

FDCC Winter Meeting
Hyatt Grand Champions Resort
Indian Wells, California
February 26 – March 5, 2011

AVOIDING ETHICAL TRAPS AND PROFESSIONAL LIABILITY IN WEB 2.0

Presented by

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AVOIDING ETHICAL TRAPS AND PROFESSIONAL LIABILITY IN WEB 2.0

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I. INTRODUCTION

In the “Good Old Days,” a lawyer had a business card, a glossy firm brochure, and a biography in Martindale Hubbell. During the process of creating each, the lawyer made sure it complied with the rules of ethics, that it was in good taste, and that it was something the lawyer and his or her firm could be proud of. These materials were static: apart from having to update them every once in a while, once you got them “right” they stayed “right.” It was hard to imagine a scenario in which any one of these traditional ways of communicating information about the lawyer and his practice could get the lawyer in trouble, whether ethically or through professional liability.

With the advent of the Internet, law firms added to these more traditional devices a firm website. (Do you recall the internal discussions about whether your firm should even have a website?) Although these websites were "interactive" in the sense that they allowed a person accessing the website to e-mail a lawyer by clicking on a button or two, they were essentially electronic versions of firm brochures. Like brochures, they were static, and therefore easily maintained in a manner that complied with ethical rules and that did not create exposure to civil liability. This was the relatively benign world of Web 1.0.

Enter Web 2.0: a world in which lawyers (and law firm employees) and the rest of the world (which includes strangers, judges, clients and prospective clients, witnesses, jurors, opposing counsel, senior partners, law firm staff) *interact* in websites that are presumably viewable by anyone. In the Web 2.0 environment, lawyers and other law firm employees are creating content of websites, one or more per person:

- in real time, often without proofreading or reflection;

- 24 hours a day (during some of which they may have consumed intoxicating substances);
- without supervision;
- often without the ability to control content being posted by others;
- across state and national borders;
- often without knowing the identity of the persons with whom they are interacting.

In this environment, the opportunities to commit ethical violations or create exposure to civil liability are virtually limitless. The balance of this paper raises issues lawyers should consider when using Web 2.0 social networking sites to avoid committing malpractice and ethical violations.

II. WHAT IS "WEB 2.0"?

The defining feature of a so-called "Web 2.0" site is that it "gives its users the free choice to interact or collaborate with each other in a social media dialogue as creators…of user-generated content in a virtual community, in contrast to websites where users…are limited to the passive viewing of content that was created for them."[1]

While young adults continue to be the heaviest users of social media, Web 2.0 is definitely not "just for kids" anymore – nearly half of internet users ages 50-64 and one in four users age 65 and older now use social networking sites like Facebook or LinkedIn.[2]

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[1] Wikipedia, *Web 2.0*, http://en.wikipedia.org/wiki/Web_2.0 (last visited Nov. 1, 2010). Appropriately, this definition comes from Wikipedia – itself a prominent Web 2.0 product. *See* Wikipedia:About, http://en.wikipedia.org/wiki/Wikipedia:About (Nov. 1, 2010) (describing Wikipedia as "written collaboratively by largely anonymous internet volunteers").

[2] Mary Madden, *Older Adults and Social Media* (Aug. 27, 2010), http://www.pewinternet.org/Reports/2010/Older-Adults-and-Social-Media.aspx.

A. Facebook

Facebook (www.facebook.com) is by far the most popular personal social networking site. Launched it 2004, it currently has more than 500 million active users, half of whom log on to Facebook in any given day.[3] Facebook allows users to upload content to an online profile, "friend" other users, play games, take quizzes, organize events and join interest groups. An average user has 130 "friends" and creates 90 pieces of content each month.[4] Sharing photos is one of the most popular Facebook activities, and more than 3 billion photos are uploaded to the site every month.[5] A vast array of customizable privacy settings allows users to control who can see the content they post – only their "friends," only members of certain "networks," or the unrestricted public.

While Facebook started as a site for college students, "American use of Facebook today is very intergenerational," with only 40% of users under the age of 25 and nearly 20% of users age 45 or older.[6] In an effort to attract more business users, Facebook has also recently re-designed its community or fan pages, which allow businesses or organizations to establish a profile which other users can "like" or become "fans" of.[7] However, the primary focus that fuels Facebook's popularity continues to be purely social interaction with "friends" online.

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[3] Facebook, Statistics, http://www.facebook.com/facebook#!/press/info.php?statistics (last visited Nov. 1, 2010).

[4] *Id.*

[5] Eric Eldon, New Facebook Statistics Show Big Increase in Content Sharing, Local Business Pages (Feb. 15, 2010), http://www.insidefacebook.com/2010/02/15/new-facebook-statistics-show-big-increase-in-content-sharing-local-business-pages.

[6] Justin Smith, December Data on Facebook's US Growth by Age and Gender (Jan. 4, 2010), http://www.insidefacebook.com/2010/01/04/december-data-on-facebook%E2%80%99s-us-growth-by-age-and-gender-beyond-100-million.

[7] Some businesses, law firms in particular, were not particularly pleased with the way that this new feature automatically captured their employees' self-descriptions of their jobs on their individual profiles and used that information to automatically generate a community page for the firm. What employees may have intended as a private expression of frustration with their day-to-day jobs, led to the automatic creation of firm-branded pages reflecting the firm's employment of, for example, "bimbos," "whipping boys," "slaves," or "Morlocks". *See* Jenna Greene, Firms no fan of Facebook pages (May 31, 2010), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202458966925&src=EMC-Email&et=editorial&bu=National%20Law%20Journal&pt=NLJ.com%20Daily%20Headlines&cn=20100601NLJ&kw=Firms%20no%20fan%20of%20Facebook%20pages&hbxlogin=1.

B. MySpace

Like Facebook, MySpace (www.myspace.com) allows users to upload information, photos and videos to an online profile and to socially interact online with other users. MySpace currently has more than 100 million users worldwide.[8] However, while Facebook has made a concentrated effort to reach out to older users and businesses, MySpace's primary focus remains on a younger demographic. Consistent with this focus, the site recently debuted a new brand, website and suite of products aimed to "redefine the company as a social entertainment destination for Gen Y."[9]

C. LinkedIn

Unlike the purely social focus of Facebook and MySpace, LinkedIn (www.linkedin.com) has been business-oriented since its launch in 2003, with a stated mission to "connect the world's professionals to make them more productive and successful."[10] LinkedIn has over 80 million members, including executives from all Fortune 500 companies.[11] The average user age is approximately 44.[12]

LinkedIn members' online profiles are tailored towards the site's business focus, functioning much like an online resume. Members can post information regarding job history, job descriptions, education history, contact information and links to external websites. Members can also upload one photo to be displayed with their profile and can join various interest groups. Unlike Facebook and MySpace, LinkedIn requires you to state how you know someone before it will send a connection request to that person and, if you do not answer, requires you to request an "introduction" through a mutual connection. One of LinkedIn's defining features is the ability for members to write "recommendations" for each other. If a member accepts a recommendation written by another

[8] MySpace, Fact Sheet, http://www.myspace.com/pressroom/fact-sheet (last visited Nov. 1, 2010).
[9] Meet the New Myspace (Oct. 27, 2010), http://www.myspace.com/pressroom/2010/10/meet-the-new-myspace.
[10] LinkedIn, About Us, http://press.linkedin.com/about (last visited Nov. 1, 2010).
[11] *Id.*
[12] Pingdom.com, Study: Ages of social network users (Feb. 16, 2010), http://royal.pingdom.com/2010/02/16/study-ages-of-social-network-users/.

member, that recommendation appears on the accepting member's profile.[13]

D. Specialized Legal Social Networks

A number of specialized social networking platforms, geared specifically towards legal professionals, have been launched in the past few years as well.

Legal OnRamp (http://legalonramp.com) is an invitation-only social networking platform for in house counsel and outside lawyers. Launched in 2007, it is "designed to make it easier for corporate lawyers to make connections among themselves and with law firms, using elements modeled in part after popular networking sites such as Facebook and LinkedIn."[14] But Legal OnRamp provides more than just connections – it also provides substantive FAQs, updates and publications on various legal issues, blogs and standard forms and templates and various forums for online discussions. Members are required to contribute "substantive content" to the site or risk removal. Compared to the millions of users active on Facebook and LinkedIn, Legal OnRamp's community is very small – with approximately 10,000 members (half of whom are in-house) as of late 2009.[15]

Both the ABA and Martindale-Hubbell have joined the social networking game as well, with LegallyMinded (www.legallyminded.com) and Martindale-Hubbell Connected (http://community.martindale.com). LegallyMinded touts a community which "fuses cutting-edge social networking features, top-notch news and articles, and user-generated content."[16] Membership is not limited to just lawyers – rather, paralegals, law librarians and law students can join as well. A key feature of Martindale-Hubbell Connected, which was formed in partnership with LinkedIn and utilizes an interface designed by LexisNexis, is a user's

[13] This feature may pose particular problems for attorneys in states where ethics rules prohibit testimonials – be sure to check your state's ethics rules before accepting recommendations or writing recommendations for others.
[14] Eric Young, Startup connects in-house attorneys to law firm's advice (Sept. 24, 2007), http://www.bizjournals.com/eastbay/stories/2007/09/24/focus3.html?jst=s_cn_hl.
[15] Bruce MacEwan, Legal OnRamp Release 2.0 (Oct. 1, 2009), http://www.adamsmithesq.com/archives/2009/10/legal-onramp-release-20.html.
[16] About LegallyMinded, http://www.legallyminded.com/Pages/about.aspx (last visited Nov. 1, 2010).

ability to integrate his or her Connected profile with his or her paid profile on Martindale.com or LinkedIn account. Connected users can also post information in public groups or blogs which are visible to the public and indexed by Google.

Finally, JD Supra (www.jdsupra.com) aims to "give legal professionals a platform to publish top-quality work to a wide audience, maintain a profile online, and be credited for their experience, and expertise."[17] Users are encouraged to post a variety of content, including pleadings and other court filings, court decisions or verdicts, whitepapers and legal forms. Information posted by JD Supra users is public and can be searched and viewed by members and non-members alike. However, only members of the legal profession can maintain a profile and contribute to the site. A user's activity on JD Supra can also be integrated with Facebook, Twitter and LinkedIn.

E. Twitter

Twitter (www.twitter.com) is perhaps the fastest-growing social media platform. As of late 2010, Twitter had 160 million registered users.[18]

The defining characteristic of Twitter is the "tweet" – the form in which users communicate and interact with other users who "follow" them on the service. Users publish 140-character messages from a computer or mobile device which then appear, in reverse-chronological order, on the homepages of all of their "followers." Those 140 characters can consist of pure text, a shrunken URL pointing a reader to an external website, or one of any number of code-like abbreviations that have developed to communicate that the content has been "re-tweeted" from another user or to organize "tweets" on similar topics under a single "hashtag." Approximately 90 million "tweets" are written per day.[19]

More so than many other forms of social media, Twitter has been uniquely adopted as much for professional use as for personal use. While there are plenty of individuals "tweeting" about their personal lives, there are also scores of professionals "tweeting" about professional topics and companies "tweeting" about their products and services.

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[17] About JD Supra, http://www.jdsupra.com/about/index.aspx (last visited Nov. 1, 2010).
[18] About, http://twitter.com/about (last visited Nov. 1, 2010).
[19] *Id.*

III. AVOIDING LEGAL MALPRACTICE AND ETHICAL VIOLATIONS IN WEB 2.0

A. Using Web 2.0 in Litigation: Information-Gathering

Social media websites are a treasure trove of information about one's clients, opposing parties, opposing counsel, and witnesses. Determining what information about these individuals is available through these resources is as much a part of a lawyer's obligation to perform a reasonable investigation of the facts involved in a lawsuit in which he or she is involved as any other source of potentially helpful or harmful information.

First, in order to represent your client in an informed way, the lawyer should find out what information about the client is, for better or worse, available to the other side through social networks. The lawyer should also counsel the client not to post information on social websites that is untrue or that could be used to the client's disadvantage in the lawsuit. In some cases, it may be preferable to simply advise the client to refrain from engaging in any kind of social media activity while the case is pending.

Second, the lawyer should thoroughly investigate social networking websites to learn what he or she can about the opposing party and significant witnesses, and use that information accordingly.

Some of a person's social media activity, along with other potentially important biographical information or photographs, can likely be retrieved by a simple Google search. However, ethical issues often arise in situations where an individual has chosen to make some or all of his or her "profile" or other information private or viewable only by his or her "friends" or "connections." Under these circumstances, is it permissible for a third party, such as a paralegal or investigator (whose name the target would not recognize), to attempt to become the target's "friend" to get access to their otherwise restricted profile information? At least one jurisdiction has said no, concluding that such deceptive conduct violates a lawyer's duty to be truthful in his or her statements to others and that the duty of truthfulness also encompasses non-lawyer staff and investigators.[20] Ethical rules that may be implicated in this type of scenario include the following:

[20] Philadelphia Bar Ass'n Prof. Guidance Comm, Op. 2009-02 (March 2009)

Rule 4.1 Truthfulness In Statements To Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person…

Rule 4.3 Dealing With Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding….

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

…

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

…

B. Using Web 2.0 in Litigation: Lawyer's Own Activity

Web 2.0 not only provides users with the ability to gather factual information regarding parties in litigation, it also provides lawyers with a vast array of tools to assist them in their practice by facilitating interaction

with other lawyers and other individuals with expertise in particular fields. However, just as lawyers should counsel their clients to be careful what they do online, lawyers should be extra vigilant to ensure that their own online activity related to ongoing litigation does not expose them to civil liability or ethics violations.

First, maintaining client confidentiality is paramount. ABA Model Rule 1.6 provides as follows:

> **Rule 1.6 Confidentiality of Information**
>
> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

A lawyer's online activity has the potential to jeopardize client confidentiality in numerous ways. For example, many lawyers use chat rooms, discussion boards or other forums to exchange ideas about tactics, strategy, and the like. If you choose to do this, be careful not to reveal work product analysis, strategy, or tactics in pending matters in these forums, which can happen by disclosing enough "generic" or "hypothetical" information about the matter that opposing counsel, who may be monitoring that website, can identify you and your client and thereby gain knowledge of otherwise-privileged information.

In addition, keep confidentiality concerns in mind when choosing the means by which you communicate with your clients. If you make the decision to "friend" a client on Facebook or otherwise connect with them through social media, take care to limit privileged and confidential communications to only those methods which are truly private (i.e., don't write anything on your client's "wall" that you wouldn't want opposing counsel to read).

While "tweeting" about the details of a recent confidential settlement agreement would most definitely place the lawyer in ethical and malpractice peril, what about posting regarding a recent verdict or ruling obtained in a case? Though these items are likely a matter of public record, and therefore posting about them is not technically prohibited by the rule governing confidentiality, a lawyer should recognize that clients

may not appreciate the details of their most recent litigation victory or defeat being splashed across the internet by their lawyer. Also, even simply posting on a matter of public record opens the door for accidental disclosures of impressions or insight about the case that the lawyer only acquired in the course of his or her representation of the client – the dissemination of which would violate the lawyer's duty of confidentiality if done without the client's consent.

Second, social media activity is rife with the potential for conflicts of interest. Just as posting "hypotheticals" online may open the door for confidentiality breaches, responding to such "hypotheticals" opens the door for the inadvertent creation of an attorney-client relationship with the person who posed the question. The question of whether an attorney-client relationship was formed is determined from the viewpoint of the putative client; therefore, even if the lawyer provides a disclaimer with the advice (i.e., "this is not legal advice") a court could still potentially determine that an attorney-client relationship was formed. Such a determination could wreak havoc on the lawyer's existing client relationships (in the form of disqualification or malpractice lawsuits) if representing the new "client" presents any conflicts of interest. Because online interaction often takes place anonymously or under screen names, the lawyer would not necessarily have any way of knowing if the anonymous person seeking advice in a discussion group is an opposing party or would otherwise present a conflict of interest until it is too late.

The ABA Model Rules regarding conflicts of interest, as applied to current and prospective clients, are set out below:

> **Rule 1.7 Conflict Of Interest: Current Clients**
>
> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's

responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Rule 1.18 Duties To Prospective Client

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the

> prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).
>
> (d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:
>
> (1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:
>
> (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and
>
> (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
>
> (ii) written notice is promptly given to the prospective client.

Third, if any of a lawyer's social networking activity extends to members of the judiciary, then additional considerations also apply. Some jurisdictions have adopted rules and/or opinions which expressly prohibit judges from "friending" lawyers who appear before them.[21] Even if it is technically permissible to "friend" members of the judiciary in your jurisdiction, it is still a risky proposition to do so, in light of the risk that casual, social conversation could be perceived as *ex parte* communications regarding any pending matters.

[21] *See e.g.,* Fla. Supreme Ct. Judicial Ethics Adv. Comm., Op. No. 2009-20 (Nov. 17, 2009).

C. Communicating Professional Information

The simplest way to manage the risks associated with using social media websites to promote oneself or one's firm is to not use them. Although this seems obvious, it is worth mentioning because lawyers hear from every corner that they will be left behind if they do not use social media sites to promote themselves and their law firms: using social media sites professionally is described as all but inevitable. Time will tell, but at present it still appears to reasonable and viable to simply elect *not* to use social networking sites to promote one's self or one's firm, and instead to continue to rely on traditional, less risky, methods of doing so.

Assuming that a lawyer chooses to use social media websites to communicate information about the attorney, his or her law firm, or the nature of their practice, the following are some considerations to avoid committing legal malpractice or ethical violations when doing so.

First, be honest. The breakneck speed of online interactions, and the informal tone they often take, can make it all too easy to exaggerate or overstate one's qualifications or accomplishments. Ask yourself – would I make this claim or statement in a written brochure, or to a prospective client in person? If not, then don't post it online either. A lawyer's communications regarding his or her qualifications or services must not be false or misleading, regardless of the medium through which those communications are made. Also, be conscious of your jurisdiction's rules regarding multijurisdictional practice and the circumstances under which a lawyer may hold himself or herself out as a "specialist" in any particular field and make sure any statements about your bar admissions, experience and qualifications do not violate those rules. The ABA Model Rules on these topics provide as follows:

> **Rule 7.1 Communications Concerning A Lawyer's Services**
>
> A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

Rule 7.4 Communication of Fields of Practice and Specialization

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law…

…

(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication.

Second, before even dipping a toe in the social media pool, a lawyer should get very familiar with the applicable jurisdiction's rules regarding lawyer advertising. This will be an ongoing challenge, as many states are just now recognizing the challenge that social media presents in this context and are either promulgating new rules or otherwise attempting to adapt existing rules to effectively govern the Web 2.0 arena. Needless to say, the technology has considerably outpaced bar association rulemaking in this regard, as many jurisdictions are just now reaching a consensus on the rules governing lawyer websites, let alone lawyer social media activity.[22]

Despite the absence of clear rules on the subject, a few common themes are clear.

- A lawyer should review all of his or her social media activity, including websites, blogs, Facebook pages, tweets and LinkedIn recommendations to ensure compliance with the applicable advertising rules.

- A lawyer should be particularly cautious in sending invitations to connect to persons who could be deemed "prospective clients" lest the invitation be viewed as a "solicitation" in violation of ethical rules. (Depending on the circumstances, a lawyer's responding to "hypotheticals" posted online could also potentially be viewed as a "solicitation.")

- Any instance in which a current or former client is commenting on the skills of or "recommending" a lawyer (as members are encouraged to do on LinkedIn) must comply with applicable rules regarding the use and permissible content of client testimonials.

For reference, the ABA Model Rules regarding lawyer advertising as set out below; however, many jurisdictions regulate lawyer advertising much more stringently than the ABA Model Rules contemplate, so it is

[22] For example, the ABA only recently issued a formal opinion on lawyer websites. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 10-457 (2010). In Florida, the Florida Bar has been in the process of formulating proposed amendments to Rule Regulating the Florida Bar 4-7.6 (Computer Accessed Communications) for over two and a half years, yet the amendments have not yet been approved by the Florida Supreme Court and, therefore, have not gone into effect.

imperative to become familiar with the particular rules of the jurisdiction in which you practice.

Rule 7.2 Advertising

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority…

(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

Rule 7.3 Direct Contact With Prospective Clients

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

> (b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:
>
> (1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or
>
> (2) the solicitation involves coercion, duress or harassment.
>
> (c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2)…

D. The Importance of a Social Media Policy

Law firms should have social media policies. While creating one is a daunting task, it is vitally important to fulfilling a lawyer's duty to adequately supervise the other lawyers and non-lawyer staff with whom they work. In the long run, it does you little good to take the time to painstakingly ensure that your own online activity does not violate any legal or ethical rules if an associate or legal assistant you supervise is posting client confidences as their Facebook status updates on a daily basis. As demonstrated by the following ABA Model Rules, a lawyer has a duty to ensure that other lawyers and staff are complying with the applicable ethical rules and can be held responsible for their failure to do so:

Rule 5.1 Responsibilities Of Partners, Managers, And Supervisory Lawyers

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm

> shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
>
> (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
>
> (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
>
> (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
>
> (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Developing a social media policy and providing some level of training on its contents is imperative to protecting your firm's "brand" online as well as protecting yourself and your colleagues from ethical violations and potential legal malpractice claims.

IV. CONCLUSION

Web 2.0 social media sites offer lawyers a wide range of resources to attract more business and to do a better job on cases they already have. However, they also create a whole new world of risks that, if not respected and managed, may leave the Web 2.0 user in an ethical dilemma or "on the wrong side of the v." Attorneys are well advised to proceed into the world of Web 2.0 with enthusiasm, but also with caution.

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FDCC Winter Meeting
Hyatt Grand Champions Resort
Indian Wells, California
February 26 – March 5, 2011

SOCIAL MEDIA – WHAT WILL PRIVATE INVESTIGATORS DO NOW?

Presented by

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SOCIAL MEDIA – WHAT WILL PRIVATE INVESTIGATORS DO NOW?

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I. RELEVANCE – WHAT STAYS IN VEGAS IS ON FACEBOOK

With the amazing explosion in people using social media in just the past five years, there is much that is unknown, undecided, and unexplored with this tool. ”Smart Phones” are common place and allow us to remain in contact with clients, co-workers, and friends the world over instantly. Nevertheless, many continue to be naïve in understanding the lasting impact of their “posts”, “blogs”, and “tweets.” The confusion has spread to the courts and resulted in varying decisions with respect to the discoverability and privacy of certain social media pages and posting.

This paper is not designed to explore all of the recent court decisions or ethical considerations, but, rather, to discuss some of the applications this author has utilized in discovery, mediation, and trials over the past three years. Once considered the playground of youth, the largest growing segments of Facebook are adults in the 55-65 age groups. This past year, Facebook boasted that it had 500 million users worldwide. Twitter claims that it has over 100 million users. It is reported that one-third of adults now have a social media site. Over ninety percent of Millennials communicate through social media and consider email “old school.” Social media has played an increasing, important, and significant role in investigating claims, obtaining information on lay and expert witnesses, serving subpoenas, conducting voir dire, preparing for depositions, and use in mediations and trials. This paper will not deal with the “old” Twentieth Century technology of email and discovering one’s web browsing history. While such information was and is helpful, a wider world exists. Social media can make personal information available in an instant and with little to no cost. What once took many hours to develop is available literally at the push of a button.

II. SERVICE OF SUBPOENA

Recently, we needed to file suit on behalf of a corporate client. We could not find the potential defendant for many months. One day, while checking his Facebook account, the defendant posted a notice as to where he would be spending a Saturday evening in Milwaukee and what time he planned to arrive. Our process server was waiting for him at the

appointed time and place. This individual had his privacy settings set so that anyone could view his postings or "Status" as it is known in the Facebook world.

In a current case, a former employee was essential to interview. This individual possessed personal knowledge surrounding the use of a medical device which was the subject of the lawsuit. Plaintiff's attorney claimed that he could not find the witness. We put the name into Facebook and within five minutes obtained the witness's cell phone number and immediately contacted the witness.

III. DISCOVERY- "FREE SURVEILLANCE"

A. "I Cannot Hike Or Walk Long Distances"

In a recent case, a plaintiff complained of back pain following a truck-car accident. We were representing a major trucking company for the defense. The plaintiff was a young woman at the University of Wisconsin. I emailed my niece, who attended the same school to ask if she knew her. I never thought I would receive a response with a link to the plaintiff's Facebook page. Plaintiff claimed that she was unable to ride her horses, nor participate in any activity that requires long walks or hiking. Facebook allows one to list hobbies and favorite activities. In her case, she listed horseback riding, hiking, running and gymnastics. As I viewed the link, I saw photographs that were posted to her page by others that "tagged" plaintiff performing with the gymnastics club and horseback riding. I made screenshots of these pages and posts.

On the day before her deposition, I again looked at her Facebook page. Plaintiff had photographs of herself hiking at Devil's Lake, a Wisconsin State Park popular for camping, hiking, and rock climbing. These photos were posted by others and "tagged" with her name. This action of "tagging" put the photos on the plaintiff's Facebook page. The posted photos showed plaintiff hiking on one of the more grueling and challenging paths located on the western bluffs of the lake.

At the deposition, I allowed her to discuss all of her limitations. When asked about things she enjoyed doing, she discussed camping with her family. She truthfully testified that she had been camping, over Labor Day weekend, at Devil's Lake. She then testified:

A: It was a frustrating time for me because I could not enjoy myself. When my family went on a hike, I had to stay back at the campsite.

Q: You mean that your family went on a hike without you?

A: Yes, they went on a long hike and I had to stay behind at the campsite to rest my back.

Q: So, it must have been very frustrating for you to have to stay behind while your family went on their hike?

A: Oh, it was very frustrating.

Q: So you were unable to participate in any hiking over the weekend?

A: That's right.

Q: I have been to Devil's lake myself. Did they do that large hike on the western bluff?

A: They did. I love that path and I could not go which made me sad.

At the close of the deposition I asked her if she had a MySpace page. She did not. I then asked her if she had a Facebook page. She admitted that she did. I then made a formal request of her attorney to obtain a screenshot of her Facebook page as it existed on the day of the deposition.

Subsequent to the deposition, plaintiff counsel told me that his client did not know how to make a copy of her Facebook page. I responded that, if I knew how to make a copy of a page, she should know how to do so and that if she did not do so, we would take the matter up with the court and/or subpoena the records from Facebook.

Plaintiff did copy her page; however, the photographs were not included in the discovery response. The failure to include the photograph helped us since we already had printed them off on the day of the deposition.

B. Mediation

At the court ordered ADR, I brought the copies that we had made of the Facebook page as well as my laptop, so that we could go directly to the page. By the time of the mediation, plaintiff had activated privacy controls that would not allow us to view her page. I did show the mediator the photos we had as well as what was produced. We never disclosed to plaintiff's counsel what we had and did not authorize the mediator to do so either. However, the mediator cautioned the plaintiff's counsel that we were prepared to go to trial and that what we possessed would severely hurt plaintiff's credibility and case. The matter was eventually dismissed.

C. You Tube Video

In a case involving a claim of a severe rotator cuff injury, we played the plaintiff's video deposition on one laptop while, on the other; we had a You Tube video of the plaintiff demonstrating how to build an addition on his home. On You Tube, he was lifting 4x8 sheets of plywood out of his pickup truck and lifting them over his head to move them. In the deposition, plaintiff stated and demonstrated that he could not lift his right arm higher than 45 degrees and could no longer do work around his home. Demand prior to the mediation was $675,000. The case settled for significantly less (subject to a confidentiality agreement).

IV. BLOG RESULTS IN DISMISSAL OF EXPERT

A search of an expert witness turned up a web page designed to inform the readers of the dangers of Ritalin. The expert sold bumper stickers, buttons, articles, promoted seminars and other material designed to generate income. He also discussed his availability as an expert witness. However, the best nugget of gold was his blog in which he went on a rant about how a particular drug company was out to "get him." This part of his blog was deleted a few days after its discovery.

We contacted the general counsel for the drug company on the hunch that this expert had past experiences with the company. The general counsel provided us with a large amount of material that would prove very useful in cross-examination of the expert at the trial. During cross, we were able to produce many materials from the expert's own society which branded him as one with no experience with the drug in question, nor had he done any controlled studies to support his theories.

At trial, the trial judge struck the witness as being a fraud and lacking in even a basic scientific understanding of the drug and its uses. His disqualification was a direct result of a careless blog out on the internet.

V. VOIR DIRE

Since reportedly one-third of Facebook users allow anyone to see their profiles, it is essential for an attorney to run the names of potential jurors for information. Even if one's jurisdiction does not provide one with prospective juror names before jury selection, some attorneys use the internet in the courtroom to run a search of potential jurors while in the courtroom. Some court houses now have wireless; however, it is not required given that, with an internet card from your cell phone provider, one can be connected to the internet while in court. In some cases, post selection searches have uncovered information that was not disclosed either on jury information data sheets or during actual voir dire. I submit that it has become "standard of care" for the reasonable trial attorney to do a search of potential jurors to uncover information that is readily available concerning court records, businesses owned, past lawsuits, and even some mundane postings on Twitter or Facebook.

Many jurors have their own web pages, businesses, or blogs that can give a great deal of insight to their bias or prejudices that may influence the case. If you are not seeking the information, your opponent probably is doing her homework. (See, *Social Networking Sites Help Vet Jurors, Nat'l L.J.*, Aug. 18,2008, cited in A New "Must Use" Tool in Litigation?, For the Defense, August 2010.)

VI. OTHER SOCIAL MEDIA SITES – DISCOVERY REQUESTS

Facebook, LinkedIn, YouTube, Twitter, Texting, MySpace, Blogs, and My Sugar Daddy.com are just some of the sites that are available to obtain information. It is important that counsel propound early discovery requests:

- What social media do you use or frequent?
- Produce screen shots of one's current Facebook/My Space page including wall comments, photographs, and profile.
- What profile or screen name do you use?

- Is your profile private?
- What level of privacy do you maintain?
- Have you blocked anyone in particular? Who? Why?
- What status have you posted since the date of the accident in question?
- Are you in any YouTube/internet videos?
- What Videos have you posted to Facebook or You Tube?
- Do you have a personal blog?
- Where have you posted resumes?
- Do you belong to any dating sites such as Match, eHarmony, Yahoo Personals?
- Are you listed on Monster or other employment sites?

VII. DISCOVERY USING OTHER SOCIAL MEDIA

A. My Sugar Daddy.com

Use of medical records, particularly nursing notes has for many years produced information helpful to determining the level of claimed disability. In one case, the plaintiff claimed that she could no longer enjoy a normal sexual relationship with her husband. She further stated in medical records that she did not use alcohol, tobacco or drugs. In a personal blog, she listed, post accident that she had been drinking to the point where she thought she was going to the hospital. In Tweets that were obtained, she discussed having sex with someone not her husband. In a YouTube video, she is seen with a bottle of imported beer and bragging that she only "drinks the good stuff." The best part of the discovery was finding that she had posted on My Sugar Daddy.com. This is a web site for women looking for wealthy male companionship in exchange for lavishing attention and affection on the Sugar Daddy. Plaintiff had her own account and in her profile described herself as very sexually active and looking for a rich guy to take care of her. In return, plaintiff promised to take very good care of her "Daddy." What was left out was the fact that she was

married. The information about Sugar Daddy came from her sister who was upset that she was attempting to defraud our defendant company and, further, she was upset to find her sister using her computer to be on this web site. It was the family that gave our investigator access to the computer which also contained her password an allowed us access to this interesting web site.

Similarly, an investigator was able to discover that plaintiff enjoyed doing "tests" on Facebook answering weighty existential questions such as:

- How many times a week do you like to have sex? A: 20
- What is your favorite stripper song? A: Pussy Liquor
- What movie is your life? A: Footloose.

B. Employment Issues

LinkedIn provides a current resume and work status of individuals. In a number of cases, we have found false information in LinkedIn pages which undermined the witness's credibility before the jury.

An expert testified that he did not advertise himself for hire as a medical expert. He was unable to explain three websites that advertised his services for hire. Nor was he able to explain why he stated that he was on the faculty at the University Of Chicago Medical School, when he never was on the faculty. He changed his LinkedIn profile the day after the trial.

Another plaintiff who claimed he could not work was presented with his LinkedIn profile describing the many jobs he had held and how he was not taking in more referrals as he had no time for new projects.

C. I Can't Come To The Deposition As I Am Out Of Town

Recent articles have also described interesting ways to get information on plaintiffs. In one case, a plaintiff who stated that he could not work due to depression following an accident and could not be deposed because he was going to be out of the country, posted in a publicly accessible profile that he was working as a movie extra and enjoying vacationing in New Orleans. When the information was given to plaintiff counsel, the claim was dismissed. (Litigation, Mining Social Media Sites for Litigation Gold, 10/1/10.)

VIII. FRIENDS AND JURORS – CAN WE TRULY EXPECT TRIALS TO BE FAIR IN THE INTERNET AGE?

Jurors have been caught using Facebook posts, doing research on Google, and Twittering about trials as they are ongoing. This has led to judges issuing instructions to the effect of:

> You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, I-phone, text messaging, or on Twitter, through any blog or website, through any Internet chat room, or by way of any other social networking websites, including Facebook, My Space, LinkedIn, and You Tube

In Michigan, a juror was fined $250 for posting on her Facebook page that she believed that the defendant was guilty, even before the case was given to the jury for deliberation. The 20 year old juror wrote on Facebook, "gonna be fun to tell the defendant they're GUILTY." The post was discovered by the defense attorney's son while checking juror names on the internet.

In Fort Lauderdale, a juror sent the judge a note indicating that she had overheard a juror talking about doing research on the case. The judge interviewed each juror asking if they had done any research. Eight of the 12 jurors had Googled the defendants' names and medical terms. A mistrial was immediately ordered. (*St. Petersburg Times*, October 29, 2010)

In Florida, a rape trial had not ended and the foreperson updated her Facebook account calling the testimony "boring, boring, boring." A fellow juror posted a comment to a local newspaper, after the trial, accusing the foreman of having outside information. A motion for new trial is currently pending.

In New York, a juror sent a "friend request" to one of the witnesses in the trial in which he served, during the trial.

In Maryland, a group of jurors posted messages about their jury service despite being told by a judge not to do so.

In the United Kingdom, a juror was dismissed from the jury for polling her friends about whether to convict the defendants in a criminal case.

Judges have confiscated cell phones, Blackberries, I-Touch, and I-Pads from jurors during a trial and only allowed access to them if there is an emergency or child care issue. This does not stop what a juror does after hours and, short of sequestration, in this age of instant news and information, it is difficult to stop jurors from making comments, research or connecting with others about the trial. This really is no different than in the past. Attorneys had no idea if a juror was going to read the paper, call a friend, discuss the case with a spouse or friend, or go to the library and do research. As one author has opined, the good news is that we now have the ability to find out what a juror has done by a search of social media. The information is "out there to actually find and see." (Jack King, Director of Communications and Public Affairs at the National Association of Criminal Defense Attorneys. Cited in Litigation, 10/1/10)

IX. POST SETTLEMENT USES

The terms of a confidential settlement were violated when one of the attorneys discovered that a party Tweeted that a settlement had been reached. In other cases, a personal blog posted detailed information concerning a confidential settlement.

X. USE IT OR LOSE

To those of us who have been trial attorneys for many years, the vast array of social media and internet sites available for information appears daunting. Consider that in actuality accessing this information is far easier that the days of a private investigator having to search court records, interviewing neighbors, or hiding in a van while waiting to capture surveillance photos or video. Anyone can learn how to use the tools available and literature is growing daily with instructions for use and suggestions for innovations in the use of the internet. Social media is here to stay and the means to use it becomes easier each day. You owe it to your clients to make full use of the information that is available and you may even have fun doing so. Happy Hunting.

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Joe has been named a Wisconsin Super Lawyer for the past six years and is Board Certified in Civil Trial Law by the National Board of Trial Advocacy. He is licensed in Florida and Wisconsin. Joe is a past DRI board member and is active in the FDCC. He has lectured and authored articles on Trial Advocacy and Ethics internationally.



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SKYROCKETING LITIGATION COSTS COMPEL BROAD REVISION OF THE FEDERAL RULES OF CIVIL PROCEDURE

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SKYROCKETING LITIGATION COSTS COMPEL BROAD REVISION OF THE FEDERAL RULES OF CIVIL PROCEDURE

A Review of Proposed Rule Changes Submitted by the FDCC, LCJ and Other Defense Groups to Civil Rules Advisory Committee

BY HOWARD MERTEN

ALEXANDRA PEZZELLO

Consider the current state of federal civil litigation as revealed in a recent intensive study involving twenty Fortune 200 companies:

- The companies spent 16 to 24 cents of every dollar of global profit on U. S. litigation.
- These same companies reported a 73% rise in litigation costs from 2000 to 2008.
- They produced over 1,000 pages of documents for every *one page* that ultimately got marked as a *potential* trial exhibit.[1]

The business community has long known that litigation expenses often preclude them from reaching the merits of cases and compel settlement of frivolous claims. This recent study documents that these costs also impact corporate bottom lines and the competitiveness of U.S. companies.

Increasing costs and delays are severely impacting the fundamental health of the civil justice system. The jury box, once the ultimate check on the system, is fast becoming a vestigial anachronism. It may already be there—only about 1% of all federal civil case filings now get resolved by a jury.[2] If anything, the problem is only getting worse as courts and litigants

[1] Lawyers for Civil Justice et al., Statement on Litigation Cost Survey of Major Companies 2 (2010) available at http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/33A2682A2D4EF700852577190060E4B5/$File/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf?OpenElement.

[2] Ashby Jones, *Why Have Federal Civil Jury Trials Basically Disappeared,* The Wall Street Journal Law Blog (September 21, 2010), available at

struggle, largely without success, to come to grips with the exploding problems surrounding electronic data. In an increasing number of cases, the possibility of resolution on the merits is simply an illusion.

It should come as no surprise, then, that there is a growing consensus within virtually all constituencies in the civil justice system – litigants, lawyers, judges and academics – that fundamental reform is needed. The American College of Trial Lawyers has declared that, "…although the civil justice system is not broken, it is in serious need of repair. In many jurisdictions, today's civil justice system takes too long and costs too much."[3] The United States Supreme Court declared that increasing discovery costs often prompt settlement of meritless cases and declared that it is a "…common lament that the success of judicial supervision in checking discovery abuse has been on the modest side."[4]

The Standing Committee on Rules of Practice and Procedure has recognized that problems exist in the civil justice system that warrant serious attention. This committee, which oversees the rules of civil procedure within the federal judiciary, has formally begun a process to consider whether federal civil litigation needs an overhaul. In May 2010, the Judicial Conference Advisory Committee on Civil Rules (hereinafter "Advisory Committee") held a critically important conference at Duke University Law School to "…explore the current costs of civil litigation, particularly discovery, and to discuss possible solutions."[5]

Many in the business and defense community see the Advisory Committee's current efforts as a unique opportunity to restore sanity to a litigation system that is fast becoming exponentially more expensive and less capable of resolving the merits of disputes. The study quoted at the

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http://blogs.wsj.com/law/2010/09/21/why-have-federal-civil-jury-trials-basically-disappeared/ .

[3] Lawyers for Civil Justice, DRI, Federation of Defense & Corporate Counsel, International Association of Defense Counsel, White Paper, Reshaping the Rules of Civil Procedure for the 21st Century: The Need for Clear, Concise and Meaningful Amendments to Key Rules of Civil Procedure (May 2, 2010) at ix, available at http://www.dri.org/ContentDirectory/Public/CommitteeDocs/0440/Reshaping%20the%20Rules%20of%20Civil%20Procedure%20for%20the%2021st%20Century.pdf (hereinafter "Reshaping The Rules").

[4] *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 546 (2007).

[5] 2010 Conference on Civil Litigation Duke Law School, Durham, NC, May 10-11, 2010, Purpose Statement, available at http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/h_RoomHome/4df38292d748069d0525670800167212/?OpenDocument.

start of this article was submitted to the Advisory Committee by the Federation of Defense and Corporate Counsel ("FDCC"), Lawyers for Civil Justice ("LCJ") and other leading defense bar organizations, along with a White Paper entitled, Reshaping the Rules of Civil Procedure for the 21st Century: The Need for Clear, Concise and Meaningful Amendments to Key Rules of Civil Procedure.[6] In their submission, these organizations have proposed several specific rule changes designed to enhance the federal system's ability to meet Rule 1's promise of just, speedy and inexpensive resolution of disputes.[7]

The work of the Advisory Committee is ongoing. After the Duke Conference, the Advisory Committee and the Committee on Rules of Practice and Procedure issued a report recounting the work of that conference and formed subcommittees to continue study of possible rules changes (hereinafter the "Committee Report").[8] The FDCC has continued to work with the LCJ and other defense organizations to inform this process and the Advisory Committee's ongoing work with the facts and perspective that the defense and corporate community consider critical to any meaningful improvement to the civil justice system. This paper reviews the current status of that process, and summarizes the submissions of the FDCC and LCJ, including the initial White Paper and three further written submissions to the Advisory Committee. The complete texts of these submissions are available at www.lfcj.com.

In particular, this paper will review the proposals submitted with respect to the following:

> I. Adopting more particularized pleading standards to allow courts to better assess the validity of claims at the outset of cases and control discovery;
>
> II. Adopting specific changes to the discovery rules, including limiting the scope of discovery and the number of document requests, and incorporating the proportionality requirement into Rule 26's definition of the scope of discovery;

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[6] Reshaping the Rules, *supra* note 3.
[7] Fed. R. Civ. Pro. 1.
[8] Judicial Conference Advisory Committee on Civil Rules and the Committee on Rules of Practice and Procedure, *Report to the Chief Justice of the Unites States on the 2010 Conference on Civil Litigation*, (September 1, 2010) (hereinafter "Committee Report").

III. Creating uniform national standards governing the preservation of electronic data, litigation holds and spoliation sanctions; and

IV. Requiring the requesting party to pay the reasonable costs incurred by a party responding to a discovery request.

The Advisory Committee has laudably called for a review of the Federal Rules of Civil Procedure. The defense bar and the business community should embrace this opportunity to rebalance the system, to redirect litigation to the merits of disputes and not discovery. The Advisory Committee has asked for input. The business entities that are feeling the impact of a misaligned system, and the attorneys who represent them, should speak out. Others certainly will.

I. PLEADINGS PROPOSALS

Both practitioners and legal scholars are rethinking the wisdom and meaning of "notice pleading." The White Paper proposes to change the pleading standard to require more than "mere notice pleading" by requiring a statement of material facts.[9] The proposed amendment to Rule 8(a)(2) would read as follows:[10]

> (a) **Claim for Relief**. A pleading that states a claim for relief must contain:
>
> (1) a short plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
>
> (2) a short plain statement, made with particularity, of all material facts known to the pleading party that support the claim, ~~showing~~ creating a reasonable inference that the pleader is plausibly entitled to relief; and
>
> (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

[9] *Id.* at 6-7.

[10] All additions to the text of the current Federal Rules of Civil Procedure proposed are indicated by underscoring the text, while proposed deletions are ~~struck~~.

> For purposes of this section, a material fact is one that is necessary to the claim and without which it could not be supported. As to facts pleaded on information and belief, the pleading party must set forth with particularity the factual information supporting the pleading party's belief."[11]

The proposed amendments would also *remove* entirely the language in Rule 8(d)(1) which states that "[e]ach allegation must be simple, concise, and direct. No technical form is required."[12]

The proposed amendments to Rule 8 would also be carried over into Rule 9 as follows:

> (b) **Fraud or Mistake; Conditions of Mind**. In accordance with Rule 8(a)(2), in alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.
>
> (c) **Conditions Precedent**. In pleading conditions precedent, so long as the pleading otherwise satisfies the requirements of rule 8(a)(2), it suffices to allege generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent has occurred or been performed, a party must do so with particularity."[13]

Rule 65, pertaining to injunctions and restraining orders, would also be amended to require in 65(b)(1)(A) "specific facts in an affidavit or a verified complaint that comports with Rule 8(a)(2)…"[14]

Lastly, the final proposed amendment pertaining to pleading would supplement Rule 12(a)(4), creating a new subsection (B), which would read as follows:

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[11] Reshaping The Rules, *supra* note 3, at 8.
[12] *Id*.
[13] *Id.* at 9.
[14] *Id. at* 10.

> **Stay of Discovery**. Upon the filing of a motion to dismiss under Rule 12(b)(6), a motion for judgment on the pleadings under Rule 12(c), or a motion for a more definite statement under Rule 12(e), all discovery and other proceedings shall be stayed during the pendency of the motion unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party."[15]

The heightened pleading requirements proposed by the FDCC and LCJ are by no means new concepts. To the contrary, the requirement of more particularized pleading can be seen in the current version of the Federal Rules of Civil Procedure, other rules of procedure and numerous areas of substantive federal law. The example most familiar to practitioners is the heightened pleading standard contained in F.R.C.P. Rule 9(b), which requires that, when "alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake".[16] Heightened pleading standards are also present in Supplementary Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions Rule E(2)(a); the Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4(b)(1)-(3) (1995); the now obsolete "21K" Act, 15 U.S.C. §§ 6601-6617 (2008); and local patent rules in various district courts.[17] Moreover, "in the 1980's, federal courts reacted to perceptions of increasing frivolity in antitrust, securities fraud, and civil rights litigation with judge-made requirements of greater particularity in pleading."[18] However, such judge initiated attempts to modify the pleading standard were struck down by the Supreme Court, which "rejected the ability of federal courts to heighten pleading standards judicially (i.e. without formal amendment of the Rules)."[19] These widespread attempts nonetheless speak eloquently to the perception by federal judges working in the trenches that more rigorous pleading standards would give them the tools they need to weed out frivolous claims and control discovery abuse. The lessons of the courts' earlier attempts should be heeded and the rules amended.

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[15] *Id*. at 9.
[16] *Id.* at 14.
[17] *Id.* at 14-18.
[18] *Id.* at 15.
[19] *Id.* (*citing Swierkiewicz v. Sorema,* 534 U.S. 506 (2002)*; Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,* 507 U.S. 163 (1993)).

The FDCC and LCJ have emphasized that —[t]he purpose of the judicial system is the evaluation and adjudication of known claims, not the unfettered search for unknown claims. Yet, the current procedural framework has devolved to where legal action is permitted without actual knowledge of facts to support a cognizable claim or to limit litigation to the known claim."[20] By requiring a plaintiff to plead material facts, the proposed amendments endeavor to refocus litigation in order to avoid excessive costs, delay and abuses.

The Advisory Committee reviewed the proposed pleading amendments set forth in Reshaping the Rules, along with proposals from a number of other interested parties.[21] The Report discussed another possible alternative to more particularized pleading - amending Rule 8 —to expand on the categories of claims flagged for 'heightened pleading' by Rule 9(b)."[22] Specifically, Rule 9(b) could be expanded to include —claims of conspiracy and actions that involve official immunity."[23] Other proffered alternatives included focusing —on the Rule 12(b)(6) motion to dismiss" or an expansion of —Rule 12(e) motion for a more definite statement."[24] The Committee Report also indicated that there may also be a need to address the sufficiency of pleading of affirmative defenses, pursuant to Rule 8(b), although no amendment was proposed in that regard.[25]

The Committee Report also discussed concerns from some corners that heightened pleading standards might require expanded pre-suit discovery in order to alleviate what was referred to as —information asymmetry."[26] The LCJ is preparing a comment addressing these proposals. These authors submit that liberalized pre-suit discovery would represent a fundamental misapplication of the federal rules and the litigation process. Plaintiffs are not entitled to discovery to search for a claim that *may* exist. Rather, parties are entitled to initiate discovery only when they can plead sufficient facts to show a plausible entitlement to relief. To liberalize the availability of pre-suit discovery without even a plausible claim having been presented would exacerbate the already existing problems which have prompted a reexamination of the federal rules and the proposed amendments.

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[20] Reshaping The Rules, *supra* note 3, at 19.
[21] Committee Report, *supra* note 8, at 6-7.
[22] *Id.* at 6.
[23] *Id.*
[24] *Id.* at 6-7.
[25] *Id.* at 7.
[26] *Id.* at 6-7.

The current Rule 27 limits the use of pre-suit discovery to the preservation of evidence and strikes the appropriate balance. Expansion of pre-suit discovery would create an additional procedural and discovery battleground. It would engender disputes over jurisdiction, service and numerous other practical issues prior to the formal commencement of a suit. Such discovery would defeat the goals of recent amendments to pleading and discovery which have sought to more directly tie the scope of permissible discovery more closely to the specific claims and defenses set forth in the pleadings. Pre-suit discovery — i.e. discovery initiated before specific claims and defenses are even proffered—would require the courts to assess requested discovery and resolve discovery disputes with no guideposts to aid such review.

II. DISCOVERY PROPOSALS

The FDCC and LCJ have proposed four substantive changes with respect to discovery: (1) narrowing the scope of discovery to "any nonprivileged matter that would support proof of a claim or defense" subject to a "proportionality assessment"; (2) exempting from discovery "specifically identified categories, types or sources of electronically stored information … absent a showing of substantial need and good cause"; (3) amending the "proportionality rule" to explicitly include requirements to limit the scope of discovery; and (4) amending Rule 34 to limit the number of document requests, the time period for such requests, and the number of custodians from whom production could be sought.[27]

The first proposed amendment is a new Rule 26(b)(1) which would read as follows:

> "**Scope in General**. The scope of discovery is limited to any nonprivileged matter that would support proof of a claim or defense or impeachment of a witness and must comport with the proportionality assessment required by Rule 26(b)(2)(C)."[28]

[27] Lawyers for Civil Justice, Comment to the Civil Rules Advisory Committee, *A Prescription for Stronger Medicine: Narrow the Scope of Discovery* (September 1, 2010) at 2 (hereafter "Discovery Supplement"); Reshaping The Rules, *supra* note 3, at 24, 26 and 32.

[28] Reshaping The Rules, *supra* note 3, at 23 n. 114 (deletions omitted).

The purpose behind this amendment is to refocus discovery on the "claims and defenses in the action", while also expressly incorporating the proportionality requirement into the scope of discovery.[29] Such a formulation would also eliminate the two-tier approach to the current Rule 26, by eliminating the second tier expansion of discovery for "good cause", which has not served to prevent excessive discovery as had been intended.[30] Neither the power of the courts to manage discovery, nor prior amendments to the rules have successfully narrowed the scope of discovery or remedied the problems associated with broad discovery, including costs, delay and abuse.[31] The proposed amendment to Rule 26(b)(1) therefore sets out to create a self-enforcing rule which attempts to "narrow the scope of discovery without judicial oversight."[32]

The second proposed amendment would amend Rule 26(b)(2)(B) to exclude, absent a showing of "substantial need and good cause, subject to the proportionality assessment", certain specified categories of electronically stored data from discovery. The amended rule would read as follows:

> "(B) Specific Limitations on Electronically Stored Information
>
> (1) A party need not provide discovery <u>of the following categories</u> of electronically stored information ~~from sources~~, <u>absent a showing by the receiving party of substantial need and good cause, subject to the proportionality assessment pursuant to Rule 26(b)(2)(C):</u>
>
> (a) <u>deleted, slack, fragmented, or other data only accessible by forensics;</u>
>
> (b) <u>random access memory (RAM), temp files, or other ephemeral data that are difficult to preserve without disabling the operating system;</u>

[29] *Id.* at 23-24.
[30] *Id.* at 24.
[31] *Id.* at 20-22.
[32] *Id.* at 23.

(c) on-line access data such as temporary internet files, history, cache, cookies and the like;

(d) data in metadata files that are frequently updated automatically, such as last-opened dates;

(e) information whose retrieval cannot be accomplished without substantial additional programming, or without transforming it into another form before search and retrieval can be achieved;

(f) backup data that are substantially duplicative of data that are more accessible elsewhere;

(g) physically damaged media;

(h) legacy data remaining from obsolete systems that is unintelligible on successor systems; or

(i) any other data that are not available to the producing party in the ordinary course of business and that the party identifies as not reasonably accessible because of undue burden or cost and that on motion to compel discovery or for a protective order, if any, the party from whom discovery of such information is sought shows is not reasonably accessible because of undue burden or cost."[33]

The just-cited amendment is viewed as further achieving what the 2006 amendments set out to address, but failed to sufficiently achieve with respect to the goals of —reducing costs and burdens of e-discovery."[34] The purpose of this amendment is —to clarify what is _not reasonably accessible,' to reduce the amount of motions practice required to afford

[33] *Id.* at 25-26.
[34] *Id.* at 27.

parties the protection of the rule, and to increase predictability for all parties regarding what is and is not discoverable."[35] The amendment also serves to "identify those types and sources of ESI that are burdensome and expensive to locate, retrieve and provide" as well as "identify sources that are least likely to contain non-duplicative readable and relevant information", as identified through the Seventh Circuit's Electronic Discovery Pilot Program.[36] Further, by elevating the language from "good cause" to "substantial need", the amendments aim to clarify the requesting party's burden, and it further separates the proportionality assessment from a "good cause" analysis.[37]

FDCC and LCJ also proposed to amend the so-called "proportionality rule", Rule 26(b)(2)(C), to provide as follows:

> "(C) *When Required*. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:
>
> (i) the discovery sought is ~~unreasonably~~ cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
>
> (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
>
> (iii) the burden or expense of the proposed discovery sought outweighs its likely benefit <u>or is not proportional to the claims and defenses at issue</u> considering the needs of the case, the amount in controversy, the parties' resources, <u>the complexity</u> and importance of the issues at

[35] *Id.* at 28.
[36] *Id*; *See also* Seventh Circuit Electronic Discovery Committee, *Seventh Circuit Electronic Discovery Pilot Program: Statement of Purpose and Preparation of Principals* 14 (2009) (Pilot Program).
[37] Reshaping The Rules, *supra* note 3, at 29.

> stake in the action, and the importance of the discovery in resolving the issues."[38]

Such amendments to the proportionality rule are meant to "explicitly invoke the principle of proportionality" and to align the provision with that of amended Rule 26(b)(1) with respect to the scope of discovery.[39]

The final proposed amendment with respect to discovery would place numerical limits on Rule 34 requests for production of documents. The amended Rule 34(b)(1) would read as follows:

> "(1) Contents of the Request.
>
> The request:
>
> (A) must describe with reasonable particularity each item or category of items to be inspected;
>
> (B) must be limited, unless otherwise stipulated or ordered by the court in a manner consistent with 26(b)(2), to:
>
> (i) a reasonable number of requests, not to exceed 25, including all discrete subparts;
>
> (ii) a reasonable time period of not more than two years prior to the filing date of the complaint;
>
> (iii) a reasonable number of custodial or other information sources for production, not to exceed 10;…"[40]

As suggested by the just-quoted proposed amendment, Rule 26(b)(2) would also be amended to allow the court, by order, to amend the temporal scope of the requests, or number of custodial sources required

[38] *Id.* at 30-31.
[39] *Id.* at 31.
[40] *Id.* at 31-32.

to be searched for requests under Rule 34", as it is permitted to presently with respect to Rules 30 and 36.[41]

The proposed amendments to Rule 34 are "modeled on those enacted in 1993 related to the number of permissible depositions and interrogatories under Rules 30 and 33 respectively".[42] The submissions to the Advisory Committee highlight that: "[s]eventeen years after the introduction of these limits, they have not caused a substantial hardship to litigants. On the contrary, parties have adapted to the presumptive limits and courts have grown adept at adjudicating requests to exceed or reduce the stated limit. More importantly, they have contributed to at least some streamlining of federal litigation by forcing parties to more carefully assess the discovery needs of their case."[43]

The Committee Report also examined the proposed amendments to the rules pertaining to discovery. It commented that the Duke "Conference produced some specific areas of agreement on the need for some additional rule changes and better enforcement of existing rules, along with areas of disagreement on whether a more significant overhaul of the discovery rules is needed."[44] Privilege logs were noted as being the source of "unnecessary expense and delay and a symptom of the dysfunction" by plaintiff and defense counsel alike.[45] The Committee Report also noted that additional study was necessary on the proposals to set "presumptive limits on the number of discovery events", shifting discovery costs to the requesting party, and the suspension of discovery when a motion to dismiss is filed.[46]

In response to the Committee Report, the FDCC and LCJ submitted a supplement to the Advisory Committee on the topic of limiting discovery entitled "*A Prescription for Stronger Medicine: Narrow the Scope of Discovery"* (hereafter "Discovery Supplement").[47] The FDCC and LCJ view the four proposed amendments, which narrow the scope of discovery, as furthering the "long held goals of the [Advisory] Committee and many members of the broader legal community, namely, ending discovery abuse and misuse and limiting the skyrocketing costs for

[41] *Id.* at 31.
[42] *Id.* at 35.
[43] *Id*.
[44] Committee Report, *supra* note 8, at 7.
[45] *Id*.
[46] *Id.* at 9.
[47] Discovery Supplement, *supra* note 27.

litigants seeking fair and efficient resolutions of claims."[48] Surveys indicate that the increasing size and cost of discovery and the sheer volume of documents produced has no meaningful impact on the substance of the litigation. Indeed, in major cases that went to trial in 2008, only "one tenth of one percent (0.1%) of the pages" produced were marked as *potential* exhibits.[49]

Further, the scope of discovery has been a recurring topic for consideration by the Rules Committee since the amendment of the rules in 1970, and has resulted in various amendments to the discovery rules attempting to address rising costs, delay, and abuse.[50] However, none of the prior amendments, including the most recent amendments in 2000, have successfully curbed the burdens, misuse, and increasing expense of discovery.[51] Additionally, the "[i]ssue of electronic discovery has magnified the need for action" to amend Rule 26.[52] The FDCC and LCJ argued that "bold action is required to address a problem that has long-haunted rule makers, litigants, practitioners and judges", which the proposed amendments represent.[53] The FDCC and LCJ concluded that "[a]fter more than 30 years of tinkering and in light of expansion of discovery in this technological age, the time has come to take definitive action to finally narrow the scope of discovery."[54]

III. PRESERVATION OF INFORMATION PROPOSALS

Perhaps one of the most critical problems facing the federal civil justice system is the lack of national uniformity respecting the preservation duties imposed in litigation. Presently there is an *ad hoc* patchwork of judicially created "litigation hold" procedures. This, together with the high cost of complying with litigation holds or the potential of severe sanctions, undergirds the FDCC and LCJ's proposed new Rule 26(h) with respect to preservation, as well as a proposed amendment to Rule 37.[55] The amendments are meant to "directly address preservation" in an attempt to create "uniform national rules designed to give certainty to preservation

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[48] *Id.* at 2.
[49] *Id.* at 3.
[50] *Id.* at 4.
[51] *Id.* at 4-9.
[52] *Id.* at 9.
[53] *Id.* at 1.
[54] *Id.* at 11.
[55] White Paper, *supra* note 3, at 35.

issues faced by parties and consistency to analyses and decisions by courts."[56]

The new Rule 26(h) would read as follows:

> ~~(~~**h) Preservation**
>
> **(1) Duty to preserve**
>
> Preservation of documents, intangible things and electronically stored information, unless otherwise ordered by the court, is limited to matters that would enable a party to prove or disprove a claim or defense, and must comport with the proportionality assessment required by Rule 26(b)(2)(C). All preservation is subject to the limitations imposed by Rule 26(b)(2)(C). The court may specify conditions for preservation.
>
> **(2) Specific Limitations on Electronically Stored Information.**
>
> Absent court order demonstrating that the requesting party has (1) a substantial need for discovery of the electronically stored information requested and (2) preservation is subject to the limitations of Rule 26(h)(1), a party need not preserve the following categories of electronically stored information:
>
> > (A) deleted, slack, fragmented, or other data only accessible by forensics;
> >
> > (B) random access memory (RAM), temp files, or other ephemeral data that are difficult to preserve without disabling the operating system;

[56] *Id.* at 35-36.

> (C) on-line access data such as temporary internet files, history, cache, cookies and the like;
>
> (D) data in metadata files that are frequently updated automatically, such as last-opened dates;
>
> (E) information whose retrieval cannot be accomplished without substantial additional programming, or without transforming it into another form before search and retrieval can be achieved;
>
> (F) backup data that are substantially duplicative of data that are more accessible elsewhere;
>
> (G) physically damaged media;
>
> (H) legacy data remaining from obsolete systems that is unintelligible on successor systems; or
>
> (I) any other data that are not available to the producing party in the ordinary course of business."[57]

The proposed amendments would also replace existing Rule 37(e), with respect to sanctions, to read as follows:

> **"(e) Electronically Stored Information**. Absent willful destruction, a court may not impose sanctions on a party for failing to provide relevant electronically stored information for the purpose of preventing its use in litigation."[58]

[57] *Id.* at 36-37 (emphasis added).
[58] *Id.* at 38.

Such an amendment to Rule 34 would serve to distinguish "willful" conduct from merely negligent or unintentional preservation errors.[59]

As further described by the submissions to the Advisory Committee, "courts are attempting to address civil discovery of information from complex computer systems using principles developed in the paper age," thus necessitating the revision of the rules to comport with the changes in technology.[60] In light of what has thus far been "*ad hoc*, unwritten, *de facto* litigation hold rules", the threat of sanctions has led "parties to feel compelled to engage in costly over-preservation of digital information that may have little or no use in litigation."[61] The amended rules seek to provide clearer lines and to create uniformity and predictability.[62] The amendments are also designed to counteract the use of "spoliation as a litigation tactic,"[63] where "[j]udicial and party resources are detoured into depositions, affidavits, motion practice and hearings—all looking for what is missing—rather than focusing on the types and volume of relevant evidence already preserved and produced".[64] The amendments seek to avoid what has been termed the "gotcha game", which places the focus on what steps were taken to preserve data "without regard to the significance of the data to the ultimate outcome of the case."[65]

The FDCC and LCJ further examined the difficulties in defining and creating uniformity with respect to "*when* does the duty to preserve attach" and "*what* evidence must be preserved."[66] Courts have generally held "that the duty to preserve extends to what the company knows, or reasonably should know, will likely be requested in reasonably foreseeable litigation."[67] However, significant issues remain as to what type of pre-litigation events trigger a duty to preserve, the high costs and burden associated with undertaking preservation efforts, the frequent lopsidedness of the burdens of preservation and the potential exposure of privileged analysis if hold notices are produced.[68] The proposed amendments attempt to address many of the problems associated with

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[59] *Id.* at 36.
[60] *Id.* at 38.
[61] *Id*.
[62] *Id.*
[63] *Id.*
[64] *Id.* at 40.
[65] *Id.* at 41.
[66] *Id.* at 42.
[67] *Id.* at 42-43 (internal quotation marks omitted).
[68] *Id.* at 44-50.

preservation and aim to create greater uniformity and certainty by their application.[69]

The Committee Report after the Conference noted that there was "significant support across plaintiff and defense lines for more precise guidelines in the rules on the obligation to preserve information relevant to litigation and the consequences of failing to do so."[70] The Report further noted that "uncertainty leads to inefficient, wasteful, expensive and time-consuming information management and discovery, which in turn adds to costs and delays in litigation." It additionally noted that "[c]learer guidance should be provided if it can be", including defining what event constitutes a trigger for a duty to preserve.[71] The Committee Report also addressed the topic of sanctions, which is a topic upon which circuits are divided when establishing culpability. The Report highlighted that "Conference participants asked for a rule establishing uniform standards of culpability for different sanctions."[72]

As a follow-up to the Committee Report, the FDCC and LCJ, again together with sister defense organizations, supplemented their comments to the Advisory Committee with "*Preservation—Moving The Paradigm*" (hereinafter "Preservation Supplement"), which further addressed preservation and the necessity for amendments to the current Rules.[73] Highlighting the core issues, the Preservation Supplement states that "[c]ases are being settled, discontinued or not brought in the first place because the cost of preservation is too high, the risk of spoliation sanctions is too great, and the impact of ancillary litigation proceedings on discovery disputes is too debilitating."[74]

The Preservation Supplement focuses on certain areas in particular that necessitate and justify the amendments. First, new technology and the "proliferation of data" require that a new approach be taken due to the increased volume of information and the changing ways in which companies store it.[75] As a result the rules must be changed to meet 21st

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[69] *Id.* at 51.
[70] Committee Report, *supra* note 8, at 8.
[71] *Id.*
[72] *Id.* at 9.
[73] Lawyers for Civil Justice, DRI-Voice of the Defense Bar, Federation of Defense & Corporate Counsel, and International Associate of Defense Counsel, *Preservation – Moving the Paradigm* (November 10, 2010).
[74] *Id.* at 2.
[75] *Id.* at 2-3.

century litigation realities and needs.[76] In that vein, the spoliation analysis should refocus on whether the evidence was —destroyed to prevent its use in litigation" and on intentional conduct, as opposed to what steps were taken in order to preserve information.[77]

Additionally, the Preservation Supplement emphasizes the need to create a bright line standard for events triggering a duty to preserve, suggesting the standard be when litigation is —reasonably certain", as opposed to the less clear judicially created standards of —reasonable anticipation of litigation" or "reasonably foreseeable litigation".[78] Such a rule would increase certainty and predictability as to when preservation obligations have been triggered.[79] The submissions also suggest that the comments to the proposed amended Rules could provide guidance on issues such as duration and ongoing duties, use of litigation hold notices, affect on work product doctrine, and the availability of sanctions based on culpability.[80]

The Preservation Supplement also indicates that another area of focus should be defining the —reasonable scope of preservation".[81] The scope of preservation obligations creates the —greatest amount of uncertainty and unquantifiable risk for litigants and their lawyers."[82] Defining the scope of preservation would serve to avoid the —gotcha game" (as previously mentioned), promote cooperation and refocus judicial resources on the merits of the claims, as opposed to what may have been innocently lost, focus disputes on available relevant data, reserve spoliation related sanctions for bad faith or willful conduct, reserve questions of spoliations for the courts and, importantly, tie in preservation to the overall narrowing of the scope of discovery as seen in the amendments to Rule 26(b)(2)(C).[83]

The Preservation Supplement further highlights the real problem preservation issues are causing for litigants due to data volume, the associated costs of preservation, and the resulting burdens.[84] Yet,

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[76] *Id.* at 4.
[77] *Id.* at 5.
[78] *Id.* at 7.
[79] *Id.* at 7-8.
[80] *Id.* at 9-10.
[81] *Id.* at 10.
[82] *Id.*
[83] *Id.* at 11-14.
[84] *Id.* at 14-19.

unfortunately, as mentioned with respect to the volume of documents produced in comparison to those produced as exhibits, surveys demonstrate that "[l]ess than 10% of the data collected is actually reviewed for litigation…[and] approximately 1% of the total volume of material actually being preserved is actually used in litigation."[85] Nonetheless, "[c]ompanies are spending an inordinate amount of money" and broadly preserving data in order to avoid potential sanctions.[86] Such an upside-down approach necessitates changes to the current rules which fail to address the current state of technology or litigation realities.[87]

IV. ALLOCATION OF DISCOVERY COSTS PROPOSAL

The final amendment to the Rules proposed by the FDCC and LCJ would amend Rule 26 to shift the costs of discovery to the requesting party:

> "In General. A party submitting a request for discovery is required to pay the reasonable costs incurred by the party responding to a discovery request.
>
> (1) Such costs include the costs of preserving, collecting, reviewing, and producing electronic and paper documents, producing witnesses for deposition and responding to interrogatories.
>
> (2) Each party is responsible for its own costs related to responding to Disclosure Requirements under Rule 26.
>
> (3) Non parties responding to Subpoenas under Rule 45 shall be entitled to recovery of reasonable costs associated with compliance with the subpoena.
>
> (4) The costs described in subsection (1) and (3) above shall be considered Taxable Costs under Rule 54(d)."[88]

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[85] *Id.* at 19.
[86] *Id.* at 20.
[87] *Id*.
[88] Reshaping The Rules, *supra* note 3, at 56.

The goal of the amendment is to "encourage each party to more properly tailor its discovery requests to its discovery needs by shifting the cost-benefit decision" and to "focus the scope of discovery requests on evidence that is reasonably calculated to produce relevant information from the most cost-effective source."[89] The amendment would also aim to prevent discovery from being used as a "weapon" to force settlement, irrespective of the merits of the case.[90] It is further aimed to prevent the costs of discovery from far exceeding the "value of the information sought or even the amount in controversy" and to "alter the natural tendency of litigants to draft discovery requests as broadly as possible…."[91] The cost shifting is also viewed as a mechanism for implementing proportionality and the associated "cost/benefit" or benefit/burden analysis.[92] The new rule is also viewed as encouraging not just greater efficiency but cooperation between the parties during discovery. Cost shifting would encourage "self-policing" and lessen the emphasis on court involvement.[93]

The Committee Report commented on the proposed cost-shifting of discovery costs, as well as what it referred to as "[m]ore limited versions of a requester-pays rule [which] would result in cost sharing at least when discovery demands prove overbroad or disproportionate or the requesting party loses on the merits."[94] However, the Committee further notes that "[s]uch proposals are a greater departure from the existing system and would require careful study of their likely impact beyond the discovery process itself."[95]

V. CONCLUSION

The time has come for a broad revision of the Federal Rules of Civil Procedure to address the increasing costs, delays and abuses which are increasingly present in the civil justice system. Although no one amendment could ever be a magic bullet, the proposed amendments to the Rules pertaining to pleading, discovery, and preservation are necessary to rebalance the Rules to further their purpose of securing "the

[89] *Id.* at 57.
[90] *Id*.
[91] *Id* at 58.
[92] *Id*.
[93] *Id.* at 59-60.
[94] Committee Report, *supra* note 8, at 9.
[95] *Id.* at 9.

just, speedy, and inexpensive determination of every action and proceeding."[96]

[96] FED. R. CIV. P. 1.

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FDCC Winter Meeting
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February 26 – March 5, 2011

THE FIVE PILLARS OF E-DISCOVERY

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THE FIVE PILLARS OF E-DISCOVERY

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I. INTRODUCTION

Without discovery, modern litigation would be impossible. In just a few years, we have experienced the migration of discovery from paper files to electronic files with an exponential increase in the volume of information available to litigants. "The more information there is to discover, the more expensive it is to discover all the relevant information until, in the end, „discovery is not just about uncovering the truth, but also about how much of the truth the parties can afford to disinter."[1]

Discovery of electronic files is no longer a novelty but a reality in virtually every case. As e-discovery has become the rule rather than the exception in discovery, the principles that govern successful e-discovery have solidified.

This paper explores the five pillars of e-discovery: (1) the duty of cooperation and the Rule 26 "meet and confer" obligation; (2) search and retrieval of documents; (3) proportionality; (4) cost shifting; and (5) the impact of e-discovery on privilege and work-product protection claims. As with most complex topics, these subsets of e-discovery are intertwined and often overlap. These five pillars provide the foundation for good legal analysis and decision-making about e-discovery.

A. The Duty of Cooperation (Rule 26 – "Meet and Confer" Obligation)

The "meet and confer" obligation is the first pillar of e-discovery. The purpose of Rule 26, "which requires parties to meet before a scheduling order is entered and to prepare a discovery plan,"[2] is to make discovery less contentious, less costly, and less dependent on judicial supervision.

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[1] *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 311 (S.D.N.Y. 2003) ("*Zubulake I*").

[2] *Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co.*, 259 F.R.D. 568, 582 (M.D. Fla. March 4, 2009) ("*Bray & Gillespie I*") *aff'd in part, quashed in part sub nom. Bray & Gillespie Mgmt., LLC v. Lexington Ins. Co.*, 2009 WL 5606058 (M.D. Fla. Nov. 16, 2009), citing Fed. R. Civ. P. 26(f).

Ideally, the discovery plan should include, "among other things, the parties" views and proposals on disclosure of electronically stored information ("ESI"), including the form or forms in which it should be produced."[3] Thus, the value of Rule 26 is fully realized in the context of e-discovery.

E-discovery is almost by definition "complicated." Experience has proven it can be very expensive, and it is becoming apparent in many cases that searching for and producing such voluminous amounts of documents cannot be accomplished without the supervision of the court. However, the meet and confer requirement of Rule 26 can (and should) be used to defer the involvement of the court on as many issues as possible, for as long as possible.

At a Rule 26 conference, the parties' objective may be to "narrow the range of information sought."[4] Or the parties may use the "meet and confer" to come to agreement on other various issues pertaining to their discovery, such as keywords to be used in searches of electronic data. The "requesting party must specify" how and in what form it desires the requested documents produced.

Any agreement reached during a Rule 26 conference should be clearly documented in the record, either through pleadings or at oral argument. If the record does not so reflect, a court may determine that one party "did not reciprocate [the other party's] efforts to compromise." If no argument is reached, the court may look to willingness to compromise and the number of concessions made when resolving the parties' disagreements.[5]

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[3] *Id*., citing Fed. R. Civ. P. 26(f)(2), (f)(3)(C) (eff. Dec. 1, 2006).

[4] *Victor Stanley, Inc. v. Creative Pipe, Inc., et al.*, 2010 WL 3703696 at 11 (D. Md. Sept. 9, 2010).

[5] *Fairfax Financial Holdings Ltd., et al. v. S.A.C. Capital Management LLC, et al.*, Docket No. MRS-L-2032-06, Superior Court of New Jersey Law Division – Morris County, March 27, 2009 ("The record clearly demonstrates that most of the concessions regarding the search terms came from Defendants. Moreover, however they are characterized, Plaintiffs' search term lists were still far narrower than the Defendants' proposals, and Plaintiffs failed to demonstrate concretely how their proposals would satisfy their obligation, under Rule 4:10-2, to produce all relevant, not privileged material in whatever form, or how the Defendants' scaled-back search term list would be overly burdensome. They still have not done so."). *Id*.

In *Bray & Gillespie Management LLC, et al. v. Lexington Insurance Company, et al.*, the court noted that "[c]ounsel for the parties discussed ESI during their initial meeting to prepare the case management report, and they discussed ESI afterward, but they did not reach an agreement. These efforts complied with Rule 26(f)."[6] Therefore, failure to come to agreement will not necessarily result in failure to comply with Rule 26.[7] However, while failure to come to agreement may be acceptable, failure to actively participate in the meet and confer session may result in an unfavorable outcome once the court is involved.[8]

These cases bear out the practical idea that parties must try to reach agreement before involving the court. The "meet and confer" obligation necessitates compromise if it is to work as intended, even when compromise seems to be the worst of all options.

B. Search and Retrieval of Data (and Litigation Hold)

"What is true in love is equally true at law: Lawyers and their clients need to communicate clearly and effectively with one another to ensure that litigation proceeds efficiently. When communication between counsel and client breaks down, conversation becomes „just crossfire," and there are usually casualties."[9]

The process of searching and retrieving the requested discovery documents comprises the second pillar of e-discovery. Good communication between counsel and client is mandatory to ensure the proper files are searched and the proper documents produced. As stated in *Qualcomm Incorporated v. Broadcom Corporation*:

> For the current "good faith" discovery system to function in the electronic age, attorneys and clients must work together to ensure that both

[6] *Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co.*, 259 F.R.D. 568, 582 (M.D. Fla. March 4, 2009) ("*Bray & Gillespie I*") *aff'd in part, quashed in part sub nom. Bray & Gillespie Mgmt., LLC v. Lexington Ins. Co.*, 2009 WL 5606058 (M.D. Fla. Nov. 16, 2009).

[7] *Id*.

[8] *Fairfax Financial Holdings Ltd., et al. v. S.A.C. Capital Management LLC, et al.*, Docket No. MRS-L-2032-06, Superior Court of New Jersey Law Division – Morris County, March 27, 2009.

[9] *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 424 (S.D.N.Y. 2004) ("*Zubulake V*").

> understand how and where electronic documents, records and emails are maintained and to determine how best to locate, review, and produce responsive documents. Attorneys must take responsibility for ensuring that their clients conduct a comprehensive and appropriate document search.[10]

Counsel must give his or her client "clear instructions . . . to preserve [relevant] information and, perhaps more importantly, [counsel must stress] a client"s obligation to heed those instructions.[11]

The first step in search and retrieval is ensuring there are actually preserved documents to search once discovery requests are made.[12] The duty to preserve relevant evidence is actually a duty owed to the court, rather than to the opposing party.[13]

There is no hard and fast rule for all jurisdictions regarding when "the duty to preserve potentially relevant evidence" arises.[14] Under the common law, the obligation to preserve evidence begins at the moment that litigation is reasonably anticipated, which may occur as early as when a plaintiff begins contemplating litigation or as late as when the defendant is served with the complaint, not to mention during any communication between the

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[10] *Qualcomm Incorporated v. Broadcom Corporation*, 2008 WL 66932 at 9 (S.D. Cal., January 7, 2008) *vacated in part on other grounds*, 2008 WL 638108 (S.D. Cal. Mar. 5, 2008) *appeal dismissed*, 327 F. App'x. 877 (Fed. Cir. 2008) ("*Qualcomm I*").

[11] *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 424 (S.D.N.Y. 2004) ("Early on in this litigation, UBS"s counsel-both in-house and outside-instructed UBS personnel to retain relevant electronic information. Notwithstanding these instructions, certain UBS employees deleted relevant e-mails. Other employees never produced relevant information to counsel. . . . Counsel, in turn, failed to request retained information from one key employee and to give the litigation hold instructions to another. They also failed to adequately communicate with another employee about how she maintained her computer files. Counsel also failed to safeguard backup tapes that might have contained some of the deleted e-mails, and which would have mitigated the damage done by UBS"s destruction of those e-mails.").

[12] See *Victor Stanley, Inc. v. Creative Pipe, Inc., et al.*, 2010 WL 3703696 at 27 (D. Md. Sept. 9, 2010) ("While the fact-finder can review only the documents that the parties produce, and production and preservation are not synonymous, production is possible only if documents are preserved.").

[13] *Id*.

[14] *Id*. at 17.

parties in between.[15] However, "[t]he mere existence of a dispute does not necessarily mean that parties should reasonably anticipate litigation or that the duty to preserve arises."[16] The *Zubulake* court found that the duty to preserve arises "when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation."[17] For example, in *Goodman v. Praxair Services*, the court found that the duty arose when the defendants received a demand letter threatening litigation because the letter "provide[d] constructive notice that litigation [was] likely."[18]

Additionally, the duty to preserve "may arise from statutes, regulations, ethical rules, court orders, . . . a contract, or another special circumstance."[19] The *Zubulake* opinions have provided the most detailed discussion regarding the duty to preserve sources of "deleted data, data in slack spaces, backup tapes, legacy systems, and metadata."[20] However, because the circuits are not in agreement regarding the duty to preserve, "it is not clear for litigants how uniformly the *Zubulake IV* opinion will be applied."[21]

The problem with the lack of a national standard for preservation is that corporations operating in multiple jurisdictions with different holdings on the subject are forced to create their own policies for preserving documents. According to the *Victor Stanley* decision,

> The only "safe" way to do so is to design [a preservation policy] that complies with the most demanding requirements of the toughest court to have spoken on the issue, despite the fact that the highest standard may impose burdens

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[15] *Id*. at 23.

[16] *Goodman v. Praxair Services, Inc.*, 632 F. Supp. 2d 494, 509-10 (D. Md. 2009).

[17] *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) ("*Zubulake IV*").

[18] *Goodman v. Praxair Services, Inc.*, 632 F. Supp. 2d 494, 510-11 (D. Md. 2009).

[19] *Victor Stanley, Inc. v. Creative Pipe, Inc., et al.*, 2010 WL 3703696 at 22 (D. Md. Sept. 9, 2010), citing Paul W. Grimm, Michael D. Berman, Conor R. Crowley, Leslie Wharton, *Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions*, 27 U. Balt. L. Rev. 381, 388 (2008).

[20] *Id*. at 26, citing *Zubulake IV*, 220 F.R.D. at 220.

[21] *Id*.

> and expenses that are far greater than what is required in most other jurisdictions in which they do business or conduct activities.[22]

A party will likely meet its duty to preserve if it acts reasonably and in good faith. For example, the preserving party may act reasonably by "taking „positive action to preserve material evidence," [which] action must be „reasonably calculated to ensure that relevant materials will be preserved," such as giving out specific criteria on what should or should not be saved for litigation."[23]

As soon as the duty to preserve attaches, the party is obligated to "identify, locate, and maintain information that is relevant to specific, predictable, and identifiable litigation."[24] Relevant documents include:

> [A]ny documents or tangible things (as defined by [Fed. R. Civ. P. 34(a)]) made by individuals „likely to have discoverable information that the disclosing party may use to support its claims or defenses." The duty also includes documents prepared for those individuals, to the extent those documents can be readily identified (e.g., from the „to" field in e-mails). The duty also extends to information that is relevant to the claims or defenses of any party, or which is „relevant to the subject matter involved in the action." Thus, the duty to preserve extends to those employees likely to have relevant information – the „key players" in the case.[25]

The steps for properly conducting search and retrieval of documents, when the duty to preserve has attached, is as follows:

1. Issue a written litigation hold;

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[22] See *id*. at 25.

