).

[146] 42 U.S.C. § 300aa-12(e)(2); *see also* Vaccine Rule 27.

[147] Avera v. Sec'y of Health & Human Servs., 515 F.3d 1343, 1347 (Fed. Cir. 2008) (quoting 42 U.S.C. § 300aa-12(e)(2)(B)).

[148] Scharfenberger v. Sec'y of Health & Human Servs., 124 Fed. Cl. 225, 231 (2015) (citing Hall v. Sec'y of Health & Human Servs., 640 F.3d 1351, 1356 (Fed. Cir. 2011)).

[149] Court of Federal Claims, *Statistical Report for the Fiscal Year October 1, 2017–September 30, 2018*, https://www.uscfc.uscourts.gov/sites/default/files/Statistical%20Report%20for%20FY2018.pdf.

[150] 28 U.S.C. §§ 1346, 2671–2680.

[151] Levin v. United States, 133 S. Ct. 1224, 1228 (2013) (internal quotation marks omitted).

[152] 28 U.S.C. § 1346(b)(1). Venue lies "only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred." 28 U.S.C. § 1402(b).

[153] 28 U.S.C. § 2675(a).

[154] Brady v. United States, 211 F.3d 499, 502 (9th Cir. 2000) (quoting Jerves v. United States, 966 F.2d 517, 521 (9th Cir. 1992)).

[155] 28 U.S.C. § 2675(a).

[156] 28 U.S.C. § 2401(b) ("a tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues").

[157] United States v. Kubrick, 444 U.S. 111, 111 (1979). An ill-defined administrative claim will generally be insufficient to preserve a claim. One commentator noted:

> A number of litigated cases have involved attempts by claimants to resist dismissal by proving that they did present an administrative claim. Most of these cases suggest that the plaintiff actually was not intending compliance with the FTCA administrative presentation requirement at the time the alleged "administrative presentation" was made. Rather, the cases suggest that the plaintiff discovered the jurisdictional requirement of an administrative claim only after filing suit and was attempting to discover some previous action that would qualify as a presentation of an administrative claim. Courts generally have been unsympathetic to these creative presentation efforts. The language of the statute of limitations requiring presentation "in writing to the appropriate Federal agency" has proved fatal to a number of plaintiffs. Oral presentations of claims in the form of requests to the wrongdoer for restitution or requests for a meeting with the United States Attorney have been rejected as qualified presentations of administrative claims.

Donald N. Zillman, Presenting a Claim Under the Federal Tort Claims Act, 43 La. L. Rev. 971 (1983), https://digitalcommons.law.lsu.edu/lalrev/vol43/iss4/7.

[158] 28 U.S.C § 2680(a)–(n).

[159] Franklin v. United States, 992 F.2d 1492, 1495 (10th Cir. 1993) (stating that whether the FTCA exception in § 2680(h) applies was a "question of subject matter jurisdiction"); *see*

also Milligan v. United States, 670 F.3d 686, 692 (6th Cir. 2012) ("Because the FTCA is a jurisdictional statute, if a case falls within the statutory exceptions of 28 U.S.C. § 2680, the court lacks subject matter jurisdiction. . . ." (brackets and quotations omitted)); Hydrogen Tech. Corp. v. United States, 831 F.2d 1155, 1161 (1st Cir. 1987) ("[B]ecause 28 U.S.C. § 1346(b) provides that federal courts shall have jurisdiction over FTCA claims 'subject to' . . . section 2680 [and] the exceptions found in that section define the limits of federal subject matter jurisdiction in this area.").

160 28 U.S.C. § 2680(a).

161 Garcia v. U.S. Air Force, 533 F.3d 1170, 1176 (10th Cir. 2008) (citing Berkovitz v. United States, 486 U.S. 531, 536 (1988)).

162 *Id.* (internal quotations omitted).

163 *Id.* (internal quotations omitted).

164 *Id.*

165 *Id.*

166 28 U.S.C. § 2680(h).

167 *Id.* ("assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution").

168 26 Fed. Reg. 1977 (Mar. 6, 1961).

169 42 U.S.C. §§ 2000e–2000e-17.

170 Pub. L. No. 92-261, 86 Stat. 103 (March 24, 1972), amending 42 U.S.C. §§ 2000e *et seq.* (1970).

171 29 C.F.R. § 1614.105(a).

172 *Id.* §§ 1614.105(d), 1614.106(a).

173 *Id.* § 1614.105(b).

174 *Id.* § 1614.106(e)(2).

175 *Id.* § 1614.401.

176 *Id.* § 1614.407.

177 *Id.* § 1614.403.

178 42 U.S.C. § 2000e-16(c); *see also* 29 C.F.R. § 1614.407.

179 *McKay v. England*, No. Civ. A. 01-2535, 2003 WL 1799247, at *1 (D.D.C. March 27, 2003) (citing Brown v. Gen. Servs. Admin., 425 U.S. 820, 835 (1976)).

180 *See* 33 U.S.C. § 1251 *et seq.*

181 33 U.S.C. § 1323(a).

182 33 U.S.C. § 1365(a)(1).

183 *See* 42 U.S.C. § 7401 *et seq.*

184 *Compare* 42 U.S.C. §§ 7418(a), 7604(a)(1), *with* 33 U.S.C. §§ 1323(a), 1365(a)(1). The CWA and CAA each contain a section requiring that citizen suits be brought exclusively in district courts, 33 U.S.C. § 1365(a)(2) and 42 U.S.C. § 7604(a)(2), and another one granting exclusive jurisdiction to the courts of appeal to "[r]eview . . . the Administrator's action . . . in approving or promulgating any effluent limitation or other limitation." 33 U.S.C. § 1369(b)(1); *see also* 42 U.S.C. § 7607(b)(1); Natural Res. Def. Council v. Reilly, 788 F. Supp. 268, 272 (E.D. Va. 1992) ("The CAA establishes a split scheme of exclusive jurisdictions; exclusive jurisdiction will lie with either the district court or the court of appeals depending on the nature of the underlying challenge."). Federal facilities actions under the CWA may be brought in state court, but they are expressly subject to removal under the language of the statute. 33 U.S.C. § 1323(a) ("Nothing in this section shall be construed to prevent any department, agency, or instrumentality of the Federal Government, or any officer, agent, or employee thereof in the performance of his official duties, from removing

to the appropriate Federal district court any proceeding to which the department, agency, or instrumentality or officer, agent, or employee thereof is subject pursuant to this section, and any such proceeding may be removed in accordance with section 1441."). The federal facilities provision of the CAA does not include the express language found in the CWA, but courts have nonetheless found that the government can remove such actions filed in state court to federal court. *E.g.*, City of Jacksonville v. Dep't of Navy, 348 F.3d 1307, 1313 (11th Cir. 2003) ("Whereas § 7604(e) does not unequivocally prohibit removal, § 1442(a)(1) explicitly and unambiguously gives the federal government the right to remove actions in which they are named as a defendant to federal court. Despite Congress' intent to authorize enforcement of local air pollution laws in state courts, we find no intent in the legislative history or plain language of § 7604(e) to preclude removal"); *see also* 28 U.S.C. § 1442(a)(1) ("A civil action or criminal prosecution that is commenced in a State court and that is against or directed" to the United States, its agencies or their officers "may be removed by them to the district court of the United States.").

185 Dep't of Air Force v. Rose, 425 U.S. 352, 361 (1976) (quoting Rose v. Dep't of Air Force, 495 F.2d 261, 263 (2d Cir. 1974)).

186 5 U.S.C. § 552(a)(3)(A).

187 *Id.* § 552(a)(4)(B).

188 U.S. Dept. of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 755 (1989) (quoting 5 U.S.C. § 552(a)(4)(B)).

189 Spurlock v. FBI, 69 F.3d 1010, 1015 (9th Cir. 1995) (quoting Kissinger v. Reporters Comm. for Freedom of Press, 445 U.S. 136, 150 (1980)).

190 *Spurlock,* 69 F.3d at 1015 (quoting Dep't of Justice v. Tax Analysts, 492 U.S. 136, 142 (1989)).

191 Paul Frederic Kirgis, *Section 1500 and the Jurisdictional Pitfalls of Federal Government Litigation*, 47 Am. Univ. L. Rev. 301, 316 (1997) (explaining that, prior to the 1976 amendments to the APA expressly allowing injunctions against the United States, the primary avenue for challenging the United States was the APA-based judicial review of agency action).

192 *Id.*

193 5 U.S.C. § 702.

194 *Id.*

195 5 U.S.C. § 704.

196 Bowen v. Massachusetts, 487 U.S. 879, 904 (1988) has caused confusion over the years regarding the scope of the APA's waiver of sovereign immunity. In *Bowen*, the Supreme Court explained that not all monetary relief is necessarily "money damages," holding that the term "money damages" in the APA is properly understood as compensatory rather than specific relief. *Id.* at 895–897. The Court then held that the Commonwealth of Massachusetts's suit was not one "seeking money in compensation for the damage sustained by the failure of the Federal Government to pay as mandated; rather, it [was] a suit seeking to enforce the statutory mandate itself, which happens to be one for the payment of money." *Id.* at 900 (emphasis removed). Since *Bowen*, the Supreme Court has arguably adopted a narrower and clearer position on the issue: "Almost invariably . . . suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty." Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 210 (2002) (internal quotation marks and citation omitted).

197 Neb. Pub. Power Dist. v. United States, 590 F.3d 1357, 1384 (Fed. Cir. 2010).

198 U.S. Const. amend. XI.

199 Edelman v. Jordan, 415 U.S. 651, 662–663 (1974) (emphasis added).

[200] Alden v. Maine, 527 U.S. 706, 713, 722 (1999) (noting that states "immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution" and that "the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment," since in enacting the Eleventh Amendment "Congress acted not to change but to restore the original constitutional design").

[201] Coll. Sav. Bank v. Fla. Postsecondary Educ. Expense Bd., 527 U.S. 666, 675–676 (1999); Lapides v. Bd. of Regents, 535 U.S. 613, 618–620 (2002).

[202] *Coll. Sav. Bank,* 527 U.S. at 670.

[203] Fla. Prepaid Postsecondary Ed. Expense Bd. v. Coll. Savings Bank, 527 U.S. 627, 639 (1999). Section 5 of the Fourteenth Amendment grants Congress the power "to enforce" the substantive guarantees of section 1—among them, due process and equal protection of the laws—by enacting "appropriate legislation." U.S. Const. amend. XIV, § 5; *see also id.* § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

[204] *Edelman,* 415 U.S. at 673 (quoting Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909)).

[205] Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99 (1984) (quoting Quern v. Jordan, 440 U.S. 332, 342 (1979)).

[206] *See*, *e.g.*, *Coll. Sav. Bank,* 527 U.S. at 671; *see also Pennhurst State Sch.,* 465 U.S. at 100 ("It is clear, of course, that . . . a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment.").

[207] *Id.* at 101 (quoting Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459, 464 (1945)).

[208] Hawaii v. Gordon, 373 U.S. 57, 58 (1963).

[209] Will v. Mich. Dep't. of State Police, 491 U.S. 58, 71 (1989) (internal citation omitted). A suit against state officials that is, in fact, a suit against a state is barred regardless of whether it seeks damages or injunctive relief. *Pennhurst State Sch.,* 465 U.S. at 102 (citing Cory v. White, 457 U.S. 85, 91 (1982)).

[210] 209 U.S. 123 (1908).

[211] *Id.* at 159; *Edelman*, 415 U.S. at 664. *But see Pennhurst State Sch.,* 465 U.S. at 125 (the Eleventh Amendment bars suits against state officials seeking prospective injunctive relief for a violation of state law).

[212] *Id.*; Milliken v. Bradley, 433 U.S. 267 (1977); Green, 474 U.S. at 71–73.

[213] Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993). Furthermore, the rationale for the exception's "existence is rooted in the Supremacy Clause: 'Both prospective and retrospective relief implicate Eleventh Amendment concerns, but the availability of prospective relief of the sort awarded in Ex parte Young gives life to the Supremacy Clause.'" Ellis v. Univ. of Kansas Med. Ctr., 163 F.3d 1186, 1197 (10th Cir. 1999) (quoting Green, 474 U.S. at 68).

[214] Hafer v. Melo, 502 U.S. 21, 26 (1991).

[215] 248 F.3d 1143, No. 99-30995, at *3 (5th Cir. Feb. 6, 2001).

[216] *Id.* (quoting *Hafer,* 502 U.S. at 25).

[217] *Ibid.*

[218] Kentucky v. Graham, 473 U.S. at 166–167 (1985) (collecting case).

[219] 538 U.S. 721 (2003).

[220] *Id.* at 725; *see also* 29 U.S.C. § 2601 *et seq*.

[221] *Hibbs,* 538 U.S. at 729–735.

[222] 427 U.S. 445, 455–457 (1976).

[223] 42 U.S.C. § 2000e-2(a).

[224] Ill. Const.1970, Art. XIII, § 4.

[225] 705 ILCS 505/1 *et seq*.

[226] 745 ILCS 5/1.

[227] The Illinois Court of Claims is a seven-judge tribunal that, among other things, hears cases for any citizen with a claim of money damages or personal injury against a state agency or state employee. *See* 705 ILCS 505/1; 705 ILCS 505/8.

[228] 705 ILCS 505/8(d).

[229] The Industrial Commission consists of six commissioners who devote their entire time to the duties of the commission. N.C. Gen. Stat. § § 97-77(a) (2019).

[230] *Id*. § 143-291(a) (West 2019); *see also, e.g*., *id*. § 143-299.2 ("The maximum amount that the State may pay cumulatively to all claimants on account of injury and damage to any one person arising out of any one occurrence . . . shall be one million dollars ($1,000,000).").

[231] Local governments, cities, counties, towns, and other political subdivisions of the states may be immune from suit for money damages in state court under the common law doctrine of governmental immunity. *See*, *e.g*., Estate of Williams ex rel. Overton v. Pasquotank Cnty. Parks & Recreation Dep't, 732 S.E.2d 137, 140 (N.C. 2012) (quoting Evans ex rel. Horton v. Hous. Auth., 602 S.E.2d 668, 670 (N.C. 2004)) ("Our jurisprudence has recognized the rule of governmental immunity for over a century. Under the doctrine of governmental immunity, a county or municipal corporation 'is immune from suit for the negligence of its employees in the exercise of governmental functions absent waiver of immunity.'" (internal citations omitted)). This immunity is also subject to waiver. *See*, *e.g*., City of Houston v. Crabb, 905 S.W.2d 669, 673 (Texas. App. 1995) ("The Texas Constitution . . . waives a government's immunity from liability"); *see also* Coleman v. East Joliet Fire Prot. Dist., 46 N.E.3d 741, 750 (Ill. 2016) ("in Illinois, the common-law doctrine of local governmental tort immunity has been replaced by the Tort Immunity Act and other statutes that grant tort immunity for various governmental services provided to the public").

CHAPTER 7

Juror Perspectives on Litigation

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§ 7.01 Jury Trial Introduction

American culture has seen considerable change over the past several years as we become more diverse and tolerant of different lifestyles, gender roles, languages, and varied experiences. It is difficult to pinpoint any particular factor that's most responsible for the cultural shift, but some include generational changes, hip-hop and pop culture, technology, social movements, social media, and the economic climate. Irrespective of the cause, the changing lifestyle has dramatically affected how trial teams investigate and evaluate potential jurors, and how lawyers attempt to persuade them once the court empanels the jury. While these exercises have always been tough, some observers believe that selecting jurors and convincing them to side with you has never been more challenging.[2] In this climate, preparation before the trial can make all the difference, and jury consultants, particularly those trained in psychology, social sciences, statistical analysis, and modeling for the prediction of behavior, can be key to helping counsel prepare for trial.[3] For example, jury consultants often design bespoke focus groups and other jury research tools to test case themes (i.e., learn the case's strengths and weaknesses) and develop a profile for an ideal juror.[4] Indeed, the guidance these consultants provide before and during jury selection and the research they perform on potential jurors via social media and other platforms are often an integral part of the jury selection process. Counsel who effectively use jury consultants and other tools to prepare for trial should be better equipped to select the right jurors and communicate a winning thematic story that will resonate with them. We discuss all aspects of preparing for a jury trial in this chapter, many times using illustrations from actual mock trials.

§ 7.02 Certain Factors That Influence Juror Perspectives

[1] Generational Influences

Of the elements that have transformed how lawyers assess jurors today, none may be more influential than generational change. Major shifts tend to occur whenever a younger generation begins entering the jury pool. In spite of their youth, Millennials and adults in Generation Z aren't afraid to make their voices heard. They are poised to have a dramatic effect on the jury system given their outspokenness and relationship with technology. The most important thing to understand about this new generation with respect to technology is the effect the Internet has had on their lives. They have never lived in a world without digital media, and access to and use of the Internet has steadily increased over the years. Roughly nine out of every ten adults in the United States use the Internet.[5]

The very nature of media has changed due to the Internet. In contrast to broadcast and print media, online media, because of their many-to-many nature, are intrinsically more inclusive. The Internet is interactive; it requires participation, not idle observation. This has had an enormous impact on the way the generation entering the jury pool learns new concepts, perceives information, and assigns credibility. They do not observe; they participate.

Given these trends, it is no surprise that younger jurors have changed the dynamics of trials by accessing the Internet to research cases or by putting information out about trials through social networking sites or social networking services during trial.[6]

[2] Technology and Social Networking

A number of issues have emerged during jury trials due to jurors' use of technology. Problems occur when jurors access the Internet to research cases or put information out about the trial via social networking Web sites or social networking services. In fact, courts now routinely address the issue of juror misconduct arising from the use of social media during trial. As one court said, "When the embrace of social media is ubiquitous, it cannot be surprising that examples of jurors using platforms like Facebook and Twitter 'are legion.'"[7]

In fall 2018, for example, a Wisconsin judge declared a mistrial after a juror brought to court an article he printed off the Internet about the Parkland school massacre in Florida; in the case at hand, the 19-year-old defendant was charged with making terrorist threats for claiming he would "shoot kids."[8] Also, in 2016, in a case of first impression in the state, a Florida appellate court considered whether the trial court abused its discretion by denying the plaintiff's motion for a new trial based on a juror posting comments about the case on social media.[9] After swearing in the jury, the trial judge instructed: "Do not discuss this case or ask for advice by any means at all, including posting information on an Internet website, chatroom, or blog."[10] Despite this instruction, a juror posted a series of tweets on his Twitter account during trial, including: "I still hate the fact that I have to be here all day" and "Everyone is so money hungry that they'll do anything for it."[11] The appellate court held that, while the juror's tweets were "potentially offensive," the trial court didn't abuse its discretion in concluding that the tweets "were insufficiently prejudicial to Plaintiff to require a new trial."[12] As a result of situations like these, in 2016, California proposed, but failed to pass, a bill that would have imposed a fine of up to $1,500 on any juror that performed Internet research on a case or used social media during a trial.[13]

Because states don't have such laws in place, judges and counsel should consider examining potential jurors about their use of social media during *voir dire*, and judges should continue to admonish jurors not to discuss the case on social media during the trial. Moreover, given that younger jurors in particular often misapprehend the scope of the prohibition,[14] judges should clarify that the bar applies to posting any remarks on social media about the case, even if the juror posts anonymously or under a pseudonym. One district court judge, who is just 50 years old, clearly understands these issues and has taken steps to address them in his cases. In one trial, he instructed jurors not to discuss the case among themselves, not to tweet about it, not to post items about it to Facebook, and not to research it on the Internet in any way. He said, "I told them if they did anything on the Internet regarding this case, I would throw them in jail . . . after the case I learned that they took my admonitions so seriously that several were fearful about checking their email!"[15]

[3] The *CSI* Effect

Hip-Hop and pop culture have always influenced jurors, but no such event has had a larger impact on the legal system than the television show *CSI: Crime Scene*

Investigation. Although it was cancelled in 2015,[16] the popular show's 15-year run has had a dramatic effect on public perception of evidence. This fictional show was crucial in popularizing the "true crime" genre of television and podcast media,[17] which has exploded since *CSI*'s cancellation. The more recent widespread popularity of the podcast series *Serial* and the television docuseries *Making a Murderer* have intensified the *CSI* effect and caused it to evolve into what may now more appropriately be called the True Crime effect[18]—although the phenomenon is still referred to by its original name.

The *CSI* effect promotes often unrealistic expectations among jurors of how conclusively forensic evidence determines innocence or guilt, or, from the perspective of the civil litigator, causation or liability. The show and its true crime genre progeny have caused jurors to recalibrate the way they consider evidence, which in turn has impacted the way they contemplate the burden of proof. Rather than "beyond a reasonable doubt," many prosecutors argue that jurors are applying a "beyond any doubt" standard, completely dependent on forensic, scientific evidence.[19] This has similar implications for a civil litigator.

The use of deductive reasoning, once the cornerstone of the justice system, is being replaced by the need for absolute scientific proof of guilt or liability. Some complain that jurors have lost all ability to make assessments of credibility or weigh evidence. Instead, jurors expect that attorneys will present impossibly conclusive evidence like that often seen on *CSI*. Jurors in mock trials on civil cases have indicated in deliberations that they cannot consider video deposition testimony because it is not "evidence." They want "hard proof," like documents. It is interesting that this parallels *CSI*'s slogan: "People lie, the evidence never does."

Jurors have always confused the different standards of proof in criminal and civil cases. Many litigators have observed a mock juror lecturing the others on "beyond a shadow of a doubt" in a civil case. The *CSI* effect in civil cases adds to the ongoing confusion. A trial consultant makes the point:

> Prosecutors are now offering scientific evidence that they wouldn't have awhile back—either because it was deemed unimportant or because the management of a crime lab's resources and priorities would have prevented its production. Whatever the reason, they must do it now, lest a jury wonder where the CSI stuff is, and quickly and incorrectly assume that *an absence of proof is a proof of absence*. This **is the** inherent danger of the CSI effect; a layperson's assumption that, if the evidence existed anywhere in the universe, the prosecutor would introduce it. Accordingly, when the attorney does not produce the evidence, the jury assumes that it doesn't exist and that the claimed event in fact never happened.[20]

This phenomenon has occurred time and time again in civil cases. One example is a product liability case dealing with a pediatric Ambu bag resuscitator.[21] During a routine tonsillectomy, a child patient went without air for 17 minutes. In the course of the litigation against the doctor, the plaintiffs discovered that the Ambu bag had been recalled, and they filed a claim against the manufacturer. The recall occurred because the valve on some of the bags would stick, cutting off air that should have flowed freely through the bag. The issue in this case was whether or not the particular bag in question contributed to the injury. The plaintiffs had clear circumstantial

evidence through the testimony of those on the scene. They testified to seeing a rise and fall in the chest during mouth-to-mouth, intubation, and intubation to mouth, but they did not see a rise and fall when the Ambu bag was used. Yet, a central criticism of the plaintiffs' case by many of the mock jurors was that the plaintiffs did not take a microscopic photograph of the valve to see if there was a smooth or fissured surface to indicate that the valve had been stuck together, stopping the flow of air.

As noted by a trial consultant in another case:

> In a federal suit, a plaintiff alleges sexual discrimination and violations of the Equal Pay Act. Part of the dispute is over who saw which e-mails and when, and either party's ability to offer any hard evidence is relatively meager. This is a standard, run-of-the-mill civil lawsuit. However, while the fight is over how much the plaintiff has been paid during certain years, whether others have been paid more for improper reasons, and whether her pay has been affected by complaints, counsel did not notice the technical nature of this lawsuit.
>
> Why is a pay dispute a technical lawsuit? Focus groups in this case showed how civilians react to the major issues, how they respond to graphics, and how they decide what happened, who's liable, and what the damages should be. One mock juror said, "What do they mean they can't tell who got which e-mails and who didn't? The FBI can find hard drives from computers that have been blown up or burned, and they can put them under microscopes to see if the individual bit is a one or a zero, and can visually reconstruct the contents of the hard drive. That's how they've caught a bunch of terrorists. So why aren't we seeing that evidence? Because they don't want us to see it. Or they aren't sure of their case."[22]

In a hearing for a new trial, a juror opined that he believed that the burden of proof in the medical malpractice case he had been seated on *should* have been "beyond a reasonable doubt."[23] As illustrated by these examples, the *CSI* effect can have an impact on civil cases, blindsiding the trial team regarding its existence in their fact pattern. This requires trial counsel to view the case through fresh eyes. A good starting point may be to have a consultant, someone who has not lived with the case for four years, review it for *CSI* effect issues.

[4] The Donald Trump Effect: An Assault on Evidence-Based Reasoning

Evidence-based reasoning is the process of thinking about something in a logical way and supporting your thinking with proof to show that your thoughts are, indeed, logical.[24] The U.S. criminal justice system relies on such reasoning by jurors for the orderly administration of justice. As one commentator explained:

> [T]he word "verdict" comes from the Latin *veredicto*, meaning "to speak the truth." When a jury reaches a verdict, it speaks truth by resolving factual disputes between the parties. Did the defendant shoot the victim? Was the plaintiff injured when the contract was breached? Disputed facts are proven or disproven through the presentation of evidence, testimony and tangible objects that make the existence of a fact more or less probable. This basic formula—evidence proving facts, facts informing truth—is fundamental to our notion of ordered liberty and the constitutional guarantee of a jury trial.[25]

During Donald Trump's presidency, however, we have arguably reached a "post-truth"[26] era where people blatantly ignore evidence in deciding what's truth, and instead rely on belief and emotions that are unsupported by evidence. There are many examples of President Trump and his administration engaging in this behavior. One of the more infamous cases concerns the size of President Trump's inauguration crowd. In his first briefing as the White House press secretary, Sean Spicer stated emphatically that the gathering on the National Mall for President Trump's inauguration "was the largest audience to ever witness an inauguration, period." Even before then, Trump told an audience that he had given his inauguration address to a "massive field of people . . . packed."[27] But side-by-side shots of President Trump's 2017 inauguration crowd on the National Mall, compared to President Barack Obama's 2009 inauguration crowd on the mall, showed a noticeable difference, with 2009's crowds undeniably filling up more of the space from the perspective of the Washington Monument looking toward the Capitol.[28] Nevertheless, President Trump's administration stuck to their story, and, in a television interview, White House counselor Kellyanne Conway famously proclaimed that Sean Spicer's false statements about the crowd size at President Trump's inauguration were not lies, but "alternative facts."[29]

The Trump administration's assault on evidence-based reasoning has permeated the conscience of many Americans, and, as such, lawyers should be conscious of what we have coined the "Donald Trump Effect" when selecting a jury. Two South Carolina lawyers spoke about how this effect reared its ugly head in a pretrial focus group. The sole question at trial was whether the City of Columbia contracted with an architectural firm to work on construction drawings for a publicly financed hotel while the city waited for bond financing. Under the express terms of the contract, the firm would be entitled to $1.6 million if the jury determined a contract did exist.[30] But some members of the focus group would have ignored that fact and awarded the architectural firm less money based on their personal beliefs about what would be proper payment under the contract:

> Our pretrial focus groups revealed a serious possible pitfall in an otherwise strong case. When the focus group moderator presented the facts, both groups were unanimous: there was a contract; the city breached the contract. But when our moderator began polling the first group on the question of damages, troubling outliers emerged. Without much thought, the first four individuals favored an award of $1.6 million—the only conclusion possible based on the facts they were given. The fifth group member: $600,000. Our curious moderator paused, "tell me why you say $600,000." A slightly overweight white man in his early 60s with a snowy, unkempt beard and overalls rocked back slightly in his chair. "Well," he began, "$1.6 million is an awful lot of money and $600,000 just seems fair," he concluded without further explanation. Our moderator paused, waiting for explication. When it did not follow, he gently pressed, "well, does it matter to you that the evidence will show that what they agreed to adds up to $1.6 million?" Without hesitation, "nope. $600,000. That's what's fair."
>
> . . . Then another man, also white, mid-40s with creased, leathery skin and a goatee uncrossed his arms, peeked out from under the bill of his camouflage ball cap and said, "I'd do 400." While looking at the bearded man, he continued, "but 600 is ok with me too." Again, the moderator probed: "What about this document that says they agreed to pay a certain amount each week? Doesn't that add up to $1.6 million?" "Yep, but that don't mean I agree with that." "What

> if the architect ends up losing money at $400,000 because they had to pay people to draw hundreds of pages of detailed blueprints?" "That don't matter because that's not what I would give'em," he said, pushing back from the table and re-crossing his arms to signal that that was the end of the matter. The second panel of 10 yielded a similar result with the overwhelming majority following the facts while two panelists—this time a middle-aged accountant and a stay-at-home mom—took a facts-be-damned approach.[31]

The lawyers learned from the focus group that some jurors will reject evidence-based reasoning and rely on a belief of what's right, even when their view conflicts with the facts. This is particularly true in an era when the President tacitly countenances this practice.[32]

Voir dire and juror research will be critical to ferreting out those jurors who are averse to evidence-based reasoning. "Far more helpful in detecting evidence-averse jurors are open-ended questions soliciting disclosure concerning juror participation in social, political, civic, religious, or other organizations; which bumper stickers were displayed on their vehicle during the last year; the juror's primary source(s) of news; and which magazine and newspapers the juror regularly reads." To be sure, "there is likely no better indicator of whether an individual values objective fact-finding than an examination of sources they rely on to gather information for them. Subscribers to a national newspaper no doubt value objective fact-finding far more than those reliant on a Facebook newsfeed to aggregate 'newsworthy' content."[33] Regarding juror research, lawyers should gather juror voting history and information that is publicly available on social media platforms, such as Facebook, Twitter, and Instagram, and on blogs. Postings on these sites can provide much insight into a juror's disposition and manner of reasoning. In gathering this information, lawyers should be careful to abide by any laws, and not violate any ethical rules.

