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Admitting that We're Litigating in the Digital Age: A Practical Overview of Issues of Admissibility in the Technological Courtroom

Leslie C. O'Toole[1]

I. Introduction

"The law does not, and should not, prohibit proficient professional employment of new technology in the courtroom. This is, after all, the twenty-first century."[2]

"Given the pervasiveness today of electronically prepared and stored records, as opposed to manually prepared records of the past, counsel must be prepared to recognize and appropriately deal with the evidentiary issues associated with the admissibility of electronically generated and stored evidence."[3]

Technology is changing the practice of law, and litigation is, of course, no exception. As new means of data collection and evidence presentation become more commonplace, the digital dilemmas and computer quandaries of trial are rapidly increasing. From an eviden-

[1] Ms. O'Toole thanks Kevin Sobel-Read, also with Ellis & Winters, for his invaluable contributions to this paper. She also thanks Deborah D. Kuchler for her prior collaboration on projects involving technology in the courtroom, which helped shape the concepts in this article.

[2] Commonwealth v. Serge, 896 A.2d 1170, 1178 (Pa. 2006).

[3] Lorraine v. Markel Am. Ins., Co., 241 F.R.D. 534, 537 (D. Md. 2007).

Leslie O'Toole is a partner with Ellis & Winters in Raleigh, NC. She obtained her undergraduate degree from Brown University (A.B. Magna Cum Laude, 1982) and her J.D. from the University of North Carolina (High Honors, 1986). She practices in the areas of civil litigation, focusing on products liability, medical malpractice and commercial litigation.

tiary standpoint, many new technologies are treated in the same way as more "traditional" evidence. But the differences can be deadly—at least if counsel wants certain evidence admitted, or specific evidence kept out.[4] As one commentator has noted, computer-generated evidence "warrants special care and caution because of its persuasive impact, its susceptibility to manipulation, and the undue reliance jurors may place on it because of their familiarity with the medium."[5]

The present article therefore walks through several issues regarding the admissibility of evidence in the digital age. Following an overview of the admissibility hurdles that should be on every litigator's checklist when it comes to new technologies, the article takes a closer look at several particular areas—animations, simulations, and on-screen presentation of evidence—delving into some of the hidden dangers lurking with respect to each. The lessons to be learned are applicable to many other types of new technology as well.

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[4] Either way, the power of digitally produced and/or displayed evidence is incontrovertible. *See*, *e.g.*, J. Bradley Ponder, *But Look Over Here: How the Use of Technology at Trial Mesmerizes Jurors and Secures Verdicts*, 29 Law & Psychol. Rev. 289 (2005); Richard K. Sherwin, Neal Feigenson & Christina Spiesel, *Law in the Digital Age: How Visual Communication Technologies are Transforming the Practice, Theory, and Teaching of Law*, 12 B.U. J. Sci. & Tech. L. 227, 235 (2006) ("It takes a lot less time and mental effort to see a picture than to read [or hear] a thousand words.").

[5] Betsy S. Fiedler, *Are Your Eyes Deceiving You?: The Evidentiary Crisis Regarding the Admissibility of Computer Generated Evidence*, 48 N.Y.L. Sch. L. Rev. 295, 295–96 (2004); *see also* Catherine Palo, *Computer Technology in Civil Litigation*, 71 Am. Jur. Trials 111, § 143 (1999) ("once admitted, the trier of fact may be beguiled by the neat tabulations of a printout or the apparent precision of numbers calculated to several decimal places").

II.
New Technology and the Practice of Law

The introduction of increasingly sophisticated technology into the courtroom is transforming the process of litigation. These transformations can be both observed and felt throughout the trial process, beginning with the electronic filing of documents and continuing all the way through the possibility of submitting appeals in so-called digital format briefs. One result is that trial lawyers are becoming increasingly reliant on images, graphs, animations, and other visual aids.[6]

As these visual aids replace what once would have been only conventional images and the attorney's spoken words, the perception of the information used at trial is altered. "When judges and jurors scrutinize photographs, videos, computer animations, and other graphic materials" in making their decisions "they are doing something very different from what they are doing when they listen to testimony or read documents."[7] In other words, "courtroom display technologies shift the criteria by which effective communication is assessed by fact-finders."[8]

One consequence of this shift in communication criteria can be that "[e]ffectiveness may be determined by the context rather than by factors intrinsic to the technical details."[9] In short, these changes are causing litigators to actually "strategize their cases differently."[10] Trial attorneys are therefore finding that to litigate successfully in today's digital age, they must maintain a certain degree of tech savvy. But a focus on the technology itself is not enough. Indeed, the most sophisticated computer animation in the world will not be of any use if you cannot get the evidence *admitted* in the first place.[11] At the same time, there are

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[6] *See*, *e.g.*, Verizon Directories Corp. v. Yellow Book USA, Inc., 331 F. Supp. 2d 136, 143–44 (E.D.N.Y. 2004) ("[S]ubstantial technological . . . effort is often expended to present a case. . . .Courts should be aware of the heightened power of audio-visual evidence.").

[7] Sherwin *et al.*, *supra* note 4, at 239. This difference is in part due to two related concepts. First, there is diverse symbolic and cultural metadata in every picture that does not exist in text. Second, pictures contain a host of meanings that are left "unsaid," and as such, each viewer—judge or juror—will fill in the blanks with his or her own personal meanings. *Id.* at 261.

[8] Gordon Bermant, *The Development and Significance of Courtroom Technology: A Thirty-Year Perspective in Fast Forward Mode*, 60 N.Y.U. Ann. Surv. Am. L. 621, 622 (2005).

[9] *Id.*

[10] Sherwin *et al.*, *supra* note 4, at 235.

[11] Be aware, mastering these modern trial nuances has ethical implications as well: "Counsel must remain diligent to keep up with this rapidly expanding and often changing field of law in order to provide competent representation to their clients." Gregory D. Shelton, *Providing Competent Representation in the Digital Information Age*, 74 Def. Couns. J. 261, 261 (2007).

elements inherent in the changing dimensions of technology-based trial that may alert the attentive litigator to when, and how, to keep out an opponent's dazzling evidence.[12]

III.
Admissibility

A. *General Issues*

"The use of computer generated animations, graphics and simulations is one of [the] most visible manifestations of technology in the litigation process."[13] The Federal Rules of Evidence "do not separately address the admissibility of electronic data," but they do "apply to computerized data as they do to other types of evidence."[14] Moreover, "certain general principles have appeared in the courts, which govern the treatment of [this] type of evidence."[15]

Chief Magistrate Judge Grimm of the District of Maryland recently laid out, in a thoughtful and thorough opinion, several guidelines for the admissibility of electronically stored and presented evidence.[16] According to Magistrate Judge Grimm, the admissibility of electronically stored or presented information is "determined by a collection of evidence rules that present themselves like a series of hurdles to be cleared by the proponent of the evidence."[17] Although each hurdle may not apply to every piece of evidence, stumbling on any single one of the applicable hurdles could bar the admission of that evidence.[18]

The key hurdles are

1. **Relevance**: Is the evidence relevant under Rule 401?

2. **Authenticity**: Can the evidence be authenticated under Rule 901(a)?

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[12] Indeed, "there are so many opportunities for error, most of them human, in any data processing system, that a skillful opponent may be able to exploit the inevitable uncertainties and diminish the impact of the computer evidence on the jury." Palo, *supra* note 5, at § 143.

[13] David Boies, *Computer Generated Evidence*, 5 A.B.A. Bus. & Com. Litig. Fed. Cts. § 56:13 (2d ed. 2007).

[14] *Lorraine*, 241 F.R.D. at 538 n.5 (citations omitted).

[15] Laura Wilkinson Smalley, *Establishing Foundation to Admit Computer-Generated Evidence as Demonstrative or Substantive Evidence*, 57 Am. Jur. Proof of Facts 3d 455, § 5 (2000 & Supp. 2008).

[16] *See generally Lorraine*, 241 F.R.D. at 534. The *Lorraine* opinion is meant to be, and should be referred to by counsel as, an excellent resource on these questions of admissibility.

[17] *Id*. at 538.

[18] *See id.* "If a possible objection is a matter of concern, a back-up exhibit may be prepared in the event the preferred exhibit is excluded." Boies, *supra* note 13, at § 56:13.

3. **(Non-)hearsay**: Is the evidence hearsay, and if so, does it fall within one of the exceptions of Rules 803, 804, or 807?
4. **The "best evidence rule"/"original writing rule"**: Is the evidence an original or an acceptable duplicate under Rules 1001–1008?
5. **Probative value versus prejudice**: Does the probative value appropriately outweigh the risk of prejudice under Rule 403?[19]

First, as will be familiar to the practitioner, the Federal Rules of Evidence define "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[20] As such, evidence that is not relevant will never be admissible.[21] "Once evidence has been shown to meet the low threshold of relevance, however, it presumptively is admissible unless the constitution, a statute, [a] rule of evidence or procedure, or case law requires that it be excluded."[22]

Second, electronic evidence must meet the requirements for authenticity.[23] This step is key. Commentators have, in fact, observed that "[l]aying the foundation is the most common difficulty encountered by proponents of computer evidence."[24] Moreover, "the inability to get evidence admitted because of a failure to authenticate it almost always is a self-inflicted injury which can be avoided by thoughtful advance preparation."[25]

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[19] *Lorraine*, 241 F.R.D. at 538.

[20] Fed. R. Evid. 401.

[21] Fed. R. Evid. 402.

[22] *Lorraine*, 241 F.R.D. at 541 (citing Fed. R. Evid. 402). Also, keep in mind that "evidence may be admissible for one purpose, but not another, or against one party, but not another. Therefore, it is important for the proponent of the evidence to have considered all of the potential purposes for which it is offered, and to be prepared to articulate them to the court if the evidence is challenged." *Id.* (footnote omitted).

[23] *See generally* Fed. R. Evid. 901(a) ("The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.").

[24] Palo, *supra* note 5, at § 135; *see also* H. Christopher Boehning & Daniel J. Toal, *Overcoming Evidentiary Hurdles*, 238 N.Y.L.J., Oct. 23, 2007, 5 col. 1 ("The rules of evidence relating to authenticity are among the principal obstacles to admission of an electronic document into evidence."). For this reason, among others, "[c]orrectly collecting, preserving, and keeping a documented chain of custody are critical steps in the early stages of a litigation in order to utilize electronic information in motion practice and at trial." Shelton, *supra* note 11, at 262; *see also* Boies, *supra* note 13, at § 56:13 ("[I]t is advisable for counsel to keep an accurate record of the events, factors and information that go into the creation of the displays. That record can lend assistance when responding to objections as to foundation or reliability.").

[25] *Lorraine*, 241 F.R.D. at 542. "This underscores a point that counsel often overlook. A party that seeks to introduce its own electronic records may have just as much difficulty authenticating them as one that attempts to introduce the electronic records of an adversary." *Id*. at 547.

As a general rule, the "degree of foundation required to authenticate computer-based evidence depends on the quality and completeness of the data input, the complexity of the computer processing, the routineness of the computer operation, and the ability to test and verify results of the computer processing."[26] The thoroughness needed for a given foundation, however, also depends of course on the jurisdiction. The United States Court of Appeals for the Ninth Circuit, for example, has noted that "it is becoming recognized that early versions of computer foundations were too cursory, even though the basic elements covered the ground."[27] In that case the court relied on an elaborate eleven-step foundation for computer records.[28] Although certainly not all courts would require this degree of thoroughness, the warning is clear: "the fact that one court already has done so should put prudent counsel on notice that they must pay attention to how they will authenticate [electronic evidence], and that they should be prepared to do so in a manner that complies with the Federal Rules of Evidence and any governing precedent."[29]

Third, issues regarding hearsay are "pervasive when electronically stored and generated evidence is introduced."[30] To be sure, many of the hearsay exceptions and exclusions apply to electronic evidence just as they do to conventional evidence.[31] One of the quirks regarding electronic evidence, however, is the fact that Rule 801(a) defines hearsay as having

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[26] *Id*. at 544 (quoting 5 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 900.06[3] (Joseph M. McLaughlin ed., 2d ed.1997)). One tip here is that "[e]vidence generated through the use of standard, generally available software is easier to admit than evidence generated with custom software." Palo, *supra* note 5, at § 118. Similarly, the choice of a third-party litigation support firm may impact admissibility in the event an employee is "called upon to testify as to the foundation or reliability of their products. In such a situation, the knowledge of the employee as to the documents and other information, as well as the technical procedures that were used to contract the graphics, will be on display for the court and should be as complete as possible." Bois, *supra* note 13, at § 56:13.

[27] In re Vee Vinhnee, 336 B.R. 437, 445 (B.A.P. 9th Cir. 2005).

[28] *Id.* at 446.

[29] *Lorraine*, 241 F.R.D. at 549 n.27. "The above discussion underscores the need for counsel to be creative in identifying methods of authenticating electronic evidence when the facts support a conclusion that the evidence is reliable, accurate, and authentic, regardless of whether there is a particular example in Rules 901 and 902 that neatly fits." *Id*. at 553.

[30] *Id*. at 562.

[31] Boehning & Toal, *supra* note 24.

> To properly analyze hearsay issues there are five separate questions that must be answered: (1) does the evidence constitute a statement, as defined by Rule 801(a); (2) was the statement made by a "declarant," as defined by Rule 801(b); (3) is the statement being offered to prove the truth of its contents, as provided by Rule 801(c); (4) is the statement excluded from the definition of hearsay by rule 801(d); and (5) if the statement is hearsay, is it covered by one of the exceptions identified at Rules 803, 804 or 807.

Lorraine, 241 F.R.D. at 562–63.

been stated by a "person."[32] Among other ramifications, "[t]his [definition] has the effect of excluding anything automatically generated by a computer."[33] In addition, in light of the real-time contexts in which emails, instant messages, and other electronic data are often sent and received, courts may begin "to consider the use of hearsay exceptions that have not typically been used for other writings."[34] Some prime candidates are present sense impression (Rule 803(1)); excited utterance (Rule 803(2)); and then-existing mental, emotional, or physical condition (Rule 803(3)).[35]

Fourth, in order to be admitted, electronic evidence must satisfy the common law "best evidence rule," codified in the Federal Rules of Evidence as the "original writing rule."[36] Because of the manipulability and reproducibility of digital data, the best evidence/original writing rule may—to one's help or harm—be particularly applicable.[37] There are generally few problems here with evidence that exists initially in physical form but which counsel intends to *display* electronically: "Once a sufficient foundation is laid, and the exhibit is admitted in evidence, it can be shown electronically in any way the court determines promotes a fair trial."[38] But where the evidence was *created* in electronic form, counsel may be

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[32] Fed. R. Evid. 801(a) ("A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion."); 801(b) ("A 'declarant' is a person who makes a statement.").

[33] Boehning & Toal, *supra* note 24; *see also Lorraine*, 241 F.R.D. at 564–65 (citing cases).

[34] Boehning and Toal, *supra* note 24.

[35] *Id*.; *see also Lorraine*, 241 F.R.D. at 569–70.

[36] Fed. R. Evid. 1001–1008; *Lorraine*, 241 F.R.D. at 576 n.54 ("The rule is more accurately is referred to as the 'Original Writing Rule' because it does not mandate introduction of the 'best' evidence to prove the contents of a writing, recording or photograph, but merely requires such proof by an 'original,' 'duplicate' or, in certain instances, by 'secondary evidence'—any evidence that is something other than an original or duplicate (such as 'testimony, or a draft of a writing to prove the final version, if no original or duplicate is available.')" (citations omitted)).

[37] To cite one striking example, it "has been estimated that an e-mail sent on January 1 will be copied 27,000 or 28,000 times by the end of the year, and not all on that particular computer system." Panel Discussion, *Managing Electronic Discovery: Views from the Judges*, 76 Fordham L. Rev. 1, 2 (2007) (hereinafter "Panel Discussion") (comments of Professor Daniel J. Capra); *cf. Lorraine*, 241 F.R.D. at 547 ("Because it is so common for multiple versions of electronic documents to exist, it sometimes is difficult to establish that the version that is offered into evidence is the 'final' or legally operative version. This can plague a party seeking to introduce a favorable version of its own electronic records, when the adverse party objects that it is not the legally operative version, given the production in discovery of multiple versions.").

[38] National Institute of Trial Advocacy and the Federal Judicial Center, Effective Use of Courtroom Technology: A Judge's Guide to Pretrial and Trial, 181, *available at* http://www.fjc.gov/public/pdf.nsf/lookup/CTtech00.pdf/$file/CTtech00.pdf (last visited Dec. 22, 2007) (hereinafter "FJC Guide"); *see also* Fed. R. Evid. 611(a) ("The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.").

required to "jump through the hoops of Rules 1001, 1002, and 1003."[39] Therefore, "when counsel intend to offer electronic evidence at trial or in support of a motion for summary judgment they must determine whether the original writing rule is applicable, and if so, they must be prepared to introduce an original, a duplicate original, or be able to demonstrate that one of the permitted forms of secondary evidence is admissible."[40]

Fifth and finally, like other "traditional" evidence, electronic evidence must satisfy the balancing test of probative value versus unfair prejudice, as described by Rule 403.[41] In this realm, Magistrate Judge Grimm has outlined four specific circumstances that may present hazards with regard to electronic evidence:

1. when "the evidence would contain offensive or highly derogatory language that may provoke an emotional response";
2. when "there is a substantial risk that the jury may mistake [computer animations] for the actual events in the litigation";
3. when there are "summaries of voluminous electronic writings, recordings or photographs under Rule 1006"; and
4. when "the court is concerned as to the reliability or accuracy of the information that is contained within the electronic evidence."[42]

Other potential sources of prejudice exist as well, some of which may surprise the more paper-based practitioner.[43] For example, the "impact color has on the eye and mind, coupled with the possible biased intentions of the [producer of computer-generated evidence],

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[39] FJC Guide, *supra* note 38, at 182. Note that "[e]lectronic files are the 'originals' of writings created with word processing software, E-mails, and photographs or videos created with digital cameras." *Id*. Under Rule 1001(3), a printout is also an "original." Fed. R. Evid. 1001(3) ("[A]ny printout or other output readable by sight, shown to reflect the data accurately, is an 'original.'").

[40] *Lorraine*, 241 F.R.D. at 583.

[41] Fed. R. Evid. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

[42] *Lorraine*, 241 F.R.D. at 584 (citations omitted).

[43] Note also that the "'visual appeal' and novelty" of digitally presented materials can "call for an extra 'prong' of caution in the form of explicit jury instructions." Carmel Sileo, *Ruling on Computer Evidence Animates Pennsylvania High Court*, Trial, Aug. 2006, at 74, 74; *see also* Datskow v. Teledyne Cont'l Motors Aircraft Prods., 826 F. Supp. 677, 685 (W.D.N.Y. 1993) (admitting demonstrative animation, but giving cautionary instruction that "the animation was not meant to be a re-creation of the accident, but simply computer pictures to help [the jury] understand [the expert's] opinion. . . . [T]he video was not meant to be an exact re-creation of what happened back there on November 26, 1986." (internal quotation marks omitted)).

may cause inequity."[44] With respect to animations, all of the following have been pointed out as possibly causing unfair inferences: viewpoint, speed, timing, frame flaws, motion flaws, terrain flaws, and sound.[45] Something as simple as labels in a video can trip counsel up and bar admission: "the combination of the video editing and the labels may create an unfair representation of what the deposition testimony or site inspection showed."[46] Even "[e]conomic disparity between parties may affect their ability to produce animations or simulations which can result in an unfairly one-sided presentation of the evidence."[47]

Because of these many hurdles, it is generally in counsel's best interest to resolve during pretrial proceedings any questions regarding the admissibility of any electronic evidence: "[t]he best insurance against a miscarriage of justice is discovery, in which you will set up admissibility and weight attacks."[48] Nevertheless, since some questions regarding admissibility may still slip into the trial, "counsel must be prepared to lay or attack the foundation of critical computer evidence and, if admitted, to support or impeach its credibility."[49] In addition, although "[a]ll of these evidentiary issues are, of course, important in the context of trial," Magistrate Judge Grimm's opinion in *Lorraine* makes clear that "they are equally important when preparing motions for summary judgment."[50]

B. *Digital Photographs*

New technology allows tremendous flexibility in the presentation of evidence. One consequence is that something as seemingly routine as the projection of a photograph can, when done digitally, have unforeseen complications.[51] The complications begin with determining what *type* of digital photo a particular image is in the first place.

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[44] Fiedler, *supra* note 5, at 312–13; *see also* FJC Guide, *supra* note 38, at 195 ("Color used on objects or screens may be objectionable when the purpose is to suggest linkages that may not exist in fact and for which there is no foundation.").

[45] FJC Guide, *supra* note 38, at 206–08. Likewise, the morphing and sound features of PowerPoint-type presentations can invite objections. *Id*. at 196–97.