[23] *Id*. at 26, citing *Jones v. Bremen High School Dist. 228*, 2010 WL 2106640 at 6 (N.D. Ill.).

[24] *Id*. at 23.

[25] *Id*. at 23, citing *Zubulake IV*, 220 F.R.D. at 217-18 (S.D.N.Y. 2003).

2. Identify all of the key players and ensure that their electronic and paper records are preserved;

3. Cease deleting email or preserve the records of former employees that are in the party"s possession, custody, or control;

4. Preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources.[26]

When the duty to preserve arises, the party is "obligated to suspend its routine document retention/destruction policy and implement a „litigation hold" to ensure the preservation of relevant documents."[27] If a party cannot meet its duty to preserve because it "does not own or control the evidence, [the party] still has an obligation to give the opposing party notice of access to the evidence or of the possible destruction of the evidence if the party anticipates litigation involving that evidence."[28] Counsel should ascertain quickly whether non-parties, such as former employees, might have relevant documents in their possession to which the client does not have access.

In addition to seeking all documents, counsel should meet with all prospective witnesses, including the key players.[29] Without interviewing everyone involved, it is impossible to speculate who did or did not have knowledge of the subject of the lawsuit.[30] If the corporation is too large and it is not feasible to speak with every key player, some sort of keyword

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[26] *Pension Committee of University of Montreal Pension Plan v. Banc of America Securities, LLC*, 685 F.Supp.2d 456, 471 (S.D.N.Y. 2010).

[27] *Goodman v. Praxair Services, Inc.*, 632 F. Supp. 2d 494, 511 (D. Md. 2009).

[28] *Id*. at 513-14.

[29] *Qualcomm Incorporated v. Broadcom Corporation*, 2010 WL 1336937 at 2 (S.D. Cal. April 2, 2010) ("*Qualcomm II*"). "The Court was not presented with any evidence establishing that either in-house lawyers or outside counsel met in person with the appropriate Qualcomm engineers (those who were likely to have been involved in the conduct at issue and who were likely to be witnesses) at the beginning of the case to explain the legal issues and discuss appropriate document collection." *Id*.

[30] *Phillip M. Adams & Associates, L.L.C. v. Dell, Inc.*, 621 F. Supp. 2d 1173, 1189 (D. Utah 2009).

search may be run system-wide.[31] At this point in the process it is important to remember that documents only have to be retained at this stage, not reviewed.[32]

When communicating with the "key players," because they are the "„employees likely to have relevant information," it is particularly important that the preservation duty be communicated clearly to them."[33] Additionally, all employees, including the key players, "should be periodically reminded that the preservation duty is still in place," to ensure uniformity of preservation as well as account for changes within the company, such as new hires.

Counsel should also learn how the party"s computer and electronic storage system is organized, for example

> where emails are stored, how often and to what location laptops and personal computers are backed up, whether, when and under what circumstances data from laptops are copied into repositories, what type of information is contained within the various databases and repositories, [and] what records are maintained regarding the search for, and collection of, documents for litigation.[34]

Counsel should consider the client"s retention policies, for instance whether there is a "server-based automatic deletion policy for e-mails" and how much space each employee is allowed on the network to maintain e-mails. In one of the *Fairfax* cases, one of the parties contended it was their corporate policy "that no substantive business-related e-mails are to be deleted."[35] The party used that policy as the basis for their argument that searching backup tapes would be a waste of time because "all business-related e-mails for all relevant time periods should be maintained on [the]

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[31] *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004) ("*Zubulake V*").

[32] *Id*.

[33] *Id*. at 433-34.

[34] *Qualcomm Incorporated v. Broadcom Corporation*, 2010 WL 1336937 at 2.

[35] *Fairfax Financial Holdings Ltd., et al. v. S.A.C. Capital Management LLC, et al.*, Docket No. MRS-L-2032-06, Superior Court of New Jersey Law Division – Morris County, October 29, 2009 at 2-3.

computers, unless affirmatively deleted in violation of company policy or [they] somehow became corrupt."[36] The court noted, however, that there was no evidence that e-mails were not deleted regardless of the policy.[37]

Neither a court nor a litigant is "required to simply accept whatever information management practices a party may have."[38] While a party"s information management practices may suit its business purposes, "one of those business purposes must be accountability to third parties."[39] This is especially important when considering storage of electronic documents in an accessible format.

Once the written litigation hold has been established to ensure relevant information is not lost or destroyed, the information must be collected and reviewed. Documents must be collected from the key players but should also be collected from any employee with involvement in the situation that lead to (or will lead to) litigation.[40] Failure to collect records from these key players may also result in a finding of gross negligence or willfulness, while the loss of non-key employees" records may cause a finding of negligence.

The litigation hold is especially important when it comes to backup tapes. Tapes are typically used for a specified amount of time (daily, weekly, or monthly) and then deleted and used again. In *Victor Stanley*, the backup tapes were even more problematic because the system was not properly managed and "the system failed „[a]t least once or twice a week" when someone forgot to replace the backup tape."[41] Additionally, all users had access to the tapes and could alter or delete data.[42] The *Victor Stanley*

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[36] *Id*.

[37] *Id*.

[38] *Phillip M. Adams & Associates, L.L.C. v. Dell, Inc.*, 621 F. Supp. 2d 1173, 1193 (D. Utah 2009).

[39] *Id*.

[40] *Pension Committee of University of Montreal Pension Plan v. Banc of America Securities, LLC*, 685 F.Supp.2d 456, 465 (S.D.N.Y. 2010).

[41] *Victor Stanley, Inc. v. Creative Pipe, Inc., et al.*, 2010 WL 3703696 at 5 (D. Md., September, 9, 2010).

[42] *Id*.

case illustrates the importance of a proper litigation hold because, without one, ESI could be lost or modified at any time.[43]

Even hiring an ESI consultant is not enough if he or she is not given enough authority to effectively preserve ESI. For example, in *Victor Stanley*, the defendants retained an ESI consultant for two months for the purpose of preserving "some data" but "did not consult her specifically about implementing an ESI preservation plan or a litigation hold."[44] "No reasonable measures were taken to prevent potentially relevant data stored on any of [the defendant"s] computer systems from being modified, overwritten, or deleted."[45]

After the duty to preserve relevant information attaches, the parties must not delete, destroy, or "otherwise fail[ ] to preserve evidence."[46] While this instruction seems obvious, counsel should note the various methods of deleting, destroying, or otherwise failing to preserve evidence, including keeping business data on personal computers, moving data to an external hard drive, exchanging old servers for newer ones, updating software which renders files created on older software unreadable, or the use of "cleaning" or "defragmenting" programs to permanently delete data.[47] The *Victor Stanley* defendants ran programs such as Disk Cleanup, Disk Defragmenter, Easy Cleaner, and CCleaner.[48] Failure to preserve data and other evidence may result in a finding of negligence, or even gross negligence or willfulness, because such a failure is "likely to result in the destruction of relevant information."[49]

Once the proper documents have been retained under the litigation hold, the next step is determining which of those documents is responsive to the opposing party"s requests. In *Bray & Gillespie*, Lexington requested "electronically stored information," to be produced "without deletion or

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[43] *Id*.

[44] *Id*.

[45] *Id*.

[46] *Id*. at 1.

[47] *Victor Stanley, Inc. v. Creative Pipe, Inc., et al.*, 2010 WL 3703696 at 12 (D. Md., September, 9, 2010).

[48] *Id*. at 6.

[49] *Pension Committee of University of Montreal Pension Plan v. Banc of America Securities, LLC*, 685 F.Supp.2d 456, 464-65 (S.D.N.Y. 2010).

alteration of meta-data, in its native form, and to indicate the computer hardware and the software program(s) needed to translate the information into usable form in the information‟s native format.”[50] Because the request specifically stated the format in which the records should be produced, production of the records in non-native format on a disc failed to comply with the form of ESI production to which both parties had agreed.[51]

The parties should specify the format of the produced documents both to ensure that documents are produced as requested and to confirm that the parties understand their own responsibilities. For example, in *Bray & Gillespie*, the producing party scanned all documents, including those in paper form and those in electronic form, and the requesting party objected because they interpreted the agreement to scan documents to only apply to paper documents.[52] The scanned electronic documents did not contain metadata, were not in native format, and had no coding, which would allow searching by certain fields, “such as creation date, last modification date, author, or subject,” functions that would have been possible if the data had been produced in its native form.[53]

The producing party can object to the form the requesting party specifies, but if the producing party fails to object after receiving notice of the specification of the form, later complaints may be futile.[54] Additionally, if a party produces documents in any other format than that requested or that in which they are stored in the normal course of business, the opposing party may question the motives behind production in a different format.[55]

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[50] *Bray & Gillespie Management LLC, et al. v. Lexington Ins. Co.*, 259 F.R.D. 591, 595 (M.D. Fla., August 3, 2009).

[51] *Id*.

[52] *Bray & Gillespie Management LLC, et al. v. Lexington Ins. Co.*, 259 F.R.D. 568, 573 (M.D. Fla., March 4, 2009).

[53] *Id*. at 575.

[54] See *id*. at 586.

[55] *Id*. at 585, quoting Fed. R. Civ. P. 34, Advisory Comm. Notes, 2006 Amend. (“„[T]he option to produce in a reasonably usable form does not mean that a responding party is free to convert electronically stored information from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation. If the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature.‟”).

The search for responsive documents should commence immediately after receiving the requests. In *Bray & Gillespie*,[56] hotel records known as "room folios" were at issue. Specifically, Bray & Gillespie did not even begin to look for the room folios until seven months after the court ordered their production.[57]

The process of searching should also be documented, in case the requesting party inquires about what was and was not produced and why. Each party also has a duty to adequately prepare knowledgeable witnesses regarding the search methods it used, and if those methods are questioned, those witnesses will likely have to testify as to "[w]hich files were searched, how the search was conducted, who was asked to search, what they were told, and the extent of any supervision."[58] Documenting the process of the search will also be helpful if any declarations are required.

Pension Committee of University of Montreal Pension Plan v. Banc of America Securities, LLC offers an excellent example of what not to do during the search and collection phase:

> In addition to failing to institute a timely written litigation hold, one or more of these plaintiffs failed to collect or preserve any electronic documents prior to 2007, continued to delete electronic documents after the duty to preserve

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[56] *Bray & Gillespie Management LLC, et al. v. Lexington Ins. Co.*, 259 F.R.D. 591, 593 (M.D. Fla. August 3, 2009) ("[T]he Bray & Gillespie Plaintiffs ("B&G") allege that Defendant Lexington Insurance Company ("Lexington") breached the commercial property insurance policy that it sold to B&G by refusing to pay any of B&G"s losses caused by Hurricane Jeanne, which made landfall south of Daytona Beach, Florida, on September 26, 2004. Among the significant components of damages that B&G seeks to recover under Court V are business interruption losses, extra expenses, and corporate expenses (collectively, "business interruption losses") caused by Hurricane Jeanne at the Treasure Island Resort ("Treasure Island"), one of B&G"s hotel properties in Daytona Beach, Florida. Lexington has argued, among other things, that Hurricanes Charley and Frances, which made landfall in central Florida only weeks before Hurricane Jeanne, and for both of which Lexington already paid B&G the $25 million per occurrence policy limits, caused all of the damage, or substantially greater damage, to Treasure Island than Hurricane Jeanne caused, and that Treasure Island was not open to the public following Hurricane Frances.").

[57] *Id*. at 594.

[58] *Pension Committee of University of Montreal Pension Plan v. Banc of America Securities, LLC*, 685 F.Supp.2d 456, 477 (S.D.N.Y. 2010).

> arose, did not request documents from key players, delegated search efforts without any supervision from management, destroyed backup data potentially containing responsive documents of key players that were not otherwise available, and/or submitted misleading or inaccurate declarations.[59]

Another obvious instance of failure to conduct a proper search occurred in *Qualcomm Incorporated v. Broadcom Corporation*, when employees deemed knowledgeable enough to testify during deposition were not asked to search their computers for relevant documents or emails.[60] Sanctions for failing to preserve ESI is outside the scope of this article, but counsel should be aware that failure to properly search, collect, and produce data that is both relevant and responsive could result in sanctions regardless of whether the failure was negligent, reckless, or willful.[61]

If a court finds that the search, retrieval, or production of documents is inadequate, it may order the party to participate in a "comprehensive Case Review and Enforcement of Discovery Obligations ("CREDO") program." CREDO is "a collaborative process to identify the failures in the case management and discovery protocol used by [a party] and its in-house and retained attorneys . . . to craft alternatives that will prevent such failures in the future, to evaluate and test for alternatives, and ultimately, to create a case management protocol which will serve as a model for the future."[62]

The *Qualcomm* court's description of the CREDO program is also helpful for instructing clients on how to comply with discovery *before* such a program is necessary. The program recommends sufficient communication between "client and retained counsel, among retained lawyers and law firms, and between junior lawyers conducting discovery and senior lawyers asserting legal arguments." Additionally, CREDO

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[59] *Id*. at 479-80.

[60] *Qualcomm Incorporated v. Broadcom Corporation*, 2008 WL 66932, at 3. "If a witness is testifying as an organization's most knowledgeable person on a specific subject, the organization has an obligation to conduct a reasonable investigation and review to ensure that the witness does possess the organization's knowledge." *Id*. at 11.

[61] *Id*. at 7.

[62] *Id*. at 18.

suggests adequate case management and discovery plans with which all clients, employees, and lawyers are familiar, including "determining the depth and breadth of case management and discovery plans that should be adopted; identifying by experience or authority the attorney from the retained counsel"s office who should interface with the corporate counsel and on which issues; describing the frequency the attorneys should meet and whether other individuals should participate in the communications; identifying who should participate in the development of the case management and discovery plans; describing and evaluating various methods of resolving conflicts and disputes between the client and retained counsel, especially relating to the adequacy of discovery searches; describing the type, nature, frequency, and participants in case management and discovery meetings; and, suggesting required ethical and discovery training." This format should be altered to fit the circumstances of clients with a one in-house lawyer or several retained law firms. As used in the CREDO program, "identifying and evaluating data tracking systems, software, or procedures that corporations could implement to better enable inside and outside counsel to identify potential sources of discoverable documents," such as the correct databases or archives, is also important.[63]

Another case considered the importance of search terms and keywords with regard to e-discovery. After several meet-and-confer sessions, the parties in *Fairfax Financial Holdings Ltd., et al. v. S.A.C. Capital Management LLC, et al.*,[64] agreed to produce certain electronically-stored documents and to use search terms "to limit the number of electronic documents" that would need to be reviewed and produced. The parties did not come to agreement on which search terms to use.[65] The court noted

> This dispute highlights the difficulty of defining the appropriate boundaries of electronic discovery. Ironically, while the use of computers and search terms has made it infinitely easier to store and retrieve documents, in terms of determining what documents are relevant, they are still no

[63] See *id*. at 19.

[64] *Fairfax Financial Holdings Ltd., et al. v. S.A.C. Capital Management LLC, et al.*, Docket No. MRS-L-2032-06, March 19, 2009.

[65] *Id*. at 1-2.

> substitute for old-fashioned manual review. Search terms are merely a screening device. They help to identify *potentially* relevant and responsive documents. But only the lawyer"s trained eye can determine if they are *actually* so. Any investigation conducted through the use of search terms inevitably runs the risk of being too broad, or too narrow. There is simply no way to predict from the terms themselves – which are formulated in language only a computer can understand – what the search will ultimately yield. Consequently, no set of search terms will perfectly balance the Moving Defendants" right to all relevant non-privileged material and the Plaintiffs" right to be free from overly broad and unduly burdensome discovery.[66]

In determining which list of search terms to use – the Plaintiffs" and Defendants" original lists or the Defendants" revised list – the court noted that the Defendants" revised list "eliminates, modifies, or combines numerous terms to reduce the number of total hits by a significant percentage" and "makes a realistic effort to accommodate Plaintiffs" concerns about burdensomeness (an effort Plaintiffs did not reciprocate by insisting throughout on their original search term list)."[67] Additionally, a high number of search terms and returned documents must be weighed against "the factual and legal complexity of th[e] case, the nature of the claims and defenses at issue, and the possibility that overlap might further reduce the amount of documents Plaintiffs must review."[68] Plaintiffs may also move for a modification of the order later if they find that "the search is generating an excessive amount of irrelevant information," but they must produce evidence, such as "a sampling of the terms run, the results, and a calculation of the time and money spent," proving that the search is unproductive.[69]

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[66] *Id*. at 2-3.

[67] *Id*. at 3.

[68] *Id*.

[69] *Id*. at 4.

Keywords and search terms, therefore, should only be considered after "careful thought, quality control, testing, and cooperation with opposing counsel."[70] Counsel would also be wise to solicit the advice of the key players for words or abbreviations they actually may have used in the documents being searched.[71]

Privileged and relevant documents should be segregated.[72] Counsel should take great care when responding to requests in order that the party does not produce something it deems irrelevant, unresponsive, or even privileged. While that premise applies to all discovery, it is especially prudent with regard to e-discovery because attempting to categorize such large volumes of electronic data could easily result in inadvertent production of data that could have been withheld. For example, if one party agrees to produce "certain categories of documents[, . . .] not producing all of the documents that fit within such a category is unacceptable."[73]

In addition to conducting a thorough search, if additional relevant *and responsive* documents are found post-search, counsel should immediately bring those documents to the attention of the opposing party and the court.[74] Counsel should also commence a new search, either in the same place the new data was found or by using new key words that would have produced the data and any like it, to ensure that no other responsive data is missing.

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[70] *William A. Gross Const. Associates, Inc. v. Am. Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134, 134 (S.D.N.Y. 2009) ("DASNY's proposed search terms included „DASNY, „Dormitory Authority," and „Authority," and the names of the other parties to the action. DASNY also added „Court! in connection with Bronx," „Hall of Justice," and „Bronx but not Zoo" (since Hill worked on an unrelated project involving the Bronx Zoo). The other parties requested the use of thousands of additional search terms, emphasizing the construction issues they were involved in, such as „sidewalk," „change order," „driveway," „access," „alarm," „budget," „build," „claim," „delay," „elevator," „electrical"-you get the picture. DASNY correctly pointed out that use of such extensive keywords would require production of the entire Hill email database, since Hill's business is construction management, and those terms would be used for any construction project.").

[71] *Id*. at 135.

[72] See *Bray & Gillespie Management LLC, et al. v. Lexington Insurance Company, et al.*, 259 F.R.D. 568, 587-88 (M.D. Fla. March 4, 2009).

[73] See *Qualcomm Incorporated v. Broadcom Corporation*, 2008 WL 66932 at 9.

[74] See *id*. at 4.

While communication with a client is of great importance, counsel should not rely upon the client"s assurances if there is reason to investigate further.[75] In *Qualcomm*, if the attorneys for the producing party had insisted upon reviewing the records "regarding the locations searched and terms utilized, they would have discovered the inadequacy of the search and the suppressed documents."[76]

Counsel should also agree upon[77] and appoint an attorney to supervise the discovery process and be responsible for "verifying that the necessary discovery had been conducted[,] including ensuring that all of the correct locations, servers, databases, repositories, and computers were correctly searched for potentially relevant documents."[78] As stated in *Zubulake*,

> [i]n short, it is *not* sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information. Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched. This is not to say that counsel will necessarily succeed in locating all such sources, or that the later discovery of new sources is evidence of a lack of effort. But counsel and client must take *some reasonable steps* to see that sources of relevant information are located.[79]

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[75] See *id*. at 12. "[T]he court finds it likely that . . . one or more of the retained lawyers chose not to look in the correct locations for the correct documents, to accept the unsubstantiated assurances of an important client that its search was sufficient, to ignore the warning signs that the document search and production were inadequate, not to press Qualcomm employees for the truth, and/or to encourage employees to provide the information (or lack of information) that Qualcomm needed to assert its non-participation argument and to succeed in this lawsuit. These choices enabled Qualcomm to withhold hundreds of thousands of pages of relevant discovery and to assert numerous false and misleading arguments to the court and jury. This conduct warrants the imposition of sanctions." *Id*. at 13.

[76] *Id*. at 13.

[77] See *Qualcomm Incorporated v. Broadcom Corporation*, 2010 WL 1336937 at 3-4.

[78] *Id*. at 2.

[79] *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004).

Prior to production, counsel must perform a "reasonable inquiry" to ensure the client has complied with its discovery obligation. If relevant and responsive documents are found during this inquiry, the attorney must either verify that they were previously produced to the opposing party or must produce them immediately.[80] It should go without saying that any documents found should be read or reviewed by counsel, but failure to do so has created avoidable problems in other cases.[81] "At the end of the day, however, the duty to preserve and produce documents rests on the party. Once that duty is made clear to a party, either by court order or by instructions from counsel, that party is on notice of its obligations and acts at its own peril."[82]

The *Zubulake* case offers the following further guidance on how to comply with the duty to preserve in the context of e-discovery:

> The subject of the discovery of electronically stored information is rapidly evolving. When this case began more than two years ago, there was little guidance from the judiciary, bar associations or the academy as to the governing standards. Much has changed in that time. There have been a flood of recent opinions-including a number from appellate courts-and there are now several treatises on the subject. In addition, professional groups such as the American Bar Association and the Sedona Conference have provided very useful guidance on thorny issues relating to the discovery of electronically stored information. Many courts have adopted, or are considering adopting, local rules addressing the subject. Most recently, the Standing Committee on Rules and Procedures has approved for publication and public comment a proposal for revisions to the Federal Rules of Civil Procedure designed to address many of the

[80] *Qualcomm Incorporated v. Broadcom Corporation*, 2008 WL 66932 at 14.

[81] *Id*. at 15.

[82] *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 436 (S.D.N.Y. 2004).

> issues raised by the discovery of electronically stored information.
>
> Now that the key issues have been addressed and national standards are developing, parties and their counsel are fully on notice of their responsibility to preserve and produce electronically stored information. The tedious and difficult fact finding encompassed in this opinion and others like it is a great burden on a court‟s limited resources. The time and effort spent by counsel to litigate these issues has also been time-consuming and distracting. This Court, for one, is optimistic that with the guidance now provided it will not be necessary to spend this amount of time again. It is hoped that counsel will heed the guidance provided by these resources and will work to ensure that preservation, production and spoliation issues are limited, if not eliminated.[83]

C. Proportionality

Proportionality is the third pillar of e-discovery. Because of the increasingly large volume of documents involved in a typical case involving e-discovery, counsel should always be mindful of the proportionality requirement of Rule 26(b)(2)(C), which might provide an avenue for decreasing the level of production required.[84] "Whether preservation or discovery conduct is acceptable in a case depends on what is *reasonable*, and that in turn depends on whether what was done – or not done – was *proportional* to that case and consistent with clearly established applicable standards."[85] Moreover,

> the permissible scope of discovery as set forth in Rule 26(b) includes a proportionality component of sorts with respect to discovery of

[83] *Id*. at 440-41.

[84] *Victor Stanley, Inc. v. Creative Pipe, Inc., et al.*, 2010 WL 3703696 at 17 (D. Md. Sept. 9, 2010).

[85] *Id*. at 24.

> ESI, because Rule 26(b)(2)(B) permits a party to refuse to produce ESI if it is not reasonably accessible without undue burden and expense. Similarly, Rule 26(g)(1)(B)(iii) requires all parties seeking discovery to certify that the request is „neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, the amount in controversy, and the importance of the issues at stake in the action.‟ Thus, assessment of reasonableness and proportionality should be at the forefront of all inquiries into whether a party has fulfilled its duty to preserve relevant evidence.[86]

In an opinion considering cost-shifting and its effects (discussed below), the court noted that

> [t]he cost of production is almost always an objectively large number in cases where litigating cost-shifting is worthwhile. But the cost of production when compared to "the amount in controversy" may tell a different story. A response to a discovery request costing $100,000 sounds (and is) costly, but in a case potentially worth millions of dollars, the cost of responding may not be unduly burdensome.[87]

In *Fairfax Financial Holdings Ltd., et al. v. S.A.C. Capital Management LLC, et al.*, the court considered proportionality after the defendants requested e-discovery from plaintiffs‟ backup tapes, which numbered some 666.[88] The plaintiffs estimated that making such a production would cost approximately $10 million.[89] Because of this estimate, plaintiffs argued that the data kept on the tapes was not "reasonably accessible

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[86] *Id*. at 24.

[87] *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 321 (S.D.N.Y. 2003).

[88] *Fairfax Financial Holdings Ltd., et al. v. S.A.C. Capital Management LLC, et al.*, Docket No. MRS-L-2032-06, Superior Court of New Jersey Law Division – Morris County, October 29, 2009, at 3.

[89] *Id*.

because of undue burden or cost," per the Rule 26(b)(2)(B) and the New Jersey Rule of Court 4:10-2(f).[90] However, this provision is not foolproof, and a court "nevertheless may order discovery from such sources if the requesting party establishes good cause."[91]

"„The decision whether to require a responding party to search for and produce information that is not reasonably accessible depends not only on the burdens and costs of doing so, but also on whether those burdens and costs can be justified in the circumstances of the case.‟"[92] Factors to be considered in this analysis include:

1. the specificity of the discovery requests;

2. the quantity of information available from other and more easily accessed sources;

3. the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources;

4. the likelihood of finding relevant, responsive information that cannot be obtained from more easily accessed sources;

5. predictions as to the importance and usefulness of further information;

6. the importance of the issues at stake in the litigation; and

7. the parties‟ resources.[93]

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[90] *Id*.

[91] *Id*. at 3-4.

[92] *Id*. at 4, quoting *Major Tours, Inc. v. Colorel*, 2009 U.S. Dist. LEXIS 97554 at 8-9 (D.N.J. Oct. 20, 2009) (citing the Advisory Committee Notes to Fed. R. Civ. P. 26(b)(2)(B), 2006 Amendment).

[93] *Id*., quoting *Major Tours, Inc. v. Colorel*, 2009 U.S. Dist. LEXIS 97554 at 8-9 (D.N.J. Oct. 20, 2009); see also N.J. Ct. R. 4:10-2(g) (listing similar factors to Fed. R. Civ. P. 26(b)(2)(C)).

While these factors are obviously dependent on the facts of each case, the *Fairfax* court offers an excellent application of these factors to the facts involved.

According to *Fairfax*, "[t]he analysis starts with determining whether Plaintiffs satisfied their burden of demonstrating that the requested e-mail discovery is „not reasonably accessible because of undue burden or cost.‟"[94] The court found that this burden was met because backup tapes are typically classified as inaccessible.[95] In addition, the plaintiffs provided affidavits from its information technology manager and an e-discovery vendor that "the cost to retrieve and process all of the information would approximate $10 million."[96] The court considered the affidavit of the defendants‟ e-discovery vendor, who opined that the tapes could be obtained at a lower cost, but deemed it "purely speculative, as [the vendor] has not seen or analyzed the tapes in question."[97] The court also dismissed the defendants‟ argument that the tapes were reasonably accessible because the same tapes had been produced to the Securities and Exchange Commission in prior litigation.[98] Because of these findings, the court stated that "the weight of the evidence favors the conclusion that the information stored on Plaintiffs‟ backup tapes is not reasonably accessible within the meaning of Rule 4:10-2(g)."[99]

After determining reasonable accessibility, the court must determine whether the requesting party has established such "good cause" to justify production, considering the aforementioned factors.[100] The court provides the caveat, however, that "a court should not treat the „good cause‟ factors

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[94] *Fairfax Financial Holdings Ltd., et al. v. S.A.C. Capital Management LLC, et al.*, Docket No. MRS-L-2032-06, Superior Court of New Jersey Law Division – Morris County, October 29, 2009, at 4-5.

[95] *Id*., citing *Major Tours*, 2009 U.S. Dist. LEXIS 97554 at 10 (citing *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 319-20 (S.D.N.Y. 2003)).

[96] *Id*.

[97] *Id*. at 5.

[98] *Id*.

[99] *Id*.

[100] *Fairfax Financial Holdings Ltd., et al. v. S.A.C. Capital Management LLC, et al.*, Docket No. MRS-L-2032-06, Superior Court of New Jersey Law Division – Morris County, October 29, 2009, at 5.

as a checklist and determine which party has the most checks," but instead should weigh the factors by importance.[101]

Regarding the first factor – specificity of the discovery requests – counsel should use caution in agreeing to search terms based only upon accessible media, as those same terms may be used if media they consider inaccessible is deemed otherwise. In *Fairfax*, the defendants argued that the search terms were "sufficiently narrowly tailored." The plaintiffs complained that the search terms would yield too many false hits. The court, however, had already approved those search terms, and "[s]ince the keyword search criteria already approved by [the court] ha[s] been used in the collection, review, and production of information stored on Plaintiffs' accessible media, the same terms are sufficiently specific for use on information stored on Plaintiffs' inaccessible media." The court held that this factor weighed in the Defendants' favor.[102]

The second factor – the quantity of information available from other and more easily accessed sources – is also subject to interpretation. While 47,000 emails seems like a large number on its face, the court may consider the length of the litigation and the number of "corporate parties, their officers, directors, employees, and representatives, and individual parties" involved and determine that the number could be considerably higher. While the *Fairfax* court made such an observation, the court ultimately held that without evidence of the contents of the backup tapes, it would be "impossible to decide this factor without resorting to rank speculation."[103]

The court noted that the third and fourth factors – "the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources" and "the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources" – was similarly hindered by lack of evidence. "It is undisputed that deleted e-mails would only exist on Plaintiffs' backup

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[101] *Id*. ("However, I do so mindful of other learned courts' counsel that 'a court should not treat the good cause factors as a checklist and determine which party has the most checks.' Rather, '[t]he factors should be weighed by importance.'" (internal citations omitted)).

[102] *Id*. at 5-6.

[103] *Id*. at 6.

tapes, but there is no evidence that any such e-mails in fact exist and, if so, that they contain relevant information."[104]

The fifth factor – predictions as to the importance and usefulness of further information – allows both parties to speculate. "Relying on their corporate policy against deletion and their substantial production of e-mails from accessible media, Plaintiffs assert that '[t]here is no reason to believe that the backup tapes contain material, relevant data to [sic] that is not otherwise available.'" The defendants, however, argue that "'[t]he most highly relevant e-mails – e-mails that would support [their] allegations about the fraud and mismanagement at Fairfax at the time . . . are precisely the kinds of e-mails that a custodian would have deleted rather than preserved under the alleged (but unwritten) e-mail retention policy." The court opined as follows:

> If in fact Plaintiffs' accessible media were to contain all relevant and responsive e-mails, this factor would weigh in Plaintiffs' favor, as the duplicative information contained on the backup tapes would then have no importance at all. To the contrary, if the backup tapes were to contain deleted e-mails evidencing fraud and mismanagement at Fairfax, this factor would weigh heavily in the Defendants' favor, as such information would establish key points in Defendants' defense. In sum, this factor is a draw.[105]

The sixth factor – the importance of the issues at stake in the litigation – was described in *Zubulake v. UBS Warburg LLC*, as "one that will rarely be invoked."[106] The *Fairfax* court stated "this factor should come into play if a case has 'the potential for broad public impact,' such as 'toxic tort class actions, environmental actions, so-called impact or social-reform litigation, cases involving criminal conduct, or cases implicating important or constitutional questions.'" The court then concluded that the impact of this

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[104] *Id*.

[105] *Id*. at 6-7.

[106] 217 F.R.D. at 321.

case is only on the parties, and the amount of potential damages does not alter that impact.[107]

The seventh factor – the parties' resources – does not rest solely on the coffers of the parties but is more focused on "whether the burden or expense of the proposed discovery outweighs its likely benefit." However, evidence of what the media in question contain is still necessary to determine any benefit.[108]

If a court cannot reach a conclusion as to proportionality by applying the above factors,[109] a court may order "staged discovery or sampling" of the medium in question in order to determine "whether there is good cause to order a more expansive search of the information."[110] The *Zubulake* court opined that "'requiring the responding party to restore and produce documents from a small sample of backup tapes will inform' the analysis of the Rule 26(b) factors."[111] An actual sample removes the speculative part of application of the factors because "there will be tangible evidence of what the backup tapes may have to offer . . . [and] tangible evidence of

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[107] *Fairfax Financial Holdings Ltd., et al. v. S.A.C. Capital Management LLC, et al.*, Docket No. MRS-L-2032-06, Superior Court of New Jersey Law Division – Morris County, October 29, 2009, at 7.

[108] *Id*. ("Both parties to this litigation have substantial financial resources. But this does not mean that a well-funded litigant must expend burdensome sums of money to produce data on inaccessible media as a matter of course. The critical inquiry is whether the burden or expense of the proposed discovery outweighs its likely benefit. But again, my analysis of this factor is frustrated by a complete lack of evidence of the contents of the backup tapes as compared to the contents of Plaintiffs' accessible media." (internal citations omitted)).

[109] *Id*.

[110] *Id*. at 7-8 ("When neither party knows precisely what information is contained in the inaccessible sources, courts have resorted to staged discovery or sampling as an appropriate method to determine whether there is good cause to order a more expansive search of the information. See *Zubulake*, 217 F.R.D. at 324 (ordering defendant to produce any five backup tapes selected by plaintiff from a total of 94 tapes); *In re Priceline.com Inc. Sec. Litig.*, 233 F.R.D. 88, 90 (D. Conn. 2005) (ordering parties to confer and decide on how many backup tapes would be restored as a reasonable sampling). See also *McPeek v. Ashcroft*, 202 F.R.D. 31, 34-35 (D.D.C. 2001) (ordering restoration and production of a limited sampling of inaccessible media to inform the court's later determination of whether the benefit of a full restoration and production would outweigh the associated burdens and costs).").

[111] *Id*., citing *Zubulake*, 217 F.R.D. at 324.

the time and cost required to restore the backup tapes. . . ."[112] Applying this strategy to the *Fairfax* case, the court ordered the Defendants to choose one of the "critical custodians" and ordered the plaintiffs to "restore and produce all responsive and non-privileged e-mails pertaining to that custodian for the requested time periods," omitting all e-mails already produced.[113]

D. Cost Shifting

Cost-shifting is the fourth pillar of e-discovery. Depending on the accessibility of the discovery documents requested, the cost of searching for and producing such a high volume of electronic documents may increase exponentially. As one court noted, "[t]he failure to engage in discovery as required by Rule 26(g) is one reason why the cost of discovery is so widely criticized as being excessive – to the point of pricing litigants out of court."[114]

Discovery of electronic documents is considerably more complicated "because otherwise discoverable evidence is often only available from expensive-to-restore backup media." Rule 34 applies to electronic documents and data compilations, including those that "may have been deleted and now reside only on backup discs."[115] Because of this circumstance, courts have resorted to "creative solutions for balancing the broad scope of discovery prescribed in Rule 26(b)(1) with the cost-consciousness of Rule 26(b)(2)."[116] Cost-sharing has emerged as a method to be used to offset the often unequal financial burdens upon the parties.

"The Federal Rules of Civil Procedure specify that „any matter, not privileged, that is relevant to the claim or defense of any party" is discoverable, except where:

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[112] *Id*., citing *Zubulake*, 217 F.R.D. at 324.

[113] *Fairfax Financial Holdings Ltd., et al. v. S.A.C. Capital Management LLC, et al.*, Docket No. MRS-L-2032-06, Superior Court of New Jersey Law Division – Morris County, October 29, 2009, at 8-9.

[114] *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 359-60 (D. Md. 2008).

[115] *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 316-17 (S.D.N.Y. 2003).

[116] *Id*. at 316.

> (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties‟ resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

The *Zubulake* court[117] interpreted the proportionality and cost-shifting implications of Rule 26 as follows:

> Although "the presumption is that the responding party must bear the expense of complying with discovery requests," requests that run afoul of the Rule 26(b)(2) proportionality test may subject the requesting party to protective orders under Rule 26(c), "including orders conditioning discovery on the requesting party‟s payment of the costs of discovery." A court will order such a cost-shifting protective order only upon motion of the responding party to a discovery request, and "for good cause shown." Thus, the responding party has the burden of proof on a motion for cost-shifting.[118]

Cost-shifting[119] will not be considered in every case in which discovery of electronic data is an issue. The general rule that "the responding party

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[117] *Id*. at 311 ("This case provides a textbook example of the difficulty of balancing the competing needs of broad discovery and manageable costs. Laura Zubulake is suing UBS Warburg LLC, UBS Warburg, and UBS AG (collectively, "UBS" or the "Firm") under Federal, State and City law for gender discrimination and illegal retaliation. Zubulake‟s case is certainly not frivolous and if she prevails, her damages may be substantial.").

[118] *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 283 (S.D.N.Y. 2003).

[119] *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 317 (S.D.N.Y. 2003).

must bear the expense of complying with discovery requests" still holds.[120] Because "cost-shifting may effectively end discovery" in cases where the parties are not equals financially, courts must use cost-shifting wisely and only in appropriate circumstances.[121] "Thus, cost-shifting should be considered *only* when electronic discovery imposes an "undue burden or expense" on the responding party. The burden or expense of discovery is, in turn, „undue" when it „outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties" resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.""[122] However, the presence of electronic evidence on its own is not automatically deemed an "undue burden or expense."[123] Instead, the issue is really whether the format in which the electronic data is kept is accessible or inaccessible.[124]

The *Zubulake* opinion identified five categories of data, ordered by most to least accessible:

1. *Active, online data:* "On-line storage is generally provided by magnetic disk. It is used in the very active stages of an electronic records [sic] life-when it is being created or received and processed, as well as when the access frequency is high and the required speed of access is very fast, *i.e.,* milliseconds." Examples of online data include hard drives.

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[120] *Id*.

[121] *Id*. at 317-18.

[122] *Id*.

[123] *Id*. at 318. "Many courts have automatically assumed that an undue burden or expense may arise simply because electronic evidence is involved. This makes no sense. Electronic evidence is frequently cheaper and easier to produce than paper evidence because it can be searched automatically, key words can be run for privilege checks, and the production can be made in electronic form obviating the need for mass photocopying." *Id*.

[124] *Id*. ("In the world of paper documents, for example, a document is accessible if it is readily available in a usable format and reasonably indexed. Examples of inaccessible paper documents could include (a) documents in storage in a difficult to reach place; (b) documents converted to microfiche and not easily readable; or (c) documents kept haphazardly, with no indexing system, in quantities that make page-by-page searches impracticable. But in the world of electronic data, thanks to search engines, any data that is retained in a machine readable format is typically accessible.").

2. *Near-line data:* “This typically consists of a robotic storage device (robotic library) that houses removable media, uses robotic arms to access the media, and uses multiple read/write devices to store and retrieve records. Access speeds can range from as low as milliseconds if the media is already in a read device, up to 10-30 seconds for optical disk technology, and between 20-120 seconds for sequentially searched media, such as magnetic tape.” Examples include optical disks.

3. *Offline storage/archives:* “This is removable optical disk or magnetic tape media, which can be labeled and stored in a shelf or rack. Off-line storage of electronic records is traditionally used for making disaster copies of records and also for records considered „archival“ in that their likelihood of retrieval is minimal. Accessibility to off-line media involves manual intervention and is much slower than on-line or near-line storage. Access speed may be minutes, hours, or even days, depending on the access-effectiveness of the storage facility.” The principled difference between nearline data and offline data is that offline data lacks “the coordinated control of an intelligent disk subsystem,” and is, in the lingo, JBOD (“Just a Bunch Of Disks”).

4. *Backup tapes:* “A device, like a tape recorder, that reads data from and writes it onto a tape. Tape drives have data capacities of anywhere from a few hundred kilobytes to several gigabytes. Their transfer speeds also vary considerably ... The disadvantage of tape drives is that they are sequential-access devices, which means that to read any particular block of data, you need to read all the preceding blocks.” As a result, “[t]he data on a backup tape are not organized for retrieval of individual documents or files [because] . . . the organization of the data mirrors the computer‟s structure, not the human records management structure.” Backup tapes also typically employ some sort of data compression, permitting more data to be stored on each tape, but also making

restoration more time-consuming and expensive, especially given the lack of uniform standard governing data compression.

5. *Erased, fragmented or damaged data:* "When a file is first created and saved, it is laid down on the [storage media] in contiguous clusters... As files are erased, their clusters are made available again as free space. Eventually, some newly created files become larger than the remaining contiguous free space. These files are then broken up and randomly placed throughout the disk." Such broken-up files are said to be "fragmented," and along with damaged and erased data can only be accessed after significant processing.[125]

Categories one through three are generally considered to be accessible, while categories four and five are inaccessible. Accessible data, or data in a "readily usable" format, includes data that "does not need to be restored or otherwise manipulated to be usable." Inaccessible data, or data that is not "readily usable," must be restored or reconstructed before it can be of any use to either party.[126] For example, if the data is contained in an active file or on an easily searchable optical disk, "it would be wholly inappropriate to even consider cost-shifting." If the producing party can produce the data cheaply and quickly, that party should bear the associated costs.[127] If the data is stored in an inaccessible format, however, and the process of restoring the data would be costly and time-consuming, it is appropriate to at least consider cost-shifting.[128]

In *Zubulake*, after several exchanges, an agreement was reached regarding electronic communications about the plaintiff.[129] Backup tapes

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[125] *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 318-19 (S.D.N.Y. 2003).

[126] *Id*. at 319-20.

[127] *Id*. at 320. "For these sources of e-mails-active mail files and e-mails stored on optical disks-it would be wholly inappropriate to even consider cost-shifting. UBS maintains the data in an accessible and usable format, and can respond to Zubulake's request cheaply and quickly. Like most typical discovery requests, therefore, the producing party should bear the cost of production." *Id*.

[128] *Id*.

[129] *Id*. at 312-13 ("With respect to document request twenty-eight, the parties reached the following agreement, in relevant part: Defendants will [ ] ask UBS about how to retrieve e-

were the issue, but UBS did not initially even search the backup tapes for responsive emails.[130] According to the producing party, UBS, the estimated cost of restoring those emails would be $175,000.00, "exclusive of attorney time in reviewing the emails."[131] Zubulake's motion to compel followed.[132] The court took particular note of the importance of the e-mails, because "an e-mail contains the precise words used by the author[, and] it is a particularly powerful form of proof at trial when offered as an admission of a party opponent."[133]

UBS had "extensive email backup and preservation protocols," including backup via tape and also on optical disks.[134] Emails were backed up on the backup tapes daily, weekly, and monthly. The tapes were recycled after certain time periods.[135] The process for restoring each backup tape was described as follows:

> Each backup tape routinely takes approximately five days to restore, although resort to an outside vendor would speed up the process (at greatly enhanced costs, of course). Because each tape represents a snapshot of one server's hard drive in a given month, each server/month must be restored separately onto a hard drive. Then, a program called Double Mail is used to extract a particular individual's e-mail file. That mail file is then exported into a Microsoft Outlook data file, which in turn can be opened in Microsoft Outlook, a common e-

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mails that are saved in the firm's computer system *and will produce responsive e-mails if retrieval is possible* and Plaintiff names a few individuals.").

[130] *Id*. at 313.

[131] *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 312 (S.D.N.Y. 2003).

[132] *Id*. at 313 ("Zubulake, believing that the 9/12/02 Agreement included production of e-mails from backup tapes, objected to UBS's nonproduction. In fact, Zubulake *knew* that there were additional responsive e-mails that UBS had failed to produce because she herself had produced approximately 450 pages of e-mail correspondence.").

[133] *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 286-87 (S.D.N.Y. 2003).

[134] *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 314-15 (S.D.N.Y. 2003).

[135] *Id*. at 314 ("Nightly backup tapes were kept for twenty working days, weekly tapes for one year, and monthly tapes for three years.").

> mail application. A user could then browse through the mail file and sort the mail by recipient, date or subject, or search for key words in the body of the e-mail.[136]

Another program was used to create indexes of each backup tape, and through searching these indexes, it was determined that the e-mail files responsive to Zubulake"s requests are contained on a total of ninety-four backup tapes.[137] The optical disks were much easier to search and were not erasable or rewritable.[138]

Because the indexes revealed 94 backup tapes with potentially relevant documents, and because UBS admitted it had not yet searched those 94 tapes, the court disagreed with UBS"s contention that its production was complete.[139] The court speculated that UBS recognized that Zubulake was entitled to further discovery and then encouraged the court to order cost-shifting as a means of protecting itself from undue burden or expense.[140]

The *Zubulake* case referenced the decision in *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*,[141] that outlined eight factors to be used when determining whether cost-shifting should apply. Those factors are:

1. the specificity of the discovery requests;

2. the likelihood of discovering critical information;

3. the availability of such information from other sources;

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[136] *Id*.

[137] *Id*.

[138] *Id*. at 315 ("UBS has retained each optical disk used since the system was put into place in mid-1998. Moreover, the optical disks are neither erasable nor rewritable. Thus, UBS has *every* e-mail sent or received by registered traders (except internal e-mails) during the period of Zubulake"s employment, even if the e-mail was deleted instantaneously on that trader"s system.").

[139] *Id*. at 316-17.

[140] *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 317 (S.D.N.Y. 2003).

[141] *Rowe Entertainment, Inc. v. William Morris Agency, Inc.,* 205 F.R.D. 421 (S.D.N.Y.2002).

4. the purposes for which the responding party maintains the requested data;

5. the relative benefits to the parties of obtaining the information;

6. the total cost associated with production;

7. the relative ability of each party to control costs and its incentive to do so; and

8. the resources available to each party.[142]

However, the *Zubulake* court then revised the eight *Rowe* factors, which tended to favor cost-shifting in all cases.[143] The *Zubulake* court also noted that factors specifically identified in the Rules were not covered in the eight factors submitted by the *Rowe* court, including "consideration of „the amount in controversy, the parties" resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues."" The *Zubulake* court opined that adding these factors would balance the *Rowe* factor that "typically weighs most heavily in favor of cost shifting, „the total cost associated with production.""[144] Two other factors – "the resources available to each party" and "the importance of the issues at stake in the litigation" – also were found to be of minimal import or impact in favor of other considerations, namely "the total cost of production as compared to the resources available to each party."[145]

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[142] *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 316 (S.D.N.Y. 2003).

[143] *Id*. at 320 ("In the year since *Rowe* was decided, its eight factor test has unquestionably become the gold standard for courts resolving electronic discovery disputes. But there is little doubt that the *Rowe* factors will generally favor cost-shifting. Indeed, of the handful of reported opinions that apply *Rowe* or some modification thereof, *all of them* have ordered the cost of discovery to be shifted to the requesting party. In order to maintain the presumption that the responding party pays, the cost-shifting analysis must be neutral; close calls should be resolved in favor of the presumption. The *Rowe* factors, as applied, undercut that presumption for three reasons. *First,* the Rowe test is incomplete. *Second,* courts have given equal weight to all of the factors, when certain factors should predominate. *Third,* courts applying the *Rowe* test have not always developed a full factual record.").

[144] *Id*. at 321.

[145] *Id*.

The *Zubulake* court consolidated the first and second *Rowe* factors, noting that specificity in the requests is necessary to ensure relevant evidence is obtained in a cost-effective manner. The *Zubulake* court‟s first factor thus became "the extent to which the request is specifically tailored to discover relevant information."[146] The court also eliminated *Rowe*‟s fourth factor, "the purposes for which the responding party maintains the requested data" as "typically unimportant," noting that the purpose for which data is stored does not affect its accessibility. The court noted two instances in which "the very purpose of maintaining the data will be to produce it to the opposing party": communications required by law to be kept, such as by SEC Rule 17a-4. However, the court points out that cost-shifting would not apply in a case involving such documents because the law also requires the data to be kept "in an accessible place."[147]

The *Zubulake* court then set forth its own seven-factor test, which includes

1. The extent to which the request is specifically tailored to discover relevant information;

2. The availability of such information from other sources;

3. The total cost of production, compared to the amount in controversy;

4. The total cost of production, compared to the resources available to each party;

5. The relative ability of each party to control costs and its incentive to do so;

6. The importance of the issues at stake in the litigation; and

7. The relative benefits to the parties of obtaining the information.[148]

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[146] *Id*.

[147] *Id*. at 321-22.

[148] *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 322 (S.D.N.Y. 2003).

The court cautioned against treating the factors as a checklist and noted that some factors weigh more heavily than others. The central question of cost-shifting, according to *Zubulake*, is whether "the request imposes an „undue burden or expense‟ on the responding party," or "how important is the sought-after evidence in comparison to the cost of production?"[149] The *Zubulake* court provided this analysis in ranking the factors:

> The first two factors-comprising the marginal utility test-are the most important. These factors include: (1) The extent to which the request is specifically tailored to discover relevant information and (2) the availability of such information from other sources.
>
> . . .
>
> The second group of factors addresses cost issues: "How expensive will this production be?" and, "Who can handle that expense?" These factors include: (3) the total cost of production compared to the amount in controversy, (4) the total cost of production compared to the resources available to each party and (5) the relative ability of each party to control costs and its incentive to do so.
>
> The third "group" – (6) the importance of the litigation itself – stands alone, and . . . will only rarely come into play. But where it does, this factor has the potential to predominate over the others. Collectively, the first three groups correspond to the three explicit considerations of Rule 26(b)(2)(iii).
>
> Finally, the last factor-(7) the relative benefits of production as between the requesting and producing parties-is the least important because it is fair to presume that the response to a discovery request generally benefits the requesting party. But in the unusual case

[149] *Id*. at 322-23.

> where production will also provide a tangible or strategic benefit to the responding party, that fact may weigh *against* shifting costs.[150]

The *Zubulake* court blamed the *Rowe* factors' favoritism toward cost-shifting on assumptions made by the courts applying the factors regarding "the likelihood that relevant information will be found."[151] The *Zubulake* opinion points out that such an assumption cannot be relied on without proof, which will rarely exist before the requested documents are obtained or at least sampled.[152] The *Zubulake* court advocated sampling because it "inform[s] the cost-shifting analysis" and allows courts to determine whether relevant information is available, and at what cost, without relying on assumptions or speculation.[153]

In *Zubulake*, after the backup tapes were sampled and the trial court reviewed the data found and UBS's affidavit as to the time and money spent, the court held that all remaining backup e-mails would be produced, but some (but not the bulk) of the costs would be shifted to the plaintiff, Ms. Zubulake.[154] The total cost of restoring and producing relevant documents from the five backup tapes was $19,003.43.[155] In considering whether to shift any of the costs to Zubulake, the court "emphasiz[ed] again that cost-shifting is potentially appropriate only when *inaccessible* data is sought."[156] The court applied the seven factors[157] and made the following determinations.

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[150] *Id*. at 323.

[151] *Id*.

[152] *Id*. at 323-24.

[153] *Id*. at 324.

[154] *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 281 (S.D.N.Y. 2003).

[155] *Id*. at 283.

[156] *Id*. at 284. "In *Zubulake I,* I considered plaintiff's request for information contained only on backup tapes and determined that cost-shifting *might* be appropriate. It is worth emphasizing again that cost-shifting is potentially appropriate only when *inaccessible* data is sought. When a discovery request seeks accessible data-for example, active on-line or near-line data-it is typically inappropriate to consider cost-shifting." *Id*.

[157] *Id*.

The first two factors are the most heavily weighted.[158] The court looked to the e-mails Zubulake had already produced, which, "taken together, [p]resumably . . . are reasonably representative of the seventy-seven backup tapes."[159] Though the e-mails were hostile to Zubulake, they did not provide evidence of discrimination based on her gender.[160] The court also noted UBS's increase in production, from 100 pages of e-mails (which UBS deemed a complete set) to 853 pages of e-mails after searching the five sampled backup tapes.[161] The court then concluded that these numbers "lead to the unavoidable conclusion that there are a significant number of responsive e-mails that now exist only on backup tapes."[162] Additionally, evidence existed that implied one of UBS's employees concealed or deleted "especially relevant e-mails" after imposition of the litigation hold. The court found that while some of the new e-mails (or their contents) could be found in other places, "a good deal of [the data] is only found on the backup tapes."[163]

As to factors one and two, the court then found that the sample restoration demonstrated that "Zubulake's discovery request was narrowly tailored to discover relevant information."[164] The court further found that, because certain relevant e-mails were only available on the backup tapes, "direct evidence of discrimination may only be available through restoration."[165] The court concluded that the existence of such direct evidence of discrimination was still speculative, but "because UBS bears the burden of proving that cost-shifting is warranted, the marginal utility test tips slightly against cost-shifting."[166]

Factors three, four and five focus on costs.[167] The court noted that both parties' damages estimates suggested a potential verdict of several million

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[158] *Id*.

[159] *Id*. at 285.

[160] *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 285-86 (S.D.N.Y. 2003).

[161] *Id*. at 286-87.

[162] *Id*. at 287.

[163] *Id*.

[164] *Id*.

[165] *Id*.

[166] *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 287 (S.D.N.Y. 2003).

[167] *Id*.

dollars.[168] The court then applied the proportionality test and concluded that a cost of $165,954.67 for restoring the remaining 72 backup tapes[169] was "surely not 'significantly disproportionate' to the projected value of th[e] case."[170]

With regard to the resources of the parties, the court noted that Zubulake was an individual while UBS was a large corporation. Additionally, the court noted that, while Zubulake's former salary was incredibly high, at the time of this opinion she had been unemployed for two years and was suing her former employer, likely rendering her "not . . . particularly marketable."[171] The court also considered the fact that Zubulake valued her claim at $19 million, suggesting she could "have the financial wherewithal to cover at least some of the cost of restoration[,]" and the likelihood that her attorneys would be willing to front larger expenses in light of the possible multi-million dollar verdict.[172] The court held that this factor weighed against, but did not rule out, cost-shifting.

The court also made note of the fact that UBS was allowed to choose the vendor charged with restoring the tape, and that it was possible that a less-expensive vendor could have been selected instead.[173] Once the

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[168] *Id*. at 287-88 ("In order to assess the amount in controversy, I posed the following question to the parties: Assuming that a jury returns a verdict in favor of plaintiff, what economic damages can the plaintiff reasonably expect to recover? Plaintiff answered that reasonable damages are between $15,271,361 and $19,227,361, depending upon how front pay is calculated. UBS answered that damages could be as high as $1,265,000. Obviously, this is a significant disparity. At this early stage, I cannot assess the accuracy of either estimate. Plaintiff had every incentive to high-ball the figure and UBS had every incentive to low-ball it. It is clear, however, that this case has the potential for a multi-million dollar recovery. Whatever else might be said, this is not a nuisance value case, a small case or a frivolous case. Most people do not earn $650,000 a year. If Zubulake prevails, her damages award undoubtedly will be higher than that of the vast majority of Title VII plaintiffs.").

[169] *Id*. "UBS spent $11,524.63, or $2,304.93 per tape, to restore the five back-up tapes. Thus, the total cost of restoring the remaining seventy-two tapes extrapolates to $165,954.67." *Id*.

[170] *Id*.

[171] *Id*.

[172] *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 288 (S.D.N.Y. 2003).

[173] *Id*.

vendor is hired, however, "costs are not within the control of either party."[174] Therefore, this factor is neutral.[175]

Factor six, the "importance of the issues at stake," very rarely comes into play. The court noted that discrimination issues in the workplace are "hardly unique"[176] when compared with "toxic tort class actions, environmental actions, so-called „impact" or social reform litigation, cases involving criminal conduct, or cases implicating important legal or constitutional questions."[177] The court then found that this factor was also neutral.

The court found that the seventh factor, concerning the benefits of the information to each party, weighed in favor of cost-shifting. While the court agreed with Zubulake's assertion that UBS would possibly find evidence to use at trial or for summary judgment, "there can be no question that Zubulake stands to gain far more than does UBS, as will typically be the case."[178]

"Because some of the factors cut against cost shifting, but only *slightly so*- in particular, the possibility that the continued production will produce valuable new information-some cost-shifting is appropriate in this case, although UBS should pay the majority of the costs."[179] The court based this finding on the fact that there is "plainly relevant evidence that is only available on UBS's backup tapes."[180]

The court then considered how much of the cost of restoration should be shifted to Zubulake. The court noted that the results of the seven-factor test requires UBS to pay the bulk of the costs, so Zubulake's share should be less than half. "A share that is too costly may chill the rights of litigants

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[174] *Id*.

[175] *Id*. The court also noted that "because these backup tapes are relatively well-organized-meaning that UBS knows what e-mails can be found on each tape-there is nothing more that Zubulake can do to focus her discovery request or reduce its cost. Zubulake has already made a targeted discovery request and the restoration of the sample tapes has not enabled her to cut back on that request." *Id*.

[176] *Id*.

[177] *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 321 (S.D.N.Y. 2003).

[178] *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 289 (S.D.N.Y. 2003).

[179] *Id*.

[180] *Id*.

to pursue meritorious claims." The court also considered the speculative nature of whether the search would produce any relevant documents of value, before it ultimately concluded that twenty-five percent of the cost should be assigned to Zubulake.[181]

The court also noted the difference between the "entire cost of the production" and the cost only of restoring the backup tapes, the difference being the costs associated with conducting a privilege review and producing the data.[182] Because of this difference, the court provided this "general rule": "where cost-shifting is appropriate, only the costs of restoration and searching should be shifted."[183] The court defined restoration as "the act of making inaccessible material accessible."[184] Restoration is a "„special purpose" or „extraordinary step.""[185] Search costs are shifted because "they are so intertwined with the restoration process," as the vendor will likely search as he restores.[186]

However, the court noted, "the responding party should *always* bear the cost of reviewing and producing electronic data once it has been converted to an accessible form."[187] The reasons for never shifting these costs are as follows: first, the "producing party has the exclusive ability to control the cost of reviewing the documents," and the producing party may choose to hire an expensive law firm to conduct the review or require a more thorough investigation than may be warranted.[188] Second, since the question of cost-shifting arises only with regard to inaccessible data, "once the data has been restored to an accessible format and responsive documents located, cost-shifting is no longer appropriate."[189] More eloquently, the court described backup tapes (and the cost of restoring and producing them) as follows:

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[181] *Id*.

[182] *Id*. at 289-90.

[183] *Id*. at 290.

[184] *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 290 (S.D.N.Y. 2003).

[185] *Id*.

[186] *Id*.

[187] *Id*.

[188] *Id*.

[189] *Id*. at 291.

> Documents stored on backup tapes can be likened to paper records locked inside a sophisticated safe to which no one has the key or combination. The cost of accessing those documents may be onerous, and in some cases the parties should split the cost of breaking into the safe. But once the safe is opened, the production of the documents found inside is the sole responsibility of the responding party. The point is simple: technology may increasingly permit litigants to reconstruct lost or inaccessible information, but once restored to an accessible form, the usual rules of discovery apply.[190]

The court concluded that UBS should bear 75% of the restoration costs and all other costs, while Zubulake should pay 25% of the restoration costs.[191] The parties may also elect to execute a "claw-back" agreement (discussed below) and forego the privilege review, and its associated costs, altogether.[192]

The *Zubulake* court summarized its analysis as follows: "deciding disputes regarding the scope and cost of discovery of electronic data requires a three-step analysis:

> *First,* it is necessary to thoroughly understand the responding party‟s computer system, both with respect to active and stored data. For data that is kept in an accessible format, the usual rules of discovery apply: the responding party should pay the costs of producing responsive data. A court should consider cost-shifting *only* when electronic data is relatively inaccessible, such as in backup tapes.
>
> *Second,* because the cost-shifting analysis is so fact-intensive, it is necessary to determine

[190] *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 291 (S.D.N.Y. 2003).

[191] *Id*.

[192] *Id*. at 290.

> what data may be found on the inaccessible media. Requiring the responding party to restore and produce responsive documents from a small sample of the requested backup tapes is a sensible approach in most cases.
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> *Third,* and finally, in conducting the cost-shifting analysis, the following factors should be considered, weighted more-or-less in the following order:
>
> 1. The extent to which the request is specifically tailored to discover relevant information;
>
> 2. The availability of such information from other sources;
>
> 3. The total cost of production, compared to the amount in controversy;
>
> 4. The total cost of production, compared to the resources available to each party;
>
> 5. The relative ability of each party to control costs and its incentive to do so;
>
> 6. The importance of the issues at stake in the litigation; and
>
> 7. The relative benefits to the parties of obtaining the information.

The court then ordered UBS to produce, at its own expense, "*all* responsive e-mails that exist on its optical disks or on its active servers" (data in accessible format), and all responsive e-mails "from any five backup tapes selected by Zubulake." UBS was directed to document its search in detail as to time and money spent and relevant material found. The trial court will then apply the cost-shifting analysis provided and

determine whether further discovery of the backup tapes will be had and whether cost-shifting is appropriate.[193]

Problems may occur with regard to restoring backup tapes; for instance, software may become obsolete, necessitating conversions to even be able to access the documents; the tapes may be incorrectly labeled; or the producing party "chose[ ] to keep records in a manner that makes them difficult to retrieve."[194]

Efforts to encourage a cost-sharing order should never affect the quality of ESI produced. In *Bray & Gillespie Management LLC v. Lexington Insurance Co.*, the court found that because Bray & Gillespie caused problems with its production of ESI, Bray & Gillespie would have to "bear the burden of whatever it takes to get the ESI produced in a usable format," a sanction that effectively eliminated any possibility of cost-sharing.[195]

Once cost-shifting has been allowed, however, the court will not reallocate the distribution of costs on a whim. In a later proceeding of the *Zubulake* case concerning spoliation sanctions, the court declined Zubulake‟s request that the court reallocate the costs shifted to her in the prior proceeding because her basis for this request – missing tapes and e-mails – was already considered in the earlier proceeding in which the court allocated the costs amongst the parties.[196]

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[193] *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 324 (S.D.N.Y. 2003).

[194] *Toshiba Am. Elec. Components, Inc. v. Superior Court*, 124 Cal. App. 4th 762, 766, 21 Cal. Rptr. 3d 532, 536 (Cal. Ct. App. 2004) ("Some of the software that TAEC was using when the tapes were made had become obsolete, requiring the development of specialized conversion tools to access the information. Some of the tapes had deteriorated from age. Still others were incorrectly labeled. Lexar cited three federal district court cases that held, in effect, that a demanding party ought not to be penalized when a producing party has chosen to keep records in a manner that makes them difficult to retrieve. (*In re Brand Name Prescription Drugs Antitrust Litigation,* (N.D.Ill. 1995) 1995 WL 360526; *Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.,* (E.D. Pa.1991) 1991 WL 111040; *Kozlowski v. Sears, Roebuck & Co.* (D.Mass. 1976) 73 F.R.D. 73, 76.)").

[195] *Bray & Gillespie Management LLC, et al. v. Lexington Insurance Company, et al.*, 259 F.R.D. 568, 579 (M.D. Fla. March 4, 2009).

[196] *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 219 (S.D.N.Y. 2003).

E. Privilege and Work-Product Protection Claims

The fifth pillar of e-discovery involves the production of privileged documents. As noted by *Coburn Group, LLC v. Whitecap Advisors LLC*,[197] "[w]here discovery is extensive, mistakes are inevitable."[198] Therefore, the importance of privilege cannot be understated, and "claims of inadvertence [will be] properly honored so long as appropriate precautions are taken."[199]

Federal Rule of Evidence 502 states that "when privileged information is inadvertently disclosed, 'the disclosure does not operate as a waiver in a Federal or State proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).'"[200] Rule 502 "specifies the circumstances under which a privilege is waived despite the claim that the privileged document was inadvertently produced."[201] To determine waiver, the court must first determine whether the document is privileged and then whether the privilege has been waived.[202]

The party claiming privilege "must 'demonstrate with reasonable certainty that the attorney's communication . . . rested in significant and inseparable part on the client's confidential disclosure.'"[203] While Rule 502 does not

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[197] *Coburn Group, LLC v. Whitecap Advisors LLC*, 640 F. Supp. 2d 1032 (N.D. Ill. 2009). "Coburn Group, LLC, ("Coburn") claims in this lawsuit that Whitecap Advisors LLC ("Whitecap") breached an oral contract to pay Coburn fees for referring investors to Whitecap. In the present motion, Whitecap originally requested an order requiring Coburn to return two documents totaling 16 pages that it claims are privileged and were inadvertently produced in its document production of approximately 40,000 pages. . . . Coburn refused Whitecap's request to return the documents and opposes the motion. . . . The sole remaining issue is a half-page long e-mail that Whitecap employee Brian Broesder sent to Whitecap principal Eric Kamisher on September 26, 2007." *Id*. at 1035.

[198] *Id*. at 1039, citing *Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec,* 529 F.3d 371, 388 (7th Cir. 2008), *reh'g denied* (July 11, 2008).

[199] *Id*.

[200] *Amobi v. District of Columbia Dept. of Corrections*, 262 F.R.D 45, 49 (D.D.C. 2009).

[201] *Id*. at 51.

[202] *Id*.

[203] *Id*.

indicate specifically who has the burden of proving waiver, the prior rule placed the burden on the party claiming privilege to show that it did not waive attorney-client privilege.[204]

In *Amobi v. District of Columbia Dept. of Corrections*, the defendants disclosed an attorney"s memorandum regarding arbitration proceedings.[205] Counsel for defendants asked the plaintiffs to return or destroy the memo, but the plaintiffs agreed only to sequester it until a finding as to privilege could be made.[206] Defendants argued that, since one of the attorneys who received the memo served as their counsel during the arbitration proceedings, the memo was privileged. Further, they noted that while they inadvertently disclosed the memo, they immediately notified plaintiffs" counsel about the inadvertent disclosure.[207]

Rule 502 "brings uniformity across the circuits to their once differing treatment of the effect of certain inadvertent disclosures of privileged materials."[208] This "middle ground" approach provides a "three-part test to determine if the inadvertent disclosure constitutes a waiver."[209] Disclosure will not constitute a waiver if: "(1) the disclosure was inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error."[210] The emergence of e-discovery contributed significantly to the development of the new rule; the large volume of electronic documents produced led to higher costs of production due to the many hours spent "analyzing every piece lest the inadvertent production of one be deemed a waiver not only as to the piece inadvertently disclosed but as to all others that relate to the same subject matter."[211] However, Rule 502 does not

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[204] *Id*. at 53.

[205] *Id.* at 48-49 ("When it made its production, the District disclosed a memorandum prepared by attorney advisor Repunzelle Johnson on the eve of the arbitration proceedings. Jonathan O"Neill was copied on the memorandum. Both Johnson and O"Neill serve as attorney advisors for the Office of Labor Relations and Collective Bargaining ("OLRCB").").

[206] Amobi v. District of Columbia Dept. of Corrections, 262 F.R.D 45, 49 (D.D.C. 2009).

[207] *Id*.

[208] *Id*. at 52, citing Fed. R. Evid. 502 advisory committee note.

[209] *Id*.

[210] *Id*. See also, *Coburn Group, LLC v. Whitecap Advisors LLC*, 640 F. Supp. 2d 1032, 1037 (N.D. Ill. 2009).

[211] *Id*. at 52, footnote 1, citing Fed. R. Evid. 502 advisory committee"s note.

grant a free pass to parties who choose not to take "reasonable precautions" against disclosure of such privileged documents. "Instead, the reasonableness of precautions taken to protect the privilege is an explicit consideration in determining whether waiver occurred, no matter the inadvertency of the disclosure."[212]

"Inadvertent disclosure" is not defined by Rule 502. Prior to the rule, other courts considered the number of documents produced, "the level of care with which the review for privilege was conducted, and even the actions of the producing party after discovering that the document had been produced."[213] Some courts find that the new rule simply considers "if the party intended to produce a privileged document or if the production was a mistake."[214] The *Amobi* court noted the definition of "inadvertent" – "[n]ot properly attentive or observant; inattentive, negligent, heedless . . . [c]haracterized by want of attention or taking notice; hence, unintentional."[215] "Additionally, permitting „inadvertence" to be a function of, for example, the amount of information that had to be reviewed or the time taken to prevent the disclosure melds two concepts, „inadvertence" and „reasonable efforts," that should be kept distinct. One speaks to whether the disclosure was unintended while the other speaks to what efforts were made to prevent it." The *Amobi* court then stated it would interpret "inadvertent" to mean "an unintended disclosure."[216]

The *Amobi* plaintiffs attempted to argue that if a lawyer disclosed the allegedly privileged document, "then it clearly was not mistaken and not inadvertent," and if it was produced by a non-lawyer, then the defendants "did not take reasonable steps to protect privilege."[217] The court, however, dismissed this argument because "[c]oncluding that a lawyer's mistake never qualifies as inadvertent disclosure . . . would essentially reinstate the strict waiver rule in cases where lawyers reviewed documents, and it would create a perverse incentive not to have attorneys review documents

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[212] *Amobi v. District of Columbia Dept. of Corrections*, 262 F.R.D 45, 53 (D.D.C. 2009).

[213] *Id*. See also *Coburn Group, LLC v. Whitecap Advisors LLC*, 640 F. Supp. 2d 1032, 1037-38 (N.D. Ill. 2009).

[214] *Id*.

[215] *Id*.

[216] *Id*.

[217] *Id*. at 54.

for privilege."[218] Further, "[e]very waiver of the attorney-client privilege produces unfortunate consequences for the party that disclosed the information. If that alone were sufficient to constitute an injustice, there would never be a waiver."[219]

If the court determines disclosure was inadvertent, the court will next consider "whether the holder of the privilege or protection took reasonable steps to prevent disclosure of the privileged document."[220] When addressing an e-discovery waiver, this factor is of great importance.[221] Factors that may be considered include "the reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the extent of the disclosure, the number of documents to be reviewed, the time constraints for production, and the overriding issue of fairness."[222] However, these factors were intentionally not codified in the rule "because the analysis should be flexible and should be applied on a case by case basis."[223]

When large quantities of ESI data are involved, "it would be appropriate to consider, for example, the software that was used to discriminate between the privileged and the non-privileged."[224] The document inadvertently produced in *Amobi* was a four-page paper document.[225] The court noted that the defendants failed to inform the court of the total number of documents produced, "so the court cannot determine the magnitude of the error in producing this one document."[226] The *Amobi* defendants also failed to explain "what they did when they got the documents, how they segregated them so that the privileged documents were kept separate

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[218] *Amobi v. District of Columbia Dept. of Corrections*, 262 F.R.D 45, 54 (D.D.C. 2009).

[219] *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 263 (D. Md. 2008).

[220] *Amobi v. District of Columbia Dept. of Corrections*, 262 F.R.D 45, 54 (D.D.C. 2009), citing Fed. R. Evid. 502(b)(2).

[221] See *id.*, citing *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 259 (D. Md. 2008).

[222] *Id.* at 54, citing Fed. R. Evid. 502 advisory committee note at Subdivision (b). See also *Coburn Group, LLC v. Whitecap Advisors LLC*, 640 F. Supp. 2d 1032, 1038-39 (N.D. Ill. 2009).

[223] *Id.*, citing Fed. R. Evid. 502 advisory committee note at Subdivision (b).

[224] *Id*.

[225] *Id*.

[226] *Amobi v. District of Columbia Dept. of Corrections*, 262 F.R.D 45, 54 (D.D.C. 2009).

from the non-privileged, and how, despite the care they took, the privileged document was inadvertently produced."[227] Again, in conducting a privilege review as in searching for responsive data, the importance of documenting the process cannot be overstated. If a party cannot describe its efforts, the court cannot determine whether those efforts were reasonable.[228] The *Amobi* court also questioned whether attempting to rectify their mistake 55 days after discovering it constituted a "prompt effort" under Rule 502(a)(3) but did not fully discuss that factor because of the lack of reasonableness in their efforts.[229] The court then held that the defendants did not meet their burden and that the work-product privilege had been waived.[230]

In *Victor Stanley, Inc. v. Creative Pipe, Inc.*, the plaintiffs, not the defendants, noted that the documents produced to them contained potentially privileged or work-product protected documents. The plaintiffs properly segregated those documents and notified defense counsel, who promptly claimed that the documents were produced inadvertently.[231] Counsel for defendants described the privilege review as follows: documents that were text-searchable were subjected to a keyword search, but documents that were not text-searchable were manually reviewed. Due to time constraints, only the titles of the non-text-searchable documents were reviewed for indications of privilege.[232] The court was skeptical of this argument though, because the defendants did not indicate which documents inadvertently produced slipped through because of error in the keyword search or human error in the title-page review.[233]

In *Coburn*, the defendants produced an e-mail they later claimed was protected work product that was produced inadvertently despite the efforts of the defendants and their counsel.[234] The defendants culled responsive

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[227] *Id*.

[228] *Id*. at 54-55 ("There can be no reasonable efforts, unless there are efforts in the first place.").

[229] *Id*. at 55.

[230] *Id*.

[231] *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 255 (D. Md. 2008).

[232] *Id*. at 256.

[233] *Id*.

[234] *Coburn Group, LLC v. Whitecap Advisors LLC*, 640 F. Supp. 2d 1032, 1035 (N.D. Ill. 2009).

documents from hard drives containing some 72,000 pages of documents. Two experienced paralegals were tasked with reviewing and separating the documents, a process that took five weeks to complete.[235] Of the 72,000 pages reviewed, 40,000 documents were produced.[236] Defense counsel realized a work-product protected document had been produced when plaintiff"s counsel questioned a deponent about the e-mail.[237] The following day, counsel for defendants asserted the privilege and requested the email be returned.[238] The plaintiffs responded that they would "quarantine" the documents while they researched the issue but ultimately decided not to return them.[239]

"The primary test of work product is „whether the material sought to be protected from discovery was prepared in anticipation of litigation."[240] The *Coburn* plaintiff contended that the email was not protected work product, that the inadvertent production waived any protection, and that the email reveals that the defendant "misled the court on an earlier motion."[241]

The court concluded that the email was in fact work product, based in part on its subject line – "Requests on Coburn Filing" and the date of the email, four months after the lawsuit was filed.[242] The court noted that even though the email did not contain "opinion work product [and] there was no disclosure of an attorney"s mental impressions, conclusions, opinions or theories," the email was work-product because it contained an attorney"s responses to questions regarding the lawsuit and "[i]n order to formulate those responses, [the attorney] collected, selected and organized certain information."[243] The court also noted that it is the manner in which the documents are prepared, not necessarily the contents of those

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[235] *Id*.

[236] *Id*.

[237] *Id*. at 1036.

[238] *Id*.

[239] *Id*.

[240] *Coburn Group, LLC v. Whitecap Advisors LLC*, 640 F. Supp. 2d 1032, 1036 (N.D. Ill. 2009), citing *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.,* 145 F.R.D. 84, 86 (N.D.Ill. 1992).

[241] *Id*.

[242] *Id*. at 1037.

[243] *Id*.

documents, that govern whether the work-product privilege attaches; if the same content is found in documents that are not work-product, those documents are discoverable.[244] The court therefore concluded that the email would be protected unless the privilege was waived or the opposing party "made the showing of „substantial need‟ required by Rule 26(b)(3)(A)(ii)."[245]

The *Coburn* court analyzed inadvertence more simply, asking only "whether the party intended a privileged or work-product protected document to be produced or whether the production was a mistake." In applying this test, the court noted sections (a)(1) and (b)(1) of Rule 502, which contrast a waiver that is "intentional" with a disclosure that is "inadvertent."[246] The court found that production of the email was a mistake, and thus, inadvertent.[247] The number of documents in the *Coburn* case – 40,000 – qualifies as substantially large.[248]

The process utilized in *Coburn* involved the lead attorney supervising two experienced paralegals, who worked subject to a protocol created by the lead attorney that required them to

> identify responsive documents by date; identify and mark for [the attorney‟s] review any correspondence between Whitecap‟s general counsel and any employee at Whitecap; identify and mark as privileged any correspondence between Whitecap‟s employees and Whitecap‟s outside counsel; identify and mark as privileged documents prepared by any employee of Whitecap in anticipation of or in preparation for litigation pursuant to request by Whitecap‟s outside counsel; . . . mark responsive documents relating to customers as "confidential material"

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[244] *Id*.

[245] *Id*.

[246] *Coburn Group, LLC v. Whitecap Advisors LLC*, 640 F. Supp. 2d 1032, 1038 (N.D. Ill. 2009).

[247] *Id*. at 1037-38.

[248] *Id*. at 1039.

> or "attorneys only"; and, segregate non-responsive documents.[249]

The opposing party criticized giving such an important task to paralegals, but the court "declin[ed] to hold that the use of paralegals or non-lawyers for document review is unreasonable in every case," and specifically found that because of the large volume of documents, "use of experienced paralegals who were given specific direction and supervision by a lawyer who is lead counsel in the case was not unreasonable."[250]

"[W]hether a document is work product can rest on facts not apparent from the face of the document."[251] In the *Coburn* case, "the fact that [the email] was prepared to provide information to Whitecap"s attorneys is not apparent from the document itself."[252] However, Rule 502 would be meaningless if the fact that any document got through effectively rendered the review unreasonable.[253] The court also noted that there is no requirement under Rule 502 that the producing party must "engage in a post-production review to determine whether any protected communication or information has been produced by mistake."[254] The *Coburn* court therefore found that the defendants took "reasonable steps to prevent disclosure," and the mistake of producing one email "despite those steps is not fatal to its claim for protection.[255]

With regard to the steps taken to rectify the error, the plaintiffs noted that the defendants did not realize the inadvertent production occurred until four months after production and did not challenge plaintiffs" refusal to return the document for five weeks.[256] The court dismissed the first contention by stating that the relevant time is "how long it took the producing party to act after it learned that the privileged or protected

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[249] *Id*.

[250] *Id*.

[251] *Id*. at 1040.

[252] *Coburn Group, LLC v. Whitecap Advisors LLC*, 640 F. Supp. 2d 1032, 1040 (N.D. Ill. 2009).

[253] *Id*.

[254] *Id*.

[255] *Id*.

[256] *Id*.

document had been produced."[257] The court noted the defendants' immediate objection to use of the protected document during deposition and the written request the following day for the document's return. The court also found that five weeks, during which counsel for both sides investigated "the facts and law surrounding the documents" was not an unreasonable delay "[i]n light of the fact that [defendants] accommodated [plaintiffs'] counsel's request for additional time to formulate [its] position, and that [plaintiffs] agreed to 'quarantine' the documents until the dispute was resolved."[258]

Because the email was protected work product and the court found no waiver, the plaintiffs' only avenue for retaining the email is to prove that it "has 'substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.'"[259] The court found that "[plaintiffs] do[ ] not argue that it has not be[en] able to get discovery about [the subject of the email]. Rather, it is the email itself that [plaintiffs] want[ ], to seek sanctions and 'show at trial a pattern of untruthfulness.'"[260] Therefore, the court found that the plaintiffs had not made a proper showing to meet the requirements of Rule 26(b)(3)(A)(ii).[261]

The *Victor Stanley* case also considered whether certain electronic documents were privileged or protected.[262] During a meet and confer session, the parties identified and prepared "a joint protocol to search and retrieve relevant ESI responsive to" the plaintiff's requests.[263] The protocol contained numerous keyword search terms.[264] The court specifically noted that the search terms "were aimed at locating responsive ESI, rather than identifying privileged or work-product protected documents within the population of responsive ESI."[265] Instead, the privilege review was

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[257] *Id*. at 1041.

[258] *Coburn Group, LLC v. Whitecap Advisors LLC*, 640 F. Supp. 2d 1032, 1041 (N.D. Ill. 2009).

[259] *Id*., citing Fed. R. Civ. P. 26(b)(3)(A)(ii).

[260] *Id*.

[261] *Id*. at 1042.

[262] *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 253 (D. Md. 2008).

[263] *Id*. at 254.

[264] *Id*.

[265] *Id*.

instituted after this initial search for responsive data. Because of the estimated length of time such a review would take, another keyword search was run, this time for privileged or protected documents, and the parties requested permission to enter into a "clawback agreement."[266] However, when the discovery deadline was extended, the clawback agreement was abandoned and the documents were reviewed.[267]

The *Victor Stanley* court noted the lack of information regarding the keywords used during the privilege review, how those keywords were developed, "how the search was conducted, and what quality controls were employed to assess their reliability and accuracy."[268] The individuals who developed the keywords did not present any qualifications for "designing a search and information retrieval strategy that could be expected to produce an effective and reliable privilege review."[269] The defendants also failed to provide the court with other information, such as "whether the search was a simple keyword search, or a more sophisticated one, such as one employing Boolean proximity operators; or whether they analyzed the results of the search to assess its reliability, appropriateness for the task, and the quality of its implementation."[270] The court also noted the "well-known limitations and risks associated with [keywords], and proper selection and implementation obviously involves technical, if not scientific knowledge."[271]

As demonstrated above, "all keyword searches are not created equal."[272] The *Victor Stanley* defendants also failed to sample any of the files that the keyword search yielded to determine if the search results were reliable and did not contain privileged information.[273] "Common sense suggests that even a properly designed and executed keyword search may prove to be over-inclusive or under-inclusive, resulting in the identification of

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[266] *Id*. at 254-55.

[267] *Id*. at 255.

[268] *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 256 (D. Md. 2008).

[269] *Id*. at 256.

[270] *Id*. at 259-60.

[271] *Id*. at 260.

[272] *Id*. at 256-57.

[273] *Id*. at 257.

documents as privileged which are not, and non-privileged which, in fact, are."