§ 7.03 Social Media: A "Must Use" Tool for Jury Consultants

At the outset, in a 2014 opinion, the ABA Ethics Committee concluded that lawyers can "passively" review a juror's public social media profile provided that they do not "communicate" with the person via a request to access private material;[34] this same rule applies to jury consultants.[35] Today, jury consultants and counsel must appreciate the many ways in which social media can influence a trial and know how to use social media to a client's advantage. As of February 2019, 72% of adults in the United States use at least one social media platform (up from 5% in 2005), and 80% of adults between ages 19 and 64 use social media.[36] In addition, many adults use these sites at least once a day.[37] YouTube and Facebook are, by far, the most used social media sites.[38] Instagram is a distant third, followed by Pinterest, LinkedIn, and Twitter.[39] Given the figure above, it is highly likely that most, if not all, members of the venire will be active on social media. Said differently, "[w]hen the embrace of social media is ubiquitous, it cannot be surprising that examples of jurors using platforms like Facebook and Twitter 'are legion.'"[40]

[1] Pretrial Use of Social Media

Social media can help ensure the success of pretrial jury research, such as focus groups.[41] For example, social media sites like Facebook and LinkedIn can aid consultants

in identifying and recruiting mock jurors who represent the demographic makeup of the actual jury pool. There is, however, a potential for bias against non-computer literate adults when using social media platforms in this manner. Jury consultants can also use social media to investigate and select (or reject) potential mock jurors they get from other sources. In addition to jury research, some jury consultants are using social media to test attitudes toward a brand in the form of advertisements or online testing platforms. Also, if the case or a party is in the news, consultants should regularly monitor social media to gauge public perception.

[2] Use of Social Media for *Voir Dire*

Virtually all jury consultants and trial teams now use social media to inform jury-selection decisions. At what point a consultant does this research depends largely on when the court releases the names of the jury pool to counsel; some judges provide the names a week or more before trial, while others don't provide them until the morning of the trial. Even when the court releases the names of the venire on the eve of trial, jury consultants should have a person on hand who is trained to conduct fast and effective social media research. This research can be critical for removing non-ideal jurors from the pool. For example, this excerpt describes a real instance when the court dismissed a juror for hardship based on information the jury consultant learned through social media research:

> [A]n internet search for a juror revealed a baby registry, which told us this juror had a son just two months before. Armed with this (and other information which revealed this person would have been a poor juror for us), we were able to ask questions of this juror so she could be dismissed for hardship. This strategy allowed us to avoid the risk of having to later burn a peremptory strike on her and save that strike for a more "dangerous" juror for whom we could not secure a cause strike.[42]

If possible, lawyers should ask questions about a potential juror's social media use during *voir dire*, such as: "Do you use any social media?"; "Is your use of social media for personal use, professional use, or both?"; "Which social media sites do you use?"; "Describe your use of social media."; "How often do you use social media?" The potential juror's answers can provide useful material to evaluate the person or narrow the scope of the Internet search for the person designated to perform the social media research at trial.

Social media research can reveal whether the information the potential jurors "report in court matches their posted information or not."[43] As one observer noted, "[a]n unemployed person may claim a different profession or work status on LinkedIn or fail to report prior work history to the court."[44] To sum it up, social media research can greatly inform the use of questions to potential jurors, the use of challenges for cause (e.g., bias, prejudice, or prior knowledge that would prevent impartial evaluation of the evidence presented in court), and the use of peremptory challenges.

[3] Use of Social Media During and After Trial

In high-profile or televised cases, jury consultants and counsel should monitor social media as a benchmark for public perception on the successes and failures in the trial.

Plus, social media can show what themes are resonating with the public and whether people are understanding the details of the case. Lawyers are, in fact, using information that they learn from social media during the course of trial to adjust their strategy. For example, "during the highly publicized Casey Anthony trial, a jury consultant for Anthony's attorneys analyzed more than 40,000 opinions on social media sites and used them to help the defense put together their trial strategy."[45]

Jury consultants should also review jurors' social media profiles during (and after) the trial to look for any misconduct. The ABA Ethics Committee noted that courts are now "instructing jurors in very explicit terms about the prohibition against using [social media] to communicate about their jury service or the pending case and about the prohibition against conducting personal research about the matter, including research on the Internet."[46] Courts began giving these warnings "because jurors have discussed trial issues on [social media], solicited access to witnesses and litigants on [social media], not revealed relevant [social media] connections during jury selection, and conducted personal research on the trial issues using the Internet."[47]

The model instruction used by many courts reads:

> I know that many of you use cell phones, Blackberries, the internet [sic] and other tools of technology. You also must not talk to anyone at any time about this case or use these tools to communicate electronically with anyone about the case . . . You may not communicate with anyone about the case on your cell phone, through email, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, including Facebook, Google+, My Space [sic], LinkedIn, or YouTube. . . . I expect you will inform me as soon as you become aware of another juror's violation of these instructions.[48]

Notwithstanding courts providing such instructions to jurors, there are still countless examples of cases in which jurors are accused of misconduct based on their use of social media.[49] While this misconduct often occurs during trial, jury consultants and parties many times don't learn about the conduct until after the trial has concluded. For example, in *People v. Daily*,[50] a party discovered social media posts from a juror after the verdict indicating that "she did not want to serve as a juror, that prior to the close of the evidence she posted 'oh, by the way, this is going and the fact that I have to keep showing up here and missing work—just because of [inaudible] I'm going to vote guilty. LOL.'" And she "responded to a third party telling her to 'vote guilty.'"[51]

The upshot is that jury consultants and counsel should be vigilant about reviewing jurors' social media sites during and after trial to search for potential misconduct. In fact, in some jurisdictions, counsel may have an ethical duty to report jury misconduct of which either they or their jury consultant become aware.[52]

§ 7.04 Complexities of Modern Jury Trials

[1] Strategies and Techniques for Pretrial Jury Research

Jury trials are often unpredictable and complex, but pretrial jury research, such as mock juries and mini-trials, can help reduce some of the uncertainty. It used to be that pretrial research was a "luxury" to be employed only in cases with significant monetary exposure. However, as the litigation environment has evolved, so has use of

pretrial jury research for a broader range of cases. This research is especially appropriate in cases involving complex circumstances or concepts, problematic facts, and difficult witnesses. It can help determine how best to frame a case for a jury, narrow the focus of the case, perfect arguments, test themes, and provide practice for trial lawyers. The results of pretrial jury research can also be an excellent tool in settlement negotiations.

Trial consultants now offer an array of services for pretrial jury research, from half-day focus groups to full multi-day mock trials. Some consultants also offer online survey research. Today, trial consultants can tailor services to fit any budget and any goal.

There are basic steps that parties and their lawyers should take to ensure the success of pretrial jury research. First, the party should retain a consultant that can effectively evaluate juror feedback and provide insightful analysis. Then, the lawyers should work closely with the trial consultant to develop a carefully designed, goal-oriented plan for the project. A party's failure to determine the ultimate goals of the project before designing a plan and commencing the exercise may result in a project that doesn't answer the pertinent questions and address strategic goals. Once a comprehensive plan is developed, the lawyers must prepare thorough arguments, witness excerpts, exhibits, and other material to use in the exercise.

The timing of pretrial jury research is important as well. For example, focus groups conducted early in litigation can streamline themes of the case and assist in directing discovery. Usually, this type of exercise is conducted within a day or less and often requires less preparation; yet, it can yield important feedback, ultimately saving the party money. Research conducted closer to trial, whether by mock jury or mini-trial, may allow for practical testing of comprehensive, detailed arguments, and demonstrative exhibits and graphics. Research conducted at this juncture can also provide an excellent arena for testing live witnesses in front of mock jurors and collecting extensive data for an ideal juror profile. We expand on many of the themes below.

[2] Types of Pretrial Jury Research

Lawyers and trial consultants can design pretrial jury research in many different ways—most designs are derivatives of traditional surveys, focus groups, or mock trials. An effective consultant can help tailor the research to specific goals, for the allocated resources, and to answer the ultimate and pertinent questions in the case. Here are some of the more common types of pretrial jury research:

[a] Focus Groups

Focus groups generally fall within one of two models, and consultants confusingly call them different things. For this discussion, we will call the two designs a "mock jury" and a "mini-trial." First, a mock jury is one of the most popular project designs as it usually takes less preparation and implementation time than other types. This design can help develop and test potential case themes, discover the strengths and weaknesses of a case, and assess how jurors will perceive critical issues. Ideally, a mock jury will be conducted when discovery is still open, so, if necessary, parties can seek additional information based on the results of the exercise.

For a mock jury, counsel present a 30 to 60-minute combined opening and closing statement (i.e., a "clopening");[53] they present for their own side and role-play the

opposing party. The presentation often includes the most critical demonstratives, exhibits, photographs, and video of deposition clips. In this abbreviated project, jurors do not deliberate. Instead, group discussions conducted by a neutral facilitator, along with written questionnaires, are used to reveal jurors' thoughts about the case.

As one example, in a patent infringement case involving a well-known drug, the consultant tested the infringement claims and defenses against invalidity in a simple one-day exercise. Using the mock jury format, the lawyers and consultant found that one of the validity defenses did not resonate with the mock jurors, primarily due to the credibility of one witness.[54] This information was valuable to have early in the process. The consultant was able to make changes and test the defenses again, with a positive result.

The mini-trial is commonly used when a party has a larger budget for pretrial research, and the stakes at trial are greater. As for timing, the mini-trial is ideally conducted after critical witness positions are known. Its main purpose is to discover how jurors feel about witnesses and the parties' arguments, to test the impact of the trial strategy on mock jurors, and to access what information jurors relied on when rendering their verdict. Rather than a clopening, mini-trials typically include an opening statement, presentations by both sides, often with demonstratives, exhibits, and video of deposition clips, as well as a closing argument. At the end of each presentation, the group answers a series of questions about their opinions on the case and the evidence. After all of the presentations, the group will individually answer a final series of questions similar to a verdict sheet and then be broken into groups for deliberation. The jurors decide liability and evaluate the credibility and likability of the lawyers and witnesses.

In any pretrial research project, the consultant will often recommend that lead counsel assume the role of opposing counsel, with two goals in mind. One, it ensures that the exercise will be fairly weighted. Stacking the deck in the lead counsel's favor by having her square off against a younger and less experienced attorney will do little to help envision and prepare for the challenge of trying the case against an experienced opponent. Two, having lead counsel take on the opposing counsel role helps lead counsel understand the strengths of the opposing party's case. This is many times a helpful learning experience. Attorneys frequently express the usefulness of putting themselves in their opponent's shoes and having to advocate that position. The only time the consultant may advise against this strategy is on the eve of trial, because it can be challenging for an advocate to quickly switch sides.

The consultant may work with two teams of attorneys, one from the firm hired to represent the client in the litigation and one brought in to role-play the other side. This situation can be helpful if the parties collaborate with a common goal of learning the best way to frame the case. If the parties do not collaborate, however, but rather duke it out with secret strategies the way real parties often do in trial, other priorities can emerge. Preparation would be better served by collaborating to achieve a common goal. Otherwise, both sides tend to get too concerned with winning the mock trial, lest their client lose confidence in their individual abilities. The group loses sight of the overall goals of the research, and the best strategies for the case can get lost in the shuffle.

The importance of carefully preparing both sides cannot be overstated. The most reasonable, worst-case scenario must be tested, and it must be tested fairly for the project to be worthwhile. In fact, the most valuable lessons are often learned from losing.

The client and counsel need to identify the weaknesses in the case and look critically at their own case. This is a key step toward achieving a good result at trial or in settlement.

[b] Online Mock Trials

Another form of research is the online mock trial. This can be a relatively inexpensive way to glean information, but the approach has a number of disadvantages. First, it is impossible to simulate an actual trial using this technology. Although certain arguments and evidence may be presented to individual jurors, and it is even possible for jurors to deliberate via text message, the results cannot be compared to an actual courtroom-like presentation and group deliberation. The interactive and collaborative nature of the experience is lost when jurors sit alone at home. Also lost is the subtle information derived from watching and listening to jurors hear evidence and argue with each other. Second, the anonymity of online participation calls into question whether the juror is assuming an electronic personality different from how she acts in reality. Finally, the end product provided to counsel is usually a set of data and charts with little or no interpretation. Although this information may be of some use, without the experienced interpretation and recommendations of a trained consultant, raw data and charts are usually slightly helpful at best, and misleading at worst. Litigants planning to use an online mock trial should take care to select a reputable organization.

[c] Surveys

Community attitude surveys have long been used to gain insightful information about a particular venue. Consultants who specialize in venue analysis, usually for change of venue motions, often use community attitude surveys, because they are statistically sound instruments, often administered to over 400 respondents to ensure reliability and validity. Typically, they are general in nature, rather than case-specific.

In high-profile cases or cases where there has been pretrial publicity, surveys are often used to persuade the court to change venue, or in some cases to persuade the court to allow additional attorney *voir dire* or a supplemental juror questionnaire if those tools are not commonly used in the venue.

[3] Set Aside Time to Prepare

Conducting a successful focus group or mock trial, one yielding significant results that aid the trial team, requires a time commitment from everyone involved. This is time well spent, whether preparing the case for trial or for a strong settlement posture. Streamlining arguments, paring down exhibits, refining demonstrative aids, and contemplating the position of the opposition are almost always helpful exercises. As stated by one attorney, "Every time I mock try a case, I am surprised by how well organized my case is in my mind when I emerge from the process. It takes time, but it is worth it."[55]

Failure to prepare properly for a focus group or mock trial exercise wastes time and money. It is impossible to obtain reliable, useful data when the presentations are sloppy, hastily thrown together, not well organized, or skewed. A good consultant can assist in making sure that both sides are adequately presented, but, at the end of the day, the real work of preparing the case falls to the attorney trying it.

[4] Guarantee Useful Results

Many variables impact the costs of pretrial research, such as the selected research venue (i.e., conference centers, market research facilities), the number of necessary jurors, the length and type of exercise (i.e., one day, multiple days, deliberation groups), the sophistication of the data collection (i.e., real-time high-tech analysis, questionnaires, qualitative focus groups), and the sophistication of the video (i.e., multiple cameras, closed-circuit viewing). Decisions about these variables must be made with the goals of the project and the available resources in mind.

Although cutting costs is always a goal, it is important not to undercut the ability to analyze the data in doing so. For example, not videotaping deliberations might seem like a great way to save money. However, it is next to impossible to hear what each juror says at any given time, especially when there is more than one deliberation group involved. It is imperative to have a video recording so the consultant can review the tapes to provide useful analysis. The recording also provides the attorney and client with a record of the discussions for future review.

Another way to capture more information: two cameras in the deliberation room allow for recording of both the entire panel and the present speaker. Although the required camera operator adds to the expenses, the close-up shot of a juror making a heated argument on behalf of the client can be invaluable at mediation. The data also can be used for juror profiling and to assist in preparing witnesses. There is nothing that gets a witness in line more quickly than showing him mock jurors' negative reactions to his or her testimony.

In a case involving an insurance dispute, an excess carrier was refusing to cover a large oil company for one of the most highly publicized oil spills in the United States.[56] Jurors had heard so much about the original case in the press that they seemed to reverse the plaintiff and defendant in the insurance case. They considered the plaintiff an "evildoer." The plaintiff in this case was still "on trial," so to speak. This presented multiple issues about how best to frame the case. After several mock exercises, one of the most enlightening pieces of information was the juror profile that emerged. The plaintiff's ideal juror profile that developed from the data completely defied conventional intuition. Initially, the attorneys were reluctant to rely on the counter-intuitive results. Eventually, however, they realized that reliable, valid data cannot be ignored, and they used the profiles when exercising peremptory challenges.[57] The plaintiff prevailed, winning a judgment for $410 million, one of the largest awards in the state that year.[58]

The litigation environment is more competitive than ever. Attorneys are learning to use cutting-edge tools and technology to their advantage. Pretrial research is one of these tools. Veteran litigators have long understood that, when designed carefully with budgetary considerations in mind, many cases can benefit from information obtained from pretrial research.

§ 7.05 Thematic and Strategic Preparations from Start to Finish

[1] Importance of the Story

Trial consultants and seasoned litigators alike talk a great deal about themes and their importance in any case. What they are really talking about is storytelling. Storytelling

is one of the few human traits that is universal across cultures and through all known history. Another way to think about storytelling is that it is made up of the interactions of intentional agents, or characters with minds, possessing various motivations.[59] A good story has recognizable emotions and believable interactions among characters. Two-thirds of the most respected stories in the narrative tradition are variations on three patterns or prototypes.[60] The two most common are romantic and heroic struggles, such as David versus Goliath. The third focuses on plenty versus famine, as well as social redemption. These themes appear over and over again. The human brain is hardwired to identify these prototypes in the stories heard.[61]

Time and again, research has shown that humans respond more positively to information that is presented in story form rather than in a straightforward argument or analytical format.[62] Information presented as a story is also more easily understood and retained. This is why it is important, in a case, to find the "story" or "themes" early on and weave them throughout the preparation of the case. Whether the story finds its way to a jury box, a judge, or the mediator's office, the fact finders are human beings, and human beings predictably respond better to stories than to analytical presentations.[63]

A roundtable meeting early in the case with as many team members present as possible to "white board" possible themes and story issues can prove fruitful. For example, an attorney who spent several hours briefing a trial consultant on the facts of a case put together a presentation for her team on the key players, events and legal arguments. She met with the consultant the night before the meeting and gathered everyone for the roundtable white board. Everyone came prepared with the basics, and the team spent a day devising thematic strategies to deal with the largest issues in the case. This was prior to the most significant depositions and provided an excellent roadmap for obtaining useful information from the depositions. Having started 18 months before trial, the exercise proved extremely useful in ongoing trial preparation, and was even woven into briefs to the court. The court granted summary judgment.

[2] Visual Story

Most people learn better with pictures accompanying the narrative of a story. Visual learners make up 61% of the general public, compared to 47% of attorneys.[64] This may explain why attorneys can grasp abstract legal concepts and tend to believe that a list of words on a page constitutes a "graphic." In most civil trials, jurors are bombarded with a tremendous amount of dry and difficult information to learn in a short period of time. For many jurors, demonstratives need to tell the story with pictures, not with words. A bullet point list of words is not a demonstrative; it is a list. Timelines, bar charts, graphs, photos, and other demonstratives that visually represent what the speaker is describing properly prepare a case for the fact finder (a jury, the judge or a mediator).

Unfortunately, most trial teams begin preparing demonstratives late in the game. This can prove inefficient and costly. Most graphics firms charge a premium to work around the clock in the days leading up to a trial. Lawyers can save their client money with a more modest effort early in the litigation. Trial consultants can assist counsel with graphics in preparing important hearings and a mediator who is trying to learn a case quickly. She who teaches best, wins, and helpful demonstratives assist in this goal. Demonstratives prepared for use in pretrial research may only need to be tweaked to be ready for trial.

The effective use of demonstratives and technology is a skill all trial lawyers should learn. For example, in an extremely complex contract dispute, the judge had set a one-hour time limit for each party's opening statements.[65] Counsel had a great deal of information to impart in that time, but because he had conducted pretrial research and understood which themes would resonate with jurors, his narrative was effectively streamlined to fit the time limit. While the opposition basically read his opening and showed two demonstratives throughout his one-hour time frame, the better prepared attorney chronologically walked through, in story form, a simple, building timeline with eight of the key big picture events.

Because he was well versed in the facts and the depth to which he wanted to go, he used no notes. In the segments between the points on the timeline, there were excerpts from pre-admitted documents, pictures, a "cast of characters," and other helpful cues for the jury and the attorney. The attorney was clear, concise, in control, and conversational. His opening statement was far more successful that of the other side. The breakup of the timeline and the intersection of various documents allowed the jurors to anchor those pieces of evidence in time and, most important, allowed the prepared counsel to "teach" the jury in a way that would be memorable for them and favorable for the counsel.

[3] Mediation or Settlement

Many cases settle, which is often the best result for all involved. However, the threat of a jury trial always looms. The side that leverages this to its benefit will have the upper hand in any settlement negotiations. As mentioned previously, lawyers can sometimes use information gathered from pretrial research to their clients' benefit in settlement negotiations. For instance, counsel can prepare a memorandum outlining the key points and use it in a presentation at the mediation. Additionally, he or she can present video clips in the joint segment, if there is one, or to the mediator alone.

There is much blustering about what a jury will or will not do in mediations and other settlement discussions. Pretrial research data can bring both sides "down to earth," at least a little. No one takes information collected from pretrial research seriously if the data appear to be skewed. All cases have negatives. Counsel needs to be willing to let the other side see that they know the weaknesses of their case and how the jury might react to them.

Most states' rules for mediation dictate that information disclosed in mediation is not discoverable.[66] Counsel needs to check the rules on this point in the relevant jurisdiction prior to disclosing any pretrial research information. Our research has not revealed a case in which a court ruled that a trial consultant's work product was discoverable.[67] Tara Trask's experience from sitting on the Board of the American Society of Trial Consultants indicates that this organization is committed to ensuring that the work of trial consultants remains protected by the work product doctrine.

[4] Trial

Many trial consultants get the phone call to assist for trial on the Friday before a Monday jury selection. Although this is not the most effective way to benefit from the talents of a seasoned consultant, late is better than never. As the trial approaches, early involvement allows the consultant to streamline demonstratives, to draft an ideal juror

profile based on research gathered in the case (often adding data gathered from previous cases of a similar fact pattern or in a similar jurisdiction), and to begin drafting *voir dire* and, if possible, a supplemental juror questionnaire. The consultant also can start working with counsel to identify key points and demonstratives for the opening statement.

[a] Jury Selection

Preparation for jury selection begins with the compilation and analysis of available data to identify an ideal juror profile. This profile usually contains some demographic information, attitudinal beliefs, values, and sometimes even personality traits. Demographics are usually the least predictive of all components in jury selection. In fact, stereotypical choices based on conventional wisdom can often lead a trial lawyer astray.

[i] Juror Questionnaires

Many courts have warmed to the idea of supplemental juror questionnaires. Years ago, some judges who allowed them were also willing to hear argument on what material should and should not be included in the questionnaire. The custom in most jurisdictions today, however, seems to be that the court will allow a supplemental juror questionnaire if the parties can agree on the questionnaire, the questionnaire is a reasonable length, and the parties present it to the court jointly, often at the pretrial hearing.

What varies from jurisdiction to jurisdiction is when the panel completes the questionnaire. In some cases, panel members answer the questionnaire at the courthouse several days in advance or the questionnaires are mailed to the jurors in advance of selection day. In other cases, the court administers the questionnaire the morning of jury selection. The earlier trial counsel can open the discussion with opposing counsel, agree to the questionnaire, and broach the subject with the judge, the more likely counsel can get the court to send the questionnaire to the prospective panel in advance (with parties sharing the cost of the court-addressed, stamped return envelopes).

Obviously, having more time to review and analyze the questionnaires is preferable. However, even if the questionnaires are administered the morning of jury selection, a short one- to two-page questionnaire is preferable to none at all. Very often, one or two questions from pretrial research can be added to the questionnaire to assist counsel in identifying non-ideal prospective jurors.

[ii] Voir Dire

As mentioned earlier, the trial consultant can draft suggested *voir dire* for counsel based on pretrial research findings. The *voir dire* should be used first to elicit information about the panel and second to teach them about the case. Of course, how much a judge will allow counsel to get into specifics of the case varies by venue.

Additionally, having a consultant present at *voir dire* can help counsel. Normally, the consultant sits at counsels' table to be in close proximity to the presenting attorney and to view the potential jurors' responses. Conducting *voir dire* effectively is a difficult skill. It often forces the advocate to wear an uncomfortable hat.

For example, if defense counsel is presented with a juror with anti-corporate feelings, many advocates, by their very nature, will try to convince the juror that her views are wrong. In the following exchange, the lawyer handles the situation poorly.

Juror: I just think that big corporations make too much money.

Lawyer: Tell me a little bit more about that. *(The lawyer poses a good question.)*

Juror: Well, it just seems to me that with all these big corporate executives getting in trouble, they must be doing something wrong. And, I think they are all pretty greedy.

Lawyer: Well, my client is an executive at a big company, but he does not think he did anything wrong here.

Juror: I am just saying, I do not like the whole setup. It just seems to me that corporate America is out to cheat everyone.

Lawyer: Do you think *all* executives of big companies are greedy? *(Here the lawyer is starting to go in the wrong direction.)*

Juror: Well, not all of them. I am sure some of them are okay.

Lawyer: So, you would be willing to listen to what my client says, and to judge him on his merits, right?

Juror: I guess so. I can try.

Lawyer: Okay, because my client really believes that he did not do anything wrong here. Can everyone agree with me that it is important to wait to hear from my client before you judge him?

Juror: Yes, I guess. Okay.