[46] *Id.* at 192.

[47] Christopher B. Mueller & Laird C. Kirkpatrick, 5 Federal Evidence § 9:26 (3d ed. 2007).

[48] Edward J. Imwinkelried, *Can This Photo Be Trusted?*, Trial, Oct. 2005, at 48, 55 (footnote omitted).

[49] Palo, *supra* note 5, at § 143. Furthermore, "the advocate's job does not end when the evidence is admitted. The weaknesses in the foundational testimony the opponent of the evidence may have elicited on voir dire become the basis for later cross-examination and a credibility attack." *Id.*

[50] Boehning & Toal, *supra* note 24.

[51] "To be sure, digital photo techniques are useful in the legal system. . . . Yet, in an individual case, uncritical acceptance of digital images can allow unreliable evidence to reach the jury." Imwinkelried, *supra* note 48, at 55.

Digital photos that are offered as evidence generally have one of three origins: (1) images that were taken using a digital camera; (2) images taken on film and subsequently converted into digital form; and (3) and images taken with a traditional camera but then "enhanced" digitally.[52] The origin can affect the admissibility. Original digital photos are of course the simplest to admit.[53] Converted digital photos, similarly, are unlikely to meet significant foundational problems.[54]

Digitally enhanced photos, however, are another matter. Often in such cases, "the proponent cannot rely on sponsoring testimony by a witness familiar with the object or scene" because the image "may be an enhanced one that no one ever saw or could have seen."[55] The proponent may therefore be forced to "offer the exhibit as a product of a scientific process, which could make it vulnerable to an admissibility attack."[56] A lot can happen when one

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[52] Imwinkelried, *supra* note 48, at 48–49. Note that "[t]o convert a traditional film photo into a digital image, the technology involves complex, multistep processes. Errors are possible at virtually every step." *Id.* at 51.

[53] Regarding a digital photo taken of an accident scene, for example, a proponent "can offer the trial exhibit as the product of the scientific technology of digital photography"; in the alternative, "the proponent can rely on the foundational testimony of a sponsoring witness familiar with the object or scene depicted, citing Federal Rule 901(b)(1)." Imwinkelried, *supra* note 48, at 52. Under this latter theory, so "long as the witness vouches that the image is a 'fair,' 'accurate,' 'true,' or 'good' depiction of the object or scene, the testimony satisfies the relaxed authentication test codified in Rules 901(a) and 104(b)." *Id.* at 52–54.

[54] One hiccup can occur in regard to converted digital photos if the judge "refuses to judicially notice the general reliability of digital photography"; in such a case, "the proponent will have to lay a foundation establishing the scientific validity of conversion technology, as required by *Daubert v. Merrell Dow Pharmaceuticals, Inc*." *Id*. at 54. According to Professor Imwinkelried, "[t]his should not be a difficult task. *Daubert* directs the trial judge to consider, among other things, the extent to which the technology is generally accepted. . . .The use of digital conversion is so widespread that the foundation is likely to pass muster." *Id.*

[55] *Id.* at 54; *see also* FJC Guide, *supra* note 38, at 205 ("The opponent may argue that the traditional Rule 901 formulation is not sufficient with respect to a photograph that has been digitally altered. When the witness looks at a photo, the witness does not (and perhaps cannot) verify all of the component parts of the photo.").

[56] Imwinkelried, *supra* note 48, at 54.

"enhances" an image; indeed, "the enhancement might eliminate the very details that the trier of fact needs to reach a just verdict."[57]

Moreover, digitally displayed photographs are especially susceptible to certain objections—such as completeness.[58] The act of cropping a photo, for instance, can be performed in seconds by savvy counsel on any number of software programs. Although cropping may seem innocuous at first glance, a comparison with hard-copy alteration perhaps brings the practice into better perspective: "it certainly is true that in direct examination counsel would not normally be allowed to approach the witness with a scissored up portion of a paper copy of a document just to bamboozle an opponent."[59] Indeed, objections to completeness on the ground of cropping may be sustained even where the modifications are minimal.[60]

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[57] *Id*. Similar to the checklist of his that was adopted by the *In re Vee Vinhnee* court, *see supra* note 28 and accompanying text, Professor Imwinkelried recommends that when attempting to admit an enhanced digital photograph, a proponent should be prepared to lay the following foundation:

> [1] The witness is an expert in digital photography. [2] He or she describes image enhancement technology, including both the creation of a digital image consisting of pixels and the computer manipulation of the pixels. [3] In general, both parts of the process are valid. [4] There has been adequate research into the specific application of image enhancement technology involved in the case. [5] The research resulted in the development of computer software for this application. [6] At a given time and place, the witness received a film photograph. [7] The witness followed proper procedure in digitizing the photograph. [8] The witness also followed correct procedure in using computer software to enhance the film photograph. [9] The witness recognizes the exhibit as the photograph that was produced when he or she used the software to enhance the film photograph.

Imwinkelried, *supra* note 48, at 54 (Also noting that this "extensive foundation should be satisfactory in any jurisdiction.").

[58] Federal Rule of Evidence 106 provides a platform for objecting to given evidence on grounds of completeness. Fed. R. Evid. 106 ("When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."). Completeness objections can also be framed under Rule 611(a). *See supra* note 38.

[59] FJC Guide, *supra* note 38, at 185.

[60] *Id.* at 185–86 ("One reason that judges sometimes sustain an objection to this kind of alteration of a cropped segment of a document, even if they are disposed to allow the segment itself, is that some sharp-eyed juror will spot the change and argue about its significance. This wastes time and diverts the jury from its charge."). In addition, "cropping can be used to create images that are, in fact, unfair given the context in which they are used." *Id*. at 186.

Likewise, as noted, the presentation of digital photos provides a multitude of possibilities for unfairness. Among others, risk occurs when the photos "have been resized, reshaped, displayed with misleading lighting, or displayed much larger than life."[61] Resizing is generally unremarkable, unless "photos of different dimensions [are] used to present facts unfairly."[62] Reshaping, on the other hand, is "almost always inherently unfair if size, shape, or distances are in issue."[63]

C. *Animations*

Among the most useful, and most frequently used, of the new technologies of the modern courtroom are computer-generated animations and simulations. Although these two variations of computer technology are in many ways similar,[64] a distinction should be drawn between them—indeed, admissibility may depend on the distinction.[65]

Animations, on the one hand, "are visual depictions that serve to illustrate or clarify such things as an eyewitness's recollection of the events at issue, an expert's opinion as to what occurred, or a general phenomenon or principle that served as the basis for an expert's opinion."[66] Thus, animations are generally offered as illustrative evidence only.[67]

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[61] *Id*. at 189.

[62] *Id*. For instance, a "large photo of a small object placed next to a small photo of a large object may suggest unfairly that the two are nearly the same size." *Id.* In addition, "when photos are resized they frequently are also distorted" by the software. *Id.* at 190. Even though "distortion is usually inadvertent [it] . . . does not diminish its seriousness"; therefore, especially since "lawyers may not recognize a distorted photo that has been worked on by someone else," counsel must be careful when resizing, particularly when the resizing is assigned to others. *Id.* at 191.

[63] *Id*. at 190.

[64] *See*, *e.g.*, Boies, *supra* note 13, at § 56:15 (referring to the distinction as a "fine line").

[65] *See*, *e.g.*, Lorraine v. Markel Am. Ins., Co., 241 F.R.D. 534, 559 (D. Md. 2007) ("[T]he classification of a computer-generated exhibit as a simulation or an animation also affects the evidentiary foundation required for its admission." (citation omitted)); *cf*. Verizon Directories Corp. v. Yellow Book USA, Inc., 331 F. Supp. 2d 136 (E.D.N.Y. 2004) (electing to admit technological demonstratives into evidence).

[66] Mueller & Kirkpatrick, *supra* note 47, at § 9:26 (footnotes omitted). "In part due to television, the typical American is a primarily visual learner; and for that reason, in the short term, many jurors find the animation more understandable than charts or oral testimony." *Lorraine*, 241 F.R.D. at 559 (citation omitted). Keep in mind, however, that animation "is only as good as the information put into it." Fiedler, *supra* note 5, at 312 (footnote omitted).

[67] Mueller & Kirkpatrick, *supra* note 47, at § 9:26; *see also* Datskow v. Teledyne Cont'l Motors Aircraft Prods., 826 F. Supp. 677, 685 (W.D.N.Y. 1993) (admitting animation as demonstrative exhibit "to help the jury understand the expert's opinion as to what happened") (citation omitted).

Regarding the admission of animations:

> [e]ach case must be judged on its own facts, taking into account the specific purposes for which the animation is submitted."[68] In general, however, courts "have allowed the admission of computer animations if authenticated by testimony of a witness with personal knowledge of the content of the animation, upon a showing that it fairly and adequately portrays the facts and that it will help to illustrate the testimony given in the case.[69]

The most common means of authenticating a computer animation are therefore Federal Rules of Evidence 901(b)(1) (witness with personal knowledge) and Rule 901(b)(3) (testimony of an expert witness).[70] Some courts also require a showing under Rule 901(b)(9) of "the process by which the animation was prepared, similar to that required for computer output generally."[71] This can happen through a showing that

> (1) the computer equipment is accepted in the field as standard and competent and was in good working order, (2) qualified computer operators were employed, (3) proper procedures were followed in connection with the input and output of information, (4) a reliable software program was utilized, (5) the equipment was programmed and operated correctly, and (6) the exhibit to be admitted is properly identified as the output in question."[72]

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[68] Fiedler, *supra* note 5, at 301.

[69] *Lorraine*, 241 F.R.D. at 559; *see also* Insight Tech., Inc. v. SureFire, LLC, 2007 WL 3244092, *3 (D.N.H. Nov. 1, 2007) ("To be admissible, the animations must be authenticated by independent evidence or be self-authenticating."); FJC Guide, *supra* note 38, at 205–06 (animations "may be offered in evidence with the usual foundation as to competence of the witness, relevance of the animation, identification of all of the elements that went into the animation, and evidence of the trustworthiness of the animation").

[70] *Lorraine*, 241 F.R.D. at 560.

> [I]n the case of expert witnesses, the standard of Fed. R. Evid. 702 and *Daubert* are not ordinarily applied to the animation itself. Expert testimony, of course, remains subject to those standards. Thus, in addition to the above, an expert should be prepared to testify regarding the evidentiary foundation of her opinion (as reflected in the animation) and any assumptions upon which she relied that were incorporated into the animation.

Boies, *supra* note 13, at § 56:15.

[71] Mueller & Kirkpatrick, *supra* note 47, at § 9:26; *see also* Fed. R. Evid. 901(b)(9) (addressing authentication or identification through "[e]vidence describing a process or system used to produce a result and showing that the process or system produces an accurate result").

[72] Elan E. Weinreb, *'Counselor Proceed with Caution': The Use of Integrated Evidence Presentation Systems and Computer-Generated Evidence in the Courtroom*, 23 Cardozo L. Rev. 393, 410 (2001) (internal brackets and footnote omitted).

As one source has noted, however, "the impact of animated exhibits is so great, that if there are insufficient indicia of reliability under Rule 901, then Rule 403 and Rule 611 considerations will weigh against use of the animation as an illustrative aid."[73]

D. *Simulations*

"Simulations, on the other hand, are created by entering known data into a computer program, which analyzes those data according to the rules by which the program operates (*e.g.*, the laws of physics or mathematics) to draw conclusions about what happened and to recreate an event at issue."[74] "In essence, with this form, the computer's data codes and resulting output become the witness."[75] As such, a simulation is "treated as a form of scientific evidence,"[76] and therefore is "normally offered as substantive evidence and requires a much more rigorous foundation" than an animation.[77]

In establishing this foundation, "the most frequent methods of authenticating computer simulations are 901(b)(1) (witness with personal knowledge); and 901(b)(3) (expert witness)."[78] Because of the more rigorous foundation required for simulations, there are also a number of stumbling blocks that may hinder the proponent of a simulation. Several courts have listed the following areas of concern:

> (1) the underlying information itself could be unreliable; (2) the entry of the information into the computer could be erroneous; (3) the computer hardware could be unreliable; (4) the computer software programs could be unreliable; (5) "the execution of the instructions, which transforms the information in some way—for example, by calculating numbers, sorting names, or storing information and retrieving it later" could be unreliable; (6) the output of the computer—the printout, transcript, or graphics, could be flawed; (7) the security system used to control ac-

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[73] FJC Guide, *supra* note 38, at 206; *see supra* note 38 quoting Federal Rule of Evidence 611(a). Note also that a common method for opposing admission of an animation is to highlight the "differences between the animation and actual conditions that might undercut the animation's probity." Fiedler, *supra* note 5, at 301; *cf.* Mueller & Kirkpatrick, *supra* note 47, at § 9:26 ("Minor discrepancies in the animation do not necessarily require its exclusion provided they are called to the attention of the jury and are not misleading.").

[74] Mueller & Kirkpatrick, *supra* note 47, at § 9:26; *see also Lorraine*, 241 F.R.D. at 560 ("We permit experts to base their testimony on calculations performed by hand. There is no reason to prevent them from performing the same calculations, with far greater rapidity and accuracy, on a computer.").

[75] Fiedler, *supra* note 5, at 297.

[76] *Lorraine*, 241 F.R.D. at 560.

[77] Mueller & Kirkpatrick, *supra* note 47, at § 9:26.

[78] *Lorraine*, 241 F.R.D. at 560.

> cess to the computer could be compromised; and (8) the user of the system could make errors.[79]

Federal Rules of Evidence 702 and 703 will likely also come into play where an expert witness is used.[80] "Thus, in addition to the 'standard' admissibility hurdles, the simulation may also be subjected to the requirements of [Rule] 702 and the standards for expert testimony as put forth by *Daubert v. Merrell Dow Pharmaceuticals Inc.* and its progeny.[81]

Moreover, a "simulation may raise Best Evidence concerns to the extent it relies on or incorporates the content of writings, recordings or photographs, although it may qualify as a summary under Fed. R. Evid. 1006 or as a duplicate under Fed. R. Evid. 1003."[82] Because of these various issues, when intending to offer a simulation, "advance notice should be given to opposing parties so that they can evaluate the evidence and be prepared to challenge or rebut it if necessary"—indeed, "[a]dvance notice and disclosure to the opposing party is sometimes required by court rule."[83]

IV.
Conclusion

Technology is becoming all the more prevalent in the courtroom. As the Honorable Lee Rosenthal recently observed, "Judges may actually come to require more and more that lawyers bring their [information technology] people to the meet-and-confer."[84] We may not be there yet. But at the end of his fifty-page opinion in *Lorraine v. Markel American Insurance Company*, Chief Magistrate Judge Grimm perhaps summed it up best: "Because it can be expected that electronic evidence will constitute much, if not most, of the evidence used in future motions practice or at trial, counsel should know how to get it right on the first try."[85]

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[79] *Id*. at 560 (citing Commercial Union Ins. Co. v. Boston Edison, 591 N.E.2d 165, 168 (Mass. 1992); Bray v. Bi-State Dev. Corp., 949 S.W.2d 93 (Mo. Ct. App. 1997)); *see also* Palo, *supra* note 5, at § 143 (listing four areas of potential weakness in regard to electronic evidence: "(1) integrity of the input data; (2) integrity of the computer equipment and programs; (3) security of the data processing system; and (4) integrity of the output").

[80] *Lorraine*, 241 F.R.D. at 560–61.

[81] Boies, *supra* note 13, at § 56:14; *see also* Ortiz v. Yale Materials Handling Corp., 2005 WL 2044923, *9 (D.N.J. Aug. 24, 2005) (computer-generated simulations have "long been accepted as an appropriate means to communicate complex issues to a lay audience, so long as the expert's testimony indicates that the processes and calculations underlying the reconstruction or simulation are reliable").

[82] Mueller & Kirkpatrick, *supra* note 47 (footnotes omitted).

[83] *Id.* The same applies to animations. *Id.*

[84] Panel Discussion, *supra* note 37, at 15 (comments of Hon. Lee H. Rosenthal).

[85] *Lorraine*, 241 F.R.D. at 585.

Family Responsibility Discrimination

Michele Ballard Miller
Kerry McInerney Freeman
Xuan-Thu Phan

Although family responsibility discrimination is not specifically prohibited by federal anti-bias laws, litigation in that area has skyrocketed in the past decade. A 2006 report by the Center for Worklife Law at the University of California Hastings College of the Law found that these types of claims had increased 400% during this period, and that employees prevailed more than 50% of the time, drawing judgments of up to $25 million. Given these statistics, this trend will likely continue. Accordingly, employers must recognize the potential for liability and take steps to avoid becoming the next defendant.

I.
Sources of Family Responsibility Discrimination Claims

Family Responsibility Discrimination – or FRD – is a form of gender discrimination against women or men because of their caregiving responsibilities. While the primary care-giving responsibility at issue is usually childcare, an increasing proportion of care-giving focuses on caring for the elderly and disabled. Although federal law does not prohibit such discrimination *per se*, both the courts and the Equal Employment Opportunity Commission (EEOC) have recognized that there are circumstances in which discrimination against care-givers might constitute both unlawful disparate treatment under Title VII and a violation of the Americans with Disabilities Act's (ADA's) prohibition against discrimination based on an employee's association with an individual with a disability. Such discrimination may also

With more than 25 years of experience practicing exclusively in the area of labor and employment law, Ms. Miller provides strategic advice to companies on a wide range of employment issues. She also defends companies in litigation involving claims of discrimination, harassment, retaliation and other employment-related disputes.

Named a "Super Lawyer" by Super Lawyers - Northern California magazine each year since 2004, Ms. Miller is a frequent lecturer on employment issues both for firm clients and outside groups. Her articles on employment issues affecting employers and HR professionals have appeared in numerous publications, on websites and in training materials.

Ms. Miller is on the board of directors of the National Association of Minority and Women Owned Law Firms (NAMWOLF) and is a member of the Federation of Defense and Corporate Counsel (FDCC) as well as the employment law sections of a variety of bar associations.

Ms. Miller received her J.D. from the University of California, Hastings College of the Law, in 1982 and her Bachelor of Arts degree from the University of Michigan in 1978.

run afoul of the Family and Medical Leave Act (FMLA), the Pregnancy Discrimination Act (PDA), the Equal Pay Act of 1963 (EPA), the Employee Retirement Income Security Act (ERISA), and the Equal Protection Clause of the U.S. Constitution. Moreover, an increasing numbers of state and local laws have cropped up specifically prohibiting discrimination against employees because they are parents or have family responsibilities. Employees have also pursued FRD cases under state common-law theories, including wrongful discharge and breach of contract.

II.
Key Statistics Compelling Employers to Take Notice of Such Claims

In addition to the statistics above, the Center for Worklife Law report highlighted other data that employers should note, including the following:

- Plaintiffs are more likely to prevail in FRD cases than other types of employment discrimination cases;
- The average award is $100,000, and the largest award is $25 million;

Over the past eleven years, Ms. Freeman has represented management in wide-ranging employment litigation matters in state and federal court, including those involving claims of wrongful termination, harassment, discrimination, and retaliation. Additionally, she advises clients regarding a variety of workplace issues including misconduct investigations, employee discipline, workplace violence, personnel policies and reasonable accommodations for individuals with disabilities.

Ms. Freeman received her J.D. in 1996 from Boalt Hall School of Law at the University of California, Berkeley, where she was a member of the Berkeley Journal of Employment and Labor Law and an intern at Disability Rights Education and Defense Fund (DREDF). She earned her Bachelor of Arts degree in 1990 from the University of California, Berkeley.

- no company is immune from FRD claims; indeed, many companies on the lists of best companies to work for as rated by *Fortune* and *Working Mother* magazines have been sued for FRD;
- 92% of FRD cases are filed by women; and
- 62% of the cases are filed by employees in non-professional occupations (mostly service positions).

III.
Types of Family Responsibility Claims Being Made

A survey of FRD cases being filed shows they involve a variety of different employment actions, including

- Refusing to hire women with preschool aged children, even though men with preschool aged children are hired;
- Failing to promote women with children while promoting men with children and women without children;

Ms. Phan's practice focuses on all aspects of labor and employment litigation, including race, gender, age, and disability discrimination and wage and hour disputes. She has experience defending single plaintiff, multi-plaintiff, class action and collective action cases and represents clients before state and federal courts as well as before administrative agencies.

Ms. Phan received her J.D. in 2003 from Boalt Hall School of Law at the University of California, Berkeley and her Bachelor of Arts degree from Mills College in 1997. Prior to joining Miller Law Group, Ms. Phan was with the law firm of Jones Day.

- Rejecting scheduling requests made by women for childcare reasons while granting similar scheduling requests made by men;
- Firing an employee for becoming pregnant;
- Treating women employees harshly and giving them unfounded critical evaluations after they became pregnant or gave birth;
- Denying family leave request for a male employee to care for his newborn baby because the employer believed only women should be caregivers; and
- Failing to promote mothers based on an assumption that they will not work hard enough because of their family responsibilities.