Moreover, the *Victor Stanley* plaintiffs disputed the contention that the files were not easily searchable.[274] The court agreed with this assertion and found that the defendants "waived any claim to attorney client privilege or work-product protection for the 165 documents at issue because they failed to take reasonable precautions by performing a faulty privilege review of the text-searchable files and by failing to detect the presence of the 165 documents.[275] The court therefore came to the following conclusions:

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[274] *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 257 (D. Md. 2008).

[275] *Id*. at 260-62, citing *United States v. O'Keefe,* 537 F.Supp.2d 14, 24 (D.D.C. 2008) ("Whether search terms or „keywords" will yield the information sought is a complicated question involving the interplay, at least, of the sciences of computer technology, statistics and linguistics.... Given this complexity, for lawyers and judges to dare opine that a certain search term or terms would be more likely to produce information than the terms that were used is truly to go where angels fear to tread."); *Equity Analytics, LLC v. Lundin,* 248 F.R.D. 331, 333 (D.D.C. 2008), ("[D]etermining whether a particular search methodology, such as keywords, will or will not be effective certainly requires knowledge beyond the ken of a lay person (and a lay lawyer)...."); *In re Seroquel Prods. Liab. Litig.,* 244 F.R.D. 650, 660 n. 6, 662 (M.D.Fla. 2007) (criticizing defendant"s use of keyword search in selecting ESI for production, noting the failure of the defendant to provide information "as to how it organized its search for relevant material, [or] what steps it took to assure reasonable completeness and quality control" and observing that "while key word searching is a recognized method to winnow relevant documents from large repositories ... [c]ommon sense dictates that sampling and other quality assurance techniques must be employed to meet requirements of completeness."); *The Sedona Conference Best Practices Commentary on the Use of Search & Information Retrieval Methods in E-Discovery,* 8 Sedona Conf. J. 189, 194-95, 201-02 ("[A]lthough basic keyword searching techniques have been widely accepted both by courts and parties as sufficient to define the scope of their obligation to perform a search for responsive documents, the experience of many litigators is that simple keyword searching alone is inadequate in at least some discovery contexts. This is because simple keyword searches end up being both over- and under-inclusive in light of the inherent malleability and ambiguity of spoken and written English (as well as all other languages)."). *Id.* at 194-95. To address this known deficiency, the Sedona Conference suggests as best practice points, *inter alia:*

Practice Point 3. The choice of a specific search and retrieval method will be highly dependent on the specific legal context in which it is to be employed.

Practice Point 4. Parties should perform due diligence in choosing a particular information retrieval product or service from a vendor.

> In this case, the Defendants have failed to demonstrate that the keyword search they performed on the text-searchable ESI was reasonable. Defendants neither identified the keywords selected nor the qualifications of the persons who selected them to design a proper search; they failed to demonstrate that there was quality-assurance testing; and when their production was challenged by the Plaintiff, they failed to carry their burden of explaining what they had done and why it was sufficient.[276]

The court also reminded defendants that if they had sought the court-approved non-waiver agreement, or clawback agreement, as they initially planned to do, "they would have been protected from waiver."[277] A clawback agreement allows the parties to enter an agreement with the court allowing production of certain documents to the opposing party with the understanding that if privileged or work-product protected documents are produced, the producing party will be able to "claw back" those documents. However, the parties should give careful thought to entering into such an agreement in order to avoid agreeing to produce documents

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Practice Point 5. The use of search and information retrieval tools does not guarantee that all responsive documents will be identified in large data collections, due to characteristics of human language. Moreover, differing search methods may produce differing results, subject to a measure of statistical variation inherent in the science of information retrieval.

Practice Point 6. Parties should make a good faith attempt to collaborate on the use of particular search and information retrieval methods, tools and protocols (including as to keywords, concepts, and other types of search parameters).

Practice Point 7. Parties should expect that their choice of search methodology will need to be explained, either formally or informally, in subsequent legal contexts (including in depositions, evidentiary proceedings, and trials).

Id.; and *Information Inflation: Can the Legal System Adapt,* 13 Rich. J.L. & Tech. 10, at 38, 40 (as cited at www.westlaw.com) ("[I]t is not surprising that lawyers and those to whom they delegate search tasks may not be particularly good at ferreting out responsive information through use of simple keyword search terms.... Accordingly, the assumption on the part of lawyers that any form of present-day search methodology will fully find „all" or „nearly all" available documents in a large, heterogeneous collection of data is wrong in the extreme.").

[276] *Id*. at 262.

[277] *Id*.

(or relinquish a privileged document inadvertently produced) when doing so would be detrimental to their case. Additionally, at least one court has noted that Rule 502(b) "preserves the privilege if „the holder of the privilege or protection took reasonable steps to prevent disclosure" of the privileged material," but "[s]imply turning over all ESI materials does not show that a party has taken „the reasonable steps" to prevent disclosure of its privileged materials."[278]

II. CONCLUSION

Because of the volumes of information produced through e-discovery, the process of collecting, sorting, reviewing, and producing ESI is increasingly outsourced to non-lawyer professionals. The world in which complex litigation arises is dominated by computers, which in turn are ruled (if they do not in fact live autonomously among us) by technical experts. The management of e-discovery, therefore, cannot be fully accomplished without computer and data management experts. The fundamental decisions, however, about process and substance remain the province of lawyers. This article attempts in a small way to define the five pillars of e-discovery that support and inform a lawyer's fundamental decision-making when tasked with the job of managing e-discovery.

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[278] *Spieker v. Quest Cherokee, LLC*, 2009 WL 2168892 at 3 (D. Kan. July 21, 2009).

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BEWARE:
THE HIDDEN DANGERS IN EMPLOYMENT

Presented by
Alternative Dispute Resolution, Civil Rights and Public Entity Liability, and Employment Practices and Workplace Liability Sections

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BEWARE: THE HIDDEN DANGERS IN EMPLOYMENT

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I. General Overview of Employment Litigation and Trends

Employers are facing difficult times. The failing economy has resulted in lost jobs because employers can no longer afford to carry dead weight. Employment litigation is on the rise,[1] and a number of hot button employment litigation trends are making headlines in the news.

Take, for example, the practice of hiring illegal aliens. As Americans face a limited amount of available jobs in the workforce, local municipalities around the country are reacting to the federal government's failure to enforce immigration laws by trying to enact their own statutes to prevent illegal immigrants from living and working in their communities.[2] These measures carry with them the danger of civil rights violations and may expose employers to civil penalties[3] and even criminal liability.[4]

This paper addresses many of the hidden dangers that lurk in the employment litigation landscape. In Part I, we provide an overview of recent employment litigation statistics and trends. Part II discusses the uncertain legal risks employers face when monitoring their employees' use of social media technology such as Facebook and Twitter. We then present strategies employers can use to regulate the electronic communications of employees while minimizing employer liability for

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1 *See* 2010 Fulbright & Jaworski L.L.P. Litigation Trends Survey, *available at* http://www.fulbright.com/litigationtrends.

2 *See*, *e.g.*, *Lozano v. City of Hazleton*, No. 07-3531, --- F.3d ----, 2010 WL 3504538, *1 (Sept. 9, 2010 3d Cir.) (local ordinance regulating employment of and provision of rental housing to undocumented aliens pre-empted by federal Immigration Reform and Control Act, 8 U.S.C. 1324a-1324b), discussed *infra*.

3 *See, e.g.*, Arizona Senate Bill 1070, discussed *infra*.

4 *Id.*

managing use that occurs both during and after work hours and off company premises.

In Part III, we identify the ethical and legal implications which accompany an attorney's decision to speak to the press. We highlight the consequences of sloppy lawyering and propose a set of best practices when dealing with the media. Part IV examines the relaxed legal standard for "certifying" a collective action under the Fair Labor Standards Act,[5] and offers suggestions to help employers avoid these types of lawsuits. In Part V, we consider responses by local municipalities to a perceived immigration crisis in our country. We conclude by discussing recent legal developments which affect local legislation intended to curb employers who hire illegal aliens. Finally, Part VI describes how businesses can develop and promulgate employment related documents to prevent being sued.

A. The Litigation Swell and Employment Litigation Statistics

Gripped by economic anxiety, employers continue to trim their ranks and reduce wages, and employees are capitalizing on opportunities to file suit.[6] Over four hundred in-house counsel and corporate law departments in the United States and the United Kingdom surveyed on the state of global litigation issues and trends reported an increase in multi-plaintiff employment litigation cases in 2010.[7] The majority of these suits involved wage and hour claims premised on misclassification and overtime and evidenced a reduction in claims involving meals and breaks.[8] No one, it seems, is immune to wage dispute litigation—twenty-seven workers recently filed suit in Manhattan federal court against Del Posto, Chef Mario Batali's restaurant, claiming the restaurant illegally pooled workers' tips in

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[5] 29 U.S.C. § 201 *et. seq*.

[6] http://laconiclawblog.com/index.php/2010/10/13/2010-fulbright-litigation-trends-survey-shows-increase-in-employment-litigation.

[7] One interpretation of the survey results showed that 18% of those polled reported increases in wage and hour disputes under the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 ("FLSA"); 11% reported a rise in traditional labor union related matters; 10% reported an increase in age discrimination cases; 7% reported rises in race discrimination suits and ERISA suits; and 6% reported rises in sex discrimination suits and disability discrimination suits. *See* http://blog.larrybodine.com/2010/10/articles/clients/fulbright-report-sees-upswing-in-litigation/. *See also* http://insurancenewsnet.com/article.aspx?id=229869&type=newswires.

[8] http://blog.larrybodine.com/2010/10/articles/clients/fulbright-report-sees-upswing-in-litigation.

violation of state labor laws.[9] It can prove difficult to stay positive in this grim economic climate—this is not the first time employees have sued Chef Batali over wages,[10] but the most recent lawsuit was filed just after Del Posto was awarded a rare fourth star by *The New York Times*.[11] Indeed, when asked to identify the most frequent type of litigation pending against their company, 40% of survey respondents cited labor and employment cases.[12]

Discrimination claims accounted for much of the swell in employment litigation this past year.[13] According to survey respondents, race, age, and wage and hour claims subjected employers to the most monetary exposure.[14] Part of the reason employment litigation may be popular among plaintiffs and defendants alike is because it is effective. Survey respondents agreed that litigation is the preferred method for resolving disputes which are not international in nature.[15] Those polled pointed to "better results" and "reviewability," while a minority of respondents preferred arbitration because of its lower cost.[16] Nevertheless, more than one-quarter of respondents in the United States now require arbitration of employment disputes in non-union settings, demonstrating a 6% increase

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[9] The lawsuit seeks compensation including backpay, unspecified damages and attorneys' fees and alleges that the restaurant created a point system that determined how much each worker received in tips. For example, captains were allotted six points, while stockers received two points. *See* http://blogs.findlaw.com/law_and_life/employment-law/; *see also* http://blogs.wsj.com/metropolis/2010/10/12/del-posto-worker-sue-mario-batali-over-wages-tips.

[10] http://blogs.wsj.com/metropolis/2010/10/12/del-posto-worker-sue-mario-batali-over-wages-tips.

[11] http://blogs.findlaw.com/law_and_life/2010/10/chef-mario-batali-sued-in-wage-dispute.html.

[12] http://www.fulbright.com/litigationtrends20.

[13] In an attempt to prevent employment discrimination claims, five major companies in Germany have agreed to participate in a pilot scheme using anonymous application forms for certain categories of employees (including apprentices). The forms will not include photographs or supply information about the candidate's age, ethnic origin, sex, marital status, or number of children. The pilot will be evaluated in a year to see whether it causes a reduction in discrimination. However, there are no current plans to make the anonymous application forms compulsory in Germany. *See* "Employment Trends in Europe" (September 2010), *available at* http://www.elexica.com/newsletter.aspx?id=1399.

[14] *See* http://www.fulbright.com/litigationtrends20. *See also* http://insurancenewsnet.com/article.aspx?id=229869 &type=newswires.

[15] http://www.fulbright.com/litigationtrends20.

[16] *Id.*

from 2009.[17] Moreover, upwards of 70% of responding companies consider arbitration beneficial for employee relations.[18]

B. Beware: The Internet Does Not Discriminate

Discrimination suits by employees are not the only litigation risks employers must worry about. Statistics show many employers are using social technology to further their own business strategies.[19] More than 25% of surveyed corporate counsel said their company utilizes profiles on LinkedIn.com for recruiting; 22% of respondents use Twitter.com as a means of marketing; and 17% use Facebook.com for developing business.[20] Nearly one-quarter of companies also reported their use of some form of corporate blog.[21] Increased online activity in the workplace may contain hidden dangers, however, because the acceptance of social networking by both employees and employers can enable abusive behavior such as cyberbullying, discussed later.

Thus, employers need to consider the consequences of social media activity to avoid liability.[22] As discussed in detail in Part I, taking adverse

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17 *Id.*

18 *Id.*

19 *Id.*

20 http://blog.larrybodine.com/2010/10/articles/clients/fulbright-report-sees-upswing-in-litigation.

21 *Id.*

22 Gordon and Rees' November 2010 Labor and Employment Law Update explains that "On October 27, 2010, the National Labor Relations Board ("NLRB") filed a precedent-setting complaint against an employer for allegedly terminating an employee for criticizing her boss on Facebook. In its complaint, the NLRB alleges that American Medical Response of Connecticut Inc. ("AMR") "maintained an overly broad blogging and internet posting policy" that contained unlawful provisions such as prohibiting employees from posting disparaging remarks about the company on social networking sites. The NLRB also alleges that AMR's enforcement of its internet posting policy resulted in an illegal termination when the company fired an employee after she posted a "negative remark" about her boss online. The significant issue presented by the NLRB's complaint against AMR is whether bad-mouthing an employer on social media sites that reach critical masses will be considered protected activity. Arguably, such employee conduct may be considered "acts of disloyalty," which can lose protection under the National Labor Relations Act and, therefore, provide a legitimate basis for discharge. Until these issues are addressed more definitively by the courts, employers should take preventative measures and invest in effectively managing and protecting company resources against potentially derisive and damaging postings in the first place. A hearing is set for January 25, 2011 before an administrative law judge in Hartford, Connecticut to address the allegations set forth in the NLRB's complaint against AMR." *NLRB Files Complaint*

action against an employee poses high legal risk unless an employee's online activities are illegal, and may subject a company to unwanted media scrutiny. Therefore, it is crucial that employers promulgate workplace policies to inform and guide employees' online behavior in order to successfully manage the reputations of their companies.

The recent termination of CNN Senior Editor Octavia Nasr highlights how just one sentence posted online can generate international fervor. Described as an "eminent journalist, with a distinguished, 20-year CNN career,"[23] the former senior editor of Middle East affairs was promptly fired four days after she posted a "tweet" on Twitter expressing regret at the death of Lebanese Grand Ayatollah Mohammed Fadlallah.[24] Nasr's tweet praised Fadlallah as "one of Hezbollah's giants I respect a lot," prompting outrage from supporters of Israel, who pointed to Fadlallah's links to terroristic activity.[25] Nasr has since apologized publicly for her actions, adding, "Reaction to my tweet was immediate, overwhelming and provides a good lesson on why 140 characters should not be used to comment on controversial or sensitive issues, especially those dealing with the Middle East."[26]

According to the 2009 Electronic Business Communication Policies and Procedures Survey, conducted by the American Management Association in partnership with the ePolicy Institute, 26% of companies fired employees in 2009 for inappropriate Internet use, and 3% "admitted rejecting prospective employees on the basis of content posted on a personal social media web page."[27] Nancy Flynn, executive director of the ePolicy Institute and author of The e-Policy Handbook, Second Edition, explained that many companies maintain social media policies that are often "needlessly vague."[28] Flynn says that "[A] lot of organizations are

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Against Employer for Terminating Employee Who Criticized Boss on Facebook, *available at* http://www.gordonrees.com/publications/viewPublication.cfm?contentID=1704.

[23] Maria Williams, *How 140 Characters Got a Respected Editor Fired*, Society for Human Resource Management, http://www.shrm.org/hrdisciplines/businessleadership/articles/Pages/140Characters.aspx.

[24] *Id.*

[25] Brian Stelter, *CNN Fires Middle East Affairs Editor*, N.Y. Times, July 8, 2010, at B3.

[26] Joe Pompeo, *CNN Won't Say They Fired Octavia Nasr Because Her Tweet Outraged People*, http://www.businessinsider.com/the-real-issue-2010-7.

[27] Williams, http://www.shrm.org/hrdisciplines/businessleadership/articles/Pages/140Characters.aspx, *supra.*

[28] *Id.*

short-sighted. They think 'We don't tweet or have a corporate blog.' But even if they don't, they still need to monitor social media. They need to ask not only, 'What are our employees writing?' but also, 'What are our former employees and our competitors writing?'"[29]

II. Key Risks Associated with Employees' Use of Social Networking Technology

In today's world, the possibilities for social networking and other online activities are almost endless. Blogs, YouTube, Twitter, MySpace, Facebook, email, texting, online chat rooms. And most of your employees are probably participating in online social media to some extent -- whether they are blogging about their personal and professional lives, uploading photos of themselves, or watching YouTube videos.

Most online activities and postings are harmless. But suppose an employee's posting is damaging to your organization, employees, or clients by disclosing sensitive information or by including comments that are defamatory, discriminatory, harassing, or considered to be workplace bullying. Or perhaps the content is simply offensive. In this Part, we examine the key risks associated with employee use of technology -- both during work and after hours -- as well as the risks employers face when they regulate and manage their employees' use of these electronic media.

A. The Risks of Employee Texting, Tweeting and Other Technology

During the work day, employees often spend time Facebooking their friends, Tweeting the latest updates to their followers, or just surfing the web. Though these activities may decrease productivity, they likely will not result in any additional harm to the employer. In more extreme cases, however, employees may harass or bully their co-workers, reveal confidential company information, endorse products or services without proper disclosure, or engage in criminal conduct. In such instances, employers face far greater risks, including the following:

- **Disclosure of sensitive company information:** Employees may inadvertently -- and sometimes intentionally -- reveal proprietary or confidential information on a blog, in an email, or on a social networking site.

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[29] *Id.*

- **Defamation of co-workers or clients:** Employers may face liability for defamation based on electronic communications disseminated by employees. For example, employees can create turmoil by posting rumors, gossip, or offensive statements regarding their co-workers and supervisors. Negative comments by management about a departing employee may also create liability.

- **Harassment, discrimination, and retaliation:** Social networking sites, email, and blogs provide employees with additional avenues for engaging in inappropriate conduct, especially during non-work hours. Employees may vent workplace frustrations by posting discriminatory statements, racial slurs, or sexual innuendo directed at co-workers, management, customers, or vendors.

- **Bullying**: A recent study revealed that 35 percent of employees have reported being the victim of workplace bullying.[30] Common forms of bullying include verbal abuse, conduct (i.e., threatening, intimidating behavior, etc.), abuse of authority, interference with work performance, and destruction of workplace relationships. And when one considers the prevalence and accessibility of technology, it only stands to reason that bullies may make social networks or other online forums their weapon of choice. Currently, there are no states with laws making workplace bullying illegal but such legislation has been considered in 17 states.[31] In the meantime, employees may be successful in bringing unlawful harassment claims under Title VII or the state equivalent.[32] Employers are wise to get ahead of this trend and address workplace bullies in a proactive manner. Current personnel policies should be examined to ensure that bullying is prohibited, there is a policy in place for employees to report such misconduct, and reports of bullying are taken seriously.

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[30] Results of the 2010 WBI U.S. Workplace Bullying Survey, Workplace Bullying Institute (Nov. 2, 2010), http://www.workplacebullying.org/research/WBI-NatlSurvey2010.html.

[31] California, Oregon, Washington, Nevada, Utah, Montana, Kansas, Oklahoma, Missouri, Wisconsin, Illinois, Vermont, New York, New Jersey, Connecticut, Massachusetts, and Hawaii have introduced healthy workplace legislation. Healthy Workplace Bill (Nov. 2, 2010), http://www.healthyworkplacebill.org.

[32] *See EEOC v. Nat'l Educ. Ass'n*, 422 F.3d 840 (9th Cir. 2005) (holding that the "reasonable woman" standard applies to workplace abusive conduct, even if there is no sexual content to the behavior.). For California employers, *see also Garcia v. Los Banos*, 2006 U.S. Dist. LEXIS 8683 (E.D. 2006) (holding the *EEOC v. Nat'l Educ. Ass'n* analysis would apply under California's Fair Employment and Housing Act).

- **Reporting requirements for child pornography:** Some states have mandatory reporting statutes that require information technology workers to report child pornography found on computers they are servicing.[33] In cases of child pornography or other illegal electronic conduct, employers must take particular care to preserve the evidence for legal authorities.

- **Federal Trade Commission (FTC) guidelines:** According to newly revised FTC Guides addressing the use of "endorsements and testimonials in advertising," employers may face liability when employees comment on their employer's services or products on the Internet without disclosing the employment relationship.[34] For example, if an employee Tweets that his employer's sushi rolls are the best around, he must do so in compliance with these FTC guidelines. Failure to do so puts him and the employer on the hook, as both can be liable if the comment is either false or unsubstantiated. So, if the sushi rolls are indeed the best around and there are studies or surveys to show it, there may be no risk of liability.

- **Unfair competition laws:** In a lawsuit recently filed in federal district court in Minneapolis, Minnesota,[35] TEKsystems, Inc., an IT services and staffing company, has alleged that three ex-employees (and one current employee) used LinkedIn to unfairly compete against it, and breached their non-competition and non-solicitation obligations, by contacting at least 20 of its contract employees. TEKsystems claims it can prove the breach based on evidence from one of the employees' LinkedIn account. It contends the employee had LinkedIn connections with 16 of its contract employees, and that she sent electronic messages inviting them to visit her in her new workplace. This is the first lawsuit to make headlines based on evidence from an employee's LinkedIn account, and is a real-life example of the

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[33] *See, e.g.,* Ark. Code § 5-27-604, 325 Ill. Comp. Stat. 5/4.5, Mich. Comp. Laws § 750.145c (9), Mo. Rev. Stat. § 568.110, N.C. Gen. Stat. § 66-67.4, Okla. Stat.tit. 21 § 1021.4, S.C. Code § 16-3-850, and S.D. Codified Laws § 22-22-24.18. In addition, the Appellate Division of the Superior Court of New Jersey has held "that an employer who is on notice that one of its employees is using a workplace computer to access pornography, possibly child pornography, has a duty to investigate the employee's activity, lest it result in harm to innocent third-parties." *Doe v. XYC Corp.*, 887 A. 2d 1156 (2005).

[34] FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 CFR § 255 (2009).

[35] *TEKsystems, Inc. v. Hammernick et al.,* No 0:10-cv-00819 (D. Minn.).

potential for harm to employers that can result from employees' use of social media.

B. Disciplining Employees for Misuse of Technology

There are myriad scenarios that may prompt an employer to discipline an employee for the misuse of technology. The most obvious situation is when the employee engages in illegal conduct while at work. However, what happens if the employee is engaging in unlawful conduct outside of work? Or if an employee engages in legal, on-duty behavior that the employer finds troublesome or annoying? Consider these recent examples:

- Two former employees of Houston's restaurant in Hackensack, New Jersey, filed a lawsuit in federal court after they were fired for bad-mouthing the restaurant on MySpace.[36] They set up a private MySpace forum specifically to vent about work, and emailed invitations to co-workers. A supervisor called a co-worker into his office, asked for the login information, received the information from the employee, then notified higher level supervisors, who logged in and viewed the comments. The restaurant alleged that the online postings violated company policies on professionalism and maintaining a positive attitude. The plaintiffs contended that the employer's unauthorized access to the forum violated the federal Stored Communications Act (18 U.S.C. § 2701 *et seq.*), as well as their right to privacy under New Jersey law. A key issue in the litigation was whether Houston's management properly obtained access to the site by obtaining the login details from a co-worker, or whether the employee who revealed the login information to management was coerced into doing so.[37] A jury subsequently found in the employees' favor, awarding them over $3,400 in compensatory damages and $13,600 in compensatory damages. At last check, the employees were also seeking attorney's fees of almost $125,000 under the Stored Communications Act.

- A former Delta Air Lines flight attendant filed a lawsuit for sex discrimination after she was fired for posting mildly suggestive photos

[36] *Pietrylo v. Hillstone Restaurant Group*, 2009 U.S. Dist. LEXIS 88702 (D.N.J. 2009) (unpublished).

[37] *See* Dionne Searcey, *Employers Watching Workers Online Spurs Privacy Debate*, Wall Street Journal, April 23, 2009, at A13.

of herself in her Delta uniform on her blog.[38] She claimed that Delta had not taken similar action against male employees who had engaged in similar conduct.

Before deciding to take any disciplinary measures against an employee based on the use -- or misuse -- of social media or technology, employers should consider whether there are legal constraints preventing or limiting such action. Generally, it is not illegal to look at an employee's public blog or YouTube video. But, as the Houston's restaurant dispute shows, accessing a private, password-protected site without permission could raise serious legal issues.

And, even if an employer legally learns about an employee's inappropriate or illegal online activities or conduct, there may be restrictions on what the employer can do with the information, as well as limitations on actions the employer can take against the employee. Laws that may apply include:

- **National Labor Relations Act (NLRA):** The NLRA affords employees (even those who are not unionized) the right to engage in "concerted activity," including the right to discuss the terms and conditions of employment affecting the employee *and* co-workers. In fact, the National Labor Relations Board (NLRB) recently lodged a complaint against American Medical Response of Connecticut Inc. alleging that the company violated the NLRA by terminating an employee who criticized her boss on Facebook. Thus, before disciplining an employee who, for example, has complained about the employer on Facebook, an employer should determine if the employee has engaged in protected concerted activity.

- **Off-duty statutory protections:** Some states, including California, Colorado, Connecticut, New York, and North Dakota, have enacted statutory protections for employees who engage in lawful off-duty conduct. For example, the California statute makes it illegal to demote, suspend, or discharge an employee for lawful conduct occurring during non-working hours away from the employer's premises.[39]

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[38] *See Simonetti v. Delta Airlines, Inc.*, No. 5-cv-2321 (N.D. Ga.) (stayed pending bankruptcy proceedings).

[39] CAL. LABOR CODE § 96(k). *See also*, N.Y. LABOR CODE § 201-d; N.D. CENT CODE § 14-02.4-01.

- **Whistleblower laws:** Many federal and state statutes contain protections for employees who "blow the whistle" on corporate wrongdoing.

- **Political activity laws:** Some states, including California, Missouri, Nevada and New York, have laws that prohibit employers from interfering with an employee's political activities.

- **Wage disclosure laws:** Some states have enacted laws prohibiting an employer from disciplining an employee for disclosing or discussing his or her wages.[40] Note, too, that taking adverse action in this context could also amount to a violation of the NLRA, depending on the circumstances.

- **Constitutional right to privacy:**[41] The right to privacy afforded by the U.S. Constitution does not apply to private employers. However, some state constitutions, like California's, have broader protections that do extend to private employers and employees. Privacy concerns are most likely to arise when the employee believes the communications are private and the employer gained unauthorized access to those communications (such as by pretending to be someone else).[42]

- **Free speech protections:** The federal First Amendment right to free speech does not apply in the private workplace, but some related state laws apply to private employers. For example, Connecticut law prohibits retaliating against employees for exercising their free speech rights,[43] and some state constitutions contain free speech protections, although many of these are limited to the public employment context.[44]

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40 *See, e.g.,* CAL. LABOR CODE § 232.

41 Employee privacy rights are discussed in detail in Section C, *infra*.

42 *See Moreno v. Hanford Sentinel, Inc.,* 172 Cal.App.4th 1125 (App. Ct. 2009) (Coalinga high school student who posted a negative article about her city and school on MySpace brought an invasion of privacy action against a newspaper and the high school principal, after the principal submitted the article to the newspaper and it was published. The court concluded that the defendants' demurrer to the invasion of privacy cause of action was properly sustained without leave to amend because the facts contained in the article were not private and the author publicized her opinions about Coalinga by posting the article online). *See also Konop v. Hawaiian Airlines, Inc.* 302 F.3d 868 (9th Cir. 2002).

43 CONN. GEN. STAT. § 31-51q.

44 *See Tucker v. Journal Register East*, No. 3:06CV00307 (D. Conn. Nov. 7, 2007).

- **Discrimination and Retaliation:** In most states and under federal law, it is illegal to discriminate on the basis of a protected classification, such as race, gender, disability, religion, marital status, and even genetic information.[45] Some states prohibit sexual orientation discrimination. **The bottom line** is that unless an employee's online activities are illegal,[46] or may be legal but are directly harmful to your business or a clear violation of company policy, taking adverse action against the employee poses a high degree of legal risk often with minimal benefit to the employer. Disciplining the employee also could subject the company to unwanted media scrutiny. Unfortunately, there is rarely a clear answer on the best course of action in this developing area of law, and employers would do well to proceed with caution before taking disciplinary action.

C. Monitoring Employees' Internet and Technology Use

Considering the significant potential liability and other risks employers face from employee Internet use, how far can employers go in monitoring their online communications? Further, as part of workplace investigations into harassment or misconduct, can an employer search an employee's computer or electronic communications? These are all questions facing employers today, and the answers to these questions are ever evolving.

Although the Fourth Amendment to the U.S. Constitution prohibits unreasonable searches and seizures by the government, it does not apply to private-sector employers. While private-sector employees have no federal constitutional right to privacy, employer conduct in monitoring employee Internet and technology use is limited by common law principles and federal and state privacy laws, including those discussed below:[47]

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[45] The U.S. Equal Employment Opportunity Commission has not yet issued final regulations regarding how the Genetic Information Nondiscrimination Act (GINA) will apply to social networking sites.

[46] Consider the example involving two Domino's Pizza employees in North Carolina, who filmed a "prank" video in the kitchen of the Domino's shop where they worked. The video showed the employees preparing sandwiches while one put cheese up his nose and mucus on the sandwiches. Then, they posted the vignette on YouTube. The workers claimed it was only a joke, but they lost their jobs and were facing felony food-tampering charges. *See* Stephanie Clifford, Video Prank at Domino's Taints Brand, N.Y. Times, April 16, 2009, at B1.

[47] Some of the laws just discussed - *e.g.* the California constitution - may apply to employer conduct in monitoring employee Internet and technology use.

- **Federal Wiretap Act and the Electronic Communications Privacy Act (ECPA):** The ECPA prohibits unauthorized and intentional "interception" of wire, oral, and electronic communications, as well as unauthorized "accessing" of electronically stored wire or electronic communications.[48] The Stored Communications Act, which is part of the ECPA, covers stored communications.[49] Courts have held that employers do not violate the ECPA by accessing stored emails on the company's *own* file server.[50] The point is that employers cannot hack into another server or access employees' private communications using improper means, such as that alleged in the Houston's case discussed above.

- **Invasion of privacy actions:** Most employees who have sued their employers for monitoring the use of electronic media have done so through invasion of privacy actions. In this circumstance, the most applicable invasion of privacy theory is "intrusion upon the plaintiff's seclusion or solitude."[51] Under this theory, the employee must prove: (1) an intentional intrusion, physical or otherwise; (2) upon the employee's solitude or seclusion or private affairs or concerns; (3) which would be highly offensive to a reasonable person. An employer may successfully defend itself against such a claim if it can prove that the employee did not have a reasonable expectation of privacy in the electronic communications. Courts are generally more inclined to rule in the employer's favor where the employee voluntarily uses an employer's network and/or computer and consented to be monitored or was advised of the employer's written electronic communications policy which expressly provides for employer monitoring.[52]

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48 18 U.S.C. §§ 2510-20, 2701-11.

49 18 U.S.C. § 2701, *et seq.*

50 See Fraser v. National Mutual Ins. Co., 352 F. 3d 107 (3d Cir. 2003).

51 RESTATEMENT (SECOND) OF TORTS § 652 (1965).

52 *See City of Ontario v. Quon*, 130 S. Ct. 2619 (2010) (holding, on narrow grounds, that audit of employee's text messages did not invade employee's right to privacy); *Thygeson v. U.S. Bancorp*, 2004 U.S. Dist. LEXIS 18863 (D.Or. Sept. 15, 2004) (holding that an employee had no reasonable expectation of privacy in the internet websites he accessed while using his work computer); *Smyth v. Pillsbury Corp*., 914 F. Supp. 97 (E.D. Pa. 1996) (holding that employee did not have a reasonable expectation of privacy in the contents of emails he sent of the company's email system). *But compare Stengart v. Loving Care Agency*, 990 A. 2d 650 (N.J. 2010) (holding emails between employee and her attorney are protected by attorney-client privilege).

D. Strategies for Regulating Electronic Communications

Employers should have clear, well-crafted policies regarding Internet and social media use and employee online communications, both inside *and* outside the workplace. Employees -- who may not realize they can expose their employers to risk by posting information on blogs and private social networking sites during work or non-work hours -- should be informed of potential risks and made aware of the employer's expectations. Although the realities of the modern workplace make a ban on private use of the Internet or email unrealistic for many companies, a comprehensive policy regarding use of these electronic media is invaluable. While the precise terms of the policies will depend on the employer's needs, here are some best practices associated with drafting and implementing Internet and email policies, and avoiding legal disputes:

- Provide employees with written notice that they should not expect privacy when using company-owned computers, communication systems, or other electronic equipment (Blackberries, pagers, etc.), and that computer use will be monitored.

- Provide employees with notice that their company-owned computers and devices, email, and voicemail, are subject to search.

- Adopt and distribute an Acceptable Usage Policy, defining acceptable personal usage, if any, and the consequences of noncompliance.

- Put employees on notice that electronic communications with the following kinds of content will not be tolerated and could result in discipline: (1) proprietary and confidential company information; (2) discriminatory statements or statements that would violate the company's policies against harassment and workplace bullying; and (3) defamatory statements.

- Obtain a signed acknowledgement from each employee of receipt of the policy.

- Conduct periodic reviews of policies to ensure that they adequately address company privacy and confidentiality concerns, the developing law, and all forms of company technology that are in use.

- Counsel managers and supervisors to avoid statements that might weaken or undermine such policies or create privacy expectations

where they do not exist. Make sure that all policies include language stating that the policies can only be modified in writing by a designated representative, and only if the writing clearly states that it is a modification.

- Implement effective and practical security procedures to safeguard employee email accounts, access to confidential and private data, and to manage employee remote access to employer systems.

- Do not attempt to gain unauthorized access to password-protected sites or other areas that are intended to be private. Beware of the federal Stored Communications Act and state privacy rights.

- Consult counsel before accessing employee emails sent from personal accounts.

- Blogging and social networking policies demand particular care:

    - Consider a policy that prohibits employees from posting anything about the company, its products, or services, unless they provide a clear disclaimer stating their affiliation with the company.

    - Consider prohibiting employees from uploading work-related contacts or customer or employee lists to their LinkedIn or similar account.

    - Consider two blogging policies: One that applies only to employees engaged in blogging as part of their job duties, and another applicable to all employees regarding personal blogging.

        - For job-related blogging: The policy should state that job-related blogging should be done for specific job-related purposes, that posts must not reveal private, confidential, or trade secret information, and that posts must not use harassing, bullying, discriminatory, defamatory or offensive language. Also, employers should review internal protocols for approving such blog posts before the posts are made public.

        - For personal blogging: Consider prohibiting employees from visiting social networking sites while at work, and have a policy regarding employee endorsements of the company, as well as its products or services.

The need for such policies emphasizes just how prominently online communications fit into our daily lives, both within and beyond the workplace. The Internet affords employees, employers and lawyers a twenty-four-hour pipeline for promotion and commentary. Perhaps now more than ever before, lawyers must heed the hidden liabilities that surround their statements to the press.

III. Dealing with the Media

A. Background

Let's face it: the press loves a juicy story. Facing constant pressure to beat their competitors in this 24-hour news cycle, reporters are constantly searching for the next big scoop. They troll filings in state and federal courts, sit in courtrooms, or clamor for that choice sound bite at the courthouse steps. So long as it piques the public interest, a lawsuit can give rise to a story that is splashed across the front page of *The New York Times*, posted on a legal news web site devoted to legal news,[53] or picked apart by commentators on the news networks.

Stories driven by lawsuits can be compelling for any number of reasons.[54] The lawsuit on which a story is based may contain tawdry details about a high-profile divorce. It may chronicle an alleged course of workplace misconduct at the headquarters of a well-known employer. Or it may involve a multi-million dollar dispute between a professional athlete and his team.

But if the professional athlete, the well-known employer, or the spurned spouse happens to be your client, the media's discovery of the case can either be a blessing or a curse. It all depends on how you, the learned lawyer, deal with it.

B. Ethical Considerations

One of the lawyer's paramount concerns in dealing with the media is to stay on the right side of the ethics rules. Because they differ among jurisdictions, we'll rely on the ABA's Model Rules of Professional Conduct.

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[53] *See*, *e.g.*, The Wall Street Journal Law Blog, *available at* http://blogs.wsj.com/law.

[54] See, e.g., Dareh Gregorian, Manhattan judge says Prince of Brunei lawsuit 'is not about sex'; jury will not see life-size sex statues, N.Y. Post, November 9, 2010.

The first ABA Model Rule potentially implicated by a case that generates significant media attention is 1.6(a):

> A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

In other words, although your instinct may be to respond to a reporter's telephone query with some variant of "my client categorically denies that she _____," you must first obtain authorization from your client to speak to the press. Written consent is definitely preferable; specific authorization to speak to the media on the client's behalf can even be embodied in your standard form of retainer (or added to the retainer if you anticipate at the outset that the case or client will attract media interest). Moreover, an answer to a seemingly innocuous question could entail a disclosure of information sealed by court order or private agreement, *i.e.*, "Ms. Lawyer, my sources tell me that three years ago your client was fired by Company X. Is that something you can confirm or deny?" Avoid this trap.

Aware of the potential for ethics violations caused by a media maelstrom, the ABA promulgated Model Rule 3.6, "Trial Publicity." It provides as follows:

> (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
>
> (b) Notwithstanding paragraph (a), a lawyer may state:
>
> > (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial

> effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.
>
> (d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

However, not all problems that arise from counsel's ill-advised comments to the media involve a violation of ethics or disciplinary rules. Consider the following case.

C. Ricciardi v. Weber[55]

This decision from New Jersey's intermediate appellate court confronted the issue of whether a lawyer's statements about a case during a press conference can constitute defamation or slander. In a unanimous ruling, the panel held that it could.[56]

The facts are simple. An employee (Brown) wanted to sue his employer and his supervisor (Ricciardi) for sexual harassment under Title VII of the Civil Rights Act of 1964[57] and the New Jersey Law Against Discrimination (LAD).[58] Brown's wife worked for an attorney (Weber), who ultimately agreed to represent Brown in the discrimination lawsuit.[59]

Days before the suit was filed, the United States Supreme Court decided *Oncale v. Sundowner Offshore Services, Inc.*,[60] which dealt with male-on-male sexual harassment in the workplace.[61] As a result of *Oncale*, "Brown's suit became instant news when it was filed, generating

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55 350 N.J. Super. 453 (App. Div. 2002).
56 *Ricciardi*, 350 N.J. Super. at 460.
57 42 U.S.C. § 2000e.
58 N.J.S.A. 10:5-1-42.
59 *Ricciardi*, 350 N.J. Super. at 462.
60 523 U.S. 75 (1998).
61 *Ricciardi*, 350 N.J. Super. at 462.

numerous newspaper articles and television reports. Weber's office fielded the calls from the media."[62]

According to the Court, Weber told reporters that:

> [t]he *Oncale* case 'made a good case better'; Ricciardi was 'constantly smearing [Brown's] sexuality' and 'constantly taunting [Brown] about sex'; Brown left the job because he could not stand the comments anymore; the unemployment compensation board determined that Brown left for good cause; Brown had asked Ricciardi several times to stop, but to no avail; Brown was 'constantly harassed and berated, and it was all of a sexual nature'; and Brown was asking for one million dollars in compensatory damages plus punitive damages. The articles also contained statements that the suit alleged that the employer secretly hung mirrors over the toilet bowls at work. Weber also gave an interview to ABC News, in which he said that Ricciardi asked Brown about his daughter's sex life.[63]

The problem with Weber's assertions were that many of them were found to be untrue, and others did not appear in the original complaint. For example, although Brown told Weber that he had found a camera in the men's room ceiling tile at work, that allegation was not included in the complaint.[64] Also, Brown testified that Weber's comments to ABC News about Brown's daughter's sex life were inaccurate.[65]

Brown's lawsuit against Ricciardi was settled before trial, but that did not end the matter. In fact, Ricciardi turned around and sued Weber for defamation and slander.[66] He alleged that Weber's comments to the press about Brown's lawsuit damaged his reputation and tarnished his good

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62 *Id.*
63 *Id.* at 462-63.
64 *Ricciardi*, 350 N.J. Super. at 463.
65 *Id.* at 464.
66 *Ricciardi*, 350 N.J. Super. at 464-65.

name.[67] The trial court granted Weber's motion for summary judgment, but the appellate court reversed.[68]

The Court held that genuine issues of material fact warranted the denial of Weber's motion for summary judgment. In reaching this determination, the Court focused in part on the fact that Weber's statements to the press about Ricciardi's alleged inquiry about Brown's daughter's sex life was not grounded in the complaint.[69] In other words, had this allegation of wrongdoing been presented in the complaint, a qualified privilege might have protected Weber's statements to the press. The lesson here is that the careful lawyer who chooses to interact with the press can potentially avoid adverse consequences by limiting her discussion of the case to facts or allegations pled in the complaint.

But that lesson should not be treated as a license to abuse the privilege that may attach in situations where an attorney merely discusses with the press what he or she has inserted in the complaint. The Court observed that Weber admitted that he filed complaints without investigating their underlying allegations, especially where he had no reason to believe Brown was lying. He also admitted that he did this in order to promote swift settlement negotiations with the insurance carrier, and that he encouraged Brown to give an interview to the press because it would help his case.[70]

While in some circumstances there may be limited truth to Weber's belief – that statements to the press pressure the litigants and the insurance carrier to settle – it is manifestly clear that the consequences of sloppy lawyering and ill-advised comments to the press must factor into any decision involving the media.

D. Best Practices

We present, in no particular order, a list of five best practices for dealing with the media:

1. Include in your retainer agreement a provision addressing press inquiries. Make sure your strategy is agreeable to the client, i.e., the firm has a policy of not commenting to the

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67 *Ricciardi*, 350 N.J. Super. at 464-65.
68 *Id.* at 460.
69 *Ricciardi*, 350 N.J. Super. at 472.
70 *Ricciardi*, 350 N.J. Super. at 472.

press, the firm only responds to press inquiries after consultation with the client, the firm frequently holds press conferences in its conference.

2. If you are contacted by a reporter, ask him or her to submit a list of written questions. This will give you time to strategize with your client and to evaluate the risks of responding.

3. Don't be afraid to decline comment. The consequences of an ill-advised comment to the press (ethical troubles, defamation suits, angry client) are much worse than an inference of wrongdoing that may or may not stem from your decision to stay silent in the face of a salacious allegation.

4. If you are uncomfortable with a "no comment," tell the reporter that you will respond to the allegations in court or that your papers (answer, motion) speak for themselves.

5. If you engage the press, avoid taking a position that could come back to haunt you during the litigation or trial, e.g., ("My client categorically denies that he was in the park at 10 p.m."). A court could take judicial notice of the statement, and/or your adversary could use it to impeach your client ("Mr. Smith, you testified at deposition that you were in the park at 10 p.m. – isn't it true that your lawyer told The Daily Planet that you were not in the park at 10 p.m.?").

Dangers do not confine themselves to technology and the media, however. Liabilities may lurk within the law itself, as we explore in Part IV.

IV. Avoiding Fair Labor Standards Act Collective Actions

A. Background

The federal Fair Labor Standards Act (FLSA) establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in federal, state, and local governments.[71] For employers, an action brought under the FLSA can be a formidable enemy, especially when it takes the form of an FLSA collective action. Indeed, in November 2010, fast-food giant McDonalds

[71] *See* http://www.dol.gov/whd/flsa/index.htm.

Corporation settled an FLSA collective action for $2.4 million. The action was brought by a class of assistant managers who accused the company of wrongly exempting them from FLSA protections.

An FLSA collective action permits the aggregation of hundreds or thousands of claims. The only requirement is that the employees be "similarly situated."[72] Particularly troubling for employers is the fact that courts apply a "less stringent" standard for the initial "certification" of an FLSA collective action than the more rigorous standard used in Rule 23 class actions.[73] As demonstrated below, employee misclassification is the driving force behind an FLSA collective action.

B. *Ravenell v. Avis Budget Car Rental, LLC*[74]

This case involves a group of Avis employees who "claim that Avis erroneously classified them as managerial employees to avoid paying for overtime work[.]"[75] It didn't take much for this lawsuit to morph into an FLSA collective action. The Court observed that "[a]fter commencement of the lawsuit, seven current and former AVIS shift managers … have filed consents to become parties to this action as similarly situated individuals."[76]

Following limited discovery, the plaintiffs moved for conditional certification as a collective action.[77] In discussing the legal standards for certification, the Court cited precedent from district courts within the Second Circuit for the proposition that a group of plaintiffs can prevail on a motion for certification "by making a modest factual showing sufficient to demonstrate that they and potential plaintiffs together were victims of a common policy or plan that violated the [FLSA]."[78] According to the Court's opinion, the "modest factual showing" can be established with nothing more than "substantial allegations" of wrongdoing.[79]

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72 *See* 29 U.S.C. §216(b).

73 *See Grayson v. K-Mart Corp.*, 79 F.3d 1086, 1096 (11th Cir. 1996), *cert. denied*, 519 U.S. 987 (1996).

74 No. 08-CV-2113(SLT)(ALC), 2010 U.S. Dist LEXIS 72563 (E.D.N.Y. July 19, 2010).

75 *Id.* at *3.

76 *Id.*

77 *Id.*

78 *Id.* at *4 (alteration in original) (citations omitted).

79 *Id.* at *4-5 (citations omitted).

As a practical matter, this means that in some circumstances a crafty plaintiff's lawyer with strong writing skills can tip the scales in her favor at the outset of the litigation even though the collective action may ultimately turn out to be meritless. However, it should be noted that, in this case, the plaintiffs made their modest factual showing "through their allegations in the [c]omplaint, their deposition testimony, and the deposition testimony of the opt-ins, that there was a common policy of wrongfully depriving shift managers of overtime, which is enough to warrant conditional certification at this juncture."[80]

C. Best Practices to Avoid an FLSA Collective Action

Because it does not take much – at least from an evidentiary standpoint – to create an FLSA collective action, employers need to be proactive in learning how to avoid them. To that end, we offer these five best practices:

1. Familiarize yourself with the FLSA and how it applies. The U.S. Department of Labor provides guidance and other helpful tools on its website, www.dol.gov/whd/flsa/index.htm.

2. Stay abreast of Department of Labor opinion letters and administrator interpretations of the FLSA.

3. Understand the importance of employee job classification. Nonexempt workers are entitled to a minimum wage of $7.25 per hour and overtime payment at a rate of not less than one and one-half times their regular rates of pay after 40 hours of work in a workweek.

4. Promulgate policies and guidelines for your company or organization that demonstrates your commitment to complying with the FLSA.

5. Become conversant with terms used in the FLSA. A "workweek", for example, is a period of 168 hours during 7 consecutive 24-hour periods.

These measures will minimize the risks companies face after they have selected candidates for employment. But what about the hidden risks

[80] *Ravenell*, 2010 U.S. Dist. LEXIS at *12.

employers must contend with during the selection process itself? In Part V, we address another hot topic in employment law this year concerning the local backlash against employers who hire illegal immigrants.

V. Local Response to the Hiring of Illegal Aliens

A. Background

Local municipalities around the country are reacting to tensions created by mass unemployment and increased crime by implementing measures to restrict employers and landlords from hiring and renting to illegal aliens. Towns are willing to spend massive tax dollars preventing what they perceive as an immigration crisis. The National Employment Law Project reports that Farmers Branch, Texas, a population of 8,000 and the first city in the nation to prohibit landlords from renting to illegal immigrants,[81] "has spent $3.2 million in legal fees defending itself since September 2006 in unsuccessful litigation purporting to prohibit landlords from renting to unauthorized immigrants. The ordinance was permanently enjoined in March 2010."[82]

B. Arizona

Perhaps most controversial is the passage of Arizona's immigration laws. On June 28, 2010, the United States Supreme Court announced it would hear arguments by business, civil rights, and immigration groups against the "The Legal Arizona Workers Act," adopted in 2007.[83] Also called the "Employers Sanctions Law," the Act penalizes employers who knowingly or intentionally hire illegal aliens in Arizona by suspending or revoking their licenses to do business there, and requires employers to check the work-authorization status of all new employees through an "E-Verify" system offered by the Department of Homeland Security.[84]

Going one step further, in April 2010, Arizona Governor Jan Brewer signed into law the "Support Our Law Enforcement and Safe Neighborhoods Act" (Senate Bill 1070, often referred to simply as

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[81] See Villas at Parkside Partners v. City of Farmers Branch, 496 F.Supp.2d 757 (N.D. Tex. 2007).

[82] http://www.nelp.org/page/-/Justice/2010/CostlyInEveryWay2010.pdf?nocdn=1.

[83] "Supreme Court to hear Arizona immigration law challenge," June 28, 2010, http://www.reuters.com/article/idUSTRE65R3CQ20100628.

[84] *See generally* http://www.azag.gov/LegalAZWorkersAct/. The full text of House Bill 2745 is available at www.azag.gov/LegalAZWorkersAct/hb2745h.pdf.

SB1070).[85] This law instructs Arizona state and local law enforcement agencies to ask individuals they encounter for proof of legal U.S. residency and makes it a misdemeanor crime to be without proper immigration documentation.[86] The law also implicates employers who shelter, hire, and transport illegal aliens by criminalizing the act of hiring or being hired from a vehicle which "blocks or impedes the normal movement of traffic" as a misdemeanor or felony, depending on the number of illegal aliens involved.[87]

The law initially allowed police to ask anyone for proof of legal U.S. residency, "when practicable,"[88] based solely on a police officer's reasonable suspicion that the person might be in the country illegally.[89] The measure proved so controversial, however, that Arizona lawmakers tempered it seven days after its initial signing by the adoption of Arizona House Bill 2162, making it so that officers could only check a person's immigration status if that person had been stopped or arrested for a different reason.[90] The amendment also prevented law enforcement from investigating complaints based on "race, color or national origin."[91]

Critics include U.S. Attorney General Eric Holder, who expressed concern that the law would create "a situation where people are racially profiled, and that could lead to a wedge drawn between certain communities and law enforcement, which leads to the problem of people in those communities not willing to interact with people in law enforcement, not willing to share information, not willing to be witnesses where law enforcement needs them."[92] On July 28, 2010, a district court judge granted the Department of Justice's request for a preliminary injunction the day before the law was to take effect, blocking its most controversial provisions.[93] Attorneys for Governor Brewer appealed the decision, and

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85 The full text of SB1070 is available at www.azleg.gov/legtext/49leg/2r/bills/sb1070s.pdf.

86 *Id.*

87 *Id.*

88 *See* SB1070, Art. 8(B).

89 *Id.*

90 *Id.*

91 *See* House Bill 2162 at Section 3, 11-1051(B), *available at* http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/49leg/2r/bills/hb2162c.htm.

92 "Holder: Feds may sue over Arizona immigration law," May 9, 2010, http://articles.cnn.com/2010-05-09/politics/holder.arizona.immigration_1_immigration-law-illegal-immigrants-immigration-reform?_s=PM:POLITICS.

93 "Legal Battle Looms Over Arizona Immigration Law," July 28, 2010, http://www.cnn.com/2010/US/07/28/arizona.immigration.law/index.html?hpt=T2.

the Ninth Circuit Court of Appeals began hearing oral arguments on November 1, 2010.[94]

C. Pennsylvania

Drastic local measures such as those in Arizona are not confined to the border states. In 2006, officials in the city of Hazleton in northeastern Pennsylvania "took independent action to regulate the local effects of unlawful immigration" by enacting local ordinances that attempted to regulate employment and rental housing to illegal aliens of Hispanic origin.[95] The Third Circuit observed, "Hazleton's mayor, as well as other local officials, subsequently concluded that aliens lacking lawful status were to blame for certain social problems in the City, (reference omitted), and that the federal government could not be relied upon to prevent such aliens from moving into the City, or to remove them."[96]

The ordinances authorized "public monitoring, prosecution, and sanctions," and permitted the City to suspend the license of any business that failed to terminate an employee within three days of the City discovering the worker lacked authorization to work in the United States.[97] On September 9, 2010, the Third Circuit upheld a permanent injunction, ruling that federal law pre-empted the ordinances.[98] The Court cited concerns that the local employment restrictions would lead to discriminatory hiring practices, noting:

> By imposing additional sanctions on employers who hire unauthorized aliens, while not penalizing those who discriminate, Hazleton has elected to place all of its weight on one side of the regulatory scale. This creates the exact situation that Congress feared: a system under which employers might quite rationally choose to err on the side of discriminating

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[94] Jennifer Medina, *Federal Appeals Court Weighs Arizona Law on Immigrants*, N.Y. Times, November 2, 2010, at A16.

[95] *Lozano v. City of Hazleton*, No. 07-3531, *supra*, --- F.3d ---- at *1.

[96] *Id*. *See also Lozano v. City of Hazleton*, 496 F.Supp.2d 477, 522 n.44 (M.D. Pa. 2007).

[97] *Id.* at 2.

[98] *Id.* at 40. The city plans to appeal to the United States Supreme Court. Julia Preston, "Court Rejects a City's Efforts to Restrict Immigrants," N.Y. Times, September 10, 2010, at A12.

against job applicants they perceive to be foreign.[99]

On November 5, 2010, a three-judge appeals panel upheld the lower's courts decision that Hazleton's insurance provider does not have to pay the plaintiffs' legal costs associated with their successful challenge to the constitutionality of the city's immigration statute.[100]

D. Implications for the Future

These measures reflect local frustrations about perceived inaction by the federal government and fuel the greater debate of whether controlling immigration is a federal responsibility.[101] On a broader level, these legislative efforts mirror the trends in employment litigation this year, demonstrating heightened responses to epidemic unemployment which create new avenues of employer liability yet to be fully clarified by the courts. At least for now, the full extent of the danger remains hidden. The obvious goal is to prevent litigation by your employees. Part VI discusses proactive measures available to companies to discourage these suits.

VI. Preventing Your Company From Being Sued

A. Background

One of the main issues that all companies have to deal with on a day-to-day basis is employee relations. One of the most effective ways to prevent problems with staff and employers is to maintain updated and properly drafted employment related documents. This begins with the offer letter, if appropriate, to be provided to prospective hires and includes the company's policies and procedures handbook. Another factor to consider is whether the employer should have an arbitration agreement to resolve employee disputes. It is clear that if a company invests the appropriate amount of time and resource in developing its employment

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99 *Id.* at 39.

100 "Panel: Hazleton insurer won't pay for plaintiffs," November 7, 2010, http://thetimes-tribune.com/news/panel-hazleton-insurer-won-t-pay-for-plaintiffs-1.1060627.

101 For more discussion about the expanding movement by states to combat employment of illegal immigrants, __*see* http://topics.nytimes.com/top/reference/timestopics/subjects/i/immigration-and-emigration/arizona-immigration-law-sb-1070/index.html?inline=nyt-classifier.

related documents, a great deal of management strife and potential legal liability can be avoided.

B. Employee Handbooks

Every company, no matter how large or small, should have a written employee handbook. Although there is no need to be complex, it is an absolute necessity to ensure that the company is protected. In addition, an employee handbook should educate your employees as to the benefits of working for the company and articulate both the employee's and the employer's mutual expectations.

Every employee handbook should also contain an "employment-at-will" disclaimer. In most cases, an appropriate disclaimer is a clear and unambiguous statement in the handbook that the company's policy statements and personnel practices are not intended to form express or implied contracts regarding the duration of terms and conditions of employment and are not promises that the policies will be applied in every case.

Equally important to an "employment-at-will" disclaimer is an equal employment opportunity statement/anti-discrimination policy. This policy should state the company provides equal employment opportunities to all employees and applicants without regard to race, creed, color, sex, national origin, etc. as federal and state law provide.

Some businesses or companies believe it beneficial to require employees to use arbitration as a means of dispute resolution. Inserting an arbitration provision in an employee handbook can be an effective way to keep discrimination claims out of the courts. However, a recent case from the United States Court of Appeals for the Third Circuit teaches that the mere promulgation or existence of a company-wide arbitration policy is not enough to make it binding on employees – they have to know about it.

C. *Kirleis v. Dickie, McCamey & Chilcote, P.C.*[102]

This case came to the Third Circuit after the district court denied the employer's motion to compel arbitration. The employee, an attorney and a partner in the defendant law firm, filed two complaints in the district court alleging sex discrimination, retaliation, and hostile work environment in

[102] 560 F.3d 156 (3d Cir. 2009).

violation of federal and state law.[103] The defendant moved to compel arbitration, "citing a mandatory arbitration provision in its bylaws."[104] The operative bylaw was Section 9.01:

> (a) General Rule: Any dispute arising under these By-Laws including disputes related to the right to indemnification, contribution or advancement of expenses as provided under these By-Laws, shall be decided … in accordance with the commercial arbitration rules of the American Arbitration Association, before a panel of three arbitrators, one of whom shall be selected by the [law firm], the second of whom shall be selected by the shareholder, director, officer, or indemnified representative and the third of whom shall be selected by the other two arbitrators.[105]

The employee did not dispute the existence of the mandatory arbitration provision or claim that it was ambiguous. Rather, she asserted that she had never been provided with a copy of the bylaws until the employer annexed it to its motion to compel arbitration.[106] This was dispositive. The Court held simply that "[b]ecause the bylaws were not distributed to [the employee], she could not have agreed to arbitrate her claims."[107]

It is thus absolutely critical that the handbook contain an acknowledgement provision that each employee must sign. Establishing with documentary proof that an employee read and understood the terms of an agreement to arbitrate – or an anti-discrimination policy or complaint procedure – contained in a handbook or promulgated elsewhere will avoid problems like the one encountered in *Kirleis*.

D. Best Practices

The following five best practices are useful tools to avoid your company from getting sued:

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103 *Kirleis*, 560 F.3d at 158-59.
104 *Id.* at 159.
105 *Id.*
106 *Kirleis*, 560 F.3d at 159.
107 *Kirleis*, 560 F.3d at 161.

1. Create a comprehensive employee handbook that: (1) makes clear that the employment relationship is “at-will”; (2) articulates the anti-discrimination policy; and (3) sets forth a an easy-to-understand complaint procedure.

2. Constantly revise the handbook to make sure it is current with developments and trends in the law.

3. Make sure that your employees have read the handbook and familiarized themselves with its provisions. Require each employee to affirm in writing that they’ve read the handbook and agree to be bound by its terms.

4. Evaluate internally whether it’s advantageous or cost-effective to require arbitration as a means of dispute resolution. Private arbitration fees can eclipse the cost of litigation.

5. Make the handbook the sole source of policies and procedures to avoid ambiguity or conflicting policies.

VII. Conclusion

We witness advances in the law every day. The employment litigation landscape continues to evolve, creating both new opportunities and new challenges for employers. Taking advantage of these opportunities while anticipating and adapting proactively to the challenges will serve employers and attorneys well in this brave new world.

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FDCC Winter Meeting
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Indian Wells, California
February 26 – March 5, 2011

MEDICAL PRODUCT ADVERTISING IN THE SOCIAL MEDIA AGE: REVOLUTIONARY ADVERTISING TECHNOLOGY AND THE FDA

Presented by
Drug, Device and Biotechnology Section

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MEDICAL PRODUCT ADVERTISING IN THE SOCIAL MEDIA AGE: REVOLUTIONARY ADVERTISING TECHNOLOGY AND THE FDA

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Twitter.

Facebook.

Social media.

Twitter did not exist before March, 2006. Facebook was founded in February 2006 – the grand old dame of social media. Social media is a term that in recent years has come to define an interactive social network of friend and connections. Facebook has over 500 million active users, half of whom log on every day.[1] As of the end of 2009, Twitter had some 75 million users, and was adding 6.2 million users a month.[2] Unlike Facebook‟s active membership, 80% of Twitter‟s users (including M. Shalhoub, one of this article‟s authors) have less than 10 „tweets‟.[3]

Traditional advertising in the medical products business evolved in the past two decades from text advertisements in staid medical journals, the Physician‟s Desk Reference and booths and presentations at physicians‟ meetings large and small all across the country. The medical products industry then embraced with an almost religious fervor direct to consumer advertising in newspapers, magazines and television. The Food and Drug Administration ("FDA") monitored and regulated this then new and burgeoning form of advertising to try to ensure that full and complete information was provided to patients, including what the product was intended for, and its risks and complications.

The development of the internet provided another media for medical products advertising. Though interactive, internet advertising is largely static advertising that is "layered" with clicks in links providing more and

[1] http://www.facebook.com/press/info.php?statistics.
[2] [2] http://themetricsystem.rjmetrics.com/2010/01/26/new-data-on-twitters-users-and-engagement.
[3] http://themetricsystem.rjmetrics.com/2010/01/26/new-data-on-twitters-users-and-engagement.

more information. Internet advertising permitted more information to be provided to patients than could ever be provided in a 30 or 60 second television commercial or a one or two page newspaper or television advertisement. Still, the FDA took notice and in 2009 provided its views of what advertising would be considered to be appropriate.

Social media communications are, by definition, not expansive spaces like traditional internet advertising. Twitter permits 140 characters. Facebook ads are limited to 25 characters for the title and 135 characters for the text.[4] Everyone has seen and knows the approximate size of ads in Google and of the results of "hits" on a Google search. There is not much available real estate in those locations for the sort of information that can be provided, even in a 30 second television commercial.

Since 1906 the FDA"s control over medical product labels has been one of its most powerful tools for attempting to protect the public"s health.[5] To encourage appropriate use of prescription drugs and devices, the FDA has sought to ensure that promotional statements neither overstate the benefits or understate the risks of any medical product.

As communications media have evolved, and in particular as social media has revolutionized business advertising, manufacturers have tended to wait for the FDA to establish regulations concerning marketing practices before devoting substantial resources to a new medium, since noncompliance may lead criminal and/or civil penalties. Direct-to-consumer advertising in traditional print media proceeded at a snail"s pace until the FDA issued a guidance document in 1985 establishing standards for providing a "brief summary" of risks.[6] Prescription-drug advertising in broadcast media was also minimal until the FDA revised the definition of "adequate" risk information in 1997, and again in 1999, to permit broadcast media to include references to a toll-free number or web site where consumers could obtain more detailed information concerning a product"s adverse effects.

In recent years, the marketing of pharmaceutical products has been forever changed by not only the advent of direct-to-consumer advertising, which exploded after the aforementioned 1997 and 1999 FDA revisions

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[4] http://www.facebook.com/help/?faq=14709&tq.
[5] http://healthpolicyandreform.nejm.org/?p=13254.
[6] Jeremy A. Greene, M.D., Ph.D., Aaron S. Kesselheim, M.D., J.D., M.P.H., *Pharmaceutical Marketing and the New Social Media,* N Engl J Med 2010; 363:2087-2089.

allowing abbreviated risk information, but also by the proliferation of social networking and other online media tools such as Twitter, Facebook, message boards and blog posts. Businesses never before had such a direct link to potential consumers of its products. The potential ability for medical products companies to provide information to their patients is unprecedented. Patients have never before had the ability very inexpensively to conduct research for themselves, and to participate in care they are receiving together with their physicians.

Like much of the rest of the world, the FDA views the internet as increasingly interchangeable with print and broadcast media. Unlike print or broadcast media, information provided on the web will show up in web search results for years, if not decades, and be seen by tens of millions. So far, the FDA has been of the opinion that manufacturer communication on the internet is the equivalent of a traditional mass media advertisement.[7]

The FDA"s current advertising and promotion regulations do not even begin to address the complexity and multitude of issues implicated by these new forms of communication.[8]

I. FDA PUBLIC HEARINGS ON INTERNET AND SOCIAL MEDIA TOOLS

In November 2009, after numerous industry pleas, the FDA held a two day public hearing concerning the promotion of FDA regulated medical products using the internet and social media tools.[9] Over 60 speakers from both the public and private sector spoke at length about the use of the internet and social media in the medical products industry.

The FDA has yet to release any guidance or regulations as a result of the public hearings, although they are expected by the end of 2010.[10] However, the direction they are headed is clear. Drug manufacturers that

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[7] http://www.fda.gov/downloads/AboutFDA/CentersOffices/CDER/UCM193422.pdf.
[8] See generally, www.fda.gov, for a discussion of traditional broadcast media guidance see http://www.fda.gov/RegulatoryInformation/Guidances/ucm125039.htm.
[9] For a summary of the speakers and materials submitted to the FDA see the following link, and links contained therein: http://www.fda.gov/aboutfda/centersoffices/cder/ucm184250.htm.
[10] The FDA is expected to provide its guidance in the near future. http://www.pharma-marketer.com/first-internet-guidelines-from-fda-likely-to-address-space-limitation-issue/. If these have been issued by the time of the Indian Wells meeting, we will discuss them, and update this paper.

utilize social media platforms must, at a very minimum, meet existing standards concerning risk information. More importantly the FDA indicated that there may be a higher standard on internet advertisements since unlike traditional media, space is essentially unlimited.[11]

While the medical products industry may ultimately be held to a higher standard for information they actively disseminate, the FDA is unlikely to hold companies responsible for information created or hosted by true third parties.[12] For example, Wikipedia, an online encyclopedia, allows users to create a webpage on almost any topic. Once created, the information on that topic is continuously subjected to changes by its online community. There are currently a multitude of Wikipedia pages dedicated to medical products.[13] Since the user can, at any time, change the content on those pages, the FDA is unlikely to hold manufacturers responsible for its content.

II. WILL THE FDA ADOPT THE FTC"S STANCE ON SOCIAL MEDIA?

In October 2009, the Federal Trade Commission (FTC), the governmental agency responsible for protecting consumers from fraud or deceptive business practices, revised its guidelines[14] concerning the use of endorsements and testimonials in advertising to include online social media. Specifically covered in the new rules is the use of social media, such as Twitter, by celebrities to endorse a product. Such promotions are now banned unless the commercial relationship is disclosed. So, too, are celebrity mentions of products in other media, such as talk shows.

The newly enacted FTC guidelines are, in effect, the first rules imposed on a general public that no longer solely relies on access to TV, print or radio to publish opinions or create a personal media channel. The public hearings leading up to the FTC revisions shed light on the expected FDA regulations concerning the internet and social media.

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[11] *See Generally*, *U.S. Department of Health and Human Services Food and Drug Administration, Promotion of FDA-Regulated Medical Products Using the Internet and Social Media Tools* at http://www.fda.gov/downloads/AboutFDA/CentersOffices/CDER/UCM193463.pdfId.

[12] *Id.*

[13] http://en.wikipedia.org/wiki/Lipitor; http://en.wikipedia.org/wiki/Lorazepam; http://en.wikipedia.org/wiki/Methadone.

[14] http://www/ftc.gov/opa/2009/10/endortest.shtm.

Legal commentators about the FTC revisions opined during the public hearings that the future growth of advertising in the social media context would be adversely affected if advertisers were forced to adhere to the guidelines.[15] Some commentators asked the FTC to defer to industry self regulation.[16] There were also concerns raised over word of mouth communications among consumers and if such communications could be effectively policed.[17] Ultimately the FTC chose to implement a set of revisions which put the onus of its online specific guidelines squarely on the shoulders of advertisers.

Additionally, in spite of the fact that advertisers may not be able to control every comment posted to third-party sites, the FTC may still hold advertisers liable for misleading claims, particularly if they did not exercise best efforts to prevent the dissemination of misleading information.[18] The FDA is likely to follow suit when finally promulgating its regulations concerning social media, since unlike almost all other forms of advertising, medical products have been strictly regulated in traditional media and that trend will certainly continue in the digital frontier.

III. DIGITAL MEDIA SERVICES AND THE GATHERING OF HEALTH INFORMATION

Not only must the medical products industry be cautious of direct to consumer advertising on the internet and in social media, they must also be aware of how their consumers‟ health information is gathered for advertising purposes.

In November 2010, four consumer and privacy watchdog groups asked the FTC to investigate what has been described as allegedly unfair and deceptive advertising practices that consumers confront when they attempt to gather health information online.[19] In their filing, the groups claim that social media data mining[20] provides drug manufacturers with privileged information used to target the consumer for medical advertising

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[15] http://www.ftc.gov/os/2009/10/091005endorsementguidesfnnotice.pdf.
[16] *Id.*
[17] *See* 16 CFR Part 255 (December 1, 2009).
[18] Alan Friel, *Navigating FTC's Guidance on Social Media Marketing*, (November 30, 2009) at http://www.adweek.com/aw/content_display/community/columns/other-columns/e3i5bf1e98f0ce98d79ff2629077ea6b78a?pn=2.
[19] Howard Anderson, *Privacy Advocates Call for FTC Action,* (November 29, 2010) at http://www.healthcareinfosecurity.com/articles.php?art_id=3131.
[20] Data mining - sorting through data to identify patterns and establish relationships.

to drive interest in prescription medications. Other practices mentioned include using unbranded websites to promote connections to brands, which are sponsored by drug manufacturers.

The groups asked the FTC to work with the Food and Drug Administration and other agencies to develop a set of policies for regulating the use of behavioral targeting,[21] data collection and other digital techniques in the marketing of drugs and health-related products.

IV. THE FDA"S INVOVEMENT IN ONLINE MEDIA

While the FTC has already promulgated specific regulations concerning the use of the internet and social media for advertising purposes, the FDA"s first foray into social media advertising did not occur until April 2009 when the FDA issued warning letters to 14 manufacturers who sponsored search-engine ads for prescription drugs which lacked a connection to a statement of risks.[22] These letters broke from the FTC"s "one click rule" for internet advertising. The one click rule allowed for all risk information to be provided in a hyperlink.[23]

The FDA further refined its position on internet and social media advertising in July of 2010 when Novartis received an untitled letter from the FDA"s Division of Drug Marketing, Advertising and Communication (DDMAC). Novartis manufactures Tasigna, a medication used to treat a specific form of leukemia.[24] Novartis had created a Facebook Share widget which allowed it members to share content across profiles. This

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[21] Behavioral targeting uses information collected on an individual's web-browsing behavior, such as the pages they have visited or the searches they have made, to select which advertisements to display to that individual. Companies believe this helps them deliver their online advertisements to the users who are most likely to be interested.

[22] http://www.law.uh.edu/healthlaw/perspectives/2010/kumar_fda.pdf.

[23] See generally, http://postscript.communitycatalyst.org/?p=597, In December 2008, The Prescription Project submitted a petition to the FDA requesting the agency to articulate the rules regulating online advertising. The Prescription Project urged the FDA to take a strong public opinion advising all drug and device manufacturers on how closely risk and side effect information must appear to an internet ad. Up until this point the medical product community had adopted the "one click rule". The rule provided that all of the risk and side effect information be referenced in a hyperlink, meaning the information was only one click away from the advertised product. Marking a significant shift in current industry standards, the FDA rejected the „one-click" rule which was currently used by manufacturers.

[24] http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/EnforcementActivitiesbyFDA/WarningLettersandNoticeofViolationLetterstoPharmaceuticalCompanies/UCM221325.pdf.

allowed visitors to Novartis‟ website on Tasigna to share any page of the site through Facebook by generating a link to the page, along with a thumbnail image and brief description of the product. This information was then presented on users‟ Facebook profiles, and in some instances, in the homepage stream of all of the users‟ friends.[25]

The FDA cited Novartis for four specific violations: omission of risk; broadening of indication; unsubstantiated superiority claims/overstatement of efficiency; and failure to submit. First, with respect to omission of risk, the FDA found that wherever a communication provides information about the benefit(s) of a product it must also provide risk information and it must do so "in each part" of the communication where the benefit information is provided, not in a hyperlink, which the FDA had already ruled insufficient in 2009.[26]

Second, with respect to the broadening of indication violation, Tasigna was limited to patients with a very specific form of leukemia. However, the content Novartis displayed on the user‟s page when the share function was used failed to include the limitations and thus implied that Tasigna was appropriate for a broader population base. Facebook‟s share function displays up to 100 characters of a page‟s title and a 121 characters of text from the pages metadata[27] description. In spite of these limitations, the FDA still required an accurate and complete description of the approved indication.

Third, the use of the phrase "next generation treatment" implies a superiority claim for which there is not substantial evidence. This constitutes a violation of the unsubstantiated superiority claims/ overstatement of efficiency guideline. This violation does not appear to be specific to social media, other than to emphasize that rules already applicable to traditional media apply to social media as well.[28]

Lastly, the FDA found that Novartis failed to submit all labeling and advertising at least 30 days in advance of dissemination. It is worth noting that the FDA limited the scope of this failure to the share widget generated

[25] MACMIS #18870, Page 3.
[26] *Id.*
[27] Metadata consists of keywords and definitions which are used to describe the Web page's content. Most search engines use this data when adding pages to their search index.
[28] *Id.* at 5.

by Novartis itself. It declined to extend the violation to all subsequent re-postings of the original content.[29]

V. THE MEDICAL PRODUCT INDUSTRY"S RELUCTANCE TO EMBRACE SOCIAL MEDIA

Most large scale medical products companies have been hesitant to participate in social media due to the FDA"s lack of a comprehensive policy to regulate it. For instance, one company only recently began to host a blog to share information with physicians.[30] Participants are allowed to share information either about the company"s blog postings or other members" comments. This particular company prescreens all comments and refuses to post any mention of products for two reasons: (1) they are unaware of what their obligations are concerning risk information within the limited constraints of a blog posting, and (2) if product discussions are allowed there is a concern that it could stray into off-label topics which could potentially result in off-label promotion.

Drug manufacturers are permitted to promote the use of drugs only for the reasons the drug was approved. Physicians, on the other hand, may prescribe a particular drug to treat a symptom or condition not initially anticipated when the drug was approved. These "off-label" uses are not regulated by the FDA. However, old media or social media, off-label promotion by the pharmaceutical industry is strictly prohibited, and we can expect the FDA to pay particular attention to this issue in the guidance that is about to be issued.

While the FDA has stated that they will not hold manufacturers responsible for information disseminated by true third parties, a manufacturer risks running afoul of the FDA if it hosts a blog where "off-label" topics are discussed.

Another concern faced by medical product manufacturers is the correction of misinformation on the internet or within social media. Some manufacturers have refused to correct what it perceives as misinformation under the pretense that they may be held accountable for all of the information on the target site. The opposing school of thought is to

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[29] *Id.* at 5.

[30] *See Generally*, *U.S. Department of Health and Human Services Food and Drug Administration, Promotion of FDA-Regulated Medical Products Using the Internet and Social Media Tools* at http://www.fda.gov/downloads/AboutFDA/CentersOffices/CDER/UCM193463.pdf.

actively and aggressively monitor the brand to prevent negative consumer opinion that can ultimately threaten a company‟s reputation, profitability and shareholder value.

VI. WHAT STEPS CAN THE MEDICAL PRODUCTS INDUSTRY TAKE TO PREVENT FDA VIOLATIONS?

While there are currently no specific FDA regulations governing medical products company‟s use of social media, the government is likely to place the risk of the internet‟s inability to self govern on manufacturers and their agencies.

The FDA‟s letter to Novartis provides valuable insight into the mindset of government regulators and their views on social media. Disclosure of relevant risk information is crucial. As a manufacturer it is not enough to provide a hyperlink to risk information, as of today, that information must be present in “each part” of the communication.

A medical products company which decides to engage in internet and social media advertising make sure that it controls the content – this is true whether a blog is hosted, a website is created or information is supplied to a third party site. Full and complete disclosure and active monitoring of user generated content is the safest course of conduct. Remember, the FDA will hold a manufacturer accountable for any content that is not deemed true third party information.

As discussed previously, some manufacturers are reluctant to identify and monitor the internet and social media for misinformation concerning its products. However, the negative connotations associated with false or misleading online statements concerning a product can, and will, spread within hours. By aggressively monitoring and protecting its products from misinformation, manufacturers have the opportunity to present themselves as socially responsible and responsive to patient‟s concerns.

As with all marketing in this highly regulated industry, in house and outsourced marketing practices must be monitored and controlled to ensure that the techniques they employ comply with all applicable standards. The gathering of health care information to be used by a drug manufacturer should be carefully scrutinized. It is not hard to picture the public relations nightmare if a manufacturer is found to have improperly utilized or obtained data.

Internet and social media advertising will continue to change dynamically over the coming months and years. Until the government formulates a clear and concise set of regulations that speak directly to online and social media advertising, it is best to follow all regulations which currently apply to traditional media advertising.

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THE INS AND OUTS OF TRYING THE BELLWETHER CASE IN AN MDL

Presented by
Class Action and Multidistrict Litigation Section

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THE INS AND OUTS OF TRYING THE BELLWETHER CASE IN AN MDL

BY EDWARD B. RUFF, III
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The preferred way of handling mass tort lawsuits in the federal courts has long been for the Judicial Panel on Multidistrict Litigation to transfer and consolidate cases to a single federal court for pretrial proceedings.[1] As recently as August 10, 2010, the Judicial Panel on Multidistrict Litigation consolidated and transferred to the Eastern District of Louisiana claims arising out of the explosion that destroyed the Deepwater Horizon offshore drilling rig, killed 11 out of 127 workers on the rig, and has impacted the lives and livelihoods of tens of thousands of Americans to an extent which can not be determined.[2] Given the pervasiveness of multidistrict litigation in the area of mass torts, it is necessary to understand the importance of litigating a MDL's bellwether case. To this end, this article discusses the events occurring in the time subsequent to consolidation and prior to remand. Specifically, it focuses on the trial of a bellwether case in an MDL proceeding. Part I serves as an introduction to multidistrict litigation by focusing on the creation of a MDL. Part II discusses what is meant by a bellwether case and its purpose in the MDL proceeding. Part III discusses various examples of bellwether cases. Part IV addresses the determination of the bellwether Plaintiff. Part V discusses practical considerations for trying a bellwether case. Finally, Part VI addresses the effect of a positive verdict in a bellwether case.

I. INTRODUCTION TO MULTIDISTRICT LITIGATION

In 1968, Congress enacted Section 1407 of the Judicial Code to rectify the problem of duplicative discovery and conflicting contemporaneous pretrial rulings common to mass litigation.[3] Today, Section 1407 provides:

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[1] Charles Silver and Geoffrey P. Miller, *Article: The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 108 (2010) (citing Deborah R. Hensler, *Revising the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 DUKE J. COMP. & INT'L L. 179, 188-86 (2001); Deborah R. Hensler, *The Role of Multi-Districting in Mass Tort Litigation: An Empirical Investigation*, 31 SETON HALL L. REV. 883, 895 (2001)).

[2] *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, 2010 U.S. Dist LEXIS 83268 (J.P.M.L. Aug, 10, 2010).

[3] Multidistrict Litigation Act, Pub. L. No. 90-296 (codified as amended at 28 U.S.C.§ 1407 (2010)).

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: Provided, however, that the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.[4]

Thus, in order to remedy the issues plaguing the court system as a result of proliferating mass litigation, Section 1407 authorized the creation of a the Judicial Panel on Multidistrict Litigation (hereinafter the "MDL Panel") and authorized it to transfer federal cases involving common questions of fact, but pending in different districts, for consolidated or coordinated pretrial proceedings.[5]

The MDL Panel consists of "seven circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same circuit."[6] The purpose of the MDL Panel "is

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[4] 28 U.S.C. § 1407(a).

[5] Mary H. Cronin, Jesse P. Hyde & Edward B. Ruff, III, *Multidistrict Litigation: Technical and Practical Considerations*, 59 FED'N DEF. & CORP. COUNS. Q. 391 (2009).

[6] 28 U.S.C. § 1407(d). The current Chairman of the Judicial Panel is the Honorable John G> Heyburn II, from the United States District Court for the Western District of Kentucky. The other members include the Honorable Kathryn H. Vratil from the District of Kansas, the Honorable Frank C. Damrell, Jr. from the Eastern District of California, the Honorable David R. Hansen from the United States Court of Appeals for the Eighth Circuit, the Honorable Barbara S. Jones from the Southern District of New York, the Honorable W. Royal Furgeson, Jr. from the Northern District of Texas, and the Honorable Paul J. Barbadoro from the District of New Hampshire. *See*

to (1) determine whether civil actions pending in different federal districts involve one or more common questions of fact such that the actions should be transferred to one federal district for coordinated or consolidated pretrial proceedings; and (2) select the judge or judges and court assigned to conduct such proceedings."[7]

The MDL Panel, on its own initiative or via motion, may order consolidation.[8] Should the MDL Panel find that consolidation is appropriate, it will issue a transfer order, whereby the MDL Panel will assign a title and number to the MDL and will identify the related actions that are being transferred pursuant to Section 1407. These cases constitute the MDL. Should the MDL Panel at a later date become aware of additional related actions, the "tag-along actions" can at that time be consolidated into the MDL. A "tag-along action" refers to "a civil action pending in a district court which involves common questions of fact with either (1) actions on a pending motion to transfer or to create an MDL or (2) actions previously transferred to an MDL, which the Panel would consider transferring under Section 1407."[9] A party seeking transfer of such an action must file a Notice of Tag-Along Action with the MDL Panel. The MDL Panel may then issue a conditional transfer order transferring the action to the MDL Court.[10] If no objection to the conditional transfer order is filed, the order becomes final, and the tag-along actions are transferred to the MDL. However, should an objection be filed, the MDL Panel shall apply the standards applicable to motions to consolidate pursuant to Section 1407 in order to resolve the objection.