In the following exchange, the lawyer handles the situation well. At first, the juror's responses are similar to those in the previous exchange. However, different questions posed by the lawyer lead to different responses from the juror.

Juror: I just think that big corporations make too much money.

Lawyer: Tell me a little bit more about that.

Juror: Well, it just seems that with all these big corporate executives getting into trouble, they must be doing something wrong. And, I think they are all pretty greedy.

Lawyer: Well, my client is an executive at a big company. It sounds to me like you already may have a slight feeling that, because he is a corporate executive, he has done something wrong. That is okay if you feel that way, a lot of people do, I just need to know.

Juror: I am just saying, I do not like the whole setup. It just seems to me that corporate America is out to cheat everyone.

Lawyer: So, it sounds to me like you have pretty strong feelings about this. Is that fair to say?

Juror: Yes, I think that is fair.

Lawyer: So, you have said that you basically feel that all corporate executives are greedy, and because my client is a corporate executive, it is probably safe to say that he is starting out a little bit behind with you, right? And understand, you are not going to hurt my feelings, a lot of folks feel that way. I just need to know.

Juror: Yes, I think that is a fair thing to say.

Lawyer: Who else agrees with this? *(Note jurors to return to for further inquiry.)* Let me ask you this, if you were my client, would you want you as a juror?

Juror: *(Juror chuckles.)* No way.

Lawyer: Your honor, may we approach? *(Move to strike for cause.)*

[b] Opening Statement

Nowhere is the incorporation of themes or a story more important than in the opening statement. In the white board meetings with counsel and the trial consultant, the team begins preparation of the opening by starting at the end. What are the three, four, five big-picture things that the counsel wants the jury saying to themselves at the end of the opening statement? Once listed on the board, these big-picture items become the goals guiding the framework for the opening statement. Next, the team drafts the first four or five sentences of the opening by answering the question, what is this case about? No matter how complex the case, if counsel cannot answer that question in four or five sentences, counsel does not know what the case is about.

From there, the team can loosely outline or script out the opening, based on trial counsel's comfort level and normal practice. Opening statement run-throughs are helpful because sequence is important, and it is often difficult to determine what works until the opening statement is conducted verbally. Often, sequence is the main change made in these sessions. One or two run-throughs, at most, can be acceptable preparation. Memorizing an opening or over-preparing is not necessary and can prove counter-productive.

[c] Trial Support

Proper trial support for counsel is an important part of ensuring effectiveness and improving chances for the best result. A well-trained trial technician can call up documents on the screen and use software to emphasize key points. This service can be critical in supporting the attorney during opening and closing statements, as well as witness testimony. Additionally, edits to video depositions that are particularly damaging for the opposition can be prepared in advance and readily called up for impeachment purposes. A skilled trial technician develops a good relationship with court staff. These relationships can benefit the trial lawyer greatly. Most important, having technical assistance allows the trial lawyer to do her job and not be distracted by managing exhibits and demonstratives.

Having a trial consultant observe the trial and provide strategic feedback can also be invaluable. Many trial consultants observe 20 to 30 trials a year, and even the most seasoned litigators cannot match that aggregate experience. Coupled with the fact that most trial consultants' backgrounds are in the social sciences, communications or other related disciplines, counsel stands to benefit greatly by adding a team member with unique knowledge and perspective to the case. While many consultants possess a strong legal acumen, they are trained and experienced in effectively communicating with juries.

[d] Shadow Juries

Of all the trial consulting services, shadow juries[68] may be one of the most controversial and yet one of the most useful. Because galleries in courtrooms are generally public spaces, citizens are usually free to sit and observe proceedings. Shadow juries must be conducted by trained and experienced consultants who are discreet and understand the ethical ramifications of their work. When recruiting a shadow juror, the consultant must use a rigorous screening process and recreate demographic makeup of the actual jury. Once the actual jury is impaneled, the shadow jury is chosen to represent, as closely as possible, the actual jury. Many times a smaller shadow jury can represent the actual jury. A shadow jury of six to eight can often be a representative sample.

Shadow jurors fill out an extensive intake questionnaire and sign a code of conduct and confidentiality agreement. They are never told which side (or that any side) has retained them. Normally, a two-to-three hour orientation process is conducted so that they are clear on rules, the most important being that they are to have no contact with any seated juror or witness. They are also told not to have any contact with the lawyers or anyone else in the courtroom. Many consultants suggest that a motion *in limine* be filed. This alerts the court to the shadow jury's presence and ensures that opposing counsel will not try to make an issue of it.

A reputable consulting firm will ensure that a professional facilitator is present in the courtroom gallery, supervising the shadow jurors at all times. Even though this person is retained by one party, the facilitator must disregard that party at all times, lest the shadow jurors ascertain who hired them. Shadow jurors are advised to enter and exit the courtroom independently of one another as individuals observing the trial or are instructed to follow the lead of the facilitator. If the facilitator is in the courtroom, they are in the courtroom, and vice versa. Obviously, it is important that they not hear arguments to the bench or other proceedings that take place outside the presence of the actual jury. At the end of each day, the facilitator meets with the shadow jurors at an offsite location, interviews each one independently, and provides a written or verbal report (or both) to counsel.

Although shadow juries are not meant to be predictive of outcome, they may be the best gauges of how a case is being perceived on a daily basis. Many trial teams have walked into the war room satisfied with how well the day had gone, only to be deflated by a report indicating that the shadow jurors did not have the same perception. Conversely, a trial team can be concerned about whether complex information was conveyed effectively and feel pleased to read or hear in the shadow reports that the shadow jurors understood the concepts being taught.

[5] Post-Trial

Post-trial work is often overlooked. The trial team is elated and celebrating, shell-shocked, or somewhere in between. Often, everyone involved is ready to move on to other things. Trial consultants can conduct onsite post-trial interviews when allowed by the judge. Sometimes, the jury may be willing to talk to each side as a group. More often, the consultant ends up chasing jurors down the courthouse steps. Some are willing to talk; others are not.

The consultant can follow up with phone interviews. This information can be valuable, particularly if the case in question is one of several in a docket or if the client

faces similar cases on a regular basis. These interviews are more formal and are usually conducted using a script of questions. The interviews should be conducted within several days of the completion of the trial, because memories fade quickly, and valuable information can be lost.

Notes

[1] This chapter was originally authored by Tara Trask, president of Trask Consulting, a boutique litigation strategy, jury research and trial consulting firm with offices in San Francisco, Houston, and New York. The chapter was updated by Charles E. Harris, II, a partner in the Litigation & Dispute Resolution group at Mayer Brown LLP, and Marjan A. Batchelor, an associate in the Litigation & Dispute Resolution group at Mayer Brown LLP. Charles and Marjan relied on their collective experience working with jury consultants in preparing for trial and on research regarding emerging issues affecting the venire. Tara is not responsible for and has not reviewed the emerging material in this chapter section 7.02[4].

[2] *Cf.* Todd Oppenheim, *Too "Woke" for the Jury Box*? The Marshall Project (May 2, 2018), https://www.themarshallproject.org/2018/05/02/too-woke-for-the-jury-box ("Over the last several years . . . finding impartial jurors has felt increasingly difficult").

[3] *Id.*

[4] Carmen Caruso, *Selecting a Jury Can Be Complicated During Divisive Political Times*, Am. Bar Ass'n (May 23, 2018), https://www.americanbar.org/news/abanews/publications/youraba/2018/june-2018/selecting-a-jury-can-be-complicated-during-divisive-political-ti.ssologout.

[5] Pew Research Center, *Internet/Broadband Fact Sheet* (June 12, 2019), http://www.pewinternet.org/fact-sheet/internet-broadband/. As of September 2018, 89% of U.S. adults had Internet access. Those in their twenties, often referred to as Millennials, represented the highest number of users, with 98% using the Internet.

[6] For further discussion, *see* sections 7.02[2], 7.03.

[7] United States v. Feng Ling Liu, 69 F. Supp. 3d 374, 386 (S.D.N.Y. 2014) (internal citation omitted).

[8] Wisconsin v. Cherrier, No. 2018CF000220 (Wis. Cir. Ct. Sept. 24, 2018); *see also* Michael Longaecker, *Mistrial Declared in Wisconsin Terrorizing Case After Juror Held in Contempt of Court*, Duluth News Tribune (Sept. 24, 2018), https://www.duluthnewstribune.com/news/4503738-mistrial-declared-wisconsin-terrorizing-case-after-juror-held-contempt.

[9] Murphy v. Roth, 204 So. 3d 43, 45 (Fla. Dist. Ct. App. 2016).

[10] *Id.* at 46.

[11] *Id.* at 46–47.

[12] *Id.* at 49–50.

[13] Cal. AB No. 2101 Sanctions: jurors (Feb. 17, 2016) (to add, repeal, and amend codes related to court sanctions), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB 2101.

[14] *See*, *e.g.*, *Murphy*, 204 So. 3d at 45 ("the trial court necessarily credited and accepted Juror 5's explanation that this misconduct was neither intentional nor willful, and that none of his tweets related specifically to this case").

[15] Interview by Tara Trask with Amul R. Thapar, Judge, E.D. Ky.

[16] Jonathan McAloon, *CSI Cancelled After 15 Years*, Telegraph (May 13, 2015), https://www.telegraph.co.uk/culture/tvandradio/11602967/CSI-cancelled-after-15-years.html.

[17] Eddie Mullan, *How We Got Hooked on Grisly True Crime*, BBC (Dec. 6, 2018), http://www.bbc.com/culture/story/20181205-how-we-got-hooked-on-grisly-true-crime.

[18] *See* Kenny Herzog, *From the* CSI *Effect to* Making a Murderer*: Will True-Crime Docuseries Change How Jurors Think?*, Vulture (Jan. 15, 2016), https://www.vulture.com/2016/01/making-a-murderer-jurors-csi-effect.html; Liz Banks-Anderson, *The "Making a Murderer" Effect*, Pursuit-Univ. of Melbourne (Mar. 16, 2016), https://pursuit.unimelb.edu.au/articles/editing-the-making-a-murderer-effect.

[19] Rich Matthews, *The "CSI Effect" . . . in Civil Cases as Well as Criminal Ones*, 19 The Jury Expert 10 (June 2007), https://heinonline.org/HOL/Page?handle=hein.journals/jurexp19&div=40&g_sent=1&casa_token=&collection=journals&t=1560976520.

[20] *Id.*

[21] This case was the subject of pretrial research conducted by Tara Trask. Hoffman v. Titus Cty. Hosp. Dist., Case No. 30285 (Tex. Dist. Ct. Feb. 2005).

[22] Matthews, *supra* note 19, at 10.

[23] This was noted by Tara Trask while observing a trial and the following motion for a new trial in April 2009.

[24] The Knowledge Network for Innovations in Learning and Teaching, Unit 1 Objectives: What is evidence-based reasoning?, https://tccl.arcc.albany.edu/knilt/index.php/Unit_1_Objectives:_What_is_evidence-based_reasoning%3F (last modified May 12, 2015).

[25] Richard A. Harpootlian & Christopher P. Kenney, *Jury Practice in Post-Truth America: A Cautionary Note*, 4 Emory Corp. Governance & Accountability Rev. 131 (2017) (citation omitted).

[26] Oxford Dictionary defines "post-truth," its 2016 word of the year, as "relating to or denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief." Oxford Dictionaries, "Word of the Year 2016 is . . .", https://en.oxforddictionaries.com/word-of-the-year/word-of-the-year-2016.

[27] Elle Hunt, *Trump's Inauguration Crowd: Sean Spicer's Claims Versus the Evidence*, The Guardian (Jan. 22, 2017), https://www.theguardian.com/us-news/2017/jan/22/trump-inauguration-crowd-sean-spicers-claims-versus-the-evidence.

[28] *Id.*

[29] Eric Bradner, *Conway: Trump White House Offered "Alternative Facts" on Crowd Size*, CNN Politics (Jan. 23, 2017), https://www.cnn.com/2017/01/22/politics/kellyanne-conway-alternative-facts/index.html.

[30] Harpootlian & Kenney, *supra* note 25, at 135–136.

[31] *Id.* at 137.

[32] In the focus group described here, the lawyers noted the jurors who seemed to ignore evidence-based reasoning were white, rural, or suburban, with little to no college education and stagnant wages. *Id.*

[33] *Id.* at 139.

[34] ABA Comm. on Ethics & Responsibility, Formal Op. 466, at 9 (2014).

[35] *See* ABA Model Rules of Prof'l Conduct r. 5.3 (Am. Bar Ass'n 2018) ("With respect to a nonlawyer . . . retained by or associated with a lawyer: * * * * the person's conduct [must be] compatible with the professional obligations of the lawyer.").

[36] Pew Res. Ctr, *Social Media Fact Sheet*, https://www.pewinternet.org/fact-sheet/social-media/ (June 12, 2019).

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Feng Ling Liu*, 69 F. Supp. 3d at 374, 386 (quoting United States v. Fumo, 655 F.3d 288, 332 (3d Cir. 2011) (Nygaard, J., concurring)).

[41] We discuss pretrial jury research in detail at section 7.04.

[42] Litigation Insights, *Why Receiving the Jury List in Advance of Trial Is Important to Jury Selection* (Dec. 16, 2014), https://www.litigationinsights.com/jury-list-in-advance-trial-important/.

[43] Laurie Kuslansky, *10 Key Things to Know About Social Media and Jury Consulting*, The Litigation Consulting Report (Apr. 1, 2013), http://www.a2lc.com/blog/bid/63880/10-Key-Things-to-Know-About-Social-Media-and-Jury-Consulting.

[44] *Id.*

[45] *Id.*

[46] Formal Op. 466, *supra* note 34, at 6.

[47] *Id.*

[48] *Id.*

[49] *E.g.*, Jenco v. Crowe, No. A14–0375, 2015 WL 303653, at *4 (Minn. Ct. App. Jan. 26, 2015) ("Appellants assert juror misconduct by two jurors, one who posted a number of 'tweets' (posts to the social-media website Twitter) during the trial reflecting his disdain for jury duty"); Dimas–Martinez v. State, 385 S.W.3d 238, 242 (Ark. 2011) ("[A] second juror was posting on his Twitter account during the case, and continued to do so even after being questioned by the circuit court, [which was] evidence of juror misconduct that calls into question the fairness of his trial.") (internal footnote omitted); State v. Smith, 418 S.W.3d 38, 42, 48–49 (Tenn. 2013) (requiring an evidentiary hearing to determine whether a new trial was necessary on the basis of juror misconduct after a juror sent Facebook messages to one of the State's witnesses during trial); *see also* Robert P. MacKenzie III & C. Clayton Bromberg Jr., Jury Misconduct What Happens Behind Closed Doors, 62 Ala. L. Rev. 623, 638 (2011) ("The fastest developing area in the realm of juror misconduct involves juror use of e-mail, social networking sites such as Facebook, and microblogging sites such as Twitter during trial.").

[50] No. 1-16-0813, 2018 WL 6920110, at *4-*5 (Ill. App. Ct. Dec. 31, 2018) (denying motion for new trial based on jury misconduct).

[51] *Id.* at *4.

[52] *E.g.*, N.Y.C. Ass'n. B. Comm. Prof. Jud. Eth., NY Eth. Op. 2012-2 ("Should a lawyer learn of juror misconduct through otherwise permissible research of a juror's social media activities, the lawyer must reveal the improper conduct to the court."). *But see* Formal Op. 466, *supra* note 34, at 9 ("While any Internet postings about the case by a juror during trial may violate court instructions, the obligation of a lawyer to take action will depend on the lawyer's assessment of those postings in light of court instructions and the elements of the crime of contempt or other applicable criminal statutes.").

[53] If possible, the consultants and lawyers should select the mock jurors who represent the demographics of the actual jury pool.

[54] This is pretrial jury research conducted in September 2000.

[55] Interview by Tara Trask with a client.

[56] Exxon Corp. v. Certain Underwriters at Lloyd's of London, No. 93-40252 (Tex. Dist. Ct. 1997).

[57] This is from Tara Trask's confidential pretrial research.

[58] *Exxon Corp.*, *supra* note 56. The defendant appealed, but the parties agreed to settle. *See Exxon Corp.,* Nos. 14-96-01332, 14-96-01363, 1997 WL 155411.

[59] Jeremy Hsu, *The Secrets of Storytelling: Why We Love a Good Yarn*, Sci. Am. Mind 46, 46 (Aug. 2008), http://www.scientificamerican.com/article.cfm?id=the-secrets-of-storytelling.

[60] *Id.* at 51.

[61] *Id.* at 50.

[62] *See, e.g.*, Catherine Kohler Riessman, Narrative Analysis (1993); Nelson Phillips & Cynthia Hardy, Discourse Analysis: Investigating Processes of Social Constructions (2002).

[63] Harrison Monarth, *The Irresistible Power of Storytelling as a Strategic Business Tool*, Harvard Bus. Review (Mar. 2014), https://hbr.org/2014/03/the-irresistible-power-of-storytelling-as-a-strategic-business-tool.

[64] Kenneth Lopez, *Attorneys and Juries Learn and Communicate Very Differently*, Sarbanes-Oxley Compliance J. (Jan. 8, 2007), http://www.s-ox.com/dsp_getnewsDetails.cfm?CID=1940%20.

[65] This is from the author's confidential pretrial research.

[66] *See, e.g.*, Cal. Evid. Code § 1119.

[67] *See, e.g.*, *Sporting Prods., LLC v. Pacific Ins. Co.,* No. 10-80656, 2011 WL 13227802, at *3 (S.D. Fla. Oct. 13, 2011) ("the Court finds that billing records relating to [the defendant's expert]'s work on the claim as a forensic accountant and trial consultant are not discoverable"); *see also* Ill. Sup. Ct. Rule 201(b)(3) ("A consultant is a person who has been retained or specially employed in anticipation of litigation or preparation for trial but who is not to be called at trial. The identity, opinions, and work product of a consultant are discoverable only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject matter by other means.").

[68] Shadow jury refers to a group of mock jurors paid to observe a trial and report their reactions to a jury consultant. Shadow jurors will be present in the courtroom with the real jury, hear and observe the same evidence and argument. However, unlike the real jury, the shadow jury agrees to be interviewed about their perceptions, understanding of the case, and beliefs regarding how the case must turn out at regular intervals.

CHAPTER 8

Domestic and International Commercial Arbitration

Sarah E. Reynolds and Allison M. Stowell[1]

§ 8.01 Introduction[2]

Traditionally, arbitration has been lauded as a faster and lower-cost alternative to litigation. This is not necessarily the case now: as arbitration, and particularly international arbitration, has evolved into a means of resolving the most complicated of disputes, it can sometimes rival litigation in cost and time. Nonetheless, arbitration offers benefits distinct from litigation—ranging from the relative ease of enforcing arbitral awards in foreign states to the ability to craft a dispute resolution process specific to the dispute at hand. As a result, and as evidenced by its growing use in resolving complex disputes, arbitration has developed into the preferred means of resolving many types of disputes, particularly those arising out of cross-border transactions.

Because arbitration provides parties flexibility to cater the arbitral process to a particular dispute, careful management of the arbitration directly translates into a more efficient dispute resolution process. Such management must begin before a dispute even arises, during the negotiation of the arbitration agreement. It extends through the arbitral process, when the complexity and value of the dispute should inform the procedure, including the number of briefs, scope of discovery, and conduct of the hearing.

This chapter focuses on aspects of arbitration that, when carefully analyzed and managed, will assist in maintaining a cost-effective and efficient process. In doing so, it largely addresses international commercial arbitration. Nonetheless, many of the same principles apply to domestic commercial arbitration and even investor-state arbitration.

The chapter first addresses, as a preliminary matter, when arbitration is preferable to litigation in resolving disputes. It describes the two principal benefits of arbitration, namely, that it provides a neutral forum in which to resolve disputes between parties from different states and the ability to enforce an award across jurisdictions. The additional benefits of arbitration are then described: privacy and even confidentiality, flexibility, qualified adjudicators, convenience, and certainty.

The chapter next addresses the single most important tool for an efficient arbitration: a well-drafted arbitration agreement. It provides an overview of the negotiation process; identifies the necessary, strongly recommended, and optional issues that should be assessed in drafting an arbitration agreement; and then highlights considerations of efficiency and cost-effectiveness for each issue.

Finally, the chapter provides an overview of the arbitral process. In doing so, it describes the significant procedural mechanisms that may be used to tailor each proceeding to a specific dispute and highlights considerations of efficiency and cost-effectiveness.

§ 8.02 Choosing Between Arbitration and Litigation

Arbitration provides two principal advantages to litigation: it provides both a neutral forum for adjudicating a dispute between parties from different states and the ability

to enforce the resulting award internationally. The ease of enforcing the arbitral award in jurisdictions beyond the one in which the award is issued is vital to cross-border transactions, because the award is likely to be enforced in a different jurisdiction than the arbitral seat or a party's assets are likely located in multiple jurisdictions. This advantage, in particular, renders arbitration the preferred, if not required, means of resolving cross-border disputes.

Arbitration has other advantages: it provides privacy, flexibility, qualified adjudicators, and finality to its users. It also has downsides: it can be costly and lengthy, the tribunal's authority is limited in some respects compared to the judiciary, and the tribunal lacks jurisdiction over non-parties to the arbitration agreement.

Both the advantages and disadvantages of arbitration are described below.

[1] Advantages of Arbitration

[a] Arbitration Provides a Single, Neutral Forum to Hear Disputes

When a dispute involves parties from different states or legal systems, arbitration eliminates the home court advantage that accrues to one party in litigating in the familiar courts, legal traditions, and language of its own jurisdiction. Arbitration does so by providing both a neutral forum and neutral adjudicators: the parties may agree on a neutral place of the arbitration (the arbitral "seat") and a neutral governing law, and they may select arbitrators from a neutral legal tradition or other background. Additionally, in most instances, the parties will participate in the selection of the arbitrators, who are required to be independent and impartial.[3]

The availability of a neutral forum, coupled with independent and impartial adjudicators selected with the parties' input, alleviates concerns that may exist about the potential of resolving disputes in certain jurisdictions, from a lack of familiarity with the law and courts in the jurisdiction of the other side to questions regarding the qualifications or independence of the judiciary in those jurisdictions.

[b] Arbitration Awards Are Internationally Enforceable

Relative to court judgments, arbitration awards are easier to enforce internationally because their enforcement is governed by a widely ratified treaty, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (also known as the New York Convention) as well as the widespread adoption of legislation supporting the New York Convention. There is no comparable treaty or legislation for court judgments.

The New York Convention requires its 159 contracting states—among them, all of the Americas and the European Union, Australia, Japan, Russia, India, and China[4]—to recognize arbitration agreements and to enforce arbitration awards except in limited, enumerated circumstances. Particularly, all contracting states to the Convention must recognize arbitration agreements falling within the Convention and must compel arbitration under them "unless" a state "finds that the said agreement is null and void, inoperative or incapable of being performed."[5] Further, contracting states "*shall* recognize arbitral awards as binding and enforce them"[6] except on limited grounds:

(1) parties to the arbitration agreement were incapacitated or the arbitration agreement is invalid;

(2) "the party against whom the award is invoked was not properly notified of the arbitration or was otherwise unable to present its case";

(3) the arbitral tribunal lacked jurisdiction to determine all or some of the issues before it (and, if only some issues, the award may still be partially enforced);

(4) the composition of the arbitral tribunal or the arbitration procedure did not accord with the parties' arbitration agreement; or

(5) the award was vacated by a court in the arbitral seat or the award is not yet binding.[7]

Additionally, enforcement may also be refused if a court in the arbitral seat determines that:

(1) the arbitration's subject matter may not be resolved by arbitration in that country or

(2) "recognition or enforcement of the award would be contrary to the public policy of that country."[8]

Importantly, none of these grounds go to the merits or substance of the award.

The difficulty of vacating arbitration awards under the New York Convention, along with the relative ease of enforcement, contributes to a high rate of voluntary compliance with arbitration awards. A 2008 survey of corporate users of arbitration concluded that parties voluntarily comply with arbitration awards most of the time: "84% of respondents indicated that the opposing party had honoured the award in full in more than 76% of cases."[9] For those survey respondents that had enforced awards, 57% of respondents to the survey stated that enforcement took less than one year.[10]

Notably, legislation bolstering the New York Convention has become widespread. In the United States, the New York Convention is implemented in Chapter 2 of the Federal Arbitration Act.[11] Eighty other states have passed legislation based on the United Nations Commission on International Trade Law's ("UNCITRAL") Model Law on International Commercial Arbitration, which imposes standards corresponding to the New York Convention.[12]

[c] Qualified and Experienced Adjudicators Hear and Determine the Dispute

Parties can participate in the constitution of the arbitral tribunal in multiple ways. In the arbitration agreement, they can dictate the process by which the tribunal is constituted or require that the arbitrators meet certain minimum requirements. In constituting the tribunal, they may, for example, appoint a party-appointed arbitrator and provide input on the selection of the tribunal chair, or they may evaluate candidates proposed by the institution administering the arbitration. Because of the parties' participation in the selection of adjudicators, a dispute may be heard and determined by adjudicators with the experience the parties deem relevant to the specific dispute, whether that experience be direct industry experience, language skills, legal education, or experience as an arbitrator.

[d] Arbitration Proffers Privacy and, at Times, Confidentiality

In contrast to court proceedings, whose dockets and hearings are generally public, arbitrations are frequently private and may be confidential. Hearings are generally limited to those involved in the proceeding,[13] and submissions are privately "filed" and awards privately issued by circulating them among the arbitral tribunal, parties, and administering institution. Arbitrations are also frequently confidential.

Neither privacy nor confidentiality is guaranteed, however. Arbitrations involving state entities may be legally required to be public, and any awards or submissions filed in enforcement or other court proceedings also become public. Further, the confidentiality in arbitration is due in large part to custom and practice rather than a legal obligation, as few institutions impose confidentiality obligations on the parties. Nonetheless, arbitration's lack of public dockets and hearings, combined with its tradition of confidentiality, results in a proceeding that typically proffers greater privacy and confidentiality than litigation. Moreover, if confidentiality is a particular concern for parties, they may further protect themselves by including a confidentiality requirement in the arbitration agreement.

[e] The Arbitral Process Is Flexible

Arbitration enables the parties to craft a procedure that is specific to a dispute with the aim of providing the most efficient and expeditious resolution possible. In contrast to the rules of procedure and evidence governing litigation, broad rules govern the conduct of an arbitration. Article 22 of the ICC Rules, for example, requires the tribunal and parties "to make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute."[14] To that end, "the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties."[15]

This flexibility also lends itself to convenience: schedules are set by the parties and the tribunal, and hearings may be held in a time and place that is convenient.

[f] Arbitration Provides Finality

The lack of an appellate process and the limited grounds on which an arbitration award may be vacated create finality for the parties once an arbitration award is issued: awards are generally binding on the parties and enforceable worldwide once made.[16]

[2] Disadvantages of Arbitration

[a] Arbitrations Can Be Costly and Lengthy

Once considered a relatively inexpensive and speedy means of resolving disputes, the most common current critiques of arbitration are its cost and duration.[17] Arbitration reduces or eliminates the costs and time associated with discovery and appeals incurred in U.S. litigation, but imposes other costs unique to arbitration, namely, the arbitrators' fees and expenses, any administering institution fees, the tribunal secretary's fees (if any), and fees to rent a hearing space. Similarly, while arbitration avoids

some of the time-consuming phases of litigation, other aspects—delays in constituting a tribunal and lack of dispositive motions—can create their own delays.