IV.
Family Responsibility Discrimination Claims Under Title VII and the ADA

Although no federal law specifically prohibits discrimination based on family caregiving responsibilities, the growing trend of FRD claims has prompted the EEOC to chime in. In May 2007, the EEOC issued guidance regarding circumstances that could give rise to FRD claims under Title VII and the ADA.[1] After asserting that the Enforcement Guidance "[wa]s not intended to create a new protected category," the EEOC went on to "illustrate circumstances in which stereotyping or other forms of disparate treatment may violate Title

[1] *See* EEOC Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities, Notice No. 915.002, May 23, 2007, http://www.eeoc.gov/policy/docs/caregiving.html (last visited Oct. 5, 2008).

VII or the prohibition under the ADA against discrimination based on a worker's association with an individual with a disability."[2] The EEOC recognized that the FRD cases tend to arise from employment decisions that are based on stereotypes about the relative dedication and competency of caregivers, rather than on individual performance or behavior. Although the stereotyping at issue tends to focus on women having and caring for children, stereotyping about caregiving responsibilities is not limited to women and childcare issues – it includes stereotypes about men caring for children and stereotypes about employees of both genders caring for sick, disabled, or elderly family members.

A. *Treatment Of Women Who Are Pregnant Or Caring For Children*

Employers often make the gender-based assumption that being pregnant and having current or future childcare responsibilities will interfere with a female employee's work performance and make her less dependable than a male employee. Employers may further stereotype female caregivers who adopt part-time or flexible work schedules as "homemakers" who are less committed to the workplace than their full-time colleagues. Sometimes employers' assumptions are "benevolent" – "well-intentioned and perceived by the employer as being in the employee's best interests."[3] Relying on this array of stereotypes, some employers may deny female care-givers opportunities based on assumptions about how they might balance work and family responsibilities. Whether the stereotypes are well-meaning or not, the EEOC Guidance warns employers, both by citing actual cases and providing examples, how those stereotypes can lead to FRD claims, and the type of evidence that can support those claims:

- Asking female applicants, but not male applicants, whether they were married or had young children;
- Making stereotypical or derogatory comments about pregnant workers or working mothers or other female caregivers;
- Subjecting female employees to less favorable treatment after they announced they were pregnant;
- Assigning women with caregiving responsibilities to less prestigious or lower-paid positions;
- Assuming a working mother would not want to relocate to another city, and therefore ruling her out for promotion;
- Deviating from workplace policies when taking a challenged employment action;

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[2] *Id.*

[3] *Id.*

- Downgrading an assessment of an employee's performance after the worker becomes pregnant or assumes caregiving responsibilities without any link to changes in the worker's actual performance;
- Providing negative subjective assessments that are not supported by specific objective criteria;
- Forcing an employee to go on unpaid leave after missing two days of work, saying "now that you're pregnant, you will probably miss a lot of work, and we need someone who will be dependable"[4]; and
- Refusing to reassign lifting duties for a pregnant worker despite having reassigned lifting duties for a male co-worker who hurt his arm in a car accident and a female co-worker following her hernia surgery.

The EEOC Guidance also warns employers that treating caregiving women of color differently than white caregiving women may invite claims of discrimination. For example, when, in the absence of a compensatory time-off policy, an employer allows a white employee to take compensatory time off to care for her children when her babysitter calls in sick but rejects an African American woman's similar requests without any justification, the denial of compensatory time off will appear to be discriminatory.

Moreover, the United States Supreme Court has emphasized that an employee's caregiving status should factor into the analysis of whether a challenged personnel action rises to the level of an adverse employment action that could support a claim of retaliation. In *Burlington Northern & Santa Fe Railway Corporation v. White*,[5] the Court explained, by way of example, that whereas a schedule change might be insignificant (and therefore not materially adverse) to an employee without caregiving responsibilities, the same schedule change could "matter enormously" to a mother with school age children, thus converting the same scheduling change into a materially adverse action giving rise to a claim of retaliation.[6] *Burlington Northern* puts employers on notice that where family caregivers are concerned, a wide variety of employment actions, such as transferring an employee to an office with a longer commute, placing an employee on a rotating schedule, or terminating an employee's telecommuting arrangement, could be considered materially adverse actions supporting a claim of retaliation.

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4 *Id.*

5 Burlington Northern & Santa Fe Railway Corporation v. White, 548 U.S. 53 (2006).

6 *Id*. at 69.

B. *Treatment of Men Caring for Children*

As the United States Supreme Court has observed, "[s]tereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. These mutually reinforcing stereotypes create[] a self-fulfilling cycle of discrimination."[7] While male plaintiffs constitute a small percentage of FRD claimants, roughly 8%, male plaintiffs' claims, like their female counterparts', have about a 50% success rate. Men's complaints generally involve the following areas: (1) denial of, interference with, or retaliation for taking leave to care for a family member; (2) denial of flexible work arrangements or family leave available to women; and (3) discrimination based on an association with a disabled family member.

C. *Treatment of Men and Women Caring for Disabled or Aging Family*

Because the ADA prohibits discrimination based on an individual's association with, or relationship to an individual with a disability, an employer may not treat a worker less favorably based on stereotypical assumptions about the worker's ability to perform job duties satisfactorily while also caring for someone with a disability. For example, the EEOC Guidance explains that an employer may not refuse to hire a job applicant whose wife has a disability because the employer assumes that the applicant would have to use frequent leave and arrive late due to his responsibility to care for his wife. Nor may an employer refuse to hire the most qualified candidate who is a divorced father with sole custody of his disabled son because the employer assumes his caregiving responsibilities will have a negative effect on his attendance and work performance.

VI.
Family Responsibility Discrimination Beyond Title VII and the ADA

Although plaintiffs have relied on Title VII and the ADA more than any other statutes when challenging employers' alleged unfair treatment of family caregivers in the workplace, a multitude of other statutory and constitutional sources provide avenues of relief for FRD plaintiffs.

A. *Pregnancy Discrimination Act*

Pregnancy discrimination complaints are a large subset of FRD cases. Between 1992 and 2005, there was a more than 30% increase in the number of pregnancy discrimination complaints filed with the EEOC and state enforcement agencies. The Pregnancy Discrimination Act states that "women affected by pregnancy . . . shall be treated the same . . . as other

[7] Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003).

persons not so affected but similar in their ability or inability to work."[8] Under the PDA, an employer cannot take adverse action against a pregnant employee because it anticipates that she will be unable to fulfill its job expectations. Courts have held employers liable for refusing to hire pregnant applicants based on the assumption they would not return to work immediately or would require a significant amount leave.[9] Extending the reach of the PDA, in *Walsh v. National Computer Systems, Inc.*,[10] the Eighth Circuit found that an employer had violated the PDA by taking adverse actions against an employee because she might become pregnant in the future. Affirming a jury's verdict of discrimination and harassment, and its related award of $625,000 in damages, the Eighth Circuit found an employer was properly held liable for hostile actions taken after the employee returned from maternity leave, including the following: telling the plaintiff she " 'better not be pregnant again,' "[11] throwing a telephone book at her with instructions to "find a pediatrician who was open after hours,"[12] scrutinizing her hours more than other employees,' increasing her workload without additional pay, and posting notes on her cubicle when she was absent stating " 'Out-Sick Child.' "[13]

B. *Family and Medical Leave Act (FMLA)*

Employees have also been successful in bringing FRD cases under the FMLA. For example, in *Liu v. Amway Corporation*,[14] the Ninth Circuit held that the employer interfered with plaintiff's FMLA leave by pressuring the plaintiff to reduce her leave and using her leave as a negative factor in the company's decision to terminate her. And in *Batka v. Prime Charter*,[15] the plaintiff successfully claimed her employer retaliated against her when her supervisor became antagonistic toward her and critical of her work after she told him that she was pregnant and intended to return to work at the end of her maternity leave.

It is becoming increasingly common for employees caring for aging family members to bring FRD cases under the FMLA – often garnering big verdicts. In *Schultz v. Advocate Health and Hospitals*,[16] a maintenance employee was awarded $11.65 million in damages after he brought suit alleging, among other things, that he had been fired in retaliation for taking FMLA leave to care for his aging parents. During his leave, Schultz's supervisor

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8 42 U.S.C.A. § 2000e(k) (West 2003).

9 *See* Wagner v. Dillard Dep't Stores, 17 Fed. Appx. 141, 149 (4th Cir. 2001).

10 332 F.3d 1150 (8th Cir. 2003).

11 *Id.* at 1155.

12 *Id.*

13 *Id.*

14 Liu v. Amway Corp., 347 F.3d 1125 (9th Cir. 2003).

15 301 F. Supp. 2d 308 (S.D.N.Y. 2004).

16 2002 WL 1067256 (N.D. Ill. May 28, 2002).

instituted a monthly performance standard that evaluated employees based on the volume of work completed within a set period of time. Schultz was terminated while on FMLA leave for failing to meet the new performance standard. During the trial, Schultz introduced evidence that the performance standard that led to his termination was not applied uniformly to all similarly situated employees (e.g., he was able to show that the requirements were more rigidly applied to him than to other employees). Further, he was able to show that other employees who did not meet the performance standards and were not on FMLA leave were not terminated.

C. *Equal Protection Clause*

In *Back v. Hastings on the Hudson Union Free School District*,[17] the Second Circuit held that an employment action based on stereotypes about motherhood is a form of gender discrimination in violation of the Equal Protection Clause. Elana Back was a school psychologist who argued she was denied equal protection rights when she was not recommended for tenure by her female supervisors due to stereotypes regarding the ability of women with young children to successfully combine work and mothering duties. Plaintiff pointed to comments made about a woman's inability to combine work and motherhood as direct evidence of gender bias. In considering her claim, the court reasoned that

> [j]ust as it takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring "a course at charm school," so it takes no special training to discern stereotyping in the view that a woman cannot "be a good mother" and have a job that requires long hours, or in the statement that a mother who received tenure "would not show the same level of commitment [she] had shown because [she] had little ones at home."[18]

The court ruled that "sex-plus" discrimination is actionable under section 1983 just as under Title VII, and held there was sufficient evidence for the case to survive summary judgment.[19]

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[17] 365 F.3d 107 (2d Cir. 2004).

[18] *Id.* at 120 (citation omitted).

[19] *Id.* at 118.

D. *ERISA*

ERISA has been used successfully to challenge employer actions by caregivers in situations including (1) refusing to hire or terminating an employee with an ill family member or dependent to avoid higher health insurance premiums;[20] (2) reducing an employee's pension credits because of a policy that required her to stop working when she became pregnant;[21] and (3) terminating a pregnant employee to avoid providing maternity leave benefits.[22]

E. *Equal Pay Act*

The EPA, which prohibits wage discrimination on the basis of sex, has also been used to protect the rights of family caregivers in the workplace. To prevail under this law, the female worker must show that the employer paid men and women different wages for performing "equal work" in jobs that require substantially "equal skill, effort, and responsibility, and which are performed under similar working conditions."[23] With respect to FRD cases, the EPA has supported claims of discriminatory pay practices where full-time employees are paid at a higher rate than part-time employees performing essentially the same work, but where the part-time employees are disproportionately women or women with children.[24]

F. *Special California Protection for Caregivers*

In addition to the federal legislation above, California provides additional protection to employees in its state statutes. Specifically, section 1030 of the California Labor Code requires workplace accommodations for lactating mothers.[25] Moreover, section 230.8 of that code bars discharge of or discrimination against parent-employees who take leave of up to forty hours each year (eight hours each month) to participate in their child's school or daycare activities, or who take time off to appear at a child's school because of suspension or expulsion.[26]

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[20] *See, e.g.,* Strait v. Midwest Bankcentre, Inc., 398 F.3d 1011 (8th Cir. 2004); Fleming v. Ayers & Assoc., 948 F.2d 993 (6th Cir. 1991).

[21] *See, e.g.,* Maki v. Allete, Inc., 383 F.3d 740 (8th Cir. 2004).

[22] *See, e.g.*, Grew v. Kmart Corp. of Illinois, Inc., 2006 U.S. Dist. LEXIS 6994 (N.D. Ill. Feb. 26, 2006).

[23] 29 U.S.C.A. § 206(d)(1) (West 1998).

[24] *See, e.g.*, Lovell v. BBNT, 295 F. Supp. 2d 611 (E.D. Va. 2003), *reh'g denied*, 299 F. Supp. 2d 612 (E.D. Va. 2004).

[25] Cal. Lab Code § 1030 (West 2008).

[26] Cal. Lab. Code § 230.8(a)(1) (West 2008).

VII
Tips for Avoiding FRD Claims

Family responsibility discrimination is a hotbed for litigation, and every indication is that this trend will continue. Accordingly, employers must recognize the potential for liability and take steps to avoid being the next defendant.

An employer can minimize its risk by implementing the following practices:

- Train supervisors regarding gender discrimination, stereotyping, harassment and retaliation in the context of workers with family care responsibilities, and explain how to seek help from human resources when needed;
- Train supervisors to avoid making inappropriate comments and taking inappropriate actions, such as making personnel decisions based on stereotypes (e.g., a new mother will not be able to commit to her job);
- Ensure that supervisors are aware of any state or local leave provisions pertaining to parents;
- Ensure that employees are evaluated on performance, rather than on a supervisor's assumption about the employee's commitment to his or her job (base all performance evaluations on documented objective criteria and observations);
- Distinguish between pregnancy-related leave and other forms of leave, ensuring that any leave specifically provided to women alone is limited to the period that a woman is incapacitated by pregnancy or childbirth;
- Review leave requests and monitor approved leave by type and length to ensure the approvals do not have a disparate impact on caregivers;
- Revise anti-harassment policies to include examples of harassment directed at caregivers, and handle complaints from caregivers regarding possible harassment in the same manner as others; and
- Have an effective mechanism for receiving and investigating complaints of discrimination and harassment.

While we do not expect this area of litigation to subside in the near future, a well-prepared employer should be able to successfully meet the challenges ahead.

The Unsettling Nature of the Right to Settle Provisions in a Professional Liability Policy

Thomas F. Segalla
Brian R. Biggie

Litigation between professionals and their liability insurers over the last several years has increased, and jockeying for a position over who has the right to settle a professional liability claim has become more complicated. When it comes to the settlement of a third-party claim against the professional/insured, an insurer must be mindful of the duties and obligations both the insurer, and the insured, owe under the policy. One example where these duties and obligations may vary is when a policy grants the insured the right to consent to a settlement. The consequence of such a provision will be governed in part by the policy language and by the statutory and common law of the jurisdiction handling any resulting dispute.

Notably, if the policy does not contain a right to consent provision, or the provision is unenforceable, an insurer's right to settle is not absolute. The insurer must satisfy its obligation to act in good faith. Following a brief and general introduction regarding settlement provisions in insurance policies and some of the unique concerns for professionals, this article discusses the legal limitations affecting the right to settle claims covered by a professional liability policy.

I.
Introduction

Typically, under a general liability policy, the authority to investigate and settle claims is reserved to the insurer. Generally, providing the insurer this authority does not present a conflict between the interests of the insurer and the insured. For the homeowner or driver unlucky enough to the find him or herself a defendant in a personal injury action, for example,

Thomas F. Segalla is a founding member and senior trial partner in the law firm of Goldberg Segalla LLP, where he is the head of its Litigation Defense Practice. He is a member of the DRI Board of Directors, is the Emeritus Chair of the DRI Law Institute and a Past Chair of its Insurance Law Committee and is also a member of the Federation of Insurance and Corporate Counsel and the International Association of Defense Counsel where he serves on several of their substantive committees. He has lectured extensively and published articles for these organizations. His litigation practice is largely devoted to the defense of general insurance and coverage matters, labor law, bad faith and fraud, and environmental and toxic tort matters. He is also retained as an expert by litigants in coverage and bad faith litigation. He is the co-author of the renowned Insurance Treatise Couch on Insurance 3d and provides commentaries to the monthly Bad Faith Update published by Mealeys/Lexis-Nexis.

concerns about the insured's professional reputation or the possibility of higher insurance premiums are not likely prevalent. For those litigants, the prospect of litigation, the threat to personal assets, and the forced involvement in our litigation system undoubtedly cause the most anxiety. Arguably, the insured under the traditional liability policy is more than willing to grant the insurer the authority to resolve a claim, and the sooner the claim can be resolved, the happier the insured will be.

This dynamic changes, however, in the context of an insured covered under a professional liability policy. In this instance, the insured has a strong interest in safeguarding his or her reputation and may be faced with significantly higher premiums subsequent to a loss. Any settlement poses a risk to an insured's reputation and possibly the insured's ability to continue to practice.

One would expect that concerns over reputation have increased exponentially as the information age makes it possible to send and receive information instantaneously. In addition to the fact that some states require insurance companies to report claims, physicians, lawyers, and engineers must worry about details of a settlement, whether accurate or not, being discussed in chat rooms, blogs, or other websites. These issues can create the conflict between the insurer and the insured over a potential settlement, even if that settlement is within the policy limits.

This conflict, and these divergent interests, have led some physicians to seek policies containing 'Right to Consent' clauses, which traditionally provide that the insurer shall not compromise any claim under the policy without the insured's consent. In contrast, policies

Brian R. Biggie concentrates his practice on complex insurance coverage disputes and analysis. He has successfully argued cases before the Third and Fourth Departments and practices in courts throughout New York. He is also admitted to practice law before the United States District Court for the Western District of New York and is a member of the Defense Research Institute and the New York and Erie County Bar Associations. He currently serves as a Board Member for the Buffalo Alliance for Education and works on the Schools Committee with the Buffalo Niagara Partnership. For the past two years he has organized a gift-giving campaign for the benefit of over 300 local children in need. He is the 2006 recipient of the Commitment to Education Award from the Buffalo Alliance for Education.

that do not include a 'Right to Consent' clause generally provide that the insurer has the right to investigate, negotiate and settle any suit or claim if it thinks that settlement is appropriate. Understanding the different effect these two provisions have on competing duties and obligations of the insured and insurer can be challenging.

II.
Policies Containing A "Right to Consent" Provision

Generally, policies that contain consent clauses also include mandatory arbitration provisions. As a result, there is limited case law addressing disputes over malpractice settlements under a policy with a consent provision. Based on an extensive search of cases across the country, no court has held that such provisions are unenforceable or against public policy.[1] Florida, however, has passed a statute stating that a consent clause allowing the insured to veto a settlement within policy limits is against public policy.[2]

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[1] *See* Appendix "A" which provides a jurisdictional analysis of how various courts have handled settlement provisions in professional liability policies.

[2] *See* Fla. Stat. Ann. § 627.4147(1)(b) (West 2005).

Courts have recognized that such provisions are unique to professional liability policies.[3] In assessing the enforceability of a "Right to Consent" clause, at least one court, while upholding the provision, considered the public policy implications and noted that "[t]here is . . . a public interest in extrajudicial settlement of lawsuits. The settlement clause tends to defeat that interest and therefore will be narrowly construed so as not to defeat the covenant of good faith and fair dealing which is an implied reciprocal term of the policy."[4]

The court went on to state that a settlement clause (i.e. "Right to Consent" clause) "does not permit unreasonable rejection of [a] settlement by the insured"[5] and allows the insured "an opportunity to convince a jury or judge that his refusal to agree to a settlement was reasonable under all the circumstances, including his concern for professional reputation. The settlement clause exhibits no inconsistency with the policyholder's obligation of good faith."[6]

III.
Policies Giving Insurers The Exclusive Right To Settle Within Policy Limits: The Obligation of Good Faith

In the case *Mitchum v. Hudgens,*[7] the Supreme Court of Alabama confronted a policy provision that gave the insurer the exclusive right to settle any claim against its insured within the policy limits. In affirming the insurer's authority to resolve the claim, the court stated that

> [m]ost courts construing identical or similar policy provisions have reached the same conclusion. As stated in 7C J. Appleman, *Insurance Law and Practice* § 4711 (3d ed. 1983): 'It was earlier stated that an insurer has the right to make a compromise or settlement of any claims against the insured, and that it is not bound to consult the interests of the insured to its own prejudice. The law favors settlement without recourse to litigation.'[8]

The court did note that the exclusive right given to the insurer cannot be exercised arbitrarily and went on to state, " 'The right given by contract still requires that the insurer

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[3] *See* 2 Rowland H. Long, The Law of Liability Insurance § 5A.19, p. 5A-112.1, fn. 1).

[4] Transit Casualty Co. v. Spink Corp., 156 Cal. Rptr. 360, 367 (Dist. Ct. App. 1979) (citation omitted).

[5] *Id.*

[6] *Id*.

[7] 533 So. 2d 194 (Ala. 1988).