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http://www.jpml.uscourts.gov/General_Info/general_info.html (last visited November 15, 2010).

[7] United States Judicial Panel on Multidistrict Litigation, *An Overview of the United States Judicial Panel on Multidistrict Litigation*, available at http://www.jpml.uscourts.gov/General_Info/general_info.html.

[8] 28 U.S.C. § 1407(c); John G. Heyburn, II, *Symposium: The Problem of Multidistrict Litigation: A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2231, n.3d (2008) (citing *In re Asbestos Prods. Liab. Litig. (No. VI)*, 771 F. Supp. 415, 416 (J.P.M.L. 1991) (noting that the Panel had issued an order to ascertain why actions involving asbestos were not centralized); *In re Air Crash Disaster Near Papeete, Tahiti, on July 22, 1973*, 397 F. Supp. 886, 887 (J.P.M.L. 1975) (noting that on its own initiative, the Panel ordered the parties to show cause as to why actions stemming from an air crash should not have been consolidated); *In re Midwest Milk Monopolization Litig.*, 379 F. Supp. 989, 990 (J.P.M.L. 1974) (noting that the Panel acted pursuant to statutory authority when it sought centralization for actions arising out of antitrust allegations in the milk industry)).

[9] Rules of Procedure of the Judicial Panel on Multidistrict Litigation, available at http://www.jpml.uscourts.gov/General_Order-Panel_Rules_9-8-2010-Effective_10-4-2010-Final.pdf, at 1.1(h) (hereinafter the "MDL R.P.").

[10] *Id.* at 7.1(b).

As a MDL is employed primarily to streamline pretrial proceedings, upon completion of the pretrial proceedings, the MDL Panel remands cases to their transferor courts for trial.[11] Remand, however, is not necessary where a constituent case terminates during the pendency of the MDL.[12] In practice, however, few cases are remanded for trial; the majority of constituent cases are settled in the transferee court.[13]WHAT IS A BELLWETHER CASE AND WHAT IS ITS PURPOSE

The term bellwether is derived from the ancient practice of belling a wether (a male sheep) selected to lead his flock.[14] The success of the wether selected to wear the bell was determined by whether the flock had confidence that the wether would not lead them astray.[15] In the context of a MDL, a bellwether trial refers to a trial of a select group of plaintiffs whose verdicts are then used to aid in facilitating settlement of the remaining cases.[16] As the Manual for Complex Litigation explains:

> Test cases ... enable the parties and the court to determine the nature and strength of the claims, whether they can be fairly developed and litigated on a group basis' and what range of values the cases may have if resolution is attempted on a group basis. The more representative the test cases, the more reliable the information about similar cases will be.[17]

The original bellwether and its modern litigation counterpart are not dissimilar; each serves as a leader of its "flock" and is typical of its

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[11] 28 U.S.C. § 1407(a).
[12] *Id.*
[13] Heyburn, *supra* note 10, at 2329; *see also* United States Judicial Panel on Multidistrict Litigation, *Annual Statistics of the United States Judicial Panel on Multidistrict Litigation (2009)*, available at http://www.jpml.uscourts.gov/Statistics/JPML_Annual_Statistics-CY_2009.pdf ("Since the creation of the Panel in 1968, there have been 323,258 civil actions centralized for pretrial proceedings. As of September 30, 2009, a total of 11,737 actions have been remanded for trial, 395 actions have been reassigned within the transferee district, and 223,126 actions had been terminated in the transferee court.").
[14] Oxford English Dictionary (2d Ed. 1989) (the term is used contemptuously when referring figuratively to individuals); *see also In re: Chevron U.S.A., Inc.*, 100 F.3d 1016, 1019 (5th Cir. 1997).
[15] *Chevron*, 100 F.3d at 1019.
[16] Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 577-78 (2008).
[17] Manual for Complex Litigation (Fourth) § 23.215 (2004).

members.[18] Trial judges and litigators utilize the bellwether plaintiff to inform the process and aid in the valuation of cases in order to facilitate settlement.[19] Thus, like its Middle English counterpart, today, in courts across the nation, bellwether plaintiffs attempt to guide mass litigation to a just and proper result. As explained by the Manual for Complex Litigation, a bellwether trial can only achieve this goal if it is composed of representative cases.[20] Thus, it is paramount that the parties and the judge work together to choose representative cases to populate any bellwether trial.

III. TYPES OF BELLWETHER CASES

There is no blueprint for what is a proper bellwether case. Historically, litigants have attempted both binding and non-binding bellwether trials. As explained *infra*, a binding bellwether trial should be avoided because of concerns relating to the constitutional rights of the plaintiffs not selected to participate in the bellwether trial. For this reason, a successful bellwether trial will not be binding upon those plaintiffs not selected to participate in the bellwether trial. Within the non-binding bellwether trials, there are a variety of different approaches that have been put into practice. Examples of some of those shall be discussed *infra*.

A. Binding Bellwether Trials Are of Dubious Constitutionality

In its infancy, the bellwether trial was used seemingly in lieu of a class action where class certification could not be obtained.[21] It is important to note, however, that unlike a class action, consolidation of multiple actions in a MDL "does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in

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[18] *Id.*

[19] *See, e.g.s, Silivach v. Celebrity Cruises, Inc.*, 333 F.3d 355, 359-360 (3rd Cir. 2001) (affirming use of bellwether plaintiffs to aid in settlement of 22 cases involving Legionnaire's disease on a cruise ship); *Dodge v. Cotter Group*, 203 F.3d 1190, 1194 (10th Cir. 2000) (affirming use of bellwether trials in cases involving uranium contamination in a community) (both cited in Lahav, *supra* note 18, at 577-78 n.6).

[20] Manual for Complex Litigation (Fourth) § 22.315 ("If individual trials, sometimes referred to as bellwether trials or test cases, are to produce reliable information about other mass tort cases, the specific plaintiffs and their claims should be representative of the range of cases.").

[21] Ellon E. Fallon, Jeremy T Grabill, and Robert P. Wynne, *Proceedings of the Tulane Law Review Symposium: The Problem of Multidistrict Litigation: Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2331 (2008) (citing *Cimino v. Raymark Indus., Inc.*, 152 F.3d 297, 318 (5th Cir. 1998)).

another."[22] For this reason, courts have found certain approaches to bellwether trials inappropriate. Specifically, the Fifth Circuit has held that the nonconsensual sampling and extrapolation of causation and damages in personal injury cases violated litigants' Seven Amendment right to a jury trial and due process rights.[23] Judge Edith H. Jones explained these concerns in a special concurrence to the Fifth Circuit's decision in *In re Chevron U.S.A., Inc.*[24] Judge Jones wrote:

> The use of statistical sampling as a means to identify and resolve common issues in tort litigation has, however, been severely criticized. Among other things, the technique may deprive nonparties of their *Seventh Amendment* jury trial right. In *Matter of Rhone-Poulenc Rorer Inc.*, Judge Posner observed that bifurcating liability and causation questions may require the same issue to be reexamined by different juries. That is, even if the bellwether jury found liability on the part of Chevron, later juries could be called upon to reassess that decision when faced with questions of comparative causation or comparative negligence. That all plaintiffs are here represented by a single set of attorneys does not, in my view, alleviate *Seventh Amendment* concerns; to the contrary, it compounds them with potential ethical problems. Additionally, as Judge Higginbotham cautioned in *In re Fibreboard Corp.*, there is a fine line between deriving results from trials based on statistical sampling and pure legislation. Judges must be sensitive to stay within our proper bounds of adjudicating

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[22] *In re TMI Litig.*, 193 F.3d 613, 724 (3rd Cir. 1999) (quoting *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 497 (1933)).

[23] Manual for Complex Litigation (Fourth) § 22.93 (citing *Cimino v. Raymark Indus.*, 151 F.3d 297, 315-22 (5th Cir. 1998) (holding that individual determinations of liability, injury, and damages are required by the Seventh Amendment in an asbestos mass tort personal injury context); *In re Fibreboard*, 893 .2d 706, 711-12 (5th Cir. 1990) (holding that, as a matter of Texas product liability law, plaintiffs must show specific causation and individual injuries to establish a claim)).

[24] *Chevron*, 109 F.3d at 1021-1033 (Jones, J. specially concurring).

> individual disputes. We are not authorized by the Constitution or statutes to legislate solutions to cases in pursuit of efficiency and expeditiousness. Essential to due process for litigants, including both the plaintiffs and Chevron in this non-class action context, is their right to the opportunity for an individual assessment of liability and damages in each case.[25]

In essence, in the absence of consent, utilizing a bellwether trial to determine the rights and liabilities of MDL constituents other than the bellwether plaintiffs raises due process and Seventh Amendment issues. In order to avoid these issues, a better approach is to use a non-binding bellwether approach, whose results will provide guidance to the parties in order to facilitate settlement.

B. Bellwether Trials that Are Not Binding on the Remaining MDL Constituents Provide a Useful Guide to Value and Settle the Remaining Cases

Although a nonbinding bellwether case alleviates the majority of constitutional concerns, the issue of structuring the bellwether case remains. The Manual for Complex Litigation recognizes that both courts and litigants have "experimented with various trial structures" in resolving the mass tort cases.[26] The Manual for Complex Litigation provides the following examples:

- A *series of individual trials against one or more defendants on all issues.* The verdicts in representative cases inform the parties as to a likely range of verdicts in other similar cases. For the most part, the silicon gel breast implant litigation and the diet drug litigation have followed this model, with most of the individual trials conducted at the state level.[27]

- *A series of consolidated trials on all issues, if they are sufficiently common.* Each trial involves defined groups of

[25] *Id.* at 1023 (internal citations omitted).
[26] Manual for Complex Litigation (Fourth) § 22.93.
[27] *Id.*

similarly situated plaintiffs (e.g., a manageable number of coworkers from the same job, homeowners who had the same type of siding installed by the same contractor) against one or more defendants, with special procedures, if necessary, to assist the jury in comprehending multiple claims against multiple parties.[28]

- *A consolidated common issues trial with some plaintiffs presenting claims against defendants on all issues, yielding findings on common issues.* This works in a single incident mass tort case, a property damage case, or a narrowly defined aspect of a dispersed mass tort (e.g., a case involving a single product and injuries allegedly incurred in a single work site or in a single state, within a limited time period). The remaining plaintiffs would have to prove specific causation and damages in later proceedings in which the findings on common issues from the first trial would apply. The individual issues may also be resolved through the procedures discussed immediately below involving trials of representative cases. Certain issues relating to liability may be severed under Federal Rule of Civil Procedure 42(b) from issues relating to causation or damages, and then consolidates as to multiple parties under Rule 42(a) for a joint trial. Federal courts have frequently concluded that dispersed mass tort personal injury claims, particularly those involving the law of different states, cannot be generally tried on an aggregated basis.[29]

- *A consolidated trial on common issues followed by a stipulated binding procedure (such as arbitration or mediation) agreed to by the parties to resolve individual cases.* This type of approach to the individual issues encompasses possible test-case trials or special master

[28] *Id.* (citing *Malcom v. Nat'l Gypsum Co.*, 995 F.2d 346 (2d Cir. 1993) (reversing jury trial of forty-eight cases on ground that lack of commonality resulted in jury confusion); Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815 (1992); Kenneth S. Bordens & Irwin A. Horowitz, *The Limits of Sampling and Consolidation in Mass Rot Trials: Justice Improved or Justice Altered?*, 22 LAW & PSYCHOL. REV. 43, 47 (1998)).

[29] Manual for Complex Litigation (Fourth) § 22.93 (internal citations omitted).

adjudications. Such an approach is more feasible in a single incident mass tort than in a dispersed mass tort.[30]

- *A stipulated resolution of all elements of individual claims according to a formula or by a hearing before an arbitrator, special master, or magistrate judge.* The court should ensure the parties' waiver of the right to a jury trial is knowing and intelligent.[31]

Although a discussion of each of the various approaches contemplated by the Manual on Complex Litigation is beyond the scope of this article, two examples shall be discussed as examples — *In re Vioxx Products Liability Litigation* and *In re Stand 'n Seal Products Liability Litigation*. These cases are most akin to the Manual for Complex Litigation's category of "*A series of consolidated trials on all issues, if they are sufficiently common.*"

1. *In re Vioxx Products Liability Litigation* (MDL 1657)

On February 16, 2005, the Judicial Panel on Multidistrict Litigation created the *In re Vioxx Products Liability Litigation* MDL.[32] Vioxx is a prescription drug that belongs to a class of pain killers known as non-steroidal anti-inflammatory drugs ("NSAIDs").[33] Merck & Company, Inc. ("Merck") manufactured Vioxx.[34] In 1999, the FDA approved Vioxx as a safe and effective treatment for osteoarthritic pain, primary dysmenorrheal (menstrual pain), and acute pain based on the data that had been supplied by Merck.[35] Vioxx is the result of a discovery by scientists in the early 1990s that cylooxygenase ("COX"), an enzyme that stimulates synthesis of prostaglandins, which are chemicals produced in the body that promote certain effects, had two forms — COX-1 and COX-2.[36] Scientists believed that NSAIDs that selectively targeted COX-2 enzymes would be able to offer the traditional pain relief associated with NSAIDs and also offer a reduced risk of debilitating gastrointestinal perforations,

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[30] *Id.*
[31] *Id.* (note the concerns relating to the Seventh Amendment right to a jury trial. Again, resolution of the individual claims through a bellwether trial involving other plaintiffs or through a formula poses due process and Seventh Amendment concerns that need to be addressed prior to adopting any such binding resolution).
[32] *In re Vioxx Prods. Liab. Litig.*, 360 F. Supp. 2d 1352 (J.P.M.L. 2005).
[33] *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 776, 778 (E.D. La. 2007).
[34] *Vioxx*, 501 F. Supp. 2d at 778.
[35] *Id.* at 778-79.
[36] *Id.*

ulcers, and bleeds ("PUBs").[37] The plaintiffs in the Vioxx MDL brought state law products liability claims against Merck as a result of their use of Vioxx..[38] Generally, the plaintiffs alleged failure-to-warn, fraud, and warranty claims.[39]

Faced with the prospect of 20 million plaintiffs bringing suit based on their Vioxx use,[40] the transferee court recognized the necessity of conducting bellwether trials in the Vioxx MDL. The transferee court conducted six bellwether trials,[41] only one of which resulted in a verdict for the plaintiffs.[42] Ultimately, the six bellwether trials proved fruitful for the court and the litigants. After the trials, all parties, with the assistance of the courts, began to engage in serious discussions regarding a global settlement. The discussions resulted in a partial settlement of all Vioxx-related personal injury suits pending in state and federal courts.[43] Pursuant to the settlement, Merck agreed to pay $4.85 billion to eligible claimants.[44] The terms of the settlement specified that individual awards would vary depending on an objective evaluation by an independent administrator.

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[37] *Id.*
[38] *Id.* at 779.
[39] *Id.*
[40] *Id.* ("It is estimated that 105 million prescriptions were written for Vioxx in the United States between May 20, 1999 and September 20, 2004. Based on this estimate, it is thought that approximately 20 million patients have taken Vioxx in the United States.").
[41] Although the court conducted six trials, the first bellwether trial resulted in a mistrial. Thus, the six trials only consisted of trials in five cases.
[42] *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 452 n.4 (E.D. La. 2006) ("The first bellwether trial, *Evelyn Irvin Plunkett v. Merck & Co., Inc.*, No. 05-4046 (E.D. La. filed Aug. 23, 2005), was conducted while the Court was temporarily located in Houston, Texas because of Hurricane Katrina, and resulted in a hung jury. The case was subsequently retried in New Orleans and resulted in a verdict for Merck. The second bellwether trial, Gerald Barnett, et al. v. Merck & Co., Inc., No. 06-485 (E.D. La. filed Jan. 31, 2006), resulted in a $ 51 million verdict for the Plaintiff. The Court has ordered a new trial on the issue of damages in Barnett, finding the $ 50 million compensatory damage award excessive. However, the parties have asked the Court to reconsider its decision in Barnett. The third bellwether trial, Robert Smith v. Merck & Co., Inc., No. 05-4379 (E.D. La. filed Sept. 29, 2005), resulted in a verdict for Merck. The fourth bellwether trial, Charles Mason v. Merck & Co., Inc., No. 06-810 (E.D. La. filed Feb. 16, 2006), also resulted in a verdict for Merck. The fifth bellwether trial, Anthony Dedrick v. Merck & Co., Inc., No. 05-2524 (E.D. La. filed June 21, 2005), is scheduled to begin on November 27, 2006.").(internal citations omitted).
[43] Heather Won Tesoriero, Sarah Rubenstein and Jamie Heller, *Merck's Tactics Largely Vindicated as it Reaches Big Vioxx Settlement*, WALL ST. J., Nov. 10, 2007, at A1.
[44] *Id.*

2. *In re Stand 'n Seal Products Liability Litigation* (MDL 1804)

In re Stand 'n Seal Products Liability Litigation was created by the MDL Panel on January 5, 2007.[45] Stand 'n Seal "Spray-On" Grout Sealer ("SNS") is a consumer product used to seal ceramic tile grout in kitchens, bathrooms, and similar areas.[46] SNS represented an innovation in the field of grout sealants because it allowed the user to easily stand and spray the sealant onto the grout without the strain of using a brush and having to manually apply the sealant.[47] In *In re Stand 'n Seal Products Liability Litigation*, the plaintiffs alleged that problems with SNS began when its manufacturer, SLR, Inc., changed its chemical components.[48] SNS had originally been manufactured using a fluoropolymer[49] chemical named Zonyl 225; but from April to May of 2005, and again in July 2005, SLR manufactured SNS with a fluoropolymer chemical known as Flexipel S-22WS.[50] Prior to SLR's unilateral decision to reformulate SNS, approximately 1.3 million cans of SNS had been sold with almost no incidents of consumer complaints. However, as a result of the change, the plaintiffs allege that they began experiencing respiratory problems such as chemical pneumonititis and Reactive Airways Dysfunction Syndrome as a result of their exposure to SNS.[51] As a result of the alleged injuries, consumers all over the country filed lawsuits alleging various state law claims, including negligence, strict products liability, and breach of warranty, as well as a federal action for violation of the Consumer Product Safety Act.[52]

The transferee court in *In re Stand 'n Seal Products Liability Litigation*, like the court in *In re Vioxx Products Liability Litigation*, determined that the case was appropriate for bellwether trials. The court planned for three

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[45] *In re Stand 'n Seal Prods. Liab. Litig.*, 469 F. Supp. 2d 1351 (J.P.M.L. 2007).
[46] *In re Stand 'n Seal Prods. Liab. Litig.*, 2009 U.S. Dist. LEXIS 63540, *5 (N.D. Ga. July 15, 2009)
[47] *Id.*
[48] *Id.*
[49] *See id.* at *5-6 n.1 ("Fluoropolymers are known for exceptional chemical resistance to high temperature stability. The most commonly known fluoropolymer is probably the DuPont brand Teflon. Teflon is used in hundreds of products including coating of non-stick frying pans.").
[50] *Id.* at *5.
[51] *Id.*
[52] *Id.* at *6-7.

bellwether trials. The first two bellwether trials settled on the eve of trial.[53] The third bellwether trial resulted in a verdict in favor of all defendants.[54] Shortly after the defense verdict, the parties settled all but three of the remaining cases.

IV. DETERMINING THE BELLWETHER PLAINTIFFS

As explained *supra*, there are a number of methods to structure a bellwether trial. Regardless of the method chosen, the most critical determination is who shall serve as bellwether plaintiffs. In order for the verdict in a bellwether case to serve as a useful guide to the litigants and the court, the plaintiffs must be representative of the MDL's remaining constituents. As commentators have recognized, "the representativeness of the bellwether sample will affect the validity of the outcome of consolidated trial."[55] For example, "if the sample chosen includes a disproportionate number of severely injured plaintiffs, then the awards to the non-trial plaintiffs will be artificially inflated."[56] Recently, the Fifth Circuit, in *In re Chevron U.S.A., Inc.*, granted Chevron's writ of mandamus seeking relief from the district court's trial plan to utilize 30 out of 3000 plaintiffs as bellwethers because they were not representative of the 2,970 non-bellwether plaintiffs.[57] Thus, it is paramount to develop a comprehensive database of the key characteristics of the MDL's constituents prior to selecting the bellwether plaintiffs in order to ensure the bellwether plaintiffs accurately represent the MDL's constituents. Then, the parties and the court must work together to use this information to select the parties most likely to fulfill the goal of having bellwether plaintiffs that resemble the population and will provide a useful result.

A. Step 1 — Developing the Composition of Cases

The first step in designing a successful bellwether trial is ascertaining the makeup of the MDL's constituent plaintiffs by cataloguing the entire universe of cases.[58] As commentators have explained:

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[53] *See, e.g., In re Stand 'n Seal Prods. Liab. Litig.*, MDL Docket No. 1804, Entry Nos. 2426.
[54] *See In re Stand 'n Seal Prods. Liab. Litig.*, MDL Docket No. 1804, Entry Nos. 2917-2921.
[55] Bordens et al., *supra* note 30, at 49.
[56] *Id.*
[57] *In re Chevron U.S.A, Inc.*, 109 F.3d 1016 (5th Cir. 1997).
[58] Fallon et al., *supra* note 23, at 2343-44.

> A bellwether trial is most effective when it can accurately inform future trends and effectuate an ultimate culmination of the litigation; therefore, it is imperative to know what types of cases comprise the MDL. Otherwise, the transferee court and attorneys risk trying an anomalous case, thereby wasting substantial amounts of both time and money. Thus, to ensure that the cases ultimately tried are emblematic of all the cases comprising the MDL, the transferee court and the attorneys must determine the composition of the MDL prior to engaging in any further trial-selection techniques.[59]

In essence, the parties should aim to conduct a "census" of all plaintiffs in the case to identify all major variables. For example, in the Vioxx MDL, the "census" was conducted through limited case specific discovery utilizing plaintiff and defendant profile forms.[60] Similarly, in *In re Stand 'n Seal Products Liability Litigation*, the parties used plaintiff profile forms in order to streamline case specific discovery and catalog the characteristics relevant to the litigation including personal information, purchase information, exposure information, medical history, and work history.[61] In short, the plaintiff profile forms offer the parties an efficient method of

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[59] *Id.* at 2344; *see also Meranus v. Yarbrough*, 991 U.S. Dist. LEXIS 8731, *3-4 (S.D.N.Y 1991) ("The choice of representative plaintiffs for bellwether discovery cannot be made in a vacuum, however. Choosing an appropriate sampling technique will depend upon the extent to which the plaintiffs differ from one another with respect to characteristics relevant to this litigation. For example, some plaintiffs may have been so eager for tax advantages that they were willing to take any risk. Some may have relied on the same investment advisor. Because clusters of plaintiffs may have different attributes, then, stratified random sampling rather than pure random selection may be necessary. This, in turn, requires identification of the pertinent characteristics and categorization of the plaintiffs according to these factors.").

[60] *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 780, 790-91 (E.D. La. 2007) ("Second, in an effort to streamline case-specific discovery in thousands of individual cases, the Court has required that every plaintiff who alleges a cardiovascular injury to submit to Merck a Plaintiff Profile Form, which contains biographical and medical information, and authorizations for the release of medical records. Upon receipt of these materials, Merck is then required to provide a Merck Profile Form, which discloses contacts Merck has had with plaintiffs' doctors and any other relevant information Merck may have about individual plaintiffs.").

[61] *See* Sample *In re Stand 'n Seal Products Liability Litigation* Plaintiff Profile Form, *attached hereto as* Appendix "A".

obtaining information necessary to develop a picture of the characteristics of the MDL's constituent plaintiffs.

The plaintiff profile forms then allow the parties to group the plaintiffs according to the most relevant categories. In *In re Vioxx Products Liability Litigation*, the major variables were: (1) the type of injury (heart attack, stroke, or other), (2) period of ingestion (short-term versus long term), (3) age group (older or younger than sixty-five, (4) prior health history (previous cardiovascular injuries or not), and (5) date of injury (before or after a certain label change).[62] For example, consider the case of *In re Stand 'n Seal Products Liability Litigation*. In that case, not all of the plaintiffs were injured by the same product; did not purchase at the same time; did not suffer the same injuries; and did not have the same medical background. Each of these characteristics became important for categorizing the plaintiffs in the Stand 'n Seal MDL.

First, the plaintiff profile forms allowed the plaintiffs to be broken down according to the type of product they alleged exposure to. Generally, the plaintiffs claimed that they had been injured as a result of SNS' manufacturer, SLR, Inc.'s, decision to replace SNS' original and benign active ingredient, Zonly, with another fluoropolymer, Flexipel.[63] However, not all SNS containing Flexipel was identical; two distinct formulations existed. From April to May 2005, SLR manufactured SNS with Flexipel, then in July 2005, after being specifically instructed to return to the original Zonyl-based formula, SLR produced batches of SNS containing Flexipel that had been mixed with another chemical — n-Butyl acetate.[64] Thus, in the Stand 'n Seal MDL, there were four classes of plaintiffs: (1) plaintiffs who were exposed to SNS containing Zonyl; (2) plaintiffs exposed to SNS containing Flexipel; (3) plaintiffs exposed to SNS containing Flexipel plus n-Butyl acetate; and (4) plaintiffs exposed to unknown batches of SNS.[65] Based on the batch numbers printed on the bottom of the SNS cans, it

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[62] Fallon et al., *supra* note 23 at 2345 (citing *In re Propulsid Prods. Liab. Litig.*, MDL Docket No. 1355, 2003 WL 22023398, at 1 (E.D. La. Mar. 11, 2003) ("The Court further noted that it wished to proceed to trial on three types of cases involving Propulsid: wrongful death cases, personal injury cases, and the sustained prolonged QT cases seeking medical monitoring.").

[63] *In re Stand 'n Seal Prods. Liab. Litg.*, 2009 U.S. Dist. LEXIS 63540, *5 (N.D. Ga. July 15, 2009).

[64] *See id.* at *11 (explaining the addition of n-butyl acetate).

[65] In many instances, the plaintiffs had discarded the can of SNS subsequent to use and therefore it was not possible to directly determine the type of SNS the plaintiff had been exposed to.

was possible to determine which type of SNS each plaintiff had been exposed to. Thus, by using plaintiff profile forms, the parties were able to quickly ascertain the batch numbers for the SNS in question and break the plaintiffs down into the four categories listed above.

Second, the plaintiff profile forms allowed the plaintiffs to be broken down by time of purchase. As explained *supra*, not all plaintiffs were injured by the same type of SNS. The timing of the purchase was important for three reasons. First, the different types of SNS were produced at different times. Thus, depending on when a plaintiff purchased SNS, it could potentially eliminate exposure to certain types of SNS. This proved especially important with respect to plaintiffs that could not produce a batch number because they had lost or disposed of the can of SNS they claim to have used. Second, the timing of a plaintiff's purchase was relevant to allegations of failure to warn. The defendants possessed different knowledge at different times. Thus, the timing of purchases was relevant to allegations of failure to warn. Third, the timing of purchases was relevant to allegations of negligent recall. As some plaintiffs purchased SNS prior to an initiation of the SNS recall, they could not maintain an action for negligent recall. Again, the plaintiff profile forms helped to quickly establish a timeline of SNS purchases and break plaintiffs down by significant dates.

The third and fourth classifications — type of injury and medical history — were also aided by use of plaintiff profile forms. The injuries in the Stand 'n Seal MDL consisted primarily of inhalation injuries; the most damaging of which was the allegation that SNS caused chemically induced asthma or Reactive Airways Dysfunction Syndrome. The plaintiff profile forms allowed the plaintiffs to be characterized by the type of injury alleged, and consequently grouped by potential severity. Related to the injury alleged, the plaintiff profile forms also facilitated the discovery of any potential minimizing factors or alternative causation. As the Stand 'n Seal MDL dealt primarily with inhalation injuries, the plaintiffs' smoking history became particularly relevant. The plaintiff profile forms allowed the parties to quickly obtain this information.

In sum, using the *In re Stand 'n Seal Products Liability Litigation* as an example, it is apparent how plaintiff profile forms facilitate the "census" of the constituent plaintiffs. In that case, the plaintiff profile form allowed the parties to quickly determine the population's makeup based on the type of product used, the timing of purchase, the seriousness of injuries, and the potentially significant mitigating factors. After establishing such a profile of

the population, the parties in conjunction with the court, are able to make an informed selection of cases that are representative of the MDL as a whole and therefore would serve as a good bellwether plaintiff.

B. Step 2 — Selecting the Cases

After ascertaining the pertinent characteristics of the MDL class and breaking the population down by characteristic, the parties and the court must determine which plaintiffs will serve as the bellwether plaintiffs. There are different schools of thought regarding how to select representative plaintiffs to serve as the bellwether plaintiffs.[66] The Sixth Circuit has noted that,

> There are essentially four basic approaches to selecting representative plaintiffs: plaintiffs' counsel selects all representatives; each side selects an equal number of representatives; plaintiffs' counsel or both sides nominate plaintiffs and the judge selects the representatives; or representatives are randomly selected from the established categories of plaintiffs.[67]

An additional approach also exists — requiring the attorneys to agree on the cases jointly.[68] Commentators who have addressed the various approaches to selection of a bellwether plaintiff have found that none is perfect — each has its benefits and problems.

Turning initially to the first three situations posed by the Sixth Circuit, plaintiffs' counsel selecting all representatives, each party selecting an equal number of representatives, and both sides nominating plaintiffs to the judge, each situation faces the issue that bellwether plaintiffs will not likely be representative of the population as a whole. In selecting plaintiffs to serve as bellwether plaintiffs, each party has an incentive to suggest the

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[66] Richard O. Faulk, Robert E. Meadows, & Kevin L. Colbert, *Article: Building a Better Mousetrap? A New Approach to Trying Mass Tort Cases*, 29 TEX. TECH. L. REV. 779, 792 (1998).
[67] *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1196 n.6 (6th Cir. 1998) (*quoted in* Faulk et al., *supra* note 68, at 792).
[68] Fallon et al., *supra* note 23, at 2349.

plaintiffs that are strongest for their side.[69] "If the plaintiffs select all the bellwethers, they will pick what they believe are the strongest cases."[70] The primarily problem with an approach allowing one side to select all of the bellwether plaintiffs is that it will result in an "inequitable stacking of overtly unfavorable and possibly unrepresentative cases, as well as creating an atmosphere of antagonism."[71] Surely, such a collection of plaintiffs would not represent the population as a whole. The concerns are not remedied solely by allowing each side the opportunity to select an equal number of plaintiffs.[72] As the Fifth Circuit recognized in *In re Chevron*, if each side selects an equal number of cases to serve as the bellwether cases, the resulting trial will simply be a trial of the "best" and "worst" cases.[73] In essence, allowing attorneys the option to select the cases will result in cases from either one end of the spectrum or both, but in no way representative of the population as a whole.

The fourth option, selection by random sampling, also raises concerns, but for the different reasons. Whereas allowing attorneys to select the bellwether plaintiffs will likely result in a trial of the best and worst cases, random sampling does the opposite — it ignores the best and worst cases.[74]

The final option, requiring the plaintiffs and the defendants to agree on the bellwether plaintiffs likely leads to the best result. In that instance, the cases selected will most likely be representative of the population as a whole and be fair to both sides.[75] Although of the posited options, it will be the most difficult to effectuate, it will likely provide the most accurate

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[69] R. Joseph Barton, *Utilizing Statistics and Bellwether Trials in Mass Torts: What do the Constitution and the Federal Rules of Civil Procedure Permit?*, 8 WM. & MARY BILL RTS. J. 199, 211 (1999).
[70] *Id.*
[71] Fallon et al., *supra* note 23, at 2350; *see also* Petition for Writ of Certiorari at 10, *John Crane, Inc. v. Abate*, 119 S.Ct 1096 (1999) (No. 98-873) (arguing that plaintiffs chose the "most sympathetic and inflammatory" cases that were "wholly *atypical*" of the other 1300 consolidated claims).
[72] *Id.*
[73] *In re Chevron, U.S.A., Inc.*, 109 F.3d 1016, 1019 (5th Cir. 1997) ("Whatever may be said about the trial contemplated by the district court's December 19, 1996 order, one thing is clear. It is not a bellwether trial. It is simply a trial of fifteen (15) of the "best" and fifteen (15) of the "worst" cases contained in the universe of claims involved in this litigation. There is no pretense that the thirty (3) cases selected are representative of the 3,000 member group of plaintiffs.").
[74] Barton, *supra* note 71, at 211.
[75] Fallon et al., *supra* note 23, at 2350.

picture of the litigation as a whole and therefore best serve the purpose of bellwether trial.

V. PRACTICAL TRIAL CONSIDERATIONS

Once the bellwether plaintiffs have been determined, it is necessary to develop a trial strategy that will keep the case focused on the bellwether plaintiffs that were carefully chosen to be the representatives of the MDL's constituent case. This can be achieved, in part, by utilizing motions *in limine* to maintain the focus on only those cases selected to serve as bellwether plaintiffs. In addition to keeping the focus on only those cases before the jury, where the bellwether case consists of a number of plaintiffs, it is important to ensure the jury considers each plaintiff individually, rather than allowing the plaintiffs' attorneys to bootstrap weaker cases to the stronger.

A. Motions in Limine are an Effective Way to Limit the Universe of Information Available to the Jury

As in any trial, in a bellwether case it is important to limit the universe of information presented to the jury. Although the concern is not unique, it is more poignant in the MDL context because, in general, MDL cases involve mass torts that have affected significantly more people than a traditional case and for this reason have likely received attention in the media. As such, experience dictates that certain motions *in limine* are particularly valuable in the context of litigating a bellwether case. Laboratory studies have indicated that punitive damages awarded to plaintiffs are significantly affected by the size of the nontrial plaintiff population.[76] Specifically, "bellwether" plaintiffs received higher punitive damages awards when the jury was told that there hundreds of plaintiffs.[77] Conversely, where jurors are not informed as to the size of the plaintiff population, punitive damages have been found to be significantly lower.[78] One way to avoid the potential that a jury punishes defendants due to knowledge that the bellwether plaintiffs represented a large plaintiff population is to file motions *in limine* to bar any media accounts and to bar evidence of similar incidents.

Defendants in a bellwether case should move to bar evidence of media coverage because it is inadmissible hearsay and not subject to any

[76] Bordens et al., *supra* note 30, at 58.
[77] *Id.*
[78] *Id.*

exceptions. News articles are inadmissible hearsay when offered to "primarily to establish the truth of their contents."[79] News stories are generally hearsay and inadmissible as evidence of the facts stated in the articles.[80] Unsupported newspaper statements provide no firsthand evidence of the reporter's perception, memory or sincerity and therefore lack circumstantial guarantees of trustworthiness risking unfair party prejudice, such as the potential for differing punitive damages awards as explained *supra*.[81] Additionally, media coverage is excluded when other probative non-hearsay evidence is available to prove the fact at issue.[82]

In addition to barring media accounts, defendants in a bellwether trial should seek to bar evidence of similar incidents. Again, efforts to bar evidence of similar incidents aim to limit the universe of information available to the jury to solely the facts of bellwether plaintiffs' cases and prevent the jury for being apprised of the extent of the population of plaintiffs in the MDL.

Regardless of plaintiffs' purpose for offering evidence of allegedly similar incidents, in order for the proffered incidents to be deemed relevant plaintiffs must demonstrate that such incidents are "substantially similar" to the incidents at issue.[83] The requisite degree of similarity is the same regardless of what the offering party is attempting to prove.[84] "'This doctrine applies to protect parties against the admission of unfairly prejudicial evidence, evidence which, because it is not substantially similar

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[79] *U.S. v. Baker*, 432 F.3d 1189, 1211-12 (11th Cir. 2005) (holding that newspaper articles are inadmissible hearsay because they were offered to prove the truth of their contents — the identity of the gunman in the incident); *Sklar v. Clough*, 2007 U.S. Dist. LEXIS, at *8 (N.D. Ga. Jul. 5, 2007); *Dallas County v. Commercial Union Assur. Co.*, 286 F.2d 388, 392 (5th Cir. 1961) (a "newspaper article is hearsay, and is almost all circumstances inadmissible").

[80] *See Marous Bros. v. Ala. State Univ.*, 2008 U.S. Dist. LEXIS 10867, *9 (M.D. Ala. Feb. 11, 2008) (holding that newspaper articles regarding defendants' unfinished building of dormitories and displaced students were hearsay and did not satisfy any hearsay exception); *Sklar*, 2007 U.S. Dist. LEXIS at *8 (excluding newspaper articles reporting on defendant university's funding to student organizations as hearsay not within any exceptions).

[81] *Larez v. Los Angeles*, 946 F.2d 630, 643-44 (9th Cir. 1991); *Baker*, 432 F.3d at 1212 (holding that even in the absence of any non-hearsay evidence concerning gunmen's description, prejudice from a newspaper article substantially outweighed its probative value to prove the murder's publicity).

[82] *See, e.g., Larez*, 946 F.2d 644 (barring three independent newspaper articles attributing similar quotations to defendant as not the "best evidence").

[83] *Gibson v. Ford Motor Co.*, 510 F. Supp. 2d 1116, 1123 (N.D. Ga. 2007).

[84] *Martin v. Altec Indus., Inc.*, 2005 WL 6038744, *8 n.133 (N.D. Ga. Dec. 30, 2005).

to the accident or incident at issue, is apt to confuse or mislead the jury.'"[85] A party attempting to demonstrate that conditions substantially similar to the occurrence caused other incidents cannot merely state that such incidents involved the same product. Rather, "the court 'must be apprised of the specific facts of previous accidents.'"[66] Likewise, "[t]o simply state that an accident occurred, a lawsuit was filed and the lawsuit was concluded in some manner or other fails entirely to meet plaintiffs' evidentiary burden."[87] Not only must the conditions that caused the other incidents be substantially similar, but the injuries themselves must also be sufficiently similar.[88]

Importantly, demonstrating similarity of causation requires "exclusion of all reasonable secondary explanations for the cause of the other incidents."[89] If the third-parties' medical histories are unknown, then the evidence must be excluded.[90]

Moreover, plaintiffs can only demonstrate substantial similarity of causation through expert testimony.[91] Courts have routinely excluded

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[85] *Id.* at *9 (quoting *Jones v. Otis Elevator Co.*, 861 F.2d 655, 661 (11th Cir. 1998)).
[86] *Nesbitt v. Sears, Roebuck and Co.*, 415 F. Supp. 3d 530, 536 (E.D. Pa. 2005); *Soldo v. Sandoz Pharm. Corp,*, 244 F. Supp. 3d 434, 550 (W.D. Pa. 2003) (q quoting *Gumbs v. Int'l Harvester, Inc.*, 718 F.2d 88, 98 (3rd Cir. 1983) ("That the evidence of other injuries allegedly involves the same product is not enough to make the [evidence] admissible even under the liberal standard of admissibility of Fed. R. Evid. 401.")).
[87] *J.B. Hunt Transport., Inc. v. G.M. Corp.*, 52 F. Supp. 2d 1084, 1089 (E.D. Mo. 1999).
[88] *Peters v. Nissan*, 2008 WL 2625522, *2 (E.D. La. Feb. 1, 2008) (the court pointed out the differing injuries and accident types in ruling that the reports lacked sufficient information to demonstrate substantial similarity); *Wolf by Wolf v. Procter & Gamble Co.*, 555 F. Supp. 613, 621-22 (D.M.J. 1982) (other consumer complaints regarding the product at issue were not similar to the alleged injury at issue).
[89] *Buckman v. Bombardier Corp.*, 893 F. Supp. 547, 552 (E.D.N.C. 1995) (citing *Hale v. Firestone Tire & Rubber Co.*, 756 F.2d 1322, 1332 (8th Cir.1985); *Uitts v. General Motors Corp.*, 411 F. Supp. 1380, 1383 (E.D. Pa. 1974), *aff'd without opinion*, 513 F.2d 626 (3d Cir. 1975)).
[90] *See Amatucci v. Delaware and Hudson Ry. Co.*, 745 F.2d 180, 183 (2d Cir. 1984) (testimony of other alleged heart attacks suffered at the same place of business had no probative value on the issues of the employer's negligence, notice, or causation and was irrelevant where the circumstances surrounding the other alleged heart attacks, including the personal and family medical histories of the victims, were unknown).
[91] *See Burke v. U-Haul Int'l, Inc.*, 2007 WL 403588, *2 (W.D. Ky. Jan. 31, 2007) (in holding that lay witnesses cannot give an opinion about the cause of their accident, the court emphasized that "[n]o expert has compared their experiences to those of the driver here, nor has any expert analyzed these other accidents to determine an actual cause" rendering the testimony as having "almost no probative value on the issue of the cause of the accident").

evidence of allegedly similar incidents when they lack sufficient information for determining similarity to the incidents at issue.[92]

As explained above, although Rule 401 provides for a broad standard of relevancy, the requirements to meet this burden in the context of similar incidents are exacting. In order to preclude the plaintiffs from offering evidence of similar incidents, prior to trial the defendants in a bellwether case should seek to exclude evidence of any similar incidents in order to limit the scope of the information presented to the jury.

In sum, in defending a bellwether trial, it is paramount to limit the universe of information presented to the jury to solely the information related to the bellwether plaintiffs' cases. This will avoid the prejudice of informing the jury as to the size of the plaintiff population. It will also maintain the representative nature of the bellwether plaintiffs and allow the verdict to serve as a useful tool in facilitating settlement of the remaining cases.

B. It is Paramount to Keep the Jury Focused on the Distinctions Among the Bellwether Plaintiffs' Cases While Presenting a Straightforward and Concise Defense

In addition to limiting the information presented at trial to the facts of the bellwether plaintiffs' cases, it is paramount to keep the cases separate in the minds of the jury. This can be difficult should the bellwether trial consist of a number of plaintiffs representing different portions of the population of plaintiffs.

For instance, in the recent bellwether trial in *In re Stand 'n Seal Products Liability Litigation*, the bellwether case consisted of five plaintiffs. The plaintiffs presented different purchase scenarios, exposure to different batches, different damages, and different medical histories. In such a situation, it is important to streamline the defense while making as straightforward and clear case as possible. This will help prevent the jury

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[92] *See Jones v. Ford Motor Co.*, 204 Fed. Appx. 280, 285-87 (4th Cir. 2006); *Bryan v. Emerson Electric Co., Inc.*, 1988 WL 90910, *5 (6th Cir. Sept. 1, 1988); *Cameron v. Otto Bock Orthopedic Industry, Inc.*, 43 F.3d 14, 16 (1st Cir. 1994); *C.A. Associates v. Dow Chemical Co.*, 918 F.2d 1485, 1489-90 (10th Cir. 1990); *Peters v. Nissan Forklift Corp.*, 2008 WL 2625522, *2-3 (E.D. La. Feb. 1, 2008); *Guild v. GM Corp.*, 53 F. Supp. 2d 363, 368 (W.D.N.Y. 1999); *Wilson v. Bradlees of New England, Inc.*, 1999 WL 816817, *7 (D.N.H. Feb. 3, 1999); *Wolf by Wolf v. Procter & Gamble Co.*, 555 F. Supp. 613, 621-22 (D.N.J. 1982); *Verchot v. GM Corp.*, 812 So. 2d 296, 304-05 (Ala. 2001); *Mercer v. Pittway Corp.*, 616 N.W.2d 602, 616-17 (Iowa 2000).

from being overwhelmed with information. In the Stand 'n Seal MDL, the parties were forced to simplify the cases as a result of a court-ordered twenty (20) hour time limit imposed on both the plaintiffs collectively as well as the defendants collectively. Although each case will present its own nuances, one strategy that proved effective in the Stand 'n Seal MDL was the presentation of a video montage of the plaintiffs' treating physicians' video-evidence depositions immediately prior to the close of evidence. Thus, for the first time, the jury saw, in no more than ten minute blocks, testimony from the individual plaintiffs' treating physicians addressing their lack of continuing symptoms or preexisting conditions. Such a straightforward and concise presentation resonated with the jury and was easily committed to the juror's memories. The defense was then able to turn to this evidence in closing, where after discussing general causation, lead defense counsel presented brief timelines of each individual plaintiff demonstrating their medical histories including preexisting conditions and the resolution of their complaints, as had been concisely displayed in the video montage. The streamlined effort with emphasis on the individual nature of the claims was successful as the jury entered a defense verdict against all five plaintiffs.[93]

VI. THE EFFECT OF A BELLWETHER VERDICT

The effect of a bellwether verdict is to educate the parties and the court of the strength and value of the MDL's constituent cases. The parties can then use the result to facilitate settlement of the remaining case. The practice has been extremely successful in the past. For instance, as discussed above, after the conclusion of the six bellwether trials in the Vioxx MDL, the parties reached a partial global settlement of all Vioxx-related personal injury suits pending in state and federal courts.[94] Similarly, after the defense verdict in the bellwether trial in the Stand 'n Seal MDL, all but three of the remaining cases settled. These are not exceptions; rather these results appear to be the rule. "Since the creation of the Panel in 1968, there have been 323,258 civil actions centralized for pretrial proceedings. As of September 30, 2009, a total of 11,737 actions have been remanded for trial, 395 actions have been reassigned within the transferee district, and 223,126 actions had been terminated in the

[93] *See In re Stand 'n Seal Prods. Liab. Litig.*, MDL Docket No. 1804, Entry Nos. 2917-2921.

[94] Tesoriero et al., *supra* note 45, at A1.

transferee court."[95] Thus, the practical effect of the result in a bellwether trial is to effectuate settlement of the remainder of the MDL's constituent cases.

VII. CONCLUSION

It is tempting to view a bellwether case as just an isolated incident — one trial among the potential hundreds or thousands of potential trials arising out of a mass tort. However, the effects of the bellwether trial, if properly constructed, reach far beyond the scope of any individual case. A positive result can potentially end the litigation in its entirety. For this reason, it is paramount to select a representative bellwether plaintiff who can serve as the archetype for potential future litigation. Ensure that the trial is limited to the facts of that plaintiff or those bellwether plaintiffs by limiting the universe of information presented to the jury. Finally, distill your defense of the case into a streamlined effort that will remain manageable for the jury. In doing so, hopefully your result will sound through the litigation and earn a positive result for both you and your client.

[95] United States Judicial Panel on Multidistrict Litigation, *Annual Statistics of the United States Judicial Panel on Multidistrict Litigation (2009)*, available at http://www.jpml.uscourts.gov/Statistics/JPML_Annual_Statistics-CY_2009.pdf.

ED RUFF

Ed Ruff has tried more than 60 mass tort, product liability, commercial litigation, medical liability and complex matters to verdict. He has served as lead counsel in a number of multi-district litigation (MDL) matters including Vioxx, Stand 'N Seal, Menu Foods, Pedicle Screw, RTI and L-Tryptophan. He has developed a reputation for handling matters on a national basis. Ed just completed the successful defense of a nationwide distributor of a spray-on grout sealer in an MDL trial in Atlanta, GA in which five plaintiffs sustained serious and permanent lung injuries. Also, he recently defended a large commercial matter involving a claim for a financial interest in the company that provided the electronic basis for the New York Stock Exchange (NYSE) and was lead trial counsel in a $35 million dollar recovery in Milwaukee, WI, state court arising out of the Miller Park Stadium litigation.

Ed has authored numerous publications and has lectured for the ISBA, DRI, FDCC and IADC. He is frequently asked to speak at DRI seminars, the Chicago Daily Law Bulletin Seminars and at the FDCC annual and winter meetings. Ed speaks on a variety topics related to product liability safety, fire and casualty, multidistrict litigation and jury trials. He has been an instructor for the FDCC Litigation Management College numerous times.

Ed is a managing partner/shareholder with Pretzel & Stouffer, Chartered, in Chicago, Illinois. He is also a Mechanical Engineer with a background in Heat Transfer Engineering. He remains active in team sports; enjoys fishing and trail bike riding with his wife and 4 adult children.

JAMES G. GILLINGHAM

James G. Gillingham is an associate with Pretzel & Stouffer, Chartered, and has experience in complex commercial litigation, mass tort product liability, and professional liability defense litigation in both state and federal court.

Appendix A

IN RE: STAND N' SEAL PRODUCTS LIABILITY LITIGATION	MDL Docket No. 1804
THIS RELATES TO: _____	
Civil Action No: _____	Plaintiff: _____ (name)

PLAINTIFF PROFILE FORM

Other than in Sections IA and IB, those questions using the term "You" should refer to the person who used STAND N' SEAL "Spray On" Grout Sealer ("SNS"). Please attach as many sheets of paper as necessary to fully answer these questions.

I. CASE INFORMATION

A. Name of person completing this form: _____

1. Social Security Number: _____
2. Maiden or Other Names Used By Which You Have Been Known: _____
3. Address: _____

B. If you are completing this questionnaire in a representative capacity (e.g., on behalf of the estate of a deceased person or a minor), please complete the following:

1. Social Security Number: _____
2. Maiden or Other Names Used By Which You Have Been Known: _____
3. Address: _____
4. State which individual or estate you are representing, and in what capacity you are representing the individual or estate? _____
5. If you were appointed as a representative by a court, state the:
   Court: _____ Date of Appointment: _____
6. What is your relationship to the deceased or represented person or person claimed to be injured? _____

7. If you represent a decedent's estate, state the date of death of the decedent and the address of the place where the decedent died. _____
8. If you are claiming the wrongful death of a family member, list any and all heirs of the decedent. _____

C. Claim Information

1. Are you claiming that you have been physically injured as a result of using "SNS"?
   Yes ☐ No ☐

   If "yes,"

   a. What is your understanding of the bodily injury you claim resulted from your use of "SNS"? _____
   b. When do you claim this injury occurred? _____
   c. Who diagnosed the condition? _____
   d. Did you seek treatment at a hospital for the condition(s) listed in 1(a)? Yes ☐ No ☐
   e. Were you admitted to the hospital for the condition(s) listed in 1(a)? Yes ☐ No ☐

      If "yes," please state the date of your admission to and discharge from the hospital. _____

   f. Were you admitted to the Intensive Care Unit ("ICU") at any time at any hospital for the condition(s) listed in 1(a)? Yes ☐ No ☐

      If "yes," please state the date of your admission to and discharge from the ICU. _____

   g. Were you ever diagnosed previously with the condition(s) listed in 1(a)? Yes ☐ No ☐

      If "yes," when, and who diagnosed the condition at that time? _____

   h. Please provide the name, address and period of care for each medical provider from whom you have received any treatment, assessment or advice for that condition:



i. Do you claim that your use of "SNS" worsened a condition that you already have or had in the past? Yes ☐ No ☐

If "yes," set forth the past injury or condition. _____

If "yes," please provide the name, address and period of care for each medical provider from whom you have received any treatment, assessment or advice for that condition:

Name	Address	Period of Care

If "yes," please state whether or not you had already recovered from that injury or condition before you used "SNS."

_____

If "yes," please state the date of recovery, if any. _____

j. Medications prescribed or recommended by providers for conditions in 1(a) or 1(e): ___

_____

k What is the prognosis for the injury you allege was caused by your exposure to "SnS"?

_____

l. Please state the total cost of your treatment to date: _____

m. If you are continuing treatment, please state the amount you are seeking for future treatment: _____

n. Have you ever been exposed to any of the following:

☐ Asbestos ☐ Silica dust ☐ Chemical fumes ☐ Solvent Fumes

If "yes," please provide the approximate date of exposure and the place of exposure.

_____

2. Are you claiming mental and/or emotional damages as a result of your use of "SNS"? Yes ☐ No ☐

a. If "yes", state the date(s) you claim you suffered mental and/or emotional damages.

_____

b. Are you receiving treatment for your mental and/or emotional damages? Yes ☐ No ☐

If "yes," for each provider (including but not limited to primary care physician, psychiatrist, psychologist, psychoanalyst, therapist, or counselor) from whom you have sought treatment for psychological, psychiatric or emotional problems during the last ten (10) years, state:

Name	Address	Period of Treatment	Reason for Treatment

c. To your understanding, please describe the mental and/or emotional condition you claim resulted from your use of "SNS."

_____

_____

_____

d. Medications prescribed or recommended by mental health providers:

_____

e. Please state the total cost of your treatment to date: _____

f. If you are continuing treatment, please state the amount you are seeking for future treatment: _____

3. Are you claiming mental and/or emotional damages as a result of someone else's use of "SNS"? Yes ☐ No ☐

a. If "yes," please state your relationship to the user. _____

b. If "yes," please state the date(s) you claim you suffered mental and/or emotional damages. _____

c. If "yes," to your understanding, please describe the mental and/or emotional condition for which you are seeking damages. _____
_____
_____

d. If "yes," for each provider (including but not limited to primary care physician, psychiatrist, psychologist, psychoanalyst, therapist, or counselor) from whom you have sought treatment for psychological, psychiatric or emotional problems during the last ten (10) years, state:

Name	Address	Period of Treatment	Reason for Treatment

e. Medications prescribed or recommended by mental health providers:
_____

f. If "yes," please state the total cost of your treatment to date. _____

g. If "yes," please state the amount you are seeking for future treatment. _____

II. STAND N' SEAL "SPRAY ON" GROUT SEALER ("SNS") INFORMATION

A. Prior to your use of "SNS", had you ever used any other brand of tile and grout sealer? Yes ☐ No ☐

If "yes," please state the brand and date used. _____

B. Did you personally purchase the "SNS" product that you are claiming caused your injury? Yes ☐ No ☐

If "no," who purchased it? _____

If "no," please state your relationship to the purchaser. _____

a. Where was "SNS" purchased? _____

b. Address of place where "SNS" was purchased? _____

c. When was "SNS" purchased? _____

d. Who was present when "SNS" was purchased? _____

e. Do you have the receipt of sale? Yes ☐ No ☐ (If "yes", please attach a copy to this completed form).

f. How many cans of "SNS" were purchased? _____

g. Did you receive assistance from anyone at the place of purchase when buying "SNS"? Yes ☐ No ☐

If "yes," please state the name of the person(s) assisting you with your "SNS" purchase. _____

If you do not know the name of the person(s) who assisted you, please provide a physical description of the person(s), e.g. Caucasian male in mid 40s with mustache.
_____
_____
_____
_____
_____

h. Please describe any communications with the person(s) listed in your response to Question II.B.(g). _____
_____
_____
_____
_____

i. Did any advertising influence your decision to purchase "SNS"? Yes ☐ No ☐

If "yes," please describe the advertising. _____
_____
_____

If "yes," do you have possession of this "SNS" advertising? Yes ☐ No ☐

If "yes," do you have a photograph(s) of this "SNS" advertising? Yes ☐ No ☐

j. Did you observe any in store advertising for "SNS" at the time of your purchase? Yes ☐ No ☐

If "yes," please describe the advertising you observed. _____

If "yes," do you have possession of this "SNS" advertising? Yes ☐ No ☐

If "yes," do you have a photograph(s) of this "SNS" advertising? Yes ☐ No ☐

C. How did you first hear about "SNS"? _____

D. Why did you purchase "SNS"? _____

E. When did you use the "SNS" that you are claiming caused your injury? _____

F. On the date stated above, did you use the entire contents of the SNS can(s) on this date? Yes ☐ No ☐

If "no," did you use "SNS" on another date? _____

If "yes," please state the date(s) you used the remainder of the contents of the "SNS" can(s):

G. Was this the first time you ever used "SNS"? Yes ☐ No ☐

If "no," how many times before had you used "SNS"? _____

Please list all dates on which you used "SNS": _____

H. With respect to your claims in this lawsuit, how many cans of "SNS" did you use? _____

I. Are you still in possession of the "SNS" can(s) you claim caused you harm? Yes ☐ No ☐

If "no", explain what did with the can(s) after you used it? _____

For each can of "SNS" you used, please provide the batch number(s) printed on the bottom of the can: _____

J. Please describe in detail the physical appearance of the can. In lieu of this description, please attach a photograph(s) of the front, back and bottom of the can. _____

K. Are you in possession of any other "SNS" can(s) whether or not you claim it caused you injury? Yes ☐ No ☐

If "yes", please provide the batch number(s) printed on the bottom of each can(s) you are in possession of: _____

L. Please describe in detail how you used "SNS" on the date(s) you claim it caused you harm. _____

M. Describe in detail the space/area/place in which you were using "SNS." In lieu of this description, please attach photographs of the space/area/place which provides an accurate depiction of the space/area/place at the time of your use of "SNS". _____

N. Did you take any precautions before using "SNS"? Yes ☐ No ☐

If "yes," please list each precaution you took. _____

O. Was the area where you were using "SNS" ventilated? Yes ☐ No ☐

If "yes," please describe the ventilation present? _____

If "no," please explain why no ventilation was used? _____

P. Were you wearing any type of mask or covering over your nose and mouth while using "SNS"? Yes ☐ No ☐

If "yes," describe in detail the type of mask or covering you were using. _____

Q. How long did you use "SNS"? _____

Did you use "SNS" in the space/area/place described in your answer to Question II L for the entire time period stated above? Yes ☐ No ☐

Did you use "SNS" without any breaks in usage in the space/area/place described in your answer to Question II L for the entire time period stated above? Yes ☐ No ☐

R. Did you experience any side effects or symptoms of illness while using "SNS"? Yes ☐ No ☐

If "yes," describe in detail the symptoms (i.e. headache, nausea, shortness of breath, ...) you experienced. _____

If "no," how soon after your use of "SNS" did you experience any symptoms of illness? ___

Please describe the side effects or symptoms of illness you experienced? _____

S. Was anyone else present when you were using the "SNS" product? Yes ☐ No ☐

If "yes", state the names and addresses of all persons who witnessed you using "SNS":

Name	Address

T. Was the "SNS" product used in the course of your employment (employment includes contract or subcontract work for a general contractor or home or business owner)? Yes ☐ No ☐

If "yes," state:

1. Employer's name: _____
2. Employer's address: _____
3. Dates of Employment: _____
4. Occupation/Job Dates: _____
5. Date(s) "SNS" was used: _____
6. Address(es) where "SNS" purchased: _____
7. Frequency of use: _____
8. Name of Supervisor: _____
9. Did your employer give any safety instructions on how to use the SNS product? Yes ☐ No ☐

   If "yes," what instructions were you given? _____

10. Did you review the Materials Safety Data Sheet ("MSDS") for "SNS" prior to using the product? Yes ☐ No ☐

    If "yes," did you read it prior to using "SNS"? Yes ☐ No ☐

11. Were you provided with any type of mask or covering to be used over your nose and mouth, by your employer, prior to your use of "SNS"? Yes ☐ No ☐

    Describe in detail the type of mask or covering you were provided by your employer. ___

III. PERSONAL INFORMATION OF THE PERSON WHO USED "SNS"

A. Name: _____

B. Maiden or other names used or by which you have been known: _____

C. Social Security Number: _____

D. Current address: _____

E. Identify each address at which you have resided during the last ten (10) years, and list when you started and stopped living at each one:

Address	Dates of Residence-beginning and end

F. Driver's License Number and State Issuing License: _____

G. Date and Place of Birth: _____

H. Sex: Male ☐ Female ☐

I. Identify the highest level of education (high school, college, university or other educational institution) you have attended (even if not completed), the dates of attendance, course of study pursued, and diplomas or degrees awarded:

Institution	Dates Attended	Course of Study	Diplomas/Degrees

J. Employment Information.

1. Current employer (if not currently employed, last employer).

Name	Address	Dates of Employment	Occupation/Job Duties

2. List the following for each employer you have had in the last ten (10) years or each employer in the ten (10) years prior to your retirement and/or cessation of employment:

Name	Address	Dates of Employment	Occupation/Job Duties

Name	Address	Dates of Employment	Occupation/Job Duties

3. Are you making a wage loss claim for either your present or previous employment? Yes ☐ No ☐

   If "yes," state your annual income at the time of the injury alleged in Section I (C).____
   _____

   If "yes," state the number of days you were unable to work as a result of injuries you claim are related to your use of the "SNS" product._____

   If "yes," state whether or not you applied for any Worker's Compensation benefits. Yes ☐ No ☐

   If "yes," state whether or not you received any such benefits. Yes ☐ No ☐

   Please state the total amount of lost wages you are claiming as a result of your alleged use of "SNS." _____

K. Military Service Information: Have you ever served in the military, including the military reserve or National Guard? Yes ☐ No ☐

   Dates of Service _____ Branch of Military _____ Service ID # _____

   If "yes," were you ever rejected or discharged from military service for any reason relating to your physical, psychiatric or emotional condition? Yes ☐ No ☐

L. Have you ever filed for Bankruptcy? Yes ☐ No ☐

   If "yes," when, where, what was the disposition, and in what year was your bankruptcy discharged? _____
   _____
   _____

M. Insurance/Claim Information:

1. Have you ever filed a worker's compensation and/or social security disability (SSI or SSD) claim? Yes ☐ No ☐

   If "yes," to the best of your knowledge please state:

   a. When your claim was filed: _____

   b. Nature of disability: _____
   _____
   _____
   _____

   c. Approximate period of disability: _____

2. Have you ever been out of work for more than thirty (30) days for reasons related to your health (other than routine post-partum maternity leave)? Yes ☐ No ☐

   If "yes," set forth when and the reason. _____
   _____
   _____
   _____

3. Have you ever filed a lawsuit or made a claim, other than in the present suit, relating to any bodily injury? Yes ☐ No ☐

   If "yes," state to the best of your knowledge the court in which the action was filed, case name and/or names of adverse parties the name and contact information of your attorney, and a brief description of the claims asserted. _____
   _____
   _____
   _____
   _____
   _____
   _____
   _____

N. As an adult, have you been convicted of, or plead guilty to, a felony and/or crime of fraud or dishonesty? Yes ☐ No ☐

   If "yes," set forth where, when and the felony and/or crime. _____
   _____
   _____
   _____

IV. FAMILY INFORMATION

A. For each marriage, please list for each marriage the name of your spouse; spouse's date of birth (for your current spouse only); spouse's occupation; date of marriage; date the marriage ended, if applicable; and how the marriage ended (e.g., divorce, annulment, death).

Name of Spouse	Spouse's Date of Birth	Spouse's Occupation	Date of Marriage	Date Marriage Ended	How Marriage Ended (if applicable)

B. Has your spouse filed a loss of consortium claim in this action? Yes ☐ No ☐

C. To the best of your knowledge did any child, parent, sibling, or grandparent of yours suffer from any type of lung disease? Yes ☐ No ☐ Don't Know ☐

If "yes," identify each such person below and provide the information requested.

Name	Current Age (or Age at Death)	Type of Problem	Cause of Death (if applicable)

D. For each of your children, list his/her name, age, address and general health.

Name	Age	Address	General Health

V. MEDICAL BACKGROUND

A. Height: _____

B. Current Weight: _____

Weight at the time of injury, illness or disability described in Section I(C): _____

Weight for the past five (5) years: 2006 _____ 2005 _____ 2004 _____
2003 _____ 2004 _____

C. Did you at any time prior to your claimed "SNS" related injury suffer from any lung disease(s) and /or injuries, including but not in any way limited to: Asthma; Pneumonia; Emphysema; Chronic Obstructive Pulmonary Disease; Cystic Fibrosis; Lung Cancer; Bronchitis, Tuberculosis, Trauma to your ribs, sternum or chest or Surgery to your lungs or chest?
Yes ☐ No ☐

If "yes," specify type of disease and/or injury, date of diagnosis, diagnosed by whom, type of treatment, date(s) of treatment and prognosis:

Disease/Injury	Onset of Disease/Injury	Date Diagnosed	Physician	Treatment	Date Cured

Disease/Injury	Onset of Disease/Injury	Date Diagnosed	Physician	Treatment	Date Cured

D. Have you ever had a pulmonary function test (PFT)? Yes ☐ No ☐

If "yes," please state the date(s) of the PFT. _____

If "yes," please state the name and address of the medical provider. _____

_____

_____

Did you ever have a PFT prior to your use of the "SNS" product? Yes ☐ No ☐

Have you ever had chest x-rays? Yes ☐ No ☐

If "yes," please state the name and address of the medical provider. _____

_____

_____

If "yes," please state the date the x-rays were taken. _____

Have you ever had a CT scan of your lungs or chest? Yes ☐ No ☐

If "yes," please state the name and address of the medical provider. _____

_____

_____

If "yes," please state the date the CT scan(s) was/were taken. _____

E. Have you received a disability rating from any medical provider? Yes ☐ No ☐
If "yes," what rating have you received? _____
If "yes," for what condition were you given the rating? _____
If "yes," do you claim your disability is a result of your use of "SNS"? Yes ☐ No ☐

F. Have you been determined by any medical provider and/or governmental agency to be partially or totally disabled? Yes ☐ No ☐

If "yes," please state the name and address of the provider or agency providing this determination. _____

_____

_____

If "yes," for what condition were you given the determination? _____
If "yes," do you claim your disability is a result of your use of "SNS"? Yes ☐ No ☐

G. Smoking/Tobacco Use History: **Check the answer, circle the specific type of tobacco use, and fill in the blanks applicable for your history of smoking and/or tobacco use.**

☐ Never smoked cigarettes/cigars/pipe tobacco or used chewing tobacco/snuff.

☐ Past smoker of cigarettes/cigars/pipe tobacco or used chewing tobacco/snuff (circle all that apply).

a. Date on which smoking/tobacco use ceased: _____
b. Amount smoked or used: on average _____ per day for ____ years

☐ Current smoker of cigarettes/cigars/pipe tobacco or user of chewing tobacco/snuff (circle all that apply).

a. Amount smoked or used: on average _____ pack(s) per day for ____ years.

b. Amount smoked or used: on average _____ cigars/pipe tobacco per day for ____ years (circle all that apply).

☐ Smoker, different amounts at different times. Please provide details about the amount smoked during various periods of time: _____

_____

_____

H. Illicit Drugs: Have you ever used (even one time) any illicit drugs (including but not limited to marijuana, cocaine, heroin, methamphetamine, ecstasy) of any kind within one (1) year before, or any time after, you first experienced your alleged "SNS" related injury?
Yes ☐ No ☐ Don't Recall ☐

If "yes," identify each substance and state when you first and last used it. _____

_____

_____

Have you ever huffed any aerosol product at any time? Yes ☐ No ☐

If "yes," identify each substance huffed, and state when you first and last huffed it. _____

_____

_____

VI. DOCUMENTS

Please indicate if any of the following documents and things is currently in your possession, custody, or control, or in the possession, custody, or control of your lawyers by checking "yes" or "no." Where you have indicated "yes," please attach the documents and things to your responses to this profile form.

A. Records relating to the purchase of "SNS" in question, including but not limited to, receipt of sale, credit card bill, and any related invoices. Yes ☐ No ☐

B. Any documents relating to safety instructions regarding use of "SNS," including but not limited to, warning labels, employer's safety instruction sheets, MSDS or any other related documents. Yes ☐ No ☐

C. Photographs and/or videotapes of "SNS." Yes ☐ No ☐

D. Photographs and/or videotapes of the place where you purchased "SNS." Yes ☐ No ☐

E. Records of physicians, hospitals, pharmacies, and other healthcare providers identified in response to this profile form. Yes ☐ No ☐

F. Decedent's death certificate (if applicable). Yes ☐ No ☐

G. Report of autopsy of decedent (if applicable). Yes ☐ No ☐

VII. LIST OF MEDICAL PROVIDERS AND OTHER SOURCES OF INFORMATION

List the name and address of each of the following:

A. Your current family and/or primary care physician:

Name	Address

B. To the best of your ability, identify each of your primary care physicians for the last ten (10) years.

Name	Address

C. Each hospital, clinic, or healthcare facility where you have received inpatient treatment or been admitted as a patient during the last ten (10) years.

Name	Address	Admission & Discharge Dates	Reason for Admission

D. Each hospital, clinic, or healthcare facility where you have received outpatient treatment (including treatment in an emergency room) during the last ten (10) years.

Name	Address	Admission Date	Reason for Admission

E. Each physician or healthcare provider from whom you have received treatment in the last ten (10) years.

Name	Address	Date of Treatment

F. Each pharmacy that has dispensed medication to you in the last ten (10) years.

Name	Address

G. If you have submitted a claim for disability benefits, including application for benefits from Social Security or private insurance, in the last ten (10) years, state the name and address of the office that is most likely to have records concerning your claim, and the disability claimed.

Name	Address	Disability Claimed

H. If you have submitted a claim for worker's compensation, state the name and address of the entity that is most likely to have records concerning your claim and the reason you made such a claim.

Name	Address	Reason for Claim

VERIFICATION

STATE OF _____)
)
COUNTY OF _____)

I, _____, being first duly sworn upon oath, depose and say that I have read the foregoing that I know and understand the contents thereof, and that the responses provided herein are true and correct to the best of my information, knowledge, and belief.

_____
Print Name

Sworn to and subscribed before me
this _____ day of _____, 2007.

_____ [SEAL]
Notary Public

My commission expires: _____



FEDERATION OF DEFENSE
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FDCC Winter Meeting
Hyatt Grand Champions Resort
Indian Wells, California
February 26 – March 5, 2011

ELECTRONIC PRIVACY CONCERNS IN SINGLE-PLAINTIFF EMPLOYMENT LITIGATION AND EMPLOYMENT CLASS ACTIONS

Presented by
Class Action and Multidistrict Litigation Section

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ELECTRONIC PRIVACY CONCERNS IN SINGLE-PLAINTIFF EMPLOYMENT LITIGATION AND EMPLOYMENT CLASS ACTIONS

BY DAVID A. SCHOOLER, ESQ.

I. INTRODUCTION

Employees use company e-mail for personal business. Normally, this practice is discouraged but ignored. Problems arise when an employee contemplating litigation communicates with his or her attorney, and then later becomes embroiled in a lawsuit as a plaintiff. In a less common but similar scenario, an employee working in human resources, legal or at a supervisory level has access to privileged outside counsel communication before a class action is commenced and subsequently becomes a class member.

II. ISSUES IN SINGLE-PLAINTIFF EMPLOYMENT LITIGATION

The scenario is common. An unhappy employee is considering suit against his or her employer. The employee decides to use the computer they sit in front of all day to find an attorney. The employee then starts e-mailing this attorney from his or her work account. Things get worse and the employee quits, is terminated, or files a charge of discrimination while still employed.

Months later, the company's counsel starts reviewing the employee's old e-mails. The question now presents itself: how does the attorney proceed when he or she discovers the company possesses arguably privileged communications between the employee and his or her counsel?

A. Are The E-Mails Privileged?

The first inquiry is whether the communication is truly privileged. To simplify a complex idea: privilege exists where there is confidential law-related communication within the attorney-client relationship.

1. Traditional Considerations For Privilege To Attach

As a threshold matter, the communications must meet the traditional definitions of privilege. To use Minnesota law, attorney-client privilege protects:

(a) client communications;

(b) seeking legal advice;

(c) from an attorney;

(d) acting in that capacity;

(e) which are made in confidence; and

(f) which have not been waived.

See Nat'l Texture Corp. v. Hymes, 282 N.W.2d 890, 895 (Minn. 1979). —The purpose of the privilege is to encourage the client to confide openly and fully in his attorney without fear that the communications will be divulged and to enable the attorney to act more effectively on behalf of his client." *Id*. at 896.

2. The *Asia Global* Factors

The real issue is whether the privilege has been waived. Interestingly, to date the seminal case in this arena*, In re Asia Global Crossing, Ltd*., arises out of bankruptcy litigation. 322 BR 247 (S.D.N.Y. 2005). The case sets forth the most widely used test to determine if an e-mail retains privilege. The factors are as follows:

(1) does the corporation maintain a policy banning personal or other objectionable use;

(2) does the company monitor the use of the employee's computer or e-mail;

(3) do third parties have a right of access to the computer or e-mails; and

(4) did the corporation notify the employee, or was the employee aware, of the use and monitoring policies?

Id. Essentially, the case sets forth a practical test to weigh an employee's expectation of privilege against an employer's disclaimer of privilege. The test presumes the nature of the communication and the existence of an attorney-client relationship.

3. The Employee's Intent

The first and fourth *Asia Global* factors examine the employee's subjective intent to keep private communication with counsel. Specifically, did the employee communicate with his or her attorney while fully aware that the employer objected to the communication and could potentially review the communication?

a. Comparing E-mail to U.S. Mail

An employee for a defense contractor is aware that personal correspondence is banned and that all incoming and outgoing letters are monitored. If that employee were to send a letter from work discussing law-related matters with his or her attorney, it would be difficult to later claim a reasonable expectation of privacy.

4. The Employer's Intent

The second and third *Asia Global* factors examine the objective indicia of an expectation of privacy. Specifically, were the circumstances such that a reasonable person could not have expected his or her communication to remain confidential?

a. Comparing E-mail to U.S. Mail

To use the previous analogy, the defense contractor now has a well-known policy in place where all letters are opened and read before delivery and photocopies of the letters are stored in a generally accessible manner. Here, the company has created an environment in which it would be unreasonable to expect that one's personal correspondence would be confidential or read only by the identified recipient.

5. Tips For The Employer

For both traditional business reasons, and with an eye towards litigation, most large corporations have become sensitive to the use of electronic resources. Accordingly, many now maintain policies and procedures banning or discouraging the use of e-mail for personal business.

However, this is only a useful safeguard when coupled with complimentary policies regarding the review and retention of all incoming and outgoing e-mails. Like the defense contractor in the analogy above, it might not be enough just to ban private e-mail. Rather, employers should consider

affirmative steps to discourage the misconception of privacy in workplace correspondence.

For instance, conspicuous statements both in the employee handbook and when an employee logs on to his or her computer will serve to remind employees that the company equipment may be monitored.

B. Proceeding With Caution

Despite the most comprehensive warning, employees will still use e-mail for personal reasons. When an employee-attorney e-mail is subsequently found, the hint of impropriety if this correspondence is reviewed without proper protection can quickly derail otherwise straightforward litigation.

1. The Lesson From *Stengart v. Loving Care Agency*

Stengart v. Loving Care Agency has created a buzz in the world of workplace privacy. 990 A.2d 650 (N.J. 2010). To summarize the facts in *Loving Care*, attorneys for the employer discovered that (1) they had access to the former employee's personal e-mail accounts by virtue of her logging into these accounts from her work computer and (2) the employee's personal e-mail account contained correspondence to and from her current counsel. The question of whether access to these e-mails made its way to the New Jersey Supreme Court.

For attorneys, the case is a cautionary tale. The final holding in the case was aimed squarely at the counsel involved: —We leave to the trial court to decide whether disqualification of the Firm, screening of attorneys, the imposition of costs, or some other remedy is appropriate."

The attorneys for Loving Care were able to access Stengart's web-based personal e-mail because she had previously accessed it from her work laptop in derogation of the company's acceptable use policy. The threat of discipline arose because of the attorneys' decision to access that information without any disclosure to the court or opposing counsel.

2. Be very aware of Rule 4.4(b)

Rule 4.4(b) of the ABA Model Rules of Professional Conduct instructs that if an attorney —knows or reasonably should know that the document was inadvertently sent" he or she should —promptly notify the sender." The rule

does not, however, address a situation in which there is no —inadvertent" receipt, but rather, on-going possession in the employee e-mail setting.

C. Using What You Have

The safest course of conduct when arguably privileged communications are discovered is full disclosure. If the e-mail is discovered during review of an employee's or former employee's work account, the attorney should proceed in the same manner as if he or she had inadvertently received the correspondence from opposing counsel. Specifically, the attorney should notify opposing counsel of the existence of these e-mails.

From a litigation standpoint, this does not concede much. If the e-mails are relevant and support the company's position, they will eventually need to be disclosed. Including the e-mails in an exhibit list on the eve of trial or attaching them to a summary-judgment brief would simply be an invitation to sidetrack litigation. If the e-mails are irrelevant, disclosure to opposing counsel should not affect litigation. Here, surprise will inevitably backfire.

1. Once The Existence Is Known, The Question Becomes: Are The E-mails Admissible?

Numerous courts have held that emails sent and received using employer-provided computers or email accounts are not subject to a reasonable expectation of confidentiality and are not protected by attorney-client privilege.

a. Emails Sent And Received Using Employer-Provided Email Account May Not Be Subject To Any Privilege As A Result Of Employer's Monitoring Policy

In *Alamar Ranch, LLC v. County of Boise*, the court addressed a situation in which an employer's policy notified employees that their emails:

(1) would become the employer's property;

(2) would be subject to monitoring; and

(3) should not be assumed to be confidential.

No. CV-09-004-S-BLW, 2009 WL 3669741, at *4 (D. Idaho Nov. 2, 2009).

The court held that emails sent from an employee to her attorney were not privileged, stating as follows:

> It is unreasonable for any employee in this technological age—and particularly an employee receiving the notice [the employee] received—to believe that her e-mails, sent directly from her company's e-mail address over its computers, would not be stored by the company and made available for retrieval. Accordingly, the Court finds that [the employee] waived the privilege for those messages she sent from her work computer.

Id. The court also held that the emails sent from the attorney to the employee's work email address were not privileged, stating that:

> With regard to the e-mails that [the attorney] sent to [the employee], there is no question that [the employee's] address—"JeriK@IHFA.org"—clearly put [the attorney] on notice that he was using her work e-mail address. Employer monitoring of work-based e-mails is so ubiquitous that [the attorney] should have been aware that the IHFA would be monitoring, accessing, and retrieving e-mails sent to that address. Given that, the Court finds that [the attorney's] e-mails sent to [the employee's] work e-mail are likewise unprotected by the privilege.

Id. (emphasis added).

b. Employees May Not Have Reasonable Expectation Of Privacy In Emails Sent Or Received Using Employer-Provided Computer When A Notice Advised Him Each Time He Logged On That He Had —No Legitimate Expectation Of Privacy"

In *United States v. Etkin*, the court addressed a situation in which the employer used a log-on notice that appeared whenever the employee turned on her laptop. No. 07-CR-913 (KMK), 2008 WL 482281, at *3–5 (S.D.N.Y. Feb. 20, 2008) In this case, the court held that:

> [T]he issue here is whether the notices that appeared each time Defendant logged onto his work computer sufficiently

> notified Defendant that any email he sent to his wife from that computer might be read by a third party. The Court finds—without hesitation—that it did. Defendant's claim that he actually did believe that the March 13, 2007 email to his wife would remain confidential therefore is entirely unreasonable.

Id. at *5. *See also Sims v. Lakeside School*, No. C06-1412 (RSM), 2007 WL 2745367, at *1–2 (W.D. Wash. Sep. 20, 2007) (emails sent and received using employer-provided laptop and email account were not subject to any privilege under employer's monitoring policy); as well as *Long v. Marubeni America Corp.*, No. 05-Civ-639 (GEL/KNF), 2006 WL 2998671, at *3–4 (S.D.N.Y. Oct. 19, 2006) (emails stored on employer-provided computer were not subject to any privilege under employer's monitoring policy).

III. ISSUES IN CLASS ACTION LITIGATION

This situation, while less common, puts the employer on the other side of the ball. What happens when the unhappy employee has access to correspondence between the employer and its counsel? Now imagine this unhappy employee has made copies of sensitive communications regarding employment litigation the employer has recently settled. Here, there is a dangerous possibility for a serious breach of attorney-client privilege.

Notably, this scenario is reminiscent of whistle-blower litigation involving in-house counsel.

A. Where Are The Pitfalls?

For plaintiffs, the pitfalls are twofold: (1) use of privileged materials, or the circumvention of discovery, can result in sanctions; and (2) illicit interception of communications creates both civil *and* criminal liability.

1. Bypassing Discovery Rules Can Lead To Serious Sanctions

Outside the context of e-mails, courts have not looked kindly upon obtaining an adverse party's materials outside the discovery process. In a federal district court opinion from Minnesota, *Arnold v. Cargill*, attorneys for a plaintiff in an employment suit were disqualified because they

obtained Cargill's documents from another former employee. Civil No. 01-2086 (DWF/AJB) (D. Minn. Sept. 24, 2004).

The District Court Judge was clear in his admonishment of the disqualified attorneys, stating:

> At a minimum, [counsel's] behavior recklessly disregarded the risks associated with playing fast and loose with the rules protecting against disclosure of privileged and confidential material. At worst, [counsel] is guilty of a serious deception with respect to its role in the disclosure and retention of Cargill's privileged and confidential information. Either way, these proceedings have been tainted by the mishandling of Cargill's privileged and confidential material.