The cost and duration of arbitration reflects, at least in part, the complexity of disputes that are arbitrated and the reality that resolving complex disputes is costly irrespective of the forum. Even so, administering institutions proactively respond to users' concerns, at times creatively. The ICC, for example, now reduces arbitrators' fees for unreasonable delay in submitting an award: panels of three arbitrators must now submit their awards to the ICC within three months of the final hearing or submission to avoid docked fees, and a sole arbitrator must submit an award within two months.[18]

[b] Arbitrators Lack Jurisdiction over Third Parties to the Arbitration Agreement

Because the tribunal's authority derives from a party's consent to arbitrate a particular dispute with a particular party,[19] non-parties to the arbitration agreement may not be parties in the arbitration, except in very limited circumstances.[20] Accordingly, absent party consent, arbitrators largely lack the ability to join third parties or consolidate multiple proceedings. This poses a particular challenge to disputes arising in multi-contract transactions. This disadvantage may be overcome in various ways, though it requires careful consideration when drafting the arbitration agreement.[21]

[c] Arbitrators Lack Certain Authority Enjoyed by Courts

Another downside to arbitration is the tribunal's limited authority as compared to courts; at times, tribunals can hesitate to exercise the authority they do have. For example, arbitrators cannot compel testimony from third-party witnesses; nor do they sanction counsel for dilatory or harassing tactics. As a result, it is occasionally necessary to seek recourse in aid of arbitration in court.

§ 8.03 The Arbitration Agreement

The most vital tool for maintaining an efficient arbitration is the arbitration agreement. This agreement forms the foundation of an arbitration, as it is the basis of the arbitral tribunal's authority to issue an award binding on the parties. The U.S. Supreme Court has explained, "[a]rbitration is strictly a matter of consent and thus is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration."[22] Because the consent to arbitrate is so fundamental to the tribunal's authority, an award may be vacated in the whole or in part under the New York Convention if it, or a portion of it, exceeds the tribunal's authority.[23]

An agreement to arbitrate must be in writing.[24] At its most basic, an effective arbitration agreement avoids disputes regarding its enforceability and the scope of the tribunal's authority or jurisdiction. A poorly drafted provision opens the door not only to risk of vacatur, but also to costly and time-consuming preliminary disputes as to whether a claim is properly litigated or arbitrated. These disputes require either a separate court proceeding or an additional stage in the arbitration.

At its best, a well-drafted arbitration agreement not only minimizes such disputes, but also supplies the parties and tribunal with tools enabling them to cater the

arbitration to the specific claims at issue. The process of drafting such an arbitration agreement is not particularly time-consuming or complex. Nonetheless, it requires careful consideration, and the agreement's importance necessitates that it not be a mere afterthought during the negotiations of the broader transaction.

[1] Drafting an Arbitration Agreement

Importantly, arbitration agreements should be drafted by an attorney with experience specifically in drafting these clauses. To do so, counsel considers the disputes most likely to arise under a contract and each party's interests in those foreseeable disputes are assessed. The arbitration agreement is then tailored to ensure that the parties and tribunal have the necessary authority to resolve the disputes as effectively as possible. This section provides an overview of the issues that experienced counsel considers in drafting these clauses, focusing on those considerations that impact the efficiency of the dispute resolution process. Note that considerations other than efficiency may impact the arbitration agreement.

To be enforceable, an arbitration agreement must (i) specify the types of disputes to be arbitrated, (ii) provide that arbitration is the exclusive means of resolving those disputes, and (iii) incorporate applicable arbitral rules governing the arbitration. Failure to include these three fundamental provisions renders the arbitration agreement unenforceable. Each administering institution provides model clauses containing these necessary provisions. These should serve as the basis for the arbitration agreement, while they may be augmented, they should not be changed without reason.

Beyond the three necessary provisions, it is strongly recommended that an arbitration agreement address nine additional issues: (i) the administering institution, if any; (ii) the arbitral seat; (iii) the number of arbitrators to hear the dispute; (iv) the method of selecting the arbitrators; (v) the substantive law applicable to the arbitration; (vi) the language of the arbitration; (vii) where the award can be enforced or vacated; (viii) authorization for interim relief; and (ix) the finality of the arbitration award.

For most arbitration agreements, addressing these 12 issues is sufficient—and including adding provisions unnecessarily risks overcomplicating the agreement, raising questions as to the intended effect of provisions. For some agreements, however, the characteristics of a transaction and the potential disputes that may arise render additional, optional provisions advisable.

[2] Elements of an Arbitration Agreement

The list below identifies the necessary, strongly recommended, and additional provisions that may be considered in drafting an arbitration agreement.

Drafting an Arbitration Agreement	
Required Provisions	
1	What is the scope of the arbitration agreement?
2	Is arbitration the exclusive means of resolving the dispute?
3	What arbitration rules apply to the arbitration?

Strongly Recommended Provisions	
4	Should the arbitration be administered?
5	Where should the arbitration be seated?
6	Should one or three arbitrators hear the dispute?
7	How should arbitrators be selected?
8	What law governs the arbitration and the arbitration agreement?
9	What language should the arbitration be held in?
10	Should conservatory or interim relief be expressly authorized?
11	What courts may enforce or vacate an award?
12	Should the finality and binding nature of the award be made express?
Optional Provisions	
13	Should the arbitration be confidential?
14	Should the dispute resolution process be multi-tier?
15	Should the arbitrators be required to have any specific qualifications, skills, expertise or background?
16	Should the statute of limitations for certain claims be limited, if permissible under applicable law?
17	Should summary disposition be expressly authorized?
18	Should joinder or consolidation be expressly authorized?
19	Is security during the pendency of the arbitration necessary?
20	Should disclosure be limited?
21	Should time limits be imposed on the arbitral process?
22	Should damages be limited, and, if so, how?
23	What interest, if any, should the tribunal award on monetary damages?
24	Should the currency of the award be specified?
25	Should offsets on payments made pursuant to an award be expressly permitted or prohibited?
26	Should the tribunal allocate costs and fees (including attorneys' fees) and, if so, how?
27	How should the costs of enforcing any arbitration award be allocated?
28	Must the parties continue to perform any contractual obligations during the arbitration?

While other factors must be assessed, considerations of efficiency and cost-effectiveness are summarized for each issue in turn below.

[3] Required Provisions

[a] What Is the Scope of the Arbitration Agreement?

Except in rare circumstances, an arbitration agreement should require that all disputes arising under or relating to the parties' contract must be resolved by arbitration.

This language—"all disputes arising under or relating to"—is considered by U.S. courts to be a "broad" arbitration clause and, as such, it is deemed to cover even collateral claims that "implicate[] issues of contract construction or the parties rights and obligations under it."[25] By covering even collateral claims, disputes over whether the agreement covers a particular claim are eliminated.

In rare circumstances, parties may wish to reserve specific types of disputes for determination by experts with specialized knowledge. Such disputes may include purchase price adjustment disputes in mergers and acquisitions, technical disputes in construction, and infringement of intellectual property disputes. If an expert determination provision is also included in a contract, both it and the arbitration agreement must be carefully drafted to minimize disagreements over which provision applies. Even then, disagreements over the proper forum to resolve the dispute are common, particularly when a dispute implicates both technical and legal questions.

[b] Is Arbitration the Exclusive Means of Resolving the Dispute?

Arbitration agreements must be mandatory to be enforceable. As a result, arbitration agreements must use mandatory language, such as "shall," that requires the parties to arbitrate.

[c] What Arbitration Rules Apply to the Arbitration?

An arbitration agreement must identify the rules that will govern the arbitration. In administered institutions, the applicable rules are dictated by the selection of the institution (or vice versa): the administering institution's rules apply.

Rules across the major administering institutions contain broad similarities, and selection of one institution's rules over another's is usually not dispositive. Nonetheless, the distinctions among rules do impact the procedure. There are, for example, important differences as to how, in the absence of party agreement, the tribunal is constituted, the seat selected, and other key aspects of the arbitration are determined; when third parties may be joined or arbitrations consolidated; and the process by which emergency relief is awarded. In addition, each institution also has its own unique procedure: the ICC rules, for example, require the parties and tribunal to draft the "Terms of Reference," which identifies key information about the arbitration and describes the parties' positions and the relief they seek.[26]

[4] Strongly Recommended Provisions

[a] Should the Arbitration Be Administered?

An arbitration may be ad hoc—i.e., created by the parties specifically for that dispute—or administered—i.e., overseen by an administering institution and conducted in accordance with that institution's rules.

An ad hoc arbitration affords the parties the greatest flexibility to create a bespoke dispute resolution procedure: the parties may agree to specific rules governing the arbitration and its procedure and, at least until the tribunal is constituted, they bear the responsibility of running it. As a result, ad hoc arbitrations require the parties'

cooperation until the tribunal is constituted. Historically, this has posed significant obstacles to ad hoc arbitrations when one or both parties refused to participate in the process. As two examples, one party could prevent the tribunal from being constituted by refusing to appoint its party-appointed arbitrator, or preclude the constitution of an independent and impartial tribunal by appointing an arbitrator with conflicts of interest. These and other obstacles may now be overcome by providing for ad hoc rules (such as the UNCITRAL Arbitration Rules) that were developed to overcome such obstacles, and by designating an appointing authority to aid in constituting the tribunal should recourse to an outside authority be necessary.

The flexibility of an ad hoc arbitration may be beneficial for extremely large arbitrations, disputes involving a state or state entity, or parties with significant arbitration experience. Absent circumstances such as these, an administered arbitration is generally preferable for international commercial disputes.

In administered arbitrations, an administering institution administers, or manages, the arbitral proceedings in exchange for a fee. There is broad overlap in how each institution manages an arbitration, though there are differences between them. Broadly, institutions may assist in appointing arbitrators and manage paying them, determine challenges to an arbitrator's independence and impartiality, hold initial teleconferences with the parties to address efficiency-related issues, or scrutinize awards for enforceability.

An administering institution should be selected from the many reputable, well-established institutions, as their rules are battle-tested and the awards resulting from their arbitrations will have an extensive record of enforceability. Significant worldwide administering institutions include the International Chamber of Commerce ("ICC"), the London Court of International Arbitration ("LCIA"), the Singapore International Arbitration Centre ("SIAC"), the Hong Kong International Arbitration Centre ("HKIAC"), the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC"), and the International Centre for Dispute Resolution ("ICDR").[27] Other institutions administer specific types of disputes—most notably, the International Centre for Settlement of Investment Disputes ("ICSID") administers investment disputes between a state and a national of another state. In addition, smaller reputable institutions abound regionally.

As Paul D. Friedland writes, there are six factors that should be considered in deciding among institutions: (i) "the relative advantages or disadvantages of any distinctions" between the institutions' arbitration rules; (ii) institutions' "relative abilities and preferences" in appointing arbitrators; (iii) personnel's experience and capabilities in administering cases; (iv) reputation, "insofar as reputation may enhance or undermine the prospects for enforcement of an arbitral award"; (v) cost; and (vi) institutions' experience and suitability in different regions.[28]

Because each institution calculates fees differently, it is difficult to predict with certainty which major administering institution will be the least expensive to administer any one particular dispute. The ICC, the most popular institution, though among the more expensive due to its level of administrative involvement, charges a percentage of the amount in dispute on a sliding scale, then adjusts that fee for additional services, exceptional circumstances, or early resolution.[29] The ICDR also charges based on the value of the amount in dispute, but provides set fees up to $10 million, and then charges a percentage on the amount above $10 million.[30] The LCIA, meanwhile, charges hourly fees.[31]

[b] Where Should the Arbitration Be Seated?

The place of arbitration—the arbitral seat—is a critical selection for the parties in drafting an arbitration agreement. The seat must be in a state that is party to the New York Convention in order to obtain the treaty's protections. The seat must also be in a jurisdiction that has a history of pro-arbitration courts: under the New York Convention, the courts of the arbitral seat (and only those courts) may "set aside" the arbitration award.[32] The seat's courts may also provide aid in support of arbitration by compelling arbitration, ordering interim relief or discovery, enforcing arbitration awards, and other aid. Accordingly, the seat's courts should have a well-developed body of law in support of arbitration and a track record of upholding arbitration awards.

Popular arbitral seats include London, Paris, Singapore, Hong Kong, New York, Geneva, and Stockholm.[33]

[c] Should One or Three Arbitrators Hear a Dispute?

Either one arbitrator or a panel of three arbitrators hears a dispute.

A sole arbitrator has certain advantages: fees are lower for one arbitrator rather than three, the possibility of delays due to scheduling conflicts is decreased, and, so long as the arbitrator has availability, drafting the award may be faster because there is no need to build consensus among a panel. As a result, transactions that are likely to involve only small-value disputes may be better served by a sole arbitrator.

A three-arbitrator tribunal is recommended for large-value or other significant disputes. Despite the increased cost, a panel of three arbitrators provides more predictability in the arbitral process and result and decreases the potential for an arbitrary decision—factors that are key for a dispute resolution process that has no right of appeal. Three arbitrators also enable the dispute to be adjudicated by a panel comprised of arbitrators with complementary backgrounds and experiences. For example, a party-appointed arbitrator may be selected for his or her industry experience while a chairperson may be selected for his or her experience as an arbitrator.

[d] How Should Arbitrators Be Selected?

While the arbitral rules provide a default method of constituting the tribunal, not all of these default methods permit the parties to select specific arbitrators. If the default method does not permit party participation in the selection of the arbitrators, the parties likely want to include their own method in the arbitration agreement. One common method for constituting a three-arbitrator tribunal is for each side to appoint a party-appointed arbitrator within a specified time period, and those two arbitrators then appoint a chairperson of the tribunal, again within a specified time period. If a party fails to appoint its party-appointed arbitrator or if the two party-appointed arbitrators fail to agree on a chair, recourse to the administering institution may be had.

[e] What Law Governs the Arbitration?

The parties should be sure to include a governing law provision in their contract so as to designate the substantive law governing the contract and disputes. Failure to

do so will require costly briefing and delay, as the tribunal will be required to select the applicable law.[34] The governing law should be familiar to the party and, if not, the party should confer with local counsel.

To avoid any doubt on the issue, parties with an arbitral seat in the United States may wish to also designate within the arbitration agreement (separately from the governing law section) that federal, and not state, law applies by providing that the Federal Arbitration Act governs the arbitration agreement and any arbitration.

[f] What Language Should the Arbitration Be Held In?

Contracts among parties who use different languages should specify the language to be used in the arbitration. Should the parties fail to do so, the tribunal will be required to select the language to be used, thereby requiring easily avoidable briefing. Though the tribunal will usually select the language of the contract, it will not necessarily do so: under certain rules, the tribunal may consider "all relevant circumstances," not just the language of the contract, in selecting the language.[35]

In designating a language of the arbitration, the parties should consider the languages of the contract, communications between the parties, each party's documents that could be submitted as exhibits in an arbitration (and would therefore likely need to be translated), and the availability of arbitrators able to hear a proceeding in a particular language.

[g] Should Conservatory or Interim Relief Be Expressly Authorized?

Most arbitral rules and governing laws already authorize tribunals and courts, respectively, to award conservatory or interim relief in aid of arbitration.[36] Even though express authorization from the parties is unnecessary to award provisional relief, including it in the arbitration agreement emphasizes that the parties consider access to this form of relief to be important. Accordingly, it may ease a party's ability to obtain interim relief when necessary.

[h] What Courts May Enforce or Vacate an Award?

U.S. courts have interpreted the Federal Arbitration Act to require, for domestic arbitration awards at least, that the parties expressly agree that an arbitration award may be judicially confirmed.[37] Because there is little case law clarifying that this requirement does not apply to international arbitration awards issued under the New York Convention,[38] if an arbitration award may be enforced in the United States, any residual risk from these court decisions should be eliminated by including authorization for any court having jurisdiction over the parties or their assets to enter judgment on an award.

[i] Should the Finality and Binding Nature of the Award Be Made Express?

While arbitration rules make clear that arbitral awards are final and binding,[39] the parties may emphasize their intent that this be so, and that the parties waive their right to appeal or other recourse insofar as such waiver is valid.

[5] Optional Provisions

[a] Should the Arbitration Be Confidential?

While arbitrations frequently remain confidential, it is by no means guaranteed. Only the LCIA, HKIAC, and SIAC impose some confidentiality obligations on the parties;[40] the other major administering institutions only require that the institution and tribunal maintain confidentiality (though the tribunal may issue orders regarding confidentiality).[41]

As a result, where confidentiality is a particular concern for the parties, a provision imposing confidentiality obligations on the parties should be included in the arbitration agreement. The provision should take into account the necessity of submitting awards and other documents in court proceedings in aid of arbitration, in vacatur or confirmation actions, or enforcement actions, and other exceptions to the confidentiality obligation.

[b] Should the Dispute Resolution Process Be Multi-tier?

The parties may impose a multi-tier dispute resolution process, in which parties are required to first negotiate and/or mediate before an arbitration may be commenced. Even if disputes are unlikely to be resolved, the process may assist in narrowing the issues in dispute. So long as a specified time period—30 days, for example—is imposed on this initial step and this time period is triggered by a specific event—such as the submission of a notice of dispute, there is little downside to using a multi-tier dispute resolution process. However, the parties should take care to ensure that they retain the mandatory "shall" language that is required for an arbitration agreement.[42]

[c] Should the Arbitrators Be Required to Have Any Specific Qualifications, Nationality, Background, or Experience?

Parties are best able to evaluate the combination of qualifications, skills, expertise, and background that are preferable in a party-appointed arbitrator after the specific dispute arises. Accordingly, it is generally preferable to omit requirements for arbitrators in the arbitration agreement itself. Doing so reserves maximum flexibility for a party once the dispute arises. However, there are limited circumstances in which it may be advisable to include minimal qualifications. In such instances, the requirements should not be overly specific so that each party retains an array of independent candidates from which it may choose.

[d] Should the Statute of Limitations for Certain Claims Be Limited, If Permissible Under Applicable Law?

If the laws governing the parties and/or their transaction permit the parties to modify the statute of limitations, they may impose time limits requiring that a party commence the arbitration within a specified time period after the claim arises.

[e] Should Summary Disposition Be Expressly Authorized?

Traditionally, arbitration has lacked the dispositive motions that are intrinsic to U.S. litigation, risking that even frivolous claims and defenses proceed to a hearing.

Beginning in 2016, the major administering institutions for commercial disputes began adopting summary disposition procedures, arbitration's equivalent to summary judgment. Currently, SIAC, the SCC, ICC, and HKIAC have done so.[43] While an argument exists that tribunals already have sufficient authority to summarily dispose of claims under other institutions' rules,[44] there is a hesitancy to do so without express authorization.[45] As a result, parties may include a provision expressly authorizing tribunals to determine dispositive issues at any stage of the arbitration.

[f] Should Joinder or Consolidation Be Expressly Authorized?

Because arbitration requires a party's consent to arbitrate a particular dispute with a particular party, disputes involving non-parties to the arbitration agreement present unique challenges in arbitration. Such disputes arise particularly in transactions involving multiple contracts among multiple parties—as two examples, disputes arising from transactions comprised of ancillary agreements between various affiliated entities and construction disputes involving an owner, contractor, and subcontractor. Currently, most multi-contract transactions have separate arbitration agreements or even a mix of arbitration agreements and forum selection clauses, meaning that all parties with an interest in a dispute have not entered into an arbitration agreement with all the other parties. As a result, the dispute cannot be readily consolidated into a single arbitration or interested parties readily joined.

Admittedly, international arbitration continues to grapple with the most efficient means of resolving multi-party, multi-contract disputes. In recent years, institutions have revised their rules in an attempt to address consolidation and joinder; this remains only a partial solution because most rules still require consent of the parties, which is unlikely to exist in multi-contract transactions.[46] Until the issue is resolved more fully, if a transaction involves multiple parties and multiple contracts, parties should take care to address the ability to join parties and consolidate arbitrations in their arbitration agreement. This may be accomplished by a standalone arbitration agreement entered into by all parties to a transaction or, alternatively, all of the arbitration agreements in the various contracts should provide the parties' consent to consolidation and joinder.[47]

[g] Is Security During the Pendency of the Arbitration Necessary?

If there are concerns about a party's ability to satisfy a future arbitration award, in addition to other protections included in the structure of a transaction itself (such as an indemnification escrow account), the parties may include a provision in the arbitration agreement that requires a party to deposit a sum certain in an escrow account in the event that an arbitration is commenced against it. Note that it may be necessary to enforce such a provision in a separate court proceeding.

[h] Should Disclosure Be Limited?

Discovery—"disclosure" in international arbitration—is extremely limited compared to U.S.-style discovery. It is generally limited to documents produced pursuant to requests identifying "narrow and specific" categories of documents and excludes depositions, initial disclosures, and interrogatories.[48] Disclosure from third parties is

uncommon, because tribunals do not have authority to compel disclosure from third parties.[49] Attempts to shoehorn U.S.-style discovery into a process that is neither designed for extensive discovery nor has the judicial tools necessary to obtain it will create unnecessary delay, expense, and frustration for the parties.

Parties may want to limit each other from engaging in expansive disclosure in the arbitration agreement, including by requiring the arbitral tribunal to be guided or bound by the International Bar Association's ("IBA") Rules on the Taking of Evidence in International Arbitration, which have come to embody the disclosure customs and practices in international arbitration.

[i] Should Time Limits Be Imposed on the Arbitral Process?

An arbitration agreement may impose time limits on the arbitral process. Even so, parties should usually avoid imposing strict deadlines beyond those contained in the arbitral rules, particularly if a complex dispute may arise from a transaction. It is difficult to predict the complexity of possible disputes arising out of or relating to a contract and the time necessary to resolve those disputes. Accordingly, a strict time limit risks either rushing the process needed to determine the dispute or, if the award is issued after the time limit, a challenge to the award as being late.

[j] Should Damages Be Limited, and How?

As is customary in contracts, the parties may limit the types of damages that may be awarded in an arbitration and should consider including a clause limiting damages.

[k] What Interest, If Any, Should the Tribunal Award on Monetary Damages?

Arbitrators generally have discretion to award interest at an appropriate rate, and frequently adopt the rate provided in governing law. If permitted under the governing law, and if the parties wish to deviate from the governing law, the parties may specify in their arbitration agreement the interest to be awarded, the date from which it is to be awarded, and whether the interest is simple or compound.

[l] Should the Currency of the Award Be Specified?

If a transaction involves multiple currencies, the parties may specify that an award be satisfied in a specific currency to avoid a later dispute over the issue.

[m] Should Offsets or Other Deductions on Payments Made Pursuant to an Award Be Expressly Permitted or Prohibited?

Where a party may claim the right to offset amounts not at issue in the arbitration from the arbitral award, or where taxes may be imposed on the payment of the award, specifying in the arbitration agreement that the arbitration award must be paid free of offsets, taxes, or other deductions may avoid a later dispute. Alternatively, the agreement may provide that parties may permit offsets, taxes and other deductions.

[n] Should the Tribunal Allocate Costs and Fees (Including Attorneys' Fees) and, If So, How?

Under most arbitral rules, the tribunal has the authority but not the obligation to award costs and fees incurred in the arbitration, including but not limited to, attorneys' fees, expert witness fees, institutional fees, and arbitrator fees.[50] The practice of allocating costs is an important tool for an efficient arbitral process: it disincentivizes dilatory or harassing tactics by threatening to shift the cost of any bad faith or dilatory strategies to the offending party.[51]

Including a provision regarding the allocation of costs and fees permits the parties to emphasize their agreement that the tribunal should allocate costs and fees, and to instruct the tribunal how it should do so. Alternatively, if the parties want each side to bear its own costs and fees, they should include a provision prohibiting the allocation of fees.

[o] How Should the Costs of Enforcing Any Arbitration Award Be Allocated?

The costs and fees incurred in an arbitration do not include any costs and fees incurred in enforcing the arbitration award, and these will not be included in the tribunal's allocation of costs and fees. Where there are distinct concerns that the opposing party will not voluntarily comply with an arbitral award or where enforcement is anticipated to be unusually costly, the parties may include a provision allocating the costs and fees incurred in enforcing the award.

[p] Must the Parties Continue to Perform Any Contractual Obligations During the Arbitration?

In certain industries or under certain types of contracts, disputes are likely to arise while the parties are still performing under the contract. The arbitration agreement may provide that the parties must continue to perform their obligations under the contract while the arbitration is pending.

§ 8.04 Arbitration Rules

Parties must agree on the governing arbitration rules if they have weighed the considerations in favor of arbitration. These rules generally cover, among other things, the selection of the arbitrators, location of the arbitration, discovery rights, conduct of the merits hearing, timing and form of award, award decisional standards, and post-award relief. Parties may draft these rules from scratch, adopt a set of standard rules from an alternative dispute resolution ("ADR") organization, or follow a hybrid approach, adopting some or all of the standard rules and drafting additional ones.

The latter approach allows parties to tailor the rules to their specific interests, carving out rights that will be important to them during and after the arbitration. Because the hybrid approach incorporates standard rules, parties are also assured that issues they might not have considered will still be covered. Knowing standard arbitration rules and the procedural differences among ADR administrators is crucial.