[8] *Id*. at 196.

make an investigation, consider the desires or instructions of the insured and that the settlement not be made in bad faith.' "[9]

Whether an insurer is liable for bad faith will undoubtedly be judged by the common law and/or statutory bad faith standard applied in the relevant jurisdiction. For example, the New York Court of Appeals in *Feliberty v. Damon*[10] considered the following fact pattern. The plaintiff was served with a summons and complaint seeking recovery based upon alleged medical malpractice. Following trial, the injured party obtained a verdict against the plaintiff for an amount within the policy. The plaintiff/physician demanded that the insurer and counsel appeal the verdict. The insurer did not do so. Before the judgment was entered, and without the consent of the insured, the insurer settled the claim for an amount slightly less than the verdict. The insured filed suit alleging that the insurer acted in bad faith by settling the matter without his consent.

The policy at issue did not require the consent of the insured to settle the matter. In holding that the insurer did not act in bad faith, the court of appeals stated that the

> insurance contract . . . specifie[d] that the 'company may make such investigation and such settlement of any claim or suit as it deems expedient.' Unlike bargained-for, and presumably costlier, policy provisions contemplating the insured's consent to settlement . . . , here the parties' contract unambiguously gave the insurer the unconditioned right to settle any claim or suit without plaintiff's consent.[11]

The court stated that the insured's discontent was based upon the decision to settle the case. That decision, however, was a decision the insurer had the right to make.[12]

The *Filiberty* decision, although decidedly in favor of the insurer, does not foreclose the possibility of a bad faith claim even where the insurer retains the right to settle. Following the decision in *Feliberty*, the court of appeals in *Pavia v. State Farm* [13] addressed an insurer's obligation to act in good faith in settling an action and stated

> The notion that an insurer may be held liable for the breach of its duty of "good faith" in defending and settling claims over which it exercises exclusive control on behalf of its insured is an enduring principle, well settled in this State's jurisprudence. . . . The duty of "good faith" settlement is an implied obligation derived from the insurance contract.[14]

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[9] *Id.* at 197 (quoting 7C John Alan Appleman, Insurance Law and Practice § 4711, 369-70 (3d ed. 1983)).

[10] 527 N.E.2d 261 (N.Y. 1988).

[11] *Id*. at 262.

[12] *Id.*

[13] 626 N.E.2d 24 (N.Y. 1993).

[14] *Id*. at 26-27 (citations omitted).

While the *Pavia* decision still requires an insured to show more than negligence to establish a bad faith claim,[15] the referenced language opens the door for an insured to at least allege a bad faith claim based on a settlement without consent. An insurer should, at a minimum, be mindful of the possibility that it may incur the expense of defending a bad faith claim filed by an insured who does not agree with a potential settlement. Again, any potential bad faith claim will have to be assessed according to the common law and/or statutory standards applicable in that particular jurisdiction.

Florida is one State that has addressed 'Right to Consent' clauses statutorily. For example, in *Freeman v. Cohen,*[16] a Florida court stated as follows:

> "It is against public policy for any insurance . . . policy to contain a clause giving the insured the exclusive right to veto any . . . settlement offer, or offer of judgment, when such offer is within the policy limits. However, any . . . settlement offer, or offer of judgment made by an insurer . . . shall be made in good faith and in the best interests of the insured."[17]

The insurance policy in *Freeman* provided: "The Company is authorized to compromise any claim hereunder without the consent of the Insured, including any offers for admission of liability, arbitration, settlement or judgment, unless such offer and compromise is in excess of the applicable limits of liability under this policy."[18]

Dr. Freeman tried to prevent his insurer from settling a claim against him without his consent by cancelling the policy and advising his insurer that it no longer represented his interests and, therefore, did not have any right to negotiate a settlement. At the same time, the claims adjuster was finalizing a settlement with the plaintiffs. The plaintiffs filed a motion to enforce the settlement. Dr. Freeman objected on grounds that the carrier had no authority to settle the claim, and it acted in bad faith because the settlement would result in increased premiums and damage to his reputation. The argument that authority to settle was lacking because the policy had been cancelled was rejected. While the reason is not entirely clear, it may have been because the cancellation was a tactical move to negate the provisions in the contract authorizing the carrier to settle the case. The court simply stated that Dr. Freeman's arguments were insufficient as a matter of law.[19]

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[15] *Id.* at 27.

[16] 969 So. 2d 1150 (Fla. Dist. Ct. App. 2007), *rev. denied*, 980 So. 2d 1070 (Fla. 2008).

[17] *Freeman*, 969 So. 2d at 1152 (quoting Fla. Stat. Ann. § 627.4147(1)(b) (West 2005)).

[18] *Id*.

[19] Cohen v. Freeman, 914 So. 2d 449, 450 (Fla. Dist. Ct. App. 2005), *aff'd* 969 So. 2d 1150 (Fla. Dist. Ct. App. 2007).

While addressing the bad faith claim, the court stated that while the Florida statute prevents an insured from vetoing a settlement, an insurer's power to settle is not absolute and must be in the best interest of the insured. The court held that an insurance policy's purpose was indemnification and defense against covered claims. Its purpose was not to protect an insured from increases in insurance premiums or damage to the insured's reputation. The court stated, in part, "The only bad faith action available to an insured when the carrier settles a claim against the insured within policy limits is one alleging prejudice to a pending counterclaim of the insured or exposure of the insured to additional damages above the policy limits[.]"[20]

Most recently, Dr. Freeman filed a complaint seeking a declaration that Florida's "no consent" statute was unconstitutional because it violated the Supremacy Clause and the Contracts Clause of the U.S. Constitution. Dr. Freeman's complaint was dismissed because he lacked standing to bring the claim. As a result, the court did not reach the merits of his constitutional claims.[21]

IV.
Conclusion

There are a number of questions that remain regarding consent to settlements in a malpractice action, regardless of who retains the authority to settle, including

- What are the standards governing an insured's decision to withhold consent?
- What are an insurer's obligations where the settlement is less than the insured's deductible?
- What is the right of the insurer to collect from the insured any payment of the insured's deductible?
- What are the relationships between the insured, primary insurer, excess insurer, and/or reinsurer in these types of situations?

In the end, given the concerns of an insured, there is always the possibility of divergent interests in settling a malpractice action. A dispute, and possible litigation, may arise regardless of whether the insurer, or the insured, is vested with the right to settle a claim.

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[20] *Freeman*, 969 So. 2d at 1155.

[21] Freeman v. Medical Protective Co. of Fort Wayne, No. 08-80479, 2008 U.S. Dist. LEXIS 59106 (S.D. Fla. Aug. 1, 2008).

APPENDIX A

A JURISDICTIONAL ANALYSIS OF SETTLEMENT PROVISIONS IN PROFESSIONAL LIABILITY POLICIES (AS OF DECEMBER 2007)

JURISDICTION	APPLICATION OF CONSENT PROVISION
Alabama	In *St. Paul Fire & Marine Ins., Co. v. Edge Memorial Hosp.*, 584 So. 2d 1316 (Ala. 1991), St. Paul issued a policy generally reserving the right to investigate and settle claims. The exception to this right was contained in an endorsement stating, in part, "We can pay the deductible to settle a claim. If we do you agree to repay us as soon as we notify you of the settlement." *Id.* at 1326. The insured refused to reimburse St. Paul for a settlement arguing that it was not notified and did not give consent. The court stated that "where the insured has a direct financial stake in the litigation, the law generally requires that the insured have control over acceptance or rejection of settlement offers. *Id*. The court stated that it was undisputed that the insured did not consent to the settlement and St. Paul breached its contractual obligations. In *Mitchum v. Hudgens*, 533 So. 2d 194 (Ala. 1988), the court held that the insured's consent was not required before the insurer could settle a malpractice claim. The court went on to state, "This is not to say, however, that the insurer is entitled to exercise this right arbitrarily. 'The right given by the contract still requires that the insurer make an investigation, consider the desires or instructions of the insured and that the settlement not be made in bad faith.'" *Id.* at 197.
Alaska	No reported case applying a right to consent provision.
Arizona	No reported case applying a right to consent provision.
Arkansas	No reported case applying a right to consent provision.
California	California has adopted a statute that requires written consent of the insured to effectuate a settlement, but it protects the interests of the injured party by stating that the failure to obtain such consent does not invalidate the settlement. *See* Cal. Bus. & Prof. Code § 801 (2007). The relevant portion of the statute states, "Notwithstanding any other provision of law, no insurer shall enter into a settlement without the written consent of the insured, except that this prohibition shall not void any settlement entered into without that written consent." § 801(f). In *Chambi v. Regents of Univ. of Cal.*, 116 Cal. Rptr. 2d 50 (Cal. Dist. Ct. App. 2002), Chambi and Regents were sued for malpractice resulting in a settlement that included the dismissal of Chambi. The settlement was reached without Chambi's consent. Chambi filed suit and alleged that Regents violated § 801. The court noted that § 801 applied to "insurers" and that Regents was a self-insured public entity. Therefore, the requirements of § 801 did not apply.

	In *Transit Casualty Co. v. Spink Corp*., 156 Cal. Rptr. 360 (Cal. Dist. Ct. App. 1979), the court upheld an excess insurer's right to recover against an insured and the primary insurer for refusal to consent to settle. The court held that there existed a three-way relationship that created a three-way duty of care. That reasoning was subsequently rejected by the California Supreme Court in *Commercial Union Assurance Co. v. Safeway Stores Inc.*, 610 P.2d 1038 (Cal. 1980) . The court held that while an implied covenant of good faith exists in all insurance policies, "[t]he insured owes no duty to defend or indemnify the excess carrier; hence, the carrier can possess no reasonable expectation that the insured will accept a settlement offer as a means of 'protecting' the carrier from exposure." *Id.* at 1041-42.
Colorado	No reported case applying a right to consent provision.
Connecticut	No reported case applying a right to consent provision.
Delaware	No reported case applying a right to consent provision.
District of Columbia	No reported case applying a right to consent provision.
Florida	In contrast to California, Florida has passed a statute stating that a professional liability policy cannot grant an insured veto power for a settlement within the policy limits. *See* Fla. Stat. Ann. § 627.4147(1)(b) (West 2005). In fact, the statute states that it is against public policy for an insurance contract to contain a clause granting such authority to the insured. The statute requires that any settlement be "made in good faith and in the best interests of the insured." *Id.* A commonly cited case in Florida discussing consent to settlement in a malpractice action is *Shuster v. South Broward Hospital District Physicians' Professional Liability Insurance Trust*, 591 So. 2d 174 (Fla. 1992). In *Shuster*, South Broward issued a policy reserving the right to settle a claim "as it deems expedient." *Id*. at 176. The insured filed an action seeking recovery for bad faith after three malpractice actions were settled without the insured's consent. The court noted that the policies at issue were procured before § 627.4147 was passed, and the statute, therefore, did not apply. The court held that phrase "deems expedient" placed the insured on notice "that the agreement granted the insurer the exclusive authority to control settlement and to be guided by its own self-interest." *Id*. at 176. The court identified two exceptions to this general principle: (1) where there are multiple parties, and the insurer, in bad faith, simply settles with only some of the parties, thereby exposing the insured to a potential excess judgment; and (2) where the settlement would eliminate a counterclaim available to the insured. In *Rogers v. Chicago Insurance Co.*, 964 So. 2d 280, 284 (Fla. Dist. Ct. App. 2007), the court held that the statutory requirement that a settlement be made "in the best interests of the insured mean[t] the interests of the insured's rights under the policy, not some collateral effect" unrelated to the claim.
Georgia	No reported case applying a right to consent provision.
Hawaii	No reported case applying a right to consent provision.
Idaho	No reported case applying a right to consent provision.

Illinois	In *Rogers v. Robson, Masters, Ryan, Brumund and Belom*, 392 N.E.2d 1365 (Ill. App. Ct. 1979), the plaintiff filed suit alleging his insurer breached the terms of an insurance contract by settling a claim without his consent. The court noted that the policy contained a clause that required the insurer to obtain written consent in order to settle a claim; however, this requirement did not apply to claims involving a former insured. At the time the claim was settled, Roger was no longer an insured; therefore, his consent was not required. Lastly, the court rejected the argument that an insurer could do away with the consent requirement by simply canceling or refusing to renew a policy. The court stated there was no foundation for the proposition that the insurer refused to renew the policy in "an attempt to get around the consent requirement." *Id*. at 1370.
Indiana	No reported case applying a right to consent provision.
Iowa	No reported case applying a right to consent provision.
Kansas	In *Saucedo v. Winger*, 915 P.2d 129 (Kan. Ct. App. 1996), the Court of Appeals for Kansas was required to interpret the consequences of a policy that did not address the issue of consent. In *Saucedo*, after a malpractice claim was tried to a verdict in favor of the insured, appealed, and remanded for a new trial, the insurer thought it best to simply settle the case. The settlement was reached without the consent of the insured. The policy did not reserve to the insurer the right to settle a claim and instead only stated that the insured could not settle an action without the insurer's consent. The court held that since the policy did not say the carrier had the exclusive right to settle, it must be interpreted to mean that the carrier, "cannot settle for less than the policy limits without the consent of the defendant." *Id.* at 136. In Kansas, under the Health Care Provider Insurance Act, health care providers pay a surcharge to the Fund to qualify for excess coverage. *See* Kan. Stat. Ann. § 40-3403 (2006). If an insurer tenders the limits of its policy, but the claim exceeds the amount of coverage, the insurance commissioner is authorized to negotiate a settlement with the claimant. In *Miller v. Sloan, Listrom, Eisenbarth, Sloan and Glassman*, 978 P.2d 922 (Kan. 1999), the insured's carrier tendered its policy limits, and the commissioner then negotiated a settlement. The insured objected to the settlement stating that he did not give consent to the agreement reached by the commissioner. The court held, however, that where the statute creating the Fund did not create any duty to the health care provider, and consent was not required.
Kentucky	In *American Physicians Assurance Corp. v. Schmidt*, 187 S.W.3d 313 (Ky. 2006), the insured obtained a professional liability policy that contained a clause requiring his consent before a settlement was reached. A malpractice action was instituted against the insured. The insured did not give consent to a settlement offer for the policy limits and trial resulted in an excess judgment. Subsequent to an assignment of rights, the injured plaintiff filed a bad faith action against the insurer. The court held, however, "Where the insured retains the right to consent to settlement and withholds that consent, the insurer's failure to settle cannot be deemed 'bad faith' that would give rise to liability for an excess judgment." *Id.* at 317.

Louisiana	The issue of consent by the insured can arise in the context of general liability policies as well. In *Employers' Surplus Line Ins. Co. v. City of Baton Rouge*, 362 So. 2d 561 (La. 1978), the insurer sought payment of a deductible after settling a personal injury claim. The court stated that the policy applied the deductible to an amount that the insured was "legally obligated to pay." *Id.* at 565. The court interpreted this phrase as requiring a final legal determination; therefore, in the context of a negotiated settlement with a third party, the consent of the insured was required.
Maine	No reported case applying a right to consent provision.
Maryland	No reported case applying a right to consent provision.
Massachusetts	No reported case applying a right to consent provision.
Michigan	In *Jayakar v. North Detroit General Hosp.*, 451 N.W.2d 518 (Mich. Ct. App. 1989), the hospital obtained a policy including employees as insureds. The policy also required the consent of the insured before any settlements were reached. A malpractice action was filed naming the hospital and Jayakar as defendants. Jayakar contended that the insurer needed his consent to settle the claim. The court disagreed noting that pursuant to Jayakar's reasoning, every employee or volunteer who qualified for coverage would have "unbridled power to preclude settlement." *Id.* at 519.
Minnesota	No reported case applying a right to consent provision.
Mississippi	No reported case applying a right to consent provision.
Missouri	In *Brion v. Vigilant Insurance Co.*, 651 S.W.2d 183 (Mo. Ct. App. 1983), the insured was entitled to seek damages for breach of contract after the insurer settled a malpractice claim without the insured's consent. The court characterized the consent provision as a "pride" provision and stated that "[i]n recognition of the value of a professional reputation, the instant contract gives the insured the express right to control the settlement aspect of litigation and thereby protect that reputation. The breach of this contract may, therefore, give rise to damages not generally recoverable in a conventional breach of contract action." *Id*. at 185.
Montana	No reported case applying a right to consent provision.
Nebraska	No reported case applying a right to consent provision.
Nevada	No reported case applying a right to consent provision.
New Hampshire	No reported case applying a right to consent provision.
New Jersey	In *Lieberman v. Employers Ins. of Wausau*, 419 A.2d 417 (N.J. 1980), the insured initially gave consent to settle a malpractice claim. After hearing that the allegedly injured party may be lying about, or exaggerating, his claims, the insured revoked his consent. Despite his revocation, the matter was settled. The court held that absent a policy provision stating "consent, once given, may not be withdrawn, or of proof that the insurer has acted upon such consent to its detriment, [it] discern[ed] no sound reason for holding the consent to be irrevocable." *Id.* at 422.

	Similar to the *Jayakar* decision in Michigan, in *Webb v. Witt*, 876 A.2d 858 (N.J. Super. Ct. App. Div. 2005), a doctor employed by a hospital argued that the consent clause in a professional liability policy naming the hospital as the insured required her consent before a settlement was reached. The doctor argued that it was against public policy to allow one insured the ability to veto a settlement, while denying the same right to another insured. Further, the doctor contended that allowing the settlement without her consent was a breach of the insurer's fiduciary duty. The court rejected each of these arguments stating, "In short, she wants to alter a contract of which she is a third party beneficiary, simply because it will confer an additional benefit on her, not because it contravenes public policy." *Id.* at 867.
New Mexico	No reported case applying a right to consent provision.
New York	In *Feliberty v. Damon*, 527 N.E.2d 261 (N.Y. 1988), before a judgment was entered, and without the consent of the insured, the insurer settled the claim for an amount slightly less than the verdict. The insured filed suit alleging that the insurer acted in bad faith by settling the matter without his consent. The New York Court of Appeals held that the decision to settle a case was a decision the insurer had the right to make. *Id.* at 262. In *Pavia v. State Farm Mut. Auto Ins. Co.*, 626 N.E.2d 24 (N.Y. 1993), the court held that an insured must show more than negligence to establish a bad faith claim against the insurer.
North Carolina	No reported case applying a right to consent provision.
North Dakota	No reported case applying a right to consent provision.
Ohio	In an unreported decision, the Ohio Court of Appeals applied an exception to the terms of a right to consent clause contained in a policy and held that consent was not required where the insured was no longer covered by the insurer. *Bartulica v. American Physicians Capital, Inc.*, 2002 WL31386666 (Ohio Ct. App. 2002). The insured argued that the provision required an affirmative act by the insured and that it was the insurer who chose not to renew the policy. The court held that the provision was unambiguous and applied it as written.
Oklahoma	No reported case applying a right to consent provision.
Oregon	No reported case applying a right to consent provision.
Pennsylvania	In *Bleday v. OUM Group*, 645 A.2d 1358 (Pa. Super. Ct. 1994), the court interpreted the same "deems expedient" language as did the Florida court in *Shuster,* 591 So. 2d 174. The insured filed suit premised upon breach of contract and bad faith, contending that as a result of a settlement, it would be subject to increased premiums, loss of earnings, and harmed reputations. The court held that it is possible to assert a bad faith action against an insurer where a claim is settled "within the policy limits if such settlement was contrary to the intent and expectation of the parties." *Id.* at 1360-61. The court held that the plaintiff's alleged damages were speculative and held that a plaintiff must present more to maintain a claim for bad faith where the matter is settled within the policy limits.

Rhode Island	No reported case applying a right to consent provision.
South Carolina	No reported case applying a right to consent provision.
South Dakota	No reported case applying a right to consent provision.
Tennessee	No reported case applying a right to consent provision.
Texas	In *Dear v. Scottsdale Ins. Co.*, 947 S.W.2d 908 (Tex. App. 1997) (overruled on different grounds), the court held that where the insurer has the absolute right to settle claims by a third party, the court will not "engraft any consent requirement onto [the] policy." *Id.* at 914.
Utah	No reported case applying a right to consent provision.
Vermont	No reported case applying a right to consent provision.
Virginia	No reported case applying a right to consent provision.
Washington	No reported case applying a right to consent provision.
West Virginia	No reported case applying a right to consent provision.
Wisconsin	No reported case applying a right to consent provision.
Wyoming	No reported case applying a right to consent provision.

Food for Thought: Defending the Food Purveyor When the Meal Turns Bad

Anthony F. Tagliagambe[1]

I.
Introduction

In the last several years, food safety has become a growing national concern. Whether it is killer spinach, tainted ground beef products or some type of food that contains objects that do not belong in it, American consumers are increasingly concerned and litigious about the meal that turns bad. Improper food production, storage, butchering and/or processing can cause bacteria such as E. coli to get into the food and have potentially serious medical consequences to the consumer.