Id.

In an similarly sharp rebuke for gathering an adverse party's non-privileged documents outside the discovery process, a Nebraska federal court in *Speckman v. Minn. Mining and Manufacturing Co*. not only disqualified counsel, but issued harsh discovery sanctions, and referred the matter to the Nebraska State Bar Association Counsel for Discipline. 7 F. Supp. 2d 1030 (D. Neb. 1997). Counsel in that case took, without authorization or permission, a job posting from a bulletin board located in the defendant's facility after a deposition. The court in *Speckman* was clear in stating: —[c]ircumventing the discovery process is not to be taken lightly; in fact, such actions have resulted in serious sanction… Not only is it a violation of the rules, but it is also a violation of this court and its process." *Id*.

2. Obtaining E-mail Without Authority Can Lead To Severe Consequences For Former and Current Employees

Obtaining electronically stored information without permission may expose and employee to civil and criminal liability.

a. Violation Of State Privacy Of Communications Acts

To use Minnesota law as an example, there is a statutory prohibition on the interception and disclosure of wire communications:

> Except as otherwise specifically provided in this chapter any person who:
>
> (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, electronic, or oral communication
>
> (b) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, electronic, or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire, electronic, or oral communication in violation of this subdivision; or
>
> (c) intentionally uses, or endeavors to use, the contents of any wire, electronic, or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire, electronic, or oral communication in violation of this subdivision; shall be punished as provided in subdivision 4, or shall be subject to suit as provided in subdivision 5.

Minn. Stat. § 626A.02, Subd. 1.

Covertly intercepting an e-mail message likely falls within the prohibitions of the statute; an e-mail message is a —wire communication" and surreptitiously diverting one certainly comes within the statutory definition of —intercept." Minn. Stat. § 626A.01, Subd. 4 and 5.

Although Minn. Stat. § 626A *et. seq*. is a criminal statute, civil liability is provided in section 13:

> In general. Except as provided in section 2511(2)(a)(ii) of title 18 of the United States Code, a person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity that engaged in that violation relief as may be appropriate.
>
> Subd. 2. Relief. In an action under this section, appropriate relief includes:

(1) temporary and other equitable or declaratory relief as may be appropriate;

(2) damages under subdivision 3 and punitive damages in appropriate cases; and

(3) a reasonable attorney's fee and other litigation costs reasonably incurred

Minn. Stat. § 626A.13.

b. Violation of the Federal Wire and Electronic Communications Interception and Interception of Oral Communications Act

The federal Wire and Electronic Communications Interception and Interception of Oral Communications Act mirrors the Minnesota statute, but applies only to the interception of electronic communications:

(1) Except as otherwise specifically provided in this chapter any person who –

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

* * *

(b) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

(c) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or

> having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or
>
> * * *
>
> shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

18 U.S.C. § 2511.

Similar to the state statute, the federal act is primarily criminal in nature. There is, however, civil liability in the federal act as well:

> (a) In general.--Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate.
>
> (b) Relief.--In an action under this section, appropriate relief includes—
>
> (1) such preliminary and other equitable or declaratory relief as may be appropriate;
>
> (2) damages under subsection (c) and punitive damages in appropriate cases; and
>
> (3) a reasonable attorney's fee and other litigation costs reasonably incurred.

18 U.S.C.A. § 2520. As constructed, this Act may apply to any person who received the intercepted e-mails, knowing they were intercepted.

c. Violation of the Federal Stored Wire and Electronic Communications and Transactional Records Access Act

The federal Stored Wire and Electronic Communications and Transactional Records Access Act specifically prohibits the storage and retention of unlawfully obtained electronic communications:

> (a) Offense.--Except as provided in subsection (c) of this section whoever—
>
> (1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or
>
> (2) intentionally exceeds an authorization to access that facility;
>
> and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system shall be punished as provided in subsection (b) of this section.

18 U.S.C.A. § 2701 *et. seq*. This Act too is criminal in nature but contains a civil liabilities provision:

> (a) Cause of action.--Except as provided in section 2703(e), any provider of electronic communication service, subscriber, or other person aggrieved by any violation of this chapter in which the conduct constituting the violation is engaged in with a knowing or intentional state of mind may, in a civil action, recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate.
>
> (b) Relief.--In a civil action under this section, appropriate relief includes—
>
> (1) such preliminary and other equitable or declaratory relief as may be appropriate;
>
> (2) damages under subsection (c); and
>
> (3) a reasonable attorney's fee and other litigation costs reasonably incurred.

18 U.S.C.A. § 2707.

B. Tips For The Employer

Although the employee who unlawfully accesses privileged communications may be civilly and criminally liable, an employer should be careful before pursuing its own remedies lest a straightforward matter spiral into trench warfare over the meaning of the term —intercept."

Moreover, and equally important, an employer should take great caution in raising the specter of criminal liability during on-going civil litigation.

However, if an employer learns that its privilege has been compromised, there is recourse available. First, an employer may always seek a protective order barring the use of privileged documents that were surreptitiously obtained. Second, an employer may consider obtaining a temporary restraining order if any of the plaintiffs are still employed.

IV. CONCLUSIONS

If e-mails between an adverse party and his or her counsel are found on a company's e-mail system, and this fact has been disclosed to opposing counsel, an attorney is now likely out of the dangerous ethical territory of reviewing privileged communications.

If the e-mails are relevant, the next step of course is to establish that they are admissible as evidence. Since the existence of these arguably non-privileged e-mails is now known by all parties, the company is free to argue to the court that privilege has been waived under the *Asia Global* factors.

E-mails are unfortunately like roaches: it takes drastic measures to every truly be rid of them, and if you don't address them upfront, they can become a serious nightmare. *Loving Care* began as a fairly straightforward employment discrimination matter. The case was likely destined for determination at summary judgment. However, because of the e-mail review issue, after two years of litigation, the underlying claims in *Loving Care* will only now be addressed.

DAVID A. SCHOOLER

David A. Schooler received his B.A. from St. Olaf College and his J.D. cum laude from William Mitchell College of Law. He served as an extern law clerk for Magistrate Bernard Becker of the U.S. District Court for the District of Minnesota.

Dave is a shareholder in the firm of Briggs and Morgan, Professional Association. Dave is an experienced trial attorney with a proven winning track record in complex employment and business litigation. Representative trial experience includes over 40 first-chair jury trials to-verdict in employment litigation, shareholder litigation, officer and director litigation, intellectual property litigation, and products liability litigation, personal injury and business and specialty lines policyholder insurance litigation. Dave has been certified as a Civil Trial Specialist by the Minnesota State Bar Association, is an elected member of the Academy of Certified Trial Lawyers of Minnesota, and American Board of Trial Advocates, and the Federation of Defense and Corporate Counsel. Dave has been named a —Super Lawyer" by Minnesota Law & Politics (representing the top 5% of Minnesota Lawyers).

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FDCC Winter Meeting
Hyatt Grand Champions Resort
Indian Wells, California
February 26 – March 5, 2011

GREEN CONSTRUCTION & LEED – A PRIMER FOR COUNSEL

Presented by
Insurance Coverage, Construction, and Property Insurance Sections

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INTRODUCTION

Over the past forty years, there has been an international paradigm shift from short-sighted environmental practices to long-term conservation movements. Almost 20 years ago, more than 100 heads of state met in Rio de Janeiro, Brazil for the first international Earth Summit. The assembled leaders signed the Convention on Climate Change and the Convention on Biological Diversity, and endorsed the Rio Declaration. Often cited as the first global environmental treaty, the Kyoto Protocol was initially adopted in 1997. Since then, there have been numerous global summits on environmental practice, such as the United Nations' Earth Summit, which will celebrate "Rio + 20" by returning to Rio next year. In December, 2009 the UN summit in Copenhagen drew a number of world leaders.

While the United States has moved at its own pace, and was not a signatory to Kyoto, it has focused on environmental measures since the 1970s.[1] The United States Green Building Council (USGBC), founded in 1993 as a nonprofit organization, is "committed to a prosperous and sustainable future for our nation through cost-efficient and energy-saving green buildings."[2] Green construction is a growing trend that is here for at least the foreseeable future. There have been national incentives for sustainable development, and the American Recovery and Reinvestment Act of 2009 allocated the following substantial sums to green building:

- $ 4.5 billion for green upgrades of federal buildings
- $ 5.0 billion for residential green retrofit
- $ 6.3 billion for state energy efficiency and conservation
- $11.0 billion for electrical grid upgrades
- $ 6.0 billion for new loans for wind, solar and biofuel
- $ 2.5 billion for bonds to finance wind, biomass, geothermal, hydro, landfill gas, and trash into energy

[1] For instance, the success of the Clean Water Act has been viewed as "one of the most successful environmental laws." Claudia Copeland, Congressional Research Serv., Issue Brief 10069, Clean Water Act Issues in the 107th Congress 2 (Nov. 25, 2002), available at http://assets.opencrs.com/rpts/IB10069_20021125.pdf.
[2] http://www.usgbc.org/DisplayPage.aspx?CMSPageID=124

With respect to statewide incentives, as of May 2009, twenty-four individual states had adopted renewable energy standards, which require energy providers to acquire a minimum percentage of power from renewable energy sources by a specific date.[3] New York has instituted the most ambitious requirements, mandating its energy providers to obtain 24 percent of their power from renewable sources by 2013. Five additional states have nonbinding goals for adopting renewable energy (North Dakota, South Dakota, Utah, Virginia, and Vermont).[4] Municipal and town incentives for green construction range from requiring LEED or LEED-like construction for all new buildings over a certain square footage or dollar amount, to providing property tax credits and density bonuses for green construction.[5] As of 2007, USGBC was composed of 10,000 organizations, including building owners, occupants, real estate developers, facility managers, architects, designers, engineers, contractors, product and building system manufacturers, government agencies, and nonprofits.[6] As of 2009, its membership doubled to 20,000 organizations.[7]

The effects of green construction on the national economy are staggering. USGBC asserts that green construction is an essential factor in reviving the US (and possibly global) economy.[8] Green building is one of the fastest-growing industries, increasing between 30 to 60 percent annually in products and services. Green construction projects increased from $10 billion in 2005 to $49 billion in 2008.[9] These values will increase to between $96 billion and $140 billion by 2013.[10] Investment in green building makes sense because savings in utilities can potentially compensate for the up-front investment costs in green construction within three to ten years, depending on the size of the building and what level of certification the owner seeks.[11]

Our clients in the insurance industry have are and will be affected profoundly by climate change. In fact, the CEO of XL commented that there is perhaps no industry more aligned with the world in preventing the

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[3] http://apps1.eere.energy.gov/states/maps/renewable_portfolio_states.cfm
[4] *Id.*
[5] http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1852#local
[6] http://www.usgbc.org/News/USGBCInTheNewsDetails.aspx?ID=3288
[7] http://www.usgbc.org/DisplayPage.aspx?CMSPageID=124
[8] http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1942
[9] Green Outlook 2009: Trends Driving Change report by McGraw-Hill Construction
[10] *Id.*
[11] *See, e.g.*, http://www.enermodal.com/Canadian/leed_should_i_certify.html

destructive effects of climate change. In the past few years insurers have been making strides to invest in sustainability, and to be proactive by persuading insureds to embrace energy efficiency, including providing incentive endorsements relating to green building, at no additional premium.

As members of this organization, we represent design professionals, builders, large corporations and insurance carriers, all of whom will be impacted by this Green Revolution. As attorneys to design professionals, builders, and corporate building owners, we need to understand Green Building, and how it will affect our clients, both in terms of corporate planning, operations, potential liabilities, contract drafting, risk management, coverage and exposure to enforcement and litigation. As counsel to insurers we need to understand the industries' "green" product offerings, and the coverage issues which may arise when addressing green design, construction, builder's risk, E & O claims, and adjusting losses under property policies.

Our program and the four papers that follow are intended to provide an outline of these issues.[12]

- First, Norman B. Golinkin, a Structural Engineer/Architect from SEA, Ltd., one of FDCC's long time Exhibitors, will provide an overview of Green Building, describing the concepts, identifying green organizations and explaining LEED Certification, in *"Green Building Basics."*

- Next, Ned Currie, Vice-Chair of the ADR Section and the P&O Committee, discusses liability insurance coverage issues from a green building perspective. This perspective includes standards of care within the green building industry, what coverage may apply to different liability concepts, different types of coverage available to the potential defendants, and application of the coverage to these defendants and claims, in *"Liability Insurance Coverage Issues Arising Out Of Green Construction."*

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[12] The opinions which the authors are presenting while non –controversial are individual, and do not represent the opinions of our clients or necessarily of our firms. The materials and links in the presentation are being presented under the fair use doctrine of the U.S. Copyright Act.

- Joanne Blackburn, Immediate Past Chair of the Construction Section, explores potential claims that may be made against the different defendants ranging from the design professionals down to the subcontractors, issues that arise in the construction contracts, as well as those that can arise at the projects once construction begins and case law that exists wherein LEED or other green claims have been made in *"Green Building and LEED Certification Litigation: Is Green Building Resistant to Litigation?"*

- Finally, Rebecca Levy-Sachs, Chair of the Property Insurance Section, outlines the implications of green building from the perspective of property claims and coverage, including green repair, and the impact of the ultimate incorporation of green building standards into state and municipal Building Codes bringing green repairs into Law & Ordinance coverage, in *"The Impact of Green Building on Property Insurance."*

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GREEN BUILDING BASICS

Presented by

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CHAPTER ONE – GREEN BUILDING BASICS

BY NORMAN B. GOLINKIN
(SEAlimited.com)

Traditionally, factors guiding building design and construction have included economics, functionality, durability, comfort, and aesthetics. However, in addition to providing places for living, working, and amusement, traditional buildings have had a profound impact on the natural environment, as well as the health and welfare of society. For instance, in the United States, traditional buildings represent:

- 38.9% of primary energy usage (including fuel input for production)[13]
- 38% of all CO_2 emissions[14]
- 72% of electricity consumption[15]
- 13.6% of all potable water usage[16]
- 170 million tons of building-related construction and demolition debris[17]

In recent years, efforts to reduce the overall impact of the built environment on human health and the natural environment have given rise to the "green building industry." Also known as "sustainable" or "high-performance" construction, green building can be defined as the "practice of creating structures and using processes [and materials] that are environmentally responsible and resource-efficient throughout a building's life-cycle."[18] Green building has evolved to mean different things to different people. However, in general, it can be viewed as a set of practices that attempts to address climate change, resource depletion,

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[13] Environmental Information Administration (2008). EIA Annual Energy Outlook.
[14] Environmental Information Administration (2008). Assumptions to the Annual Energy Outlook.
[15] Environmental Information Administration (2008). EIA Annual Energy Outlook.
[16] U.S. Geological Survey (2000). 2000 data.
[17] U.S. Environmental Protection Agency (2009). Estimating 2003 Building-Related Construction and
Demolition Materials Amounts.
[18] *Basic Information, Definition of Green Building*, U.S. Environmental Protection Agency.

water consumption, degradation of ecosystem/habitat, indoor environmental air quality, and the comfort and productivity of building occupants.

I. LEADERSHIP IN ENERGY AND ENVIRONMENTAL DESIGN

A number of systems and standards have been developed to direct and measure green building. The best known and most widely used of these systems is the Leadership in Energy and Environmental Design, or LEED®. Developed by the U.S. Green Building Council (USGBC), the LEED® program utilizes third-party verification to certify high-performance, sustainable buildings and neighborhoods. Although LEED® was originally conceived as a voluntary program, as of September 24, 2010, initiatives stipulating the application of LEED® in varying degrees in public school jurisdictions, institutions of higher education, and at various levels of government have been established in 45 states.

II. LEED® FRAMEWORK

LEED® was first launched in 1998. Following a number of subsequent modifications, Version 2.0 was released in March 2000. The current version—LEED® 2009—was launched on April 27, 2009. LEED® 2009 is actually a group of rating systems, each of which is applied to a specific type of project: New Construction, Commercial Interiors, Core & Shell, Schools, Retail, Healthcare, Homes, Operations and Maintenance of existing buildings, and Neighborhood Development.

Under most LEED® 2009 rating systems, a project must first meet minimum program requirements in order to participate in the certification process.[19] These requirements are meant to ensure that the project is of a type that the LEED® rating systems were intended to evaluate. Next, the project must satisfy all rating system prerequisites and achieve the requisite number of credit points. Each rating system is comprised of five major credit categories:

1. Sustainable Sites
2. Water Efficiency
3. Energy and Atmosphere

[19] LEED® 2009 Minimum Program Requirements, USGBC, November 2009.

4. Materials and Resources

5. Indoor Environmental Quality

In addition to the required prerequisites and available credits, each credit category provides bonus points for greatly exceeding the performance level or expanding the scope of existing credits (called "Innovation in Design"). Bonus points are also available for meeting requirements that have been designated as particularly important for a project's specific geographic area (referred to as "Regional Priority"). Although the number of points available in each credit category is different among the various LEED® 2009 rating systems, when combined, the available credit points in all five credit categories in each system total 100. In each rating system, Innovation in Design and Regional Priority provide for a possible six and four bonus points, respectfully, bringing the total potential points for a project to 110. The number of points a project ultimately receives determines the level of certification awarded: Certified (40-49), Silver (50-59), Gold (60-79), or Platinum (80 or more).

LEED® Certification Process

Projects become LEED® certified under a process administered by the Green Building Certification Institute (GBCI), an independent, third-party organization established in 2008. The GBCI also administers professional credentialing and certificates within the LEED® framework. The LEED® Certification Policy Manual[20] outlines the policies and procedures established to obtain project certification. The first step after determining the minimum project requirements have been satisfied is to register the project with the GBCI and pay the applicable registration fee. Registration declares the project team's intent to obtain LEED® certification, and provides access to tools and information to that end. Next, the project team must prepare the application. Each LEED® credit and prerequisite has a unique set of documentation requirements that must be completed. Required submittal documentation could include some combination of narrative, drawings, photographs, charts, graphs, and/or calculations. Upon compilation of the required submittals, application is made for review within two years of substantial completion of the project. A certification fee, which is based on the size of the project and the applicable rating system, is paid at the time of application. The GBCI reviews the submittals and returns preliminary comments to the project team. Neither

[20] LEED® Certification Policy Manual, GBCI, September 17, 2010.

project certification nor credits are awarded at this time. Rather, the reviewed prerequisites and credits are designated as "anticipated," "pending," or "denied."

Within 25 days of this preliminary review, the project team may provide a response that includes revised documentation. At that time, the GBCI designates the prerequisites and credits as either "awarded" or "denied." Under some LEED® systems (New Construction, Core & Shell, and Commercial Interiors), it is permissible to split the review process into two stages, Design Review and Construction Review. The process for each phase of the split review is similar as described above; however, neither credits nor certification is awarded until the end of the Construction Review stage. Using the two-tier system allows project teams to assess the likelihood of achieving certain credits (and, if necessary, make adjustments) early in the process. During the review process, the project team can appeal the determinations made by the GCBI. There are two levels of appeal, each currently costing $500 to appeal a single credit or prerequisite. In the end, it is not until the project team accepts the final decision of the GBCI that the project ultimately becomes LEED® certified.

NORMAN B. GOLINKIN, S.E., P.E., AIA, CXLT, LEED AP

Mr. Golinkin is a Project Structural Engineer. Mr. Golinkin received a Bachelor of Science in Architectural Studies with university honors and college highest honors, as well as a Master of Architecture, both from the University of Illinois at Urbana-Champaign. Prior to coming to SEA, Ltd., he worked for over 15 years with full-service and consulting firms, designing building structural systems. Mr. Golinkin has been involved with all aspects of the design process, from conception through construction, for a wide variety of building types, including educational, health care, religious, municipal, corporate, and residential facilities. In addition to being licensed as both an engineer and an architect, Mr. Golinkin is a LEED Accredited Professional, has experience teaching at the collegiate level, and is a Certified Operator of the English XL Variable Incidence Tribometer, a device used to measure the slip-resistance of walking surfaces.

Mr. Golinkin's background enables him to conduct investigations for determining the cause and extent of damage to commercial and residential buildings, facilities, and structures. The major emphasis of his work includes analyzing and evaluating structural and architectural failures in steel, concrete, masonry, and timber products, as well as roofing and wall assembly systems and applications; conducting slip/trip-and-fall investigations for premises liability claims; and evaluating existing structures for compliance with design plans, specifications, and building codes. Mr. Golinkin is a member of several professional technical societies and has provided expert testimony with regard to structural engineering, architecture, and premises liability.

Licensed Structural Engineer in Illinois (No. 081-005289); Licensed Professional Engineer in Wisconsin (No. 37114-006); Licensed Architect in Illinois (No. 001-014390).

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LIABILITY INSURANCE COVERAGE ISSUES ARISING OUT OF GREEN CONSTRUCTION

Presented by

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CHAPTER TWO –LIABILITY INSURANCE COVERAGE ISSUES ARISING OUT OF GREEN CONSTRUCTION

BY EDWARD J. CURRIE, JR.

I. OVERVIEW

A. Definition and Scope of "Green Building"

1. "Green Building" Defined

There is no universally accepted definition, but the term generally refers to new construction and renovations desired to increase energy efficiency and/or minimize any negative environmental effects. The EPA website, at its Green Building Publications link (http://www.epa.gov/greenbuilding/, defines "green building" as

> Green building - also known as sustainable or high-performance building - is the practice of (1) increasing the efficiency with which buildings and their sites use and harvest energy, water, and materials; and (2) protecting and restoring human health and the environment, throughout the building life-cycle: siting, design, construction, operation, maintenance, renovation and deconstruction.
>
> (Accessible at http://www.epa.gov/greenbuilding/).

A green building is further described as one that is "environmentally responsible and resource-efficient throughout its life cycle." Thus, green buildings often incorporate sustainable (reused, recycled, renewable) construction materials, minimize pollutants, and/or feature energy and water savings features. The term encompasses a broad range of features and includes, but is not limited to: energy efficient appliances or building components; alternative energy sources such as solar or wind; roofing options such as vegetated roofs or white roofs; water saving systems such as tankless water heaters, water collection and recycling systems, or xeriscaping (water-conserving landscaping); environmental features designed to reduce toxins/pollutants and improve indoor ventilation and air

quality; waste reduction and management measures such as recovery and recycling of construction and demolition debris; and, the use of permeable surface coverage to reduce urban runoff.

2. "Green Building" Credentialing

There is no universally accepted system for credentialing or verifying that a structure is in fact a "green building". Several "green building" rating or credentialing systems have evolved - of these, some were developed overseas and spread to the United States, while others were developed in the United States. Some offer a general ratings system, while others have a specific focus. Most are commercial in origin and application. While not exhaustive, the following list is intended to illustrate the breadth and application of many of these programs:

a. Federal Rating Systems – The Environmental Protection Agency (EPA), in a joint project with the U.S. Department of Energy, introduced the "Energy Star" system in 1992. This is a voluntary program designed to promote energy efficient products and practices. The program has expanded over time and now rates products in more than sixty categories, including appliances, office equipment, home electronics, lighting, and heating and cooling equipment in both residential and commercial buildings. (Information accessible at http://www.energystar.gov). Energy Star labeled homes are rated as at least fifteen percent more energy efficient than homes built to the 2004 International Residential Code.

b. The Leadership in Energy and Environmental Design (LEED) is the best known and widely used private or non-profit certification program, having achieved international recognition and acceptance. This system was developed and is administered by the U.S. Green Building Council (USGBC), which maintains a database of LEED-registered or certified building projects. (Accessible at www.usgbc.org/). The USGBC is a non-profit organization founded in

1993, comprised of a broad coalition of universities, corporations, builders and other professionals, government agencies and other non-profits. The LEED system is generally accepted by governmental agencies offering benefits for green building projects, and often included in construction contracts.

LEED certification is offered at one of four levels: certified, silver, gold, or platinum, each of which indicates an increased level of compliance. The LEED for Homes program has eighteen mandatory features, and awards further points for additional "sustainable" features, such as the use of recycled building materials or extra insulation.

c. The Green Globes program originated in Canada but is administered in the United States by the not-for-profit Green Building Initiative (GBI) (information accessible at http://www.greenglobes.com and at http://www.thegbi.org). Green Globes certification is based on a 1,000 point scale that evaluates a building on six levels: (1) energy efficiency (EE); (2) indoor environmental quality (EQ); (3) sustainable site planning and management (SM); (4) material and resources (MR); (5) water efficiency (WE); and (6) innovation (IN). GBI offers certification for both new construction and existing buildings. Certification is awarded at four levels (from one Globe to four Globes), depending on the total points awarded.

d. The National Association of Home Builders (NAHB) offers the NAHB Model Home Green Building Guidelines to its members, to serve as a voluntary baseline for single family home projects. Additionally, NAHB issued its 2008 National Green Building Standard to provide members with a nationally recognizable

standard for green building. Further information is accessible at http://www.nahbgreen.org. NAHB, along with the International Code Council (ICC), co-sponsors the National Green Building Standard (NGBS), prepared to ANSI guidelines. This system is awaiting ANSI approval. Similar to LEED, it has mandatory requirements and offers optional points for additional features. The total points awarded determine the level of certification, which is offered at four levels: bronze, silver, gold, or emerald.

e. Certain industries have developed industry-specific rating systems. These include the Carpet and Rug Institute's "Green Label" rating for carpet and the Forest Stewardship Council's rating system for wood framing materials. The American Lung Association offers its "Health House" certification.

f. A number of states offer programs for certification or whereby certain benefits can be earned. A list of these programs, offered as a practice guide for builders, can be accessed at http://www.pathnet.org/sp.asp?mc=techpractices.

3. Increased Demand for Green Building

a. Green Building Mandates

There are a number of statutes and ordinances, at federal, state, and local levels, that either require construction compliance with "green" standards, or offer incentives for green certification. Examples include the Energy Policy of 2005 and the Energy Independence and Security Act of 2007, each of which include energy efficiency and sustainable design requirements for Federal and other buildings, and the Emergency Economic Stabilization Act of 2008 extended tax credits and deductions for energy efficient building features. California, often seen as a bellwether state, enacted the 2008 California Green Building Standards Code (Title 24 CCR Part 11), applicable to all new construction in the

state. As of February 2009, eighteen states had included Green Globes in green building legislation, regulation or executive order. [Ward Hubbell, President of the Green Building Initiative, in testimony before the Senate Committee on Energy and Natural Resources, February 25, 2009.] Local governments have responded to the growth in "green building" by incorporating "green" standards into local building codes and ordinances.

b. Market Demands

The EPA provides the following statistics that assist in placing the importance of green building market in perspective: In the United States in 2002, the building industry represented more than $531 billion in annual revenues, nearly $62 billion in annual payroll, and more than 1.7 million employees. Approximately 7.1888 million new residential housing units were built between 2005 and 2009. Annually, approximately 170,000 commercial buildings are constructed, and nearly 44,000 are demolished. In 2006, buildings accounted for 72 percent of total U.S. electricity consumption: 51 percent of that total was attributed to residential units, while 49 percent was attributed to commercial units. The average household spends at least $2,000 annually on energy bills, over half of which goes to heating and cooling. Buildings in the U.S. contribute 38.9 percent of the nation's carbon dioxide emissions. The U.S. spends $4 billion annually for energy to run drinking water and wastewater facilities. The average American now uses 100 gallons of water daily, for a total daily consumption of 26 billion gallons of water. Thirty percent of this is used outdoors, primarily for landscaping - a typical suburban yard requires 10,000 gallons of water above and beyond annual rainwater. Showering alone accounts for more than 1.2 trillion gallons of water annually. Buildings and their Impact on the Environment: A Statistical Summary (Revised April 22, 2009).

Concerns over global warming, a push to reduce reliance on foreign energy sources, financial savings offered by reduced energy consumption, and the increasing popularity of environmental activism and conservation all combine to increase market demand for green building projects. Recent estimates place the "green building" industry at twelve percent of the current commercial and industrial building market. *McGraw Hill Construction (2008), Global Green Building Trends SmartMarket Report.* Non-residential building stock is projected to be fifty percent "green" by 2015. Non-residential Green Buildings to Reach 50% Share by 2015, Jan. 8, 2010, at http://www.environmentalleader.com. Despite the recent recession, demand continues to rise. "Green" buildings typically

experience higher occupancy ratings and command higher property values and higher rent payments than comparable non-green buildings. Additionally, "green" buildings are often eligible for incentives such as tax breaks and abatements, rebates, grants, and loans.

II. DETERMINING LIABILITY COVERAGE

There are certain provisions and terms of art nearly universally employed in insurance contracts. Additionally, a well defined and widely accepted body of law exists outlining the general principles of policy construction, coverage determinations, and an insurer's duty to defend. This includes certain common law principles related to insurance law that uniquely apply in the insurance context. Although a particular policy may be specifically tailored to the insured's needs and operations, these traditional principles of insurance interpretation and coverage will apply.

Traditional principles of insurance interpretation under existing policy forms for commercial general and professional liability will be confronted by new causes of action arising from "LEEDigation". There are few published court cases to date. These address liability rather than coverage issues, but insurers report a growing number of claims related to green building projects, under both property and professional liability policies.

Unfortunately, due to the infancy of liability coverage issues arising out of "LEEDigation", there are no generally accepted standards or definitions for liability insurers. Possible sources for standards and definitions which might be employed include:

- American Institute of Architects
- LEED (most often used)
- Building Research Environmental Assessment Method (BREEAM)
- Green Building Challenge Assessment Framework
- The Earth Advantage
- National Green Building Standard. See Shapiro and Hill, "Greening of the Standard of Care" (March 9, 2009).

As such, to the extent the definition of "professional services" in professional liability policy might be construed to be ambiguous when a claim arising out of green design or engineering is asserted, a professional insured might resort to these standards and definitions favoring coverage in resolving a coverage dispute.

A liability policy is written in two parts: an insuring agreement, which defines the types of risk for which coverage is provided, and exclusions, which remove coverage for certain risks that are initially within the insuring clause. *Collin v. American Empire Ins. Co.*, 26 Cal.Rptr.2d 391, 398 (Cal.App.2.Dist. 1994). A court must first consider whether a claim falls within the potential scope of coverage, and will consider exclusions only after determining that the insuring agreement is or may be triggered by the claim. *Id.*

An insured has the *prima facie* burden of proving that a claim falls within the scope of coverage. *Trans World Airlines, Inc. v. Associated Aviation*, 58 S.W.3d 609, 621 (Mo.App. E.D. 2001). The burden then shifts to the insurer to show that coverage is barred by applicable policy exclusion. *Id.* The majority rule returns the burden to the insured to show that an exception to the exclusion results in retained coverage. *Id.* (citing 21 *Appleman's Ins. Law* § 12275 (1998 Supp.; *LaFarge Corp. v. Travelers Indem. Co.*, 118 F.3d 1511 (11th Cir. 1997); *Aeroquip Corp. v. Aetna Cas. And Sur. Co.*, 26 F.3d 893, 894-95 (9th Cir. 1994); *Guar. Nat'l Ins. v. Vic Mfg. Co.*, 143 F.3d 192, 193 (5th Cir. 1998)).

The interpretation of the contractual language of an insurance policy is a question of law. *Mahaffey v. General Sec. Ins. Co.*, 543 F.3d 738, 741 (5th Cir. 2008); *Leber v. Smith*, 639 N.E.2d 1159, 1163 (Ohio 1994); *Iowa Kemper Ins. Co. v Stone*, 269 N.W.2d 885, 887 (Minn. 1978). If the terms of the contract are unambiguous and clear, they are to be accepted in their ordinary sense and enforced to carry out the expressed intent of the parties. *Id.*; *see also Allen v. Transamerica Ins. Co.*, 128 F.3d 462, 466 (7th Cir. 1997); *Union Ins. Co. v. Houtz*, 883 P.2d 1057, 1061 (Colo. 1994). Policy terms that are not defined within the policy are given their plain and ordinary meaning. *Id.* A policy must be considered in its totality, and the provisions are to be read in context. *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 620 N.E.2d 1073, 1078 (Ill. 1993).

Coverage disputes often arise when an insured alleges that a policy term is ambiguous and should be interpreted so as to provide coverage. A policy term is ambiguous only if it is subject to more than one reasonable

interpretation, and a court should not create ambiguity by a strained construction. *Fireman's Fund Ins. Co. v. Allstate Ins. Co.*, 234 Cal.App.3d 1154, 286 Cal.Rptr. 146 (3d Dist. 1991). If an ambiguous term is capable of more than one reasonable interpretation, courts generally accept the interpretation favorable to coverage for the insured. *California Dairies, Inc. v. RSUI Indem. Co.*, 617 F.Supp.2d 1023, 1030 (E.D.Cal. 2009); *Dillon Companies, Inc. v. Royal Indem. Co.*, 369 F.Supp.2d 1277, 1283-84 (D.Kan. 2005); *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 594 S.E.2d 455, 459 (S.C. 2004). Under certain circumstances, if an insurance contract contains an ambiguous term not capable of a reasonable interpretation, a court may refer to extrinsic evidence to interpret the policy. *Morgan Stanley Grp. Inc. v. New Eng. Ins. Co.*, 225 F.3d 270, 275-76 (2d Cir. 2000) (internal citations omitted); *Shifrin v. Forest City Enterprises, Inc.*, 597 N.E.2d 499, 501 (Ohio 1992) (extrinsic evidence will be considered in an effort to give effect to the parties intentions only when contract language is ambiguous or the circumstances give the language a special meaning).

The reasonable expectations doctrine is viable in a majority of states as a tool of construction in disputes arising out of alleged ambiguities. *See, e.g., Safeway Ins. Co. of Alabama, Inc. v. Herrera*, 912 So.2d 1140 (Ala. 2005); *First American Title Ins. Co. v. Action Acquisitions, LLC*, 187 P.3d 1107, 1113-14 (Ariz. 2008); *Bank of the West v. Super. Court*, 833 P.2d 545 (Cal. 1992); *Hallowell v. State Farm Mut. Auto. Ins. Co.*, 443 A.2d 925 (Del. 1982); *Richards v. Hanover Ins. Co.*, 299 S.E.2d 561, 563 (Ga. 1983); *Guajardo v. AIG Hawai'i Ins. Co., Inc.*, 187 P.3d 580, 587 (Haw. 2008); *Colonial Penn Ins. Co. v. Guzorek*, 690 N.E.2d 664, 669 (Ind. 1997); *Grinnell Select Ins. Co. v. Continental Western Ins. Co.*, 639 N.W.2d 31 (Iowa 2002); *Liggatt v. Employers Mut. Cas. Co.*, 46 P.3d 1120 (Kan. 2002); *True v. Raines*, 99 S.W.3d 439 (Ky. 2003); *General Cas. Co. of Wisconsin v. Wozniak Travel, Inc.*, 762 N.W.2d 572 (Minn. 2009); Mississippi, *Std. Artificial Limb, Inc. v. Allianz Ins. Co.*895 S.W.2d 205 (Mo.App. E.D. 1995); *Giacomelli v. Scottsdale Ins. Co.*, 221 P.3d 666, 674 (Mont. 2009); *American Family Mut. Ins. Co. v. Hadley*, 648 N.W.2d 769 (Neb. 2002); *Contoocook Valley Sch. Dist. v. Graphic Arts Mut. Ins. Co.*, 788 S.2d 259, 260-61 (N.H. 2001); *Arthur Anderson LLP v. Federal Ins. Co.*, 3 A.3d 1279 (N.J.Super.A.D. 2010); *Battishill v. Farmers Alliance Ins. Co.*, 127 P.3d 1111, 1114 (N.M. 2006); *Wider v. Heritage Maint., Inc.*, 827 N.Y.S.2d 837, 845 (N.Y.Sup. 2007); *Max True Plastering Co. v. U.S. Fidelity & Guar. Co.*, 912 P.2d 861 (Okl. 1996); *Vermont Mut. Ins. Co. v. Parsons Hill Partnership*, 1 A.3d 1016 (Vt. 2010); *Blake v. State Farm Mut.*

Auto. Ins. Co., 685 S.E.2d 895 (W.Va. 2009); *Badger Mut. Ins. Co. v. Schmitz*, 647 N.W.2d 223 (Wis. 2002); *Harper v. Fidelity & Guar. Life Ins. Co.*, 234 P.3d 1211 (Wyo. 2010). A number of states have enacted statutes that expressly limit the doctrine to policy language that is ambiguous. *See* Iowa Code Ann. § 622.22; Montana Code Ann. § 28-3-306(2); Nebraska Rev. Stat. § 25-1217; N.D. Cent. Code Ann. § 9-07-14; Oregon Rev. Stat. § 42.260. A minority of states have expressly rejected or declined to adopt the doctrine. *See, e.g., Purdy v. Farmers Ins. Co. of Idaho*, 65 P.3d 184, 191 (Idaho, 2003); *Deni Assoc. of Florida, Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So.2d 1135, 1140 (Fla. 1998).

The doctrine holds that the objectively reasonable expectations of an insured will be honored, and is generally invoked only in situations where the policy is held to be ambiguous. In a very few jurisdictions the doctrine has been expanded beyond the resolution of ambiguous language. *See Farquhar v. Alaska Nat. Ins. Co.*, 20 P.3d 577 (Alaska 2001) (insurance policies are construed to effectuate the reasonable expectations of the parties, regardless of whether the policy language is ambiguous); *Cullen v. Koty-Leavitt Ins. Agency, Inc.*, 216 Ariz. 509, 168 P.3d 917 (Ct.App.Div. 2 2007), *review granted in part*, (Apr. 22, 2008) *and aff'd in part, vacated in part on other grounds*, 218 Ariz. 417, 189 P.3d 344 (2008) (declining to enforce even an unambiguous standard insuring language to deny coverage if the insurer acted so as to induce the insured to believe that it has coverage). The doctrine of reasonable expectations does not eliminate the insured's obligation to read the policy, but will hold the parties to a reasonable understanding of the policy. *Hubred v. Control Data Corp.*, 442 N.W.2d 308, 311 (Minn. 1989).

III. INSURANCE COVERAGE ISSUES ARISING OUT OF "GREEN BUILDING" LIABILITY CLAIMS

A professional liability policy insures specified losses other than bodily injury and property damage. A commercial general liability (CGL) policy, on the other hand, does not insure economic loss, as discussed *infra*. As such, a contractor may find it necessary to purchase contractors professional liability insurance to cover economic damages claims.

Potential liability claims fall into several broad groupings, which include the following: (1) a building or its green building systems and components fail to perform as advertised; (2) a green building project fails to achieve the expected or promised certification; (3) delays and increased costs are alleged to result from design errors or green building requirements; or (4)

disputes arise because of a lack of specific industry-accepted definitions and standards, and differing expectations of the parties involved. An insured may seek liability coverage for such claims under a general liability policy or an error and omissions (professional services) policy, as discussed below.

It is foreseeable that liability coverage claims may arise in green building projects where the professional insured has arguably warranted or guaranteed specified outcomes, such as where the insured enters into a contract that requires submittal of LEED or similar certification templates. As a preliminary matter, a breach of warranty claim must allege facts that will trigger the insuring language of a policy before any coverage obligation will arise. A general liability policy that provides coverage for claims of bodily injury or property damage that arise from an occurrence arguably will not encompass a breach of warranty claim that is not proximately caused by such an occurrence. As with breach of contract claims, there is case law holding that a breach of warranty claim does not constitute an occurrence and therefore fails to trigger the insuring language of a general liability policy. *See e.g. Pennsylvania Manufacturers' Ass'n Ins. Co. v. L.B. Smith, Inc.*, 831 A.2d 1178, 1181 (Pa.Super. 2003) (breach of warranty claim is a dispute between parties to a contractual undertaking, not an accidental injury, and is not intended to be covered by a general liability policy); *Yegge v. Integrity Mut. Ins. Co.*, 534 N.W.2d 100, 103 (Iowa 1995); *but see Great American Ins. Co. v. Woodside Homes Corp.*, 448 F.Supp.2d 1275, 1285 (D.Utah 2006) (breach of warranty claim where there is evidence of property damage and an occurrence will trigger coverage under general liability policy). Thus, a coverage determination often will likely turn on the application of the insuring clause to the underlying facts, rather than on the form in which a cause of action is stated.

If a defendant has expressly or impliedly warranted that a structure is green, sustainable, energy efficient, or will meet specific certification standards or be eligible for green incentives or credits, or that services offered will yield certain green results, a plaintiff may seek damages for a breach of warranty. In the area of professional services, this creates a potential trigger for a warranties exclusion under standard E&O policy language. To date, only one insurer (Argo) is known to offer coverage tailored for green building professionals that removes this exclusion.

A. Errors and Omissions/Professional Services

Courts generally apply a policy's unambiguous definition of "professional services", often defined in the insuring language as services that require specialized learning or training and are distinguishable from the ordinary activities of life and business. *See, e.g., Garland, Samuel & Loeb, P.C. v. American Safety Cas. Ins. Co.*, 651 S.E.2d 177, 180 (Ga.App. 2007); *Miller v. Triad Adoption & Counseling Servs., Inc.*, 65 P.3d 1099, 1105 (N.M.App. 2003); *T.M. ex rel. Cox v. Executive Risk Indem. Inc.*, 59 P.3d 721, 727 (Wyo. 2002). In determining whether a claim triggers coverage for "professional services", a court looks "not to the title or character of the party performing the act, but to the act itself." *R.W. v. Schrein*, 652 N.W.2d 574, 580 (Neb. 2002) (internal citation omitted). The alleged act is not viewed in isolation, but within the context of the profession within which it is performed. *Aetna Cas. & Sur. Co. v. Dannenfeldt*, 778 F.Supp. 484, 496 (D.Ariz. 1991). "To determine whether a risk falls within the basic coverage of a professional [services] policy, the inquiry centers on the particular profession for which the policy provides coverage." *Id.*

Contract language will be important in determining whether coverage exists for a green building claim. Potential coverage issues that arise under professional liability policies involve warranties and guarantees and the applicable standard of care.

Green buildings have not yet generally been recognized in the industry as a unique category of risk. In the green building context, a potential liability issue concerns the standard of care to apply to a claim of professional negligence. For example, will the standard of care for a LEED Accredited Professional be set by comparison to other LEED Accredited Professionals (standard of care imposed by a third party such as LEED and interpreted by a third party), or the generally accepted professional standard of care applicable to architects, designers, and contractors in that field (standard of care imposed by the participants in the industry and interpreted by those participants)? With respect to architects, the AIA B101 Owner-Architect Agreement (2007), Section 2.2, requires the architect to perform services "consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances." Additionally, the American Institute of Architects addresses sustainable design in its code of ethics and in contractual requirements directing architects to present environmentally responsible design alternatives to project owners. *See e.g.* AIA Code of Ethics Canon VI Obligations to the Environment at §§

E.S. 6.1 – 6.3; AIA B214 2007 Standard Form of Architect's Services (addresses duties and responsibilities of a design professional in a LEED certification project). See Exhibits 1 and 2.

There is an argument that certain green contractual requirements imposed on architects and engineers may raise the standard of care above the traditional negligence standard that is intended to be covered by professional liability insurance. For example, one A&E professional liability policy form agrees to insure architects or engineers for claims arising out of "any negligent act, error, or omission in rendering or failing to render professional services . . ." "Professional services" is defined as "services performed for others . . . in the practice of architecture, engineering, . . . interior design, construction management or environmental consulting." If this definition applies the traditional standard of care for architects and engineers as defined and accepted in those industries, the question arises whether green building obligations contractually impose upon a LEED Accredited Professional (design professional) a higher standard of care than that insured under the policy. This could result in a green coverage claim being contested by the insurer.

At least one major underwriter has opined that LEED Accredited Professionals will have a higher standard of care imposed than a non-accredited licensed design professional. Schinnerer, LEED Accredited Professionals Program Changes Risk Profiles (Risk Management Guidelines No. 3, 2009). *See also* Marsh Report The Green Built Environment in the United States (updated December 2008); Del Percio, Victor Schinnerer: New LEED AP Program Raising Standards of Care, Changing Risk Profiles (June 25, 2009). The applicable standard of care can become a coverage issue when a design, engineering, or construction professional agrees to perform at a higher standard of care than that which prevails in the industry if coverage is predicated upon that standard of care. If the professional agrees to adhere to a green design expertise, an insurer could argue that the professional agreed to a higher standard of care than is insured in the policy. Del Percio, Considering Standard of Care Provisions in Green Construction Contracts (May 15, 2009). The standard of care conundrum also potentially applies to the general exclusion in professional liability policies for assumptions of liability that are not imposed by law (contractual indemnity). If the professional agrees to perform at a higher standard of care (i.e., green) than that imposed by the common law standard, an insurer might contest coverage. *Id.* For example, an exclusion from one professional liability policy form provides:

> The coverage under [the] Insuring Agreements ... of this Insurance does not apply to Damages or Claims Expenses in connection with or resulting from any Claim:
>
> ....
>
> B. Contractual Liability
>
> Arising out of or resulting from:
>
> ....
>
> 2. breach of any contractual obligation which goes beyond an express or implied duty to exercise a degree of care or skill as is consistent with applicable industry standards.

Under this exclusion, the insurer may have an argument that an insured architect, engineer or construction manager is excluded from coverage for certain green construction claims. This could occur if the professional has contractually agreed to LEED certification obligations, and a court should determine that the applicable LEED considerations impose a higher standard of care than "applicable industry standards".

Another coverage issue can arise when a professional agrees to green obligations deemed to be a warranty or guarantee to the owner. Warranties and guarantees are generally excluded in professional liability policies. *See, e.g., Country Life Ins. Co. v. St. Paul Surplus Lines Ins. Co.*, 422 F.Supp.2d 977, 984 (C.D.Ill. 2006); *American Auto. Ins. Co. v. Mayfield*, 287 F.Supp.2d 661, 666 (N.D.Tex. 2003); *Comstock Ins. Co. v. Thomas A. Hanson & Assoc.*, 550 A.2d 731, 734 (Md.App. 1988). For example, one risk to a professional insured arises if a design contract requires the insured to submit templates required by rating systems such as LEEDS. See Exhibit 3, Sample LEEDS Template Forms. This could be interpreted as a warranty or guarantee. Another potential risk falling within the warranty and guarantee exclusion is when the professional agrees to or promises a design or construction to achieve a particular green certification level (i.e., LEED rating) or sustainability thresholds. If such an agreement is construed to be the equivalent of a warranty, the

professional's insurer might successfully contest coverage. *Id. See, e.g., Arkansas Rice Growers Co-op Ass'n v. Alchemy Indus. Inc.*, 797 F.2d 565 (8th Cir. 1986).

This risk can be avoided by contract language clearly indicating that the obligation is solely for the satisfaction of the rating system and does not constitute a warranty or guarantee on behalf of the professional. *See* Del Percio, Victor Schinnerer, *supra*. Schinnerer has suggested the following contractual language for professionals to avoid a warranty or guaranty coverage exclusion:

> When Owner Wants the Design to Meet Specific Sustainability Criteria
>
> Owner has made Design Firm aware that Owner wants a specific level of sustainability incorporated into this Project and that Design Firm shall use the standards published by [specific design guidelines or certification standard] for this Project. Design Firm shall research the applicable sustainability requirements and design the Project with the intention of having the Project meet the requirements. Owner recognizes that a project designed to meet a specific sustainability standard might not perform as designed because of the construction, operation, and maintenance of the Project and therefore agrees that it shall bring no claim against Design Firm if the project does not perform as intended, unless the negligence of the Design Firm is the sole cause of the performance deficiency.
>
> Owner also recognizes that during the design of the Project, Design Firm shall use professional judgment in the selection of materials, products, and systems for the Project but that Design Firm cannot and does not warrant the performance of any specified material, product, or system. Design Firm will identify for Owner any material, product, or

system that, in the Design Firm's judgment from the Design Firm's examination of available performance information, might provide Owner with a benefit on this Project but does not have adequate information on its performance in actual construction or operation. Owner acknowledges that it shall look solely to the manufacturer, supplier or installer of materials, products, or systems if their performance does not meet expectations.

When Owner Wants Third-Party Certification of Sustainability

Owner has made Design Firm aware that Owner intends to pursue [specific certification standard] for this Project. Design Firm shall research the applicable certification requirements, design the Project with the intention of having the Project meet the requirements, and document the design of the Project for submission by the Owner to the certifying organization. Owner recognizes that certification is not based on design alone but also on the construction, operation and maintenance of the Project and therefore agrees that it shall bring no claim against Design Firm if the Project is not certified as intended unless the negligence of the Design Firm is the sole cause of the Project not being certified.

Owner also recognizes that during the design of the Project, Design Firm shall use professional judgment in the selection of materials, products and systems for the Project with the goal of meeting certification criteria but that Design Firm cannot and does not warrant the performance of any specified material, product, or system. Design Firm will identify for Owner any material, product or system that, in the Design Firm's judgment from the Design

> Firm's examination of available performance information, might provide Owner with a benefit on this Project but does not have adequate information on its performance in actual construction or operation. Owner acknowledges that it shall look solely to the manufacturer, supplier or installer of materials, products or systems if their performance does not meet expectations.

Del Percio, Victor Schinnerer (June 25, 2009), *supra* (quoting Victor Schinnerer).

Errors and omissions policies are often "claims-made" or "claims made and reported" policies. Such a policy may be structured to provide retroactive coverage for negligent acts or omissions if a claim is made during the specified policy period, but will deny coverage for claims made after the policy period. *See AOK Lands, Inc. v. Shand, Morahan & Co.*, 860 P.2d 924, 927 (Utah 1993). "Claims-made policies were developed primarily to address situations in which the error or omission is difficult to pinpoint and may have occurred over an extended period of time." *Id.*

Claims-made issues often arise in the context of policy terms governing the reporting of a claim. For example, the insuring language may require that a claim be first made during the policy period, or reported within the time period specified by the policy. However, a professional services claim may arise much later, after a green building project fails to perform as expected or fails to achieve the target certification level. Additionally, coverage is not triggered if the claim arises prior to the retroactive date specified in the policy, if there is one, or if the insured had knowledge prior to the policy's inception of a potential claim. A further issue may arise when a professional liability policy includes a "related to" or interrelated acts provision. In *Continental Cas. Co. v. Wendt*, 205 F.3d 1258, 1260 (11th Cir. 2000), the court considered insuring language stating that "claims arising out of the same or related wrongful acts, shall be considered first made during the policy term in which the earliest claim arising out of such wrongful acts was made." The *Wendt* court noted that some courts have held the term "related wrongful act" is ambiguous, but then rejected that conclusion and considered the ordinary and unambiguous meaning of the term to mean that if claims are logically or causally related the provision will apply. *Id.* at 1262 (internal citations omitted). *See also Alexander Mfg., Inc. v. Illinois Union Ins. Co.*, 666

F.Supp.2d 1185, 1203-05 (D.Or. 2009) (D&O policy's common claim endorsement's interrelated acts provision applied to limit coverage).

1. Architects and Engineers (A&E)

Protecting against errors and omissions arising out of professional services, these policies are distinguished from commercial general liability insurance policies which exclude liability arising out of "professional services." "The duty of the architect depends on the particular agreement entered into with the employer . . . . The architect's undertaking, however, in the absence of a special agreement, does not imply or guarantee a perfect plan or satisfactory result, and the architect is liable only for failure to exercise reasonable care and skill. The degree of skill and care which may be required of an architect in the preparation of plans is a question for the jury." *Clark v. Transcontinental Ins. Co.*, 359 Ark. 340, 197 S.W.3d 449 (Ark. 2004). However, as discussed above, the applicable standard of care (common law or a possible higher degree) could lead to coverage issues.

Argo Insurance Group of San Francisco has taken the lead in offering a green professional liability policy designed to protect architects and engineers in sustainable projects, introduced in April 2009 as its Argo Green Pro endorsement. This policy is underwritten by Lloyd's of London, and differs primarily from a standard policy in that it specifically lists sustainable services as a covered professional service, expressly including services "provided as an accredited/certified professional in the areas of sustainable site development, water savings, energy efficiency, materials and resource selection, indoor environmental quality, and computer aided drafting and design services." The Argo policy also differs from the standard A&E policy in that it specifically includes coverage for guarantees and warranties of achievement of green certification.

Argo developed this policy in response to a concern that traditional E&O policies may not provide coverage for claims against professionals involved in designing sustainable buildings because they are subject to a higher standard of care that is not reflected in the standard language of professional liability policies. The Argo policy also seeks to address the uncertainty associated with new and evolving technology and methods. Finally, Argo offers contract review services and claims assistance to its insured professionals, to assist in providing for their specific coverage needs. Success with this product will almost certainly guarantee that other insurers will develop and offer similar products.

A/E policies include both practice policies (for an individual professional) and project policies (for a project's design team). In one scenario, a project policy may provide primary coverage for a green building project, with each individual professional's practice policy providing excess coverage.

A/E coverage will not extend to a construction defect claim which falls under CGL coverage, nor is it intended to provide coverage for claims that involve administrative, business or ministerial matters, or commercial activity. *See, e.g., Continental Cas. Co. v. Hartford Acc. & Indem. Co.*, 836 F.Supp. 246, 247 (E.D.Pa. 1993) (work-product inspection services were not professional engineering services covered by the A/E policy); *Hampton Med. Grp., P.A. v. Princeton Ins. Co.*, 840 A.2d 915, 925 (N.J.Super.A.D. 2004) (billing dispute not covered by professional services policy). A/E policies generally exclude coverage for intentional acts, so if an architect knowingly misrepresents his or her qualifications for a green building project, the intentional acts exclusion may apply to bar A/E coverage. *See, e.g., In re Estate of Corriea*, 719 A.2d 1234 (D.C. 1998) ("dishonest purpose or intent" exclusion in a professional liability policy means an intent to deceive or defraud, and not a general lack of probity or straightforwardness). Thus, coverage for a claim that an architect or engineer violated the copyright or trade secrets rights of another professional will turn on whether the alleged conduct involved the rendering of professional services as defined by the insuring language or is instead deemed to implicate the insured's business practices, or to fall within the scope of a dishonest or wrongful acts exclusion. *See, e.g., Central Dakota Radiologists, P.C. v. Continental*, 769 F.Supp. 323 326 (D.N.D. 1991) (business practices are not professional services as defined by the policy).

2. Construction contractors

Construction contractors may obtain construction management professional liability coverage in addition to CGL coverage. Coverage under a professional liability policy must arise out of the contractor's performance of professional services. *See, e.g., 1325 North Van Buren, LLC v. T-3 Grp., Ltd.*, 701 N.W.2d 13 (Wis.Ct.App. 2005) (breach of contract claim asserted against the general contractor in a building renovation arose out of alleged negligence in the performance of the contractor's professional services so that coverage arose under the insured's errors and omissions policy); *but see Bell Lavalin Inc. v. Simcoe & Erie Gen. Ins. Co.*, 61 F.3d 742 (9th Cir. Alaska 1995) (breach of

contract claim that a contractor refused to pay a subcontractor for services rendered after the subcontractor abandoned the job subsequent to disputes over the time allotted to complete the work, did not arise out of the contractor's professional services); *Imperial Cas. & Indem. Co. v. High*, 858 F.2d 128, (3d Cir. (Pa.) 1988) (metallurgy claims against construction manager fell outside scope of professional liability policy but were covered by CGL policy).

The need for a contractor to purchase a professional liability policy could arise if a contractor or subcontractor advertises as being experienced with green standards, such as LEED, or the fact that they have a LEED Accepted Professional on staff, if professional services are offered. ACE now offers a Contractors Pollution Liability Program to address the risks and exposures faced by contractors as they seek to access federal stimulus dollars for green building projects. This program is designed to cover contractor and sub-contractor environmental and pollution-related exposures.

3. Directors and Officers (D&O)

Although the terms of D&O policies often are tailored to the individual specific risks and duties, they generally cover "loss" arising out of a "claim" based on a "wrongful act" by the insured in an "insured capacity". Bittle, Lyndon F. and Longroy, Sally A., Are D&O Policies at Risk of Climate Change?, TIPS-ICLC Newsletter (Summer 2008). An officer may be subject to a claim if the officer is alleged to have breached a duty owed to the shareholders or clients or imposed by government regulations or statute, arising out of environmental concerns. *See, e.g., U.S. v. Walsh*, 8 F.3d 659, (9th Cir. (Wash.) 1993) (manager liable as "operator" for civil penalties under Clean Air Act arising out of asbestos clean-up); *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. (Miss.) 2009), *appeal dismissed* 607 F.3d 1049 (5th Cir. (Miss.) 2010) (landowners had standing to sue oil and energy companies for damages from greenhouse emissions); *State of California v. Gen. Motors Corp.*, 2007 WL 2726871, *not reported in F.Supp.2d* (N.D.Cal. 2007) (State sued automakers for contributions to global warming). This could include a failure on the part of the officer to exercise due care, to comply with disclosure obligations, or to be properly informed as to issues and information impacting business practices and outcomes, such as an officer who fails to comply with local ordinance requiring certain "green building" measures be incorporated into a new facility. A corporate officer may seek insurance protection for a claim alleging that related acts or omissions caused a loss to the company

and/or its shareholders or business partners. *See, generally,* Zacharias, Carol A.N., Ace Progress Report: Climate Change is Heating Up D&O Liability (accessed Nov. 8, 2010 at www.aceusa.com/news). Insurance coverage and/or a defense will likely turn on the specific insuring language, including policy terms and definitions, exclusions, and/or severability clauses.

D&O policies frequently contain pollution exclusions, which may be at issue for a claim that an officer failed to take steps to comply with environmental regulations. *Sealed Air Corp. v. Royal Indem. Co.*, 961 A.2d 1195, (N.J.Super.A.D. 2008) (court applied reasonable expectations doctrine to hold that D&O policy's pollution exclusion did not bar coverage for alleged securities fraud pertaining to pollution liabilities, as claim was too remote from the traditional environmental pollution to which the exclusion applied); *Danis v. Great Am. Ins. Co.*, 823 N.E.2d 59, 72 (Ohio App.2.Dist. 2004) (pollution exclusion applied to claim that insureds restructured assets to avoid environmental liabilities). D&O policies also commonly exclude coverage for liability that arises from the dishonesty of the insured directors and officers (*See, e.g., Little v. MGIC Indem. Corp.*, 836 F.2d 789, 792 (3d Cir. (Pa.) 1987); *First Nat'l Bank Holding Co. v. Fidelity & Deposit Co. of Maryland*, 885 F.Supp. 1533, 1537-38 (N.D.Fla. 1995)), or when the liability is owed to a co-insured director or officer (*Finci v. American Cas. Co. of Reading, Pennsylvania v. State of Maryland Deposit Ins. Fund Corp.*, 593 A.2d 1069, 1081 (Md. 1991) (upholding "insured v. insured" exclusion)).

4. Real Estate Agents and Brokers

As with any policy for professional services as discussed above, agents and brokers are offered coverage and/or a defense only for claims that arise out of the rendering of professional services as defined by the insuring language. Accordingly, claims that pertain to administrative or general business acts, and do not involve the special training, knowledge, or skill of a realtor, are likely not to be within the scope of coverage. *See, e.g., Chapman ex rel. Chapman v. Mutual Service Cas. Ins. Co.*, 35 F.Supp.2d 693 (E.D.Wis. 1999) (acts require special knowledge or skill to qualify as "professional services").

In the green building context, claims may conceivably arise if the agent or broker is involved in a transaction for the sale or purchase of a building that is required to be, or is represented as, certified as a "green building". Due to the specialized nature of green certification and construction, a

realtor has an argument that "professional services" is satisfied. Potential causes of action include negligence, breach of contract, or misrepresentation. A realtor may be alleged to have misrepresented the nature of the property, or its expected performance.

A realtor's policy will likely contain exclusions common to professional services coverage, such as intentional acts, fraud or misrepresentation, criminal activity or unlawful acts (may arise if a claim alleges of violations of state consumer protection law - see *St. Paul Ins. Co. v. Bonded Realty, Inc.*, 578 S.W.2d 191 (Tex.Civ.App. El Paso 1979), *writ ref'd n.r.e.*, 583 S.W.2d 619 (Tex. 1979)). An exclusion is often added for property owned or managed by the realtor (property management professional services may require a specific separate policy or endorsement). As one example, Chubb Group of Insurance Companies offers a professional liability policy specifically designed for property managers. At least one court has held an ownership exclusion to be ambiguous where ownership was a temporary accommodation to a client. *Vasa North Atlantic Ins. Co. v. Golden Eagle Ins. Co.*, 1994 WL 285027 (N.D.Cal. 1994) (applying California state law). In another case, a court found policy language ambiguous as to whether a lease negotiation fell within a property management exclusion, so that the exclusion was not enforceable. *St. Paul Fire & Marine Ins. Co. v. S.L. Nusbaum & Co.*, 227 Va. 407, 316 S.E.2d 734 (1984).

B. Commercial General Liability-CGL

As discussed above, purely economic losses such as lost profits or extra incurred financial expenses do not trigger coverage under a CGL policy. *Audubon Ins. Co. v. Stefancik*, 98 F. Supp. 2d 751, 756 (S.D. Miss. 1999). At present, the standard CGL policy form does not include exclusionary language expressly related to green construction.

1. Coverage A - Bodily Injury/Property Damage

The insuring language under Coverage A of a CGL policy requires an "occurrence" that arises out of a "'bodily injury" or "property damage." An "occurrence" is generally defined as "an accident, including a continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." An intentional act by an insured has been held not to constitute an occurrence so as to trigger coverage under policy terms defining an occurrence as an accident. *See Farmland Mut. Ins. Co. v. Scruggs*, 886

So.2d 714, 718-20 (Miss. 2004); *Collin, supra*, 26 Cal.Rptr.2d at 399; *Gene & Harvey Builders, Inc. v. Pennsylvania Mfrs. Ass'n Ins. Co.*, 517 A.2d 910, 913 (Pa. 1986); *Allstate Ins. Co. v. Moulton*, 464 So. 2d 507, 510 (Miss. 1985).

A "green contractor" holding itself out as qualified to construct green buildings faces potential breach of contract claims. Such can – and will – arise if the desired certification level is not reached, if certification is denied or successfully challenged, or if component parts do not meet desired energy saving expectations. CGL coverage alone may not afford the contractor liability coverage for such claims.

Most courts hold that a breach of contract does not constitute an "occurrence." *Gibson & Assocs., Inc. v. Home Ins. Co.*, 966 F. Supp. 468, 474 (N.D. Tex. 1997); s*ee also Global Gear & Mach. Co., Inc. v. Capitol Indem. Corp.*, 2010 WL 3341464, at *5 (W.D. Ky. Aug. 23, 2010). As such, courts have generally "denied coverage in cases where the only damage alleged was the failure of a product to perform in accordance with contract specifications because such damage is not encompassed by the policy's definition of 'occurrence.'" *Id.* (citing *Jakobson Shipyard, Inc. v. Aetna Cas. & Sur. Co.*, 961 F.2d 387, 389 (2d Cir. (N.Y.) 1992)). Additionally, several courts "have held more generally that coverage simply does not exist when an insured becomes obligated to pay damages incurred by a third party because of the insured's own breach of contract." *Id.* (citing *Pace Constr. Co. v. USF&G Ins. Co.*, 934 F.2d 177, 179-80 (8th Cir. (Mo.) 1991); *Aetna Cas. & Sur. Co. v. Spancrete of Ill., Inc.*, 726 F. Supp. 204, 206-07 (N.D. Ill 1989)). However, some jurisdictions have observed that there is no distinction between tort and contract claims in the insuring language of most CGL policies, noting that the lack of coverage for a breach of contract claim is frequently a result of the claimant's failure to allege bodily injury or property damage caused by an occurrence. *Lyerla v. AMCO Ins. Co.*, 536 F.3d 684, 691 (7th Cir. (Ill.) 2008).

There is a jurisdictional divide regarding whether structural defects or other damage caused by an insured's defective workmanship constitutes an "accident." *Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co.*, 137 P.3d 486, 491 (Kan. 2006). According to the Supreme Court of Kansas:

> [O]ne line of cases has held that faulty or improper construction does not constitute an accident; rather, the damage is the natural and

> ordinary consequence of the insured's act. The other line of case has held that improper or faulty construction does constitute an accident as long as the resulting damage is an event that occurs without the insured's expectation or foresight.

Id. "A majority of states have held that faulty workmanship is not accidental, and therefore also not an occurrence with respect to damage to the defective work product itself." *Selective Ins. Co. of the Southeast v. Cagnoni Development, LLC*, 2008 WL 126950, at *11, n.4 (S.D. Ind. Jan. 10, 2008). *See also Houseman Const. Co. v. Cincinnati Ins. Co.*, 2010 WL 1658959, at *4 (W.D. Mich. Apr. 23, 2010); *Am. Home Assur. Co. v. AGM Marine Contractors, Inc.*, 379 F. Supp. 2d 134, 136 (D. Mass. 2005), *aff'd* 467 F.3d 810 (1st Cir. 2006); *Heile v. Herrmann*, 736 N.E.2d 566, 568 (Ohio. App. 1999); *Pursell Const., Inc. v. Hawkeye-Security Ins. Co.*, 596 N.W.2d 67, 71-72 (Iowa 1999); *McAllister v. Peerless Ins. Co.*, 474 A.2d 1033, 1036-37 (N.H. 1984).

The Mississippi Supreme Court has suggested that "branding faulty workmanship, defective work, and other similar phrases as 'occurrences' or not" causes "confusion between insurers and insureds." *Architex Ass'n, Inc. v. Scottsdale Ins. Co.*, 27 So. 3d 1148, 1160-61 (Miss. 2010). According the Court:

> Faulty workmanship, defective work, et al., may be accidental, intentional, or neither. A return to basics leads this Court to conclude that the underlying facts will determine whether the complaint of "property damage" (defective or faulty workmanship) was proximately caused by breach of a recognizable duty and whether that breach was accidental or intentional; or, whether the "property damage" was caused by neither. In two of the three aforementioned scenarios, no coverage would exist. Only when "property damage" is proximately caused by an accident (an inadvertent act) does an "occurrence," as defined by the policy, trigger coverage. . . .

Id. at 1161.

In most construction cases arising out of a bodily injury claim, the injury will fall within the scope of either a CGL or workers' compensation policy, and there should not be any appreciable difference between a green building project and any other construction project. For example, a bodily injury claim arising out of the collapse of a wall should be treated the same, whether the wall is constructed out of a green building material or some other material.

A CGL claim specific to green construction will more likely turn on issues of certification, marketability, or performance. Such a claim will not typically involve an underlying bodily injury, but may include property damage to trigger coverage under a CGL policy. Claims for mere economic loss have been widely held to not constitute "property damage" as defined by Coverage A. *Audubon Ins. Co. v. Stefancik*, 98 F.Supp.2d 751, 756 (S.D.Miss. 1999) (where a policy defines "property damage" in terms of tangible property, economic losses are not "property damage"); *Indianapolis-Marion Cty. Public Library v.* , 929 N.E.2d 722, 736-37 (Ind. 2010) (discussion of economic loss rule in the construction context); *Coastal Conduit & Ditching, Inc. v. Noram Energy Corp.*, 29 S.W.3d 282, 290 (Tex.App. Houston 2000).

A standard CGL policy will generally contain, among others, the following exclusions:

- "Care, custody, or control"—The general intent of such an exclusion is to avoid coverage on property that should be covered separately under property and products liability insurance. *Childtime Child Care, Inc. v. Colony Ins. Co.*, 946 So.2d 1205, (Fla.App.1.Dist. 2006) (citing 7A Appleman, *Insurance Law and Practice* § 4493.03 (1979) for the proposition that this provision is "aimed at eliminating coverage where the insured is closely related to some type of work related situation where the insured is exercising some sort of control over the property subsequently damaged and to remove the inducement for the insured to submit exaggerated or false claims and avoid the guarantee of workmanship."). "As a general matter, the care, custody or control exclusion applies 'to the particular object of the insured's work, usually personalty, and to other property which [the insured] totally and physically manipulates.'" *National Fire Ins. Co. v. Entertainment Specialty Ins. Services, Inc.*, 485 F. Supp. 2d 737, 743 (N.D. Tex. 2007)

(quoting *Goswick v. Employers' Cas. Co.*, 440 S.W.2d 287, 289-90 (Tex. 1969)). In the green building context, this exclusion may apply to situations where building equipment or machinery is leased to a builder for a green project and the builder damages the equipment or machinery while the property is in his care, custody, or control.

- "Pollution"—This provision generally excludes from coverage any bodily injury or property damage arising out of the dispersal of pollutants into or upon water or land. The pollution exclusion clause has been included as a standard clause in CGL policies since the 1970s revision of policy forms, and was revised in 1984 to exclude coverage for pollution clean-up costs that arise from governmental directives. *Dimmit Chevrolet, Inc. v. Southeastern Fidelity* 636 So.2d 700, 708 (Fla. 1993). Courts have split over whether an ambiguity exists in absolute pollution exclusions, with some holding that terms such as "dispersal", "discharge", "irritant", or "contaminant" are terms of art specific to environmental law. *See NGM Ins. Co. v. Carolina's Power Wash & Painting*, 2010 WL 146482, *slip copy* (D.S.C. Jan. 12 2010) (detailed discussion of court split as to ambiguity of exclusion, with citations). In the green building context, this would arguably exclude from coverage the costs of compliance with governmental mandates aimed at eliminating or reducing pollutants, such as carbon dioxide emissions or lead abatement.

- "Professional services"—This provision generally excludes from coverage any claim for bodily injury or property damage that arises from the rendering, or failure to render, professional services. This exclusion refers to any business activity conducted by an insured that involves specialized knowledge, labor, or skill, and is predominantly mental or intellectual as opposed to physical or manual. *Pekin Ins. Co. v. L.J. Shaw & Co.*, 684 N.E.2d 853, 856 (Ill.App.1.Dist. 1997); *Multnomah Cty. v. Oregon Auto Ins. Co.*, 470 P.2d 147, 150 (Or. 1970). This exclusion could operate to exclude coverage for a contractor who advertises and provides expertise with respect to green standards or provides the services of a LEED Accepted Professional.

- "Work product"—These provisions "preclude coverage for liability for damage to and deficiencies of the insured contractor's work product." *Diamond Heights Homeowners Assn. v. Nat'l Am. Ins. Co.*, 227 Cal. Rptr. 906, 910 (Cal. App. 1 Dist. 1991). Such provisions are consistent with the purpose of CGL policies which are neither performance bonds nor all-risk policies. *Id. See also Vintage Contracting, LLC v. Dixie Bldg. Material Co., Inc.*, 858 So. 2d 22, 28 (La. Ct. App. 5 Cir. 2003) (such provisions "generally reflect the intent of the insurance industry to avoid the possibility that coverage under a CGL policy will be used to repair and replace the insured's defective products and faulty workmanship"). Work product exclusions apply not only to the insured's defective work but also to its satisfactory work that is damaged by its defective work. *Western Employers Ins. Co. v. Arciero & Sons, Inc.*, 194 Cal. Rptr. 688, 689-90 (Cal. App. 2 Dist. 1983). In the context of green construction, this exclusion arguably would preclude coverage for some claims against a green builder for a project's green deficiencies, e.g., a structure's failure to qualify for the specific level of certification required by the owner.

- "Damage to property"—This exclusion generally is comprised of a number of provisions, including property damage to: "(1) Property you own, rent, or occupy; (2) Premises you sell, give away or abandon, if the 'property damage' arises out of any part of those premises; (3) Property loaned to you; (4) Personal property in the care, custody or control of the insured; (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the 'property damage' arises out of those operations; or (6) That particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it." *Broadmoor Anderson v. Nat. Union Fire Ins. Co. of La.*, 912 So. 2d 400, 412 (La. Ct. App. 2 Cir. 2005); *Luxury Living, Inc. v. Mid-Continent Cas. Co.*, 2003 WL 22116202, at *10-11 (S.D. Tex. Sept. 10, 2003); *Charter Oak Fire Ins. Co. v. Coleman*, 273 F. Supp. 2d 903, 909 (W.D. Ky. 2003). A number of

exceptions typically accompany this exclusion. For example, generally excepted from the exclusion for property damage to property the insured sells, gives away, or abandons, are circumstances under which the premises are considered the insured's "work" and "were never occupied, rented or held for rental" by the insured. *Luxury Living, Inc.*, 2003 WL 22116202, at *11. Subsections (3) through (6) above generally "do not apply to liability assumed under a sidetrack agreement." *Broadmoor Anderson*, 912 So. 2d at 412. And, the exclusion for "[t]hat particular part of any property that must be restored, repaired or replaced because '[the insured's] work' was incorrectly performed on it" generally "does not apply to 'property damage' included in the products-completed operations hazard." *Id.* Exclusions for property damage to the property on which the contractor or subcontractor is performing operations are designed to exclude coverage for the business risk of faulty workmanship. *Columbia Mut. Ins. Co. v. Schauf*, 967 S.W.2d 74 (Mo. 1998). "Care, custody or control" exclusions are discussed above. With regard to exclusions for damage to real property, courts have held that the damage must occur while the insured is performing operations, and the exclusion will not apply if the insured has completed the job. *See Advantage Homebuilding, LLC v. Maryland Cas. Co.*, 470 F.3d 1003, 1010-11 (10th Cir. (Kan.) 2006); *McMath Const. Co. v. Dupuy*, 897 So.2d 677, 682 (La. Ct. App. 1 Cir. 2004). Courts have interpreted the language in subsection (6) above to mean that coverage is excluded for repair or replacement costs for the replacement of the insured's faulty work. *Vintage Contracting, LLC v. Dixie Bldg. Material Co., Inc.*, 858 So.2d 22, 28 (La. Ct. App. 5 Cir. 2003); *Sapp v. State Farm Fire & Cas. Co.*, 486 S.E. 2d 71, 75-76 (Ga. Ct. App. 1997). This exclusion could apply in the context of green construction where a green builder constructs a building for itself, owns and occupies it for some period of time, and subsequently sells it to another party. If, after it is sold to the subsequent party, certain green aspects of the building fail, causing damage to the building and other property of the new owner, the new owner's claim against the green builder arguably would be excluded by the "property damage" exclusion (subsection (2)).

Subsection (5) of this exclusion could apply in situations where a contractor is hired to make green improvements to a structure, i.e. real property, and in the process of making the improvements, the structure itself is damaged. Another example of how exclusion (6) could apply in the green building context is where the contractor's work on a green project is defective. For example, defective installation of solar panels, and the owner makes a claim against the contractor for the cost of reinstalling the panels.

- "Damage to your product"—CGL policies typically provide that there is no coverage for property damage to the insured's product arising out of it and any part of it. *See, e.g., Nationwide Ins. Co. v. Phelps*, 2004 WL 491172, at *7 (Ohio Ct. App. 2004); *Alverson v. Northwestern Nat. Cas. Co.*, 559 N.W.2d 233, 236 (S.D. 1997); *Standard Fire Ins. Co. v. Chester O'Donley & Assocs., Inc.*, 972 S.W.2d 1, 9 (Tenn. Ct. App. 1998). The purpose of such provisions is to preclude coverage for damage to the insured's own product. *Fritz Indus., Inc. v. Wausau Underwriters Ins. Co.*, 2004 WL 396358, *8, n. 11 (N.D. Tex. Jan. 26, 2004). In general, work performed on realty such as dwellings or other buildings or structures is not considered a "product" of the insured. *See Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co.*, 104 P.3d 997, 1004 (Kan. Ct. App. 2005); *Scottsdale Ins. Co. v. Tri-State Ins. Co. of MN*, 302 F. Supp. 2d 1100, 1104 (D.N.D. 2004). As such, this exclusion arguably would not apply to claims against a green builder for his work on real property.

- "Damage to your work"—Such exclusions generally preclude coverage for the insured's work arising out of it or any part of it and included within the policy's definition of products-completed operations hazard. The provision excludes coverage for damages to the insured's work itself. *Dal-Tile Corp. v. Zurich American Ins. Co.*, 2004 WL 414900, at *5 (N.D. Tex. Feb. 2, 2004). However, the exclusion has been held not to apply to "property damage" to other property caused by the insured's work. *Mt. Hawley Ins. Co. v. Steve Roberts Custom Builders, Inc.*, 215 F.Supp.2d 783, 792 (E.D. Tex. 2002); *Massey v. Parker*, 733 So. 2d 74, 76 (Miss. 1999). Because the alleged property damage must

also come within the terms of the products completed operations hazard, some courts held that the exclusion has no bearing on operations in progress or uncompleted operations. *See American Mercury Ins. Group v. Urban*, 2001 WL 1723734 (D. Kan. 2001). It should be noted that the "your work" exclusions frequently include the proviso that the exclusion does not apply if the "damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor." *See, e.g., Sheehan Const. Co., Inc. v. Continental Cas. Co.*, 935 N.E.2d 160 (Ind. 2010); *Massey*, 733 So. 2d at 76. The "damage to your work" exclusion arguably would apply to preclude coverage for a green builder's finished project that is defective in that it does not meet the requisite green certification required by the owner. However, to the extent that the structure is not as green as it is supposed to be due to the negligence of subcontractors, this exclusion arguably would not apply to preclude coverage for the general contractor.

- "Impaired property"—The purpose of this exclusion is "to prevent the insured from claiming economic losses resulting from the insured's work or work product." *Transcontinental Ins. Co. v. Ice Sys. of Am., Inc.*, 847 F. Supp. 947, 950 (M.D. Fla. 1994). This provision "bars coverage for loss of use of tangible property of others that is not physically damaged by the insured's defective product." *Am. Online, Inc. v. St. Paul Mercury Ins. Co.*, 347 F.3d 89, 98 (4th Cir. (Va.) 2003). Under this exclusion, coverage is limited to others' loss of use of property that is physically damaged. *Id.* The exclusion does not apply when there is physical damage to other property into which the insured's work has been incorporated or if the insured's work cannot be repaired or replaced without injuring other property. *Id. See also Watts Industries, Inc. v. Zurich American Ins. Co.*, 121 Cal.App.4th 1029, 1047, 18 Cal.Rptr.3d 61, 73 (Cal. Ct. App. 2004); *Standard Fire Ins. Co. v. Chesta-O'Donley & Assoc., Inc.*, 972 S.W.2d 1, 8 (Tenn. App. 1998). In the context of green construction, this exclusion could apply in the following hypothetical situation: A commercial building owner enters a leasing contract with potential future tenants in which a condition of the lease is that the building maintains certain

green certifications. The commercial building owner then enters a contract with a green builder to erect a structure which will meet those certifications. The contractor constructs the building, and it meets the requisite green certification. However, the building subsequently loses its certification and the tenants move out. The owner then sues the contractor for loss of use of the building. The claim is arguably excluded by the "impaired property" exclusion.

- "Contractual liability"—This exclusion generally precludes coverage for liability for a third party's conduct that the insured has contractually assumed. *See, e.g., Certain London Market Ins. Cos. v. Penn. Nat. Mut. Cas. Ins. Co.*, 106 Fed. Appx. 884, 886 (5th Cir. (Miss.) 2004); *Penn Nat. Mut. Cas. Co. v. Associated Scaffolders & Equip. Co., Inc.*, 579 S.E.2d 404, 407 (N.C. Ct. App. 2003); *Federated Mut. Ins. Co. v. Grapevine Excavation Inc.*, 197 F.3d 720, 726 (5th Cir. (Tex.) 1999). The exclusion typically contains exceptions for liability assumed in an "insured contract," provided that the damage occurs after the execution of the "insured contract," and for liability that the insured would have even in the absence of a contract. *See Federated Mut. Ins. Co.*, 197 F.3d at 726. "Insured contracts" generally have two elements: "[f]irst, 'the contract or agreement must expressly provide for the insured's assumption of the other party's liability,'" and "[s]econd, the insured must assume the tort liability of another." *USF&G Co. v. Continental Cas. Co.*, 120 S.W.3d 556, 561 (Ark. 2003) (quoting Douglas Richmond & Darren Black, Expanding Liability Coverage: Insured Contracts & Additional Insureds, 44 DRAKE L. REV. 781 (1996)). "Insured contracts" often refer to indemnity agreements. *See Motiva Enterprises, LLC v. Liberty Mut. Ins. Co.*, 2006 WL 3246039, at *2 (S.D. Tex. 2006); *USF&G Co., supra*, 120 S.W.3d at 561.

2. Coverage B - Personal and Advertising Injury

Standard insuring language for this coverage form reads in relevant part as follows:

> Insuring Agreement:
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of personal and advertising injury to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages . . .
>
> b. This insurance applies to "personal and advertising injury" caused by an offense arising out of your business but only if the offense was committed in the "coverage territory" during the policy period.
>
> . . .
>
> 2. Exclusions
>
> This insurance does not apply to:
>
> a. "Personal and advertising injury":
>
> (1) caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury";
>
> (2) arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity;
>
> (3) arising out of a breach of contract, except an implied contract to use another's advertising idea in your "advertisement"; . . .