The following chart identifies arbitration rules for complex matters for three of the most commonly used administrators: American Arbitration Association ("AAA");

JAMS, Inc. ("JAMS"); and International Institute for Conflict Prevention & Resolution ("CPR"). The rules basically track the life cycle of an arbitration, from the initiation of the arbitration, through discovery and the merits hearing, and, finally, to the award and post-award process. Differences appear in the areas of confidentiality, arbitrator selection, discovery rights, subpoena powers, form of award and decisional standards, arbitration appeal procedure, and administrative fees. All of these organizations, however, allow parties to modify the rules by agreement.[52]

	AAA	JAMS	CPR
Initiation of Arbitration	Claimant serves "Demand" on respondent and files same with AAA (R-4(a)) or parties file written submission to arbitrate (R-4(d))	JAMS sends "Commencement Letter" confirming intention to arbitrate pursuant to pre-dispute contract or post-dispute agreement (R. 5)	Respondent receives "notice of arbitration" from claimant or parties agree to arbitration post-dispute (R. 3); CPR rules contemplate non-administered arbitration
Confidentiality	Subject to applicable law, hearings are private but persons with direct interests in arbitration are entitled to attend (R-25)	Same as AAA, plus JAMS and arbitrator shall maintain confidentiality of proceeding and award except in connection with judicial challenge to award; arbitrator may issue protective orders (R. 26)	CPR and arbitrator shall maintain confidentiality of proceeding, discovery, and arbitrator decisions except in connection with ancillary judicial proceedings; arbitrator may issue protective orders (R. 11, R. 20)
Relief Available	"[A]ny remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract" (R-47)	Same as AAA (R. 24)	Same as AAA, plus remedy or relief must be "permissible under the law(s) or rules of law applicable to the dispute" (R. 10)
Interim Relief Available	"[A]rbitrator may take whatever interim measures he or she deems necessary, including injunctive	Same as AAA, without separate interim and emergency relief rules (R. 24)	"Tribunal may take such interim measures as it deems necessary, including measures for the preservation of

	AAA	JAMS	CPR
	relief" (R-34); arbitrator authorized to issue interim awards (R-43); AAA "Optional Rules" available in connection with interim and emergency relief (O-1 through O-8)		assets, the conservation of goods or the sale of perishable good" (R. 13)
Claim Requirements	"[D]emand shall contain a statement setting forth the nature of the dispute, the names and addresses of all other parties, the amount involved, if any, the remedy sought, and the hearing locale requested" (R-4)	"Demand for Arbitration" (following initiation of arbitration) shall include "claims [and] remedies sought," and "a short statement of its factual basis" (R. 9)	Notice of arbitration shall include identity of parties, demand for arbitration, text of arbitration agreement, nature of claim, relief or remedy sought, and identity of arbitrator if claimant permitted to select (R. 3)
Response Requirements	"[A]nswering statement" may include counterclaim; if no answering statement filed, respondent deemed to deny claim (R-4)	"[R]esponse" shall include defenses, counterclaim and "a short statement of its factual basis" (R. 9)	"[N]otice of defense" shall respond to allegations in notice of arbitration, and include nature of defense, identity of arbitrator if respondent permitted to select, and any counterclaim (R. 3)
Amended Claims and Responses	Allowed up until appointment of arbitrator, who thereafter must approve same (R-6)	Same as AAA (R. 10)	Same as AAA (R. 3)
Selection and Number of Arbitrators	AAA sends parties identical list of 10 candidates from the AAA National Roster; if parties cannot agree from list, they strike objectionable names and rank remainder in order	JAMS sends parties identical list of at least five candidates in one arbitrator cases and 10 candidates in tripartite panel cases; parties' strikes limited to two and three	CPR sends parties identical list, from the CPR Panels, of not fewer than five candidates in one arbitrator cases and not less than seven candidates in multi-arbitrator cases (R. 6);

	AAA	JAMS	CPR
	of preference, following which AAA selects candidates to invite to serve (R-11, L-2); three arbitrators shall hear dispute if claims involve at least $1M; otherwise, only one arbitrator shall be appointed (L-2)	names, respectively (R. 15); one arbitrator cases are standard (R. 7)	parties may opt for "screened" selection whereby they each designate and rank three candidates and CPR solicits interest of candidates in order of preference without advising candidates which party designated them; three-arbitrator "Tribunal" cases are standard, composed of two arbitrators selected by parties and a third chosen by the two already selected (R. 5)
Jurisdiction	Arbitrator may rule on existence and validity of arbitration agreement and underlying contract; objections to jurisdiction must be made no later than answering statement (R-7)	Arbitrator may rule on existence and validity of arbitration agreement (R. 11); "jurisdictional challenges" shall be included in "response" (R. 9)	Same as AAA (R. 8)
Hearing Locale	Parties may agree on location; if any party requests a particular locale and no objections are filed within 15 days, hearing will be held at requested locale; in absence of agreement, AAA determines locale (R-10)	Arbitrator decides in consultation with parties (R. 19)	Unless agreed by parties, Tribunal shall decide "based upon the contentions of the parties and the circumstances of the arbitration" (R. 9)
Pre-Hearing Conferences	Administrative conference held with AAA to discuss nature of dispute, length and scheduling of	Administrative conference may be held with JAMS to discuss procedural matters (R. 6);	Tribunal shall hold pre-hearing conference to discuss narrowing of issues, fact stipulations, settlement, discovery

	AAA	JAMS	CPR
	hearing, arbitrator selection, and settlement (L-1); preliminary hearing held with arbitrator to discuss service of detailed claim/defense pleadings with legal authorities, fact stipulations, discovery needs, exchange of hearing exhibits, identity of witnesses and expected testimony, use of sworn statements and depositions, hearing schedule, subpoena issues, and settlement; preliminary hearing topics may be memorialized in a "Scheduling and Procedure Order" (L-3)	preliminary conference may be held with arbitrator to discuss exchange of documents relevant to dispute, identity of witnesses, expert reports, discovery needs, clarification of pleadings, hearing schedule, motion and briefing practice, hearing exhibits, and form of award (R. 16-R. 17)	needs, pre-hearing briefs, hearing schedule, and experts (R. 9)
Discovery	Parties shall cooperate in exchange of documents and information; parties may conduct discovery as agreed by parties, subject to limitations as arbitrator deems appropriate; upon good cause shown, arbitrator may order depositions or interrogatories (L-4)	Parties shall cooperate in exchange of documents and information; each party may take one deposition of opposing party or individual under control of same; additional depositions are at discretion of arbitrator (R. 17)	"Tribunal may require and facilitate such discovery as it shall determine is appropriate in the circumstances" (R. 11)

	AAA	JAMS	CPR
Evidentiary Standard	Evidence must be "relevant and material" but "[c]onformity to legal rules of evidence shall not be necessary"; arbitrator "shall take into account applicable principles of legal privilege" and determine "admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant" (R-31)	Same as AAA, but arbitrator "shall apply applicable law relating to privileges and work product" and "may be guided in [evidentiary] determination[s] by principles contained in the Federal Rules of Evidence or any other applicable rules of evidence" (R. 22)	Same as AAA, but "Tribunal shall apply any lawyer-client privilege and the work product immunity" (R. 12)
Subpoenas	Arbitrator may issue upon request (R-31)	Same as AAA and applicable to subpoenas for attendance of witnesses or production of documents prior to or at hearing; arbitrator may conduct hearings at any location in connection with same (R. 21, R. 19(c))	Same as AAA under the previous commentary to Rule 11; plus arbitrator may hold hearings at locations within subpoena power (commentary to the R. 11 has not been published)
Dispositive Motions	"[A]rbitrator may allow the filing of and make rulings upon a dispositive motion only if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case" (R-33)	Arbitrator may permit any party to file a "Motion for Summary Disposition" on a claim or issue (R. 18)	"[A] party may make a preliminary application to the Tribunal to file a motion for early disposition of issues, including claims, counterclaims, defenses, and other legal and factual question" (R. 12.6)

	AAA	JAMS	CPR
Hearing Procedure	Claimant and respondent present evidence in turn, subject to arbitrator discretion to expedite resolution and direct order of proof, bifurcate proceedings, and order parties to focus on decisional issues; oral hearings may be waived (R-30); witness evidence may be offered in written form (R-32)	Generally same as AAA, with arbitrator determining "order of proof, which will generally be similar to that of a court trial" and allowing closing arguments and/or post-hearing briefs (R. 22-R. 23)	Generally same as AAA, "Tribunal shall determine the manner in which the parties shall present their cases. Unless otherwise determined by the Tribunal or agreed by the parties, the presentation of a party's case shall include the submission of a pre-hearing memorandum" (R. 12)
Reopening Hearing	Hearing may be reopened before award on arbitrator's initiative or upon application of party (R-36)	Same as AAA, but request of party must be for "good cause shown" (R. 22)	Not mentioned
Award	Default awards: none, evidence must still be presented (R-29)	Default awards: same as AAA (R. 22)	Default awards: same as AAA (R. 16)
	form: "bare" award without reasoning is default form (R-42)	form: award containing concise statement of reasons is default form (R. 24)	form: reasoned award is default form (R. 15)
	time limit: no later than 30 days from close of hearing (R-41)	time limit: same as AAA (R. 24)	time limit: within two months after the close of the proceedings (R. 15.8)
	decision vote: by majority (R-42)	decision vote: same as AAA (R. 24)	decision vote: same as AAA (R. 15)
	decision standard: "just and equitable" (R-43)	decision standard: "rules of law and equity" deemed appropriate (R. 24)	decision standard: "substantive law(s) or rules of law" deemed appropriate (R. 10)

	AAA	JAMS	CPR
	expenses, ADR fees, and arbitrator compensation: included in award but may be apportioned among parties as appropriate (R-43)	expenses, ADR fees, and arbitrator compensation: includable and allocable (R. 24)	expenses, ADR fees, and arbitrator compensation: same as AAA (R. 17)
	interest: includable, at rate and from date as appropriate (R-43)	interest: includable, at rate and from date as appropriate, if authorized under arbitration agreement or applicable law (R. 24)	interest: same as AAA (R. 10)
	attorney fees: includable if parties agree or request same or authorized by law (R-43)	attorney fees: includable if authorized under arbitration agreement or applicable law (R. 24)	attorney fees: includable "to such extent as the Tribunal may deem appropriate" (R. 19)
Post-Award Challenges	No redetermination on merits, only corrections for clerical, typographical, or computational errors (R-46); judgment upon award may be entered in any court with jurisdiction (R-48)	Award may be corrected for computational, typographical, or "other similar error[s]" (R. 24); "[p]roceedings to enforce, confirm, modify, or vacate" award governed by Federal Arbitration Act or applicable state law (R. 25); parties may choose optional JAMS appeal process before three neutral members (R. 34; JAMS Optional Arbitration Appeal Procedure)	Generally same as JAMS without reference to award confirmation, modification, or vacatur, but including optional CPR appeal process before three former federal judges (R. 15 and CPR Arbitration Appeal Procedure)

	AAA	JAMS	CPR
Sanctions	"[A]rbitrator may, upon a party's request, order appropriate sanctions where a party fails to comply with its obligations under these rules or with an order of the arbitrator"; may enter an adverse inference, but not a default. (R-58(a))	Arbitrator may sanction for rules violations, including determining issues adversely to violating party (R. 29)	Similar to JAMS, "Tribunal may impose a remedy it deems just" against a non-complying party, "including an award on default" (R. 16)
ADR Fees	"[I]nitial filing fee" due when claim filed, and "final fee" due at time of hearing, both based on the size of the claim (e.g., $1M claim cost $5,500 for filing and $6,825 is the final fee) (AAA fee schedule)	"[F]iling fee" of $1,500 and case management fee equal to 12% of all profession fees in the arbitration (JAMS fee schedule)	Standard "filing fee" of $1,750 and an "administrative fee" based on the size of the claim (e.g., up to $1M cost $1,750 and administrative fee of $8,000) (CPR fee schedule)

As the foregoing chart illustrates, the rules of the three organizations are very similar and the differences are largely a matter of nuance. Perhaps the principal distinction is that the AAA rules default to a "bare award" based upon what is "just and equitable," while the JAMS and CPR rules generally require a "reasoned" award that takes into account applicable law. The JAMS and CPR rules also provide the option of an arbitral appeal process before three neutrals who may be retired judges. The CPR rules also differ because they assume an "ad hoc" proceeding. Parties should be cognizant of these differences when drafting agreements to arbitrate.

§ 8.05 Managing the Arbitral Process

As is expected from a dispute resolution process that aims to craft a procedure specific to each dispute, the potential forms an arbitration may take are myriad. The process varies not only based on the dispute, but is also informed by the legal backgrounds of the parties, counsel and arbitrators; the applicable rules; and the law of the seat.

Similar to the arbitration agreement, the arbitral process may be considered to have minimal requirements to produce an enforceable award under the New York Convention. The arbitration must (i) provide each party with the opportunity to present its case, (ii) fall within the tribunal's jurisdiction, (iii) comply with the parties' arbitration agreement, and (iv) comply with the law of the seat's public policy requirements.[53] Arbitral rules then give the tribunal wide berth to conduct the proceedings as

they deem fitting,[54] requiring that tribunals provide a process that is "expeditious and cost-effective[,]"[55] "impartial" and "efficient" while "giving each party an equal and reasonable opportunity to present its case."[56]

An overview of the significant phases in an arbitration are described below: submission of the pleadings, applications for emergency measures and constitution of the tribunal; written submissions and disclosure; the hearing; and the award. This overview focuses on aspects that impact the efficiency and cost of an arbitration, though these aspects must be balanced with a party's need to satisfy its burden of proof.

[1] Pleadings, Emergency Measures, and Constitution of the Tribunal

[a] Initiation of the Arbitration

The process of initiating an arbitration is dictated by the arbitration agreement. If the arbitration is administered, the parties' designated arbitration rules detail the steps to initiate an arbitration; if the arbitration is ad hoc, either the arbitration agreement itself or the designated rules will do so.

In comparison to litigation's formal procedures to file and serve a complaint, the initiation of an arbitration is streamlined: arbitration rules typically require submitting a "request for arbitration" (or, for ICDR, SIAC, and HKIAC arbitrations, a "notice of arbitration"[57]) to the administering institution in hard copy, by email or, with increasing frequency, via the institution's online portal. The request is accompanied with or followed by the institution's initial fee, and either the claimant or the administering institution is required to send the request for arbitration to the respondent.[58] While less formal, care must still be taken to fulfill the requirements to commence an arbitration, particularly if a time bar for the claims is near or, as described below, the request must name the claimant's party-appointed arbitrator.

[i] The Claimant's Request for Arbitration

Care must also be taken to satisfy all of the rule's requirements for the request for arbitration. Broadly, requests must, *inter alia*, list the parties' and counsels' contact information; provide the arbitration agreement and specify the number of arbitrators, arbitral seat, governing law, and other procedural requirements; and describe the claims and relief sought. There are minimal requirements for the description of claims and relief: the SCC and HKIAC require only "a summary of the dispute" and "a description of the general nature of the claim and an indication of the amount involved, if any[,]" respectively.[59] The ICC provides slightly more guidance, requiring "a description of the nature and circumstances of the dispute giving rise to the claims and of the basis upon which the claims are made."[60]

While the requirements are minimal, the claimant is free to provide as much detail and supporting documentation as it wants. The decision of how much detail to include should take into account the party's strategy in pursuing arbitration—whether to, for example, spur settlement negotiations or pursue its claims fully—and it should take into account a cost/benefit analysis of a detailed description of its claims as opposed to a summary. Even though detailed requests are costlier to prepare initially, the detail may enable the parties and tribunal to focus the arbitration on key issues earlier in the

proceeding; enable a more tailored procedure; serve as the basis for submissions on the merits; and further settlement negotiations by enabling the respondent to assess the claims' strengths. However, detailed requests are not always possible nor preferable: a summary saves fees and time, at least up-front; may be necessary to meet any time bars to claims; and provides flexibility to develop theories and strategies after previewing the respondent's defenses.

Notably, some rules require a claimant to nominate its party-appointed arbitrator in the request for arbitration and, if any claimant that fails to do so potentially waives the right to appoint an arbitrator.[61] Particular care must be taken to ensure that a party does not unintentionally waive this valuable right.

[ii] The Respondent's Answer

After receiving the claimant's request for arbitration, the respondent submits its answer (or, in LCIA and SIAC arbitrations, a "response") and any counterclaims. It has anywhere from 14 to 30 days to do so after it receives the request, though, similar to litigation, extensions are usually freely given.[62]

As with the request for arbitration, the answer must contain the requirements mandated in the arbitral rules, including contact information for the parties and counsel, comments on the arbitration agreement, a response to the asserted claims and requested relief, and a description of any counterclaims and relief. Each institution's rules may have other vital requirements for the answer, including the appointment of the party-appointed arbitrator.[63]

Just as with the request for arbitration, arbitral rules provide but minimal requirements for the response to the claims and the description of any counterclaims, and the respondent may provide as little or as much detail and supporting documentation as it wants. The level of detail in the claimant's request for arbitration may guide this decision. In other instances, the detail included may reflect the reality of the deadline to file the answer or the need to continue a deep analysis of the claims and defenses after the filing deadline. Even so, a more detailed answer may permit a respondent to showcase strong or complete defenses, which could potentially spur settlement negotiations and persuade the tribunal that the claims lack merit, or lay the groundwork for an application for summary disposition or preliminary determination.

[iii] Amending the Pleadings

Parties may amend or supplement their claims and defenses. Usually, leave of the tribunal is required. In determining whether leave should be granted, the tribunal may consider factors such as the delay in asserting the new claims and defenses, prejudice to the other side, and other circumstances.[64] Accordingly, a party should not delay in requesting leave to amend and do so as early in the proceedings as possible.

[b] Emergency Measures

At times, a party requires emergency or interim relief immediately upon commencing the arbitration, before the tribunal is constituted. Historically, a party would have had to seek such relief in courts; over the past decade, however, administering institutions have revised their rules to allow for parties to also seek emergency relief within

the arbitral process itself. While the exact mechanisms vary, broadly, a party may apply for emergency measures—under some rules, even before commencing the arbitration[65]—and the institution appoints a sole emergency arbitrator as quickly as within 24 hours of receiving the application.[66] After providing the parties reasonable opportunity to be heard in a procedure established by the emergency arbitrator, he or she issues an order on the emergency application, frequently within a set period of time.[67] While the emergency arbitrator may generally modify or vacate the interim award, he or she has no further authority once the tribunal is constituted and the tribunal is not bound by the emergency arbitrator's order. Once constituted, it may modify or vacate the order.

[c] Constitution of the Tribunal

The constitution of the tribunal implicates the most important strategic decisions in the arbitration. The parties are, after all, selecting the adjudicators of their dispute in a process that has no right of appeal. In choosing among candidates, a party should review candidates' curriculum vitae, writings, and seminars; canvass colleagues for their knowledge of and experience with the candidates; more recently, review information about the candidates in new online research tools; and interview candidates. While there are many factors that should be considered in choosing among candidates, there are three qualities that are particularly relevant to the maintenance of an efficient proceeding.

Both the party and candidate should conduct a thorough conflicts check to confirm the candidate's independence and impartiality. This minimizes challenges to the arbitrator, which may be asserted at any time in the proceeding and create delays in the process. The IBA has developed guidelines that are a helpful reference in evaluating potential conflicts of interest. Under the guidelines, which aim to establish universal standards for disclosing and evaluating conflicts of interest, an arbitrator "shall decline to accept an appointment . . . if he or she has any doubt as to his or her ability to be impartial or independent."[68] Doubts as to the ability to be impartial or independent exist if there are "facts or circumstances . . . which, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances, would give rise to justifiable doubts as to the arbitrator's impartiality or independence[.]"[69] The guidelines then identify specific facts that give rise to conflicts of interest, as well as those that do not.[70]

Additionally, a party should verify that candidates have sufficient availability to give the arbitration the attention it requires. This is done as part of an *ex parte* interview, and care should be taken that the interview itself does not create a conflict of interest. The IBA has also provided guidelines addressing the appropriate topics for these interviews—broadly, a party may confirm a candidate's "expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest."[71] While a "general description of the dispute" may be provided, parties are not permitted to "seek the views" of the candidate "on the substance of the dispute."[72]

Finally, a party should ensure that at least one arbitrator—and usually the chairperson of the tribunal—has significant experience as an arbitrator and a reputation for effectively managing arbitrations, thereby enabling him or her to manage the proceedings in an efficient manner. Such experience is generally vital for the chairperson of the tribunal, who guides the arbitration's procedure.

[2] Written Submissions and Disclosure

Soon after the constitution of the tribunal, the parties and tribunal hold a preliminary conference, frequently by telephone, to establish a procedure for the arbitration, set a schedule, and coordinate logistics. Before this, a party may submit correspondence on issues it deems relevant to establishing the procedure or on topics requested by the tribunal. In an ICC arbitration, the tribunal also prepares (with assistance from the parties) the Terms of Reference, which contain information about the arbitration and summarize the parties' claims and defenses.[73]

[a] Early Determination of Issues

In preparing for the preliminary conference, parties should assess whether there are any threshold or distinct issues that would resolve part or all of the parties' dispute if they were resolved early in the proceeding. It may be most efficient and cost-effective for the tribunal to determine these issues in a preliminary phase, either preliminary determination, bifurcated proceedings or summary disposition. These procedures can be used to determine threshold issues that must be resolved before the arbitration can proceed, such as the scope of the arbitration agreement and the tribunal's jurisdiction. At times, interpreting a contractual provision or law may facilitate settlement by resolving key differences or focus the parties and tribunal on key issues early on in the proceeding. At other times, determining questions of liability before turning to damages may streamline complex damage calculations.

[b] Interim Relief

A party should also assess whether interim relief is necessary to preserve the status quo—to, for example, preserve evidence or assets, protect trade secrets, or prevent harm to an ongoing business. Arbitrators have broad authority to issue interim awards,[74] and may even grant equitable relief that a court cannot.[75] Indeed, rather than impose the "irreparable harm" standard for provisional relief in U.S. courts, many tribunals "instead require that there be a material risk of serious damage to the plaintiff."[76]

[c] Written Submissions

After the constitution of the tribunal and early determination of issues, if any, the arbitration quickly pivots to the merits phase. In this phase, a party submits substantial written submissions detailing both the factual and legal basis of its claims or defenses and frequently supported by exhibits, witness testimony; and expert reports.[77] These written submissions have various names depending on the institution—memorial and counter-memorial, statement of case and statement of defense, reply, sur-reply, and rejoinder—and may vary slightly based on the administering institution, legal background of the parties and counsel, and the needs of the case. In most cases, they represent a significant undertaking and, in complex disputes, may be accompanied by hundreds of exhibits.

It may be said that two rounds of briefing, in which both sides submit two memorials, is customary in international arbitration. However, deviations from the norm are common[78] and the parties and tribunal should evaluate the appropriate number of written submissions for a specific dispute and consider means of avoiding overly

lengthy or repetitive briefing. The tribunal may, for example, impose page numbers, limit the second round of briefing to issues raised in the opposing party's immediately preceding brief, or inform the parties of areas of focus.

A party may submit testimony in the form of witness statements, to provide context to the dispute, corroborate documentary evidence, or fill in gaps left by documentary evidence. These written statements have the benefit of replacing direct examination at the hearing. However, preparing witness statements can be costly and time-consuming and so each statement and its contents must be justified. Parties should scrutinize the necessity of each witness, eliminate overlapping testimony between witnesses, and minimize testimony regarding undisputed facts or information unnecessary to satisfy a party's burden of proof.

Expert testimony is also frequently submitted in the form of expert reports.[79] Containing the scope of expert reports and maintaining testimony within the subject of the experts' expertise is vital.

[d] Disclosure

Disclosure in international arbitration stands in marked contrast to U.S.-style discovery. With rare exception, it is limited to the exchange of documents in response to "narrow and specific" document requests[80] and—particularly when the tribunal and counsel are from a legal tradition that does not have discovery—there is no disclosure at all. Nonetheless, the arbitral rules of the major administering institutions uniformly provide for limited document disclosure.[81] While a party should invoke these rules to seek the discovery necessary to vigorously pursue its claims and defenses, it—and particularly those entities trained in U.S.-style discovery—should refrain from unnecessarily expanding disclosure into a costly and time-consuming expedition for all relevant documents on an issue.

Certain disputes require broad disclosure: in some instances, a party will not be able to otherwise satisfy its burden of proof without documents that are in the other side's control. In a significant portion of disputes, however, a party may balance the costs and delay associated with disclosure with the required scope of disclosure, and work to limit disclosure to those documents that are actually needed from the opposing party to present its case appropriately. This is possible, at least in part, because disclosure frequently occurs after the first round of briefing—after both sides have presented their full case and submitted as exhibits the documents they believe most relevant to their position. As a result, a party is well-positioned at this stage to identify the documents it actually needs from the opposing party to meet its burden of proof. Reflective of this, the IBA Guidelines on the Taking of Evidence in International Arbitration, which have come to represent a standard for disclosure in international arbitration, require not only that the documents sought in disclosure be "relevant[,]" but also "material to the outcome of the case[.]"[82]

Disclosure requests are frequently made in the form of a "Redfern Schedule," named for its creator, Alan Redfern.[83] A Redfern Schedule charts, in four to five columns, the document request; a short description of how the documents requested are relevant and material to the dispute's outcome; a short description of the other party's objections, if any; potentially, a short description of the reply to those objections, and the tribunal's decision on the request.

[3] Hearing and Post-Hearing Submissions

As with a court trial, arbitral hearings are a costly phase of the dispute resolution process, requiring significant preparation. Significant consideration should be given to ways of maintaining a cost-effective hearing, and the means of doing so contain similarities to the effective management of a trial in litigation.

In contrast to litigation, the parties have the option to forgo an arbitral hearing and have the tribunal determine the matter on the papers. This option may be suitable for arbitrations in which the issues in dispute are limited to questions of law, the claims are low-value, an award is needed on an expedited basis, or the respondent did not appear in the arbitration. In other circumstances, however, the opportunity for the party to present its case and cross-examine the other side's experts and witnesses is extremely valuable.

Assuming a hearing is warranted, prior to the hearing, the tribunal and parties will likely hold a teleconference to plan the hearing. The flexibility inherent in arbitration is evident at this planning stage as those involved work to reach agreement on an effective procedure to follow at the hearing. There are significant logistics to plan: in an arbitration, even the hearing space, court reporters and translators must be reserved.[84] Without a public docket, the tribunal will likely ask the parties to assemble all submissions—and particularly every exhibit—into a hearing bundle or similar means of organization.

The teleconference will also address how the hearing will proceed. The tribunal may ask the parties to focus the hearing on specific issues; it may also ask the parties to reach agreement on a list of disputed issues. The parties may propose means to streamline testimony: witness statements may serve as a witness's direct testimony, or the direct examination of expert witnesses may take the form of presentations rather than questioning. The parties may divide the total hearing time between them and use a chess clock to ensure the time during the hearing is evenly shared. Each side's experts on a topic may testify together, in which the parties and tribunal may ask questions of either or both, a form of testimony called witness conferencing or "hot tubbing." Further, the parties may dispense with closing argument and instead submit post-hearing briefing or other written submissions requested by the tribunal.

After the hearing and any post-hearing submissions, the tribunal closes the proceedings, thereby preventing a party from submitting further evidence without the tribunal's leave. The tribunal then deliberates and drafts its reasoned award, which summarizes the parties' arguments, details the tribunals' analysis, and states the relief awarded.

[4] The Award

Upon issuance of the award, the tribunal becomes *functus officio*, or without authority to act, with limited exception, and the award is binding and enforceable on the parties. Reflective of the arbitration's fundamental advantages over litigation, a losing party has few options available to change an unfavorable opinion: it party has 30 days in which to seek a clarification or interpretation of the award[85] and 90 days in which to serve a petition to vacate.[86]

§ 8.06 Conclusion

Arbitration has become the preferred—if not necessary—means of resolving disputes arising from complex cross-border transactions because it provides parties a neutral forum in which to resolve their disputes and relative ease in enforcing awards internationally. It also provides parties the flexibility to create a bespoke dispute resolution process tailored to the particular transaction and specific dispute.

With this flexibility, however, comes the responsibility to manage the process to ensure it remains efficient and cost-effective. Careful management must begin while the parties are negotiating the transaction: consideration must be given to the arbitration agreement so that it is enforceable and empowers the parties and tribunal with the ability to adapt to the issues that arise over the course of any dispute. Then, once a dispute arises, the arbitral process must be carefully tailored to resolve specific disputes efficiently and cost-effectively. This management can translate directly into a more efficient dispute resolution process.

Notes

[1] Sarah E. Reynolds is partner and Allison M. Stowell is an associate in Mayer Brown's Litigation practice.

[2] This chapter does not endeavor to address different considerations that may arise in consumer and employment arbitration, but not in domestic and international commercial arbitration.

[3] *See, e.g.*, HKIAC Rules, Art. 11.1 ("An arbitral tribunal confirmed under these Rules shall be and remain at all times impartial and independent of the parties."); ICC Rules, Art. 11.1 ("Every arbitrator must be and remain impartial and independent of the parties involved in the arbitration."); LCIA Rules, Art. 5.3 ("All arbitrators shall be and remain at all times impartial and independent of the parties; and none shall act in the arbitration as advocate for or representative of any party."); SCC Rules, Art. 18(1) ("Every arbitrator must be impartial and independent."); SIAC Rule 13.1 ("Any arbitrator appointed in an arbitration under these Rules, whether or not nominated by the parties shall be and remain at all times independent and impartial.").