A restaurant or food store that sells contaminated food is sure to be targeted by a plaintiff who has become ill as a result of a bad meal.[2] This article focuses on the issues that arise when someone alleges that a business owner has served or sold contaminated food. More particularly, it focuses on negligence claims and claims based on breach of the implied warranty of merchantability.

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[1] The author gratefully acknowledges the assistance of Heather Hornsby of McDowell, Knight, Roedder & Sledge, LLC, Mobile, Alabama in the research and preparation of this article.

[2] Claims may also be brought against caterers despite the lack of privity between the caterer and the social guest. *See* England v. Sanford, 561 N.Y.S.2d 228 (App. Div. 1990) (finding little if anything to distinguish caterer's relationship to the party guests from a restaurant owner's relationship to paying customers despite lack of privity between caterer and party guests). Also, a person who rescues a food poisoning victim may have a claim against the food purveyor. *See* Day v. Waffle House, Inc., 743 P.2d 1111, 1112–13 (Okla. Civ. App. 1987) (finding that plaintiff, who was injured in a car wreck while driving a friend to hospital after discovering glass in his food, could recover against the restaurant).

Anthony F. Tagliagambe is a senior partner in London Fischer LLP in New York City. He is in charge of its product liability and construction litigation department. He was admitted to the New York Bar in 1979 and practices primarily in New York State and Federal Courts trying and defending cases involving products liability, construction accidents, construction defect claims, roadway design and municipal liability. He is active in numerous bar associations and committees, including the New York City Bar where he serves on the Tort Litigation Committee. He is an elected member of the Federation of Defense Corporate Counsel, where he is a New York State representative. Mr. Tagliagambe has lectured throughout the state for numerous bar associations and insurance industry groups in the areas of trial practice, discovery practice, evidence, defense of products liability cases, defense of construction cases under New York State's Labor Law and defense of catastrophic injury cases. Mr. Tagliagambe received his JD degree from Union University Albany Law School and his BA degree in English Literature from Columbia University. Mr. Tagliagambe has received the highest peer review rating from Martindale-Hubbell and has been designated one of New York's "Super Lawyers."

Consider the following simple example. Your long-time client, No Fault Insurance Company, contacts you to defend its insured, Cheeseburger Heaven. Cheeseburger Heaven is a fast-food restaurant facing a lawsuit by the plaintiff who claims to have developed serious medical problems from eating a cheeseburger he purchased in the drive-thru. Your client asks you to handle the case and wants an evaluation of potential liability. The plaintiff tells you that he purchased a cheeseburger in the drive-thru and did not eat it until he got to a nearby bookstore, where he is a cashier. He also tells you that shortly after eating the cheeseburger, he felt nauseated, vomited, and had to be taken to the emergency room, where a preliminary diagnosis of food poisoning was made. The hamburger has been thrown out and cannot be tested to determine if it actually was contaminated.

A business owner might think that lack of physical evidence (i.e., the actual hamburger consumed) will be enough to avoid liability. However, as seasoned lawyers know, direct, physical evidence is not the only type of proof that is legally recognized. Familiarity with those alternatives is crucial when representing the defendant in this type of case.

Part II of this article explains the potential causes of action that may be included in a complaint filed against the business owner in this situation. After briefly explaining breach of implied warranty claims, Part II focuses on negligence claims, including proof of breach of the duty of care and cause in fact. Understanding how a plaintiff will attempt to establish

a prima facie case of negligence is crucial when preparing a proper defense. Part III focuses on the type of injury: physical or emotional. Part IV is the conclusion. It looks toward the future, focusing on blood contamination cases and claims for fear of future disease in addition to mentioning the McDonald's obesity case and the uptick in hot liquid claims against coffee sellers such as Starbucks.

II.
Viable Causes of action

When a plaintiff claims to have been injured by contaminated food, her lawyer may include a number of different causes of action in the complaint. They include breach of the implied warranty of merchantability, negligence, and negligent infliction of emotional distress. A strict liability claim is also possible, as is a product liability claim based on a manufacturer's defect and/or a failure to warn.[3]

A. *Breach of Implied Warranty*

Although some courts in early opinions dismissed breach of implied warranty claims, finding that the restaurant business provides a service, not the sale of food, it is clear today that a breach of implied warranty claim is actionable for the purchase of foods. The Uniform Commercial Code ("U.C.C.") Section 2–314 states the following:

> Unless excluded or modified (Section 2–316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. *Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.*[4]

This section further states that "[g]oods to be merchantable must be at least such as . . . are fit for the ordinary purposes for which such goods are used."[5] Further support for this point

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[3] This article does not discuss strict liability and/or product liability claims. Even so, it is worth noting that plaintiffs may bring claims against restaurant owners and operators for failure to warn of known natural dangers. For example, where a restaurant defendant knew that it served 25% of raw oysters in its dining room, yet posted the required warning of the dangers of consuming raw oysters only over the oyster bar, the court found the defendant liable for wrongful death of the plaintiff's decedent, who died after consuming raw oysters in the dining room. Gregor v. Argenot Great Central Ins. Co., 851 So. 2d 959, 960 (La. 2003). *But see* Woeste v. Washington Platform Saloon & Rest., 836 N.E.2d 52 (Ohio Ct. App. 2005) (finding the defendant restaurant's warning to be sufficient where it was displayed in the menu).

[4] U.C.C. § 2–314(1) (2004) (emphasis added).

[5] U.C.C. § 2–314(2)(c) (2004); *see also* U.C.C. § 2–315 (2004) (implied warranty of fitness for a particular purpose).

is evidenced by the explicit rejection of the early cases in the Official Comment to the Code. Comment five states that

> [t]he second sentence of subsection (1) covers the warranty with respect to food and drink. Serving food or drink for value is a sale, whether to be consumed on the premises or elsewhere. Cases to the contrary are rejected. The principal warranty is that stated in subsections (1) and (2)(c) of this section.[6]

To succeed on a breach of warranty claim, the plaintiff must prove that the food was unwholesome or unfit for consumption.[7] Breach of the duty of care is not an element of a warranty claim.[8] However, use of care may be relevant to the issue of whether the food was unwholesome.

Courts are divided regarding the test to be used when determining if food is unwholesome or unfit for consumption. Some jurisdictions apply the natural/foreign test, and others apply the consumer expectations test.[9]

The natural/foreign test is a bright-line test. If the substance or object is natural to the food in which it is found, there is no defect and no breach of the implied warranty of merchantability.[10] The natural/foreign test was first announced in a California case, *Mix v. Ingersoll Candy.*[11] The test is a common sense approach to whether food was "reasonably" fit for human consumption. According to the court, the test was the product of a search of cases that failed to turn up any case in which a restaurant proprietor was held liable for a natural substance found in food. Basically, as long as the substance is natural and not foreign to the food, the burden is on the consumer to anticipate it and be on guard as to its presence.[12]

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[6] U.C.C. § 2–314 (Official Comment); *see also* Koster v. Scotch Assocs., 640 A.2d 1225, 1227–28 (N.J. Super. Ct. Law Div. 1993) (discussing the 1927 minority view that restaurants provided a service, not a sale, and therefore there was no warranty of merchantability or fitness of use, a view that was later abandoned when the U.C.C. was amended in 1963 to include the sale of food); Rudloff v. Wendy's Rest. of Rochester, Inc., 821 N.Y.S.2d 358, 365 (City Ct. 2006) (although implied warranty is onerous to a seller, public policy demands it because the seller has the opportunity to determine the condition of the food that the consumer does not, and the consequences to a consumer for unwholesome food may be disastrous).

[7] *See* Thomas v. HWCC-Tunica, Inc., 915 So. 2d 1092, 1094 (Miss. Ct. App. 2005) (plaintiff's warranty claim failed as a matter of law because no evidence was presented of any defect in the food consumed; plaintiff merely speculated that she swallowed a toothpick).

[8] *Rudloff*, 821 N.Y.S.2d at 368.

[9] *See* Goodman v. Wenco Foods, Inc. 423 S.E.2d 444, 448-51 (N.C. 1992) (discussing the two tests and adopting the consumer expectations test).

[10] Hochberg v. O'Donnell's Restaurant, Inc., 272 A.2d 846, 848 (D.C. 1971).

[11] 6 Cal. 2d 674, 681-683 (1936).

[12] *Id*. at 681.

The court recognized that producing food that is fit for human consumption is important for public policy and public health and safety reasons; however, the court was concerned that the obligation not be extended absurdly. To make this abundantly clear, the court wrote,

> Certainly no liability would attach to a restaurant keeper for the serving of a T-bone steak, or a beef stew, which contained a bone natural to the type of meat served, or if a fish dish should contain a fish bone, or if a cherry pie should contain a cherry stone-although it be admitted that an ideal cherry pie would be stoneless.[13]

Very few jurisdictions have retained the natural/foreign test for determining if food is unwholesome or reasonably fit for human consumption.[14]

When applying the "consumer expectations" test, the trier of fact examines the reasonable expectations of the consumer to ascertain whether the consumer should have expected and guarded against finding something in his food.[15] If so, the restaurant proprietor has not breached the implied warranty of merchantability. Typically, "the nature of the object and how the food was prepared" are merely factors, and therefore are not determinative when ascertaining whether the plaintiff should have expected "to find an item in his food."[16] When considering how the food was prepared, the focus is not a traditional negligence analysis: "The focus should not become an inquiry of whether or not a restaurant owner used ordinary care to remove from the food, as served, such harmful substance as the consumer would not ordinarily anticipate. This is the standard for a negligence cause of action, not implied warranty."[17]

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[13] *Id*. at 682. The California Supreme Court rejected the natural/foreign distinction in later decision which adopted the consumer expectation test. Mexicali Rose v. Superior Court, 1 Cal. 4th 617 (1992).

[14] Mexicali Rose v. Superior Court, 1 Cal. 4th 617, 651 (1992) (Arabian, J, dissenting) ("[A]part from the States of Georgia . . . and Louisiana . . . the foreign-natural rule lacks substantial support in any jurisdiction in the United States. Indeed, . . . the doctrine has been so thoroughly savaged by courts and commentators alike that its significance today is largely historical: a quaint relic from a distant past. Such is the state of the legal and moral fossil into which the majority seek to breathe life.") (citation omitted).

[15] Rudloff v. Wendy's Restaurant of Rochester, 821 N.Y.S.2d 358, 368 (2006).

[16] *Id*.

[17] *Id*. Goodman v. Wenco Foods, Inc., 423 S.E.2d 444 (N.C. 1992) is a good illustration of the difference in the standard between negligence and warranty claims. In *Goodman*, the plaintiff brought negligence and breach of implied warranty claims against Wendy's and its meat supplier after biting down on a bone while eating a hamburger. *Id.* at 446. Applying the consumer expectations test, the court held that a reasonable jury could determine that a bone in a hamburger should not have been anticipated by the consumer, and therefore held that the plaintiff's breach of implied warranty claim against Wendy's should go to a jury. *Id.* at 452. On the other hand, the court found that a directed verdict for Wendy's on plaintiff's negligence claim was appropriate. *Id.* at 454. Evidence was presented that due care was taken in preparing the meat, and testimony was given as to the grinding process. *Id.* at 453. The court held that the mere presence of the bone in the hamburger could not support the inference that Wendy's breached its duty of care. *Id.* at 454.

A number of other factors are also examined when applying the consumer expectations test to food cases. Those factors may include the following:

> 1) the nature or size of the object, or both, 2) the type of food involved, 3) the way in which was the food was inspected, processed and prepared, 4) the type of establishment where the food was purchased, 5) whether the food needed further preparation before consumption, 6) what type of opportunity the consumer had to protect him or herself from the alleged defect (i.e., how the item is traditionally consumed), and 7) what steps, if any, must a reasonable consumer take to inspect his or her food prior to consumption.[18]

Because so many factors are considered when applying the consumer expectation test, courts that adopt this test rarely decide implied warranty of merchantability cases as a matter of law.[19] Summary judgment for the defendant is much more likely when the natural/foreign test is applied to determine what the consumer should anticipate. For example, in *Parianos v. Bruegger's Bagel Bakery*,[20] the court granted summary judgment for the defendant in a case where a sausage, egg, and cheese bagel sandwich contained a pork bone.

When appropriate, a restaurant owner subject to a claim that the food served was unwholesome or unfit for consumption should deny that the implied warranty of merchantability has been breached. The restaurant owner may also be able to raise assumption of the risk as a defense.[21] However, the defenses of contributory or comparative fault are not available for breach of warranty claims.[22]

B. *Negligence*

Like other negligence claims (and unlike breach of warranty claims), those against restaurant owners and operators are premised on the reasonably prudent person standard. "A food provider, in selecting, preparing, and cooking food, including the removal of injurious substances, has a duty to act as would a reasonably prudent man skilled in the culinary art in the selection and preparation of food."[23] In addition to raising the traditional affirmative

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[18] *Id*.

[19] *Id*. at 369.

[20] 2005 WL 78114 at *3 (Ohio Ct. App. 2005).

[21] *E.g.*, Bronson v. Club Comanche, Inc., 286 F. Supp. 21, 23 (D.V.I. 1968).

[22] *Id.*

[23] Poplar v. Dillard's Dep't Stores, Inc., 864 So. 2d 789, 791 (La. Ct. App. 2003) (quoting Porteous v. St. Ann's Cafe & Deli, 713 So. 2d 454, 457 (La. 1998)); *see also* Bullara v. Checker's Drive-In Rest., Inc., 736 So. 2d 936, 938, 939 (La. Ct. App. 1999) (citing the same standard and finding Checker's liable for negligence where a drive-thru plaintiff found a roach in a chili dog); Flagstar Enters., Inc. v. Davis, 709 So. 2d 1132, 1139–40 (Ala. 1997) (applying similar duty standard).

defenses such as contributory negligence and comparative fault,[24] careful assessment of each of the elements of the *prima facie* case is important. For example, intentional adulteration by a business owner's employee has been held to be a criminal act that breaks the chain of causation.[25]

1. Proof of Breach: Negligence per se

Most, if not all, states have statutes prohibiting the sale of adulterated or unwholesome foods. Moreover, some local governments are permitted to legislate on the issue as well.[26] Each statute has its own definition of "adulterated" food and, of course, its own scope of application. And, each jurisdiction has its own rule regarding when the violation of a statute gives rise to a presumption of negligence as opposed to a mere inference of negligence. The defense should research these issues from its own perspective.

When applying a statute's definition of "adulterated" food, some courts use the "reasonable expectations" test to determine whether the food is adulterated.[27] In *Lewis*, the plaintiff claimed to have injured her tooth and jaw when she bit down on a pistachio shell in her pistachio nut ice cream, which she had purchased from the defendant.[28] The plaintiff argued that she was sold adulterated food in violation of state statute.[29] Under that statute, food is considered "adulterated" if

> [i]t bears or contains any poisonous or deleterious substance that may render it injurious to health; but in case the substance is not an added substance, the food

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[24] *See* Klingle v. Versatile Corp., 606 N.Y.S.2d 71, 73 (App. Div. 1993) (remanding for a new trial to include the jury charge on comparative negligence where plaintiffs noticed something wrong with the food, but continued to eat it anyway).

[25] *See* Thomas v. Speedway SuperAmerica, LLC, 2006 WL 2788522, at *3 (Ohio Ct. App. Sept. 29, 2006) (gas station cashier filled plaintiff's cup with water and intentionally added germicide and deodorant cleaner and court determined that this intervening criminal act caused plaintiff's damages).

[26] There is no private right of action for violation of the Federal Food, Drug and Cosmetic Act, and restaurants have been specifically exempted from the Act. *See* Harris v McDonald's Corp., 901 F. Supp. 1552, 1556 (M.D. Fla. 1995) (discussing Merrell Dow Pharmaceuticals v. Thompson, 478 U.S. 804 (1986)); 18 Mich. Civ. Jur. *Municipal Corporations* § 289 (2005) ("Municipal corporations may, in the interest of protecting the public health and under their police powers, adopt ordinances for the purpose of controlling restaurants, and cities of the fourth class in this state are expressly empowered to regulate and license all restaurants and eating houses.") (footnotes omitted).

[27] *See e.g.*, Lewis v. Handel's Homemade Ice Cream & Yogurt, 2003 WL 21509258, at *2 (Ohio Ct. App. June 30, 2003).

[28] *Id.* at *1.

[29] *Id.* at *2.

> shall not be considered adulterated if the quantity of the substance in the food does not ordinarily render it injurious to health.[30]

The court applied the reasonable expectation of the consumer test.[31] Comparing the pistachio nut shell to clam shells in fried clams, cherry pits in cherry pie, and pecan shells in a pecan cookie—all of which were previously held by the courts to be within the reasonable expectation of the consumer—the court found that common sense dictated that the presence of the shell was a natural occurrence and should have been anticipated and guarded against by the plaintiff.[32]

When defending against a claim built on violation of a statute, determine who the statute is meant to protect and whether the food meets the definition of "adulterated" as defined by the specific statute. Moreover, pay attention to the scope of the statute's application.[33] Finally, the procedural effect of a statutory violation may depend upon how the statute is worded and may vary from jurisdiction to jurisdiction. In some cases, violation of an adulterated food statute may be *negligence per se* (negligence as a matter of law), and in other situations it may be only evidence of negligence.[34]

2. Proof of Breach and Causation: Res Ipsa Loquitur

When the meal plaintiff ate is fully consumed or has been discarded, it may be tempting to assert that there is no evidence that defendant breached the duty of care or that even if a breach occurred, there is no evidence that it caused the plaintiff's harm. However, the plaintiff may rely on the doctrine of *res ipsa loquitur* to prove negligence and possibly causation where specific evidence of the defendant's failure to exercise reasonable care is lacking.

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[30] *Id.* (quoting Ohio Rev. Code Ann. § 3715.59(A) (West 2005)).

[31] *Id.*

[32] *Id.* at *2–3. "'Courts cannot and must not ignore the common experience of life and allow rules to develop that would make sellers of food or other consumer goods insurers of the products they sell.'" *Id.* at *3 (quoting Mathews v. Maysville Seafoods, Inc., 602 N.E.2d 764 (Ohio Ct. App. 1991)).

[33] *See* CEF Enters., Inc. v. Betts, 838 So. 2d 999 (Miss. Ct. App. 2003) (finding the statute did not apply where it dealt with sanctions available to the Board of Health, rather than individual remedies, and where the definition of adulterated food included meat and poultry only).

[34] *See* Koster v. Scotch Assocs., 640 A.2d 1225, 1228-30 (N.J. Super. Ct. Law Div. 1993) (holding that violation of the New Jersey adulterated food statute was negligence per se even though ordinarily violation of a statute is just evidence of negligence).

In *Poplar v. Dillard's Department Stores, Inc.*, the plaintiff filed suit after breaking several teeth when she bit into a foreign object in a shrimp po-boy purchased at the defendant's restaurant.[35] Although she described the object as hard and about one inch in length, she swallowed the object before realizing what had happened.[36] Therefore, there was no evidence of just what the object was.

The court held that the doctrine of *res ipsa loquitur* applied to the facts.[37] The doctrine

> [p]ermits the fact finder to infer negligence where 1) the circumstances surrounding the event are such they would not normally occur in the absence of negligence on someone's part, 2) the instrumentality was in the exclusive control of the defendant, and 3) the negligence falls within the duty of care owed the plaintiff.[38]

The inference of breach of duty may be overcome by contrary evidence, however.[39] A Louisiana court found that the presence of a foreign object in prepared food is a circumstance from which an inference of breach can be made.[40] The court noted that there was no evidence that shrimp naturally contain hard foreign substances.[41]

When a meal is consumed off-site, the plaintiff may be unable to use the doctrine of *res ipsa loquitur* to establish breach of duty and causation. Once the meal leaves the meal purveyor's premises, he or she no longer has exclusive control of the meal. Instead, it is under the exclusive control of the plaintiff, and it may be improper to infer that more likely than not, it was the defendant restaurant owner or operator's negligence that caused the plaintiff's harm. For example, in *Kroger* the court held that the plaintiff could not employ the doctrine of *res ipsa loquitur* where the plaintiff purchased pork chops, cooked them at home, and became ill.[42] The pork chops were not necessarily in the defendant's possession when the negligence occurred.

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[35] *Id.* at 790.

[36] *Id.*

[37] *Id.* at 791.

[38] *Id.*

[39] *Id.* ([T]he trial judge tacitly concluded that the inference of breach of duty was not outweighed by other evidence . . . .").

[40] *Id. But see* Wurtzel v. Starbucks Coffee Co., 257 F. Supp. 2d 520, 529 (E.D.N.Y. 2003) (holding that res ipsa loquitur did not apply because defendant did not have exclusive control of the coffee cup at the time of spill).

[41] *Poplar*, 864 So. 2d at 791–92.

[42] Kroger Grocery & Baking Co. v. Melton, 102 S.W.2d 859 (Ark. 1937).