A policy will include definitions of the relevant terms and typically defines "personal and advertising injury" to include claims for injury arising out of one or more of the following offenses: false arrest or imprisonment; malicious prosecution; wrongful eviction or entry; slander or libel of a person or organization or disparagement of that person or organizations goods, products, or services; oral or written publication of material that violates a person's right of privacy; misappropriation of advertising ideas

of business practices; or infringement of another's copyright, trade dress or slogan in the insured's advertising.

In the green building context, it is foreseeable that a CGL claim will arise alleging a personal or advertising injury. Belter and Cohen, "The Greening of America: New issues in Construction and Insurance Litigation." Personal injury claims conceivably include wrongful entry or eviction or invasion of the right to private occupancy. One example could be a government building that fails to meet approval because it does not meet statutory green building requirements and cannot be occupied, such as where an asbestos-removal project fails to meet standards required for students to reoccupy a school, or where a new federal office building fails to meet the standards for energy efficiency under applicable federal statute and the government incurs the expense of housing its offices elsewhere and hiring a new designer to bring the building up to the required standard.

Advertising injury claims must involve the insured's advertising and there must be a causal relationship between the claim and an offense listed in the advertising injury definition. *QSP, Inc. v. Aetna Cas. & Sur. Co.*, 773 A.2d 906, 923 (Conn. 2001); *Ross v. Briggs & Morgan*, 540 N.W.2d 843, 847-48 (Minn. 1995); *Bank of the West v. Superior Court*, 833 P.2d 545, 560 (Cal 1992). In the green construction context, this could include a misrepresentation claim for green qualifications claimed by an insured, a copyright infringement claim for an advertising slogan, or a disparagement claim by a competitor. To date, there are no reported cases concerning green building coverage issues in this area, but litigation can be expected.

IV. "GREEN BUILDING" INSURANCE PRODUCTS

A. ISO Forms

ISO has introduced its Increased Cost of Loss and Related Expenses for Green Upgrades, effective March, 2010. See Forms AG 04461010; BP 14750810; CP 04020909; IH 99270710; OP 04271010. These endorsements are offered as additions to Agricultural Capital Assets, Business Owners, Commercial Property, Commercial Inland Marine, and Capital Assets Program lines. The endorsement provides for the repair or replacement of insured property. While these forms apply to property insurance, they offer some insight into the language and definitions which could be utilized in "green" liability insurance products.

The endorsements use identical or substantially similar language, which includes the following definitions:

> Green means enhanced energy efficiency or use of environmentally preferable, sustainable materials, products or methods in design, construction, manufacture or operation, as recognized by a Green Standards-setter.
>
> Green Standards-setters include, but are not limited to, LEED, Energy Star, and Green Globes. A Green Standards-setter is defined as "an organization or governmental agency which produces and maintains guidelines related to Green products and practices.

The endorsements consist of three major components: (1) Green Upgrade Coverage, which provides an additional limit of insurance for an upgrade to "green" materials, typically specified to meet a named certification standard, such as LEED or Green Globes; (2) Related Expense Coverage, which provides an additional limit of insurance to be applied to expenses related to green upgrades, and is restricted to the scheduled amount for only those expenses for losses covered under the Green Upgrade Coverage for the general areas of waste reduction and recycling, design and engineering professional fees, certification fees and related equipment testing, and building air-out and related air testing; and (3) Business Interruption coverage, which is available only in conjunction with other business interruption coverage (see CP 00 30, CP 00 32, or CP 00 50), and provides thirty days additional coverage when reconstruction takes longer because of the added time necessary to obtain "green" materials or rebuild to "green" standards.

B. Other Forms/Products

Fireman's Fund (FF) is credited with launching the green building property insurance market in 2006. FF has since expanded its green line to offer a Greengard suite of products, including Building Commissioning Coverage. FF developed this product line to address an identified legal risk to professionals on a green building team, if a building fails to achieve certification. FF's "Green Financial Incentive Coverage" policy provides protection from the loss of green building related financial incentives, including tax credits and deductions, utility rebates, and loan discounts, for

a period of two years following a loss. FF also offers a product that would allow homeowners to rebuild green after a loss, and a "Delay of Occupancy or Use - Green Amendment" endorsement to its builder's risk product.

A number of other insurers have developed property insurance programs tailored to the green building industry. Travelers, Zurich, and ACE now offer builders' risk endorsements for green building projects. Chubb offers some green coverage, including business income and extra expense insurance to help companies with green properties quickly restore operations after a loss. ACE USA has added green building endorsements to its builders risk product offering, designed to address customers' potential loss stemming from changes in environmental standards, repairs using green materials, additional debris-removal expenses, and loss of tax credits. Chartis offers various green insurance products, including a policy that protects against adverse green publicity. (Green Reputation Endorsement).

There has not been a corresponding growth in green insurance products for liability claims. Argo is the only insurer known to currently offer an E&O policy specifically adapted to the needs of the green building professional, although other insurers have expressed interest and will likely follow suit. ACE now offers a Contractors Pollution Liability Program to address the risks and exposures faced by contractors as they seek to access federal stimulus dollars for green building projects. This program is designed to cover contractor and subcontractor environmental and pollution-related exposures. There are no known green building general liability products on the market at present, although it is foreseeable that as claims arise any gaps in coverage that become apparent under existing policy language will lead to the development of additional products.

EDWARD J. CURRIE, JR.

Edward ("Ned") J. Currie, Jr. obtained his undergraduate degree from the University of Mississippi in 1973, and a JD Degree from the University of Mississippi School of Law in 1976. He was admitted to practice in 1976, and has been engaged in the handling of personal injury defense, insurance coverage, and bad faith insurance defense since.

Mr. Currie is a former adjunct professor of law at the Mississippi College School of Law and has served on the faculties of the International Association of Defense Counsel Trial Academy and the National Institute for Trial Advocacy. He has served as the President of the Mississippi Defense Lawyers Association and the Mississippi Chapter of the Federal Bar Association. He has also served as a member of the Mississippi Board of Bar Commissioners, the Mississippi Judicial Model Civil Jury Instructions Committee, Chairman of the General Practice/Litigation Section of the Mississippi Bar Association, and currently serves on the Mississippi Supreme Court Advisory Committee for the Rules of Civil Procedure. He is a Fellow in Litigation Counsel of America, and a member of the International Association of Defense Counsel, the Mississippi Bar Foundation, and Counsel on Litigation Management.

He has written and lectured on insurance coverage issues for the past twenty years in the state of Mississippi and has tried numerous coverage cases, many of which are reported.

CURRIE – EXHIBIT 1

THE AMERICAN INSTITUTE OF ARCHITECTS

Ethics

FROM THE OFFICE OF GENERAL COUNSEL

2007 Code of Ethics & Professional Conduct

Preamble

Members of The American Institute of Architects are dedicated to the highest standards of professionalism, integrity, and competence. This Code of Ethics and Professional Conduct states guidelines for the conduct of Members in fulfilling those obligations. The Code is arranged in three tiers of statements: Canons, Ethical Standards, and Rules of Conduct:

- Canons are broad principles of conduct.
- Ethical Standards (E.S.) are more specific goals toward which Members should aspire in professional performance and behavior.
- Rules of Conduct (**Rule**) are mandatory; violation of a Rule is grounds for disciplinary action by the Institute. Rules of Conduct, in some instances, implement more than one Canon or Ethical Standard.

The **Code** applies to the professional activities of all classes of Members, wherever they occur. It addresses responsibilities to the public, which the profession serves and enriches; to the clients and users of architecture and in the building industries, who help to shape the built environment; and to the art and science of architecture, that continuum of knowledge and creation which is the heritage and legacy of the profession.

Commentary is provided for some of the Rules of Conduct. That commentary is meant to clarify or elaborate the intent of the rule. The commentary is not part of the **Code**. Enforcement will be determined by application of the Rules of Conduct alone; the commentary will assist those seeking to conform their conduct to the **Code** and those charged with its enforcement.

Statement in Compliance With Antitrust Law

The following practices are not, in themselves, unethical, unprofessional, or contrary to any policy of The American Institute of Architects or any of its components:

(1) submitting, at any time, competitive bids or price quotations, including in circumstances where price is the sole or principal consideration in the selection of an architect;
(2) providing discounts; or
(3) providing free services.

Individual architects or architecture firms, acting alone and not on behalf of the Institute or any of its components, are free to decide for themselves whether or not to engage in any of these practices. Antitrust law permits the Institute, its components, or Members to advocate legislative or other government policies or actions relating to these practices. Finally, architects should continue to consult with state laws or regulations governing the practice of architecture.

CANON I

General Obligations

Members should maintain and advance their knowledge of the art and science of architecture, respect the body of architectural accomplishment, contribute to its growth, thoughtfully consider the social and environmental impact of their professional activities, and exercise learned and uncompromised professional judgment.

E.S. 1.1 Knowledge and Skill: Members should strive to improve their professional knowledge and skill.

Rule 1.101 In practicing architecture, Members shall demonstrate a consistent pattern of reasonable care and competence, and shall apply the technical knowledge and skill which is ordinarily applied by architects of good standing practicing in the same locality.

Commentary: By requiring a "consistent pattern" of adherence to the common law standard of competence, this rule allows for discipline of a Member who more than infrequently does not achieve that standard. Isolated instances of minor lapses would not provide the basis for discipline.

E.S. 1.2 Standards of Excellence: Members should continually seek to raise the standards of aesthetic excellence, architectural education, research, training, and practice.

E.S. 1.3 Natural and Cultural Heritage: Members should respect and help conserve their natural and cultural heritage while striving to improve the environment and the quality of life within it.

E.S. 1.4 Human Rights: Members should uphold human rights in all their professional endeavors.

Rule 1.401 Members shall not discriminate in their professional activities on the basis of race, religion, gender, national origin, age, disability, or sexual orientation.

architect exercises supervision be made generally aware of the Code, it can also make sense to bring a particular provision to the attention of a particular employee when a situation is present which might give rise to violation.

CANON V

Obligations to Colleagues

Members should respect the rights and acknowledge the professional aspirations and contributions of their colleagues.

E.S. 5.1 Professional Environment: Members should provide their associates and employees with a suitable working environment, compensate them fairly, and facilitate their professional development.

E.S. 5.2 Intern and Professional Development: Members should recognize and fulfill their obligation to nurture fellow professionals as they progress through all stages of their career, beginning with professional education in the academy, progressing through internship and continuing throughout their career.

E.S. 5.3 Professional Recognition: Members should build their professional reputation on the merits of their own service and performance and should recognize and give credit to others for the professional work they have performed.

Rule 5.301 Members shall recognize and respect the professional contributions of their employees, employers, professional colleagues, and business associates.

Rule 5.302 Members leaving a firm shall not, without the permission of their employer or partner, take designs, drawings, data, reports, notes, or other materials relating to the firm's work, whether or not performed by the Member.

Rule 5.303 A Member shall not unreasonably withhold permission from a departing employee or partner to take copies of designs, drawings, data, reports, notes, or other materials relating to work performed by the employee or partner that are not confidential.

Commentary: A Member may impose reasonable conditions, such as the payment of copying costs, on the right of departing persons to take copies of their work.

CANON VI

Obligations to the Environment

Members should promote sustainable design and development principles in their professional activities.

E.S. 6.1 Sustainable Design: In performing design work, Members should be environmentally responsible and advocate sustainable building and site design.

E.S. 6.2 Sustainable Development: In performing professional services, Members should advocate the design, construction, and operation of sustainable buildings and communities.

E.S. 6.3 Sustainable Practices: Members should use sustainable practices within their firms and professional organizations, and they should encourage their clients to do the same.

RULES OF APPLICATION, ENFORCEMENT, AND AMENDMENT

Application

The **Code of Ethics and Professional Conduct** applies to the professional activities of all members of the AIA.

Enforcement

The Bylaws of the Institute state procedures for the enforcement of the **Code of Ethics and Professional Conduct**. Such procedures provide that:

(1) Enforcement of the **Code** is administered through a National Ethics Council, appointed by the AIA Board of Directors.

(2) Formal charges are filed directly with the National Ethics Council by Members, components, or anyone directly aggrieved by the conduct of the Members.

(3) Penalties that may be imposed by the National Ethics Council are:

(a) Admonition
(b) Censure
(c) Suspension of membership for a period of time
(d) Termination of membership.

(4) Appeal procedures are available.

(5) All proceedings are confidential, as is the imposition of an admonishment; however, all other penalties shall be made public.

Enforcement of Rules 4.101 and 4.202 refer to and support enforcement of other Rules. A violation of Rules 4.101 or 4.202 cannot be established without proof of a pertinent violation of at least one other Rule.

Amendment

The **Code of Ethics and Professional Conduct** may be amended by the convention of the Institute under the same procedures as are necessary to amend the Institute's Bylaws. The **Code** may also be amended by the AIA Board of Directors upon a two-thirds vote of the entire Board.

***2007 Edition.** *This copy of the Code of Ethics is current as of December 2007. Contact the General Counsel's Office for further information at (202) 626-7311.*

CURRIE – EXHIBIT 2

AIA® Document B214™ – 2007

Standard Form of Architect's Services: LEED® Certification

for the following PROJECT:
(Name and location or address)

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

This document provides the Architect's scope of services only and must be used with an owner-architect agreement. It may be used with G802™–2007, *Amendment to the Professional Services Agreement*, to create a modification to any owner-architect agreement.

THE OWNER:
(Name and address)

THE ARCHITECT:
(Name and address)

THE AGREEMENT
This Standard Form of Architect's Services is part of or modifies the accompanying Owner-Architect Agreement (hereinafter, the Agreement) dated the day of in the year
(In words, indicate day, month and year.)

TABLE OF ARTICLES

1 INITIAL INFORMATION

2 LEED CERTIFICATION SERVICES

3 ADDITIONAL SERVICES

4 OWNER'S RESPONSIBILITIES

5 COMPENSATION

6 SPECIAL TERMS AND CONDITIONS

ARTICLE 1 INITIAL INFORMATION

The Architect's performance of the services set forth in this document is based upon the following information. Material changes to this information may entitle the Architect to Additional Services.
(List below information, including conditions or assumptions, that will affect the Architect's performance.)

Exhibit 2

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ARTICLE 2 LEED CERTIFICATION SERVICES

§ 2.1 The Architect shall consult with the Owner, research applicable criteria, attend Project meetings, communicate with members of the Project team, and issue progress reports. The Architect shall coordinate the services provided by the Architect and the Architect's consultants with those services provided by the Owner and the Owner's consultants.

§ 2.2 The Architect shall submit U.S. Green Building Council's (USGBC's) Leadership in Energy and Environmental Design (LEED) certification documentation to the Owner at intervals appropriate to the LEED certification process for purposes of evaluation and approval by the Owner. The Architect shall be entitled to rely on approvals received from the Owner to complete the LEED Certification Services.

§ 2.3 PREDESIGN WORKSHOP

The Architect shall conduct a predesign workshop with the Owner, the Owner's consultants, and the Architect's consultants at which the participants will review the LEED Green Building Rating System. The participants will also examine each LEED credit utilizing the appropriate Green Building Rating System Project Checklist as a template for establishing green building goals, identify potential LEED points, examine strategies for implementation, assess the impact on the Owner's program and budget, and determine the LEED points to be targeted.

§ 2.4 LEED CERTIFICATION PLAN

§ 2.4.1 The Architect shall prepare a LEED Certification Plan based on the LEED points targeted. The LEED Certification Plan will describe the LEED certification process and may contain a description of the green building goals established, LEED points targeted, implementation strategies selected, list of participants and their roles and responsibilities, description of how the plan is to be implemented, certification schedule, specific details about design reviews, list of systems and components to be certified, and certification documentation required.

§ 2.4.2 Subject to Section 3.1, the Architect shall revise the LEED Certification Plan as the design and construction of the Project progresses to reflect any changes approved by the Owner, as a Change in Services.

§ 2.5 LEED CERTIFICATION DOCUMENTATION

§ 2.5.1 The Architect shall organize and manage the LEED design documentation and certification process.

§ 2.5.2 The Architect shall review the LEED certification process and regularly report progress to the Owner.

§ 2.5.3 The Architect shall provide the services of LEED accredited professionals necessary for certification of the Project.

§ 2.5.4 The Architect shall register the Project with the USGBC. Registration fees charged by the USGBC shall be a reimbursable expense.

§ 2.5.5 Subject to Section 3.1, the Architect shall prepare submittals for Credit Rulings from the USGBC for interpretation of credit language, principles, or implementation strategies. Credit Ruling fees charged by the USGBC shall be a reimbursable expense.

§ 2.5.6 Subject to Section 3.1, the Architect shall prepare and submit a LEED Certification Application for the Project to the USGBC, including required calculations and documentation for each LEED credit claimed, in accordance with the LEED Certification Plan.

§ 2.5.7 Subject to Section 3.1, the Architect shall prepare responses and submit additional documentation required by comments or questions received from the USGBC after review of the original submission for certification.

§ 2.6 LEED CERTIFICATION SPECIFICATIONS

The Architect shall provide specifications that incorporate LEED requirements for inclusion in the Contract Documents. The Contract Documents shall define the Contractor's responsibilities and documentation requirements related to LEED certification, including Construction Waste Management, Construction Indoor Air Quality, and obtaining materials credits.

§ 2.7 LEED CERTIFICATION SERVICES DURING BIDDING

§ 2.7.1 The Architect shall conduct a pre-bid meeting to review the differences between current standard construction practices and LEED principles, procedures, and requirements.

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§ 2.7.2 The Architect shall prepare responses to questions from prospective bidders and provide clarifications and interpretations of the Bidding Documents related to LEED certification in the form of addenda.

§ 2.7.3 The Architect shall consider requests for substitutions, if permitted by the Bidding Documents, and shall prepare addenda identifying approved substitutions related to LEED certification.

§ 2.7.4 The Architect shall assist the Owner in bid validation or proposal evaluation and determination of the successful bid or proposal, if any, related to LEED certification.

§ 2.8 LEED CERTIFICATION SERVICES DURING CONTRACT ADMINISTRATION

§ 2.8.1 The Architect shall review properly prepared, timely requests by the Contractor for additional information about the Contract Documents related to LEED certification. A properly prepared request for additional information about the Contract Documents shall be in a form prepared or approved by the Architect and shall include a detailed written statement that indicates the specific Drawings or Specifications in need of clarification and the nature of the clarification requested.

§ 2.8.2 If deemed appropriate by the Architect, the Architect shall, on the Owner's behalf, prepare, reproduce and distribute supplemental Drawings, Specifications and information in response to requests for information by the Contractor related to LEED certification.

§ 2.8.3 Subject to Section 3.1, the Architect, as a representative of the Owner, shall visit the site at intervals appropriate to the stage of the Contractor's operations, or as otherwise agreed by the Owner and the Architect in Section 3.1.4, to become generally familiar with and to keep the Owner informed about the progress of the portions of the Work related to LEED certification. However, the Architect shall not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. The Architect shall not have control over, charge of, or be responsible for, the construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, since these are solely the Contractor's rights and responsibilities under the Contract Documents.

§ 2.8.4 The Architect shall at all times have access to the Work wherever it is in preparation or progress.

§ 2.8.5 Subject to Section 3.1, the Architect shall review and approve or take other appropriate action upon the Contractor's submittals such as Shop Drawings, Product Data and Samples, but only for the limited purpose of checking for conformance with requirements for LEED certification. The Architect's action shall be taken with such reasonable promptness as to cause no delay in the Work or in the activities of the Owner, Owner's consultants or Contractor, while allowing sufficient time in the Architect's professional judgment to permit adequate review. Review of such submittals is not for the purpose of determining the accuracy and completeness of other information such as dimensions, quantities, and installation or performance of equipment or systems, which are the Contractor's responsibility. The Architect's review shall not constitute approval of safety precautions or, unless otherwise specifically stated by the Architect, of any construction means, methods, techniques, sequences or procedures. The Architect's approval of a specific item shall not indicate approval of an assembly of which the item is a component.

§ 2.8.6 The Architect shall review properly prepared, timely requests by the Owner, Owner's consultants or Contractor for changes in the Work related to LEED certification. A properly prepared request for a change in the Work shall be accompanied by sufficient supporting data and information to permit the Architect to make a reasonable determination without extensive investigation or preparation of additional drawings or specifications. If the Architect determines that requested changes in the Work are not materially different from the requirements for LEED certification, the Architect shall recommend an order for a minor change in the Work be issued or recommend to the Owner that the requested change be denied.

§ 2.8.7 If the Architect determines that implementation of the requested changes would result in a material change to the LEED certification, the Architect shall notify the Owner, who may authorize further investigation of such change. Upon such authorization, and based upon information furnished by the Contractor, if any, the Architect shall make a recommendation to the Owner regarding the implementation of the requested changes.

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§ 2.9 FINAL LEED CERTIFICATION REPORT

The Architect shall prepare a Final LEED Certification Report documenting the LEED rating the Project achieved, including the LEED Certification Plan, LEED Certification Documentation submitted, LEED Certification Reviews received from the USGBC, together with the specific LEED points that the Project is recognized as having received, all clarifications or interpretations of credits, and any re-certification requirements.

ARTICLE 3 ADDITIONAL SERVICES

§ 3.1 The Architect shall provide LEED Certification Services exceeding the limits set forth below as Additional Services. When the limits below are reached, the Architect shall notify the Owner:

.1	( )	revisions to the LEED Certification Plan
.2	( )	meetings during development of the design and Contract Documents
.3	( )	reviews of each Shop Drawing, Product Data item, sample and similar submittal of the Contractor
.4	( )	visits to the site by the Architect over the duration of the Project during construction
.5	( )	submittals to the USGBC
.6	( )	responses to the USGBC's comments and questions

§ 3.2 To avoid delay, the Architect shall provide the following Additional Services, notify the Owner with reasonable promptness, and explain the facts and circumstances giving rise to the need. If the Owner subsequently determines that all or parts of those services are not required, the Owner shall give prompt written notice to the Architect, and the Owner shall have no further obligation to compensate the Architect for those services:

.1 Review of a Contractor's submittal out of sequence from the submittal schedule agreed to by the Architect;

.2 Responses to the Contractor's requests for information where such information is available to the Contractor from a careful study and comparison of the Contract Documents, field conditions, other Owner-provided information, Contractor-prepared coordination drawings, or prior Project correspondence or documentation;

.3 Change Orders and Construction Change Directives requiring evaluation of proposals, including the preparation or revision of Instruments of Service;

.4 Providing consultation concerning replacement of Work resulting from fire or other cause during construction;

.5 Evaluation of an extensive number of claims submitted by the Owner's consultants, the Contractor or others in connection with the Work;

.6 Evaluation of substitutions proposed by the Owner's consultants or contractors and making subsequent revisions to Instruments of Service resulting therefrom; or

.7 Preparation of design and documentation for alternate bid or proposal requests proposed by the Owner.

ARTICLE 4 OWNER'S RESPONSIBILITIES

§ 4.1 The Owner shall furnish a program setting forth the Owner's objectives, schedule, constraints and criteria, including system requirements and relationships, special equipment and site requirements.

§ 4.2 The Owner shall provide to the Architect data necessary for the LEED Certification Services which may include design drawings, construction documents, record drawings, shop drawings and other submittals, operation and maintenance manuals, master plans, operation costs, operation budgets, pertinent records relative to historical building data, building equipment and furnishing and repair records.

§ 4.3 The Owner shall provide access to the property, buildings, and personnel necessary for the Architect to provide the LEED Certification Services. The personnel shall conduct tours and walk-throughs and explain the facility's original, current and anticipated future use.

§ 4.4 The Owner shall furnish the services of design consultants, testing agencies, and contractors necessary to allow the Architect to provide the LEED Certification Services.

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ARTICLE 5 COMPENSATION

For the Architect's LEED Certification Services described under Article 2, the Owner shall compensate the Architect as follows:

(Insert amount of, or basis for, compensation.)

§ 5.2 For Additional Services that may arise during the course of the Project, including those under Sections 3.1 and 3.2, the Owner shall compensate the Architect as follows:

(Insert amount of, or basis for, compensation.)

§ 5.3 Compensation for Additional Services of the Architect's consultants when not included in Section 5.2, shall be the amount invoiced to the Architect plus percent (%), or as otherwise stated below:

ARTICLE 6 SPECIAL TERMS AND CONDITIONS

Special terms and conditions that modify this Standard Form of Architect's Services: LEED Certification, if any, are as follows:

REPRODUCTION

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CURRIE – EXHIBIT 3

LEED-NC
LEED FOR NEW CONSTRUCTION

LEED-NC 2.2 Submittal Template
EA Prerequisite 2: Minimum Energy Performance

design

SAMPLE FORM

I, [redacted] (Responsible Individual), from [redacted] (Company Name)

verify that the information provided below is accurate, to the best of my knowledge.

SAMPLE FORM

CREDIT COMPLIANCE

The project meets the minimum energy efficiency requirements.

The project meets all the mandatory provisions (Sections 5.4, 6.4, 7.4, 8.4, 9.4, and 10.4) of ASHRAE/IESNA Standard 90.1-2004 (without amendments). ☐

SAMPLE FORM

– AND –

Select the appropriate compliance path:

The prescriptive requirements (Sections 5.5, 6.5, 7.5, and 9.5) of ASHRAE 90.1-2004 (without amendments) ☐

SAMPLE FORM

– OR –

The performance requirements (Section 11) of ASHRAE/IESNA Standard 90.1-2004 (without amendments) ☐

– OR –

The project has used a computer simulation model to document improved building energy performance under EA Credit 1 ☐

SAMPLE FORM

NARRATIVE (Optional)

Please provide any additional comments or notes regarding special circumstances or considerations regarding the project's credit approach.

SAMPLE FORM

[redacted]

SAMPLE FORM

☐ The project is seeking point(s) for this credit using an alternate compliance approach. The compliance approach, including references to any applicable Credit Interpretation Rulings is fully documented in the narrative above.

SAMPLE FORM

Exhibit 3

LEED-NC
LEED FOR NEW CONSTRUCTION

LEED-NC 2.2 Submittal Template
EA Prerequisite 2: Minimum Energy Performance

design

SAMPLE FORM

I, [redacted] (Responsible Individual) from [redacted] (Company Name)

verify that the information provided below is accurate, to the best of my knowledge.

SAMPLE FORM

CREDIT COMPLIANCE

The project meets the minimum energy efficiency requirements.

The project meets all the mandatory provisions (Sections 5.4, 6.4, 7.4, 8.4, 9.4, and 10.4) of ASHRAE/IESNA Standard 90.1-2004 (without amendments). ☐

SAMPLE FORM

– AND –

Select the appropriate compliance path:

The prescriptive requirements (Sections 5.5, 6.5, 7.5, and 9.5) of ASHRAE 90.1-2004 (without amendments) ☐

SAMPLE FORM

– OR –

The performance requirements (Section 11) of ASHRAE/IESNA Standard 90.1-2004 (without amendments) ☐

– OR –

The project has used a computer simulation model to document improved building energy performance under EA Credit 1 ☐

SAMPLE FORM

NARRATIVE (Optional)

Please provide any additional comments or notes regarding special circumstances or considerations regarding the project's credit approach.

SAMPLE FORM

[redacted]

SAMPLE FORM

☐ The project is seeking point(s) for this credit using an alternate compliance approach. The compliance approach, including references to any applicable Credit Interpretation Rulings is fully documented in the narrative above.

SAMPLE FORM

Exhibit 3

FDCC

FEDERATION OF DEFENSE & CORPORATE COUNSEL

FDCC Winter Meeting
Hyatt Grand Champions Resort
Indian Wells, California
February 26 – March 5, 2011

GREEN BUILDING AND LEED CERTIFICATION LITIGATION: IS GREEN BUILDING RESISTANT TO LITIGATION?

Presented by

Joanne Thomas Blackburn
GORDON THOMAS HONEYWELL LLP
Seattle, Washington

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CHAPTER THREE - GREEN BUILDING AND LEED CERTIFICATION LITIGATION: IS GREEN BUILDING RESISTANT TO LITIGATION?

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I. INTRODUCTION

President Obama set a goal in the American Recovery and Reinvestment Act of 2009 to have 75% of federal buildings go "green" and to improve energy efficiency in two million homes. This Act enables the government to pay money or give tax incentives in the billions of dollars to achieve its goals. The notion of going "green" is based upon the fact that in the United States buildings consume 30% of energy, 72% of electricity and 35% of carbon dioxide. *See* http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1718.

Many legal scholars and litigators alike predicted that with the new LEED Certification there would ensure a flood of litigation surrounding this new certification and tax credits for construction. LEED Certification began in 1998. LEED Certification was created by the U.S. Green Building Council (USGBC) to provide independent standards for sustainable design.[21] As of August 2010, there were at least 35,350 registered LEED commercial projects with 6,602 that proceeded to certification under the program.[22] Based upon our legal research, there have been few legal published opinions centering upon or even referencing the LEED certification. Instead, construction litigation continues and is based upon the usual breach of warranty claims, breach of contract, breach of indemnity, misrepresentations and other standard construction defect allegations.[23] These claims involve the usual parties: homeowners, developers, architects/engineers, general contractors and subcontractors. In this paper we will address the potential defendants, potential claims, and briefly the very limited lawsuits involving LEED certification.

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[21] "Green Building Claims: What theories will a plaintiff pursue, who has exposure, and a proposal for Risk Mitigation", Real Estate Law Journal, Spring 2009 by Darren A. Prum and Stephen Del Percio.

[22] *See* U.S. Green Building Council, "Leadership in Energy & Environmental Design", http://www.usgbc.org/DisplayPage.aspx?CMSPageI D= 1718.

[23] Some jurisdictions base construction defect claims on a tort claim of negligent construction, others restrict it to contract claims.

A. Possible Claims

The possible claims in construction lawsuits versus those centering on LEED certification appear similar, if not identical. They are misrepresentation, negligence and strict liability, breach of Consumer Protection Act statutes, and breach of contract. Let us examine each one briefly.

First, those sounding in tort are misrepresentation (deceit or fraud), negligence and strict liability. Deceit could occur when a building is advertised as "green" and yet not meet certain standards. With the lack of a national green building standard it is difficult to establish whether a building legally qualifies as "green." Negligence claims can center on design, workmanship or material defects. In order to establish the duty owed by a defendant to provide a green building, a plaintiff will need to establish a "green" legal standard. Without a national or legal standard on green building, cases will rely upon different standards depending on locations and type of buildings to determine whether the design professional or contractor breached his duty to the purchaser. For example, some projects get preferential treatment under the LEED program when they make an effort to lower transportation pollution through purchasing products manufactured closer to the project. This can directly conflict with the contract requiring use of specific materials or manufacturers, or limit the amount one can expend on specific material. This inherent conflict can create a negligence per se claim. Despite this potential conflict, the negligence standard will be difficult to prove without a national or legal standard.

Strict liability has been found by the courts when a contractor fails to disclose known dangerous conditions or performs negligent work to a foreseeable plaintiff. Again, this is a standard that is difficult to prove as known dangerous conditions is not an easy standard to prove.

A warranty or breach of contract claim will provide a plaintiff the ability to recover for economic loss. Warranty claims are based upon express or implied warranties. A warranty claim requires proof of both proximate and cause in fact to be successful. A defendant can overcome a warranty claim with the use of disclaimers, lack of notice, absence of privity, statute of limitations and assumption of the risk defenses. Based upon these issues, when considering a green project each party needs to review and make sure that each performance representation can be met in the final products delivered when the construction is complete. These "standards"

must be set forth clearly in the contracts in order to be enforceable in a court of law. Implied warranties apply in all sales, the implied warranty of merchantability automatically attaches to each sale. In almost every state the implied warranty of workmanlike performance and/or fitness attaches to the sale of a new home, but it is usually limited to new home construction. If one takes this the next step, one can see a situation where a design professional or contractor is sued for an implied warranty based upon a LEED certification, as a performance warranty.

Breach of contract is the most common construction claim. In looking at damages, the court will examine the intended purpose of the building and the costs required to remediate the structure to bring it into compliance with the alleged breaches of contract. These could arise in a green case wherein promises are made about the performance of the building and its ability to meet certain green performance standards. Contractor disputes based upon a breach of contract may arise from confusion between Performance Specifications and Design Specifications. If a contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications.[24] Another area ripe for claims of breach of contract is when design changes are made during construction, which occurs on every project, that result in disputes over the change and who authorized it.

The American Institute of Architects (AIA) offers two guiding documents that address LEED Certification process. Document B214 - 2007 adds LEED certification services, and adds significant obligations on the Architect to ensure that the project gets Leed certified. See Exhibit 1. Also Document B211 - 2007 appends building commissioning services to the architect's duties. See Exhibit 2. Paragraph 2.12 REVIEW OF DOCUMENTATION DURING CONSTRUCTION sets forth the following obligations on the Architect.

> During construction the Architect shall review documentation such as meeting minutes, field reports, minor changes in the Work,

[24] This legal proposition is called the Spearin Doctrine after the case *United States v. Spearin*, 248 U.S. 132 (1918). The Spearin Doctrine only applies to design specifications, specifications which set forth instructions to the general contractor on how to perform the work and what materials to provide. The Doctrine does not apply to performance specifications - these simply set forth an objective or standard, but leave the means to attain that end to the general contractor.

> Construction Change Directives, and Change Orders related to the systems to be commissioned. The Architect shall report to the Owner changes that will prevent the systems from performing as required by the Design Intent Document.

Despite these two documents, it is still risky for an architect to rely upon these documents solely. An architect can further protect himself or herself by adding a limitation to the damages clause, limiting the amount of damages to the compensation paid for the services rendered.[25]

Another area that may arise in litigation of LEED projects is preemption by federal government and statutes. The Department of Energy set up a "High Performance Green Building Partnership Consortium" as part of the mandate to the Department of Energy under the Energy Independence and Security Act of 2007. *See* 42 U.S.C. § 1708(a)(2006); 73 Fed. Reg. 73, 311 (Dec. 2, 2008). Despite state and local laws governing green requirements in building and construction, there are several federal statutes that may conflict with them and fuel further litigation. This is an area that seems to be growing in recent years and any professional needs to keep abreast of local, state and federal legislation in this area.

B. Potential Defendants in a Green Lawsuit

1. Owners/Developers

The owners of the project usually provide the design of the project along with the actual site. They are also the party that will be seeking the tax benefits that the local, state or federal governments will grant to a LEED certified project. Most owners use an American Institute of Architects "AIA" contract that has been developed and used across the country. The language in the AIA contracts have either been litigated or given a set interpretation. The owner will need to include specific language identifying the green building goals for a particular project and include this in the Requests for Proposals (RFP), Requests for Qualifications (RFQ) and the construction contracts themselves.

The parties will need to be very specific in identifying the level of LEED certification and exactly what needs to be done to achieve that level.

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[25] Some jurisdictions have held such limitations on liability clauses void.

Moreover, the owner/developer must include at each level of contracting the performance standards that must be met and within the governmental time frame to qualify for the tax benefits. Allocation of responsibility for achieving the various standards and time deadlines will enable the owner to pursue claims against the appropriate party that was responsible for the deadline or standard being met should there be a delay in the construction. Another alternative is to use liquidated damages to address failure in meeting both the time deadlines and specific LEED standards.

2. Design Professionals

The design professionals are also in the forefront with these type of contracts as it is usually the design team that must inspect and provide the green performance standard during construction as the administrator of the contract. The best alternative for the design professional is to limit the standard construction contract and limit his or her exposure to the contract price or simply require indemnity from the owner for his work. The updated AIA BI0I form simply includes the language "consider environmentally responsible design alternatives." AIA Form BI0I §A.I.6 (2007).

AIA did publish new language to address the LEED certification process in the B214 2007 Standard Form of Architect's Services contract. The form attempts to set forth the duties and responsibilities of a design professional in a project seeking LEED certification from the USGBC. The construction process to obtain LEED certification is usually more expensive than traditional construction and this is another obstacle that should be addressed by the design professional with the owner. The contract should specifically address costs and expenses associated with building green and hold the architect harmless should the owner/developer decide to go with a less expensive alternative; the design professional is not responsible. Moreover, when addressing the LEED requirements there are different decisions that need to be made to address the different credit categories. The owner must be in agreement with the design professional on the cost associated with the different choices and associated building components so that the owner's design to choose a less expensive alternative is not the responsibility of the design professional.

3. General Contractor

The contractor must also be intimately involved in the green goals and performance standards being sought to achieve LEED certification of the project. The owner and design team need to spend time explaining the design and its green goals to the contractor so he understands the reason behind building component selection and construction. The general contractor usually oversees the work by the various sub-trades and suppliers so he must ensure the green objectives are being pursued and met, as well as any time limits set by the governmental agencies involved with the tax benefits provided by the LEED certification of the project. It is common for the general contractor to offer his or her expertise in alternative designs and products during actual construction, so the performance standards sought must be explained clearly to the general contractor before construction begins and throughout the construction of the project.

Due to the various levels of LEED certification and goal of a complete green building, the general contractor needs to educate its site supervisors and other leads on green building, but may even want to hire a consulting expert in this area.

4. Lenders

Finally, the lenders for green projects should be kept in the loop as they are the parties that usually provide the financing for the project. The exposure of the lender relates to misrepresentations contained in the loan documents and an assortment of other statements related to the LEED certification.

C. Contracting Points for any Party

Each party should clarify project goals and requirements up front and argue for an integrated design process to assure the flow of information among the parties. Make sure that the contract identifies clearly which party is responsible for each design objective. Also, special attention should be given in drafting contracts to ensure that contractual language reflects expectations for certification, tax credits, sustainability, and product specifications in a cost-effective but specific way, including timelines and documentation requirements, and addresses liquidated damages.

Design professionals, contractors and owners should all meet with their insurance brokers to discuss the new green specifications to ensure that their insurance policies provide coverage for these and other green-specific warranties or services.

Finally, all parties need to be careful in disclosures and marketing materials defining expectations and risks for a green construction project to ensure they do not promise something they cannot supply.

D. Lawsuits and Other Challenges

One of the first reported Green Building cases is *Shaw Development, LLC v, Southern Builders, Inc.*, No. 19-C-07-011405 (Somerset County Cir. Ct. Md. 2007), which involved litigation between the general contractor and the developer centering on the green building tax credit program for LEED Silver Certified buildings. The construction project in Maryland included several green design features intended to qualify the project for LEED Silver certification. Due to construction delays, the general contractor missed the AIA contract mandated completion date (date certain for issuance of the Certificate of Occupancy) which was a prerequisite for the issuance of the certificates needed to qualify for the State of Maryland's tax credits. Maryland was going to provide an 8% green building tax credit. The lawsuit settled. Some speculate that the Mutual Waiver of Consequential Damages provision in the A201 General Conditions of Construction contract language forced the parties to settle.

In *Air Conditioning, Heating and Refrigeration Institute v. City of Albuquerque*, 2008 WL 5586316 (D.N.M. 2008), a company moved for preliminary injunction against a city to prevent it from enforcing ordinances that would impose minimum energy efficiency standards for commercial and residential buildings as they would cause irreparable harm to the company and were preempted by federal law, Energy Policy and Conversation Act, 42 U.S.C. § 6201, *et seq.*, National Appliance Energy Conversation Act, Pub.L. No. 100-102 (1987) and the Energy Policy Act of 1992, 42 U.S.C. §§ 6311-17. In the decision, the court explained the LEED Certification process:

> The LEED rating system was devised by the United States Green Building Council. In the context of new construction and major renovations, LEED evaluates buildings in six areas: sustainable sites, water efficiency,

> energy and atmosphere, materials and resources, indoor environmental quality, and innovation and design process. LEED provides four progressive levels of certification: certified (26-32 points), silver (33-38) points, gold (39-51) points and platinum (52-69) points. The City code requires LEED certification at the silver level for buildings.

This case established that application of LEED certification at the state level can be pre-empted by federal law.

In *Gidumal v. Site 16/17 Development, LLC*, 2010 WL 1983889 (N.Y. Supreme Court; No. 10105958), plaintiffs are owners of a unit at the luxury condominiums in New York City. Among numerous construction defects, plaintiffs alleged insufficient heat, despite marketing material promising green technology. The project was supposed to be LEED certified as a Gold-rated building featuring fresh filtered air, filtered water, eco-friendly materials and designed for low energy consumption. Despite this representation, plaintiffs experienced cold drafts and insufficient heat in their unit. Plaintiffs' experts found a deviation of 49% over the USGBC LEED and BPCA standards in the cumulative size of holes and cracks allowing infiltration of cold air. They ultimately claim that these defects were all in contrast to what was stated in the Public Offering. This case is still in its infancy, but appears to be centered on misrepresentations and a defective heating, ventilating and air conditioning (HVAC) system and not as much upon the violations of the LEED certification.

U.S. Green Building Council (USGBC) decided its first challenge to LEED certification which was awarded to the Northland Pines High School in Eagle River, Wisconsin. On May 10, 2007, Northland Pines was the first public high school to be awarded Gold certification under the LEED certification for New Construction & Major Renovations, Version 2.1. At the end of December, several groups challenged the certification. They contend that the school failed to meet Energy & Atmosphere (EA) Prerequisite 1, Fundamental Building SYSTEMS Commissioning; EA Prerequisite 2, Minimum Energy Performance and Indoor Environmental Quality Prerequisite 1, Minimum IAQ Performance.

The USGBC issued a formal written response on April 27, 2010, stating, "After extensive review, USGBC and its consultants have no reason to believe that the project failed to meet all of the LEED prerequisites and

credits that it has attempted. Thus, USGBC will not act to revoke certification or disallow any prerequisites or credits."

This decision was taken up on appeal. The appeal itself shows that the LEED certification requirements are open to subjective interpretation. There are engineers supporting both sides of the appeal. Each party has technical information and arguments to support its position. Moreover, the original decision included documents never included in the original LEED certification submission as LEED certification is issued by a non-governmental group. Thus, these objections and challenges are not subject to the traditional legal processes and procedures. There is no "appeal" of a USGBC decision to an independent authority.

Finally, the U.S. Green Building Council ("USGBC") was sued in a class action filed in U.S. District Court in New York on October 8, 2010.[26] The plaintiff class is set forth as consumers, taxpayers, building design and construction professionals. The allegations go into detail on how LEED certification is a fraud. The claims are for monopolization through fraud (Sherman Anti-trust Act), unfair competition, deceptive trade practices, false advertising, wire fraud and racketeering and unjust enrichment. Interestingly, when citing the North Pines High School certification in Eagle River, Wisconsin, the plaintiff included the following quote:

> On behalf of the taxpayers of Vilas County who would like to know with certainty whether they got what they paid for or not, we ask the engineering community to look at this file and tell us, did we miss something here? How can it be all right to certify a building that doesn't fully comply with the rules set forth by the body that is doing the certifications?

Complaint at page 11.[27]

Thus, despite all the predictions, Green litigation is still in its infancy, and may, in fact, never grow as most lawsuits still center on the old tried-and-true construction claims based upon legal precedent. The claims based

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[26] *Henry Gifford, Gifford Fuel Saving, Inc. v. U.S. Green Building Council et al.*, U.S. District Court in the Southern District of New York, Cause No. CIV7747, filed on October 8, 2010.

[27] See Appellants' Statement, June 5, 2010. *Green Real Estate Law Journal*, June 9, 2010.

upon contract disputes, warranties, product defects and misrepresentations still flood the courts. The biggest issue behind the LEED certification appears to be the fact it is not a governmental body and has no judicial punch in its enforcement. Perhaps we will see the Obama administration decide to push for further incentives in building Green, which may cause this to change. On the other hand, as litigators we may be the force behind changing this area of law. Only time will tell.

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Ms. Blackburn has extensive experience in the areas of construction defect and complex contract disputes, insurance coverage, personal injury and product liability defense. She is a partner in the Seattle office of Gordon Thomas Honeywell. She is a former president of the Washington Defense Trial Lawyers (2001-2002), she sat on the WDTL Board as the DRI State Representative from 2005 to 2008. She currently sits as the Regional Director for the Northwest Region of DRI and is a member of the DRI Board of Directors. She was also elected as a Super Lawyer from 2004 through 2010 by Washington Law & Politics Magazine. She has been a member of the Federation of Defense and Corporate Counsel since 1999 and acted as chair for the Construction Section from 2007 through 2010. Ms. Blackburn has taken product liability, wrongful death, broke/agent and contract dispute cases to trial in both Washington and Alaska. She also has sat on the Board for FareStart, a non-profit organization in Seattle that assists homeless people in getting job training in the food industry and then job placement from 2001 to 2009. She is President-Elect for the Lake Washington Chapter of the National Charity League.

Ms. Blackburn is admitted to the Washington, United States District Court, Western District of Washington, United States District Court, Eastern District of Washington, California, United States Court of Appeals, Ninth Circuit, United States District Court, Northern and Central Districts of California and Alaska bars. She is member of the American Bar Association, King County Bar Association, DRI - The Voice of the Defense Bar, Washington Defense Trial Lawyers, Federation of Defense and Corporate Counsel, Northwest Insurance Coverage Association, Council on Litigation Management and has an AV Preeminent Martindale-Hubbell rating. She earned her B.A. from the University of California at Berkeley in 1984 and her J.D. from the University of Notre Dame Law School in 1987.

Ms. Blackburn has two children, TJ, her son is 17 years old and active in football, wrestling, lacrosse and applying for college. Madison, her daughter is 16 going on 21 and loves both soccer and lacrosse. Joanne and John summited Mt. Rainier together, Joanne then summited Mt. Baker and has summited Mt. Adams at 12,281 feet several times, the last time with her daughter.

BLACKBURN – EXHIBIT 1

AIA® Document B214™ – 2007 Instructions

Standard Form of Architect's Services: LEED® Certification

GENERAL INFORMATION

Purpose

AIA Document B214–2007 provides the Architect's scope of services for LEED Certification in a standard form that the Owner and Architect can modify to suit the needs of the Project. B214–2007 is not a stand-alone document and to become effective it must be incorporated into an owner-architect agreement. It may be used with AIA Document B102™–2007, Standard Form of Agreement Between Owner and Architect, to provide the Architect's sole scope of services, or with B102–2007 in conjunction with other standard form services documents. It may also be incorporated into any owner-architect agreement when the agreement is executed or used with G802™–2007, Amendment to the Professional Services Agreement, to create a modification to any owner-architect agreement.

Why Use AIA Contract Documents

AIA contract documents are the product of a consensus-building process aimed at balancing the interests of all parties on the construction project. The documents reflect actual industry practices, not theory. They are state-of-the-art legal documents, regularly revised to keep up with changes in law and the industry—yet they are written, as far as possible, in everyday language. Finally, AIA contract documents are flexible: they are intended to be modified to fit individual projects, but in such a way that modifications are easily distinguished from the original, printed language.

Use of Non-AIA Forms

If a combination of AIA documents and non-AIA documents is to be used, particular care must be taken to achieve consistency of language and intent among documents.

Letter Forms of Agreement

Letter forms of agreement are generally discouraged by the AIA, as is the performance of a part or the whole of the Work on the basis of oral agreements or understandings. The standard AIA agreement forms have been developed through more than 100 years of experience and have been tested repeatedly in the courts. In addition, the standard forms have been carefully coordinated with other AIA documents.

Standard Forms

Most AIA documents published since 1906 have contained in their titles the words "Standard Form." The term "standard" is not meant to imply that a uniform set of contractual requirements is mandatory for AIA members or others in the construction industry. Rather, the AIA standard documents are intended to be used as fair and balanced baselines from which the parties can negotiate their bargains. As such, the documents have won general acceptance within the construction industry and have been uniformly interpreted by the courts. Within an industry spanning 50 states—each free to adopt different, and perhaps contradictory, laws affecting that industry—AIA documents form the basis for a generally consistent body of construction law.

Use of Current Documents

Prior to using any AIA Contract Document, users should consult www.aia.org or a local AIA component to verify the most recent edition.

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CHANGES FROM THE PREVIOUS EDITION

This standard form of architect's services document was revised in 2007 so that it would follow the format and terminology used in the 2007 editions of the following standard form owner-architect agreements: AIA Documents B101™–2007, B103™–2007, and B104™–2007.

A new Article 1, Initial Information, is added. Project administration services, formerly covered under Article 1, are now incorporated into Article 2. Supporting Services, formerly in Article 2, are re-titled Owner's Responsibilities and are now located in Article 4. The architect's services, formerly in Articles 3 and 4, are now set forth in Articles 2 and 3. The services themselves are not changed from the previous edition.

The most significant revision is the inclusion of a new Article 5, Compensation. The prior edition did not include a location for including the compensation to be paid for the services. The last article, Article 6, Special Terms and Conditions, replaces the former Article 5, Modifications.

USING B214–2007

Modifications

Particularly with respect to professional or contractor licensing laws, building codes, taxes, monetary and interest charges, arbitration, indemnification, format and font size, AIA Contract Documents may require modification to comply with state or local laws. Users are encouraged to consult an attorney before completing or modifying a document.

In a purchased paper AIA Contract Document, necessary modifications may be accomplished by writing or typing the appropriate terms in the blank spaces provided on the document, or by attaching Supplementary Conditions, special conditions or referenced amendments.

Modifications directly to purchased paper AIA Contract Documents may also be achieved by striking out language. However, care must be taken in making these kinds of deletions. Under NO circumstances should standard language be struck out to render it illegible. For example, users should not apply blocking tape, correction fluid or Xs that would completely obscure text. Such practices may raise suspicion of fraudulent concealment, or suggest that the completed and signed document has been tampered with. Both parties should initial handwritten changes.

Using AIA software, modifications to insert information and revise the standard AIA text may be made as the software permits.

By reviewing properly made modifications to a standard AIA Contract Document, parties familiar with that document can quickly understand the essence of the proposed relationship. Commercial exchanges are greatly simplified and expedited, good faith dealing is encouraged, and otherwise latent clauses are exposed for scrutiny.

AIA Contract Documents may not be retyped or electronically scanned. Retyping can introduce typographic errors and cloud legal interpretation given to a standard clause. Furthermore, retyping and electronic scanning are not permitted under the user's limited license for use of the document, constitute the creation of a derivative work and violate the AIA's copyright.

Cover Page

Project: Describe the Project by including (1) the official name or title of the facility, and (2) the location or address, if known.

Identification of the Parties: State the names and addresses of the parties exactly as they are identified in the Owner-Architect agreement into which this scope of services document is incorporated, or to which it provides the scope of services for an amendment.

Date: Provide the date of the existing Owner-Architect Agreement. Providing that date will assist in identifying this scope of services document with the existing owner-architect agreement being modified.

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§ 3.1 Additional Services
Insert an agreed upon number in each of the spaces provided.

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AIA® Document B214™ – 2007

Standard Form of Architect's Services: LEED® Certification

for the following PROJECT:
(Name and location or address)

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

This document provides the Architect's scope of services only and must be used with an owner-architect agreement. It may be used with G802™–2007, *Amendment to the Professional Services Agreement*, to create a modification to any owner-architect agreement.

THE OWNER:
(Name and address)

THE ARCHITECT:
(Name and address)

THE AGREEMENT
This Standard Form of Architect's Services is part of or modifies the accompanying Owner-Architect Agreement (hereinafter, the Agreement) dated the day of in the year
(In words, indicate day, month and year.)

TABLE OF ARTICLES

1 INITIAL INFORMATION

2 LEED CERTIFICATION SERVICES

3 ADDITIONAL SERVICES

4 OWNER'S RESPONSIBILITIES

5 COMPENSATION

6 SPECIAL TERMS AND CONDITIONS

ARTICLE 1 INITIAL INFORMATION
The Architect's performance of the services set forth in this document is based upon the following information. Material changes to this information may entitle the Architect to Additional Services.
(List below information, including conditions or assumptions, that will affect the Architect's performance.)

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ARTICLE 2 LEED CERTIFICATION SERVICES

§ 2.1 The Architect shall consult with the Owner, research applicable criteria, attend Project meetings, communicate with members of the Project team, and issue progress reports. The Architect shall coordinate the services provided by the Architect and the Architect's consultants with those services provided by the Owner and the Owner's consultants.

§ 2.2 The Architect shall submit U.S. Green Building Council's (USGBC's) Leadership in Energy and Environmental Design (LEED) certification documentation to the Owner at intervals appropriate to the LEED certification process for purposes of evaluation and approval by the Owner. The Architect shall be entitled to rely on approvals received from the Owner to complete the LEED Certification Services.

§ 2.3 PREDESIGN WORKSHOP

The Architect shall conduct a predesign workshop with the Owner, the Owner's consultants, and the Architect's consultants at which the participants will review the LEED Green Building Rating System. The participants will also examine each LEED credit utilizing the appropriate Green Building Rating System Project Checklist as a template for establishing green building goals, identify potential LEED points, examine strategies for implementation, assess the impact on the Owner's program and budget, and determine the LEED points to be targeted.

§ 2.4 LEED CERTIFICATION PLAN

§ 2.4.1 The Architect shall prepare a LEED Certification Plan based on the LEED points targeted. The LEED Certification Plan will describe the LEED certification process and may contain a description of the green building goals established, LEED points targeted, implementation strategies selected, list of participants and their roles and responsibilities, description of how the plan is to be implemented, certification schedule, specific details about design reviews, list of systems and components to be certified, and certification documentation required.

§ 2.4.2 Subject to Section 3.1, the Architect shall revise the LEED Certification Plan as the design and construction of the Project progresses to reflect any changes approved by the Owner, as a Change in Services.

§ 2.5 LEED CERTIFICATION DOCUMENTATION

§ 2.5.1 The Architect shall organize and manage the LEED design documentation and certification process.

§ 2.5.2 The Architect shall review the LEED certification process and regularly report progress to the Owner.

§ 2.5.3 The Architect shall provide the services of LEED accredited professionals necessary for certification of the Project.

§ 2.5.4 The Architect shall register the Project with the USGBC. Registration fees charged by the USGBC shall be a reimbursable expense.

§ 2.5.5 Subject to Section 3.1, the Architect shall prepare submittals for Credit Rulings from the USGBC for interpretation of credit language, principles, or implementation strategies. Credit Ruling fees charged by the USGBC shall be a reimbursable expense.

§ 2.5.6 Subject to Section 3.1, the Architect shall prepare and submit a LEED Certification Application for the Project to the USGBC, including required calculations and documentation for each LEED credit claimed, in accordance with the LEED Certification Plan.

§ 2.5.7 Subject to Section 3.1, the Architect shall prepare responses and submit additional documentation required by comments or questions received from the USGBC after review of the original submission for certification.

§ 2.6 LEED CERTIFICATION SPECIFICATIONS

The Architect shall provide specifications that incorporate LEED requirements for inclusion in the Contract Documents. The Contract Documents shall define the Contractor's responsibilities and documentation requirements related to LEED certification, including Construction Waste Management, Construction Indoor Air Quality, and obtaining materials credits.

§ 2.7 LEED CERTIFICATION SERVICES DURING BIDDING

§ 2.7.1 The Architect shall conduct a pre-bid meeting to review the differences between current standard construction practices and LEED principles, procedures, and requirements.

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§ 2.7.2 The Architect shall prepare responses to questions from prospective bidders and provide clarifications and interpretations of the Bidding Documents related to LEED certification in the form of addenda.

§ 2.7.3 The Architect shall consider requests for substitutions, if permitted by the Bidding Documents, and shall prepare addenda identifying approved substitutions related to LEED certification.

§ 2.7.4 The Architect shall assist the Owner in bid validation or proposal evaluation and determination of the successful bid or proposal, if any, related to LEED certification.

§ 2.8 LEED CERTIFICATION SERVICES DURING CONTRACT ADMINISTRATION

§ 2.8.1 The Architect shall review properly prepared, timely requests by the Contractor for additional information about the Contract Documents related to LEED certification. A properly prepared request for additional information about the Contract Documents shall be in a form prepared or approved by the Architect and shall include a detailed written statement that indicates the specific Drawings or Specifications in need of clarification and the nature of the clarification requested.

§ 2.8.2 If deemed appropriate by the Architect, the Architect shall, on the Owner's behalf, prepare, reproduce and distribute supplemental Drawings, Specifications and information in response to requests for information by the Contractor related to LEED certification.

§ 2.8.3 Subject to Section 3.1, the Architect, as a representative of the Owner, shall visit the site at intervals appropriate to the stage of the Contractor's operations, or as otherwise agreed by the Owner and the Architect in Section 3.1.4, to become generally familiar with and to keep the Owner informed about the progress of the portions of the Work related to LEED certification. However, the Architect shall not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. The Architect shall not have control over, charge of, or be responsible for, the construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, since these are solely the Contractor's rights and responsibilities under the Contract Documents.

§ 2.8.4 The Architect shall at all times have access to the Work wherever it is in preparation or progress.

§ 2.8.5 Subject to Section 3.1, the Architect shall review and approve or take other appropriate action upon the Contractor's submittals such as Shop Drawings, Product Data and Samples, but only for the limited purpose of checking for conformance with requirements for LEED certification. The Architect's action shall be taken with such reasonable promptness as to cause no delay in the Work or in the activities of the Owner, Owner's consultants or Contractor, while allowing sufficient time in the Architect's professional judgment to permit adequate review. Review of such submittals is not for the purpose of determining the accuracy and completeness of other information such as dimensions, quantities, and installation or performance of equipment or systems, which are the Contractor's responsibility. The Architect's review shall not constitute approval of safety precautions or, unless otherwise specifically stated by the Architect, of any construction means, methods, techniques, sequences or procedures. The Architect's approval of a specific item shall not indicate approval of an assembly of which the item is a component.

§ 2.8.6 The Architect shall review properly prepared, timely requests by the Owner, Owner's consultants or Contractor for changes in the Work related to LEED certification. A properly prepared request for a change in the Work shall be accompanied by sufficient supporting data and information to permit the Architect to make a reasonable determination without extensive investigation or preparation of additional drawings or specifications. If the Architect determines that requested changes in the Work are not materially different from the requirements for LEED certification, the Architect shall recommend an order for a minor change in the Work be issued or recommend to the Owner that the requested change be denied.

§ 2.8.7 If the Architect determines that implementation of the requested changes would result in a material change to the LEED certification, the Architect shall notify the Owner, who may authorize further investigation of such change. Upon such authorization, and based upon information furnished by the Contractor, if any, the Architect shall make a recommendation to the Owner regarding the implementation of the requested changes.

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§ 2.9 FINAL LEED CERTIFICATION REPORT

The Architect shall prepare a Final LEED Certification Report documenting the LEED rating the Project achieved, including the LEED Certification Plan, LEED Certification Documentation submitted, LEED Certification Reviews received from the USGBC, together with the specific LEED points that the Project is recognized as having received, all clarifications or interpretations of credits, and any re-certification requirements.

ARTICLE 3 ADDITIONAL SERVICES

§ 3.1 The Architect shall provide LEED Certification Services exceeding the limits set forth below as Additional Services. When the limits below are reached, the Architect shall notify the Owner:

.1	( )	revisions to the LEED Certification Plan
.2	( )	meetings during development of the design and Contract Documents
.3	( )	reviews of each Shop Drawing, Product Data item, sample and similar submittal of the Contractor
.4	( )	visits to the site by the Architect over the duration of the Project during construction
.5	( )	submittals to the USGBC
.6	( )	responses to the USGBC's comments and questions

§ 3.2 To avoid delay, the Architect shall provide the following Additional Services, notify the Owner with reasonable promptness, and explain the facts and circumstances giving rise to the need. If the Owner subsequently determines that all or parts of those services are not required, the Owner shall give prompt written notice to the Architect, and the Owner shall have no further obligation to compensate the Architect for those services:

.1 Review of a Contractor's submittal out of sequence from the submittal schedule agreed to by the Architect;

.2 Responses to the Contractor's requests for information where such information is available to the Contractor from a careful study and comparison of the Contract Documents, field conditions, other Owner-provided information, Contractor-prepared coordination drawings, or prior Project correspondence or documentation;

.3 Change Orders and Construction Change Directives requiring evaluation of proposals, including the preparation or revision of Instruments of Service;

.4 Providing consultation concerning replacement of Work resulting from fire or other cause during construction;

.5 Evaluation of an extensive number of claims submitted by the Owner's consultants, the Contractor or others in connection with the Work;

.6 Evaluation of substitutions proposed by the Owner's consultants or contractors and making subsequent revisions to Instruments of Service resulting therefrom; or

.7 Preparation of design and documentation for alternate bid or proposal requests proposed by the Owner.

ARTICLE 4 OWNER'S RESPONSIBILITIES

§ 4.1 The Owner shall furnish a program setting forth the Owner's objectives, schedule, constraints and criteria, including system requirements and relationships, special equipment and site requirements.

§ 4.2 The Owner shall provide to the Architect data necessary for the LEED Certification Services which may include design drawings, construction documents, record drawings, shop drawings and other submittals, operation and maintenance manuals, master plans, operation costs, operation budgets, pertinent records relative to historical building data, building equipment and furnishing and repair records.

§ 4.3 The Owner shall provide access to the property, buildings, and personnel necessary for the Architect to provide the LEED Certification Services. The personnel shall conduct tours and walk-throughs and explain the facility's original, current and anticipated future use.

§ 4.4 The Owner shall furnish the services of design consultants, testing agencies, and contractors necessary to allow the Architect to provide the LEED Certification Services.

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ARTICLE 5 COMPENSATION

For the Architect's LEED Certification Services described under Article 2, the Owner shall compensate the Architect as follows:

(Insert amount of, or basis for, compensation.)

§ 5.2 For Additional Services that may arise during the course of the Project, including those under Sections 3.1 and 3.2, the Owner shall compensate the Architect as follows:

(Insert amount of, or basis for, compensation.)

§ 5.3 Compensation for Additional Services of the Architect's consultants when not included in Section 5.2, shall be the amount invoiced to the Architect plus percent (%), or as otherwise stated below:

ARTICLE 6 SPECIAL TERMS AND CONDITIONS

Special terms and conditions that modify this Standard Form of Architect's Services: LEED Certification, if any, are as follows:

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BLACKBURN – EXHIBIT 2

AIA® Document B211™ – 2007 Instructions

Standard Form of Architect's Services: Commissioning

GENERAL INFORMATION

Purpose

AIA Document B211–2007 provides the Architect's scope of services for Commissioning in a standard form that the Owner and Architect can modify to suit the needs of the Project. B211–2007 is not a stand-alone document and to become effective it must be incorporated into an owner-architect agreement. It may be used with AIA Document B102™–2007, Standard Form of Agreement Between Owner and Architect, to provide the Architect's sole scope of services, or with B102–2007 in conjunction with other standard form services documents. It may also be incorporated into any owner-architect agreement when the agreement is executed or used with G802™–2007, Amendment to the Professional Services Agreement, to create a modification to any owner-architect agreement

Why Use AIA Contract Documents

AIA contract documents are the product of a consensus-building process aimed at balancing the interests of all parties on the construction project. The documents reflect actual industry practices, not theory. They are state-of-the-art legal documents, regularly revised to keep up with changes in law and the industry—yet they are written, as far as possible, in everyday language. Finally, AIA contract documents are flexible: they are intended to be modified to fit individual projects, but in such a way that modifications are easily distinguished from the original, printed language.

Use of Non-AIA Forms

If a combination of AIA documents and non-AIA documents is to be used, particular care must be taken to achieve consistency of language and intent among documents.

Letter Forms of Agreement

Letter forms of agreement are generally discouraged by the AIA, as is the performance of a part or the whole of the Work on the basis of oral agreements or understandings. The standard AIA agreement forms have been developed through more than 100 years of experience and have been tested repeatedly in the courts. In addition, the standard forms have been carefully coordinated with other AIA documents.

Standard Forms

Most AIA documents published since 1906 have contained in their titles the words "Standard Form." The term "standard" is not meant to imply that a uniform set of contractual requirements is mandatory for AIA members or others in the construction industry. Rather, the AIA standard documents are intended to be used as fair and balanced baselines from which the parties can negotiate their bargains. As such, the documents have won general acceptance within the construction industry and have been uniformly interpreted by the courts. Within an industry spanning 50 states—each free to adopt different, and perhaps contradictory, laws affecting that industry—AIA documents form the basis for a generally consistent body of construction law.

Use of Current Documents

Prior to using any AIA Contract Document, users should consult www.aia.org or a local AIA component to verify the most recent edition.

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CHANGES FROM THE PREVIOUS EDITION

This standard form of architect's services document was revised in 2007 so that it would follow the format and terminology used in the 2007 editions of the following standard form owner-architect agreements: AIA Documents B101™–2007, B103™–2007, and B104™–2007.

A new Article 1, Initial Information, is added. Project administration services, formerly covered under Article 1, are now incorporated into Article 2. Supporting Services, formerly in Article 2, are re-titled Owner's Responsibilities and are now located in Article 4. The architect's services, formerly in Articles 3 and 4, are now set forth in Articles 2 and 3. The services themselves are not changed from the previous edition.

The most significant revision is the inclusion of a new Article 5, Compensation. The prior edition did not include a location for including the compensation to be paid for the services. The last article, Article 6, Special Terms and Conditions, replaces the former Article 5, Modifications.

USING B211–2007

Modifications

Particularly with respect to professional or contractor licensing laws, building codes, taxes, monetary and interest charges, arbitration, indemnification, format and font size, AIA Contract Documents may require modification to comply with state or local laws. Users are encouraged to consult an attorney before completing or modifying a document.

In a purchased paper AIA Contract Document, necessary modifications may be accomplished by writing or typing the appropriate terms in the blank spaces provided on the document, or by attaching Supplementary Conditions, special conditions or referenced amendments.

Modifications directly to purchased paper AIA Contract Documents may also be achieved by striking out language. However, care must be taken in making these kinds of deletions. Under NO circumstances should standard language be struck out to render it illegible. For example, users should not apply blocking tape, correction fluid or Xs that would completely obscure text. Such practices may raise suspicion of fraudulent concealment, or suggest that the completed and signed document has been tampered with. Both parties should initial handwritten changes.

Using AIA software, modifications to insert information and revise the standard AIA text may be made as the software permits.

By reviewing properly made modifications to a standard AIA Contract Document, parties familiar with that document can quickly understand the essence of the proposed relationship. Commercial exchanges are greatly simplified and expedited, good faith dealing is encouraged, and otherwise latent clauses are exposed for scrutiny.

AIA Contract Documents may not be retyped or electronically scanned. Retyping can introduce typographic errors and cloud legal interpretation given to a standard clause. Furthermore, retyping and electronic scanning are not permitted under the user's limited license for use of the document, constitute the creation of a derivative work and violate the AIA's copyright.

Cover Page

Project: Describe the Project by including (1) the official name or title of the facility, and (2) the location or address, if known.

Identification of the Parties: State the names and addresses of the parties exactly as they are identified in the Owner-Architect agreement into which this scope of services document is incorporated, or to which it provides the scope of services for an amendment.

Date: Provide the date of the existing Owner-Architect Agreement. Providing that date will assist in identifying this scope of services document with the existing owner-architect agreement being modified.

§ 3.1 Additional Services

This table lists certain other services that are not described in this scope of services document, but that may be needed

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for the Project. The Architect and Owner should discuss the list and complete the table by indicating whether the services will be provided and, if so, by whom. The Architect shall not perform any listed service unless specifically designated in the Responsibility column of the table.

§ 3.2 Descriptions of Additional Services
Provide detailed scope of services descriptions of any other services designated in §3.1, unless you have chosen to provide such descriptions in an exhibit attached to the document.

§ 3.3 Insert an agreed-upon number in each of the spaces provided.

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AIA® Document B211™ – 2007

Standard Form of Architect's Services: Commissioning

for the following PROJECT:
(Name and location or address)

THE OWNER:
(Name and address)

THE ARCHITECT:
(Name and address)

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

This document provides the Architect's scope of services only and must be used with an owner-architect agreement. It may be used with G802™–2007, *Amendment to the Professional Services Agreement*, to create a modification to any owner-architect agreement.

THE AGREEMENT
This Standard Form of Architect's Services is part of or modifies the accompanying Owner-Architect Agreement (hereinafter, the Agreement) dated the day of
in the year
(In words, indicate day, month and year.)

TABLE OF ARTICLES

1 INITIAL INFORMATION

2 COMMISSIONING SERVICES

3 ADDITIONAL SERVICES

4 OWNER'S RESPONSIBILITIES

5 COMPENSATION

6 SPECIAL TERMS AND CONDITIONS

ARTICLE 1 INITIAL INFORMATION
The Architect's performance of the services set forth in this document is based upon the following information. Material changes to this information may entitle the Architect to Additional Services.
(List below information, including conditions or assumptions, that will affect the Architect's performance.)

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ARTICLE 2 COMMISSIONING SERVICES

§ 2.1 The Architect shall consult with the Owner, research applicable criteria, attend Project meetings, communicate with members of the Project team, and issue progress reports. The Architect shall coordinate the services provided by the Architect and the Architect's consultants with those services provided by the Owner and the Owner's consultants.

§ 2.2 The Architect shall prepare, and periodically update, a schedule of Commissioning Services that shall identify milestone dates for decisions required of the Owner, services furnished by the Architect, and completion of documentation provided by the Architect. The Architect shall coordinate the Commissioning Services schedule with the Owner's Project schedule.

§ 2.3 The Architect shall make a presentation to explain the Commissioning Services to representatives of the Owner.

§ 2.4 Subject to Section 3.3, the Architect shall assist the Owner by conducting Discovery Sessions.

§ 2.5 The Architect shall submit commissioning documentation to the Owner at intervals appropriate to the process for purposes of evaluation and approval by the Owner. The Architect shall be entitled to rely on approvals received from the Owner to complete the Commissioning Services.

§ 2.6 COMMISSIONING PLAN

The Architect shall prepare a Commissioning Plan based on the systems to be commissioned, program and schedule. The Commissioning Plan will describe the commissioning process for the Project and may contain a description of the objectives of the commissioning, a list of participants and their roles and responsibilities, an outline of the management structure, a description of how the plan is to be implemented, the commissioning schedule, specific details about design reviews, a list of systems and components being commissioned and reporting formats.

§ 2.7 DESIGN INTENT DOCUMENT

§ 2.7.1 The Architect shall prepare a Design Intent Document with information provided by the Owner and the Owner's consultants and contractors. The Design Intent Document will describe the performance criteria for the systems to be commissioned. The performance criteria described in the Design Intent Document shall be quantifiable and measurable through objective testing.

§ 2.7.2 After the Owner's approval of the Design Intent Documents, the Architect shall revise the Design Intent Document to reflect any changes approved by the Owner as an Additional Service.

§ 2.8 DESIGN REVIEW

The Architect shall review the design of the systems to be commissioned for the limited purpose of determining if the systems as designed will achieve the requirements of the Design Intent Document. The Architect's review shall be made with such reasonable promptness as to cause no delay in the activities of the Owner or Owner's consultants, while allowing sufficient time in the Architect's professional judgment to permit adequate review. Review of the design is not conducted for the purpose of determining the accuracy and completeness of the design documents and other details such as quality of materials, appearance, dimensions, quantities and costs. Upon completion of the review, the Architect shall issue written comments and recommendations.

§ 2.9 COMMISSIONING SPECIFICATIONS

§ 2.9.1 The Architect shall review the Contract Documents and recommend modifications necessary for coordination with the commissioning requirements and processes, which may include equipment submittals, operation and maintenance manuals, system readiness tests, and personnel training.

§ 2.9.2 The Architect shall provide Commissioning Specifications for inclusion in the Contract Documents, which will define the contractor's responsibilities related to commissioning. The Commissioning Specifications will identify systems to be commissioned and may include detailed checklists, test procedures, required test results and warranty requirements.

§ 2.10 SHOP DRAWING AND SUBMITTAL REVIEW

§ 2.10.1 The Architect shall review contractors' submittals, such as Shop Drawings, Product Data and Samples for the systems to be commissioned, for the limited purpose of evaluating the system's ability to achieve the requirements of the Design Intent Document. The Architect's review shall be made with such reasonable promptness as to cause no delay in the Work or in the activities of the Owner, Owner's consultants or contractors, while allowing sufficient time in the Architect's professional judgment to permit adequate review. Review of such submittals is not conducted for

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the purpose of determining the accuracy and completeness of other details such as dimensions and quantities, or for substantiating instructions for installation or performance of equipment or systems, all of which remain the responsibility of the contractor as required by the Contract Documents. The Architect's review shall not constitute approval of safety precautions or, unless otherwise specifically stated by the Architect, of any construction means, methods, techniques, sequences or procedures.

§ 2.10.2 Upon completion of the review, the Architect shall issue written comments for those submittals that deviate from the requirements of the Design Intent Document. The Owner may choose to accept the deviations, in which case the Architect shall revise the Design Intent Document and the related Commissioning Specifications as an Additional Service.

§ 2.11 COMMISSIONING MEETINGS

Subject to Section 3.3, the Architect shall conduct and document commissioning coordination meetings with the Owner, Owner's consultants, contractors and subcontractors, whose systems are included in the Commissioning Specifications. The Architect shall coordinate these meetings with the Project schedule.

§ 2.12 REVIEW OF DOCUMENTATION DURING CONSTRUCTION

During construction the Architect shall review documentation such as meeting minutes, field reports, minor changes in the Work, Construction Change Directives, and Change Orders related to the systems to be commissioned. The Architect shall report to the Owner changes that will prevent the systems from performing as required by the Design Intent Document. The Owner may choose to accept the changes, in which case the Architect shall revise the Design Intent Document and the related Commissioning Specifications as an Additional Service.

§ 2.13 OPERATIONS AND MAINTENANCE MANUAL REVIEW

Prior to the start of operator training, the Architect shall review the operations and maintenance manuals submitted by the contractors for the systems to be commissioned for conformance with the Commissioning Specifications.

§ 2.14 OPERATOR TRAINING

§ 2.14.1 The Architect shall review contractors' planning, scheduling, content and documentation for operator training sessions for conformance with the Commissioning Specifications.

§ 2.14.2 The Architect shall provide operator systems training including the requirements of the Design Intent Document, special design features, operating sequences and limitations, Functional Performance Test procedures, and maintenance cycles of the various systems. This training will begin before the contractor demonstrates the system performance using the Functional Performance Tests. During the commissioning of the systems, the Architect shall provide operator field training by having the operators assist in the verification of the Functional Performance Tests.

§ 2.14.3 The Architect shall observe contractors' training and maintain a training log for inclusion into the Final Commissioning Report. The training log will include the attendees' names, training dates, system or equipment on which training was performed, and the name, title and contact information of the trainer.

§ 2.15 TEST REPORT REVIEW

Before the start of Functional Performance Testing, the Architect shall observe a portion of the system readiness tests and shall review the system readiness test reports required by the Contract Documents for the systems to be commissioned. The Architect shall report to the Owner any observed deficiencies for correction prior to the start of Functional Performance Testing.

§ 2.16 FUNCTIONAL PERFORMANCE TESTING AND DOCUMENTATION

The Architect shall direct, observe and document the Functional Performance Tests for each system to be commissioned. The Functional Performance Tests shall follow the procedures included in the Commissioning Specifications. The Architect shall submit Functional Performance Test reports for each system to the Owner for review.

§ 2.17 DEFICIENCY CORRECTION

The Architect shall generate a Corrective Action Report for each deficiency identified during Functional Performance Testing. The Architect shall maintain a log of the Corrective Action Reports. Each deficiency shall be resolved by the appropriate contractor and, after correction of the deficiency, the Architect shall direct, observe, and document re-testing to confirm that the deficiency has been corrected as an Additional Service.

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§ 2.18 FINAL COMMISSIONING REPORT

The Architect will prepare a Final Commissioning Report including the Commissioning Plan, Design Intent Document, Commissioning Specification, blank Functional Performance Test procedure forms, system readiness tests reports, Functional Performance Test reports, Corrective Action Reports and log, and operator training plans and log.

§ 2.19 POST-OCCUPANCY REVIEW

The Architect shall meet with the Owner prior to one year after the date of Substantial Completion to review the operations and performance of the commissioned systems and to make appropriate recommendations to the Owner.

ARTICLE 3 ADDITIONAL SERVICES

§ 3.1 In addition to the Commissioning Services described above, the Architect shall provide the following Additional Services only if specifically designated below as the Architect's responsibility. The Architect shall perform such Additional Services in accordance with a service description provided in Section 3.2 or attached as an exhibit to this services document.

(Designate the Additional Services the Architect shall provide in the second column of the table below. In the third column indicate whether the service description is located in Section 3.2, or in an exhibit attached to this services document. If in an exhibit, identify the exhibit.)

Services		Responsibility *(Architect, Owner or Not Provided)*	Location of Service Description *(Section 3.2 below or an exhibit attached to this document and identified below)*
§ 3.1.1	Data Collection		
§ 3.1.2	Owner Supplied Data Analysis		
§ 3.1.3	Measurement and Verification Studies		
§ 3.1.4	Existing Facilities Surveys		
§ 3.1.5	Programming		
§ 3.1.6	Identification of Systems to be Commissioned		
§ 3.1.7	Sustainable Design Studies		
§ 3.1.8	LEED® Certification (B214™–2007)		
§ 3.1.9	Detailed Cost Estimating		
§ 3.1.10	Value Analysis (B204™–2007)		
§ 3.1.11	Special Bidding or Negotiations		
§ 3.1.12	On-site Project Representation		
§ 3.1.13	Construction Management		
§ 3.1.14	Record Drawings		
§ 3.1.15	Post-occupancy Evaluations		
§ 3.1.16	Other		

§ 3.2 Insert a description of each service designated in Section 3.1 the Architect shall provide if not included in an exhibit attached to this document and identified in the table above.

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§ 3.3 The Architect shall provide Commissioning Services exceeding the limits set forth below as Additional Services. When the limits below are reached, the Architect shall notify the Owner:

.1 Commissioning Meetings:

.1	(	) Discovery Sessions
.2	(	) Commissioning Services Presentations
.3	(	) Design Meetings
.4	(	) Pre-bid Meetings
.5	(	) Pre-construction Meetings
.6	(	) Construction Meetings
.7	(	) Warranty Meetings
.8	(	) Post-occupancy Review Meetings

.2 ( ) reviews of each Shop Drawing, Product Data item, sample or similar submittal of the contractor

.3 ( ) Training Sessions

.4 ( ) reviews of readiness test reports submitted by contractors

.5 ( ) visits to the site by the Architect over the duration of the Project during construction

.6 ( ) inspections for any portion of the Work to be commissioned to determine whether such portion of the Work is ready for Functional Performance Testing

.7 ( ) Functional Performance Tests of each system to be commissioned

.8 ( ) Corrective Action Reports for each system to be commissioned

§ 3.4 To avoid a delay, the Architect shall provide the following Additional Services and shall notify the Owner with reasonable promptness. If the Owner subsequently determines that all or parts of those services are not required, the Owner shall give prompt written notice to the Architect, and the Architect shall have no further obligation to provide those services:

.1 Review of a contractor's submittal out of sequence from the submittal schedule agreed to by the Architect;

.2 Responses to a contractor's requests for information where such information is available to the contractor from a careful study and comparison of the Contract Documents, field conditions, other Owner-provided information, contractor-prepared coordination drawings, or prior Project correspondence or documentation;

.3 Evaluation of substitutions proposed by the Owner's consultants or contractors and making subsequent revisions to the Design Intent Document and Commissioning Specifications resulting therefrom; or

.4 Commissioning Services provided 60 days after the originally scheduled date for completion of the Commissioning Services in the Commissioning Services schedule.

ARTICLE 4 OWNER'S RESPONSIBILITIES

§ 4.1 The Owner shall identify the systems to be commissioned and furnish a program setting forth the Owner's objectives, schedule, constraints and criteria, system requirements and relationships, special equipment and site requirements.

§ 4.2 The Owner shall provide to the Architect data necessary for the Commissioning Services which may include design drawings, construction documents, record drawings, shop drawings and submittals, operation and maintenance manuals, master plans, operation costs, operation budgets, and pertinent records relative to historical building data, building equipment, furnishings and repairs.

§ 4.3 The Owner shall provide access to the property, buildings, and personnel necessary for the Architect to provide the Commissioning Services. The personnel shall conduct tours and walk-throughs and explain the facility's original, current and anticipated future use.

§ 4.4 The Owner shall furnish the services of design consultants, testing agencies, and contractors necessary to allow the Architect to provide the Commissioning Services.

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ARTICLE 5 COMPENSATION

§ 5.1 For the Architect's Commissioning Services described under Article 2, the Owner shall compensate the Architect as follows:
(Insert amount of, or basis for, compensation.)

§ 5.2 For Additional Services provided under Section 3.1, the Owner shall compensate the Architect as follows:
(Insert amount of, or basis for, compensation. If necessary, list specific services to which particular methods of compensation apply.)

§ 5.3 For Additional Services that may arise during the course of the Project, including those under Sections 3.3 and 3.4, the Owner shall compensate the Architect as follows:
(Insert amount of, or basis for, compensation.)