[4] New York Arbitration Convention, *Contracting States*, http://www.newyorkconvention.org/countries.

[5] New York Convention, Art. II (1958).

[6] *Id.* at Art. III (emphasis added).

[7] *Id.* at Art. V.

[8] *Id.*

[9] Queen Mary University of London, *2008 International Arbitration Survey: International Arbitration: Corporate Attitudes and Practices*, 8 (2008) (http://www.arbitration.qmul.ac.uk/media/arbitration/docs/IAstudy_2008.pdf).

[10] *Id.* at 3.

[11] 9 U.S.C. §§ 201–208.

[12] UNCITRAL Model Law on *International Commercial Arbitration* (1985), with amendments as adopted in 2006, *Status*, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html; UNCITRAL Model Law (2006), http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

[13] *See, e.g.*, ICC Rules Art. 26.3 ("Save with the approval of the arbitral tribunal and the parties, persons not involved in the proceedings shall not be admitted."); ICDR Rules, Art. 23.6 ("Hearings are private unless the parties agree otherwise or the law provides to the contrary.").

[14] ICC Rules, Art. 22.1.

[15] *Id.* at 22.2.

[16] The finality of arbitral awards is encapsulated within the rules. Article 26.8 of the LCIA Rules, for example, states that "[e]very award . . . shall be final and binding on the parties. The parties undertake to carry out any award immediately and without any delay. . . ."

[17] The School of International Arbitration, Queen Mary University of London, *2018 International Arbitration Survey*: *The Evolution of International Arbitration*, 7–8 (2018) (https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2018-18.pdf) ("'Cost' continues to be seen as arbitration's worst feature, followed by 'lack of effective sanctions during the arbitral process,' 'lack of power in relation to third parties' and 'lack of speed.'").

[18] ICC, *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration*, ¶¶ 118–122 (Jan. 1, 2019) (https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf).

[19] *See* section 8.03 *infra.*

[20] In limited circumstances, non-parties to an arbitration agreement may be considered parties to the agreement. *See, e.g.*, Thomas-CSF, S.A. v. Am. Arbitration Ass'n, 64 F.3d 773, 776 (2d Cir. 1995) (a non-party to an arbitration agreement may be compelled to arbitrate on five limited grounds: 1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel).

[21] *See* section 8.03[5][f] *infra.*

[22] Granite Rock Co. v. Int'l Bhd of Teamsters, 130 S. Ct. 2847, 2857 (U.S. 2010) (internal citation omitted); *see also* 1 Gary B. Born, *International Commercial Arbitration* 250 (2d ed. 2014) (stating that no other national court has held a contrary position).

[23] *See* New York Convention Art. V(1)(c).

[24] *See* 9 U.S.C. § 2.

[25] *See, e.g.*, Collins & Aikman Prods. Co. v. Bldg. Sys., Inc., 58 F.3d 16, 23 (2d Cir. 1995).

[26] *See* ICC Rules, Art. 23.

[27] The School of International Arbitration, Queen Mary University of London, *supra* note 16, at 9, 13.

[28] Paul D. Friedland, Arbitration Clauses for International Contracts 43 (2007).

[29] *See* ICC Rules, App. III (https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_c2).

[30] *See* ICDR International Arbitration Fee Schedule (http://info.adr.org/internationalfeeschedule/).

[31] *See* Schedule of LCIA Arbitration Costs (http://www.lcia.org//Dispute_Resolution_Services/schedule-of-costs-lcia-arbitration.aspx).

[32] *See* New York Convention, Art. V.1(e).

[33] Hearings need not be physically held in the arbitral seat if inconvenient, though they usually are.

[34] *See, e.g.*, ICC Rules, Art. 21.

[35] *Id.* at Art. 20.

[36] *See, e.g.*, *id.* at Art. 28, SIAC Rule 21.

[37] *See* 9 U.S.C. § 9; *Stone & Webster, Inc. v. Triplefine Int'l Corp.*, 118 F. App'x 546, 548 (2d Cir. 2004).

[38] *See Stone & Webster*, 118 F. App'x at 548–549.

[39] *See* ICDR Rules, Art. 30.1 ("Awards . . . shall be final and binding on the parties. . . . The parties shall carry out any such award without delay and, absent agreement otherwise, waive irrevocably their right to any form of appeal, review, or recourse to any court or other judicial authority, insofar as such waiver can validly be made.").

[40] *See* LCIA Rules, Art. 30; HKIAC Rules, Art. 45; and SIAC Rule 39.

[41] *See, e.g.*, ICC Rules, Art. 22.3 (authorizing the tribunal to "make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information[]"); *see also* ICDR Rules, Art. 37 (similar); SCC Rules, Art. 3.

[42] *See* § 8.03, *supra*.

[43] *See* SIAC Rule 29; SCC Rules, Art. 39; ICC, *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration*, 10 (Oct. 30, 2017) (https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf); HKIAC Rules, Art. 43.

[44] *See, e.g.*, ICDR Rules, Art. 20.

[45] *See, e.g.*, New York Convention, Art. V(b).

[46] *Compare* ICDR Rules, Art. 9; LCIA Rules, Art. 22.1; HKIAC Rules, Art. 29; SIAC Rule 7 *with* Chinese International Economic and Trade Arbitration Commission Arbitration Rules, Art. 19.

[47] Friedland, Arbitration Clauses for International Contracts at 136.

[48] *See, e.g.*, IBA, *IBA Rules on the Taking of Evidence in International Arbitration* Art. 3(3)(a) (May 29, 2010).

[49] *See, e.g.*, International Commercial Disputes Committee and the Arbitration Committee of the New York City Bar Association, *A Model Federal Arbitration Summons to Testify and Present Documentary Evidence at an Arbitration Hearing* (May 2015) (https://www2.nycbar.org/pdf/report/uploads/20072911-ABCNYModelArbitralSubpoena.pdf).

[50] *See, e.g.*, ICC Rules, Art. 38; ICDR Rules, Art. 34; HKIAC Rules, Art. 34.

[51] *See, e.g.*, ICC Rules, Art. 38(5) (authorizing the tribunal to "take into account such circumstances it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner[]").

[52] American Arbitration Association, *Commercial Arbitration Rules and Mediation Procedures* (R-1(a)) (Oct. 2013), https://www.adr.org/sites/default/files/CommercialRules_Web_FINAL_1.pdf; JAMS, *Comprehensive Arbitration Rules & Procedures* (Rule 2) (July 2014), https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_comprehensive_arbitration_rules-2014.pdf; Int'l Inst. For Conflict Prevention & Resolution, *2019 Administered Arbitration Rules* (Rule 1.1) (Mar. 2019), https://www.cpradr.org/resource-center/rules/arbitration/administered-arbitration-rules-2019.

[53] *See* New York Convention, Arts. V.1(b)–(d), V.2(b).

[54] *See, e.g.*, ICDR Rules, Art. 20 ("Subject to these Rules, the arbitral tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.").

[55] ICC Rules, Art. 22.

[56] SCC Rules, Art. 23.

[57] *See* ICDR Rules, Art. 2; SIAC Rule 3; HKIAC Rules, Art. 4.

[58] In contrast to litigation's service of process, arbitration rules provide a variety of methods to submit a request for arbitration to the respondent, if the claimant is responsible for doing so. Article 10 of the ICDR Rules, for example, provides that, unless otherwise agreed by the parties, the claimant may submit the notice of arbitration to the respondent by "any means of communication that allows for a record of its transmission including mail, courier, fax, or other written forms of electronic communication addressed to the party or its representative at its last-known address, or by personal service." ICDR Rules, Arts. 10, 2.

[59] SCC Rules, Art. 6; HKIAC Rules, Art. 4.

[60] ICC Rules, Art. 4.

[61] *See* ICC Rules, Arts. 4(1)(g), 12(4); LCIA Rules, Art. 1.1(v); HKIAC Rules, Art. 8.1(a).

[62] *See* SIAC Rule 4 (14 days); LCIA Rules, Art. 2 (28 days); ICC Rules, Art. 5 (30 days); HKIAC Rules, Art. 5 (30 days); ICDR Rules, Art. 3 (30 days); SCC Rules, Art. 9 (time set by Secretariat).

[63] *See* ICC Rules, Arts. 5(1)(e), 12(4); LCIA Rules, Arts. 2.1(v), 2.4.

[64] *See* HKIAC Rules, Art. 18; ICC Rules, Art. 23(4); ICDR Rules, Art. 9; LCIA Rules, Art. 22(1); SCC Rules, Art. 30; SIAC Rule 20.5.

[65] *See* ICC Rules, App. 1 Art. 1(6); SCC Rules, App. II Art. 9.

[66] *See* ICDR Rules, Art. 6; SCC Rules, App. II, Art. 4 (1).

[67] *See* HKIAC Sched. 4 Art. 12 (14 days); ICC Rules, App. 1 Art. 6(4) (15 days); SCC Rules, App. II Art. 8 (5 days); SIAC Sched. 1 Rule 9 (14 days); LCIA Rules, Art. 9B 9.8 (14 days); *see also* ICDR Rules, Art. 6(3) (requiring the emergency arbitrator to set a schedule to hear the emergency relief application within two days of his or her appointment).

[68] IBA, *IBA Guidelines on Conflicts of Interest in International Arbitration*, Guideline (2).

[69] *Id.*

[70] *See, e.g.*, HKIAC Rules, Art. 11.6; ICC Rules, Art. 14.

[71] *IBA Guidelines on Party Representation in International Arbitration*, Guideline 9(a), (c); *see also, e.g.*, HKIAC Rules, Art. 11.5; SIAC Rule 13.

[72] *IBA Guidelines on Party Representation in International Arbitration*, Guideline 9(d), Comments to Guidelines 7–8.

[73] ICC Rules, Art. 23.

[74] *See, e.g.*, Ecopetrol S.A. v. Offshore Exploration and Production LLC, 46 F.Supp.3d 327 (S.D.N.Y. 2014).

[75] *See, e.g.*, Gary B. Born, International Commercial *Arbitration* § 17.02[G] (explaining the provisional relief that is available in international arbitration and the standards that may be applied in awarding such relief, and stating, "[a]n international arbitral tribunal is not a national court and its powers, and the standards for exercising those powers, are not coterminous with national courts. Rather, the arbitrator's remedial authority, and the standards it should apply in exercising that authority, are defined by *sui generis* sources of law").

[76] *Id.*

[77] *See, e.g.*, SCC Rules, Art. 29.

[78] For example, unless there are counterclaims, the LCIA Arbitration Rules limits written submissions to a statement of case, statement of defence and statement of reply, unless otherwise ordered by the tribunal. LCIA Rules, Art. 15.

[79] Tribunals may also appoint experts after consulting the parties. *See, e.g.*, ICC Rules, Art. 25.

[80] *IBA Rules on the Taking of Evidence in International Arbitration* Art. 3.3.

[81] *See, e.g.*, LCIA Rules, Art. 22.1(v).

[82] *Id.*

[83] *See, e.g.*, Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* ¶¶ 6.113–6.115 (2010).

[84] The hearing may be held in a convenient location—the hearing itself need not physically take place in the arbitral seat—and in a space sufficiently large to seat the attendees and provide break-out rooms for the tribunal and parties. Hearings are commonly held in local arbitration centers and even law firm offices.

[85] *See, e.g.*, ICDR Rules, Art. 33.

[86] 9 U.S.C. § 12.

CHAPTER 9

Cybersecurity and Privacy for Litigation Counsel

Charles E. Harris, II[1] and Samantha C. Booth[2]

§ 9.01 Introduction

All lawyers have an ethical and legal obligation to protect client data from cyber threats. Clients often entrust outside counsel with their most sensitive and confidential information, including financial records, medical records, and business and trade secrets. So it's no surprise that law firms have increasingly become targets for hackers. The FBI reports that hackers view law firms as "one-stop shops" for troves of private information about multiple clients.[3] In 2012, for instance, the security consulting

firm Mandiant estimated that 80 of the 100 largest U.S. law firms faced a cyber attack the prior year.[4] More recently, the ABA reported in its *2018 Legal Technology Survey* that, of 900 respondents from various sized law firms, about 23% reported breaches ranging from lost or stolen computers or smartphones to network intrusions.[5] This figure compares with 22% in 2017, 14% in 2016, 15% in 2015, 14% in 2014, and 15% in 2013—"an increase of 8% in 2017 after being basically steady from 2013 through 2016."[6]

With the growing volume of law firm breaches, clients are focused on their outside counsel's cybersecurity practices, and many are using data security assessments and guidelines to drive law firm prioritization of data security. The ABA reported that 39% of large law firms said clients conducted a cybersecurity audit in 2018, and 66% of law firms with 100 or more attorneys reported that clients mandated specific safeguards.[7] Despite the size of the firm, it's clear clients will continue to scrutinize their lawyers' cybersecurity practices to ensure they are implementing appropriate controls to protect client data. Plus law firms now face the threat of legal malpractice suits from clients if they fail to establish reasonable data security practices.[8] Some observers even label cybersecurity "the single biggest risk law firms face" today.[9]

And, to be sure, the ethical and legal obligations to secure client information do not only apply to outside counsel. One ethical opinion concluded that, even though in-house counsel often have "no input with regard to the technology used by the corporation," they nonetheless owe "the duty of communication with the corporate client regarding the risks and benefits of cloud storage."[10] In-house counsel may likewise owe a duty to advise their internal clients about the risks and benefits of technology used to protect the company's data.

It's essential that today's lawyers recognize and satisfy their ethical and legal duty to employ proper data security practices to protect client data. Back in 2012, *The Wall Street Journal* cautioned attorneys that, with cyberattacks against firms rising, those "who want to protect their clients' secrets are having to reboot their skills to the digital age."[11] Similarly, in May 2014, a New York ethics opinion warned attorneys about cyber threats, stating that "lawyers can no longer assume that their document systems are of no interest to cyber-crooks."[12]

We begin this chapter discussing the financial, reputational, and other harm that a breach of client data can cause. We then describe the outside counsel's ethical and legal duty to safeguard client data, some essential risks management tools to help satisfy these obligations, and special considerations for firms that use or may use "cloud" technology to store client files or that operate in or provide legal services to clients in the European Union.

§ 9.02 Costs of a Data Breach[13]

"Cyber attacks have become so frequent that it is no longer a matter of whether [law] firms will be the victim of a cyber attack, but a question of *when* and *to what extent*."[14] The costs of these attacks and the number of records exposed in them are steadily increasing each year. According to the Ponemon Institute's *2018 Cost of a Data Breach Study*, the average total cost of a material data breach increased year over year from $3.62 to $3.86 million (about 6.4%); the average cost per lost record rose from $141 to $148 (about 4.8%); and the average size of data breaches increased by 2.2%.[15] Moreover, the average total cost of a substantive breach in the United States has reached

$7.91 million.[16] Below, we discuss the elements of these costs and ways to mitigate them and instances where firms have been sued by clients for legal malpractice following a breach.

[1] Elements of the Costs of a Data Breach

As one might expect, law firms that have fallen victim to cyber attacks report business interruption losses, loss of billable hours, remediation costs, replacement costs for hardware and software, and loss of critical information, on top of reputational harm and a loss of the client trust.[17] There are other costs, however, that may not be so plain. Data breach costs broadly fall within one of five categories: detection and escalation, notification, post-data-breach response, lost business, and direct and indirect. More specifically:

- **Detection and escalation costs** include forensic investigation, assessment and audit services, crisis team management, and communications to executives and the board of directors.
- **Notification costs** can comprise creating contact databases, determining regulatory requirements, engaging outside experts, postal expenses, email bounce backs, and internal or external communication platforms.
- **Post-data breach costs** include help desk activities, inbound communications, legal expenses, product discounts, reestablishing financial accounts and making new payment cards, and regulatory interventions.
- **Lost business** includes many of the reported harms mentioned above, such as customer attrition, increased customer acquisition activities, reputational losses, and lost goodwill.
- **Direct costs** consist of money spent to accomplish such activities as engaging forensic experts, hiring law firms, or offering customers identity theft protection, and **indirect costs** include the allocation of resources, such as employees' time to notify victims, and loss of goodwill and customer churn.

The Ponemon Institute reports that most of these costs are higher in the United States than other countries.[18]

[2] Cost Mitigation

As discussed in more detail in section 9.04, employing appropriate administrative, physical, and technical safeguards, including breach response planning, can reduce the costs of a data breach. In particular, the Ponemon Institute reports that the following practices can significantly reduce the costs of a data breach: establishing an incident response team and response planning, extensive use of encryption, employee training, implementing loss prevention tools or artificial intelligence platforms, and data classification (data at higher classification levels requires more security controls).[19]

[3] Lawsuits Against Law Firms

There have been a few well-publicized instances of clients suing their outside counsel for legal malpractice after a data breach. These suits typically allege breach of

contract or negligence for failing to protect a client's confidential information, as well as misrepresentation. For example, in April 2016, two clients of the Chicago law firm Johnson & Bell brought a putative class action against the firm alleging that it failed to use reasonable security practices after hackers exploited vulnerabilities in the firm's time-tracking system to access its clients' confidential data.[20] Also in April 2016, a married couple brought a malpractice claim against a New York real estate attorney alleging that she failed to use appropriate data security practices after cybercriminals were able to hack the attorney's AOL account to divert to their account $1.9 million that was supposed to be a deposit on a property.[21]

The list of victims involved in high-profile cyber attacks over the past few years includes AMLAW 200 firms, such as Cravath, Swaine & Moore, DLA Piper, Foley & Lardner, and Weil, Gotshal & Manges. Moreover, *Bloomberg Law* reports that, during this period, over one-third of small- and medium-sized firms, and just under one-quarter of large firms, have experienced a cyber incident.[22] With the number of attacks against firms going up and the statutory and common law theories of liability for cyber attacks continuing to develop,[23] we are sure to see more legal malpractice suits against law firms alleging they used substandard data security practices and protocols.

§ 9.03 Source of Lawyers' Duty to Protect Client Data

It is axiomatic at this point that all lawyers have an ethical and legal obligation to understand emerging cybersecurity technologies and to enact reasonable data security measures to protect client data. In this section, we discuss various sources of lawyers' ethical and legal duties to protect client information from cyber threats. In the next section (9.04), we discuss certain policies and practices that lawyers should consider implementing to satisfy their obligations.

[1] Ethical Obligations

A lawyer's ethical duty to safeguard client data primarily implicates ABA Model Rules of Professional Conduct 1.1, 1.4, 1.6, 1.15, 5.1, and 5.3.[24] The ABA Standing Committee on Ethics and Professional Responsibility (the "Committee") made clear in two recent ethics opinions that these rules, read together, impose on lawyers a broad responsibility to establish policies and practices to, among other things, protect client information, monitor cyber threats, securely communicate with the client, train lawyers and staff on cybersecurity, and notify clients about a data breach.[25] We discuss each of these rules below and how they apply in the cybersecurity and data privacy context.

[a] Duty of Competence

Model Rule 1.1 demands that lawyers deliver "competent representation" to clients, meaning they must bring "knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[26] Recognizing the increasing impact of technology on the legal practice, in 2012, the ABA revised its Model Rules to specify that, to "maintain the requisite knowledge and skill, a lawyer should keep abreast of . . . the benefits and risks associated with relevant technology."[27] The Committee instructs that, once a lawyer has a grasp of the technology, she must use and maintain it in a manner that will "reasonably safeguard property and information that has been entrusted" to her.[28]

Lawyers can satisfy this ethical duty by retaining an internal or external expert to help with their cybersecurity protocols.[29]

[b] Duty to Communicate

Under Model Rule 1.4, a lawyer shall "promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . is required." The Committee concluded, based on Model Rule 1.4, that, when "the lawyer reasonably believes that highly sensitive confidential client information is being transmitted so that extra measures to protect the email transmission are warranted, the lawyer should inform the client about the risks involved."[30] The lawyer and client then "should decide whether another mode of transmission, such as high level encryption or personal delivery is warranted."[31] Also, in accordance with Model Rule 1.4, lawyers must notify clients of a data breach and advise them of "the known or reasonably ascertainable extent to which client information was accessed or disclosed."[32] The Committee noted that compliance with the Model Rules in the event of a breach "depends on the nature of the cyber incident, the ability of the attorney to know about the facts and circumstances surrounding the cyber incident, and the attorney's roles, level of authority, and responsibility in the law firm's operations."[33]

[c] Duty of Confidentiality

Model Rule 1.6 states that, except in limited cases, a "lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent."[34] Consequently, a "lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."[35] Such unauthorized disclosure doesn't give rise to an ethical violation if the lawyer has, in fact, "made reasonable efforts to prevent" it.[36] Lawyers may consider these factors to measure their reasonableness: (1) the sensitivity of the information, (2) the likelihood of disclosure if the lawyer uses additional safeguard, (3) the cost of employing additional safeguards, (4) the difficulty of implementing the safeguards, and (5) the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).[37] A lawyer must abide by clients' requests "to implement special security measures not required" under Model Rule 1.6, and, conversely, a client may give informed consent to forgo required security measures.[38]

[d] Duty to Safeguard Property

Model Rule 1.15 requires lawyers to hold "property" of their clients "in connection with a representation separate from the lawyer's own property."[39] A lawyer must identify client property "as such and appropriately safeguard[]" it.[40] Despite language in the Model Rule 1.15's comment suggesting that the rule only applies to tangible client files as opposed to intangible ones, the Committee decided that "[r]eading Rule 1.15's safeguarding obligation to apply to hard copy client files but not electronic client files is not a reasonable reading of the Rule."[41] Several state ethics committees have reached the same conclusion. For instance, the District of Columbia ethics committee said that lawyers "who maintain client records solely in electronic form should take reasonable steps (1) to ensure the continued availability of the electronic records in

an accessible form during the period for which they must be retained and (2) to guard against the risk of unauthorized disclosure of client information."[42]

[e] Duty of Supervision

Model Rules 5.1 and 5.3, read together, require lawyers with managerial authority to "make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance" that (i) "all lawyers in the firm will conform" with relevant ethics rules and (ii) internal and external staff will "act in a way compatible with the professional obligations of the lawyer."[43] The Committee said that, with respect to electronic communications, "lawyers must establish policies and procedures, and periodically train employees, subordinates and others . . . in the use of reasonably secure methods of electronic communications with clients" and "instruct and supervise on reasonable measures for access to and storage of those communications."[44] Under Model Rule 5.3, lawyers are also obligated to use diligence in selecting and supervising vendors that will provide services that require them to access client files.[45] The Committee also concluded that, taking into account their duty to use technology to safeguard confidential information and to supervise lawyers and staff, lawyers "must employ reasonable efforts to monitor the technology and office resources connected to the internet, external data sources, and external vendors providing services relating to data and the use of data."[46]

[2] Statutory and Regulatory Obligations

There is no unified federal cybersecurity and data privacy mandate for lawyers or others. Rather, the legal obligations of lawyers to protect client data arise from a hodgepodge of mostly industry-specific federal and state laws and regulatory schemes. Whether a lawyer must comply with one of these laws—either directly via the regulation or by contract—can depend on the nature of the relationship with the client, the domicile of client or lawyer, or the type of client data the lawyer is storing or has access to. Below we discuss key elements some of the most pertinent laws and regulations for lawyers.

[a] State Laws

At least 24 states have laws requiring businesses that receive, store, or otherwise access personal information about a resident of that state to implement "reasonable" security protocols to secure the data.[47] As an example, Massachusetts was one of the first states to adopt such a law, and this law has served as a model for other states. The Massachusetts law authorized a state agency to adopt rules to "safeguard the personal information of residents."[48] Those rules, in turn, require entities that access "personal information" of a Massachusetts resident (e.g., a name in combination with an account number) to create a written security program containing appropriate administrative, technical, and physical safeguards.[49] Even if lawyers aren't covered by statute, businesses that are covered must, in most cases, contractually require that lawyers maintain "appropriate security measures" when the lawyers have "access to personal information through [their] provision of services."[50] Examples will help illustrate both scenarios:

- Example #1: Ethics opinions have found that it's acceptable for attorneys to take credit cards for the payment of legal fees.[51] A lawyer who processes credit card

payments for clients would generally have to comply with any state law like those discussed above in the state where the client resides.

- Example #2: A client collects the Social Security numbers of its Massachusetts employees on an electronic record, and the lawyer needs to access the spreadsheet for the purposes of an employment litigation. In this instance, the client would have to require its attorneys to agree by contract that they will use data security practices that, at the very least, are consistent with those required by state law to protect the personal data.

Also, with Alabama's recent passing of its data breach notification law, all 50 states, as well as the District of Columbia, Guam, Puerto Rico, and the Virgin Islands, now have laws requiring companies to notify affected subjects when their personal information is exposed as a result of a data breach.[52]

[b] Federal Regulations

This is a sampling of federal regulations that may apply to lawyers direct or through contract, not a comprehensive list:

[i] HIPAA

The Health Insurance Portability and Accountability Act of 1996 and its implementing regulations, the "Privacy Rule" and "Security Rule" (collectively, "HIPAA"), are exceptional in that they impose regulatory (versus contractual) data security and privacy obligations on service providers.[53] HIPAA initially applied only to a "covered entity," meaning certain health plans, health care clearinghouses, or health care providers.[54] In 2009, however, Congress mandated that HIPAA "apply to a business associate of a covered entity in the same manner that such sections apply to the covered entity."[55] HIPAA defines the term "business associate" to include a non-employee lawyer who provides "legal . . . services to or for such covered entity . . . where the provision of the service involves the disclosure of protected health information from such covered entity."[56] Attorneys acting as business associates have sweeping responsibilities under HIPAA, including that they must (i) establish policies to implement enumerated required or permissive administrative, physical, technical, and organizational safeguards[57] and (ii) use or disclose this data only in the limited circumstances outlined in the statute.[58] Failing to comply with HIPAA can expose lawyers to significant civil and criminal penalties.[59] Thus, any lawyer who provides legal services to health care entities—and accesses health information in the process—would be wise to ensure that their practices satisfy HIPAA's broad cybersecurity and data privacy requirements.

[ii] GLBA

The Gramm-Leach-Bliley Act ("GLBA") directed the Federal Trade Commission ("FTC") and other federal financial regulators to "establish appropriate standards for the financial institutions subject to their jurisdiction relating to administrative, technical, and physical safeguards" to "insure the security and confidentiality of customer records" and "protect against unauthorized access to or use of such records."[60] Most if not all of the rules these agencies promulgated will be inapplicable to law firms as they do not fall within the GLBA's definition of a "financial institution" (i.e., businesses

"engaging in financial activities").[61] However, lawyers who work with financial services clients, such as banks, brokers or insurers, may have a contractual obligation to comply with the rules in question as service providers of those clients. We will discuss the FTC rules to illustrate the circumstances in which these rules might apply to lawyers.