3. Proof of Causation

No matter the cause of action, plaintiffs must prove causation. This causation issue presents a valuable defensive opportunity. In *Laboy v. White Castle System, Inc.*, the court entered summary judgment for White Castle, finding no triable issue of fact.[43] The plaintiff's hospital records indicated that she contracted a campylobacteriosis infection following a meal at White Castle.[44] White Castle submitted an affidavit from a physician stating that campylobacteriosis is an infectious disease with a twenty-four to seventy-two hour incubation period.[45] Because the plaintiff's symptoms began within the same twenty-four hour period when she consumed food at White Castle, the court held that the illness could not have been caused by White Castle food.[46] Moreover, the defendant submitted evidence that there were no other reports of illnesses at the time of the judgment.[47]

Where a physical injury is alleged, the plaintiff's medical history is important. *Farroux v. Denny's Restaurants, Inc.*, is a prime example of just how important the plaintiff's medical history can be to a defense strategy.[48] The plaintiff in *Farroux* was massively obese and previously suffered from gout, ulcers, bloating, an irritated esophagus, gastroesophageal reflux disease, gastritis, and a fluttering heart.[49] Moreover, the plaintiff had had recent surgery for occasional diarrhea and abdominal pain.[50] The plaintiff's personal physician told him that there were too many possible causes of his illness after eating breakfast at Denny's to choose a cause.[51] Nothing in the plaintiff's medical records mentioned food poisoning.[52] Summary judgment was affirmed for the defendant.[53]

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[43] Laboy v. White Castle System, Inc., 2003 WL 22939689, at *1 (S.D.N.Y. Dec. 11, 2003).

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*; *see also* Haughey v. Twins Group, Inc., 2005 WL 678919, at *3 (Ohio Ct. App. March 25, 2005) (holding that where the plaintiff could not identify the object that allegedly broke her tooth when she bit down on a Mexican pizza at defendant's restaurant, summary judgment for defendant was appropriate); Vitiello v. Captain Bill's Rest., 594 N.Y.S.2d 295, 295 (App. Div. 1993) (reversing the denial of summary judgment for defendant and finding bones in fish should be anticipated by the consumer).

[48] Farroux v. Denny's Rests., Inc., 962 S.W.2d 108 (Tex. App. 1997).

[49] *Id.* at 109.

[50] *Id.*

[51] *Id.*

[52] *Id.* at 110–11.

[53] *Id.* at 111.

Causation in food poisoning cases presents a unique situation because, like in the Cheeseburger Heaven scenario, the primary source of evidence that would provide conclusive proof is often consumed or discarded. This loss of evidence does not, however, prevent a plaintiff from proving the case. Lay testimony can be sufficient to prove a case,[54] and most cases rely on circumstantial evidence, which can also be sufficient.[55] Just what circumstantial evidence is sufficient varies.[56]

Evidence of foul taste, smell, or unwholesome appearance; evidence that others had become sick from eating at the defendant's restaurant; and expert testimony all are appropriate circumstantial evidence to prove a plaintiff's case. Without such evidence, and in the absence of direct evidence (*i.e.*, food testing), however, a plaintiff's claim is untenable.[57]

For example, in C*roteau v. Denny's Restaurant, Inc.*, the plaintiffs presented evidence that a Denny's restaurant had repeated problems with its refrigeration system, that the Health Inspector had issued a number of citations for violation of the sanitary code during the relevant time period; and that a recent Health Department inspection had revealed that the temperature of a walk-in refrigerator was above fifty degrees.[58] That evidence, coupled with a physician's expert testimony that the incubation period for salmonella poisoning matched the onset of the plaintiffs' symptoms, was sufficient to support a jury verdict that Denny's food caused the plaintiffs' salmonella poisoning.[59]

The plaintiff in *Foster v. AFC Enterprises, Inc.*,[60] also produced sufficient circumstantial evidence to support his claim. There, the plaintiff filed suit after becoming ill following a meal at Church's Fried Chicken.[61] The emergency room physician who treated the plaintiff for his illness told him that he had food poisoning.[62] He was later diagnosed with food poisoning by another physician as well.[63] The court noted that it was not necessary to produce

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[54] *See* Bussey v. E.S.C. Rests., Inc., 620 S.E.2d 764 (Va. 2005) (lay testimony, coupled with a doctor's diagnosis was sufficient to support a jury verdict for plaintiff).

[55] *See infra* Part II.G.

[56] *See* 40-NOV Trial 36 (2004) (discussing the importance of restaurants' food handling history and pattern where direct evidence has been disposed of).

[57] *See* Denaro v. 99 Rest., Inc., 2002 Mass. App. Div. 195, 197 (Dist. Ct. 2002) (finding defendant was entitled to summary judgment where plaintiff did not provide even circumstantial evidence to support his claims).

[58] Croteau v. Denny's Rest., Inc., 2002 Mass. App. Div. 81, 82 (Dist. Ct. 2002).

[59] *Id.* at 83.

[60] 896 So. 2d 293 (La. Ct. App. 2005)

[61] *Id.* at 294–95.

[62] *Id.* at 295.

[63] *Id.*

"an actual analysis of the food consumed in order to establish its unwholesome condition."[64] Moreover, it was not necessary that the plaintiff establish that other patrons became ill as a result of eating the chicken that day.[65] The court affirmed the trial court's award to the plaintiff.[66]

If a plaintiff's case rests on medical testimony, the opinion must meet medical opinion standards—usually, it must be stated to a reasonable medical probability/certainty. "More likely" testimony is not sufficient.[67] Moreover, it must pass general expert testimony reliability standards.[68]

In *Worthy v. The Beautiful Rest., Inc.*,[69] the court held that the evidence was sufficient to send the plaintiff's claim to a jury when a medical expert testified that the staph aureus bacteria must have been the cause of the plaintiff's illness and that the eggs she ate at defendant's restaurant must have been the source of that poisoning based upon the timing and onset of symptoms and etiology of symptoms.[70] The court held that the trial court erred in granting summary judgment for the defendant despite the restaurant manager's testimony that eggs were not left out long enough for the bacteria to grow.[71]

Expert medical testimony may not be sufficient to support causation, however, if the alleged harm seems exaggerated. In *Lassiegne v. Taco Bell Corp.*, the plaintiff choked on a chicken bone in a chicken soft taco he purchased at Taco Bell.[72] Later that day he was diagnosed with an esophageal abrasion. The plaintiff also claimed that he was deprived of oxygen during the choking incident (which he admitted lasted only seconds), and as a result, suffered from migraines, impotency, and post-traumatic stress disorder ("PTSD"). The defendants filed a motion for summary judgment on plaintiff's claims for damages

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64 *Id.* at 296 (quoting Lee v. Church's Fried Chicken, Inc., 396 So. 2d 374, 375 (La. Ct. App. 1981)).

65 *Id.* at 297.

66 *Id.*

67 *See* Smith v. Landry's Crab Shack, Inc., 183 S.W.3d 512 (Tex. App. 2006) (summary judgment for the defendant restaurant was affirmed where medical causation testimony was insufficient).

68 *See* Williams v. White Castle Sys., Inc., 772 N.Y.S.2d 35, 36 (App. Div. 2004) (the treating physician's hypothesis that plaintiffs' blood disorder could be caused by food-borne pathogens, without scientific evidence and without evidence that plaintiffs ingested a pathogen associated with the disorder, was insufficient to survive summary judgment).

69 556 S.E.2d 185 (Ga. Ct. App. 2001).

70 *Id.* at 187–88 (the expert also testified that the poisoning was the reasonable cause of her unborn child's birth defects).

71 *Id.* at 187.

72 202 F. Supp. 2d 512, 514 (E.D. La. 2002).

based upon the alleged migraines, impotency, and PTSD.[73] Excluding the plaintiff's expert testimony as to causation as unreliable, the court granted that motion as to those alleged injuries (but not as to the esophageal abrasion).[74]

III.
Type of Harm: Physical injury and/or Emotional Distress

Plaintiff's right to recover in a food case may be affected by the type of harm she suffers. When food "is contaminated by an animal, insect or other foreign object, **and an individual consumes that item** and becomes ill after discovering the contamination, this alone is enough to establish liability on the part of the defendant."[75] Damages related to the nausea and vomiting that follow consumption of the contaminated item are recoverable.[76]

In contrast, in *Chambley v. Apple Restaurants, Inc.,*[77] plaintiff did not consume, but merely saw the foreign object (an unwrapped condom) in the salad she was eating. The issue was whether there was a sufficient physical impact to support a common law negligence claim in which the plaintiff sought damages for physical and psychological injuries.[78] According to the majority opinion, because plaintiff testified that she consumed part of the salad in which she found the unwrapped condom, even though plaintiff did not put the condom in her mouth,

> a jury [had to] decide whether eating part of a salad containing a concealed, unwrapped condom [wa]s sufficient physical contact under the impact rule to permit recovery for damages. Similarly, a jury [had to] determine whether [plaintiff's]

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[73] *Id*.

[74] *Id.* at 524.

[75] CEF Enters., Inc. v. Betts, 838 So. 2d 999, 1004 (Miss. Ct. App. 2003) (emphasis added).

[76] *Id*. (finding that plaintiff's injuries were sufficient to support claims of negligence and breach of implied warranty where plaintiff bit into a biscuit contaminated with a roach and went to the emergency room for vomiting and nausea).

[77] 504 S.E.2d 551 (Ga. Ct. App.1998). *See also* Anderson v. Piccadilly Cafeteria, Inc., 804 So. 2d 75 (La. Ct. App. 2001) (distinguishing vomiting in response to food that is actually contaminated, even if one does not consume the food, which can be recoverable).

[78] *Id*. at 553. The unwrapped condom did not contaminate the salad because it did not contain contaminates according to tests conducted at the State crime lab. Therefore, plaintiff did not claim that she was physically injured because she consumed food that was contaminated or unwholesome as a result of being mixed with a contaminated condom. *Id*. at 558.

> reaction of vomiting and becoming nauseated shortly after ingesting the salad constituted a physical injury within the meaning of our law.[79]

In a vigorous dissent, Chief Justice Andrews opined that the facts in *Chambley* did not support a cause of action "because there [wa]s no evidence of an impact resulting in a physical injury that could support her claim for emotional distress damages."[80] Further, "[c]ommon law negligence actions have traditionally limited recovery for psychological and emotional distress damages to cases where there has been a discernible physical injury.[81] In *Chambley*, "[plaintiff's] sole claim [was] that, after seeing and thinking about the condom in the salad she was eating, she suffered great emotional distress and later became physically ill as a result of the continuing emotional distress."[82]

Where a plaintiff has an emotional response to his or her own perception that food is contaminated, he or she may not recover. In *Anderson v. Piccadilly Cafeteria, Inc.,*[83] plaintiff suffered an emotional response followed by a "vagal response," which stimulated the vagal nerve and caused diarrhea and vomiting.[84] The appellate court reversed the trial court's judgment in favor of the plaintiff because the evidence in the case did not show that the food was contaminated. It showed "nothing more than plaintiff's mere *perception* that the food was contaminated."[85] According to the court, a "restaurant has no duty to protect the consumer from an emotional response to her own negative perceptions."[86]

While the law is relatively clear with respect to claims for physical and/or emotional injuries where the plaintiff has consumed contaminated food, the law is changing with respect to direct victim, pure mental distress claims.[87] These changes may affect defendants' liability in food related cases. According to Prosser and Keeton,

> a handful of courts have taken the final step and permitted a general negligence cause of action for the infliction of serious emotional distress, without regard to whether plaintiff suffered any physical injury or illness as a result. A couple of

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[79] *Id*.

[80] *Id*. at 557.

[81] *Id*. at 558.

[82] *Id*.

[83] 804 So. 2d 75 (La. Ct. App. 2001).

[84] *Id*. at 77.

[85] *Id*.

[86] *Id*. at 78.

[87] *S*ee Minor v. Camper, 915 S.W.2d 437, 446 (Tenn. 1996) (adopting a general negligence approach for emotional distress claims if the emotional injury is "serious" or "severe" and supported by expert medical or scientific proof.) *See also* Culbert v. Sampson's Supermarkets, Inc., 444 A.2d 433 (Me. 1982) (holding that a mother who watched her infant choke on a foreign substance in a jar of baby food stated a claim for negligent infliction of emotional distress).

> other recent decisions, over strong dissents, have expressly refused to retain the physical harm requirement.[88]

Cases such as those referred to in the quotation may open the door to negligence claims based on foreign objects in food where the plaintiff only saw the foreign object, did not consume it, and asserts a claim for emotional distress.

IV.
Conclusion: Speculating about the Future

From time to time, courts and jurists express concern about whether there is a just and logical stopping point for legal liability.[89] Bad food cases have the potential to open that door, especially where the consumer suffers only emotional harm without a physical impact and without a physical injury. Due to the public's fear of contracting blood-borne diseases, such as HIV and hepatitis, emotional distress claims based on fear of future disease from blood contamination may be on the horizon.

In *Wilson v. J & L Melton, Inc.*, plaintiff brought suit against McDonald's after discovering her french fries were contaminated by blood.[90] Upon finding two blood spots on the inner side of the french fry container (but seeing nothing on the french fries), the plaintiff became nauseated and vomited.[91] She sought damages solely for her alleged emotional distress due to her fear that she may have contracted HIV and/or hepatitis.[92]

The plaintiff's blood continuously tested negative for either disease following the accident.[93] There was no evidence that the plaintiff was ever exposed to either disease due to the blood.[94] However, the plaintiff sought counseling shortly after the incident for panic attacks and inability to sleep due to fear of contracting a disease from eating the contaminated food.[95] The court affirmed summary judgment on behalf of the restaurant, finding that evidence of more than just fear, but actual exposure to HIV or hepatitis, was necessary to recover for emotional distress.[96]

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[88] Prosser and Keeton on Torts § 54 (W. Page Keeton, Dan B. Dobbs, Robert E. Keeton & David G. Owen eds., 5th ed. 1984) (footnotes omitted).

[89] *See e.g.,* Kleinke v. Farmers Coop. Supply & Shipping, 549 N.W.2d 714, 717 (Wis. 1996) (reasoning that there will be no logical stopping place if emotional distress damages allowed for property damage).

[90] Wilson v. J & L Melton, Inc., 606 S.E.2d 47 (Ga. Ct. App. 2004) (stating causes of action for negligence, negligence per se, and breach of the implied warranty of merchantability).

[91] *Id.* at 48.

[92] *Id.*

[93] *Id.* at 49.

[94] *Id.*

[95] *Id.*

[96] *Id.*

Similarly, in *Flagstar Enterprises, Inc. v. Davis*, the plaintiff brought a negligence/wantonness and products liability action against Hardee's after discovering human blood in the Styrofoam container holding her biscuit and gravy.[97] The Alabama Supreme Court reversed a $250,000 verdict entered for the plaintiff, which included punitive damages, because it found that the trial court erred in denying Hardee's motion for judgment as a matter of law on plaintiff's wantonness claim.[98] There was no evidence that the defendant and its employees "deliberately engaged in conduct (preparing food) in reckless or conscious disregard for the safety of the restaurant's customers."[99] The evidence showing that the employees engaged in a possible cover up of the alleged negligence was not evidence of wantonness with regard to the safety of the customers.[100]

Further, as the line between personal responsibility and legal liability gets more blurred, more cases like the McDonald's obesity case may be filed. In *Pelman v. McDonald's Corp.*,[101] Ashley Pelman, through her mother Roberta Pelman, filed suit in the United States District Court for the Southern District of New York against McDonald's on August 22, 2002, claiming that McDonald's was responsible for Ashley's obesity and concomitant health problems.[102] The plaintiffs proposed a class action suit for similarly situated teenagers and their parents. In the first written opinion on the matter, the court granted McDonald's 12(b)(6) motion to dismiss finding the complaint not sufficiently specific to withstand the motion.[103]

But the case is not over yet. The plaintiffs filed an amended complaint on February 19, 2003, and third parties were quick to try to join in the action.[104] The amended complaint stated claims for violations of the New York Consumer Protection Act for deceptive advertising practices. McDonald's again successfully moved to dismiss plaintiffs' complaint under Rule 12(b)(6).[105] The United States Court of Appeals for the Second Circuit, however, vacated that dismissal and remanded the case.[106]

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[97] Flagstar Enters., Inc. v. Davis, 709 So. 2d 1132, 1133–34 (Ala. 1997).

[98] *Id.* at 1142.

[99] *Id.*

[100] *Id.* (finding, however, sufficient evidence of the plaintiff's negligence and products liability claims to send to the jury).

[101] 237 F. Supp. 512 (S.D.N.Y. 2003).

[102] *Id*.

[103] *Id.* at 519.

[104] Pelman v. McDonald's Corp., 215 F.R.D. 96 (S.D.N.Y. 2003) (third party's motion to join as plaintiff, alleging her breast cancer was caused by her eating habits, including eating at McDonald's, denied).

[105] Pelman v. McDonald's Corp., 2003 WL 22052778, at *1 (S.D.N.Y. Sept. 3, 2003).

[106] Pelman v. McDonald's Corp., 396 F.3d 508 (2d Cir. 2005).

On remand, the district court granted a motion for a more definite statement, ordering the plaintiffs to more specifically set forth what advertisements allegedly harmed them and how.[107] Again, McDonald's filed a motion to strike portions of the complaint, and the court agreed that the plaintiffs' claims will be limited to only those specific advertisements listed in the second amended complaint.[108] The plaintiffs claimed that certain advertisements by McDonald's deceptively claimed that the food served was nutritionally beneficial and part of a healthy daily diet. These claims were allowed to be litigated.[109] The parties are currently working through class certification matters.[110]

Similar questions of individual responsibility arise in hot liquid/burn cases. Starbucks appears to be a new target in these cases.[111] But who could be surprised? There seems to be a Starbucks on every corner.[112]

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[107] Pelman v. McDonald's Corp., 396 F. Supp. 2d 439, 446 (S.D.N.Y. 2005).

[108] Pelman v. McDonald's Corp., 452 F. Supp. 2d 320 (S.D.N.Y. 2006).

[109] *Id.*

[110] *See* Case No. 02–CV–0782, in the Southern District of New York.

[111] *See* Becton v. Starbucks Corp., 491 F. Supp. 2d 737 (S.D. Ohio 2007) (coffee spill case in which the court held that there was no affirmative duty to securely place the lid on plaintiff's cup of coffee; however, Starbucks could have voluntarily assumed duty by under taking the task of putting lids on customers' cups); Alter v. Starbucks Corp., 858 N.E.2d 931 (Ill. App. Ct. 2006) (coffee spill case in which the court held that Starbucks "has a duty to the general public to provide structurally sound cups, to properly place the lids on the cups, and to serve coffee at a reasonable temperature"); Wurtzel v. Starbucks Coffee Co., 257 F. Supp. 2d 520 (E.D.N.Y. 2003) (coffee spill case in which the court held speculative circumstantial evidence of the cause of the spill not sufficient to send to the jury); s*ee also* Ullman v. Starbucks Corp., 152 F. Supp. 2d 322 (S.D.N.Y. 2001) (alleging served drink containing ground up pieces of glass).

Starbucks has even been made a defendant to a case in which the plaintiff alleges that employees engaged in "doping" his coffee. Athans v. Starbucks Coffee Co., 2007 WL 899130, at *3 (D. Ariz. March 23, 2007) (denying motion to dismiss in part for "doping" claim).

For other hot liquid spill cases, *see* McClean v. National Center for Disability Services, 816 N.Y.S.2d 551 (App. Div. 2006) (affirming denial of summary judgment for defendant because plaintiff's testimony supported an inference that hot water served to him for tea was excessively hot and beyond the reasonable expectations of the consumer); Kessel v. Stansfield Vending, Inc., 714 N.W.2d 206 (Wis. Ct. App. 2006) (finding that the medical center and vending company had no duty to warn users of hot water dispenser that water could cause serious burns, and the medical center had no duty to provide lids for cups); Bernath v. People Success, Inc., 619 S.E.2d 378 (Ga. Ct. App. 2005) (finding that plaintiff assumed the risk of a spill where she took a beverage tray knowing that it was "flimsy" and "wobbly").

[112] A comedian recently joked that she could survive being stranded in the wilderness for days before being rescued; she would just go to Starbucks.

Preparing Your Client for Deposition or Trial Testimony

Clark R. Hudson
Jackie M. Ni Mhairtin

Like it or not, plaintiffs seek sworn testimony from your clients for one reason: They want money. Whether the money comes from your client or another party is generally of little concern to the plaintiff. A sophisticated plaintiff's attorney will focus his or her questioning on questions designed to support a decision for a monetary award. Ideally, the defendant will admit liability. Alternatively, the plaintiff's attorney will secure testimony that is not intended to be an admission of liability but will be interpreted as such.