§ 5.4 Compensation for Additional Services of the Architect's consultants when not included in Section 5.2 or 5.3, shall be the amount invoiced to the Architect plus percent (%), or as otherwise stated below:

ARTICLE 6 SPECIAL TERMS AND CONDITIONS

Special terms and conditions that modify this Standard Form of Architect's Services: Commissioning, if any, are as follows:

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FEDERATION OF DEFENSE
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FDCC Winter Meeting
Hyatt Grand Champions Resort
Indian Wells, California
February 26 – March 5, 2011

THE IMPACT OF GREEN BUILDING ON PROPERTY INSURANCE

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CHAPTER FOUR – THE IMPACT OF GREEN BUILDING ON PROPERTY INSURANCE

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The rapid development of green construction has, of course, created the need for green construction contractors, architects, and engineers. Green building, in turn, creates coverage issues relative to casualty, commercial general liability, and errors and omissions policies (water leaks and mold from green roofs, failure to achieve contracted-for certification, and failure of solar panels to achieve advertised quantity of electricity) as they relate to these professionals. Management of these risks can be achieved by specific policy language. Both Ned Currie and Joanne Blackburn have addressed those issues in their articles. This brief paper will address the impact of Green Building endorsements or Law & Ordinance provisions during the adjustment of property losses.

I. GREEN ENDORSEMENTS

Insurance carriers have joined the green revolution by offering green endorsements to traditional property coverage policies, which provide coverage for energy efficiency and green improvements. In September 2009, ISO filed a green building endorsement form for use by its participant companies. Such endorsements are offered by Affiliated FM, Liberty Mutual, ACE, Hartford, Travelers, Gen Re, Zurich, XL, Fireman's Fund, Lexington, Erie Insurance Group, RSUA, Aon, West Bend Mutual, Sovereign General, Chubb, CNA and other companies. Coverage for green buildings is a relatively new product, but some similarities are emerging.[28]

- Insuring the cost of repair using green technologies and building materials;
- Permitting repair costs which capture green building recertification or enhancement; and

[28] The following carriers are now offering green building coverage in some form: Firemans Fund, Travelers, Liberty Mutual, Lexington, Ace Erie Ins Group, XL, Affiliated FM, RSUA, Aon, The Co-operators, West Bend Mut. Ins. Co., Travelers Inland, Sovereign General, Mutual Boiler Re, Chubb, Zurich, and CAN.

- A business interruption option for an increased period of restoration due to reconstruction using green standards.

All are subject to limits based on total coverage amount or percentage of total amount paid. Other coverage and endorsements with green implications include expanded building commissioning and expanded demolition and debris removal.

Sample policy language regarding repair using green building products and technologies includes:

> *If there is a direct physical loss or damage to the covered premises, we will pay for the*
>
> ***Reasonable** increased cost to*
>
> *Rebuild or replace lost or damaged portions of property using "green" material alternatives That are **of comparable quality and function.***

With respect to insuring green recertification or enhancement, policies include provisions such as the following:

> *If direct physical loss or damage covered premises was previously approved to a level of green certification pre-loss by a "green authority," we will pay for:*
>
> *1. Reasonable additional expense for engineer to design replacement or repair and to test or recalibrate systems*
>
> *2. Reasonable registration and recertification fees required by the "green authority."*

II. THE INTERNATIONAL GREEN CONSTRUCTION CODE

While these special endorsements have been offered at no additional premium for the past few years by many carriers, it is anticipated that within the next two years, green building standards will be codified into building codes. On March 10, 2010 several organizations, including the International Code Council (ICC), the American Society of Heating, Refrigerating and Air Conditioning Engineers (ASHRAE), the U.S. Green

Building Council (USGBC), the Illuminating Engineering Society of North America (IES), and AIA, announced the launch of the International Green Construction Code (IGCC) to develop adoptable and enforceable green building codes. The proposed Green building provisions have been circulated, subjected to a review and comment period and were adopted in 2010 as Version 1.0 of the International Green Construction Code. It is likely that they will be implemented into state and city building codes within the next 2-5 years, and that they will have the force and authority of any other types building codes, such as Fire, ADA, and Energy Compliance.

When those Green Building Codes are adopted and incorporated into state and municipal building codes, and subject to the permitting process and approval by local building officials, traditional Law & Ordinance coverage endorsements and provisions contained within property policies will apply to the enforcement of green construction, to the same extent as these provisions apply to fire safety, mechanical, electrical and plumbing code enforcements and ADA enforcement. At that time, there will be no need for the type of separate green endorsements which have been offered for the last few years.

III. GREEN PROPERTY ADJUSTMENT ISSUES

The incorporation of baseline green building standards will impact property loss adjustment substantially including measurement of Replacement Cost. Actual Cash Value, Period of Restoration, and D.I.C.C. claims. These green building adjustment issues may have a far greater potential to cause disputes than many building code compliance claims which the industry has faced for years. Some of those green code issues might include:

- Debris removal cost – could be significantly higher, to the extent that removal of debris is restrictively regulated.
- Cost to replace existing with "Green" may be greater than replacement with like kind.
- Impact on Architectural Engineering Costs - the cost of repair or replacement incorporating green design and products may increase architectural and engineering costs in even the most rudimentary repair situations.

- Actual Cash Value:
  - Greater deduction for obsolete existing materials.
  - Lower market value for non compliant structures.
- Period of Restoration will expand due to:
  - Longer period for schematic design and design development
  - Longer construction period to procure and install Green components
- Time Element Claims:
  - Impact on B.I. and Rental value loss due to longer Period of Restoration.

IV. BUILDING CODE BASICS

An engineer reviewing the IGCC green code recently commented that to effectively address green property loss claims and to advise clients as to critical coverage issues adjusters and insurance counsel will need to have a detailed understanding of how building codes operates on a practical basis. In order to appreciate the impact that adoption of green building baseline codes may have in adjusting a property claim which has a "law and ordinance" component, it may be helpful to understand the basics relating to the history of building codes, how they operate, and how courts have interpreted them.

A. Background[29]

Since the early 1900's, the system of building regulations in the United States was based on model building codes developed by three regional model code groups. The codes developed by the Building Officials Code Administrators International (BOCA) were used on the East Coast and throughout the Midwest of the United States, while the codes from the Southern Building Code Congress International (SBCCI) were used in the Southeast, and the codes published by the International Conference of

[29] Portions of general descriptions of the International Code Council are from various ICC materials and sites and from www.wikipedia.com.

Building Officials (ICBO) covered the West Coast and across to most of the Midwest. By the early 1990s, the nation's three model code groups decided to combine their efforts and in 1994 formed the International Code Council (ICC) to develop codes that would have no regional limitations.

The first edition of the International Building Code was published in 2000. The code was patterned on three legacy codes previously developed by the organizations that constitute ICC. Most U.S. cities, counties, and states have adopted at least one of building safety codes developed by the International Code Council. Typically, each state or city reviews the International Code Council series and, after study and comment by local professionals and building officials, adopts the codes and, in some cases, adds local requirements. For example in South Florida, Miami-Dade and Broward Counties are designated as High Velocity Wind Zones, and additional code provisions related to roofing materials, glazing, etc. have been adopted by these jurisdictions and incorporated in their building codes to address high wind velocity exposure to these materials. The codes are regularly upgraded, and changes are made after study and approval, on a state by state and city by city basis.

B. Energy Codes

Energy codes provide minimum building requirements that are cost-effective in saving energy. The energy saved is a cost savings to the building owner through lower monthly utility bills, and smaller and thus less expensive HVAC equipment. More than two-thirds of the electricity and one-third of the total energy in the U.S. is used to heat, cool, and operate buildings.[30] The International Energy Code Council ("IECC") adopted Energy Efficiency recommendations in the middle of the last decade, and those provisions were incorporated into many building codes starting in 2004. These provisions are generally incorporated into codes related to new construction, but under certain circumstances enforcement of these provisions may become an issue in the repair of damaged existing buildings. Of course, if the damaged premise is being replaced with a new building, these provisions will apply. Energy Code provisions generally address the exterior envelope, including glazing and mechanical systems such as HVAC, and may require complex design and engineering to meet performance criteria or other prescriptive requirements. Codes generally have prescriptive and performance paths for compliance.

[30] Energy Codes and Standards, by Martha G. VanGeem; Construction Technology Laboratories, Inc. (CTL)

Prescriptive paths are easy-to-use tables that contain required minimum or maximum values. Performance paths are used to trade one energy saving measure for another. For instance, if the wall insulation does not meet the prescriptive requirements, but the ceiling insulation exceeds the prescriptive requirements, then using a performance method may show compliance of the whole building with the code. Prescriptive paths are commonly used for typical buildings in states with newly adopted codes. Some performance methods can be used to show energy savings beyond code, and are used for sustainability programs or state tax credits.

C. Code Enforcement

Building codes are enforced by local building officials in each municipality. Additionally, other local or county officials, such as County Fire Marshalls, have authority to control and direct building compliance related to fire safety, including egress. Other building requirements, such as those required by the Americans with Disabilities Act (ADA), although federal, are generally incorporated into state building codes and thus enforced by local building officials. Enforcement is accomplished through the permit process, which requires that building owners submit an application for planned work, for review and approval by the building official.

The permit process can be simple, if the matter involves as was repairs, and becomes more complex when alterations, upgrades, or changes to configuration are involved. Moreover, the local building department and local building officials have substantial discretion within the limits of the code to work with the building owner to permit trade offs, and to "horse trade" for permit approval and issuance of a Certificate of Occupancy when work is completed. On the other hand, building officials, for political or other reasons, may make the permitting process difficult, expensive and lengthy. In order to effectively adjust claims that include components related to law and ordinance, local knowledge may be required. This may require retention of the appropriate building construction and/or engineering professionals, as well as in certain circumstances, local code professionals.

D. Policy Forms Providing Law & Ordinance Coverage

There are various code coverage forms in use. As with all other aspects of insurance contracts, the language of the particular policy form is very important and controls. In general, however, code coverage is provided when:

(1) there is physical loss from a covered event; and

(2) the covered loss results in the "enforcement" of a law or ordinance regarding reconstruction of the property.

This formula seems simple enough; however, adjusting claims for code improvements may become difficult and contentious and can be very expensive due to differing policy language, an insured's determination to voluntarily upgrade a property while also conducting necessary covered repairs, overprotective and cautious advice by an insured's architect and engineers in drafting permit plans, enactment of code provisions that were not in effect at time of loss, and a myriad of other factors. Adjustment of code issues requires use of the right consultants; diplomacy with the insured, the insured's architect, and other building professions; regular communications with the insured early and often; and a clear understanding of the insured's plans for reconstruction and of the insured's consultants' preparation of permit materials. Additionally, interaction with building officials may be necessary.

E. Three Types of Code Upgrade Provisions

1. DEMOLITION AND INCREASED COST OF CONSTRUCTION coverage states in pertinent part as follows:

1) This Policy covers the reasonable and necessary costs incurred, described in item 3 below, to satisfy the minimum requirements of the enforcement of any law or ordinance regulating the demolition, construction, repair, replacement or use of buildings or structures at an Insured Location, provided:

a) such law or ordinance is in force on the date of insured physical loss or damage; and

b) its enforcement is a direct result of such insured physical loss or damage.

2) This Additional Coverage does not cover loss due to any law or ordinance with which the Insured was required to comply had the loss not occurred.

3) This Additional Coverage, as respects the property insured in item 1 above, covers:

a) the cost to repair or rebuild the physically damaged portion of such property with materials and in a manner to satisfy such law or ordinance; and

b) The cost:

(i) to demolish the physically undamaged portion of such property insured; and

(ii) to rebuild it with materials and in a manner to satisfy such law or ordinance, to the extent that such costs result when the demolition of the physically damaged insured property is required to satisfy such law or ordinance.

2. **BUILDING ORDINANCE AND LAW** endorsements or policy language are similar:

Building Ordinance or Law - If there is an ordinance or law in effect at the time of loss that regulates zoning, land use or construction of a covered building, and if enforcement of that ordinance or law affects the repair or rebuilding of that building following damage by a Covered Cause of Loss:

1. We will pay:

a. The value of undamaged portions of the building if they must be demolished due to the enforcement of building ordinance or law;

b. Costs to demolish and clear the site of those undamaged portion

c. Increased costs to:

(1) Repair or reconstruct damaged portions of that building; and/or

(2) Reconstruct or remodel undamaged portions of that building, whether or not demolition is required;

when the increased cost is the consequence of enforcement of building, zoning or land use ordinance or law.

3. **ORDINANCE OR LAW ENDORSEMENT**, a standard endorsement by the Insurance Service Office (ISO), provides coverage if an ordinance or law that regulates the demolition, construction or repair of buildings is in force at the time of the loss, to the minimum extent required, if the enforcement is the result of the covered damage. The ISO endorsement specifically states that it does not provide coverage for enforcement of ordinance or law that is the direct result of damage that is not insured. Moreover, the ISO endorsement specifically provides for a proportional payment for code upgrade coverage, based upon the proportion of covered to non-covered damage. Generally, the ISO form provides sub-limits for this coverage.

The coverage provided under these endorsements includes Coverage for Loss to the Undamaged Portion of the building, Demolition Cost coverage, and Increased Cost of Construction Coverage.

The issues presented by all three types of code coverage forms are: (1) whether there was "enforcement"; (2) whether the "enforcement" was as a result of insured damage; and (3) whether the insured would have had to conduct the upgrades if the loss had not occurred, either as part of its maintenance or planned upgrades.

The second type of code coverage form listed above—the Building Ordinance and Law form—provides for broader coverage than the other two types of coverage forms because coverage exists for an ordinance which is a "consequence" of the Covered Cause of Loss, with no temporal limitation and no limitation as to code work which would have been required had loss not occurred.

The language in the ISO's Ordinance or Law Endorsement specifically addresses situations where part of the code work is related to a covered cause of loss and part is related to uninsured damage, while the other two forms are silent on the issue. None of the forms specifically address an insured's voluntary decision to conduct renovations to undamaged portions, or conduct renovations in a manner which triggers additional code requirements. However, the language in each form which refers to coverage for minimum code requirements, and the valuation language of the policy, which generally provides for coverage for the least of the cost to repair or replace with like kind and quality, clarify that voluntary upgrades that trigger code requirements will not be insured.

F. Judicial Interpretation of Law and Ordinance Provisions

In order for an insured to recover for a "code upgrade" claim, the insured must establish that the costs for which it seeks reimbursement were incurred "to satisfy the minimum requirements of the ***enforcement*** of any law or ordinance regulating the demolition, construction, repair, replacement or use of buildings or structures at an Insured Location." The term "enforcement" is not defined anywhere in insurance policies under any of the forms, and courts have construed the term "enforcement" in various ways.

The decision in *St. Luke's Episcopal Health Sys. Corp. v. Factory Mut. Ins. Co.*, 2007 WL 1217763 (S.D. Tex. 2007), supports the argument that an official affirmative act is required to constitute an "enforcement." In *St. Luke's*, the insured's basement flooded during a storm causing damage to its electrical system. *Id.* at *1. The insurer funded repairs to restore power and fix the electrical system but denied the insured's claim that the

refurbished equipment had to be replaced with new equipment in order to comply with the city's building codes. *Id.* The insurer denied such claim on the ground that the policy's Demolition and Increased Costs of Construction provision required the insured to prove "enforcement" of the building code as a direct result of the insured loss in order to recover on its code upgrade claim. *Id.* at *2. The court defined "enforcement" as the "carrying out of a mandate or command." *Id.* (quoting BLACK'S LAW DICTIONARY 528 (6th ed. 1990)). The court then concluded that the insured had failed to prove enforcement, stating:

> The phrase "enforcement of a law" focuses not on what the code technically says but on what building officials actually require. The city carries out the "mandate or command" of a code provision by executing building standards and withholding permits for construction in violation of the standards. Here, no positive action was undertaken by city officials, nor was the hospital sanctioned as a result of the alleged non-compliance.

Id. The court noted that the Texas Department of Health's failure to issue a written "deficiency notice"—the traditional means by which the TDH notifies a hospital of a rule violation—precluded a finding of "enforcement of a law" despite the insured's submission of two letters from the TDH that it claimed to demonstrate enforcement of the code provision at issue. The policy term "enforcement" in the phrase "increased costs resulting from enforcement of any ordinance or law regulating the construction, repair, or demolition of a building or other structure" is not ambiguous.

In *State Farm Fire & Cas. Co. v. Metro-Dade County*, 639 So. 2d 63, 65 (Fla. 3d DCA 1994), the court took a more expansive view of "enforcement." "Enforcement is 'the act of enforcing: as a compulsion especially by physical violence b: forcible urging or argument . . . c: the compelling of the fulfillment (as of a law or order).'" *Id.* (quoting dictionary). Thus, a county's command to homeowners in the wake of Hurricane Andrew to undertake structural improvements to bring their homes into compliance with building codes constituted an "enforcement" of ordinance or law under the policy. *Id.* at 64, 66. Where code upgrades are mandatory, "[t]he threat of enforcement is the driving force behind compliance with building and construction codes and ordinances," and the increased costs of the upgrades thus result from the "enforcement" of

ordinance or law. *Id.* at 65. Similarly, in *Regents of the Mercersburg College v. Republic Franklin Ins. Co.*, 458 F.3d 159 (3rd Cir. 2006), the court ruled that, under Pennsylvania law, compliance with requirements of the Americans with Disabilities Act is covered, even though there did not appear to be any enforcement action by government official. While the ADA is a federal statute, it falls upon local building officials to monitor its enforcement. However, in *Harbor Cmtys. LLC v. Landmark Am. Ins. Co.*, 2008 U.S. Dist. LEXIS 59179, *25-26 (S.D. Fla. 2008), the court held that a letter from OSHA merely strongly recommending that the insured conduct a forensic demolition did not classify as enforcement of an ordinance or law.

Where code upgrades are not mandatory, courts do recognize that "there may be voluntary upgrades that the insured decides to pursue for its own reasons, without prodding from outside authorities." *Federated Rural Elec. Ins. Exch. v. Public Util. Dist. No. 1*, 2006 U.S. Dist. LEXIS 71035, *6-7 (W.D. Wash. 2006); *see also SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props. LLC*, 2006 U.S. Dist. LEXIS 79326, *34-35 (S.D.N.Y. 2006) (explaining that simply because an insured has entered into a contract that necessitates compliance with building codes, the insurer is not obligated pay for the increased costs of compliance where such compliance is not legally required). However, the adjustment in such a situation is critical, so that the carrier and the insured have an understanding of the respective positions.

Under the *St. Luke's* analysis, an insured's failure to produce an order of enforcement might be dispositive of a code upgrade claim. The practical problem however is that, generally, the permit process does not work that way. Insureds retain architects, consultants, engineers and contractors on whom they rely to know the relevant codes and prepare the appropriate permit drawings for review by building authorities. Most parties attempt to avoid the sanction of an enforcement order by preparing drawings that incorporate current code requirement, and engineers and consultants for insureds will testify that they err on the side of incorporating current code provisions. Accordingly, an insured will argue that "enforcement" includes the approval of permit drawings. The language most building codes makes it clear that it is the owner's obligation to submit plans which confirm to the Building Code requirements.

For instance, according to Florida Existing Building Code, it is a design professional or an owner who must choose the scope of work that will

designate the work as a "repair" or as levels of "alteration" and have it approved by a building official:

> FEBC § 301.5:
>
> *A design professional or an owner must elect one or combination of levels of alteration pursuant to Sections 303, 304 and 305 of this code.*

Clearly, the building official does not decide the scope of work to be performed or the level of alteration; that is the owner's choice. Once the owner decides on the scope of work, then the building official must agree as to whether the work is a repair or alteration, and if an alteration, the level thereof. It is unlikely that a building official will not approve voluntary upgrades. However, is that agreement by the building official "enforcement" as required by the policy?" Or stated differently, can a third party, such as an architect or engineer for an insured generate code coverage by incorporating unnecessary code upgrades into permit plans and drawings, which are subsequently approved by the building official? The courts have not squarely addressed this issue.

In the adjustment process, it is essential to determine what code provisions the damage or covered loss triggers. Analysis by a knowledgeable consultant may be required. Without this basic information, it is impossible for an adjuster to know whether in fact there will be code implications related to the adjustment.

What should be a simpler issue is whether the "enforcement" or code work is to damaged property. Several cases have addressed and excluded code upgrades where it was not. *Chattanooga Bank Assocs. v. Fid. & Deposit Co.*, 301 F. Supp. 2d 774 (E.D. Tenn. 2004) (granting summary judgment as a matter of law that the costs of code upgrades to areas that were unaffected by the loss were not covered under the policy; leaving for trial to determine precisely the unaffected areas); *St. Paul Fire and Marine Ins. Co. v. Darlak Motor Inns, Inc.*, 1999 U.S. Dist. LEXIS 23283 (M.D. Pa. 1999) (same), *aff'd*, 205 F.3d 1330 (3d Cir. 1999).

However, the language in the Building Law and Ordinance form provides coverage for code compliance "when the increased cost is the consequence of enforcement of building, zoning or land use ordinance or law". An argument can be made that if a building official requires certain

changes or compliance to non-damaged property as a result of the covered loss, then the endorsement requirements are met. The term "consequence" means something that logically or naturally follows from an action or condition.

In *DEB Assoc. v. Greater New York Mut. Ins. Co.*, 970 A.2d 1074 (N.J. Super. 2009), the court seized on the "consequence of" language in the "Coverage C - Increased Cost of Construction" form to require the carrier to pay for all costs related to bringing a deficiently designed building up to code. High winds had caused a section of the façade and walls of an office building to collapse. During the investigation, it was discovered that the building was constructed without angle irons and that the entire building was "unsafe." Local code officials required installation of angle irons required by current code on both damaged and undamaged walls. In requiring the carrier to cover the costs related to the undamaged portions, the court reasoned that a covered cause of loss *caused the enforcement* of the building code. The court stated:

> Generally, we read insurance policies as the average lay purchaser of insurance would.
>
> Here, Commonwealth has complicated the matter by incorporating a law-the building code-into its definition of coverage. Thus, Commonwealth's coverage extends to repairs to undamaged parts of a covered building if the repairs result from enforcement of any law or ordinance
>
> If we read the policy as Commonwealth urges, the average purchaser of insurance would probably not understand its coverage without consulting an attorney to analyze the applicable building code sections. And this would largely frustrate the law's intent to encourage insurance companies to plainly write their coverage so laypersons can understand it.... [T]he test is not what the building official reasonably believes the code allows him to do. Nor is it what a lawyer or judge believes the code allows. Rather, the test is what a reasonable lay insurance purchaser

would believe the code allows the city to enforce.

This is an incredibly broad standard, which underscores the need for proactive adjustment of these issues.

G. Law and Ordinance Implications on Business Interruption

Business Income coverage generally provides recovery for business income loss that occurs during the "period of restoration," which begins after the time of the direct physical loss or damage (or a short period thereafter) and ends on the "date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality." Likewise, recovery for Extra Expense ends with the conclusion of the "period of restoration." It is well settled that the "period of restoration" refers to a theoretical period of time in which the premises *should be* repaired, rebuilt or replaced sufficient for the insured to resume operations. The "period of restoration" is not determined by: the actual length of time to complete rebuilding or repairs, *e.g.*, *Steel Prods. Co. v. Millers Nat'l Ins. Co.*, 209 N.W.2d 32, 38 (Iowa 1973); *SR Int'l Business Ins. Co. v, World Trade Ctr. Properties, LLC,* 2005 U.S .Dist. LEXIS 13001, *29 (S.D.N.Y. 2005); or the actual length of time to resume operations at the same location, *e.g.*, *Duane Reade, Inc. v. St. Paul Fire & Marine Inc. Co.*, 411 F.3d 384, 397-98 (2d Cir. 2005); *Lava Trading Inc. v. Hartford Fire Ins. Co.*, 365 F. Supp. 2d 434, 442 (S.D.N.Y. 2005). "Where the actual restoration period exceeds the theoretical period or where the premises are not restored, the theoretical period becomes the computation period." *Steel Products* , 209 N.W.2d at 38.

Some policies specifically cover the "actual loss of 'business income' and 'extra expense' sustained solely because the building ordinance or law was "enforced." Other policies specifically exclude permitting time from the period of restoration. The time to meet minimum code requirements may mean that alternative compliance methods should be implemented. The time necessary for the building official to inspect the premises and issue permits is generally considered reasonable. However, if delays in permit approval are based on the insured's failure to provide adequate design or specifications, will courts consider this additional time reasonable as well?

Generally, courts hold that business interruption coverage is appropriate for the period "reasonably necessary" to restore the building to its former

condition. *Congress Bar & Restaurant, Inc. v. Transamerica Ins. Co.,* 165 N.W. 2d 409 (Wis. 1969). The court in *Congress Bar & Restaurant* reversed the trial court's grant of BI coverage for an 11-month period, explaining:

> "Other 'circumstances' not bearing upon what is reasonably necessary to restore the premises to its previous condition are irrelevant and cannot be used to extend the period of compensation. An insured may not proceed with renovations that are completely unrelated to the covered property damage, and then "enjoy the assurance of continued income from business-interruption insurance during the period of construction."

See also Constitution State Ins. Co. v. Werner Enterprises, Inc., 1987 U.S. Dist. LEXIS 6023 (E.D. La. 1987) ("circumstances not bearing upon what is reasonably necessary to restore the premises to its previous condition" are irrelevant to determining the period of restorations or liability); *Duane Reade Inc. v. St. Paul Fire & Marine Ins. Co.,* 411 F.3d 384 (2d Cir. 2005) ("restoration beyond what is reasonably necessary to restore the premises to its previous condition, such as demolition or reconstruction, are irrelevant and cannot be used to extend the period of compensation"); *SR Int'l Business Ins. Co.*, 2005 U.S .Dist. LEXIS 13001 at *25 ("[I]f extraordinary additional time would be required to include improvements or innovations, these would not be included.")

V. CONCLUSION

As green building standards are incorporated into building codes, and become mandatory, your client will need advice concerning the interplay between these requirements and the Law and Ordinance coverage the policy provides, as well as expert advice regarding the enforcement of the particular building codes, and the actions and operations of building officials. While law and ordinance provisions and endorsement forms have been part of property policies for decades, the case law is still evolving and the issues are incredibly fact, location, and in the case of local building officials, individually sensitive. The more complex and scientific the subject of the code, the more your participation, advice, and counsel can assist your clients.

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Rebecca Levy-Sachs has practiced first-party coverage, litigation, and subrogation for thirty years. Her practice has particularly focused on commercial time element coverage, law and ordinance coverage, and all perils, including windstorm, mold, sinkhole, asbestos, environmental cleanup, and fire. She has been certified as a Windstorm Umpire by the Windstorm Insurance Network. Ms. Levy-Sachs has lectured at numerous programs presented by the FDCC, the PLRB, the DRI, the LEA, Windstorm, and the ABA (PILC) on property coverage, litigation management, expert preclusion, and e-discovery issues. Ms. Levy-Sachs is Chair of the Property Section of FDCC. Her articles and presentations have focused on business interruption, green building, code compliance, physical loss, spoliation, expert witness challenges under Daubert, and discovery issues.

She earned her B.A. from Rutgers University, and her J.D. with honors from Rutgers School of Law. She is admitted in New Jersey, Florida, and several U.S. District Courts and Courts of Appeals.



FDCC Winter Meeting
Hyatt Grand Champions Resort
Indian Wells, California
February 26 – March 5, 2011

ENVIRONMENTAL REGULATORY HURDLES FOR FUTURE ENERGY PRODUCTION

Presented by
International Practice and Law and Toxic Tort and Environmental Law Sections

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ENVIRONMENTAL REGULATORY HURDLES FOR FUTURE ENERGY PRODUCTION

BY CHUCK D. BARLOW
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I. INTRODUCTION

The last several years in environmental law have seen an unprecedented combination of regulatory actions by the United States Environmental Protection Agency (EPA) and state regulators, court actions reversing and remanding those regulations, the revision of regulations after reversal, additional new regulations promulgated under court-ordered deadlines, and the development of a completely new arena of regulation—greenhouse gas emissions. The resulting matrix of current, proposed, and anticipated regulations creates tremendous uncertainty for the power generation industry; since the establishment or reversal of any one of these regulations could change drastically the economic valuation of a decision to build a new facility in a certain location, the ability to use a certain fuel type, or the option to invest in new pollution control technology at an existing facility. For an industry that normally measures its plans for future production in decades, the current regulatory uncertainly—where project budgets can be eviscerated or confirmed on an almost daily basis—is indeed unsettling.

This situation prompted the North American Electric Reliability Corporation (NERC), the "international regulatory authority established to evaluate reliability of the bulk power system in North America," to issue a report on the impact of four major EPA regulations on future power supply.[1] The report concludes that, depending on whether a stricter or more moderate version of regulation is adopted by the EPA,

> [U]p to a 78 GW reduction of coal, oil, and gas-fired generating capacity is identified for retirement during the ten-year period of the scenario. For the Moderate Case, this occurs

[1] North American Electric Reliability Corp., 2010 Special Reliability Scenario Assessment: Resource Adequacy Impacts of Potential U.S. Environmental Regulations (October 2010) (hereafter "NERC report").

> in 2018; however, in the Strict Case a similar reduction occurs in 2015.[2]

The result, according to the NERC, could be a significant deterioration of ~~f~~future bulk power system reliability."[3]

Immediately following issuance of the report, various companies, coalitions, and members of Congress gave a spectrum of responses, from stating that the report did not adequately sound the alarm concerning the extreme regulatory impacts, to calling the report —deeply flawed" because it ~~w~~was clearly designed to find problems instead of solutions—the same approach industry always takes"[4] An EPA spokesperson tried to allay industry and consumer fears by stating: —In reality, EPA has some discretion and will be more sensitive to reliability than NERC gives us credit for."[5]

The NERC report addresses four key EPA regulations, but more importantly, does not consider the costs or impacts of the EPA's new greenhouse gas emissions permit system or of any modeled Congressional program, such as a cap-and-trade or carbon tax program. The four regulations considered by NERC are the cooling water intake structure rule (316(b) Rule), the hazardous air pollutant rule, the coal ash disposal rule, and the interstate transport of air pollution rule (Transport Rule). This paper will provide a brief summary of these four rules, with a focus on the 316(b) Rule.

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[2] NERC report at IV.

[3] Id.

[4] *See, e.g.,* Cathy Cash, *EPA rules could impact 70 GW, grid reliability by 2015: NERC,* Platts Electric Power Daily (October 27, 2010) (quoting Rep. Henry Waxman (D-Calif.), chairman of the House Energy and Commerce Committee); Mark Clayton, *New EPA rules will erode power grid reliability, report finds*, The Christian Science Monitor – CSMonitor.com (October 26, 2010).

[5] Katherine Ling, E&E News PM (October 26, 2010) (quoting EPA spokesperson Brenda Gilfillan).

II. COOLING WATER INTAKE STRUCTURE RULES (316(b))

A. Introduction To EPA Regulations Regarding Cooling Water Intake Structures

Most nuclear and fossil-fueled electric generating facilities withdraw water from surface water bodies for use in non-contact cooling. If the cooling water is withdrawn from a surface water body, § 316(b) of the Clean Water Act (CWA) requires that the facility install the "best technology available" (BTA) to avoid "adverse environmental impacts" on the waterbody, such as impacts on fisheries.[6] Section 316(b) consists of one sentence, and it is the only sentence in the CWA that applies to the intake of water, rather than to discharges of pollutants to water. Because the scope of the CWA is restricted to "navigable waters,"[7] and thus to surface waters, a withdrawal of water from a groundwater source does not trigger § 316(b). State laws often regulate the withdrawal of ground water in the absence of applicable provisions within the CWA.

Two issues have complicated the procedural implementation of § 316(b). First, under § 402(b) of the CWA, the EPA can delegate to a state the authority to conduct the permitting process required by the CWA.[8] Because most states do operate a delegated permitting program, the § 316(b) BTA requirements must be implemented through a state permitting process that is, in itself, an implementation and interpretation of federal law through the state's water withdrawal permitting laws. Second, because § 316(b) is a water *withdrawal* section trapped in the body of a water pollution *discharge* statute, the EPA has directed the implementation of § 316(b) through federal or state water pollution discharge permits, the National Pollutant Discharge Elimination Program permits required by § 402 of the CWA, even though those permits usually do not have any other connection to water withdrawal.[9]

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[6] Clean Water Act § 316(b); 33 U.S.C. § 1326(b).

[7] 33 U.S.C. § 1363(7).

[8] 33 U.S.C. § 1342(b).

[9] *See* Riverkeeper, Inc. v. U.S. Environmental Protection Agency,, 475 F. 3d 83, 122-23 (2nd Cir. 2007) (determining that 316(b) provisions may be implemented through Clean Water Act permits, despite the "textual hiccup" that the Act speaks only to permits for "a discharge"), *rev'd in part*, Entergy Corp. v. Riverkeeper, Inc., 129 S.Ct 1498 (2009).

The EPA first issued regulations for the implementation of § 316(b) in 1977. However, the regulations were struck down on procedural grounds.[10] The EPA did not repromlugate § 316(b) regulations until 2001, when it promulgated rules for new facilities (the Phase I rule),[11] and 2004, when it promulgated rules for existing facilities (the Phase II rule).[12] The United States Court of Appeals for the Second Circuit struck down the Phase II rule, in substantial part.[13] In particular, the court held that the EPA must revisit whether closed-cycle cooling exclusively, rather than a menu of technology options, should be required as the standard BTA for electric generating units and must determine more specifically what level of reduction of impacts to aquatic organisms is required by the statute. The court also struck down one variance provision that would have allowed facilities to install less costly technology if the cost of required technology was "significantly greater" than the environmental benefits, and remanded, for revision, another variance provision allowing facilities to install less costly technology if the cost of the EPA-modeled technology is significantly greater than the cost estimated by EPA in the Rule.

In March 2007, the EPA issued a memorandum suspending the effectiveness of the remanded Rule and instructing the states to use their "best professional judgment" in dealing with § 316(b) issues in the interim. This, in fact, is the standard the state permitting authorities have applied to § 316(b) for over thirty years, in the absence of EPA regulations. The EPA published a formal notice of the rule suspension in July 2007.[14] The Supreme Court granted certiorari in the case on one issue—whether the EPA was authorized to include a cost-benefit analysis in the determination of BTA under § 316(b). The Supreme Court answered that question in the affirmative and reversed the Second Circuit's ruling.[15]

The EPA is expected to issue a new version of draft rules regarding BTA for existing facilities in February 2011. It is possible that the draft rules will

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[10] *See* Appalachian Power Co. v. Train, 566 F.2d 451 (4th Cir. 1977); 44 Fed.Reg. 32956 (June 7, 1979) (withdrawing regulations).

[11] 66 Fed. Reg. 65256 (December 18, 2001).

[12] 69 Fed. Reg. 41576 (July 9, 2004).

[13] Riverkeeper, 475 F.3d 82.

[14] 72 Fed. Reg. 37101 (July 9, 2007).

[15] Entergy Corp. v. Riverkeeper, Inc., 129 S.Ct 1498 (2009).

require that cooling towers be considered BTA for all facilities or for some subset of facilities; such as at facilities that withdraw water from an ocean, tidal rivers, or estuaries. It is unknown whether the EPA will apply a facility-specific cost-benefit analysis to the selection of technology or will propose that cooling towers, as BTA, should be required regardless of cost at any given facility.

There are two overarching issues here, among many sub-issues: (i) should the EPA develop a "one size fits all" technology standard for some or all of the facilities, or should the agency allow BTA permit decisions to be made that consider the very different circumstances of various generating facilities; and (ii) should the EPA employ some form of cost-benefit analysis in selecting the required technology.

B. Cooling Water Intake Structure "Impacts"

Section 316(b) applies specifically to limit the "adverse environmental impacts" of the operation of cooling water intake structures. Assuming that an intake creates an "adverse environmental impact," § 316(b) requires the installation of BTA. In the context of § 316(b), impacts to the waterbody normally are categorized as "impingement" and "entrainment." Impingement is the pressing or pinning of fish against the intake structure's screens. This can kill the fish or damage it to the point that the fish dies of its injuries. Entrainment is the pulling of fish eggs, larvae, and other very small organisms through the intake screens and through the facility's cooling system. The thermal and physical impacts from this process kill a high percentage of these organisms, which varies by species.

C. An Example of the Application of a Cooling Tower Mandate

A requirement to retrofit existing electric generating units with cooling towers would be very costly, although the cost to facilities would vary greatly depending on site-specific issues; such as the design of the facility, nearby space available for construction of the towers, and the sensitivity of the ecosystem from which cooling water is withdrawn. The NERC report states that "the cooling water intake structures rule has the greatest

potential impact on planning reserve margins" of the four regulations considered there.[16] The report states:

> Implementation of this rule will apply to 252 GW [gigawatts] (1,201 units) of coal, oil steam, and gas steam generating units across the United States, as well as approximately 60 GW of nuclear capacity (approximately a third of all resources in the U.S.). . . Planning Reserve Margins in almost half of NERC Regions/subregions are below the NERC Reference Margin Level by 2015 [as a result of retirements and parasitic load loss from cooling tower operation].[17]

The Indian Point nuclear facility, located near New York City and owned by Entergy Corporation, provides an example of the difficulties that can be encountered in implementing a cooling tower mandate. Indian Point operates two nuclear units (Units 2 and 3) with a combined output of 2158 MW (net generating capacity), supplying approximately 30% of the total energy generated that serves the New York City area. Indian Point withdraws once-through cooling water from the Hudson River and is equipped with Ristroph traveling screens and a fish-return system. To reduce water usage, Unit 2 is equipped with dual-speed pumps, and Unit 3 is equipped with variable speed pumps. The lengthy history of Indian Point's cooling water usage and required controls consists of over thirty years of data collection, litigation, administrative and judicial decisions, and a series of multi-party settlements. Additionally, Indian Point's history includes complex permitting processes involving the Nuclear Regulatory Commission, the EPA, the State of New York, previous owners and operators of Indian Point, owners and operators of other Hudson River facilities, environmental and conservation groups, local government, and Entergy. From Entergy's perspective, the difficulties are summarized immediately below.

[16] NERC report at IV.

[17] Id.

D. Hurdles To Cooling Tower Permitting And Construction

1. Cooling tower emissions would exceed air quality standards:

   a. Westchester County is a non-attainment area for particulate matter (PM);

   b. Even with optimal plume abatement, the cooling towers would emit PM in excess of the major source threshold; and

   c. Certain PM concentrations do not satisfy applicable permitting criteria for major sources in a non-attainment area.

2. Construction would require extensive blasting and mining; local permitting authorities likely will oppose the construction and operation of the large cooling towers:

   a. Excavation area for each tower comparable to Yankee Stadium in size;

      (1) The project requires removal of 2.1 million cubic yards of rock and soil, and

      (2) The total disposal volume is greater than 50% of the total crushed marble sold or used in the U.S. in 2007;

   b. Village of Buchanan zoning does not contemplate such a large scale mining operation;

      (1) Excavation permits have 2-year maximum lifespan, and

      (2) Village of Buchanan blasting ordinance and safety requirements limit blasting times;

   c. Required insurance may not be available;

d. Cooling Tower blasting, construction and operations require a variance and site plan approval from the Village of Buchanan. The Village has been vocally opposed to cooling towers;

e. Visible plumes estimated approximately 10% of the time (90th percentile plume); and

f. The addition of closed-loop cooling (plumes and 17-story-high structures) cannot be reconciled with aesthetic authorization required by New York's coastal zone management program.

3. Relocation of major gas line required:

a. Site preparation and construction requires movement of a major gas pipeline supplying approximately 50% of New England natural gas demand. This adds approximately 24 months to the construction timeline, as moving the pipeline must be completed before blasting begins.

4. Cost:

a. Estimates indicate that cooling tower construction capital cost would be $1.2 billion. Also, significant lost power costs would be incurred during the 42-week outage for finalization and tie-in and after the beginning of operation due to continued parasitic system losses and inefficiencies.

5. Construction Timeline:

a. Estimates indicate that cooling towers reasonably would not be permitted, constructed, and placed online prior to 2029—far into the new 20-year licensing period of both units.

6. Reliability problems created by extended shutdown of both units:

    a. An extended shutdown of both units, simultaneously, for 42 weeks is projected for finalization of cooling tower construction and tie-in;

    b. Cooling towers would cause continuing parasitic losses to the supply of electricity from Indian Point;

    c. Concerning plant shutdown, the New York Independent System Operator 2010 Study found;

        (1) Reliability violations are likely in 2016 if both units are retired when their current licenses expire (in 2013 and 2015); impacts would include loss of power supply and transmission voltage support affecting the metropolitan New York region; and

        (2) Probability of an involuntary interruption of load that is ~4 to 33 times higher than the reliability standard in 2020.

7. Archeological Concerns:

    a. Both proposed cooling tower construction areas are believed to have archeological significance.

Electric generating facilities exist in a wide variety of configurations, fuel sources, and locations. As these elements demonstrate for Indian Point, many complicated factors impacting cooling tower permitting, construction, operation, and cost should be considered in the site-specific BTA determination for any unit.

III. HAZARDOUS AIR POLLUTANT REGULATION

Section 112 of the Clean Air Act requires that the EPA set standards for the emissions of "hazardous air pollutants," such as mercury, based on the maximum achievable control technology (MACT) that can be applied to units for the reduction of these pollutants. The EPA is expected to propose a new hazardous air pollutant rule for electric generating units in March 2011, with a final rule to be promulgated in November 2011. This rule will replace the Bush-era Clean Air Mercury Rule (CAMR), which created a mercury cap-and-trade program, which was struck down by a federal court.[18] Prior to the issuance of a new rule, new plants and major modifications of existing plants must analyze the application of MACT on a case-by-case basis. Currently, the EPA is collecting information from industry members on hazardous air pollutant emissions. This rule will apply to coal and oil facilities.

MACT, as it applies to mercury and other hazardous air pollutants, likely will require the installation of technologies such as activated carbon injection and may require scrubbers at coal-fired units. The EPA also is expected to set a nickel MACT for oil-fired units. In all likelihood, that standard would require the installation of precipitators at oil-fired units. The NERC report finds that the application of MACT could "trigger the retirement of 2-15 GW (Moderate to Strict Cases) of existing coal capacity by 2015," which in turn could reduce the NERC Reference Margin Levels below standards in eight NERC regions/subregions.[19]

IV. COAL ASH DISPOSAL

On December 22, 2008, a major ash release occurred from ponds holding slurry/liquid coal ash waste at the TVA Kingston coal-fired electric generating unit in Tennessee. The release involved 5.4 million cubic yards of material with significant property impact. The event has spurred the EPA to reconsider the designation of coal combustion residues as a "hazardous waste" under the federal Resource Conservation and Recovery Act[20] as a way to allow the EPA to require more stringent

[18] New Jersey v. EPA, 517 F.3d 574 (D.C. Cir. 2008).

[19] NERC report at V.

[20] 42 U.S.C. section 6901 et seq.

federal standards for ash landfills, slurry ponds, and beneficial reuse or recycling.

Ash disposal and reuse at coal-fired facilities varies depending on the type of coal burned, the design of the landfill or ponds, the design of the disposal system as primarily "wet" or "dry," and the ability and initiatives to find a beneficial reuse for the ash. Some facilities do not use the "wet" method of ash transfer and storage that proved problematic at Kingston; and some facilities recycle and market the majority of their ash to be used as roadbase, in cement blocks, or in similar products.

The EPA's proposed rule[21] solicits comments on two levels of regulation; one creating national performance standards while leaving management of ash as a non-hazardous waste largely to the discretion of individual states, and the other requiring treatment of ash as a hazardous waste. The latter would significantly increase the cost and regulatory burden on utilities. A hazardous waste designation also would make coal ash difficult to sell for beneficial uses, like producing cement. Significantly, the large majority of state environmental agencies, represented through the Environmental Council of the States (ECOS), have suggested to the EPA that the hazardous waste determination *not* be made for coal ash. The states generally believe their programs, operating under the non-hazardous section of the same federal act, are sufficient and that treating coal ash as hazardous waste is unnecessary.

The EPA estimates that nearly 900 landfills and surface impoundments nationwide may be affected. While cost estimates are highly site-specific, the EPA's proposal gives an industry-wide compliance cost range of $0.30/MWh for the States' enforcement option to $0.75/MWh for the hazardous waste option. The NERC report estimates that the rule may cause up to twelve coal units to retire.[22]

V. TRANSPORT RULE

On August 2, 2010, the EPA issued a draft Transport Rule[23] as the replacement for the Bush-era Clean Air Interstate Rule that was struck

[21] 75 Fed. Reg. 35128 (June 21, 2010).

[22] NERC report at V.

[23] 75 Fed. Reg. 45210 (August 2, 2010).

down in 2008.[24] The Transport Rule primarily creates a cap-and-trade system for sulfur dioxide (SO2) and nitrogen oxides (NOx) emitted from electric generating units in "upwind" states, in order to protect "downwind" states. The rule is based on the "good neighbor policy" of § 110(a)(2)(D) of the Clean Air Act, 42 U.S.C. § 7410(a)(2)(D), which requires each state to take action to control its emissions that "contribute significantly" to air quality non-attainment in another state. The Transport Rule seeks to control emissions in 32 eastern and midwestern states that, according to the EPA's current models, contribute to areas of particulate matter and ozone non-attainment in other states.

Actually, the rule would create three distinct allowance currencies, one for each of the following pollutants: (i) annual (year-round) NOx, a precursor to fine particulate matter formation; (ii) seasonal (summer) NOx, a contributor to NOx non-attainment; and (iii) SO2, also as a precursor to fine particulate matter formation. Facilities also are required to hold separate acid rain SO2 allowances under Title IV of the Clean Air Act, as the acid rain program will remain in place and those allowances are not interchangeable with Transport Rule allowances. The proposed rule includes three options which differ in the amount of interstate trading of allowances that would be allowed. One of the options would not permit allowance trading and thus would require the installation of controls at a larger number of units. The NERC report states that the Transport Rule "could have significant impacts as soon as 2015 should the EPA require emission limits with no offset trading; resulting in potentially 3-7 GW of potential retirements and derated capacity, requiring retrofitting of 28-576 plants with environmental controls by 2015."[25]

VI. CONCLUSION

Minds that are knowledgeable on the debate regarding the country's energy future disagree on the magnitude of the impact that these air and water regulations will have on the availability and stability of our electric generation and delivery systems. The perception of whether the cost of compliance will be justified by the sometimes debated environmental benefits varies greatly depending on the viewer. But there is no doubt that the impacts will be significant and costly; and that the implementation of

[24] North Carolina v. EPA, 531 F.3d 896 (DC Cir. 2008); *modified*, North Carolina v. EPA, 550 F.3d 1176 (DC Cir. 2008).
[25] NERC report at V.

EPA's anticipated rules should proceed in a coordinated manner that considers the sequencing and timing of the various rules and the probability that, waiting somewhere in the wings, is the wild card of greenhouse gas regulation.

CHUCK D. BARLOW

Chuck D. Barlow is Assistant General Counsel – Environmental at Entergy Corporation, a national utility company based in New Orleans. Barlow supports the Entergy national fleet from offices in Jackson, Mississippi and New Orleans. Prior to accepting this position, Barlow acted as General Counsel of the Mississippi Department of Environmental Quality from 1996 to 2003. From 1990 through May 1996, he was associated with the Jackson office of Phelps Dunbar, L.L.P., where he practiced environmental law and general litigation. In 1989-1990 Barlow clerked for former Chief Judge Charles Clark of the United States Court of Appeals for the Fifth Circuit.

Barlow holds the Master of Laws (LL.M.) in environmental and natural resource law from the Northwestern School of Law of Lewis & Clark College, Portland, Oregon, where he graduated *magna cum laude* in 1995. In 2007, he was honored with Lewis and Clark's Distinguished Environmental Graduate Award. Barlow received his undergraduate degree from Mississippi College in 1984 with special distinction and high honors, the Master of Arts in English from the University of Virginia in 1986, and his law degree from the Mississippi College School of Law in 1989 (*magna cum laude*).

In June 2001, Barlow was awarded a Certificate of Commendation by the United States Department of Justice for his work as lead counsel for the State of Mississippi in the environmental enforcement action styled *United States of America and State of Mississippi v. Morton International, Inc.* (S.D. Miss. 2001). The action resulted in the largest civil environmental penalty ever assessed against a single facility in the United States ($36 million) and resulted in the largest nationwide environmental audit program ever required by judicial order.

Barlow is the author of —State Environmental Justice Programs and Related Authorities" in *The Law of Environmental Justice* (ABA 1999) (Michael Gerrard, ed.), "Why the Christian Right Must Protect the Environment: Theocentricity in the Political Workplace," 23 Boston College Environmental Affairs Law Rev. 781 (1996), and "The Proposed Management of the Red-Cockaded Woodpecker in the Southern National Forests: Analysis and Suggestions," 17 Univ. Ark. Little Rock L.J. 727 (1995). He has taught environmental ethics as a summer adjunct professor at Lewis & Clark and Environmental Law, Hazardous Waste

Law, and the Clean Water Act as an adjunct professor at the Mississippi College School of Law.

At Entergy, Barlow has directed the company's participation in several cases of national significance, including *Massachusetts v. EPA* (where the company filed a Supreme Court amicus brief encouraging the regulation of greenhouse gases by EPA), *Entergy v. Riverkeeper* (in the Supreme Court, concerning the applicability of cost-benefit analysis under Section 316(b) of the Clean Water Act), and *North Carolina v. EPA*, (in the D.C. Circuit, where Entergy successfully challenged the fuel adjustment factor included in the Clean Air Interstate Rule).

Barlow is currently in his second term as a member of the United States Environmental Protection Agency's National Environmental Justice Advisory Council, and he previously served on the governing Council of the American Bar Association's Section on Environment, Energy, and Resources (2001 – 2004). He teaches youth Sunday school and is a member of the Society of Biblical Literature.



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THE HARD WORK OF SITTING: THINKING ABOUT THE CASE AND THE LAW TRIAL MASTERS 100 DAYS BEFORE TRIAL

Presented by

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THE HARD WORK OF SITTING:
THINKING ABOUT THE CASE AND THE LAW

BY JOSEPH M. FASI II

I. TAKE TIME TO THINK – IT IS THE MARK OF THE MASTER, THE ESSENCE OF THE TRIAL LAWYER

A. Who has the Time? Late Nights to Find Answers to the Hard Questions

B. Who Cannot Take the Time?

C. The Essence of the Trial Lawyer

D. The Birth of the Case

E. Starts on Assignment

1. Relevant Jury Instructions

2. Closing Argument

3. What will you need to persuade a jury?

4. What will you need for an appeal?

II. TRIAL THEMES

A. If You Do Not Have a Theme, Your Opponent Will

B. In This Age of Instant Information, the Theme Sets the Tone

C. The Theme Sinks in and Is Recalled

D. Short and Sweet

E. Must Match the Theory of the Case

F. Ultimate Prize – Your Opponent's Expert Adopts Your Theme

1. "No fuel, No fire"

2. —Selective Memory"

3. —The Missing Domino"

4. The first to plead the cause seems right, until his neighbor examines him. PRV 18:17

5. —The Iceberg"

6. —Ahtin Pancake"

G. Theme Must Easily Explain the Facts of the Case

H. Catchy and Easily Recalled

I. Link to the Evidence

J. Repetition

K. Use a Single Theme

1. No Alternatives

2. Simplicity is best

3. Simplicity is easily remembered

L. Tie Down Lines

1. Help the jury put the case together in a mental picture

2. Limit to two or three

3. A critical fact in the case

4. Strength for the Defense v. Weakness for Plaintiff

5. Connect to life as the jurors in your venue live it

M. The Hard Work of Sitting – Creativity

1. Nothing is off limits, write down what comes to you and do not judge yourself. Just make notes

2. Why would a juror find for us?

3. What is the case in its simplest form?

4. What theory explains the facts favorable to our side?

5. What theme would best describe the key witnesses to the case?

6. What theory explains the case from BOTH sides?

7. What theories will the plaintiff make?

N. <u>What Sells in Milwaukee? Tampa?</u>

1. What prejudices and biases do your jurors bring to the courtroom?

2. Will the theme match the demographics of the venue?

3. What social issues are relevant to your community?

4. Red/Blue States, Counties, Cities

O. <u>Stories Are Not Just for Kids</u>

1. Everyone at every age loves a story

2. Entertainment Tonight/People magazine more popular than PBS or a Law Review

3. The underdog, the oppressed, the individuals who make up the corporation

4. A love story

5. A passion for justice

6. Virtually any story you are familiar with can be used with your set of facts. One needs the time to THINK

P. <u>What We Learned In Kindergarten—Still Apply</u>

1. Play nice

2. Share

3. Work hard and get your reward

4. There is no such thing as something for nothing

5. Personal responsibility

6. Be truthful, be clear, be honest – Keep your word

Q. Test the Trial Themes

1. Methods of Testing

a. Professional jury consultants

b. Mock jury or focus groups

c. Neighbors, friends, children

2. Does it Fit Google, Facebook or Twitter?

III. DEVELOPING EXHIBITS AND POWERPOINT TO BRING THE THEME TO LIFE

A. The Hard Work of Sitting

1. What is your theme/story

2. What brings it to life?

3. From assignment in the case, start your PowerPoint

a. It can be saved

b. Slides can be moved, modified, or deleted with ease

c. Add documents to the PowerPoint when they strike you as significant – as telling the story

d. Save, Save, Save

4. Arguments against PowerPoint

    a. Jurors want to hear you tell a story

    b. Jurors will think you are —too slick"

    c. Jurors will focus on the slide and not on you

5. Reality

    a. Unless you are Clarence Darrow – there are few good story tellers

    b. We live in the age of instant information and jurors do not have to listen to you

        (1) ESPN – 24 hour sports

        (2) CNN – 24 hour news – with the scroll on the bottom

    c. If you don't use technology, jurors will likely not respect you

    d. As jurors get younger (or we get older) they want to see that you understand technology and can get them the information they want NOW and CLEARLY. Papers that once took a week to research and write, now take a couple of hours

    e. Jurors do not want to focus on you, they want the information and they want it now

    f. Be Google, Facebook, Twitter, CNN.com

6. Visuals

    a. If it was true in the past that a photo was worth a thousand words, it is even truer in this age of technology

    b. Google Images, Earth, Wikipedia, the Internet

c. Who talks on the phone anymore? Txt gtg ttyl

d. You Tube

e. Show the surgery as it happened

f. Show the accident

g. Show the language in the contact, record, and any document

h. Multi-media presentations with surveillance film and video depositions

(1) Surgery examples

(2) Testing of appliances

IV. THE HARD WORK OF SITTING – JURY INSTRUCTIONS AND CREATIVITY

A. Trial lawyers are Appellate Lawyers

B. Selecting and Wording Jury Instructions for Appeal

C. Objecting to Opponent's Jury Instructions

1. To give the trial judge every opportunity to do the ~~–i~~right thing"

2. To ensure that the judge performs his/her judicial duty and states the law correctly

D. Start your Engines

1. From assignment of the file

2. First review of Complaint

3. Frame the issues

E. Sit and Think and, then, Stand Up for your Theories

F. The Reason Behind the Rule

G. Address the Issues

1. What are the key issues?

2. Is there an issue of fundamental fairness?

3. Impact on the case?

H. Say the Issues

1. The hard work of standing

2. On the record

3. Creativity

4. Object specifically, directly and without fear

I. Defense on the Offense – Make the Issue

1. Thinking of the issues versus relying on form books

2. No need for formalities or citations

3. Creativity tied to the law or facts of the case

4. Common sense

5. Custom, habit and practice

a. Adapted instruction from products liability to medical malpractice cases

6. Standard of care of the nurse or resident

a. No —standard" instruction; however, common sense stated that the standard was different for these individuals

7. Who owned the dog?

a. Jury instruction imposed strict liability for simply owning the dog. However, owners in Florida. Dog was in Milwaukee….in a for-profit kennel.

8. Truck v. bicycle accident

a. Bike rider did not wear a helmet

b. Claim loss of smell from hitting head on road

c. Create jury instruction on failure to wear helmet based on seat belt instruction in a state with no helmet laws

d. Applied as a reduction in damages for failure to wear helmet

9. Bad result does not equal malpractice

a. Based upon testimony of plaintiff expert

b. Based upon common sense

c. Had all experts agree to this statement

J. Get the Court to Rule

K. Creativity

1. Statutes

2. Case law

3. Restatement of Torts

4. Whatever you can think of over the noon recess

L. Weave the Jury Instructions into the Final Argument

1. Jury Instructions frame your case

2. Support your theme

3. Provide Credibility

M. Purpose of Jury Instructions

1. Have the Judge reinforce your theory/theme of the case

2. Provide substantive law

3. Create reversible error

4. Inform the jury of the principles of the law as applied to a particular case

N. Officer of the Court

1. Significant responsibility and privilege

2. Balance advocacy with credibility and candor with the tribunal

I would like thank Bob Banker, Frank Gassler, Barry Cohen, and Bill Hahn from Tampa, Florida for mentoring me and setting the examples of true Trial Masters. Many of the lessons in this outline and presentation are based on their teachings and patience with me.

Joseph M. Fasi II

JOSEPH M. FASI II

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FDCC

FEDERATION OF DEFENSE & CORPORATE COUNSEL

FDCC Winter Meeting
Hyatt Grand Champions Resort
Indian Wells, California
February 26 – March 5, 2011

THE ASSAULT ON CALIFORNIA'S WATER SUPPLY

Presented by
International Practice and Law and Toxic Tort and Environmental Law Sections

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THE ASSAULT ON CALIFORNIA'S WATER SUPPLY

BY FLOYD WICKS
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California's water supply has been under various legal attacks for the past 20 years. At least one decade-long court attack turned out favorably for water companies in California generally, and specifically for the private water companies in the case. Other legal attacks by environmental groups, and contamination residuals in water wells where the contaminators could not be located, have resulted in additional pumping restrictions on the water supply.

In *Hartwell Corp. v Superior Court*, 27 Cal.4th 256 (2002) (hereinafter "*Hartwell*"), the Supreme Court in effect followed the principle in *San Diego Gas & Electric Co. v Superior Court*, 13 Cal.4th 893 (1996) (hereinafter *"Covalt"*), regarding the authority of the California Public Utilities Commission ("PUC"); and at the same time provided a "safe harbor" to regulated utilities if they complied with all federal and state safe drinking water laws.

The cases began in 1997, and continued into 1998, when over 2000 residents of Los Angeles County and several hundred residents in Sacramento filed complaints against 4 water companies regulated by the PUC and other water utilities not regulated by the PUC, alleging causes of action for negligence, strict liability, trespass, public and private nuisance, fraudulent concealment and in some cases wrongful death. The claims against the water providers were that they had provided contaminated water to the plaintiffs over an extended period of time.

In response to the actions against the regulated utilities, the PUC issued an order instituting investigation ("OII") because the complaints raised public concerns over the safety of the drinking water supplied by the utilities. The investigation itself took approximately 18 months. In the interim, all of the Superior Court cases were stayed, except one. In that one case the court sustained a demurrer without leave to amend on the grounds that the complaints themselves interfered with the jurisdiction of the Public Utilities Commissions and the performance of their official duties in the regulation of water service to the public. The parties to the actions filed numerous petitions for writs. All the writs were consolidated with the plaintiffs appeal from the granting of the demurrer. A Court of Appeal decision favorable to the water companies was published. The Supreme Court then granted review and the result was *Hartwell*.

The Court concluded in *Hartwell* that the plaintiff's challenge to the adequacy of the DHS Standards was barred. As the Court explained, if the PUC was to perform its regulatory functions including rate making, the agency was entitled to have certain water quality standards. A Superior Court determination

of the inadequacy of a DHS water quality standard applied by the PUC would not only undermine the regulation, but it would undermine the priority of the PUC rate making determination. In short it would result in regulation by litigation, and frustrate the ongoing jurisdiction of private water utilities by the Commission.

Secondly, the Supreme Court explained that the PUC provides a "safe harbor" to PUC regulated utilities if they comply with DHS and Federal Standards at the time alleged in any complaints. The Court went on to reason that an award of damages on the theory that the public utilities provided unhealthy water, even when the water met DHS Standards, would undermine the Commission's policy. Such an award would hold water utilities liable for not doing what the Commission repeatedly determined that they were not required to do.

The *Hartwell* Court did permit the cases to continue on theories that the lawsuits were not barred if allegations were made that the water failed to meet federal and state safe drinking water standards. After the cases went back to the trial court level for discovery, ultimately all of the cases settled, except the cases of three different water companies. Two of the three[1] companies filed motions for dismissal on the grounds of lack of jurisdiction because of the absence of any violations of federal or state safe drinking water standards. Plaintiffs appealed those rulings. The Court of Appeal issued their decision, *In Re Groundwater Cases*, 154 Cal.App.4th 659 (2007), almost 6 months after the 10th anniversary of the original filing of the cases in April of 1997.

In Re: Groundwater Cases held, *inter alia*, that numerical standards for levels of contaminants are in fact what the agencies must use, not qualitative standards, in determining whether or not water is contaminated. It also confirmed that challenges to the adequacy of the standards were barred by *Hartwell* and its predecessor cases. It made the additional findings that no water provider is capable of supplying "pure" water, and that isolated exceedances of maximum contaminant levels (MCLs) do not constitute violations in California.

The law in California is now well-settled that no attacks on DHS Standards or so-called MCL's are going to be permitted. Most importantly, however, any PUC regulated utility which complies with DHS Water Quality Standards, at the times alleged in any complaint filed against it, has a "safe harbor." This does not mean they are immune from suit, but it does mean that suit can be dismissed, assuming that compliance with DHS Standards at the applicable time can be shown to exist.

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[1] The "3rd defendant" was a series of public entity water purveyors. The court found that plaintiffs failed to state a claim against these entities under Government Code §865.6. *Hartwell* at 692.

This is a clear statement of what the PUC regulated utilities had intended for years, but it took almost 10-1/2 years of litigation and multiple millions of dollars in legal fees to obtain the "safe harbor" opinion. Several other states, including Ohio, Arizona and North Carolina already have safe harbor legislation in place.

On October 8, 2009, the United States District Court for the Eastern District of California ruled in the case of *San Luis & Delta-Mendota Water Authority, et al. v. Salazar*, that Water District members lacked standing to challenge the Environmental Species Acts ("ESA") action regarding the Delta Smelt fish as an invalid exercise of authority under the Commerce Clause. There were other areas on which the Water District challenged the use of water for the Delta Smelt, as opposed to allowing the previous amount of water to go to the local farmers. Unfortunately, the Water District members lost on every count. Enormous amounts of legal maneuverings have followed this controversial decision. 663 F.Supp.2d 922 (E.D.Cal. 2009).

As implementation of the court's underlying order moved forward through the Reasonable and Prudent Alternatives ("RPA's") set forth by the United States Fish & Wildlife Service ("FWS"), Water District members moved for a preliminary injunction to stop implementation of the orders. Some of the orders involved the amount of flow that would be available to the Delta regarding the Delta Smelt.

Suffice to say that this situation is far from resolved. It has also been the subject of a great deal of political rhetoric by candidates on both sides of the issue. The bottom line is that a great deal of water is prevented from use by farms in the Central Valley, for the benefit of the Delta Smelt.

Hoover Dam is more than one-half empty at the present time. Some "wags" may say well, its "one-half full." At some point, the water level may end up being so low that only a minimal amount of energy will be generated, and perhaps not enough energy to provide useable power levels. The present water level is down by 146 feet below spillway and only 33 feet above the minimum level required to produce electricity. It is interesting to note that Lake Mead loses about 7 ½ feet annually due to evaporation.

In Los Angeles County, some 120 wells are owned by the Los Angeles Department of Water & Power. Approximately 60 of these wells are now shut down due primarily to chemical contamination, the majority of which is hexavalent chromium. Unfortunately, the persons/entities who allowed the hexavalent chromium to get into the wells either cannot be found or are "long gone." Despite some efforts to locate the primarily responsible parties ("PRP's"), little if anything has been done. The loss of the 60 wells has badly hurt the ability of the Dept. of Water & Power to supply water to their customers.

As all Southern Californians know, the Metropolitan Water District ("MWD") receives a great deal of water from the Central Valley/Delta Area. This allocation of water to the MWD has been slashed, and all entities which are heavily reliant upon water from MWD are now suffering. Not only is the supply limited, but the price has jumped enormously.

In San Diego County, the Poseidon Resources company has been attempting to get approvals for a desalination plant in Carlsbad, California. After over 10 years of various fights with agencies, and various lawsuits brought by environmental groups, the approvals have now been finally granted. It is expected that water will be coming from that plant sometime in calendar year 2012.

A desalination project is being revived in Yuma, Arizona. Some of the water involved is proposed to be brought from the Sea of Cortez to the desalination plant in Yuma. The water will then be discharged to the Colorado River, which flows into the Imperial Valley for use by residents/farmers there.

Documentaries such as "The American Southwest: Are We Running Dry?" have depicted the lack of water in the Southwest. It is clear that the lack of water and the attempts made by various groups of individuals to prevent other water from being made available, have put the entire State of California and particularly Southern California, into a near crisis situation with reference to obtaining adequate water, and the price that will have to be paid for this water.

FLOYD WICKS

Floyd Wicks joined SouthWest Water Company in September 2010 as its CEO. He has more than 35 years of water and wastewater industry experience.

Most recently, he served as president and chief executive officer of American States Water Company, since its formation as a holding company for Golden State Water Company in 1998.

Prior to that, Mr. Wicks served as president and chief executive officer of Golden State Water Company, and president and chief executive officer of each of American States Water Company's subsidiaries. During his tenure, the company increased market share, profitability and quality performance.

He has also served as a director on the National Association of Water Companies, the Southern California Leadership Council, Water for People, American Water Works Association Research Foundation and the Advisory Board of Water Asset Management, LLC.

Mr. Wicks earned a bachelor of science degree in civil engineering and master of science degree in water resources engineering from Ohio State University. He is a registered professional engineer in Ohio, Pennsylvania and California.



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SLICK TRANSACTIONS: CANADIAN LAW, AND THE NORTH AMERICAN FREE TRADE AGREEMENT; CAN OIL, GAS AND WATER BETWEEN CANADA AND THE UNITED STATES REALLY MIX?

Presented by
International Practice and Law and Toxic Tort and Environmental Law Sections

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SLICK TRANSACTIONS: CANADIAN LAW, AND THE NORTH AMERICAN FREE TRADE AGREEMENT; CAN OIL, GAS AND WATER BETWEEN CANADA AND THE UNITED STATES REALLY MIX?

BY DAVID A. BERTSCHI

I. INTRODUCTION

The relationship between the United States and Canada is the closest and most extensive international association in the world. It is reflected in the staggering volume of bilateral trade – the equivalent of $1.6 billion a day in goods – as well as in people-to-people contact: about 300,000 people cross the U.S./Canada border every day (U.S. Bureau of Western Hemisphere Affairs, September 1, 2010).

The United States and Canada conduct the world's largest bilateral trade relationship, with total merchandise trade (exports and imports) exceeding $533.7 billion in 2006. Canada is the leading export market for 35 of the 50 U.S. states and is a larger market for U.S. goods than all 27 countries of the European Union. The economies of the United States and Canada are highly integrated, a process that has been accelerated by the bilateral U.S.-Canada free trade agreement (FTA) of 1989 and the North American Free Trade Agreement (NAFTA) of 1994. Since the implementation of NAFTA in 1994, total two-way merchandise trade between the U.S. and Canada has grown by more than 265%. The two countries are natural trading partners, given their geographic proximity and their linguistic and cultural similarities. It is often easier and less expensive for Canadian provinces to trade with the United States rather than with each other. Over 80% of the Canadian population lives within 200 miles of the U.S. border.

The U.S.-Canada economic relationship is also characterized by substantial bilateral investment. The United States is at present the largest single investor in Canada, with manufacturing, finance/insurance, and mining/energy being the three largest categories of U.S. foreign direct investment (FDI) in Canada.

Canada has a prominent FDI position in the United States of about $160 billion – 8.9% of the total FDI stock in the U.S. The U.S. is the most prominent destination for Canadian direct investment abroad (DIA), with a stock of 42.7% of total Canadian DIA in 2006. Canada is also highly dependent on FDI. In 2006 FDI represented 31.4% of Canada's GDP, and

Canadian DIA represented 36.1% of GDP17, both figures up from about 20.0% in 1995. Flows of FDI, which have picked up during the early years of the present economic expansion, have slowed again since 2005.

The terrorist attacks of September 11, 2001 focused attention and increased scrutiny on the U.S.-Canadian border as a possible point of entry for terrorists or for weapons of mass destruction. The potential for economic disruption caused by a terrorist attack on border infrastructure or as a result of a border closure is large. For example, the Ambassador Bridge that links Detroit and Windsor, Ontario is the largest trade link in the world, with more than 7,000 trucks crossing daily carrying goods worth more than $120 billion per year.

Several bilateral initiatives have been undertaken to minimize disruption to commerce from added border security. The focus on the border has renewed interest in some quarters in greater economic integration, either through incremental measures such as greater regulatory cooperation or potentially larger goals such as a customs or monetary union. Congressional interest has focused on these disputes, and also on the ability of the two nations to continue their traditional volume of trade with heightened security on the border.

Both the United States and Canada are considered to have relatively open and transparent trading regimes. Both are signatories to the World Trade Organization (WTO) and are bound together by the North American Free Trade Agreement. While most trade is conducted smoothly, several disputes remain contentious. Some disputes have been adjudicated by WTO and NAFTA dispute settlement procedures and others have been the subject of regulatory actions by the United States or Canada.

II. U.S. / CANADA TRADE IN ENERGY AND WATER

A. Energy Trade

Canada is the largest supplier of energy (including petroleum, natural gas, and electricity) to the United States. Canada and the United States operate an integrated electricity grid which meets jointly developed reliability standards and provides all of each other's electricity imports. Canada is a major supplier of electricity (mostly clean and renewable hydroelectric power) to New England, New York, the Upper Midwest, the Pacific Northwest, and California. Canadian uranium helps fuel U.S. nuclear power plants.

Today, the United States imports 20% more crude oil and natural gas from Canada than it did in 1998, with a concurrent dollar value increase of nearly 250%. In 2005, oil and gas displaced motor vehicles as the United States' largest import from Canada. Canada has sources of crude oil in Alberta and off the coasts of Newfoundland and Nova Scotia. As the price of crude oil increases, petroleum extracted from Albertan oil sands are becoming a major part of Canadian energy supplies. Oil sands are surface mined, and the oil is extracted through pressurization. The process itself is energy intensive and water dependent, and became commercially viable only recently. It is estimated that the potential oil extracted from the oil sands represent reserves second only those held by Saudi Arabia.

Mexico produces 3.71 million barrels a day, and Canada produces 3.23 million barrels a day; but each requires only 2 million barrels a day for domestic use. The U.S. produces 8.37 million barrels per day (the third largest in the world), but uses 20.59 million barrels a day (about 25% of the world total). Production in Mexico and the U.S. is declining, but Canada's production is increasing, largely from the Alberta oil sands.

The Alberta oil sands are often a topic in international trade talks, with China and the United States negotiating with Canada for a bigger share of the rapidly increasing output. Currently, most of the oil sands production is exported to the U.S.

An agreement has been signed between PetroChina and Enbridge to build a 400,000 barrel-per-day pipeline from Edmonton, Alberta, to the west coast of British Columbia. The pipeline will help export synthetic crude oil from the oil sands to China, and elsewhere in the Pacific. A 150 million barrel-per-day pipeline will also be built alongside to import condensate to dilute the bitumen. Sinopec, the largest refining and chemical company in China and China National Petroleum Corporation are buying shares in major oil sands development.

On August 20, 2009, the U.S. State Department issued a Presidential Permit for an Alberta Clipper Pipeline that will run from Hardisty, Alberta to Superior, Wisconsin. The pipeline will be capable of carrying up to 450,000 barrels of crude oil a day to refineries in the U.S.

The oil sands are the reason why Canada is the number one exporter of oil to the United States. Between 2003 and 2008, Canadian oil shipments cut Saudi imports by 80 million barrels a year. In 2004, Canadian oil exports pushed Saudi Arabia to the number 2 position, and by 2008,

Canada shipped 715 million barrels of oil to the U.S., compared to 550 million barrels that were shipped from Saudi Arabia. In 2008, Canada accounted for 19% of total US oil imports, and in 2009 that figure rose to 21.5%. By 2020, Alberta's gigantic oil sands mining operations, which is spread across an area the size of Rhode Island, will increase oil production from 1.2 million barrels a day for export to 4 million barrels a day for export which is the equivalent of Iran's production.

B. Water Trade

About 2.5% of the world's supply of water is fresh water. Most of it is locked in glaciers and inaccessible as ground water, leaving only about 0.3% of fresh water available for human use. One fifth of this human available fresh water is located in the Great Lakes Basin shared by Canada and the U.S, and a significant amount is located in 8 other drainage basins shared by Canada and the U.S.

It is a myth that Canada has more water than the U.S. Canada and the U.S. share about the same percentage of global, human available freshwater – roughly 7% and 6.5%, respectively. The U.S., however, has a substantially larger population and economy, and hence a substantially greater demand for fresh water. This creates an opportunity for bilateral water trade.

Globally, Canada and the U.S. are third and fourth in human available fresh water supply. Brazil has the largest share at 17.5%, and Russia the second largest share at 9.5%. China is fifth with 6% of the global supply of fresh water. This means that Canada is by far the most proximal supplier of fresh water to the U.S. These figures are, however, a gross generalization.

In reality, there are wide regional variations in the supply and demand of water in both Canada and the U.S. Some regions are in a net surplus position, and are likely to remain in that position for the foreseeable future. Some regions, including many economic and population centers of gravity, are in a net deficit position, and are likely to experience only greater deficits. The domestic disparity in regional supply and demand is nothing new. It was attended to in the past by bulk transfers between regions, in the form of large scale water diversion projects. These have proven to be a temporary solution, sparking extensive conservation measures, and, in some regions, desalination of sea water. These measures have been somewhat successful, but are also proving to be temporary. The reason is

that both U.S. and Canada are depleting their fresh water supplies faster than they are being replaced. The net withdrawal is attributed to population growth, aging infrastructure, climate change, and economic expansion. It is likely that regional disparities are only going to get larger, promoting domestic and international water trade. Furthermore, total supply is only going to get smaller, increasing prices and making water trade more affordable.

In lieu of trade, the U.S. could simply withdraw more fresh water from the shared basins that exist between Canada and the U.S., such as the Great Lakes Basin. This is also of limited value as these shared drainage basins are already being depleted at a substantial rate, and are quite far from the regions of greatest current and future water stress in the U.S. Diversion from Canada is not much of an option either as 60% of Canadian rivers are in northern Canada and flow northwards.

An important point alluded to above is the intersection between water supply and energy supply. Energy production requires water, and decreasing regional and continental water supply is seen as a potential impediment to economic growth. An interesting variation on this theme emerges in the context of agriculture. The U.S. has a long history of its agricultural sector driving fresh water supply and demand issues, but this has entered the area of energy recently as the government promotion of biofuel growth in some regions has created substantially increasing demands on fresh water supplies in those regions. The crops sown to produce the biofuels are greater consumers of fresh water then the crops they are replacing.

In spite of the substantial impetus for bulk water trade between Canada and the U.S. for industrial, agricultural, and other large-scale uses, such transfers are legislatively prohibited. Large volumes of fresh water are, however, withdrawn for “small-container” trade in fresh water.

For many years now, fresh water has been collected on both sides of the border, put into various containers, such as plastic drinking bottles, and exported internationally. This trade in small container fresh water is substantial, growing, and of a global nature. Canada draws over 5 million litres from its fresh water basins per day for bottled water, and exports about 1 million litres per day, mostly to the U.S., but also to Japan, Taiwan and China. Ironically, however, Canada is a net importer of bottled fresh water, importing the majority from France, but also a major portion from the U.S. and Italy. In 2009, Canada sold $13.1 million worth of bottled

fresh water to the U.S., and bought $7.6 million of bottled fresh water from the U.S.

III. THE LAW GOVERNING U.S. / CANADA TRADE IN ENERGY AND WATER

A. Canadian Oil and Gas Law

The division of powers between federal and provincial governments is set out in the *Canadian Constitution Act*, 1867. Generally, the federal government has jurisdiction over matters of inter-provincial, national, and international scope, while the provinces have jurisdiction over matters of a local or private nature.

The two levels of government exercise constitutional powers in respect of different but sometimes overlapping aspects of energy development, transportation and marketing. Jurisdiction will typically be determined based upon the location, dominant nature and/or scope of the matter and certain other factors. In the event of a conflict or inconsistency between federal and provincial statutes, the doctrine of paramouncy applies to give effect to the federal statute.

When Canada was formed in 1867, some matters were not contemplated and therefore are not assigned to either level of government. Environmental concerns are one such matter. The Supreme Court of Canada has determined that both levels of government may enact laws regarding the environment in respect of and ancillary to existing listed heads of power. Set forth below is a brief description of environmental and conservation legislation in place that have the potential to impact the oil and gas industry in Canada (depending upon the specific resource being exploited and the circumstances under which it is under development).

1. Environmental Protection

a. Federal

(1) The *Canada Environmental Assessment Act*

The purpose of the *Canada Environmental Assessment Act* is to ensure that projects are carefully reviewed in order to avoid significant adverse environmental effects and to encourage sustainable development. Under

this Act, the requirement for an environmental assessment will be triggered where a Federal Authority proposes a project, grants money to a project, grants an interest in land to a project, or exercises a regulatory duty in relation to a project. Once the requirement to conduct an environmental assessment has been triggered, it is up to the federal authorities to identify the scope of the proposed project, the scope of the factors that must be considered in the environmental assessment, and the time line for the assessment. After the assessment has been conducted and a report based on the findings of the assessment reviewed, the responsible authority decides whether adverse environmental effects are likely to be significant. This decision is taken into account in determining whether to proceed with the project.

(2) The *Canada Environmental Protection Act*

The *Canada Environmental Protection Act* is the primary element of the federal legislative frame work for protecting the Canadian environment and human health. The Act seeks to manage the human and environmental risks posed by toxic and harmful substances, including fuels and emissions by vehicles and equipment.

(3) The *Canada Fisheries Act*

The *Canada Fisheries Act* applies to all territorial seas and inland waters and is binding on the federal, provincial, and territorial governments. One of the goals of the *Fisheries Act* is the protection of fish habitat, which includes "any (area) on which fish depend directly or indirectly in order to carry out their life process." To this end, the Act provides a prohibition on the deposit of deleterious substances in fish habitats and a general prohibition on the destruction of fish habitat without federal authorization. The federal Department of Fisheries and Oceans is one of the federal authorities that may have responsibility for conducting an environmental assessment under the *Canadian Environmental Assessment Act*.

b. Provincial

Each province has authority over property and civil rights and in respect of exploration for and conservation and management of non-renewable natural resources within the province. The author has restricted the description of provincial legislation below to Alberta, given that Alberta's legislation is very typical of that of other provinces. The oil and gas

industry in Alberta is largely regulated by the Alberta Energy and Utilities Board and Alberta Environment.

(1) The Alberta Energy and Utilities Board (AEUB)

The AEUB is an independent, quasi-judicial agency of the Government of Alberta. Its mandate is to ensure that the discovery, development and delivery of Alberta's energy resources and utilities services take place in a manner that is fair, responsible and in the public interest. To that end, the AEUB regulates the safe, responsible and efficient development of Alberta's energy resources, including: oil, natural gas, oil sands, coal and electrical energy, along with pipelines and transmission lines that move the resources to market. The prevention of waste and the conservation of resources are key elements of the AEUB's mandate. To this end, the AEUB has been granted a broad mandate under its enabling legislation to manage Alberta's energy resources. The AEUB has jurisdiction under several environmental and conservation acts (including the *Alberta Oil and Gas Conservation Act*, the *Oil Sands Conservation Act* and the *Alberta Energy Resources Conservation Act*). The AEUB's environmental jurisdiction is exercised throughout project approval, including preliminary discussions with potential applicants to address issues that may arise, and through public hearings. Board orders and approvals may include environmental conditions. Environmental regulation is also achieved through guidelines, information letters, interim directives and regulations issued by the AEUB.

The government of Alberta recently introduced new legislation which divided the AEUB into two separate regulatory bodies: a new Energy Resources Conservation Board and the Alberta Utilities Commission. The *Alberta Utilities Commission Act* was intended to allow Alberta's regulatory authorities to effectively manage Alberta's growing natural resources sector.

(2) Alberta Environment

Alberta Environment's central mandate is the protection of the environment and the protection and management of water resources. It also addresses climate change and waste management. Alberta Environment carries out its mandate under the authority of the *Environmental Protection and Enhancement Act*, the *Water Act*, and other legislation.