[A] FTC

The FTC's "Safeguards Rule" requires financial institutions to "develop, implement, and maintain a comprehensive information security program that . . . contains administrative, technical, and physical safeguards that are appropriate to [an institution's] size and complexity, the nature and scope of [its] activities, and the sensitivity of any customer information."[62] To establish a compliant security program, financial institutions must take "reasonable steps to select and retain service providers that are capable of maintaining appropriate safeguards" and require "service providers by contract to implement and maintain such safeguards."[63] The rule defines "service provider" as an "entity that receives, maintains, processes, or otherwise is permitted access to customer information through its provision of services directly to a financial institution."[64] Therefore, financial institutions are requiring their outside counsel to enter into contracts under which the lawyers agree to implement security measures that are equal to or greater than those required under the Safeguards Rule if their legal services require them to access customers' personal information.

[c] Common Law Duty

Lawyers generally have a common law duty to "exercise the skill and knowledge ordinarily possessed by attorneys under similar circumstances."[65] No court has considered how this standard applies in the cybersecurity and privacy context. But the allegations in *Shore v. Johnson & Bell*[66] provide a glimpse into how plaintiffs will try to frame the scope of counsel's duty: "Defendant failed to implement industry standard data security measures, resulting in . . . the exposure" of its client's "confidential data. And, Defendant failed to disclose that it does not use industry data security measures."[67]

§ 9.04 Essential Risk Management Tools

There is no one-size-fits-all approach to cybersecurity and data privacy. Instead, the appropriateness of a cybersecurity and privacy program is generally a fact-specific, individualized determination based on an organization's size and complexity, the data the company processes, and its risk profile. Below, however, we discuss some common practices that most cybersecurity and privacy frameworks include and that all law firms should consider. Many of the practices we discuss are key features of available guidelines for (i) non-regulated organizations, such as the NIST Cybersecurity Framework, and the ISO/IEC 27000 family of information security standards and (ii) sector-specific rules, such as the Health Insurance Portability and Accountability Act and its implementing regulations.

[1] Encryption

Data encryption is perhaps the most common data security safeguards organizations employ. Encryption protects the confidentiality of digital data, known as plaintext, as

it is stored electronically and transmitted using the Internet or other networks. As for the process, software encrypts plaintext with an encryption algorithm and encryption key, resulting in ciphertext that recipients can only view in its original form if the text is decrypted with the correct key (called a "decryption key").[68] Two main types of data encryption exist—i.e., asymmetric encryption, known as public-key encryption, and symmetric encryption. The primary difference between the methods is that symmetric encryption uses two decryption keys, a public and private one, to encrypt and decipher plaintext, while symmetric encryption uses only one secret key to encrypt and decipher data.[69]

[2] "Bring Your Own Device" (BYOD) Policy

Most law firms permit their employees to use their personal devices (e.g., laptops, tablets, and smartphones) for work purposes. "Bring Your Own Device" (or BYOD) refers to the policy of allowing employees to use their personal devices in this manner. There are many data security and privacy risks associated with implementing a BYOD program, including lost or stolen devices, devices having access to the firm's networks, and mixing personal information with client data on one device. Law firms should implement policies and procedures to address these risks. The firm should, at a minimum, (1) allow all relevant stakeholders (e.g., legal, IT, human resources, data privacy, information security, and compliance) to participate in developing the program, (2) limit the program to employees who require remote access to the firm's network for work purposes, (3) provide clear and specific guidance on the appropriate use of authorized applications, (4) clearly convey the firm's policy regarding ownership of data on devices, (5) allow the firm to monitor and control the data on devices in the program, and (6) train employees on the proper use of authorized applications.

[3] Vendor Management

It's common today for law firms to rely on third-party vendors to support core business functions. And, in some instances, these vendors have access to a firm's client data and its internal systems. This level of access presents an inherent risk that firms must manage. Therefore, firms should review vendors' data security and privacy practices—before engaging them and during the vendor relationship—to ensure that those measures are sufficient for access to the firm's high-risk data. Also, to comply with laws and regulations or as a matter of best practices, firms should enter into agreements with vendors that expressly require vendors to implement adequate security measures to protect sensitive data. Effective contracts will (i) give a firm a right to review a vendor's practices and (ii) include language requiring that the vendor maintain adequate data security procedures, facility procedures, safety procedures, and other safeguards against destruction, alteration, and disclosure of the firm's data.

[4] Training

Employee training is critical for mitigating a law firm's enterprise cybersecurity and data privacy weaknesses. To be sure, phishing and malware attacks on employees remain common for organizations of all sizes. There are several practices that firms

can incorporate into their employee-focused training programs to help support success: (1) ensure that employees understand the importance of cybersecurity and privacy, including their role in maintaining security, (2) make sure that employees are aware of and understand the top security threats (e.g., ransomware), (3) educate employees on phishing and social engineering, including the latest strategies hackers are using, and (4) extend security and privacy training to all employees and third parties that have access to the firm's network, including lawyers, management, supervisors, and outside consultants and vendors.[70]

[5] Password Policy

Law firms should have a policy requiring employees to select strong passwords to authenticate their access to sensitive data. Furthermore, the enterprise implements appropriate measures to secure those passwords. For instance, passwords should be encrypted when stored and in transit, and passwords should expire after a period of time. The firm should require employees to create unique passwords that use a combination of words, numbers, symbols, and both upper- and lower-case letters. For examples, many organizations require network passwords to be at least eight characters long and have at least one of the following characteristics: (1) an upper-case letter, (2) a lower-case letter, (3) a base 10 digit (0 through 9), and (4) a special characters (e.g., !, $, #, %). Firms should forbid employees from using dictionary words and basing passwords on details others might know, such as your birth date, Social Security number, phone number, or names of family members or pets.

[6] Electronic Media Disposal

Several federal and state laws require businesses to dispose of certain documents containing sensitive data "in a manner that renders" personal information "unreadable, unusable, and undecipherable" and to impose penalties for failing to do so.[71] For electronic media, this simply means erasing and destroying information in a way that no one can practicably read or reconstruct the sensitive data.[72] Law firms subject to these laws must, and as matter of best practices should, establish controls to ensure that employees are maintaining the confidentiality of personal information when disposing of document that contain such data. This process may require firms to leverage specialized technologies and systems to sanitize storage media.

[7] Breach Response Planning

Even the most robust enterprise cybersecurity and privacy defenses can fail. At these moments, companies should have an incident response plan in place to respond—responsibly, promptly, and capably—to the challenges of maintaining their operations, supporting their customers, and defending against legal actions. While an incident response plan must be specific to the needs and priorities of a given organization, such a plan typically will (1) state the goals and objectives of the plan, (2) categorize the types of incidents to which the plan applies, (3) establish incident severity categories and corresponding levels of deployment, (4) identify the membership of the incident response team for different incident types, as well as the respective roles and responsibilities of the team members, (5) provide key action steps, including (a) incident detection, notification, analysis, and forensics,

(b) response actions such containment, remediation, and restoration, (c) communications, and (d) procedures to capture lessons learned, and (6) identify necessary documentation, such as an incident response checklist and key legal requirements (e.g., notification responsibilities).

[8] Cyber Liability Insurance

Law firms should consider purchasing stand-alone cyber liability insurance to reduce their exposure to data security incidents. In fact, the American Bar Association now offers insurance coverage underwritten by Chubb Limited that is designed to protect law firms from the significant expenses associated with a data breach, such as privacy notification, crisis management, business interruption, extortion threats, and the recovery of vandalized data. This policy can be tailored for a firm's individual needs and can purportedly include (1) comprehensive cyber liability and expense coverage, (2) third-party cyber liability coverage, (3) coverage for breaches and Internet liabilities that do not arise from the "Professional" services of the law firm, (4) insurance for privacy notification and crisis management expenses (e.g., legal expenses and forensic investigation), (5) business interruption coverage, (6) coverage for regulatory defense expenses, including fines, penalties, and economic redress, and (7) pre-incident loss mitigation services and post-incident services.[73]

[9] Cybersecurity and Privacy Frameworks

We discussed certain industry-specific cybersecurity and privacy frameworks issued by regulators in section 9.03[2], but there are also many private frameworks that non-regulated organizations, like many law firms, rely on to set up their data security and privacy programs. Indeed, according to *Trends in Security Framework Adoption Survey*, 84% of companies in the United States leverage a security framework, and 44% use more than one framework.[74] These frameworks generally contain a series of documented processes that serve as a blueprint for companies building their information programs to manage risk, reduce vulnerabilities, and comply with regulatory obligations. While many of these frameworks are designed for specific sectors and in complexity and scale, there is a large amount of overlap in the basic security and privacy concepts in the various frameworks. The top four cybersecurity frameworks are as follows:

- **PCI-DSS.** The "Payment Card Industry Data Security Standard" (or PCI-DSS) is a data security standard for organizations that handle payment cards issued by major card brands. The standard is mandated by the brands and administered by the Payment Card Industry Security Standards Council.
- **ISO/IEC 27001/27002.** These information security standards, published by the International Organization for Standardization and the International Electrotechnical Commission, provide best practice recommendations on data security controls for use by professionals responsible for initiating, implementing, or maintaining information security management systems.
- **CIS Critical Security Controls.** These controls are a recommended set of actions for cyber defense that provide specific and actionable ways to stop prevalent and dangerous attacks. The standards are developed, refined, validated, and supported by a large volunteer community of security experts under the direction of the Center for Internet Security ("CIS").[75]

- **NIST Cybersecurity Framework.** This framework provides a policy of computer security guidance for how private sector organizations in the United States can assess and improve their ability to prevent, detect, and respond to cyber attacks.

[10] "Reasonable" Security Standards

Many federal and state laws require entities to implement "reasonable" security standard to safeguard sensitive data.[76] While it's logical that legislators wouldn't want to impose specific standards given that technology is always evolving, for years, the vague concept of "reasonableness" in the data security context has complicated the process for entities seeking to implement appropriate data security standards. Indeed, what constitutes reasonable data security shifts from company to company based on factors like the nature of the data a company processes, the industry, and the scope of threats to an organization's data. California Attorney General Kamala Harris was the first official to try to define "reasonable" security; in February 2016, she chose the 20 controls defined by CIS as the "minimum level of information security that all organizations handling personal data should meet."[77] Those controls, which CIS lists in terms of priority, are as follows:

(1) Inventory of authorized and unauthorized devices.

(2) Inventory of authorized and unauthorized software.

(3) Secure configurations for hardware and software.

(4) Continuous vulnerability assessment and remediation.

(5) Controlled use of administrative privileges.

(6) Maintenance, monitoring, and analysis of audit logs.

(7) Email and Web browser protections.

(8) Malware defenses.

(9) Limitation and control of network ports, protocols, and services.

(10) Data recovery capability.

(11) Secure configurations for network devices.

(12) Boundary defense (e.g., intrusion detection and intrusion prevention systems).

(13) Data protection.

(14) Controlled access based on the need to know.[78]

(15) Wireless access control.

(16) Account monitoring and control.

(17) Security skills assessment and appropriate training to fill gaps.

(18) Application software security.

(19) Incident response and management.

(20) Penetration tests and red team exercises.[79]

Again, CIS sets a baseline standard. Some law firms may require other measures based on the nature of the data they are processing and the threat to that data, among other factors.

§ 9.05 Client Data in the Cloud

Cloud computing, or "the cloud" for short, refers to the availability of computing resources (e.g., servers, storage, and software) over the Internet. Although moving to cloud computing often involves an uneasy transfer of control over a company's data to a cloud provider, the cloud's benefits—namely, the cost savings versus "on-premise" models—are frequently too tempting to let pass. For instance, users typically only pay for the costs of the cloud services they use, helping them save considerable capital and operating costs through reduced spending on hardware, software, infrastructure, IT staff, and energy consumption.

Nowadays, almost everyone uses some cloud technology in their daily lives. In fact, many law firms have email and document management servers hosted on the cloud. Also, lawyers routinely use cloud-based technology like Dropbox, Microsoft OneDrive, and Google Drive for file storage and to share files with clients that are too large to send by email. Because the use of the cloud is now so common in our profession, it's critical for lawyers to understand their ethical obligation to protect client data when using the cloud. We discuss that duty below.

[1] Ethical Obligation

Over 20 state bar associations have issued ethics opinions concluding that lawyers may "use cloud-based electronic data systems and document preparation software for client confidential information," provided that they use reasonable care in adopting and using the technology.[80] The standard of reasonable care for cloud computing should include, among other things, ensuring that the cloud provider:

- explicitly agrees that the provider has no ownership or security interest in the data;
- has an enforceable obligation to preserve data security and privacy;
- will notify the lawyer if requested to produce data to a third party and provide the lawyer with the ability to respond to the request before the provider produces the requested information;
- has technology built to withstand a reasonably foreseeable attempt to access data (e.g., penetration testing);
- includes in its "Terms of Service" or "Service Level Agreement" ("SLA")[81] an agreement about how the provider will handle confidential client data;
- provides the law firm with the right to audit the provider's security procedures and to obtain copies of any security audits the provider performs;
- will host the firm's data only within a specified geographic area; if, by agreement, the data are hosted outside of the United States, the law firm must determine that the hosting jurisdiction has privacy laws, data security laws, and protections against unlawful search and seizure that are as rigorous as those of the United States;

- provides a method of retrieving data if the lawyer terminates use of the cloud product, the provider goes out of business, or the service otherwise has a break in continuity; and
- provides the ability for the law firm to retrieve data from the provider's or third-party data hosting company's servers for the firm's own use or in-house backup offline.[82]

In section 9.03[1], we discussed many of the rules of professional conduct underpinning these ethics opinions authorizing lawyers to use cloud technology. For instance, the comment to ABA Model Rule of Professional Conduct 1.1 provides that lawyers "should keep abreast of . . . the benefits and risks associated with relevant technology."[83] Moreover, after a 2012 meeting at which the ABA discussed the ethics of clouding computing, its House of Delegates approved resolutions that added language to the Model Rules to address the technology. First, Model Rule 1.6 expressly requires lawyers to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."[84] The comment specifies "[f]actors to be considered in determining the reasonableness," including "the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients."[85]

Also, the ABA amended Model Rule 5.3 to address the duty of lawyers when they use non-lawyer service providers like cloud services. Under these circumstances, "a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations,"[86] taking into account "the education, experience and reputation of the non-lawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality."[87]

A final point to keep in mind, which we discussed in section 9.01, is the finding from the Tennessee Ethics Committee that, even though in-house counsel many times have "no input with regard to the technology used by the corporation," they still owe "the duty of communication with the corporate client regarding the risks and benefits of cloud storage."[88] Corporate counsel should consider this obligation when advising their internal counsel on cloud technologies.

[2] Special Considerations

As discussed above, "to determine whether use of a particular technology or hiring a particular service provider is consistent or compliant with the lawyer's professional obligations, a lawyer must engage in due diligence."[89] To satisfy this requirement, lawyers must carefully review a cloud provider's service terms (or SLAs). Below we discuss three issues lawyers should focus on when reviewing these documents.

[a] Ownership and Access

Lawyers must take reasonable care to ensure that the cloud provider's "transmission, storage and possession of the data does not diminish the lawyer's ownership of and

unfettered accessibility to the data."[90] Said differently, the vendor's service terms should include "an explicit recognition" of the lawyers' "ownership of the data," clearly state that the "provider cannot acquire any rights or licenses" to the data and provide that the lawyers have reasonable access to, and control over, any data stored or processed on the cloud provider's system.[91]

[b] Data Segregation

Users typically have three different options to deploy cloud resources: a public, private, or hybrid cloud. Only a private cloud allows lawyers to totally segregate client information from the data of other cloud "tenants." With a public cloud, all cloud resources (e.g., hardware, software, and infrastructure) are owned by the cloud provider and delivered over the Internet. Users share the same hardware, storage, and network devices with each other. In contrast, a private cloud comprises computing resources used exclusively by one organization. It can be physically located a business's on-site datacenter, or it can be hosted by a service provider. A hybrid cloud, often called "the best of both worlds," combines on-premises infrastructure, or a private cloud, with a public cloud. In a hybrid cloud, data and applications can move between private and public clouds. For instance, a user might use the public cloud for high-volume, lower-security needs, such as Web-based email, and the private cloud for sensitive operations like financial reporting.[92] No state bar association has considered whether lawyers are required to segregate client data from other tenants' data when using the cloud. However, in exercising reasonable care, lawyers should consider the risk and benefits of the different options for hosting data.

[c] Security Precautions

It goes without saying in today's environment that lawyers must "become and remain vigilant about data security issues from the outset" of using a cloud provider to store or process client information.[93] As noted above, lawyers should ensure that the cloud provider's service terms prescribe the data security standard the provider must meet and give the law firm the right to audit the provider's data security practices. Also, the service terms should require that the provider notify the firm of a data breach. The "policy covering time and method of notification should be clearly stated as well as the standard policies and practices for responding to data breaches."[94]

§ 9.06 General Data Protection Regulation (or GDPR)

[1] Introduction

The General Data Protection Regulation ("GDPR"), effective May 25, 2018, replaced the Data Protection Directive[95] as the primary law regulating how businesses that fall under the European Union's ("EU") jurisdiction for purposes of protecting personal data. The regulation is far-reaching. Not only does it apply to EU-established businesses that handle personal data, but also to entities outside the EU that process data of EU residents in offering goods or services or that monitor the conduct of people in the EU. And it governs virtually every stage and aspect of data collection, storage, and use—including anonymization of data, collection of consent to process data, cross-border transportation of data, and data breach response. The GDPR also imposes a number of unique features, including stringent data breach notification requirements,

as well as the requirement that entities appoint a data protection officer (or "DPO") to oversee GDPR compliance. Law firms in the United States that have European offices or that handle data of EU residents in providing legal services must invest in complying with the GDPR. As discussed below, the penalties and fines for failing to do so can be hefty.

[2] The GDPR's Application to Law Firms and Their Data

[a] Scope

A key feature of the GDPR is its extraterritorial reach. As noted above, the GDPR applies to U.S. law firms that (i) "process"[96] personal data if the firm has an office established in the EU or (ii) satisfy the "targeting criterion" (i.e., they process data of EU residents in offering goods or services, or in monitoring the behavior of people in the EU).[97] A firm meets the "offering goods or services" criteria when it displays an express intention to offer such goods or services to people in the EU (regardless of whether the firm requires payment for the goods or services)—but not when its Web site is merely available in the EU or that Web site provides contact information for the firm that is not specifically directed to EU residents.[98] In addition, "monitoring" the conduct of EU residents can include a broad range of activities, such as behavioral advertising, geo-localization activities for marketing, video monitoring, online tracking through the use of cookies, or tracking through the provision of online personalized health analytics services, market surveys, or other behavioral studies.[99] Law firms should carefully evaluate their activities with respect to the EU residents to resolve whether they are covered by the GDPR.

[b] Personal Data

The GDPR is expansive not only in geographical scope, but also in the data it covers. It regulates personal data, which is defined as "information relating to an identified or identifiable natural person" (i.e., a "data subject").[100] Data relates to an "identifiable" person when someone can use it to identify a person—either directly or indirectly—by "means reasonably likely to" link that person to the data about them.[101] Thus, data need not be associated with a person's name to qualify as personal data; identification numbers, location data, protocol addresses, cookies, and other tracking data may qualify as identifiers.[102] The GDPR provides additional protection for certain special categories of data, including data related to race or ethnicity, political or religious beliefs, health or sexuality, or genetic and biometric information.[103] Processing of this data is generally prohibited unless one of ten exemptions applies (e.g., explicit consent, employment, and legal proceedings).[104] Because certain data that law firms process may qualify as "personal data," firms should integrate GDPR compliance into their data-processing practices, including intake and billing procedures, as well as day-to-day use of personal data for purposes of representing clients.

[c] Data Controllers and Processors

The GDPR distinguishes between data "controllers" and data "processors." A law firm acts as a "controller" if it determines the purpose and means of processing personal data. In contrast, a firm acts as a "processor" if it processes personal data on behalf of the controller.[105] Data controllers are primarily responsible for ensuring that

processors implement proper measures to comply with the GDPR and for protecting data subjects' individual rights under the GDPR.[106] Processors must take reasonable steps to secure data in their possession,[107] delete and return all data to the controller at the end of the service contract,[108] obtain written permission from controllers before engaging a subcontractor, and assume liability for any GDPR noncompliance by the subcontractor.[109] In certain circumstances, the GDPR requires processors to appoint a DPO.[110] Given this accountability imposed on controllers and processors, firms should adopt procedures to vet new service providers and ensure GDPR compliance by existing providers.

[3] Principles

The GDPR outlines six foundational principles for all organizations that process personal data within the scope of the GDPR. We discuss each in turn below.

[a] Lawfulness, Fairness, and Transparency

The GDPR requires that law firms process personal data lawfully, fairly, and in a transparent manner.[111] To process data lawfully, a firm must identify one of six grounds for doing so[112] (i.e., (i) the data subject freely gave consent, or (ii) the data processing is "necessary" to fulfill a contract with the subject, (iii) to comply with legal obligations, (iv) to save a person's life, (v) to perform a public interest in official functions or (vi) for the legitimate interests of the company or its affiliate).[113] Fairness looks at the data subjects' expectations and if data-processing activities have an unjustified adverse impact on the subjects. Processing of personal data based on consent obtained through deceit, for example, is unlikely to be "fair." Lastly, the "transparency" principle "requires that any information addressed to the public or to the data subject be concise, easily accessible and easy to understand."[114] Recognizing that the "technological complexity" of modern data processing makes it "difficult for the data subject to know and understand whether, by whom and for what purpose personal data relating to him or her are being collected," the GDPR requires companies to take steps to mitigate that issue.[115] The transparency principle also animates the GDPR's new "right to be informed," which we discuss below.[116]

[b] Purpose Limitation

The purpose limitation often goes hand-in-hand with the "lawfulness, fairness, and transparency" principle. It requires that personal data be "collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes."[117] In other words, law firms must be clear about the purpose for which they collect personal data, and any use of that data should align with the stated purposes for collection. Thus, if a firm wishes to use personal data for a purpose different from the original disclosed purpose, (i) the new purpose must be "compatible" with the original one (i.e., if no other, lawful basis applies),[118] (ii) the firm must obtain the data subject's explicit consent to the new purpose, or (iii) the firm must have some other lawful basis for the subsequent use (e.g., it must be necessary to serve a "vital interest" or perform a "public function").[119] In practice, the "compatibility" requirement essentially prohibits firms from processing data for an entirely different purpose than that for which the data was collected.

[c] Data Minimization

The GDPR's data minimization principle requires law firms to identify the minimum amount of personal data necessary to achieve their lawful purpose—and to ensure they are collecting enough to achieve those goals, but no more than is necessary. Firms should conduct periodic review of stored data to ensure that it is still relevant to a firm's present purposes and that any obsolete data is promptly deleted.[120] Note that other aspects of the GDPR (e.g., the accounting principle) require the firm to be able *to demonstrate* affirmatively that it is collecting and storing only that data which it legitimately needs, thus highlighting the need for firms to adopt clear and justifiable data collection procedures and processes *ex ante*.

[d] Accuracy

Personal data must be "accurate and, where necessary, kept up to date."[121] Moreover, law firms must take "every reasonable step . . . to ensure that personal data that are inaccurate . . . are erased or rectified without delay."[122] This does not mean, however, that companies cannot keep records of mistakes or errors (for which there may be a legitimate business purpose). Rather, it simply means that erroneous data must be clearly identified as such.

[e] Storage Limitation

The so-called "storage limitation" principle provides that personal data must be "kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed" but explicitly permits longer storage for data maintained for archival, scientific, historic, or statistical purposes.[123] To ensure compliance with this principle (as well as potentially competing requirements to retain client records for a certain period of time), law firms should review their retention policies and schedules to ensure periodic review and deletion of data that is no longer relevant or accurate, as well as the availability of processes that permit more immediate deletion of data, where appropriate.

[f] The "Security" Principle

The GDPR requires that personal data be "processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organizational measures."[124] Consistent with other privacy regimes, the GDPR does not impose a one-size-fits-all approach to data security. Rather, it requires law firms to adopt a level of security that is "appropriate to the risk" associated with the firm's processing activities—that is, tailored to the type, scope, and purpose of the firm's processing activities and the nature of the data at issue.[125] Relevant considerations include, but are not limited to, the likelihood and severity of harm to the "rights and freedoms of natural persons" in the event of incidents like unauthorized access or accidental destruction or damage to data, cost, and the "state of the art" at the time.[126] The GDPR does, however, suggest a number of organizational and technical security measures that firms may choose to implement. Organizational measures include limiting access to data to those employees who require it to perform their functions, as

well as a clear chain of accountability for information security within the organization. Technical measures include both physical security features (e.g., physical access controls and disposal processes that safeguard against the accidental release of personal data) as well as more technological features (e.g., pseudonymisation and encryption of data, system security, and device access controls). Technical measures might also include anticipating ways to restore or access personal data in the event of a "physical or technical incident" and adopting a "process for regularly testing, assessing and evaluating the effectiveness of technical and organizational measures for ensuring the security of the processing."[127]

[4] Individual Rights

The GDPR establishes a number of individual rights for data subjects, including the right to be informed, the right to rectification, the right to erasure (also known as the right to be forgotten), the right to restrict processing, the right to data portability, the right to object, and rights related to automated decision-making. We touch upon a few of these rights below.

[a] Right to Be Informed

The right to be informed builds upon the transparency principle, reiterating that controllers must take "appropriate measures" to explain their data-processing activities in "a concise, transparent, intelligible and easily accessible" way, "using clear and plain language."[128] The right to be informed is triggered *at the time of the data collection*. At that time, the controller must disclose (or cause to be disclosed) what the GDPR terms "privacy information."[129] This includes, at an absolute minimum, the controller and DPO contact information, the lawful basis for and intended purpose of the processing, the recipients or categories of recipients of the data, and whether the controller intends to transfer the personal data to a third country or international organization.[130] The GDPR requires additional categories of information be disclosed if, under the circumstances, additional disclosures are "necessary to ensure fair and transparent processing." Law firms can use a number of techniques to convey this information to data subjects and should consult an internal or external expert to ensure GDPR compliance.

[b] Right of Rectification

Data subjects have the "right to obtain from the controller without undue delay the rectification of inaccurate personal data."[131] This right imposes a concomitant obligation on controllers to take reasonable steps to ensure the accuracy of data and to rectify any inaccuracies upon receiving notice of the inaccuracy. Note that requests for rectification may be made either verbally or in writing; they need not be formal. Best practices in responding to a request for rectification include promptly acknowledging the request; limiting (to the extent practicable) any data processing of the disputed information while the accuracy or completeness of the data is being investigated; ensuring that any investigation is completed in a timely manner; and informing the data subject of the results of the investigation, including any reasons for declining to correct or supplement data, and of their right to file a complaint with the appropriate "supervisory authority"[132] or to seek a judicial remedy.

[c] Right of Erasure (i.e., "Right to Be Forgotten")

The right that has made the most headlines is the "right to be forgotten." First recognized by a European court in 2014, the GDPR essentially codifies and expounds upon that right by requiring personal data to be erased immediately upon the conclusion of the original processing purpose or if the data subject has withdrawn consent and no other legal grounds for processing exist.[133] Assuming no exceptions apply, a controller must take reasonable steps to erase all covered data "without undue delay" (and no later than one month after receipt of the request)[134] from both its live and backup systems.[135] Also, if the controller has disseminated the data to third parties or published the data online, the controller must take steps to locate and "inform [other] controllers which are processing such personal data to erase any links to, or copies or replications of those personal data."[136] Unless a request is "excessive," the controller cannot charge a fee for erasure. As a practical matter, law firms need to have systems and procedures in place to track the various locations where data subject to erasure might be stored and third parties to which it has been disseminated (whether directly or through publication) so that they can respond appropriately to any requests for erasure.