In today's environment, attorneys are much better prepared to understand the legal significance of a witness's words. Attorneys are also able to coach their clients in a manner to avoid unintended liability. The purpose of this paper is to provide ideas about how to prepare clients to undergo questioning by opposing counsel, but also to make attorneys aware of the ethical considerations for witness preparation.

I.
Rules Of Professional Conduct

Although the Rules of Professional Conduct may vary from state to state, there remains a consistent theme – an attorney cannot engage in subornation of perjury or create false evidence. The ABA Model Rules of Professional Conduct address our duties as follows:

Clark R. Hudson is a senior trial lawyer with Neil, Dymott, Frank, McFall & Trexler. Mr. Hudson specializes in civil litigation with emphasis in medical malpractice, medical board actions, professional and products liability, personal injury and employment law. Mr. Hudson is a member of the California and Arizona State Bar. He is also admitted to practice in the U.S. District Courts, Southern and Central District of California.

- "A lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."[1]
- A lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."[2]
- "A lawyer shall not . . . unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act."[3]
- "A lawyer shall not . . . falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law."[4]

Other than obvious decisions against attorneys for suborning perjury[5] and several law reviews that provide some guidance, there is actually very little published on the do's and

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1 Model Rules of Prof'l Conduct R. 3.3(a)(2) (2008).

2 Model Rules of Prof'l Conduct R. 3.3(a)(3) (2008).

3 Model Rules of Prof'l Conduct R. 3.4(a) (2008).

4 ABA Model Rules of Prof'l Conduct R. 3.4(b) (2008).

5 *See* In re Storment, 873 S.W.2d 227 (Mo. 1994); In re Corizzi, 803 A.2d 438 (D.C. 2002).

Jackie M. Ni Mhairtin is a graduate of University College Dublin, Ireland, and is admitted to practice law in the States of New York and California. She is an associate with the law firm of Neil Dymott Frank McFall and Trexler APLC in San Diego where her practice areas include professional liability and medical malpractice matters.

don'ts of preparing witnesses to testify.[6] Practicing attorneys are therefore left with little more than their years of practice and common sense in preparing a witness to testify. There are obviously divergent views on the lawyer's role in witness preparation. One extreme would be that "[a] lawyer has no affirmative duty to engage in pretrial witness preparation."[7] The flipside is the attorney should take every step available to ensure the client is appropriately prepared.[8] Pragmatically, the appropriate starting point in preparing your client to testify should be to determine whether your client believes his or her conduct was negligent.

II.
PREPARING THE CLIENT'S MEA CULPA

The attorney representing the client who readily professes his or her responsibility for tortious conduct has what should be viewed as a straightforward responsibility. The client comes to the attorney because he or she has a problem. It is the attorney's responsibility to help the client with the problem, not make the problem worse. In a case of admitted li-

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[6] Liisa Salmi, *Don't Walk the Line: Ethical Considerations in Preparing Witnesses for Deposition and Trial*, 18 REV. LITIG. 135 (1999); Fred C. Zacharias & Shaun Martin, *Coaching Witnesses*, 87 KY. L.J. 1001 (1999); John S. Applegate, *Witness Preparation*, 68 TEX. L. REV. 277 (1989); Richard C. Wydick, *The Ethics of Witness Coaching*, 17 CARDOZO L.REV. 1 (1995).

[7] Joseph D. Piorkowski, Jr., *Professional Conduct and the Preparation of Witnesses for Trial*: *Defining the Acceptable Limitations of "Coaching,"* Volume I, Georgetown Journal of Legal Ethics 389, 392 (1987).

[8] "A lawyer shall not intentionally [f]ail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101(B)." Model Code of Prof'l Responsibility DR 7-101(A)(1) (1991).

ability, the attorney should stress to the client the need to tell the truth, the whole truth, and nothing but the truth. The tortfeasor who acknowledges his or her errors fares far better than individuals who attempt to cover them up. An admission creates less stress and anxiety for the tortfeasor. His or her credibility remains intact, and the admission will also lessen the likelihood of increasing animosity from a jury of peers when the time comes to affix a value on the offending conduct.

III.
Half Truth Equals Half Lie

The client should be instructed that any response that leaves a misleading impression is inappropriate. A claim of lack of memory or knowledge can technically be considered perjury if the witness indeed can recall the facts.[9] Likewise, responding to questions in a way that tells only half the truth can be viewed as perjury or, at the very least, doing so can injure your client's credibility. Consider the following examples:

Question: Are you board certified?

Answer: My certification is with the American College of Obstetrics and Gynecology.

(Truth – I was certified by the American College of Obstetrics and Gynecology; however, I am not currently certified as I failed to recertify.)

OR

Question: Where did you go to medical school?

Answer: USC Medical School.

(Truth – I initially attended medical school at the University of Michigan, but failed academic probation and was dismissed from the program. I then reapplied and got into USC where I completed medical school.)

IV.
Client Who Believes Unequivocally He Or She Was Not Negligent

Whether the testimony is being given in deposition or in trial, our clients are being taken out of an environment where they are accustomed to working, thrown into an unfamiliar setting, and asked to answer questions on a moment's notice. While attorneys feel comfort-

[9] *Salmi, supra* note 6 at 148-154.

able in deposition and/or trial, clients rarely feel comfortable. Often if given an opportunity to reflect on the questions being asked, the client can provide a more reasoned response.

Frequently, clients are not wary of the legal significance of the terms they use when giving sworn testimony. Particularly in the medical field, witnesses are accustomed to performing a critical analysis of adverse events in an effort to avoid similar circumstances in the future. Savvy plaintiff's attorneys are aware of this customary practice, and will use it to prey on unsuspecting witnesses.

A. *To What Degree Can We Make Suggestions to Modify a Client's Word Choice?*

The manner in which an attorney counsels his or her client is probably as unique as the individual attorney. While there is clearly no one right way, the wrong way would be to intentionally, or unintentionally, suborn perjury. Some legal scholars are concerned with how word choice affects a jury's perception of a witness's testimony.[10] These scholars urge that attorneys use caution in recommending changes in word choice. "Some word substitutions may alter not only the emotional impact of a statement, but may modify its substantive meaning as well."[11] An over-generalized rule is that an attorney may tell a client how to testify, but not what to say. An experienced attorney understands all too well the significance of ensuring that a witness's word choice conveys the appropriate meaning. Consider the following example: A physician encounters a difficult birth in which the infant suffers a permanent neurological injury affecting the child's shoulder, arm, and hand. This specific injury (Erbs Palsy) is recognized to occur in the absence of negligence, and even in the absence of difficult deliveries. The physician believes unequivocally that his care and treatment complied with the standard of care. How will the physician want to respond when faced with the following question?

Question: Is it the standard of care to have an infant suffer a permanent neurological injury during the course of labor and delivery?

The gut response of most physicians will of course be to respond, "No." Clearly, the standard of care is to avoid these types of injuries. A "no" response suggests a deviation from the standard of care. However, with the scenario outlined, it is clear this injury can occur despite the physician's best efforts. Therefore, would not a better response be: "That can occur despite my best efforts"?

Preparing your witness as suggested in the example above alters the semantics used. However, it does not alter factually the substance of the client's position. Indeed, if the client said "no" when asked whether it is the standard of care to have the infant suffer a permanent neurological injury, that response would mischaracterize what the client actually intended to say.

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[10] *Id.* at 160.

[11] *Piorkowski*, *supra* note 7 at 402.

B. *What is the Danger of Coaching Your Client to Say, "I don't know"?*

Probably every attorney has instructed his or her client not to volunteer information.[12] Likewise, it is commonplace for attorneys to instruct their clients not to guess in order to provide a response. If the client does not know the response to a question, the correct answer is "I don't know." However, it is not always that clear. Are we obstructing another party's access to information when the client responds "I don't know" to the following scenarios?

1. The client knows something, but his or her memory is not crystal clear;
2. The client uses the response when scared and/or nervous;
3. The client uses the response when the real answer will be contrary to his or her best interests; or
4. The client uses the response when he or she cannot think of a better answer.

The client should be advised that the instruction not to volunteer information means just that. The client's duty is to respond truthfully to the question asked. The client should not use the "I don't know" (or "I don't recall") response to hide the truth.

C. *Can We Inadvertently Prompt the Client to Alter His or Her Testimony to Conform to the Law?*

Frequently attorneys counsel their clients regarding the applicable laws related to their cases. Indeed, it would be difficult to understand how a client can make an informed decision regarding his or her case without knowing the applicable laws. However, what should the attorney do to avoid the potential of a client altering his or her testimony to conform to the law?

Assume hypothetically that a physician responded to an emergency in the hospital and that he owed no pre-existing duty to the injured patient. Assume further that the Good Samaritan Statutes in his state would provide a complete defense, even in the face of negligent care, for a Good Samaritan responding to the emergency situation. However, the Good Samaritan Statutes do not apply to physicians who are in an "on-call status" when they respond to emergencies. It is conceivable that a client who received information regarding the law for a physician who was in an "on-call" status could attempt to conceal that status in efforts to preserve a Good Samaritan defense. To avoid this type of scenario, it would be prudent for the attorney to first determine the facts of the case to the extent possible prior to sharing with the client potential defenses.

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[12] In *In Re Complaint as to the Conduct of A*, 554 P.2d 479, 487 (Or. 1976), the Oregon Supreme Court held that an attorney could be disciplined after advising his client not to volunteer information.

D. *Can Repeated Rehearsals Alter a Witness's Testimony?*

Frequently, attorneys have their witness rehearse before deposition or trial. Indeed, it is easier for witnesses to provide well-reasoned responses when they have already anticipated the question they will be asked. Rehearsals also help clients to fully explore the extent of their memories and to guide them to avoid stumbling on cross-examination.

However, attorneys should take precautions to prevent witnesses from developing responses to avoid telling the truth. Likewise, attorneys should be aware of the likelihood that a rehearsal could actually cause a witness to fill in gaps in memory with information the witness really does not recall.

V.
Conclusion

At first blush, most practicing attorneys likely go about their day-to-day preparation of clients without ever considering whether the manner of their witness preparation would alter the truth of a client's testimony. Most of what we do is to improve the effectiveness of a client's testimony, rather than alter its content. Nevertheless, attorneys should take the time to assess whether their recommendations may improperly influence a client's testimony. Attorneys should certainly be aware of whether their clients are susceptible to altering their testimony in a manner that is inconsistent with the truth.

What This In-House Attorney Wants from Defense Counsel Prior to and During a Trial

Kenneth J. Nota

I.
Introduction

The title really says it all. The purpose of this article is to discuss briefly what I need and expect from my trial lawyers once it appears that a case must be tried. Although I cannot speak for all in-house attorneys, I can tell you based on conversations I have had over the years that what is important to me most likely will be important to them as well. I am sure that some parts of this article apply across the board; other parts may not. But my goal is to help you see your trial preparation work through your client's eyes, which may help you think about and approach that work in new ways.

II.
Trial Lawyer v. Defense Counsel

"*Wanted: A Good Trial Lawyer to Take My Case to Court – Litigators Need Not Necessarily Apply"*[1]

The first thing I need from my defense firm is the right trial lawyer to try my case. In the introduction, I purposely used the term "trial lawyer," as opposed to defense counsel or litigation counsel. In my seventeen years of managing litigation at Dryvit, I have come to

[1] http://www.decisionquest.com/litigation_library.php?NewsID=235 (last visited Nov. 18, 2008).

For the past 18 years, Kenneth J. Nota has served as Vice President and General Counsel for Dryvit Systems, Inc., the leading manufacturer of exterior insulation and finish systems in North America. A 1988 Graduate of University of Connecticut Law School, Ken is a member of the Massachusetts and Rhode Island Bars and is Rhode Island Bar Foundation Fellow. He is a Vice President of the Federation of Defense and Corporate Counsel, and is Co-Chairperson of the FDCC Corporate Counsel Symposium

appreciate the difference quite a bit. I certainly did not when I first joined the company in 1990. My private firm practice was in the corporate and commercial lending areas, not litigation. I initially assumed that all litigators handled all aspects of litigation, such as answering complaints, conducting discovery, drafting pre-trial motions and briefs, preparing for trial, and conducting trials and appeals. Over time, I have learned that while some litigators may in fact do everything, very few do everything well. While in medicine a general practitioner may be good, if I am having surgery, I want a surgeon, and if I am having brain surgery, I want a neurosurgeon. The same is true with lawyering. While a general practitioner may be good, if I have litigation, I want a litigator (usually a defense lawyer since my client is usually a defendant). But not every litigator is a good trial lawyer. If I have a trial, I want a trial lawyer, and I want a trial lawyer experienced in the subject matter relevant to my case. I do not want somebody who tries medical malpractice cases to try a construction defect case or a patent infringement case involving chemical formulations.

Real-life concerns can interfere with finding the right attorney for the job. When you are given or getting referrals, or when you have an existing client, maybe a client for whom you do real estate work, how forthright are you about your firm's expertise if suddenly that client has a huge litigation matter? Are you going to say, "Hey, you're a good client, but we really are not the best choice for you to handle this matter. Why don't you contact the XYZ firm? It specializes in this area." Or are you going to be afraid that if you refer the client to the XYZ firm, you may lose the client if the XYZ firm does a great job? Are you concerned about the fees you will lose? Will your ego be bruised? These are real life concerns and understandably so.

These concerns can arise even within a law firm. Partners or senior associates can get very possessive of a client and may be afraid to let somebody else work with that client. An attorney may also be too proud or arrogant to even realize his or her own limitations. I worked with an attorney who was absolutely brilliant when it came to pleading practice, motion practice, briefing, and appellate work, but he was not a good trial attorney at all; in

fact, he was pretty bad. It had nothing to do with his competence, intellect, or preparation. It had more to do with how he presented himself, the evidence, and our witness to the jury. To be a good trial lawyer, you have to be a good storyteller. The same story told by different people can be very different. This lawyer just did not connect well or come across well to the jury.

So the first thing I need from my defense firm when a case has to be tried is the right attorney to try it. If you do not have the right lawyer for the job, you will force me to bring in somebody I trust from the outside. Neither you nor I will like that. You will not like having your firm be second chair, and I will not like having to pay two firms. The other option will be to force me to overpay on the settlement of the case to avoid the bad verdict that might result from having the wrong lawyer try the case. Again, you will not like the result, and neither will I. Your firm will never get another case from me, and I will have paid too much to settle. So the bottom line for your existing clients is to be honest regarding your abilities. And if that does not work, at least remember the rules of professional responsibility: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[2] You do neither me nor your firm any favors by suggesting that you have the ability to try my case if you do not.

III.
Confidence

"Take the time—non-billable time—to learn about your client and your client's business. Learn their history, their values, their culture, their goals, their accomplishments, and their expectations."[3]

Confidence might seem like an odd topic to cover next, but it is one of those subjective analyses that I rely on when it comes to trying a case. What I am looking for is a belief in our position and confidence in your ability to tell our story. I want to know how exactly you plan to address our weakness and rebut the plaintiffs' arguments. I also want to know how you are going to promote the client, my company.

I can hire the most qualified lawyer in the state to try a particular type of case, but those qualifications mean nothing if I lack confidence in the lawyer's commitment to the case. I need to have confidence that the lawyer is committed to preparing the case correctly and to presenting it fully to the jury. This issue is not about competency. It may not even be about

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[2] Model Rules of Prof'l Conduct R. 1.1 (2008).

[3] William F. Abrams, *Budgets, Communication, and Best Practices in IP Litigation*, ABA Intell. Prop. Litig. Newsl. (2007), *available at* http://www.bingham.com/Media.aspx?MediaID=6042.

the lawyer's desire to try the case properly. It simply may be an issue of availability or time. The trial attorney may be too busy to properly prepare for the case, prepare witnesses, deal with experts, plan trial exhibits, and do everything else required. I will know this, and it will cause me to lose confidence in the attorney's ability to properly represent me at trial. One thing I always insist on is that my attorneys be better prepared than the other side. If you are not able to sufficiently prepare, I will not have the necessary confidence in you. That does not mean I do not want you to inform me about the weaknesses of the case or the arguments that the plaintiffs will make. I am not looking for guarantees.

I also need to believe that you have confidence in my company, my people, and our products. If you do not believe in what we stand for, of the righteousness of our position, then I believe that your reservations will come across to the jury. The fact is that most companies, mine certainly included, try to offer the best products, services, and information they can in the markets in which they operate. Nobody at my company gets up in the morning and heads to work with the thought, "Gee, how can I cheat, lie to, or mislead somebody today, or how can I make a lousy product?" In fact, it is just the opposite. So when we decide to try a case, it is because we have a strong belief that we are right. You need to hold that belief as well. If you do not have confidence in us, I will not have confidence in you.

IV.
Preparation

"And the number one 'rule of the road' for the management of litigation: Do not countenance surprises! Neither accept them from outside counsel nor be the reason for them happening to your client."[4]

As I mentioned above, I want my attorneys to be more prepared than the plaintiff's attorneys. I never want to lose a case due to a lack of adequate preparation. To do so would be inexcusable. I also realize that preparation is a two-way street. For you to be properly prepared, I have to give you the resources and authority to do so. That is, I have to give you the time to get ready. I have to make witnesses available. I have to approve the resources and trial tools that you may need. I have to authorize the help that you need. But you need to let me know what you want, and you have to be prepared to justify it. Furthermore, you cannot ask for all of this at the last minute. I need time to make witnesses available. I need the time to properly budget for the expenses. I need time to inform my CEO, CFO, and other constituents, so they won't be surprised by the cost. I need time to perhaps assemble the documents and demonstrative evidence that you might need to conduct the trial. I also need time to digest the information that you are providing to me and to make value judgments on what to do. Do I need jury research? Do I need a mock trial? Do I need computer-animated

[4] Bob Craig, Associate General Counsel for Litigation Waste Management.

graphics? Do I need "the twenty seven eight-by-ten colour glossy photographs with circles and arrows and a paragraph on the back of each one explaining what each one was to be used as evidence against us"?[5]

To ensure that I have all the information that I need in advance, I have instructed my attorneys to prepare various reports that include all of the relevant information I need to properly evaluate the case.[6] I require an initial report, to be completed ninety days after the case is filed.[7] I also have periodic reports that are completed on request,[8] and a Trial Plan and Budget that is completed as the case gets close to trial.[9]

The purpose of the trial plan is three-fold. First, as part of the planning and organization process, I need this information so I can prepare from a budgeting and planning process point of view. Second, it serves as a checklist to make sure that trial counsel is addressing all the points that I want him or her to address and think about. Finally, it helps me evaluate the trial attorney's preparation and ability so I can have (or lack) confidence in his or her ability to try the case the way it needs to be tried.

V.
Communication

"The overall theme is open and constant communication, proactive forecasting of case events and developments, and delivering news to the client promptly, regardless of whether it is good or bad."[10]

While preparing pre-trial reports may be tedious, those reports are necessary not only as part of outside counsel's duty to communicate with me as the client, but also so that I can fulfill my own fiduciary responsibility to communicate with my client, the corporation.

First, the reports serve as one way that counsel can meet his or her duty to keep me informed about the case. Under the ABA Model Rules, not only must the attorney inform the client of the status of the case, but the attorney must also communicate with the client about decisions being made and about the methods counsel plans to use to achieve the client's goals.[11] The reports help the attorney meet those obligations. Further, this communication is essential for me to have confidence in my attorneys' evaluation and preparation of the case.

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5 Arlo Guthrie, *Alice's Restaurant*, *on* Alice's Restaurant (Appleseed Music Inc. 1966).

6 Appendix A *infra*.

7 Appendix B *infra*.

8 Appendix C *infra*.

9 Appendix D, *infra*.

10 William F. Abrams, *Budgets, Communication, and Best Practices in IP Litigation*, ABA Intell. Prop. Litig. Newsl. (2007), *available at* http://www.bingham.com/Media.aspx?MediaID=6042.

11 Model Rules of Prof'l Conduct R. 1.4 (2008).

The reports also allow me to assess the attorneys' needs and provide them with necessary resources.

Proper communication not only helps me evaluate the case and the attorney's ability to properly try it, it also gives me the information that I need to meet my own fiduciary obligation to my corporate client by keeping it properly informed.[12] As General Counsel for Dryvit, I work directly with attorneys representing Dryvit, and those attorneys may in some sense think of me as the client. The fact is that the client is Dryvit, and in essence we are jointly representing that client. I am the person the client expects to inform it of the consequences of every piece of litigation. I rely heavily on outside counsel to provide me with the necessary information so that I can evaluate the case and meet my fiduciary obligation to my client. Under Rule 1.13, it is paramount that in-house counsel properly informs his or her client concerning the ongoing status of significant litigation and the conduct of employees or officers. The last thing in-house counsel wants is to be accused of understating a contingent liability exposure or covering up employee or officer wrongdoing that could have a materially adverse impact on the company. One need only casually read the headlines to see how many in-house counsel have gotten themselves into trouble over disclosure issues, particularly as they relate to the company's financial obligations, its accounting and SEC reporting practices, and its senior officers' conduct.