[d] Right to Data Portability

In a nutshell, the right to data portability means individuals have a "right to receive the personal data" they have "provided to a controller" or to have that data transmitted from one controller to another.[137] Data "provided" to a controller includes not only data affirmatively transmitted to the controller (like email addresses), but also data obtained through the subject's use of a controller's product, platform, or service (like the "raw" data generated by "smart" devices or Web browsing histories). The right applies only when the lawful basis for data processing is consent or performance of a contract *and* the data is being processed by automated means.[138] When the right applies, the controller must provide the requested data in a "structured, commonly used, and machine-readable format."[139]

[5] Obligations in the Event of a Breach

Controllers have a duty to report a breach—"without undue delay and, where feasible, not later than *72 hours* after having become aware of it"—to the proper supervisory authority, unless the breach is unlikely to pose a risk to the rights and freedoms of individuals.[140] The notification, at the very least, must include (i) a description of the breach and, where possible, the categories and approximate number of the affected data subjects and personal data, (ii) contact information for the DPO or other information provider, (iii) a description of the likely consequences of the breach, and (iv) a description of remedial measures.[141] In brief, a quick investigation and a timely notification of the breach are of utmost importance in ensuring compliance with the GDPR.

[6] Transfer of Data Outside of EU

The GDPR generally prohibits cross-border transfers of personal data, unless (i) a transfer is made to a jurisdiction deemed "adequate" by the Commission, (ii) a data exporter puts in place an appropriate safeguard, or (iii) an exemption applies.[142]

First, a transfer of personal data is allowed if the Commission issued an adequacy decision as to a certain country, territory, sector, or international organization.[143] A country

is an adequate data receiver when it has a level of data protection that is satisfactory in the eyes of the Commission. As of February 2019, the Commission has deemed the following countries and territories to be fully adequate: Andorra, Argentina, Guernsey, Isle of Man, Israel, Jersey, New Zealand, Switzerland, and Uruguay. The following countries are only *partially* adequate: Japan (private sector organizations), Canada (data subject to Canada's Personal Information Protection and Electronic Documents Act), and the United States (data subject to the EU-U.S. Privacy Shield framework).[144] The European Commission (the "Commission"), an institution of the EU responsible for proposing legislation, monitors the adequacy of third countries on an ongoing basis.[145]

Second, if there is no adequacy decision in place, the controller and processor must put in place other EU-approved safeguards before making the transfer.[146] Some of the more widely used mechanisms include binding corporate rules (BCRs) and standard data protection clauses. BCRs are internal codes of conduct operating within a multinational group that apply to cross-border transfers of personal data from the group's member countries to third countries. BCRs must be submitted for approval to a competent supervisory authority in the member county where one of the companies is based.[147] Alternatively, standard data protection clauses are essentially contracts between a data exporter and an importer, laying out the obligations of the parties and the individual rights at issue.[148]

Third, even if there is neither a relevant adequacy decision nor an appropriate safeguard, a restricted transfer may be allowable if one of the following exceptions applies: (i) there is a valid consent from the individual; (ii) the restricted transfer is necessary either to enter into or perform a contract with an individual (even if it involves personal data of other beneficiaries); (iii) there are important public interests involved; (iv) the restricted transfer is required to establish or defend a legal claim; (v) the restricted transfer protects the vital interest of an individual who is incapable of providing a valid consent; (vi) the transfer is made from a public register; or (vii) the transfer is a one-off incident that furthers compelling legitimate interests.[149]

[7] EU-U.S. Privacy Shield

As we mentioned above, the transfer of personal data to the United States is allowed to the extent covered by the EU-U.S. Privacy Shield. The Privacy Shield replaced the International Safe Harbor Privacy Principles held invalid by the European Court of Justice in *Schrems v. Data Protection Commissioner*, Case No. C-362/14 (E.C.J. Oct. 6, 2015), and became operational on August 1, 2016. The Privacy Shield was designed by the U.S. Department of Commerce and the Commission as a mechanism to enable cross-border data transfers between the EU member countries and the United States, while complying with the requirements of the GDPR. To join the Privacy Shield framework, a U.S.-based organization must self-certify before the Department of Commerce—through the Privacy Shield's Web site[150]—that it will publicly commit to upholding the shield's requirements.

[8] Accountability

[a] Data Protection Officer

The GDPR imposes enhanced requirements for compliance, including the mandatory appointment of a DPO for any organization that processes or stores large amounts of

personal data or for which data processing is a routine aspect of the entity's business model.[151] The DPO is charged with educating the company and employees regarding GDPR compliance, monitoring compliance with the GDPR including (through regular security audits), and interfacing with any supervisory authorities that oversee the company's data-processing activities.[152] The DPO must be an "expert" on data protection law and practices, independent, and not under the influence of upper management.[153] However, the DPO may be internal or external to a company. A DPO is not personally liable for any GDPR violations (rather, the controller is the ultimately responsible party).

[b] Contracts with Processors

The GDPR *requires* controllers to execute a written contract with any data processor, and those contracts must embody certain minimum terms. Mandatory terms include: (i) the subject matter and duration of the processing, (ii) the nature and purposes of the processing, and (iii) the type of personal data and categories of data subjects.[154] The contract must also contain terms related to the use of subcontractors, measures for protecting data subjects' rights, provisions for end-of-contract return or deletion of all personal data, and the processor's commitments regarding security measures and data confidentiality.[155] And, throughout the duration of the contract, the processor may not process any data except as instructed by the controller (unless required to do otherwise by law).[156]

[c] Documentation

The GDPR requires all controllers to "maintain a record of the processing activities under its responsibility" in writing and in electronic form.[157] Those records must be detailed: they must specify the controller's (and its DPO's) contact information, the purposes of the data processing, a description of the categories of data subjects and categories of personal data, the recipients of the data (including, where applicable, if the data has been transferred to a third country or international organization), the envisioned horizon for data use and erasure, and, where possible, a "general description" of the company's "technical and organizational security measures."[158] Processors must keep similar records.[159]

[d] Fines and Enforcement Mechanisms

The GDPR provides a number of enforcement mechanisms, as well as relatively draconian fines. Noncompliance with the GDPR is punishable by fines up to $10 million euros, or 2% of a firm's "total worldwide annual turnover of the preceding financial year, whichever is ***higher***."[160] The GDPR provides "every data subject" with a "right to lodge a complaint with a supervisory authority" for any noncompliance with the GDPR.[161] And data subjects may also bring judicial proceedings for alleged violations of rights.[162]

Notes

[1] Charles E. Harris, II is a partner in the Litigation & Dispute Resolution group in Mayer Brown's Chicago office and he is a member of the firm's Cybersecurity and Data Privacy practice.

[2] Samantha C. Booth is an associate in the Litigation & Dispute Resolution group in Mayer Brown's Chicago and Palo Alto offices and she is a member of the firm's Cybersecurity and Data Privacy practice.

[3] David G. Ries, *The ABA Techreport* 2018, Cybersecurity (Jan. 28, 2019), https://www.americanbar.org/groups/law_practice/publications/techreport/ABATECHREPORT2018/2018Cybersecurity/.

[4] Lisa Ryan, *Top Firms Aren't Prepared for Cyberattacks: Survey*, Law360 (Jan. 15, 2015), https://www.law360.com/articles/612160/top-firms-aren-t-prepared-for-cyberattacks-survey.

[5] Ries, *supra* note 3.

[6] *Id.*

[7] *Id.*

[8] Shore v. Johnson & Bell, No. 16-cv-4363, 2017 WL 714123 (N.D. Ill. Feb. 2, 2017).

[9] Ronald A. Mallen, *Legal malpractice—Statistics—Trends*, 1 Legal Malpractice § 1:18 (2019 ed.).

[10] Tenn. Bd. of Prof'l Responsibility, Formal Op. 2015-F-159 (2015).

[11] Jennifer Smith, *Client Secrets at Risk as Hackers Target Law Firms*, Wall St. J. Law Blog, (June 25, 2012), https://blogs.wsj.com/law/2012/06/25/dont-click-on-that-link-client-secrets-at-risk-as-hackers-target-law-firms/.

[12] N.Y. Comm. on Prof'l Ethics, Formal Op. 1019 (Aug. 2014).

[13] A data breach or cyber attack is an attack on a secure database, device, or other medium that results in a hacker getting unauthorized access to financial, personal, and other confidential information. Data commonly stolen in breaches includes personal health information, personally identifiable information, business and trade secrets, payment card data, Social Security numbers, and software source code.

[14] J. Salvo & B. Middlebrook, *Cybersecurity and the Lawyer's Standard of Care* (May 22, 2018), available at https://www.americanbar.org/groups/litigation/committees/commercial-business/articles/2018/spring2018-cybersecurity-and-the-lawyers-standard-of-care/ (lasted visited May 2, 2019).

[15] Ponemon Institute's *2018 Cost of a Data Breach Study* at 3.

[16] *Id.* at 15.

[17] J. Salvo & Middlebrook, *supra* note 14.

[18] Ponemon Institute's *2018 Cost of a Data Breach Study* at 26–30.

[19] *Id.* at 22.

[20] *Shore v. Johnson & Bell*, No. 16-cv-4363, 2017 WL 714123. In *Shore*, the court granted the law firm's motion to stay the litigation and compel arbitration based on an arbitration clause included in the client engagement letter. *Id.* at *3. The court also determined that the arbitration provision does not authorize class arbitration. *Id.* Firms may reduce the reputational damage and costs associated with a data breach by inserting an arbitration clause into their engagement letters.

[21] Millard v. Doran, No. 153262/2016 (Sup. Ct. N.Y. Cty. 2016).

[22] Sam Skolnik, *Access to Law Firm Data "Just Too Easy," Worrying Clients*, Bloomberg Law (Nov. 1, 2018), https://biglawbusiness.com/access-to-law-firm-data-just-too-easy-worrying-clients/.

[23] *See*, *e.g.*, Cal. Civ. Code § 1798.84; In re VTech Data Breach Litig., No. 1:15-cv-10889, 2017 WL 2880102 (N.D. Ill. July 5, 2017).

[24] We discuss the ABA Model Rules since most state ethics rules are patterned after the Model Rules.

[25] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477 (2017); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 483 (2018).

[26] Model Rule of Prof'l Conduct 1.1 (Am. Bar Ass'n 2018).

[27] *Id.* at 1.1. cmt.

[28] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 483 (2018).

[29] *Id.*

[30] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477 (2017).

[31] *Id.*

[32] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 483 (2018).

[32] *Id.* The Committee recognized in its 2018 opinion that "state breach notification laws, HIPAA, or the Gramm-Leach-Bliley Act," for example, may impose breach notification obligations, and each "statutory scheme may have different post-breach obligations, including different notice triggers and different response obligations." *Id.*

[33] Model Rule of Prof'l Conduct 1.6(a) (Am. Bar Ass'n 2018).

[34] *Id.* at 1.6(c).

[35] *Id.* at 1.6. cmt.

[36] *Id.*

[37] *Id.*

[38] Model Rule of Prof'l Conduct 1.15(a) (Am. Bar Ass'n 2018).

[39] *Id.*

[40] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 483 (2018).

[41] District of Columbia, Formal Eth. Op. 357.

[42] Model Rule of Prof'l Conduct 5.1 cmt. 2; 5.3 cmt. 1 (Am. Bar Ass'n 2018).

[43] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477 (2017).

[44] *Id.*

[45] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 483 (2018).

[46] *See*, *e.g.*, 2018 Ala. Laws Act 2018-396 (S.B. 318); Ark. Code § 4-110-104(b); Cal Civ. Code § 1798.81.5; Calif. Civil Code § 1798.91.04; Colo. Rev. Stat. § 6-1-713.5; Conn. Gen. Stat. § 38a-999b; Conn. Gen. Stat. § 4e-70; Del. Code § 12B-100; Fla. Stat. § 501.171(2); Ind. Code § 24-4.9-3-3.5; K.S. § 50-6,139b; La. Rev. Stat. § 3074; Md. Code Com Law § 14-3501 *et seq.*; Mass. Gen. Laws Ch. 93H § 2(a); 201 Mass. Code of Regs. 17.00-17.04; Minn. Stat. § 325M.05; Neb. Rev. Stat. § 87-801 *et seq.*; Nev. Rev. Stat. § 603A.210 *et seq.*; N.M. Stat. § 57-12C-4, 57-12C-5; Ohio Rev. Stat. § 1354.01 *et seq.*; Or. Rev. Stat § 646A.622; R.I. Gen. Laws § 11-49.3-2; S.C. Code § 38-99-10 to -100; Tex. Bus. & Com. Code § 521.052; Utah Code § 13-44-101 *et seq.*; 9 V.S.A § 2446-2447.

[47] Mass. Gen. Laws Ch. 93H § 2(a).

[48] 201 CMR 17.03(1), 201 CMR 17.02. The law specifies required elements of an information security program, some of which we discuss in section 9.04. *Id.* § 17.04.

[49] 201 CMR 17.02, 17.03(2)(f).

[50] *E.g.*, District of Columbia, Formal Eth. Op. 348.

[51] 2018 Ala. Laws Act 2018-396 (S.B. 318); Alaska Stat. § 45.48.010 *et seq.*; Ariz. Rev. Stat. § 18-545; Ark. Code §§ 4-110-101 *et seq.*; Cal. Civ. Code §§ 1798.29, 1798.82; Colo. Rev. Stat. § 6-1-716; Conn. Gen Stat. §§ 36a-701b, 4e-70; Del. Code tit. 6, § 12B-101 *et seq.*; Fla. Stat. §§ 501.171, 282.0041, 282.318(2)(i); Ga. Code §§ 10-1-910, -911, -912; Haw. Rev. Stat. § 487N-1 *et seq.*; Idaho Stat. §§ 28-51-104 to -107; 815 ILCS §§ 530/1 to 530/25; Ind. Code §§ 4-1-11 *et seq.*, 24-4.9 *et seq.*; Iowa Code §§ 715C.1, 715C.2; Kan. Stat. § 50-7a01 *et seq.*; KRS § 365.732, KRS §§ 61.931 to 61.934; La. Rev. Stat. §§ 51:3071 *et seq.*; Me. Rev. Stat. tit. 10 § 1346 *et seq.*; Md. Code Com. Law §§ 14-3501 *et seq.*, Md. State Govt. Code §§ 10-1301 to -1308; Mass. Gen. Laws § 93H-1 *et seq.*; Mich. Comp. Laws §§ 445.63, 445.72; Minn. Stat. §§ 325E.61, 325E.64; Miss. Code § 75-24-29; Mo. Rev. Stat. § 407.1500; Mont. Code §§ 2-6-1501 to -1503, 30-14-1701 *et seq.*, 33-19-321; Neb. Rev. Stat. §§ 87-801 *et seq.*; Nev. Rev. Stat. §§ 603A.010

et seq., 242.183; N.H. Rev. Stat. §§ 359-C:19, 359-C:20, 359-C:21; N.J. Stat. § 56:8-161 *et seq.*; New Mexico 2017 H.B. 15, Chap. 36 (effective 6/16/2017); N.Y. Gen. Bus. Law § 899-AA, N.Y. State Tech. Law 208; N.C. Gen. Stat §§ 75-61, 75-65; N.D. Cent. Code §§ 51-30-01 *et seq.*; Ohio Rev. Code §§ 1347.12, 1349.19, 1349.191, 1349.192; Okla. Stat. §§ 74-3113.1, 24-161 to -166; Oregon Rev. Stat. §§ 646A.600 to .628; 73 Pa. Stat. §§ 2301 *et seq.*; R.I. Gen. Laws §§ 11-49.3-1 *et seq.*; S.C. Code § 39-1-90; S.D. Cod. Laws §§ 20-40-20 to -46; Tenn. Code §§ 47-18-2107; Tex. Bus. & Com. Code §§ 521.002, 521.053; Utah Code §§ 13-44-101 *et seq.*; Vt. Stat. tit. 9 §§ 2430, 2435; Va. Code §§ 18.2-186.6, 32.1-127.1:05; Wash. Rev. Code §§ 19.255.010, 42.56.590; W.V. Code §§ 46A-2A-101 *et seq.*; Wis. Stat. § 134.98; Wyo. Stat. §§ 40-12-501 *et seq.*; D.C. Code §§ 28- 3851 *et seq.*; 9 GCA §§ 48-10 *et seq.*; 10 Laws of Puerto Rico §§ 4051 *et seq.*; V.I. Code tit. 14, §§ 2208, 2209.

[52] *See* Pub. L. No. 104-191, 110 U.S. Stat 1936 (1996) (codified as amended in scattered sections of 18, 26, 29, and 42 U.S.C.); 45 C.F.R. Parts 160–164.

[53] 45 C.F.R. § 160.103.

[54] 42 U.S.C.A. § 17931(a).

[55] 45 C.F.R. § 160.103.

[56] 45C.F.R. §§ 164.308, 164.310, 164.312, 164.314, 164.316.

[57] 45 C.F.R. § 164.502.

[58] 42 U.S.C. § 17931(b).

[60] 15 USCA § 6801(b). The other regulators required to promulgate rules, regulations, or guidelines under the GLBA are the Federal Reserve, Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation, National Credit Union Administration, Securities and Exchange Commission, Commodity Futures Trading Commission, and state insurance authorities. *Id.* §§ 6804, 6805(a), (b).

[61] *Id.* § 6809(3). Activities generally considered financial in nature under the GLBA include lending, exchanging, transferring, investing for others, or safeguarding money or securities; insuring, guaranteeing, or indemnifying against loss, harm, damage, illness, disability, or death or providing and issuing annuities; providing financial, investment, or economic advisory services; issuing or selling instruments representing interests in pools of assets; underwriting, dealing in or making a market in securities; and engaging in certain merchant bank activities. 12 U.S.C. § 1843(k)(4).

[62] 16 C.F.R. § 314.2(a). Customer information includes any "nonpublic personal information . . . about a customer of a financial institution, whether in paper, electronic, or other form, that is handled or maintained by or on behalf of you or your affiliates." *Id.* § 314.2(b).

[63] *Id.* § 314.4(d).

[64] *Id.* § 314.2(d).

[65] Ronald R. Mallena, *Legal Malpractice* § 20:2 (2019 ed.).

[66] No. 16-cv-4363 (N.D. Ill. filed Apr. 15, 2016).

[67] *Id.* at Docket No. 8, ¶ 79.

[68] Nate Lord, *What Is Data Encryption? Definition, Best Practices & More*, Data Protection 101 (Jan. 3, 2019), https://digitalguardian.com/blog/what-data-encryption.

[69] *Id.*

[70] Trend Micro, *The Importance of Employee Cybersecurity Training: Top Strategies and Best Practices*, SimplySecurity (Nov. 14, 2018), https://blog.trendmicro.com/the-importance-of-employee-cybersecurity-training-top-strategies-and-best-practices/.

[71] ILCS 530/40(b), (d); *see also* Nat'l Conference of Legislatures, *Data Disposal Laws* (Jan. 4, 2019), http://www.ncsl.org/research/telecommunications-and-information-technology/data-disposal-laws.aspx.

[72] *See* 815 ILCS 530/40(b)(2).

[73] ABA Member Insurance Program, *Cyber Liability*, https://www.abainsurance.com/firm-products/cyber-liability/.

[74] Tenable, *Survey Report: Trends in Security Framework Adoption*, https://www.tenable.com/whitepapers/trends-in-security-framework-adoption.

[75] CIS is a 501(c)(3) organization dedicated to enhancing the cybersecurity readiness and response among public and private sector entities.

[76] Cal. Civ. Code § 1798.81.5(b); *see also* Nat'l Conference of Legislatures, *Data Security Laws: Private Sector* (Jan. 4, 2019), http://www.ncsl.org/research/telecommunications-and-information-technology/data-security-laws.aspx.

[77] Kamala D. Harris, *California Data Breach Report 2012–2015*, Attorney General California Department of Justice, at v (Feb. 2016), https://oag.ca.gov/sites/all/files/agweb/pdfs/dbr/2016-data-breach-report.pdf.

[78] Regulators are emphasizing the use of sophisticated network access controls (multifactor authentication, segmented networks, biometrics) to control which information users can access and how they can access it.

[79] Center for Internet Security, *The 20 CIS Controls & Resources*, https://www.cisecurity.org/controls/cis-controls-list/.

[80] Tex. Prof. Eth. Comm., Tex. Eth. Op. 680 (2018); *see also* N.C. Bar Council 2011 Formal Eth. Op. 6, Mass. Bar Ass'n Eth. Op. 12-03, Or. Bar Formal Op. No. 2011-188, Prof'l Eth. Comm. of the Florida Bar Op. 10-2 (2010), NY Bar Ass'n's Comm. on Prof'l Ethics Op. 842 (2010), Pa. Bar Ass'n Eth. Op. No. 2010-060 (2010), and Iowa Comm. on Practice Eth. and Guidelines Eth. Op. 11-01 (2011).

[81] SLAs include the terms and conditions under which the cloud computing offer their services.

[82] Pa. Bar. Assn. Comm. Leg. Eth. Prof. Resp, PA Eth. Op. 2011-200 (2011). In some circumstances, however, "a lawyer may decide that some client confidential information is too vulnerable to unauthorized access or disclosure to risk its storage or use in a cloud-based electronic system." Tex. Prof. Eth. Comm., Tex. Eth. Op. 680.

[83] Model Rule of Prof'l Conduct 1.1 cmt. (Am. Bar Ass'n 2018).

[84] Model Rule of Prof'l Conduct 1.6 (Am. Bar Ass'n 2018).

[85] Model Rule of Prof'l Conduct 1.6 cmt. (Am. Bar Ass'n 2018).

[86] Model Rule of Prof'l Conduct 5.3 cmt. (Am. Bar Ass'n 2018).

[87] *Id.*

[88] Tenn. Bd. of Prof'l Responsibility, Formal Op. 2015-F-159 (2015).

[89] Conn. Bar Assn Prof'l Ethics Comm., Informal Op. 2013-07 (2013).

[90] *Id.*

[91] LCCA Security Standards, Standard 18, http://www.legalcloudcomputingassociation.org/standards/.

[92] Microsoft Azure, *What Are Public, Private, and Hybrid Clouds?* https://azure.microsoft.com/en-us/overview/what-are-private-public-hybrid-clouds/

[93] Tex. Prof. Eth. Comm., Tex. Eth. Op. 680 (2018).

[94] LCCA Security Standards, Standard 20, http://www.legalcloudcomputingassociation.org/standards/.

[95] Directive 95/46/EC.

[96] The term "processing," as used in the section and the GDPR, means "any operation . . . which is performed on personal data . . . , whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction." GDPR, Art. 4.

[97] GDPR, Art. 2, 3, Recital 23; European Data Protection Board Guidelines 3/2018 on the territorial scope of the GDPR (Art. 3), available at https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_guidelines_3_2018_territorial_scope_en.pdf.

[98] *Id.* at 14–16.

[99] *Id.* at 18.

[100] GDPR, Art. 4(1).

[101] GDPR, Art. 3, Recital 26.

[102] GDPR, Art. 3, Recital 30 (defining "online identifier").

[103] GDPR, Art. 9(1).

[104] GDPR, Art. 9(2).

[105] GDPR, Art. 4(7)–(8). For example, a firm that hires a third-party service provider (*e.g.*, an expert or billing platform) to help it process data would be the controller for purposes of that data, while the provider could qualify as either a controller or processor, depending on the degree of control it exercised over the purpose and means of the data-processing activity.

[106] GDPR, Art. 28(1). For example, data subjects wishing to revoke their consent to process would contact the controller—not the processor—even if the controller's data resides with the processor. Controllers also have an obligation to vet their data processors to ensure that they are GDPR-compliant, and the controller can be subject to penalties based on the noncompliance of their data processors.

[107] GDPR, Art. 32.1.

[108] GDPR, Art. 28.3(g).

[109] GDPR, Art. 28.4.

[110] Discussed *infra*, section 9.06[8][a].

[111] GDPR, Art. 5(1).

[112] GDPR, Art. 6.

[113] GDPR, Art. 6(1).

[114] GDPR, Recital 58.

[115] *Id.*

[116] *See* section 9.06(4)(a).

[117] GDPR, Art. 5(1)(b).

[118] GDPR, Recital 50.

[119] *See* discussion *supra* & GDPR Art. 6(1).

[120] *See* GDPR, Recital 39.

[121] GDPR, Art. 5(1)(d).

[122] *Id.*; *accord* GDPR, Recital 39.

[123] GDPR, Art. 5(1)(e).

[124] GDPR, Art. 5(1)(f).

[125] GDPR, Art. 32(1).

[126] GDPR, Art. 32(1).

[127] *Id.*

[128] GDPR, Art. 12(1).

[129] GDPR, Art. 13(1).

[130] GDPR, Art. 13(1)(a)–(f).

[131] GDPR, Art. 16.

[132] Each member state in the EU is required to "provide for one or more independent public authorities to be responsible for monitoring the application of [the GDPR], in order to protect the fundamental rights and freedoms of natural persons in relation to processing and to facilitate the free flow of personal data within the [EU]." GDPR, Art. 51.

[133] GDPR, Art. 17. If a controller wishes to deny an erasure request (*i.e.*, because one of these exceptions applies), it should follow a protocol similar to that it would follow in denying a right of rectification request: Inform the data subject of the basis for denial and of the subject's right to seek judicial or other enforcement action.

[134] *Id.*

[135] "Erasure" essentially means that the data is no longer possible to discern without "disproportionate" effort. *See* https://gdpr-info.eu/issues/right-to-be-forgotten.

[136] GDPR, Recital 66.

[137] GDPR, Art. 20.

[138] *Id.*

[139] *Id.*

[140] GDPR, Art. 33(1) (emphasis added).

[141] GDPR, Art. 33(3).

[142] *See* GDPR, Art. 44.

[143] GDPR, Art. 45.

[144] *International Transfers*, ICO (March 19, 2019), https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/international-transfers/.

[145] GDPR, Art. 45.

[146] GDPR, Art. 46.

[147] GDPR, Art. 47.

[148] *See* GDPR, Art. 46(c), (d).

[149] GDPR, Art. 49.

[150] Privacy Shield Framework (March 20, 2019), https://www.privacyshield.gov/PrivacyShield/ApplyNow.

[151] GDPR, Art. 37.

[152] GDPR, Art. 39.

[153] *See* GDPR, Art. 37, Recital 97.

[154] GDPR, Recital 81.

[155] GDPR, Art. 28.

[156] GDPR, Art. 29.

[157] GDPR, Art. 30.

[158] GDPR, Art. 30(1).

[159] GDPR, Art. 30(2). These are the absolute minimum documentation requirements. Indeed, further documentation may be necessary to ensure compliance with the various GDPR principles discussed above. For example, documenting the organization's lawful basis and legitimate interests for processing helps the organization ensure compliance with the data minimization, transparency, and purpose limitation principles above.

[160] GDPR, Art. 83(4) (emphasis added).

[161] GDPR, Art. 77.

[162] GDPR, Art. 78.

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Note: Section numbers in ***bold*** *indicate forms or lists.*

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