According to GAAP (Generally Accepted Accounting Principles),[13] a corporation is obligated under certain circumstances to disclose and account for contingent liabilities. FAS-5 requires corporations to account for contingent losses that are probable, i.e., likely to occur, and reasonably estimatible.[14] Costs are reasonably estimatible when, not only is it likely that you will suffer a loss, you can also estimate with some degree of reasonableness what the loss (or range of that loss) might be.

The General Counsel is one of the key individuals involved in assessing contingent liabilities related to litigation. An annual rite of passage is reviewing contingent liability loss reserves with the accountants to ensure that the company is properly reserved. And if reserves are not adequate, the General Counsel either has to make adjustments or report the discrepancies "up the chain" (something I fortunately have never had to do). Financial surprises are something everybody in the corporate world dislikes. While nobody complains about financial windfalls (but then again, you still need to be accurate in your accounting), failing to properly disclose or under reserving on a contingent loss can get you and the company into trouble. This is especially true if the company is publicly traded and risks running afoul of securities rules, violating GAAP, and failing to meet the PCAOB (Public Company Accounting Oversight Board) standards. Not only can these actions cost you a lot

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[12] *See* Model Rules of Prof'l Conduct R. 1.13 (2008)

[13] *Federal Accounting Standards Advisory Board, Generally Accepted Accounting Principles*, http://www.fasab.gov/accepted.html (last visited Nov. 18, 2008).

[14] *Statement of Financial Accounting Standards No. 5, Accounting for Contingencies*, http://www.fasb.org/pdf/aop_FAS5.pdf (last visited Nov. 18, 2008)

of money, they can land you in jail. Furthermore, not only must your financial statements present a fair, reasonable and accurate record, the standards set by the Public Company Accounting Oversight Board require you to have documented and practiced internal controls over the way in which that is accomplished.[15]

Therefore, the status reports and trial plan are not only important for us to properly prepare for the trial and hopefully win the case; they are also important to allow us to properly account for these matters and to fulfill our fiduciary obligation to our companies.

VI.
Accurate Budget

"'You can bring me good news. You can bring me bad news.
But never, ever bring me a surprise.'"[16]

I also need an accurate estimate of the cost of trial. Sometimes this estimate is used to make a business decision as to whether to try the case. If the company can settle a case for less than the cost of defense, absent some other overriding policies, it probably will. But even if the company decides that no matter what the cost, it will try the case, the cost still matters. In-house departments all operate under budget guidelines. Each year during the planning process, we estimate our yearly defense and indemnity expenses. In addition, at the end of each fiscal quarter, publicly traded companies are required to submit reports. As part of that process, we need to review our contingent liabilities, and we need to make sure that we are adequately reserved. Senior management and the market (not to mention the federal government) hate surprises. Nobody is a hero when he or she underestimates the cost of litigation, reserves must be adjusted, and the budget is exceeded by 200%. As part of our trial plan, we require our attorneys to provide a detailed estimate of litigation costs, taking into account all elements that can go into trying a case. This estimate includes not just billable hours, but all out-of-pocket expenses for exhibits, documents, experts, travel, transcripts, copying, food, witnesses, etc.

The budgeting process also must include an assessment of the potential range of outcomes. No trial attorney has guaranteed me a victory in any case. If you know someone who will, have him or her get in touch with me. Again, consistent with our disclosure and accounting obligations, we need to make sure contingent liabilities are properly reserved. Sometimes we try cases, even when we think that an adverse verdict will result. For example,

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[15] 17 C.F.R. § 229.103 (2008); http://www.pcaobus.org/Rules/Rules_of_the_Board/Auditing_Standard_5.pdf (last visited Nov. 18, 2008).

[16] Donald A. Loft & John S. DeGroote, *Controlling the Unpredictable: Avoid Litigation Surprises with Legal Project Management Software*, ACC Docket (2007) (quoting "one CEO to his new chief litigation counsel").

if the plaintiff's pre-trial settlement demands far exceed what we think the case is worth, we try it more as a damages case than a liability case. Therefore, lawyers must also provide a range of probable outcomes.

VII.
Planning

Trial counsel must also address logistical issues that arise before and during trial. Arrangements must be made for corporate representatives who attend the trial, company and third-party witnesses who testify during trial, meeting locations during breaks and at the end of the day, and technology resources during the trial. Arranging for meeting space and technology is easy if the courthouse happens to be in trial counsel's hometown; being able to retreat to the office at lunch time to review what happened during the morning and to prepare for the afternoon is great. Having those resources at the end of the day for the same purposes is also great. But what if the trial is in a more remote location? Where will you gather during breaks and meet at the end of the day? Does that location have all necessary resources, or do you have to bring fax machines, copy machines, computers, etc.? Depending on the case, the establishment of a "war room" may be necessary.

Regardless of those issues and whether the case is in your backyard, corporate representatives and witnesses are always going to need a place to stay. Trial counsel must be able to reserve blocks of rooms in local hotels for the client and witnesses, so that he or she will know where everyone is, that everyone has a place to stay, and that it is a convenient distance either to counsel's office or the courthouse. I really do not like it when a law firm leaves it up to the client or the witnesses to figure out where to stay and to make their own arrangements. To me, the logistical arrangements are part of being prepared, having everything you need where you need it, including people. The defendant, facing a potentially adverse verdict in a significant case, does not want to have to worry about where people are going to be staying or how to get in touch with them. Having these things worked out by counsel's secretary or paralegal is really a big help. Also, counsel should provide a complete contact list with all the relevant information, such as business phone numbers, home phone numbers, cell phone numbers, email addresses, itineraries, and hotels.

Another important part of planning is communicating directly with your witnesses, whether they are the client's employees or third parties. Finding out witnesses' availability so you can plan your case accordingly and letting them know when you are most likely to need them helps alleviate a lot of the stress they may be feeling. Most company employees are not comfortable testifying. It is not what they do. They may be chemists, engineers, marketing people, technicians, or accountants. Most of them are not professional witnesses. Testifying can be stressful, as witnesses worry that if they make a mistake, it could have an adverse impact on the company. Furthermore, they still have their jobs to do, and scheduling conflicts do arise. They do not need other stresses, such as worrying about when and where they need to be at the trial. The more you can help me make it easier for them, the better prepared and less stressed they will be.

VIII.
Learning About the Client and its Employees to Put on the Good Company Story

"Clarence Darrow once observed, 'Jurymen seldom convict a person they like or acquit one they dislike. The main work of a trial lawyer is to make the jury like his client.' For lawyers who represent corporations—which are frequently viewed as being artificial, cold and faceless entities focused only on achieving a financial end—this can be a daunting task. . . . To accomplish this, the lawyer must 'humanize' the corporation."[17]

It is important to me that the trial attorney demonstrates that he or she is willing to learn about the company, its philosophy, its products, and how it goes to market. As I mentioned earlier, having confidence flow both ways is critical to trying a case. I have to know that you believe in what the company stands for. For me to have that confidence, you have to invest in learning about us. When trying a case for a corporate defendant, it is important that you demonstrate to the jury that your client is a responsible business, focused on providing quality products, services, and support. Plaintiff's attorneys will routinely try to paint opposing counsel's client as the big, bad corporation, interested only in making as much profit as possible without regard for the consumers. Of course, anyone who runs a business knows that the only way to be a success in the long term is to provide high-quality products and services. That is just the opposite of what plaintiff's attorneys suggest. Additionally, the individuals who work at these corporations are not nameless and faceless. They are real people, who have spouses and children, go to church, participate in civic activities, and are generally very conscientious. It is easy to attack what is seen as an unfeeling corporation. But companies can act only through their employees. So when you accuse a company of bad acts, you are accusing some employees of bad acts. You need to take the plaintiffs to task on this point and put those employees on the stand to humanize the company. You need to tell the good company story. Some of that story may actually have nothing to do with the facts of the case. But how often have you been in a case where the plaintiff spends most of its time trying to make your client look bad and not much time at all on the merits of the claim? If you do not neutralize this negative information and do not get the jury to think your client is a responsible company, the jury is not going to listen very closely to your arguments on the merits.

Part of telling the good company story involves spending time getting to know the company's witnesses and understanding the organizational structure within the company. Many companies have corporate policies, mission statements, independent auditing, third-party testing, quality control standards, and internal checks and balances, all geared at delivering

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[17] Valerie P. Hans & Neil Vidmar, Judging the Jury 131 (1986) (quoting Edwin H. Sutherland & Donald R. Cressey, Principles of Criminology 442 (7TH ed. 1966).

high-quality results. Juries need to know those positive facts, especially if the plaintiff is going to play the big, bad company card. The only way for the jury to learn those facts is for you to learn them first and tell the jury the story. And the only way for you to tell the story is by putting the right company employees on the stand.

IX.
During the Trial

"Don't Litigate With An Eye Towards Settlement – Litigate With An Eye Towards Winning."[18]

So far, I have written mostly about the information and planning that we need leading up to the actual trial once the decision has been made to try the case. But what do I need during the trial? Well, the answer is a lot of the same: confidence, preparation, and communication. In fact, if you have done all of the preparation correctly, there should be no surprises at trial (although a couple of states may be different on that front). As in-house counsel, I get really frustrated during a trial because I basically have to sit there and watch others determine the outcome of the case. You get to try it. You get to examine witnesses, make objections, argue and plead, and I have to sit quietly and listen. While I am guaranteed to pass on comments whenever I can, there is still a sense of not being in control, of being a passenger. One of the ways to ease that tension is through communication. Let me know what your plans are for a witness, a document, an exhibit, or an argument; doing so helps me know what is going on and helps me assess the potential outcome of the case. If for some reason I am not at the trial, a daily email at the end of the day summarizing the events and outlining the plan for the next day is also a must.

As I mentioned earlier, I want my attorneys to be more prepared than the other side. I often think of the expression "don't bring a knife to a gun fight." In fact, as far as I am concerned, do not just bring a gun to a gun fight either. At least bring a bigger gun than the plaintiff, and wear a bullet proof vest. Depending on the significance of the case, a couple of hand grenades might be helpful, too. Obviously, it is impossible during trial to have such a significant advantage, but I want you better prepared than the plaintiff's attorney, better organized than the plaintiff's attorney, and fully equipped with the resources you need to put on the best case we can. Statistically only three percent of all cases filed are disposed of by jury or bench trial verdict.[19] That is one out of thirty-five. However, I tend to think that for most corporate defendants, fewer than three percent actually go to verdict. I know for us, it

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[18] Weltman Law Firm, Litigation Techniques and Approaches, http://www.weltmanlawfirm.com/general.php?category=Resources&headline=Litigation+Techniques+and+Approaches (last visited Nov. 18, 2008).

[19] U.S. Department of Justice, Bureau of Justice Statistics Bulletin: Civil Trial Cases and Verdicts in Large Counties, 2001 2 (2004), http://www.ojp.usdoj.gov/bjs/pub/pdf/ctcvlc01.pdf.

is fewer than one percent. If you try only one out of one hundred cases, why would you not do everything you can to win that one case? Why would you want to get an adverse verdict and have to wonder "What if I did this?" or "What if I had this witness or that exhibit?" Prepare for and use what you need to put on the best case. I have tried litigating both ways and have gotten good results only when I put my best case forward. Whenever I have put on less than a full-court press, thinking I knew what the important issues were and could ignore some others, the results have not been as good.

Putting your best case forward does not mean doing everything under the sun at the trial. Overkill is no good, and giving the jury too much information can distract from the themes you have laid out as part of the defense story. Rather, determine what is necessary to put on the best case you can, and present your client in the best light possible in order to maximize the opportunity for a positive result.

X.
Conclusion

Confidence, preparation and communication. My confidence in you depends upon how well prepared you are and how well you communicate with me. And, you know something else, the more confidence I have in you, the more likely it is that you will persuade the jury. It's a win, win, win situation. You win, I win, and our client wins, or at least we achieve the best outcome possible.

Appendix A

Reporting Responsibilities and Trial Preparation

If a case is not successfully mediated or settled, or dismissed voluntarily or on dispositive motion, the only remaining option is trial. Once a case is placed on the trial calendar you must send the Legal Secretary notice of the trial date for calendaring. No less than ninety (90) days prior to the scheduled trial date you must provide a written trial plan that contains, at the minimum, the information contained in the Trial Plan and Budget form.[20] If your first notice of the trial date is fewer than ninety (90) days from the trial date, you should provide us with that plan immediately. The purpose of the plan is to ensure that you and we have all the resources available at the time of trial to successfully defend this case, including trial exhibits, documents, witnesses, motions, corporate representatives, experts, and travel accommodations.

In addition, we may elect to have National Coordinating Counsel enter the case or appear pro hac vice and serve as first or second chair at the trial at our discretion. If we do ask National Coordinating Counsel to get involved, or even to serve as primary trial counsel, the responsible attorney should not be offended or feel that the decision is a reflection on the quality of her work or ability. We have invested substantial dollars in defense costs, especially in National Coordinating Counsel, and we plan to utilize that investment. Sometimes it is simply impossible to transpose ten years of litigation background, experience and knowledge. Our collective goal should be putting on the best possible trial.

The trial plan requirements let you know what we expect. However, we wanted to share our philosophy. First and foremost, we firmly believe we are a good company with good people and good products. We believe we must convince a jury of those facts before they will listen to our defense. Therefore, any trial plan must include a plan to present that evidence. We can help with trial exhibits and witnesses that we can use to put on that case. Second, we believe a picture paints a thousand words. We have mock-ups and other demonstrative evidence to paint that picture. Therefore, we want you to use those tools. We can provide a list of what is available, but we want you to be creative. Provide us with a list of other things you need.

Causation is an important trial issue. We need to show what is causing the problems on this house or building. As part of this defense, we need to show that our product is not a unique and radically different design from others. Mock-ups and photos of the products and other claddings have very telling effects. Those visuals make clear that the deficiencies and problems on a building have nothing to do with the cladding choice.

Damages must also be addressed. We must make sure the jury has alternatives available to it for damages. We cannot put all our eggs in the non-liability basket. We should

[20] Appendix D

be prepared to provide repair costs testimony and alternate replacement costs estimates. These repair estimates will also highlight the construction deficiencies that are causing the problems.

Professionalism is also very important to us. We expect our lawyers to be professional and better prepared than anyone else in the courtroom. We expect their presentation of evidence to be thought out and tested. We like technology, but if trial counsel uses technology, he or she had better know how to use it and must check it to make sure both that it works and that the courtroom can accommodate it. Exhibits must be well organized, and copies should be readily available for the judge and opposing counsel. Counsel must also know the rules of evidence and procedure and make use of motions, especially motions in limine and dispositive motions, to narrow the focus of the case and preserve the record for appeal if necessary.

Conviction is key; we put this term in bold print because we believe if you are not convinced of the righteousness of our position, you will not win. A jury will see through you. We believe in our company, people, and products. You must also have that conviction. If you do not, let us convince you. If we cannot convince you, you cannot convince a jury.

Finally, if you have a case being tried, you will have our full support. Do not be afraid to ask for what you need to try the case. Encouraging you to ask for support does not mean that we will approve every request, but we will not go to battle under-armed.

Appendix B

Initial Report & Plan

To: Dryvit Systems, Inc.

From:

Date:

Case Name:

File Number:

1. Case Summary
    a. Exterior Insulation and Finish Systems ("EIFS") installation date and certificate of occupancy date
    b. Building address
    c. Plaintiffs' allegation of Dryvit EIFS on building – Product ID
    d. Plaintiffs' claims
    e. Principal factual or legal issues
    f. Other Parties/Attorneys – include any firsthand knowledge about opposing counsel or other parties, such as reputation, experience, and standing in the community.
    g. Location of trial court and logistical issues, such as proximity to your office
2. Date answer filed, if applicable
3. Demurrers or Rule 12 motions filed
    a. Basis
    b. Likelihood of success
4. Discovery plan

5. Expert needs
    a. Do you have local experts who can evaluate buildings?
    b. If not, can you find one?
    c. Other experts needed
6. Damages alleged (reclad, repair, mental anguish, medical expenses, loss of use, personal property damage, mold remediation expenses, etc.)
    a. Are there any third-party reports?
    b. Are there any dollar estimates?
7. Miscellaneous information - provide any additional information you think may be of assistance

Appendix C

90-day Status Report

To: Dryvit Systems, Inc.

From:

Date:

Case Name:

File Number:

1. Updated Case Summary
    a. Are the plaintiffs the home's original owners?
    b. Date of purchase and seller's name
    c. Purchase price
    d. Exterior Insulation and Finish Systems square footage, substrate, other claddings on building
    e. Reclad/repair costs to date
    f. Reclad/repair estimates
    g. Principal legal issues
2. Status of Suit
    a. Pleadings exchanged
    b. Additional parties
    c. Dispositive motions
    d. Facts learned from discovery to date
    e. Case management orders, discovery orders, discovery matters
    f. Approaching deadlines for discovery, motions, designation of experts, etc.

3. Future discovery planned or to be completed prior to trial

4. Explanation of overall defense strategy/core defense facts

5. Updated product identification information, including system type

6. Damages alleged, if different from initial report (reclad, repair, mental anguish, medical expenses, loss of use, personal property damage, mold remediation expenses, etc.)

7. Update on experts
    a. Our experts retained and experts needed
    b. Experts retained or identified by opposing party

8. Other defendants' insurance coverage, financial conditions

9. Counsel recommendations

Appendix D

Trial Plan & Budget

To: Dryvit Systems, Inc.

From:

Date:

Case Name:

File Number:

1. Status of the Suit
    a. List dispositive motions filed or to be filed and/or any rulings on dispositive motions for any party
    b. List all discovery completed
    c. List any additional discovery to be completed
    d. Describe any case management or pre-trial orders in effect
    e. Identify the need for disclosure and the deadlines for disclosure of witnesses, exhibits, documents or demonstrative evidence at trial
    f. Describe the status of any settlement negotiations, outstanding offers or demands

2. Assess the likelihood that the case will go to trial and if it will be tried on the date scheduled

3. Explain the overall defense strategy, the core defense facts and the defense themes

4. Indicate all damages alleged (reclad, repair, mental anguish, medical expenses, loss of use, personal property damage, mold remediation expenses, etc.)
    a. Plaintiffs' supporting proof of each
    b. Our rebuttal/alternate damage evidence and witnesses

5. Evaluate the jurisdiction, judge, and opposing counsel, including your relationship with the judge and the court in the jurisdiction.

6. Evaluate Dryvit's exposure, including percentage chance of a defense verdict; potential adverse verdict amount; jury verdict potential at a 100% liability; settlement value and recommended settlement amount prior to trial; and the status of settlement negotiations

    a. Potential Verdict Amounts

        (i) Verdict for plaintiffs = % likelihood

        (ii) Verdict for Dryvit = % likelihood

        (iii) Other potential verdicts = % likelihood.

    b. Apportionment of any verdict in favor of Plaintiff

    c. Settlement value based on above

    d. Status of settlement negotiations

    e. Are we entitled to a set-off of any amounts based on settlements between other parties on any claims? If so, explain.

7. Trial Plan Details

    a. Who will try the case? Please describe his or her trial experience

    b. Do you need or want National Defense Counsel to assist at trial, and if so, what do you need or want them to do?

    c. List all witnesses you plan to call on Dryvit's behalf, and briefly describe the testimony you are seeking to elicit from them.

    d. Indicate in what order you plan to present your proof, and provide the approximate length of each party's presentations.

    e. Provide an approximate schedule stating which days or weeks you will need each Dryvit company witness or expert available for trial.

    f. Describe the documents you plan to use at trial and the general purpose for which you will use the documents either individually or by category.

    g. Describe what type of demonstrative evidence you will use, including what evidence you already have and what you need.

    h. Describe any technology you will be using to present exhibits, deposition testimony, and demonstrative evidence.

    i. Describe any third-party vendor trial support that you need.

j. Describe trial logistics, e.g. will the trial team need to stay in hotels, and if so, where, for how long and in how many rooms?

k. Will you have a "war room" established, and if so, where and what type of support is available?

l. Are daily transcripts available?

m. Do you plan to file any motions in limine?

n. What are your plans for jury voir dire and selection? Do you need a jury consultant or other help in this area?

o. Who do you want as the official company representative?

p. Describe your plans with respect to jury instructions.

q. Describe any plans with respect to the verdict form.

r. Describe our appeal options, e.g. appeal as a matter of right, discretionary upon petition, etc.

8. Estimated defense fees and costs through trial

CASE ACTIVITY	BUDGET THROUGH TRIAL
Trial:	Per week of trial: Total for ___ weeks of trial:
Miscellaneous Work:	
Expert Witness Consulting Fees:	
Other Miscellaneous Costs and Expenses:	
Total Budget:	

9. Counsel recommendations:

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