(3) The *Alberta Environmental Protection and Enhancement Act (EPEA)*

The *EPEA* is a consolidation of various environmental statutes that were previously independent. Its purpose is "to support and promote the protection, enhancement and wise use of the environment" through sustainable development. The *EPEA* provides a comprehensive means of regulating activities which may impact the environment, including requiring that certain activities be subject to an environmental impact assessment process. The *EPEA* deals with remediation of contaminated sites and the release of substances, which has been defined broadly, and could include emissions, salt water, oil and other hydrocarbons. Regulations enacted under the *EPEA* prescribe limits upon the release of some substances.

The *EPEA* requires operators to plan for and employ effective conservation and reclamation measures. Conservation refers to the planning, management and implementation of the oil and gas activity with the objective of protecting the essential physical, chemical and biological characteristics of the environment against degradation. Reclamation refers to the removal and decontamination of equipment or buildings or other structures and the reconditioning of the land to a state fit for some future use. Conservation and reclamation measures are accomplished by issuing approvals for complex industrial activities, collecting security for activities with approvals, conducting inspections of conservation and reclamation activities, and issuing reclamation certificates and undertaking compliance and enforcement actions when necessary.

(4) The *Oil and Gas Conservation Act*

The *Oil and Gas Conservation Act* and its regulations are intended to address conservation issues by conserving resources to maximize the benefit for all Albertans. The Act seeks to promote the orderly and efficient development of oil and gas resources and to observe safe and efficient oil and gas practices, including the control of pollution.

(5) The *Water Act*

The *Water Act* focuses on managing and protecting Alberta's water and on streamlining administrative process surrounding the allocation of water licenses. The *Water Act* applies to any activity that can possibly disturb either ground or surface water, and includes the impoundment, storage, consumption, taking or removal of water for any purpose. Subject to

certain exemptions provided for under the Act and its regulations, an approval or license under the *Water Act* will be required for such activities. Regulatory and policy initiatives are currently being implemented to improve the efficient industrial use of water. Further, under the *Water Act*, water management plans may be developed for major river basins in Alberta, including the Athabasca River which is located in the area of major oil sands development. Such plans could impact the right to divert water.

2. Intra-provincial & International Gas Transportation

a. Federal

(1) Intra-provincial Transportation

The federal government has authority to make laws regarding the regulation of trade and commerce in inter-provincial and international trade, including the import and export of natural resources. The federal government also has authority to regulate pipelines and other means of transportation that cross provincial and international boundaries under the *Constitution Act*, 1867. This authority is exercised through the National Energy Board (NEB), an independent federal agency that reports to Parliament through the Minister of Natural Resources, Canada.

The NEB has authority to regulate traffic, tolls and tariffs of companies operating extra-provincial pipelines. It is the NEB's responsibility to ensure that tariffs and tolls are just and reasonable, and that there is no undue discrimination in tariffs or services. The NEB also requires that pipeline companies operate according to the principle of "open access". This means all parties must have access to transportation on a non-discriminatory basis.

(2) Pipeline Construction

When a company proposes to construct a pipeline that crosses a provincial boundary, or extends beyond the international boundary, or is to extend existing pipeline systems under federal jurisdiction, a Certificate of Public Convenience and Necessity must be obtained from the NEB. Before issuing the certificate, the NEB must "be satisfied that the line is and will be required by the present and future public convenience and necessity." In determining whether a pipeline project should proceed, the

Board considers its economic, technical and financial feasibility and the environmental and socio-economic impact of the project.

b. Provincial

(1) Pipeline Construction & Operation

The AEUB regulates the construction and operation of pipelines within Alberta pursuant to the *Alberta Pipelines Act*. This Act applies to all pipelines in the province except those on plant property, and those subject to an order or certificate of the National Energy Board. Pipelines require a construction permit from the AEUB as well as an operating license from the AEUB upon completion. When reviewing an application for a construction permit, the AEUB will consider various public interest matters, including resource conservation, correlative rights of well owners, and potential environmental issues. After construction and completion, the AEUB also supervises and enforces licence and statutory requirements for pipeline operation.

(2) Energy Exports

The AEUB regulates the removal of natural gas from the province pursuant to the *Gas Resources Preservation Act*. This Act requires that the AEUB shall not grant a permit for export unless it is, in its opinion, in the public interest to do so. While the AEUB may authorize the removal of smaller quantities of gas with the approval of the Minister of Energy and Natural Resources, long term sales applications also require the approval of the Lieutenant Governor in Council.

3. The North America Free Trade Agreement (NAFTA)

It has been suggested that under NAFTA, Canada can do nothing to curtail oil exports to the United States, even in the event of energy shortages at home. Canada's trade in energy products with the United States and Mexico is governed by the rules found in Chapter 6 of NAFTA, "Energy and Basic Petrochemicals." The scope of NAFTA Chapter 6 is such that it includes virtually all forms of energy, ranging from uranium to fossil fuels to electricity. Only a handful of energy products, none of them significant, are exempt. There are four specific clauses within NAFTA Chapter 6 that directly or indirectly affect Canada's ability to restrict exports:

- Article 603(2) prohibits the use of minimum or maximum export-price requirements in cases where restrictions on the volume of exports are prohibited.

- Article 604 explicitly prohibits NAFTA members from imposing any export tax or duty on the sale of energy or petrochemical products, unless the same tax is placed on *all* NAFTA members, including the exporting party.

- Article 605 outlines the conditions under which Canada can restrict energy exports. It can do so only if *all* of the following conditions apply: exports as a percentage of total Canadian supply do not fall; Canada cannot charge a higher price to the U.S. or Mexico by means of taxes, license fees, minimum prices, or any other regulation; and any restriction cannot result from a disruption of normal supply channels.

- Article 607 outlines four specific national security-related scenarios under which energy exports may be restricted: to fulfill a defense contract or to supply a military establishment; to respond to a situation of armed conflict; to implement policies related to the non-proliferation of nuclear weapons; and to respond to threats of disruption in the supply of nuclear materials for defense purposes.

These four clauses apply only to Canada and the United States. Mexico reserves the right to control its own energy industries in most cases and is explicitly exempt from the provisions of Articles 605 and 607.

a. Interpreting the Energy Provisions in NAFTA

From the Canadian perspective, NAFTA Chapter 6 prohibits government intervention in the normal operation of North American energy markets, whether in the form of price discrimination (e.g., the imposition of export taxes), or the direct disruption of supply channels. Article 605 of NAFTA has been interpreted by some to mean that Canada is required to sell a certain percentage of its energy output to the United States, even in the face of a severe domestic shortage. Moreover, it is argued that NAFTA prevents this percentage from falling over time.

Neither of these statements is true. Canadian producers are free to sell as much oil as they wish to whomever they wish, including, for example,

overseas customers. As a result, the share of total output exported to the United States can rise or fall according to the normal forces of supply and demand. The only condition that NAFTA imposes on Canadian energy products is that all buyers in North America must have equal rights to buy those products.

Article 605 stipulates that energy exports to the United States *as a percentage of total output* cannot fall. However, this does not refer to the day-to-day operation of the Canadian energy sector. It is valid *only* as a limitation on the extent to which the Canadian government can interfere in energy markets. NAFTA prohibits the Canadian government from imposing (under normal conditions) any restriction that *causes* U.S. imports of Canadian energy to fall. In essence, NAFTA does prevent the Canadian government from imposing a policy like the National Energy Program in the 1980s.

As mentioned above, NAFTA requires that all oil produced in Canada be available to all consumers in North America. Since it would not be economically logical for oil producers to charge higher prices to Canadian consumers, this fact alone ensures that NAFTA could not create shortages in Canada because Canada was obliged to export to the United States.

Moreover, oil is bought and sold in global markets. In this way, oil is no different from any other commodity. Nickel producers, for example, sell at prices determined by global supply and demand. Minor differences aside, consumers buy at comparable prices, regardless of whether they live across the street or around the world.

Alberta energy consumers, therefore, have little to no advantage over other Canadian consumers in terms of access to oil supplies. Indeed, under current market conditions, it is advantageous for Eastern Canadian refineries and other users to import oil from countries such as Venezuela and Norway. If, for whatever reason, those supplies were not available, those consumers would simply buy from other sources at prevailing (global) prices.

The important point to ensuring oil supply to all parts of Canada is sufficient infrastructure. If shipping terminals and pipelines (with sufficient capacity) exist, then consumers across Canada will have access to world oil supplies (including those in Western Canada) at world oil prices. The

only way a local shortage could exist, then, would be because there was a global shortage.

NAFTA ensures that Canadian and U.S. consumers have equal access to oil produced in either country. In no way does it give U.S. consumers preferential access. Provided they have the demand and can pay the price, Canadian consumers could conceivably buy 100% of all energy produced in the country without violating NAFTA.

B. Canadian Water Law

Under the *Canadian Constitution Act*, the trade of fresh water falls primarily within the domain of the provinces pursuant to s. 92(13) – property and civil rights within the province, s. 92(5) – management and sale of public lands, s. 92(16) – matters of a local and private nature, and s. 92A(1)(c) – electricity-generating works.

The federal government has residual jurisdiction over the trade of fresh water across provincial and international boundaries, grounded in the federal government's jurisdiction under the *Canadian Constitution Act* pursuant to s. 91(12) – fisheries, s. 91(10) – navigation and shipping, s. 91(2) – regulation of trade and commerce, s. 92(10)(a) – interprovincial works and undertakings, s. 92(10)(c) – works "for the general Advantage of Canada", and s. 91 – Peace, Order and Good Government. The federal government has jurisdiction over fresh water on aboriginal lands, but that jurisdiction is constrained by aboriginal rights.

1. Provincial Legislation

Provincial legislation permits the trade of fresh water in smaller containers, such as water bottles, but prohibits the trade of fresh water in large containers (more than 20-30 liters), or through pipelines or channels – i.e. "bulk" fresh water trade (*Alberta Water Act* (2000); *British Columbia Water Protection Act* (1996); *Quebec Water Resources Preservation Act; New Brunswick Clean Environment Act*; *Manitoba Water Resources Conservation Act*; *Yukon Devolution Transfer Agreement*; *Northern Territories/ Nunavut Northwest Territories Waters Act*; *Nunavut Waters and Nunavut Surface Rights Tribunal Act*; *Saskatchewan Watershed Authority Act* (2005); *Ontario Water Resources Act* (1990); *Nova Scotia Water Resources Protection Act* (2000); *Newfoundland & Labrador Water Resources Act* (2002); *Prince Edward Island Environmental Protection Act* (1988)). The prohibition on bulk fresh water trade is moderated by the fact

that some provinces provide for licensing of bulk fresh water export, and the fact that every province provides exceptions for non-trade export, including: humanitarian purposes, firefighting, hydro-electricity production, use by vehicles in transit, and consumption by passengers in transit.

2. Federal Legislation

The federal government's constitutional jurisdiction over fresh water trade crystallizes in the *International Boundary Waters Treaty Act* (2002). It is the implementation of the 1909 Boundary Waters Treaty between Canada and the U.S., which is overseen by the International Joint Commission (IJC). The *International Boundary Waters Treaty Act* and its companion International Boundary Waters Regulations apply only to the Great Lakes-St. Lawrence Basin, the Hudson Bay Basin, and the Saint John-St. Croix Basin. This means that there is no federal prohibition on the bulk export of fresh water from the other significant drainage basins along the Canada – U.S. border, including the Alaska-Yukon River Basin, Fraser River basin, Columbia River Basin, and Red River Basin.

The regulation of fresh water trade in the *International Boundary Waters Treaty Act* and the companion International Boundary Waters Regulations parallels provincial fresh water trade restrictions. The export of fresh water in bulk form is prohibited, but the export of fresh water in smaller container form is permitted, as is export for humanitarian purposes, firefighting, use in transit, etc. Unlike provincial legislation, the *International Boundary Waters Treaty Act* prohibits bulk water transfer of more than 50,000 liters per basin per day. This allows at least 18 million liters to be exported from each basin each year in bulk form – a significant quantity.

Violations of the *International Boundary Waters Treaty Act* are subject to maximum fines of $300,000 to $1,000,000 daily. These legislated maximums may be exceeded at the discretion of a court to better accord with the monetary benefit that was obtained through the violation. Finally, and importantly, the fines may be levied directly against corporate officers, piercing the corporate veil.

3. International Agreements

The 1909 Boundary Waters Treaty between Canada and the U.S. provides the principles and mechanisms to prevent and resolve Canada – U.S. boundary fresh water disputes. It provides for the IJC, an

independent, bi-national agency charged with preventing and resolving disputes and investigating issues over waters shared with the U.S.

The Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement (2005) is a good faith agreement between eight Great Lakes states, Ontario, and Quebec. It evolved out of the Great Lakes Charter (1985), and restricts bulk withdrawal of fresh water from the Great Lakes-St. Lawrence River Basin. It is an annex to the binding legal agreement between the eight Great Lake States, the Great Lakes-St. Lawrence River Basin Water Resources Compact (2005), which similarly restricts bulk fresh water withdrawal from the Great Lakes-St. Lawrence River Basin.

Under NAFTA and GATT, the bulk export of fresh water is not explicitly prohibited, so there is some debate over whether it is within the scope of NAFTA and GATT. Canada's longstanding position, supported by the IJC, is that fresh water in its natural state is not considered a product or good, and as such Canada is not compelled to provide fresh water to the U.S. Either Canada or the U.S. can, however, collect and package fresh water, in bulk or small container form, and in that state it is considered a product or good under NAFTA and GATT. In that state, it is subject to NAFTA's various restrictions on preferential treatment of domestic markets.

> "NAFTA and the WTO agreements do not constrain or affect the right of a government to decide whether or not it will allow natural resources within its jurisdiction to be exploited and, if a natural resource is allowed to be exploited, the pace and manner of such exploitation.
>
> Moreover, even if there were sales or diversions of water from the Great Lakes Basin in the past, governments could still decide not to allow new and additional sales or diversions in the future."

International Joint Commission, Protection of the Waters of the Great Lakes: Final Report to the Governments of Canada and the United States, February 22nd, 2000 at p. 33.

4. Small Container Trade of Fresh Water

The general prohibition on bulk fresh water export from Canada is grounded in public sentiment. Canadian public sentiment is strongly opposed, and has been for some time, to the large scale export of fresh water from Canada, based primarily on the concern that it would irreversibly deplete Canadian fresh water sources. Strangely, the large volumes of fresh water withdrawn by the smaller container trade in fresh water pass unattended by this sentiment.

In its bottled form, fresh water is legislated at the provincial level by the *Food and Drugs Act* and the *Consumer Packaging and Labeling Act*. Federally, bottling of fresh water is regulated by the *Canadian Environmental Protection Act* and the Canadian *Environmental Assessment Act* as described above. Small container fresh water is considered a good and product under the NAFTA and GATT, and as such is subject to the trade and investment requirements of those international agreements.

IV. CONCLUSION

The trade of oil and gas and fresh water between Canada and the U.S. is an important component of the well-being of both nations as both are central to industrial, agricultural and residential activity. The volume and dollar value of such trade is only expected to increase in the future, subject to environmental and resource conservation legislation in Canada at the provincial and federal levels. Canadian legislation is permissive of oil and gas export and restrictive of bulk freshwater export.

The trade of oil and gas and fresh water between Canada and the U.S. should be viewed in the global perspective. Although Canada and the U.S. are strong trading partners, other global economic players, particularly China, are willing to compete with the U.S. for Canadian exports of oil, gas and fresh water.

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LIABILITY CLAIMS IN THE MEDICARE SECONDARY PAYER ARENA: PLANNING THE MEDICARE SET-ASIDE

Presented by
Life, Health and Disability, Trial Tactics, Practice and Procedures, and Healthcare Practice Sections

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LIABILITY CLAIMS IN THE MEDICARE SECONDARY PAYER ARENA:

PLANNING THE MEDICARE SET-ASIDE

BY
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Debate continues as to how to handle liability claims as they relate to Medicare issues. Absent clear, unambiguous guidance from Medicare we must examine the Medicare Secondary Payer Act as a whole, how it relates to claims for which Medicare has provided guidance, and what the Centers for Medicare and Medicaid Services has to date provided in the liability domain. First, however, to determine the best approach to take, perhaps it is best to look to the issue‟s origins.

The modern Medicare system began via passage of the Social Security Act of 1965 during the Johnson administration.[1] The Act provided for a system of federal health insurance under the Medicare program for 1) those over 65 years of age; 2) individuals receiving Social Security Disability Benefits who are under 65, but have been disabled for 24 months or longer; or 3) people with End Stage Renal Disease (continuing dialysis or in need of kidney transplant).[2] Initially the program consisted of hospital insurance (Part A) and Medical Insurance (Part B). In 2006 Medicare incorporated drug coverage under Part D, providing a more comprehensive overall health care plan. (Part C consists of Medicare Advantage plans, a combination of Parts A and B, with additional benefits not covered under the other sections and managed by private insurance companies on behalf of Medicare. With HMO, POS, and PPO options included, fees may be charged.[3])

The seeds of Medicare took root in 1965 and Parts A and B quickly took off (with C and D to follow decades later). Under the 1965 system, Medicare was in most instances (liability, no-fault) the primary payer for medical benefits for the subject classes, with private insurers taking only secondary responsibility for payment for benefits. In workers‟ compensation claims it was set forth that the workers‟ compensation plan would be the primary payer with Medicare acting as secondary payer. As Medicare was primary payer in all other claims, not surprisingly, costs soared.

To remedy this matter, Congress set out to affirmatively alter the status quo and reduce costs with the enactment of the 1980 Medicare Secondary Payer Act (“MSP”). In a series of amendments, codified at 42 U.S.C. §1395, Congress set

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[1] www.socialsecurity.gov

[2] http://questions.medicare.gov/cgi-bin/medicare.cfg/php/enduser/std_adp.php?p_sid=OUPuHOqg&p_lva=&p_faqid=10&p_created=993576517&p_sp=cF9zcmNoPSZwX2dyaWRzb3J0PSZwX3Jvd19jbnQ9MjI4JnBfcGFnZT0x&p_li=

[3] http://www.ssa.gov/pubs/10043.html

forth that Medicare payments "*under this subchapter may not be made, except as provided in subparagraph (B), with respect to any item or service to the extent that…(ii) payment has been made or can reasonably be made under a workmen's compensation law or plan of the United States or a State or under an automobile or liability insurance policy or plan (including a self-insurance plan) or under no fault insurance."*[4] The Act cohesively pulled workers' compensation, liability and no-fault together and added substance to Medicare's recovery efforts by setting forth specific rights of recovery afforded to Medicare.

Post 1980, Medicare, as managed by the Centers for Medicare and Medicaid Services ("CMS"), required that it be designated a secondary payer behind any liable workers' compensation, no-fault or liability plan. What did this really mean? In practical terms it meant that Medicare would no longer make a payment where a private healthcare plan or insurance policy was reasonably expected to make a payment. In the alternative, if Medicare did step in and make such a payment on an injured party's behalf where such treatment should have been covered by the primary insurance plan (the primary payer), the Medicare payment would be deemed conditional, and Medicare would automatically be entitled under 42 U.S.C. 1395y(b) to reimbursement. Hence, this was the inception of the idea of conditional payments, or as we sometimes refer to them, "Medicare liens" [5]

If Medicare makes a conditional payment on behalf of an injured party, as noted, Medicare/CMS has a statutory right of recovery. Medicare is in fact subrogated to the parties to the settlement and may join or intervene "in any action that related to the events that gave rise to the need for services for which Medicare paid."[6] It is this broad right of intervention that makes it crucial that at settlement Medicare/CMS is properly reimbursed for any liability, workers' compensation or no-fault conditional payments made on behalf of an injured party. If not, CMS may initiate recovery "as soon as it learns that payment has been made or could be made under workers' compensation, any liability or no-fault insurance, or an employer group health plan."[7] Medicare may seek reimbursement from the primary payers responsible for payment, or from any parties that receive primary payments (beneficiary, provider, supplier, physician, attorney, State agency, or private insurer receiving primary payment). If a beneficiary or other party receives a primary payment, they are to reimburse Medicare within 60 days. If CMS has to take legal action to recover from the primary payer, *double* damages may be sought.[8]

While the broad statutory rights afforded Medicare/CMS seem clear-cut, the reality is that the MSP arena has been marred with confusion since its 1980 inception. CMS has not uniformly upheld and enforced the MSP provisions, and

[4] 42U.S.C. §1395y(b)(2)(A)(ii)

[5] 42U.S.C. §1395y(b)(2)(B)

[6] 42 CFR §411.26 Subrogation and right to intervene

[7] 42 CFR §411.24 Recovery of conditional payments

[8] 42 CFR §411.24(b),(c),(e),(g),(h)

likely as a result of CMS‟ lack of oversight, practitioners, payers, and injured parties have to a large degree also ignored certain aspects of the Act.

Medicare costs are continuing to rise. Currently there are approximately 44 million Medicare beneficiaries in the United States.[9] This number is expected to swell significantly with the baby boomer generation reaching the age of Medicare entitlement (65). As such, new efforts are being made by Medicare/CMS to enforce the MSP.

Here we will examine three main ways in which CMS aims to protect Medicare‟s interests and enforce the MSP. These three areas do not necessarily encompass all aspects of the MSP, but will focus in on the major aspects of claim resolution and significant points that should be addressed in resolving claims. In doing so, we will look at three key ways in which practitioners in the field can protect Medicare‟s interests and in doing so protect the interests of their clients.

I. CONDITIONAL PAYMENTS/LIENS

Our first area of focus is conditional payments, or more specifically, what Medicare/CMS has paid on behalf of an injured party pre-settlement/judgment. The reason this area is particularly crucial is that the Act and Medicare leave little room for debate. It is clear from the MSP that CMS has the right to recover pre-settlement conditional payments from any party to the suit. Since 1980, while it has been unclear as to what rights exactly CMS intends to assert as to future medical recovery; as discussed *infra*, the one constant has been that CMS have exercised its right of recovery for pre-settlement conditional payments.

These conditional payments result in what we know as the “Medicare lien”, though this is technically incorrect as Medicare never really asserts a “lien”, but exercises a right or recovery or intervention. CMS has sought reimbursement for such payments made on behalf of beneficiaries, pre-settlement, for the past several decades. CMS can and will ensure that these funds are recovered. It is therefore critical that at the time of settlement any and all outstanding conditional payments are satisfied.

One question frequently posed is “Who does CMS seek reimbursement from?” As discussed, under the statute, reimbursement may be sought from any party to the claim.[10] This means that CMS has the option to recover against the beneficiary, his or her attorney, or the primary payer. Of note, however, CMS has repeatedly stated that their standard practice is to “recover against the settlement.” In other words, CMS follows the money. According to CMS‟ Barbara Wright, “our standard practice is to do recovery claims against a beneficiary‟s settlement, judgment or award. We don‟t, you know, in a liability situation we don‟t typically go back to the insurer. We have some reasons to do so. But that‟s

[9] Centers for Medicare & Medicaid Services, Office of Public Affairs, January 2008.

[10] 42 U.S.C. §1395y(b)(2)(iii); 42 CFR §411.24(e),(g)

not our standard practice".[11] She proceeded to note, "When there's a situation where there's been ongoing responsibility particularly if there is no settlement those are the instances where we may be pursuing recovery directly from the insurer." She reiterated this in January 2009, "For the most part, what CMS does is that if there's a settlement, judgment or award, it (CMS) pursues recovery directly against that settlement, judgment or award whether it's ongoing benefits under, for example, workers compensation, then there may be a demand against the workers' compensation entity." She emphasized, "We intend to continue to, particularly for liability and with very few exceptions, we do a recovery claim against a beneficiary settlement judgment or award once there is a settlement judgment or award."[12] She reiterated this again in February 2009, again noting there are instances where CMS may proceed against a primary payer, but that the routine procedure is to seek reimbursement against the beneficiary and their settlement.[13]

This is key information for claimants/plaintiffs and their attorneys. Essentially, CMS, despite its far-reaching grasp, has opted to pursue the settlement, thus pursue funds disbursed to the beneficiary and his or her attorney. Whether for ease of recovery, or the belief that the primary payer has already made a payment for any such medicals via settlement, CMS traditionally has opted to pursue the settlement. Cognizant of this, all parties to the settlement should ensure that any conditional payments have been satisfied at claim resolution. Further, it is imperative to remember that pursuing the settlement may include pursuing plaintiff's counsel if they fail to protect Medicare's right of reimbursement.

Such pursuit of recovery was evident in one notable recent decision. The U.S. District Court in US. v. Harris, found an attorney representing a Medicare beneficiary liable for failure to consider and protect Medicare's interests in the pre-settlement conditional payment realm.[14] In Harris, the beneficiary, Mr. Ritchea, fell off a ladder that he purchased at a local store. He treated under Medicare prior to seeking counsel. He then hired Mr. Harris, brought suit, and resolved his claim for $25,000. Mr. Harris forwarded some of the details of the settlement to Medicare, but the parties failed to reimburse the conditional payments owed Medicare. Medicare therefore sought reimbursement and filed a complaint against Mr. Harris. Mr. Harris moved to dismiss, but the court rejected his motion.

The court found that, under 42 U.S.C. §1395y(b)(2)(B)(iii), Medicare has a right of recovery against "any or all entities that are or were responsible…to make payment with respect to the same item or service…under a primary plan." "Alternatively, the government „may recover under this clause from *any entity that*

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[11] CMS Teleconference, October 29, 2008, p.52

[12] CMS Teleconference, January 28, 2009, p.22, p.41
http://www.cms.hhs.gov/MandatoryInsRep/Downloads/Jan28Transcript.pdf

[13] CMS Teleconference, February 25, 2009 p.22
http://www.cms.hhs.gov/MandatoryInsRep/Downloads/Feb252009NGHPTranscript.pdf

[14] United States of America v. Paul J. Harris, 2009 WL 891931 (N.D.W.V. Mar.26,2009)

has received payment from a primary plan or from the proceeds of a primary plan's payment to any entity".[15] The court pointed specifically to the fact that included in this group that receives payment from the primary plan may be an attorney. In this situation, Mr. Harris received payment from the primary plan, failed to satisfy the conditional payments, and CMS, as they promised they would, proceeded against the settlement. CMS pursued the settlement and in doing so sought to recover directly from Mr. Harris. The court held attorney Harris "individually liable for reimbursing Medicare in this case because the government can recover 'from *any* entity that has received payment from a primary plan,' including an attorney."[16] As a result, Mr. Harris was left owing Medicare the reimbursement, with mounting interest.

While *Harris* left plaintiffs' attorneys fearing the repercussions of Medicare, more recently we have seen that while it may be "standard practice" for Medicare to pursue the claim, and follow the settlement funds, this is not necessarily a guarantee. Many have by now heard of the recent decision in U.S. v. Stricker, or what is otherwise known as the "Abernathy" settlement.[17] Stricker came out of a very large class action in Alabama with a settlement in excess of $300 million. The settlement involved some 900 alleged Medicare beneficiaries. The problem alleged is that when the settlement occurred, back in 2003, the conditional payments pertaining to these 900 beneficiaries were apparently not reimbursed to Medicare. In 2009, years later, Medicare sought reimbursement, plus interest, against all parties to the suit – plaintiffs' attorneys, defendant carriers, and their insurers. From the defendants, Medicare, via the U.S. Department of Justice, alleged entitlement to *double* damages.

In September 2010, a decision was issued in Stricker with the court granting defendants' motion to dismiss.[18] The court determined that the DOJ's recovery was barred by the statute of limitations. The parties agreed that the relevant statute of limitations for the Government's claims, if any, was the Federal Claims Collections Act ("FCCA"). The issue became whether the FCAA's three-year or six-year statute of limitations applied.

The court determined that, in relation to the corporate defendants, no express contract existed, but rather the defendants' reimbursement duties to the Government were based solely in the Medicare Secondary Payer statute. Absent a contract, the claim was based solely in tort; thus, a three-year FCCA statute of limitations applied.

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[15] Id.

[16] Id. See, 42CFR §411.24(g)

[17] U.S. v. Stricker, et. al., CV-09-PT-2423-E. December 1, 2009, U.S. Dist. Ct., Northern District of Alabama.

[18] U.S. v. Stricker, et. al. CV-09-BE-2423-E, September 30, 2010, U.S. Dist. Ct., Northern District of Alabama.

The plaintiffs‟ attorneys on the other hand acted as agents of the Medicare beneficiaries pursuant to a contractual relationship. Their obligation to pay their clients funds was based in contract. As such, the court determined that any obligation for reimbursement arose from an express contractual relationship, not from tortious conduct. Therefore, the court imposed a six-year statute of limitations.

Despite the two separate statutes, the court found that the Government had not satisfied filing the claim in time to meet either. The defendants‟ responsibility to reimburse Medicare arose no later than court approval of the settlement agreement which was signed on September 9, 2003 and approved the following day. A payment conditioned upon release triggers a responsibility to reimburse Medicare under the MSPA.[19] Stricker was not filed until December 1, 2009.

The attorney defendants received payment from a "primary payer" at the latest on October 29, 2003, when the court ordered $275 million transferred into the attorneys‟ escrow account. As such, given every effort to extend to the Government ample opportunity to seek reimbursement, utilizing October 29, 2003, the statute has still run against the Government given their filing December 1, 2009 and the six-year statute.

Though the DOJ on behalf of Medicare did not prevail in Stricker, the action itself should serve as a warning to parties resolving claims involving Medicare beneficiaries. The court barred the action strictly due to the extensive delay of time in seeking reimbursement. The action does, however, evidence Medicare‟s continuing evolution in what could be construed as more aggressive recovery efforts. Whereas previously Medicare had indicated recovery efforts typically geared at the settlement proceeds, this shows a wide net cast at all parties to the claim. The judge in Stricker, while denying recovery based on the statute of limitations, noted the ability of the Government to seek recovery from any entity qualifying as a primary payer, or from any entity receiving primary payments.

Clearly, now more than ever, when negotiating the settlement it is very important to base settlement on the resolution of all issues, including the resolution of any and all Medicare conditional payments. This issue should be a focus early on in the negotiation as receiving an interim conditional payment letter and final demand notice can take some time. You will also want to allow time to potentially reduce the lien based on procurement costs or serious financial hardship.[20] Information regarding obtaining a conditional payment letter can be obtained through CMS‟ Coordination of Benefits Contractor (COBC) and the Medicare Secondary Payer Recovery Contractor (MSPRC). The two units work in tandem to ensure pre-settlement conditional payments are secured. The first step is

[19] Id, p. 20-21.

[20] 42CFR §411.37; See, http://www.msprc.info/index.cfm?content=includes/faq/faq

contacting the COBC and follow-up will be handled through the MSPRC, the unit responsible for facilitating recovery efforts.[21]

II. MEDICARE SET-ASIDES/FUTURE MEDICALS

A. Creation of the MSA

While it is evident that the MSP clearly encompasses payments made prior to settlement or judgment, the water has been far murkier in the realm of payments made on behalf of Medicare beneficiaries post-settlement. It seems clear that certainly since the 1980 amendments, general liability, no-fault and workers" compensation claims have all fallen under the scope of the MSP. Further, CMS has indicated that their right of recovery extends to future payments.[22] However, debate still rages as regulation remains at issue.

Despite Medicare"s assertion of control over recovery, for quite some time CMS lacked any real system of regulating compliance, specifically in the realm of post-settlement medical payments. Finally, in 2001, CMS prescribed regulations for reviewing Medicare Set-Aside allocations ("MSAs") for workers" compensation claims (July 23, 2001 CMS "Patel Memorandum").[23] Such plans would allow funds to be set-aside at settlement or judgment for the future needs of Medicare beneficiaries, ensuring that Medicare would *remain* the secondary payer in these workers" compensation claims. With this memorandum it became clear that CMS was taking interest not only in medical payments made prior to settlement, but also in post-settlement future medical payments.

The Patel Memorandum restructured settlements in the workers" compensation arena. It set forth guidelines for when and how funds should be set-aside to ensure that Medicare would remain secondary payer in workers" compensation settlements. Today these guidelines remain in place, with current workload review thresholds set by Medicare for reviewing workers" compensation MSAs. According to CMS, a workers" compensation MSA may be submitted to CMS for review in the following situations:

- The claimant is currently a Medicare beneficiary and the total settlement amount is greater than $25,000; or

- The claimant has a "reasonable expectation" of Medicare enrollment within 30 months of the settlement date and the anticipated total settlement amount for future medical expenses and disability/lost wages over the life or duration of the settlement agreement is expected to be greater than $25,000.

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[21] See, COBC:1-800-999-1118; www.cms.hhs.gov/MSPRecovClaimPro/; www.msprc.info

[22] April 22, 2003 Memorandum, Medicare Secondary Payer – Workers" Compensation Frequently Asked Questions, Q. 13.

[23] "Patel Memorandum", July 23, 2001, CMS. http://www.cms.hhs.gov/WorkersCompAgencyServices/Downloads/72301Memo.pdf

CMS does not review workers' compensation proposals under $25,000 due simply to their workload. However, Medicare consistently notes that this is not a "safe harbor" threshold and that Medicare beneficiaries must consider their interests in all cases and ensure Medicare is secondary to workers' compensation. They note the recommended method of protecting Medicare is via the MSA, regardless of whether or not the MSA is reviewed.[24]

Since 2001, practitioners in the workers' compensation arena have routinely considered Medicare's interests as to past and future benefits, and have done so with relative success. Whether obtaining a MSA and submitting for approval, or obtaining a MSA and including the Set-Aside in settlement without CMS' approval, MSAs have become commonplace on the workers' compensation landscape. Attorneys in the field realize that failure to follow the guidelines may result in a loss of benefits or a reimbursement action.

Since the Patel Memorandum, however, CMS has not issued any sort of formal guidelines as to review of liability MSAs. Thus, it is absolutely true, as many critics point out, that MSAs are still not a requirement in the liability field. However, the same MSP statute that allowed CMS to prescribe guidelines for reviewing workers' compensation MSAs clearly applies to liability as well. Thus, it stands to reason that Medicare would be able to utilize the MSP to seek recovery in the liability arena just as easily as they might in the workers' compensation field. MSAs are a valid method of protecting against this occurrence and are an accepted way of protecting Medicare's interests as secondary payer under the MSP. As noted, they are CMS' preferred method.[25]

While CMS has not yet issued guidelines for liability submissions, their actions and words indicate that they do indeed intend to move toward greater acknowledgement of liability MSAs. First, we know that the CMS Regional Offices have been accepting and reviewing liability MSAs, on a discretionary review basis, for almost three years now, with reviews as early as 2007. It is true that some Regional Offices typically opt not to review liability Set-Asides. However, those that choose not to review formal submissions routinely note that it is due to "resource constraints", and always note that their lack of review does not provide a "safe harbor" for settling entities. The Regional Offices are quick to note that the parties should still ensure that they are protecting Medicare's interests, and that all parties must ensure that Medicare is secondary to any other entity responsible for payment of medical.

Second, CMS at the national level seems to support the broad reach of the MSP. During a recent teleconference, CMS' Barbara Wright was asked to discuss liability MSAs. Ms. Wright declined to speak in detail as the conference call focused on Section 111 MMSEA reporting. However, she opined that the

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[24] CMS 7/11/05 Memo Q1 and Q2; See, also, CMS 4/21/03 Memo Q2; http://www.cms.hhs.gov/WorkersCompAgencyServices/04_wcsetaside.asp#TopOfPage

[25] http://www.cms.hhs.gov/WorkersCompAgencyServices/04_wcsetaside.asp#TopOfPage

underlying MSP statutory obligation for liability is the same as it is for workers' compensation. She noted that if "you wish to pursue CMS approval of a liability set aside, your avenue (of) approach is through the applicable regional office." She continued noting, "If they decline to review it that doesn't provide any type of safe harbor. And the regions are making their determinations based on their workload. If their workload permits and they believe there are significant dollars at issue, regional offices are reviewing proposed set aside amounts but certainly not typically at the same small level that it's being reviewed through our Workers' Compensation review contractor or Worker's Comp set asides." She noted the same legal obligations exist for liability under the MSP as exist for workers' compensation.[26] Thus, review or no review, we cannot simply opt to neglect the MSP in the liability sector if we want to protect ourselves and our clients from possible loss of benefits or recovery actions. If neglected, Medicare may disregard the settlement in its entirety, require that the entire settlement be utilized for future treatment and expenses, or pursue an action for reimbursement against any of the parties to the settlement, as set forth under the MSP.

The Atlas Settlement Group, Inc. position is that as Medicare/CMS continues to accept, review and approve liability Set-Asides on a discretionary basis, and both the Regional and National levels acknowledge the same, this method of protecting Medicare's interests affords the settling parties unparalleled protection against future potential recovery actions. Should the Regional Office choose not to review the MSA proposal, the Set-Aside formally made a part of settlement shows a clear attempt to protect Medicare's interests under the MSP. As no set guidelines for review are currently in place it is imperative that liability claims are looked at on a case by case basis, factoring in settlement value, future medicals, and claim specifics. Atlas Settlement Group, Inc. offers specific submission suggestions which we share in our newsletter supplement and which we can discuss on a case specific basis. Please contact our offices at 404-926-4160 for assistance.

Please note, that in order to complete a Medicare Set-Aside, we request the following items: a Medicare Set-Aside Referral Form requesting basic, essential claim details and accepted and denied conditions; the past two years of medical treatment, as this is the same medical requested by the reviewing CMS office; a detailed prescription history from the same period of time showing medication, dosage, and frequency of use (where available); and a claims payment history (where available). This provides a good analysis of both the claim and what can be anticipated for future Medicare-covered medical treatment.

When preparing a MSA, whether for workers' compensation or liability, the goal is to ensure that proper funds are provided to the injured party to pay for medicals that otherwise would be covered by Medicare, while also remaining cognizant of the settlement, the protection of the parties, and their interests under the MSP. The providing allocator looks at the claim with the purpose of identifying that

[26] CMS Teleconference, September 30, 2009, p.25-26. http://www.cms.hhs.gov/MandatoryInsRep/Downloads/Sep30NGHPTrancsript.pdf

which is reasonable and necessary for diagnosis and treatment. Excluded are any pre-existing conditions or any injuries or conditions unrelated to the claim. The provider will use past medical history and ongoing conditions to obtain a "rated age" for the claimant/plaintiff which is used to reduce the life expectancy of the injured party. The rated age is a "projected age" based on the injured individual's medical conditions, family history, and health habits and is determined by various life insurance companies' medical underwriters. The rated age impacts the MSA in that it may reduce the overall cost of services and medications required to be placed in the MSA, and thus the overall value of the MSA toward settlement. If an injured party is chronologically 66, but receives a rated age of 75, the MSA allocator will price out treatment and medications for the life expectancy of a 75 year old, rather than a 66 year old. This may be beneficial in that lesser funds will be required to be set-aside for future medical services prior to Medicare taking over as primary payer.

The allocator then prices only for Medicare covered medical services for the remaining life expectancy. The MSA is reduced by any costs that Medicare would not normally cover – chiropractic care, home health care, nursing home care, vitamins, etc.

B. Funding the MSA and Administration of the MSA

At settlement, MSA funds are set-aside in an interest bearing account, separate from checking and savings. Per CMS, the MSA account can be self-administered or professionally administered and a yearly accounting must be made to CMS showing MSA funds have only been used to pay for Medicare covered medical services and prescription drugs related to the claim injury.[27] The MSA may be funded in lump sum, or annuitized. Structuring the MSA via an annuity may significantly reduce the initial purchase cost of the MSA to the parties. If funded in a lump sum, CMS becomes primary payer after the entire MSA account is properly exhausted. If funded via annuity, CMS becomes primary payer in any year that the fund is exhausted and CMS remains primary payer until the next annuity payment is received.[28] There are a host of options to explore to assist in claim resolution.

Under CMS guidelines MSAs may be self-administered or professionally administered. If the injured party has been declared incompetent or has an appointed guardian/conservator, or a representative payee for Social Security purposes, the parties must include that information in the MSA proposal to CMS.[29] Self-administration is not acceptable for an incompetent party and assistance must be afforded.

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[27] http://www.cms.hhs.gov/WorkersCompAgencyServices/07_administeringwcmsas.asp#TopOfPage; CMS 4/21/2003 Memo Q8.

[28] http://www.cms.hhs.gov/WorkersCompAgencyServices/08_setasiderelatedtopics.asp#TopOfPage

[29] October 15, 2004 Memorandum, Q.2, CMS.

Assuming that an individual is competent, able to direct and handle their own finances and post-claim medical management, self-administration is a valid option as long as permitted under state law. The party choosing to self-administer must adhere to the administration rules and understand all obligations. The injured party, must, amongst other obligations:

- Place funds in an interest bearing account where funds can be separately accounted for (apart from checking and savings).

- Understand that the funds may only be used to cover future medical expenses for the treatment of the claim related injury, which would normally be covered by Medicare.

- Familiarize themselves with what Medicare will and will not cover. What is Medicare-covered changes over time. For instance, prior to 2006 prescription drugs were not covered and now they constitute a significant portion of MSA costs. Coverage changes are not necessarily retroactive and an existing plan may not always be utilized to pay for the newly covered expense. Coverage questions should be addressed with Medicare at 1-800-MEDICARE.

- Administer the MSA pursuant to the way the MSA allocation was written and presented to CMS. If approved based on state fee scheduled then the fee schedule should be used for administration purposes. If usual and customary charges were the basis for the proposal, the injured party should follow this plan. A medical provider may not be held to a fee schedule post –settlement and as a practical matter CMS will not intervene. Plaintiffs must make efforts to follow billing procedures.

- Ensure charges are paid from the MSA and not billed to Medicare.

- Report annually to Medicare (and keep accurate records of payments made from the account) so that a Medicare lead contractor may monitor expenditures and so that Medicare will begin paying for covered services at exhaustion of the account.

- Understand primary payer obligations in structured MSAs. If the MSA is funded with a yearly annuity, Medicare becomes primary payer in any year that the account becomes temporarily exhausted and until the next annuity payment is provided. If funded in lump-sum, then Medicare is primary payer at exhaustion of the account.

This is not an exhaustive list of the duties or issues involved in self-administration of a MSA, but provides the basic fundamentals. If this proves overwhelming for a plaintiff, professional administration is available. Professional administration services will:

- Establish the interest bearing account.

- Determine which bills are Medicare eligible and related solely to the claim injury.

- Provide an annual accounting to CMS and to the client (injured party).

- Administer the account based on the fee schedule, usual and customary, etc. and handle the same with the medical providers.

- Keep current with CMS guidelines as to what services should be covered, how items should be accounted for, and any new regulations or requirements.

- Handle any tax accounting issues regarding interest payments.

- In the case of a structured MSA, the professional administration company will handle the transition between the MSA annuity and Medicare as primary payer, should it occur, in any one year.

However the MSA is prepared, structured and funded, it is key to see that Medicare/CMS clearly seems to view the MSP as applying to payments on behalf of beneficiaries both pre and post settlement. As such, it is critical that during the claim resolution process we ensure we are protecting Medicare"s interests as secondary payer for future benefits as well. Until now, however, outside of the workers" compensation scope this has largely not been the case. As we will see, CMS seems to be working on a way to resolve this.

III. SECTION 111 MMSEA

As parties to settlement continued to neglect Medicare"s interests both as to conditional payments made prior to settlement and accounting for future medicals post-settlement, the government sought to close the loopholes allowing settling parties to ignore their interests. The most sweeping initiative was enactment of the Medicare, Medicaid, and SCHIP Extension Act of 2007 ("MMSEA"), and more specifically, Section 111 of the MMSEA.[30] Section 111, which statutorily went into effect July 1, 2009, though CMS has pushed back several pertinent dates, prescribes that Responsible Reporting Entities ("RREs"), primarily workers" compensation, no-fault, and liability carriers and self-insurers, or "applicable plans", report any settlement, judgment, award, or payment pertaining to a Medicare eligible claimant or plaintiff. Of note, the RRE will be reporting applicable settlements, judgments, awards, and payments, <u>not</u> whether or not a MSA was utilized.

Section 111 reporting, which is now scheduled to formally commence in early 2011, will allow Medicare through the CMS Coordination of Benefits Contractor ("COBC") to retain a working database of all claims pertaining to Medicare beneficiaries. The purpose is "to enable CMS to pay appropriately for Medicare

[30] 42 U.S.C. §1395y(b)(8)

covered items and services furnished to Medicare beneficiaries by determining primary versus secondary payer responsibility."[31] Claims will be reported regardless of an admission or determination of liability, and will assist Medicare/CMS and the COBC in ensuring compliance under the Medicare Secondary Payer Act. If claims are not reported timely to the COBC the RRE may face a $1,000 per claim, per day penalty.[32]

With carriers and self-insurers facing extreme penalties for failure to report, the RREs have every incentive to disclose the details of the settlement to the COBC via Section 111 reporting. While CMS has made it clear that Section 111 reporting is not meant to alter the Medicare recovery process or change MSA requirements it only stands to reason that CMS will have the ability via the new database to determine if its interests under the MSP have been accounted for in the settlement.[33] Does this mean you must now get a MSA in every case? No. Or unreasonably fear new CMS recovery efforts? No. What it *should* mean however is that all of us involved in a settlement should perhaps be paying a bit more attention to whether or not we are protecting Medicare's interests at settlement. Section 111 simply provides a reminder to the parties to keep Medicare's interests in mind when resolving claims and looking at past and future Medicare covered medical benefits. MSAs are a reliable way of doing so.

From a technical standpoint most of the Section 111 MMSEA reporting obligations are the responsibilities of the "applicable plans", the RREs, primarily the carriers and self-insurers. While ultimate responsibility lies with the RRE, some groups are hiring agents or their TPAs to perform reporting functions for them. Reporting is performed quarterly, with the initial report, as of the date of this publishing, scheduled for first quarter 2011. Reporting, however, may cover claims prior to this time.[34] There are well over 100 possible "fields" of information pertaining to a claim that may potentially be required to be reported, and a claimant/plaintiff"s Social Security Number (SSN) or Medicare Health Insurance Claim Number (HICN) is required for reporting.[35] Thus, do not be surprised if you now find

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[31] Version 2.0 CMS User Guide, July 31, 2009, p. 16
www.cms.hhs.gov/MandatoryInsRep/Downloads/NGHPUserGuide2ndRev082009.pdf

[32] 42 U.S.C. §1395y(8)(E)(i)

[33] CMS Teleconference, January 28, 2009, p. 22.
http://www.cms.hhs.gov/MandatoryInsRep/Downloads/Jan28Transcript.pdf

[34] Records with claim information are to be transmitted for claims that are addressed/resolved (or partially addressed/resolved) through a TPOC settlement, judgment, award or other payment on or after October 1, 2010. RREs must also report claim information where ongoing responsibility for medical services (ORM) related to a claim was assumed by the RRE on or after January 1, 2010. Version 3.1 CMS User Guide, July 12, 2010, p.6. Ongoing responsibility for medicals (ORM) refers to the RRE"s responsibility to pay, on an ongoing basis, for the injured party"s (the Medicare beneficiary"s) medicals associated with a claim. This typically only applies to no-fault and workers" compensation claims. A TPOC generally reflects a "one-time" or "lump sum" payment of a settlement, judgment, award, or other payment intended to resolve/partially resolve a claim. p. 9.
http://www.cms.gov/MandatoryInsRep/Downloads/NGHPUserGuideV3.1.pdf

[35] Version 3.1 CMS User Guide. Appendix A
http://www.cms.gov/MandatoryInsRep/Downloads/NGHPUserGuideV3.1.pdf

disclosure of a SSN a condition of settlement. This is not merely an arbitrary request, but is now a federally mandated requirement.[36]

To ease all parties into Section 111 reporting, CMS has issued interim reporting thresholds. For most liability claims with a one-time settlement, with a TPOC (Total Payment Obligation to the Claimant) date of 1/1/10 through 12/31/11, if the TPOC is $5,000.00 or less, the claim will be exempt and does not need to be reported.[37] The thresholds then decrease over the next several years until all claims are reportable.

Clearly the federal government is attempting to recoup a portion of the significant losses incurred via the Medicare system. The MSP offered a method in which to recover such funds, but to date there has been little enforcement backing the Act. It appears that CMS may finally, via this massive reporting undertaking, be serious about moving toward a comprehensive implementation of the Statute. It is unclear at this time how Section 111 will impact recovery. However, it seems clear that CMS is moving forward with the purpose of "determining primary versus secondary payer responsibility". Thus it is imperative that we, as practitioners, ensure on behalf of our clients that we protect their interests in this area, and account for any necessary benefits, past or future.

[36] http://www.cms.gov/MandatoryInsRep/Downloads/NGHPUserGuideV3.1.pdf
http://www.cms.hhs.gov/MandatoryInsRep/Downloads/NGHHICNSSNNGHPForm.pdf

[37] Version 3.1 CMS User Guide.
http://www.cms.gov/MandatoryInsRep/Downloads/NGHPUserGuideV3.1.pdf

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Atlas Settlement Group, Inc. May 2005 - Present	Founding Principal and President of Atlas Settlement Group, Inc. Expertise and practice includes providing annuity pricing and lifetime underwriting of injured persons in excess casualty, aviation, medical malpractice, general liability, workers‟ compensation and environmental claims in accordance to Section 104(a)(2) and 130(c) of the Internal Revenue Code of 1986. Successful in the placement of over 10,000 structured settlement annuities including the largest settlement annuity utilized to fund future environmental liabilities.
Ringler Associates Georgia, Inc. 1996-April 2005	Principal and President of Ringler Associates Georgia, Inc., a member of Ringler Associates. Presided over largest office of Ringler Associates, placing in excess of $100,000,000.00 in annuity sales annually.
Wells & Associates, Inc. 1991-1996	Regional Vice President for Southeastern United States annuity sales for a national structured settlement firm. Responsible for sales professionals within the southeast.
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BAILING OUT MEDICARE: DEFENSE COUNSEL'S MEDICARE REPORTING AND SET-ASIDE OBLIGATIONS

Presented by
Life, Health and Disability, Trial Tactics, Practice and Procedures, and Healthcare Practice Sections

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BAILING OUT MEDICARE: DEFENSE COUNSEL'S MEDICARE REPORTING AND SET-ASIDE OBLIGATIONS

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and
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I. MEDICARE'S ROLE AS A SECONDARY PAYER

Medicare has long been a "secondary payer;" that is to say, only liable to pay medical bills that some other person or entity is not responsible for. See 42 U.S.C. § 1395y(b)(2) (the Medicare Secondary Payer Act) and 42 CFR Part 411. To that end, the Federal Government has, since at least 1980, owned a statutory subrogation right to any proceeds due to a Medicare eligible plaintiff recovering through settlement, verdict, or administrative hearing. The public policy underlying Medicare's entitlement to avoid paying primary benefits, or alternatively to recover tort settlements and judgments, is explicit. Medicare is prohibited from paying for items or services that are otherwise reimbursable by Medicare if payment has been made or can reasonably be expected to be made by another source with primary payer responsibility. 42 U.S.C. § 1395y(b)(2)(A)(ii).

But Medicare can make payment for items or services conditionally ("conditional payment") if the primary plan has not or cannot reasonably be expected to make payment promptly. 42 CFR Part 411.52. For purposes of this exception to the prohibition of payment, "promptly" means within 120 days. Payments made conditionally require that Medicare be reimbursed under its subrogation right. 42 CFR Part 411.26.

Lawyers who practice workers' compensation have been dealing with the consequences of the Medicare statutory right of subrogation for more than twenty-five years. But Medicare, in the former guise of the Health Care Financing Administration ("HCFA"), now embodied in the Centers for Medicare and Medicaid Services ("CMS"), has until recently been extremely lax in its pursuit of reimbursement in claims not involving workers' compensation. This laxity could be viewed as a result of the fact that there was no source of information comprehensive enough to permit enforcement against the multitude of settlements every year, or that there were no penalties associated with the failure to report settlements in which

Medicare owned an interest, or that the Medicare Fund was viewed as adequate to absorb the losses.

Times have changed.

II. NOTICE OF CLAIM AND RECOVERY OF PAYMENTS MADE BY MEDICARE

The Medicare Secondary Payer Statute provides a structure by which CMS recovers its conditional payments from nearly any party interested in the claim, judgment, or settlement. Notice of the claim needs to be given to CMS's Coordination of Benefits Contractor ("COBC") pursuant to 42 CFR Part 411.25(a). Consent of the claimant Medicare beneficiary to this notice is not necessary.

Importantly, providing notice of the existence of the claim is not necessary if there is no liability and no expectation of making a payment. And this notice requirement is separate and apart from the reporting requirement under Section 111 discussed below.

A. Claimant is Primarily Responsible for Reimbursing Medicare

Medicare must be reimbursed for any Medicare-covered medical expenses within sixty days of the notice of payment obligation (that is settlement or satisfaction of judgment) by plaintiff and plaintiff's counsel. 42 U.S.C. § 1395y(b)(2); 42 CFR Part 411.24; *Cox v. Shalala,* 112 F.3d 151 (4th Cir. 1997); *Zinman v. Shalala,* 67 F.3d 841 (9th Cir.1995); *Waters v. Farmers Texas County Mut. Ins. Co.,* 9 F.3d 397 (5th Cir.1993); *United States v. Sosnowski*, 822 F.Supp. 570 (W.D. Wis. 1993).

B. The Government's Remedies are Against All Parties

Failure to comply with the notice and payment provisions gives the government substantial rights against the parties to the payment. The beneficiary may be collected from directly, or may have offsets taken against monies the government otherwise owes. The beneficiary may lose coverage under Medicare. The United States can bring an action against any or all persons or entities responsible to make payment for items or services paid by Medicare and may obtain double damages. 42 U.S.C. § 1395y(b)(2)(B). An action may be brought against any entity or person that has received payment from a primary plan, or from the proceeds of a primary plan's payments to any person or entity. Thus the

claimant, a medical provider or supplier, an attorney, a governmental agency, and an insurer are all at risk if Medicare's recovery of conditional or future payments is not protected. Additionally, the government could resort to the use of the False Claims Act, 31 U.S.C. §3729(a)(1)(G), to seek recovery under the provisions of that statute.

In *U.S. v. Harris*, 2009 U.S. Dist. LEXIS 23956, 2009 WL 891931 (N.D.W.V. 2009), summary judgment was entered for the government, finding plaintiff's attorney liable to Medicare for having distributed proceeds of settlement to plaintiff and ignoring Medicare's right to recover. There has been at least one attempt to pursue a class action on behalf of plaintiffs opposed to the collection practices of CMS. *Haro v. Sebelius,* No. CV 09-134 TUC DCB , 2009 WL 4497456 (D. Ariz.).

The regulations implementing the Medicare Secondary Payer Act make clear the extent to which insurers and defendants are at risk in the event the beneficiary fails to make CMS whole. If the Medicare beneficiary fails to reimburse CMS within 60 days of receipt of payment from a third party as required by 42 CFR Part 411.24(h), the government will surely look to the defendant's insurer. The relevant portion of 42 CFR Part 411.24 reads:

> (i) Special rules.
>
> (1) In the case of liability insurance settlements and disputed claims under employer group health plans, workers' compensation insurance or plan, and no-fault insurance, the following rule applies: If Medicare is not reimbursed as required by paragraph (h) of this section, the primary payer must reimburse Medicare even though it has already reimbursed the beneficiary or other party.
>
> (2) The provisions of paragraph (i)(1) of this section also apply if a primary payer makes its payment to an entity other than Medicare when it is, or should be, aware that Medicare has made a conditional primary payment.

Other consequences to the failure to comply include "private attorney general" actions that may result from Medicare's refusal of future benefits

to the claimant. The Medicare Secondary Payer Act provides for a private right of action. 42 U.S.C. § 1395(b)(3)(A).

C. Applicable Statutes of Limitations on CMS Claims

The statute of limitations for claims by the government under the Medicare Secondary Payer Act is either three years for tort claims, or six years for contract claims. 42 U.S.C. § 1395y(b)2)(B0(vi) provides for a three year statute of limitations, as does 28 U.S.C. § 2415(b) governing actions by the government sounding in tort. But the government has argued that the limitation is six years from either the date of payment or the date Medicare learns of the payment under 28 U.S.C. § 2415(a), which governs actions on express or implied contracts. See, e.g., *Manning v. Utilities Mutual Insurance Co.,* 254 F.3d 387, 397-98 (2nd Cir. 2001) (six year statute of limitations under False Claims Act applicable to private right of action); *U.S. v. Stricker*, CV-09-BE-2423-E, September 30, 2010 (N.D. Ala) (in the absence of a contract three year limitations period of Federal Claims Collection Act applicable; where a contract exists a six year limitations period governs).

III. SECTION 111 REPORTING

The Medicare, Medicaid, and SCHIP Extension Act of 2007 ("MMSEA") (P.L. 110-173) was signed into law with the specific aim of requiring insurance companies and self-insureds to report payments and settlements made to claimants in liability, no-fault, and workers' compensation cases who are also Medicare eligible. Section 111 of the MMSEA, 42 U.S.C. § 1395y(b)(8), is the specific instrumentality through which CMS obtains information to facilitate the recovery of its conditional payments though its statutory subrogation right. The goal of the reporting requirements is two-fold: first, to inform Medicare when other insurance is available so that conditional payments (payments made by Medicare conditioned upon reimbursement in the event of later recovery from a third party) can be avoided, and second, to inform Medicare when a settlement or payment has occurred so that conditional payments may be recovered.

There remains great uncertainty about how and when Section 111 reporting will occur and be required. CMS has pushed back the deadlines for compliance repeatedly, and the thresholds for reporting are subject to change. At the time of this writing, the most recent alert posted by CMS on its website was dated November 9, 2010. That alert:

- Extended the reporting date for general liability settlements to October 1, 2011

- Extended the dates relating to reporting threshold amounts of settlements, exempting from Section 111 reporting:

    - Settlements occurring in 2010, 2011, and 2012 for $5000 or less

    - Settlements occurring in 2013 for $2000 or less

    - Settlements occurring in 2014 for $600 or less.

Again, as of this writing there have been no changes to reporting requirements for workers' compensation payments, and settlements or payments that call for ongoing responsibility for medical payments (i.e. medical monitoring, long term care, life plan, or other "structured" types of payments) must be reported during the first quarter of 2011. Given the number of changes and extensions that have occurred since the passage of Section 111 it would be reasonable to assume that there will be, and to monitor the CMS website for, more changes and delays in the future.

The obligations imposed by the MMSEA upon Responsible Reporting Entities ("RRE") are significant. Burdensome does not begin to describe the obligations imposed by Section 111. By way of example, the "Liability Insurance (Including Self-Insurance), No-Fault Insurance, and Workers' Compensation User Guide, Version 3.1", July 12, 2010 (available in .pdf format at www.cms.gov/MandatoryInsRep) (hereafter "User Guide") is two hundred seventy one pages long. There are approximately 255 data fields of specific information that RREs must potentially report to the Coordination of Benefits Contractor ("COBC") under the MMSEA, depending upon the particular facts and type of claim at issue. Reporting is entirely electronic, and RREs are faced with hiring staff whose only job will be to timely report under the MMSEA.

A. What are Section 111 Reporting Entities (RRE)?

All group health plans, liability insurers, self-insurers, no-fault insurers, and workers' compensation insurers are RREs under the MMSEA. RREs were to have registered with CMS by September 30, 2009. After registration, an RRE may designate an agent for purposes of transmitting

the data to CMS, though the RRE remains liable for compliance. See Section 8 of the User Guide.

B. When Must Reporting Occur?

A Section 111 report by an RRE must occur whenever:

1. The RRE determines that a claimant, including one whose claim is unresolved, is entitled to Medicare benefits; and

2. A payment is made to or on behalf of the claimant.

The duty to determine if a claimant is entitled to Medicare falls squarely on the RRE. A claimant may become eligible for Medicare during the pendency of the claim, or within 30 months thereafter, and so careful attention should be paid to the particular circumstances of the plaintiff in the course of the claim or litigation.

Whether a claimant is eligible for Medicare is not simply a question of age. Persons under 65 years of age may be eligible if they are entitled to Social Security Disability Benefits for 24 months, or are receiving a disability pension from the Rail Road Retirement Board, or have Lou Gehrig's Disease (ALS), or are a child or widower of certain government employees and age 50 or more, or have end-stage Renal Disease.

Once an RRE determines that the claimant is, or shortly will be, entitled to Medicare, there are two circumstances under which "a payment" results in the need for reporting under Section 111. First, an RRE may take on the responsibility to pay for ongoing medical care of the claimant, or Ongoing Responsibility for Medicals ("ORM"). This is discussed in detail in Section 11.8 of the User Guide. The second situation is where the RRE makes a payment of a settlement, judgment or award intended in any way, whether fully or partially, to resolve a claim. These are called Total Payment Obligation to Claimant ("TOPC").

Importantly, TOPC does not necessarily occur when the payment is made. Instead, the duty to report a TOPC occurs: 1) the date of signing any written agreement; 2) where the payment is made as a the result of court order, either the later date of the signature of a writing memorializing the obligation or the date of the court order; or 3) in the event of no written

agreement the date the payment is issued. See Section 11.1 of the User Guide.

The timing of the reporting under Section 111 is quarterly, in the quarter following the payment or obligation to pay.

C. What is Reported under Section 111?

Generally CMS needs information necessary to determine the extent of its subrogated interest. Thus the key information relates to the particular identity of the claimant, the date of the incident, the plan insurance type (liability, no-fault, workers' compensation), and the ORM indicator or TPOC circumstances. In short, what CMS needs is the identity of the Medicare beneficiary and such information as may be designated by the Secretary of Health and Human Services to permit an appropriate decision regarding the coordination of benefits. Specific information about the claimant's Social Security Number (SSN) or Health Insurance Clam Number (HICN) is essential. Even ICD-9 Diagnosis Codes are required. Again, depending upon the claim type, there are literally hundreds of fields to choose from in the electronic reporting menus, and approximately 120 of those fields are required to be filled out by the RRE.

D. The Consequences of Failure to Report under Section 111.

Failure to timely report results in a penalty/fine of $1000.00 per violation per day. There are no safe harbor provisions, no defenses to failure to report, and no appeal rights.

IV. DEFENSE COUNSEL'S ROLE

In the simplest terms, the resolution of Medicare's interest in a settlement or judgment for conditional payments is a series of communications. Claimant/plaintiff should open a tort recovery record with CMS and request a conditional payment listing. Evidence of that should be disclosed early in the case to facilitate settlement discussions or satisfaction of a judgment. Indemnification language should be included in any settlement agreement to protect the defense. A clear record of the parties' consideration of, and dealing with, Medicare's interest must be made. Once the settlement or satisfaction of judgment occurs, claimant/plaintiff submits the details to CMS along with its "procurement" costs (fees, costs, and expenses) and requests a final demand from CMS. The defense then tenders the proceeds to claimant/plaintiff with terms and

conditions that assure CMS is reimbursed. The final demand is received from CMS which, after it is reimbursed, provides claimant/plaintiff with proof that CMS reimbursement has been satisfied.

In the case requiring ORM, a Medicare Set Aside ("MSA") or trust may be appropriate where the future medical expenses can be definitively allocated in the settlement agreement or special verdict.

Of course, as with most things legal, the devil is in the details. What follows are some suggestions regarding the role of defense counsel in crafting the mechanisms to accomplish the resolution of a case involving Medicare Reimbursement.

A. Make a Record of Protecting Medicare's Interest

Defense counsel should document the file to show what steps have been taken to "consider and protect" Medicare's interest in the proceeds of the proceeding. Such steps include the investigation into the claimant's Medicare eligibility, reports from treating physicians of the care plaintiff has had and will need in the future, and MSA or trust evaluations.

B. Investigation and Discovery

Address the issue of Medicare early on. It should be an early subject of conversation between counsel to the parties. Discovery should be directed to plaintiff's Medicare eligibility, including requests for SSN, HICN, and date of birth. Does the claimant have a reasonable expectation of being enrolled in Medicare within 30 months of a settlement or satisfaction of judgment? Review provider billings for identification of Medicare's interest and conditional payments. Request production of Medicare's conditional payment letter.

C. Communication with CMS

Engage the COBC early if it appears that settlement is likely or liability is certain. Obtain a Consent to Release and Proof of Representation from the claimant and claimant's attorney so that direct conversations can be had with CMS and the COBC.

It may well be worth attempting a pre-settlement compromise with CMS. Obtaining a conditional payment estimate from CMS may aid in this process, and in any event will assist with developing a settlement plan.

Depending upon the circumstances and resources involved it may be worthwhile to dispute, in writing, unrelated ICD-9 codes in order to reduce Medicare's interest. Claimant's counsel may be willing to assist in this effort.

But generally, CMS is not interested in settlement or compromise, or even underlying fault. Medicare's subrogated interest is statutory, and CMS is entitled to full payment regardless of the parties' agreement or court order. The only exception to this is if a special verdict is rendered by a jury allocating damages between medical and other damages and expenses.

Likewise, the cost of recovery does not play much role in CMS' decision making. 42 C.F.R. Part 411.37 provides that recovery may be reduced by the cost of obtaining a judgment or settlement if borne by the party against whom CMS seeks to recover. See, e.g., *In re Zypreza Products Liability Litigation,* 451 F.Supp.2d 458, 466 (E.D.N.Y. 2006). There is no reduction in recovery considered when CMS recovers from an insurer.

D. Eliminate or Account for Future Medical Expenses

Remember that the protection of Medicare's interest includes future medical expenses. When negotiating a settlement with a beneficiary provide for definite allocation for future medical costs. There are several ways to approach the issue of future medical costs:

- Obtain treating medical provider opinion that no future care is necessary. CMS will not accept the opinion of a retained expert on this point.
- Document the basis for the treatment of future medical expenses in any settlement documents and in your file.
- Utilize an MSA, though these are not required by the regulations and may be subject to CMS approval
- Establish a trust

E. Include Medicare's Interest in the Pending Lawsuit

During the course of the case before settlement defense counsel should consider including Medicare's interest in pleadings and other filings with the Court. For instance, defense counsel may wish to invoke the

jurisdiction of the Court to issue a case management order on the mechanics of identifying and resolving the Medicare interest as the case proceeds. Likewise, in any Offers of Judgment or Proposals for Settlement, be sure to include what specific sums are being offered to resolve the Medicare interest. Finally, if a final judgment is rendered in favor of a Medicare beneficiary, include in the final judgment language concerning Medicare compliance dates to be sure to effectuate plaintiff's cooperation with compliance.

F. Include Medicare in Settlement Planning

Settlements with Medicare beneficiaries will go more smoothly if well planned so as to deal with Section 111 reporting requirements and the reimbursement of Medicare. Establish a procedure to reimburse Medicare as a term of the settlement. Include the conditional payment amount as an express term of the settlement. Obtain an express release of the beneficiary's private cause of action under 42 U.S.C. § 1395y(b)(3)(A). Consider the utility of relating the injuries alleged in the claim to their specific ICD-9 codes in order to winnow out unrelated medical treatment claimed by Medicare in its conditional payment demand. Include a term in the settlement agreement by which the parties will cooperate in any action taken by CMS.

Other terms of a settlement agreement that may help to establish that the defense considered Medicare's interest in the settlement, and protect the defense from future claims of the Claimant, include:

- Claimant's agreement to provide CMS with copies of any settlement agreement;
- Claimant's acknowledgment that the settlement may impact future benefits and that claimant has the right to seek waiver or compromise from CMS based on the cost of obtaining recovery and/or hardship;
- Claimant's agreement to indemnify the defense against any claim for reimbursement by Medicare;
- Express representation and warranty that Claimant is not a Medicare beneficiary

G. Mechanics of Paying Medicare

Be sure to make the manner in which Medicare will be paid a term of the settlement agreement. Failure to do so can have untoward consequences for the defendant's ability to resolve the case in a way that avoids concerns about satisfaction of CMS' interest. In *Tomlinson v. Landers,* U.S.Dist. LEXIS 38683, 2009 WL 117399 (M.D. Fla. 2009), the court rejected a motion to enforce settlement. Following agreement on a settlement amount, the defense learned that Plaintiff had received Medicare benefits. The settlement check was issued to Plaintiff, his attorney, and CMS. The Court concluded that naming CMS as a payee was a material term of the settlement and absent express negotiation and agreement thereto there had been no meeting of the minds.

Options for payment to Medicare include:

- Pay Medicare directly
- Multiple checks, one to claimant and one to Medicare
- Make Medicare a payee on the check
- Obtain a signed release with delivery of payment contingent upon receipt of Medicare's final demand
- Obtain agreement from plaintiff that settlement funds will be held in trust until Medicare's final demand is received and paid
- Interpleader
- Medicare participation in settlement agreement
- Have CMS sign off on a stipulation of the amount of Medicare's interest

H. Ethical Implications

Failure of defense counsel to adequately protect the interests of the defendant and the insurer could theoretically risk claims against them by Medicare, and thence lead to a professional liability claim against the defense lawyer. Therefore, beware of any interested party attempting to

avoid the obligations of the Medicare Secondary Payer Act or Section 111 reporting requirements.

Putting aside the base illegality of avoiding the statutory obligations, the rules of professional conduct are to be heeded:

- The duty of candor to the tribunal is implicated if a lawyer aids a person in fraudulently or criminally avoiding Medicare reimbursement in the course of an adjudicative proceeding; and

- To the extent that CMS is acting in a purely administrative function, the duty of candor extends to a lawyers' interaction with administrative agencies as well.

Truly, reaching a settlement or terminating litigation with a Medicare beneficiary presents a unique opportunity for opposing counsel to work together to further their clients' mutual interests. Insurers may be in the surprising role of advocating for the plaintiff to assure that Medicare is accurately separating related care from unrelated care, thereby reducing Medicare's interest and the insurer's ultimate exposure. Plaintiff will, ideally, want to provide the necessary information to the insurer to aid in this endeavor and to craft a settlement of the case. An opportunity for more collegiality and professionalism between the defense bar and plaintiffs' bar is to be found in this process.

V. CONCLUSION

Despite the seemingly basic subrogation issues raised by Medicare payments, the power of the Federal Government to impose rules and obtain payment from plaintiffs, plaintiff's counsel, TPA's, insurers and self-insureds – and by the way to have all those parties assist the government in collecting – has resulted in a complex and lengthy and difficult construct. The consequences of failing to work within that construct are severe. Defense counsel must carefully attend to the details of any settlement with a Medicare beneficiary.

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Geralyn M. Passaro practices in the areas of insurance defense and commercial and complex business litigation with an emphasis on representation of directors and officers, agents and brokers, and others in professional liability and community association matters. She has been with Litchfield Cavo LLP in its Fort Lauderdale office since its inception in February 2009. Gerrie has been rated an AV® Preeminent™ lawyer by Martindale-Hubbell, representing the recognition of the highest level of professional excellence by her peers. She serves as Managing Partner of the Firm's Fort Lauderdale Office.

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"Representing the Insurance Professional in the Sale of Unauthorized Insurance Products," Federation of Defense and Corporate Counsel, Sun Valley, Idaho, June 2007

"Claims of Exploitation of the Elderly in the Sale of Financial Products," Federation of Defense and Corporate Counsel, San Diego, California, June 2005

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February 26 – March 5, 2011

RESPONDING TO A MASS ENVIRONMENTAL DISASTER

Presented by
Toxic Tort and Environmental Law Section

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RESPONDING TO A MASS ENVIRONMENTAL DISASTER

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I. INTRODUCTION

When a mass environmental disaster occurs, in-house counsel and outside attorneys will play an important role in the disaster's aftermath. Attorney responses may include conducting and overseeing an internal investigation into the cause of the disaster. Attorneys also could be called upon to respond to media inquiries. And attorneys will be involved in preparing for the litigation that likely will follow.

Each of these actions could present its own challenges. Depending on the types of discovery disputes that arise in subsequent litigation, privilege issues may arise regarding internal communications made following a disaster. The attorney spokesperson should be careful with what he or she says, since statements to the media may affect both public perception and litigation strategy. In the litigation that follows, claims from the surrounding area could vary, depending on location. If an attorney does not prepare prior to the disaster, the many other pressing responsibilities and demands may inhibit a measured, thoughtful response.

This article provides recent case law surrounding these issues. Section II analyzes how courts have handled attorney-client privilege and work product arguments made to protect internal investigation documents. Section III addresses decisions on attorney statements to the media. Section IV offers a case study of recent litigation, including some specific examples of events that occurred after environmental disasters. Hopefully, this information should provide some indication of what types of problems and issues might be anticipated, and provide guidance and inform decisions about how to proceed and address such situations.

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II. RECENT CASE LAW ON INTERNAL INVESTIGATIONS

Following a mass environmental disaster, corporations often consider conducting an internal investigation into the cause of the disaster. The reasons for such an investigation can vary greatly. The investigation may be conducted to assist in a current cleanup, to prevent future disasters, to begin winning back public opinion, to prepare for impending litigation or for government enforcement,[2] or a combination of some or all of the above.

Whatever the reason may be, any internal investigation likely will involve witness interviews and document creation. And in the subsequent litigation, plaintiffs naturally seek to discover anything related to the internal investigation. After all, few pieces of evidence at trial could be better than an internal report that says, "We should have seen this coming, but because of mistakes that we made, this disaster was our fault."

A. Attorney-Client Privilege

1. General Rule Requires Communication In Confidence for Purpose of Obtaining Legal Advice

Defendants fight discovery of internal investigation documentation primarily with two legal theories. The first is that the documentation is protected by the attorney-client privilege. For corporations, the attorney-client privilege protects communications made in confidence by the corporation and the corporation's employees to the attorney, in his or her capacity as an attorney, for the purpose of obtaining legal advice. *See Upjohn Co. v. United States*, 449 U.S. 383, 394-99 (1981). This rule often is at issue in discovery disputes over internal investigation documents.

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[2] The American College of Trial Lawyers published a comprehensive list of recommendations for companies and their attorneys to follow for internal investigations conducted in advance of potential criminal prosecution. *See Recommended Practices for Companies and Their Counsel in Conducting Internal Investigations*, 46 AM. CRIM. L. REV. 73 (2009). A recent law review article also discusses corporate internal investigations in government enforcement actions. *See* Katrice Bridges Copeland, *Preserving the Corporate Attorney-Client Privilege*, 78 U. CIN. L. REV. 1199 (2010). Members of the American Bar Association can access an April 2010 program material on this topic entitled, "Corporate Cooperation in Government Investigations and the Attorney-Client Privilege," authored by Jonathan D. Polkes, available at http://www.abanet.org/litigation/mo/premium-lt/prog_materials/2010_sectionannual/papers/012.pdf#page=1.

2. Privilege Is Strongest When Legal Activity Is Clearest

The model attorney-client relationship for protecting internal investigation documents comes from a recent Seventh Circuit decision. *See Sandra T.E. v. South Berwyn Sch. Dist. 100*, 600 F.3d 612 (7th Cir. 2009). In *Sandra T.E.*, a school district was sued after one of its elementary school music teachers was charged with sexually molesting numerous students during a span of several years. *Id.* at 615. In response to the lawsuit, the district's school board hired attorneys to investigate the allegations and provide legal advice. *Id.* After the investigation concluded, the plaintiffs subpoenaed all of the law firm's documents relating to the investigation. *Id.* These documents included interview notes and summaries, and a written executive summary of the investigation provided to the school board. *Id.* The district court ordered the documents to be produced, a decision the Seventh Circuit reversed. *Id.* at 623.

Corporations should review the facts highlighted by the Seventh Circuit before commencing their own internal investigation. When the school board hired the law firm, the engagement letter expressly stated that the firm had been retained to provide legal services. *Id.* at 620. During the investigation, every employee interview was confidential and began with *Upjohn* warnings.[3] *Id.* The firm presented its conclusions to the school board in an executive session closed to the public, and the report summary was marked "Privileged and Confidential," "Attorney-Client Communication," and "Attorney Work Product." *Id.* Based on this evidence, the Seventh Circuit concluded that the confidential communications should be protected because the attorneys had been acting as attorneys for the purpose of providing the school board with legal advice. *Id.*

Another model case protected internal investigation documents created by an outside accounting firm. *See Robinson v. Morgan Stanley*, 2010 U.S. Dist. LEXIS 25072, at *10 (N.D. Ill. Mar. 17, 2010). Before suing on claims that included retaliatory discharge, Beverly Robinson, an internal auditor for Morgan Stanley, filed a memorandum alleging "legal risks" presented by specific corporate practices and policies. *Id.* at *1. To help investigate

[3] An *Upjohn* warning informs the employee that the attorney-client privilege belongs to the corporation, not the employee. Discussion of *Upjohn* and other ethics issues involving employees of a corporation may be found in the law review article by Ariana R. Levinson, *Legal Ethics in the Employment Law Context: Who Is the Client?*, 37 N. KY. L. REV. 1 (2010).

these allegations, Morgan Stanley hired outside accounting firm KMPG. *Id.* at *2. In applying the attorney-client privilege to the investigation documents, the court noted that KMPG had been hired to assist the legal department in providing legal advice, the investigation had been kept strictly confidential, *Upjohn* warnings had been given to Ms. Robinson, and the findings of the investigation were communicated only to in-house counsel. *Id.* at *3-*6.

3. In-House Counsel Must Act In a Legal Capacity

When the internal investigation is conducted by in-house counsel, the court's focus is on whether the investigation was to render legal services.[4] *See Malin v. Hospira, Inc.*, 2010 U.S. Dist. LEXIS 98586, at *1-*3 (N.D. Ill. Sept. 21, 2010). After Deborah Malin filed an EEOC discrimination claim, Hospira's in-house counsel investigated the claim. *Id.* at *2. The court rejected Malin's attempt to discover the investigation documents because the "investigation was related to the rendition of legal services." *Id.* at *3 (quoting *Sandra T.E.*, 600 F.3d at 620). Although Malin argued that the primary role of the in-house counsel was as an investigator, the court found instead that it was to provide legal advice. *Id.* Thus, the court applied the attorney-client privilege. *Id.*

To determine whether in-house counsel is acting in a business capacity or in a legal capacity when conducting an internal investigation, one federal court developed a test that evaluates the content of the communication. *See Lindley v. Life Investors Ins. Co. of Am.*, 267 F.R.D. 382, 391-92 (N.D. Okla. 2010). The easy cases, the *Lindley* court explained, are those in which the attorney's advice is solely business advice, which receives no attorney-client privilege, or in which the attorney's advice is solely legal advice, which receives attorney-client privilege. *Id.* at 391. Difficulty arises, however, when the business and legal advice is mixed. *Id.* For the document to be fully protected, the legal advice must be both "inextricably intertwined" with the business advice and outweigh the business advice. *Id.* at 392. If the legal advice and business advice are severable, only the legal advice is protected and the business advice is discoverable. *Id.* Finally, if the business advice is the primary purpose of the communication, the document is fully discoverable. *Id.*

[4] The New York State Bar Association recently published an article about preserving the attorney-client privilege for in-house counsel. *See The Conundrum of Preserving In-House Attorney-Client Privilege*, 82-JAN N.Y. ST. B. J. 42 (2010).

4. Contents Are Determinative When Documents Are Created by Non-Attorney Employees

When employees other than in-house counsel create the documents at issue, the document's contents become determinative. *See Lewis v. Wells Fargo & Co.*, 266 F.R.D. 433, 444-46 (N.D. Ca. 2010); *see also Coorstek, Inc. v. Reiber*, 2010 WL 1332845, at *5-6 (D. Colo. Apr. 5, 2010) (applying the "functional equivalent" test to determine if an independent contractor qualified as an employee for purposes of the privilege). In *Lewis*, a wage and hour class action suit, the plaintiffs sought discovery of internal reclassification audits generated by Wells Fargo. *Lewis*, 266 F.R.D. at 435. Of the more than 2,000 documents withheld by Wells Fargo, some clearly were privileged: the communication was to or from in-house counsel, the documents were marked as privileged, and the documents contained legal advice. *Id.* at 444. Other documents were not as clear. Some documents created by non-attorney employees referenced or summarized the audits. *Id.* For these documents, the court ruled that privilege applied only if the document's author had notice that the audit being referenced or summarized was initiated by in-house counsel and was subject to attorney-client privilege. *Id.* at 444-45. In the final grouping of documents examined by the court, privilege did not apply to questionnaires and checklists circulated to managers that did not state they had been requested by in-house counsel for the purpose of obtaining legal advice. *Id.* at 445.

5. State Law Can Make a Difference

Sometimes state law affects whose communications are privileged. *See Resurrection Healthcare v. GE Health Care*, 2009 U.S. Dist. LEXIS 20562, at *7-*13 (N.D. Ill. Mar. 16, 2009). Under Illinois law, only communications made by members of the "control group" are protected by the attorney-client privilege. *Id.* at *7. All documents in *Resurrection Healthcare* that were not communications by control group members were not privileged. *Id.* at *8-*13.

6. Document's Purpose Can Matter

In other courts, the purpose for creating the document proves determinative. *See Weist v. E.I. DuPont De Nemours Co.*, 2010 U.S. Dist. LEXIS 21350, at *14 (W.D.N.Y. Mar. 9, 2010). On the first document, a communication from a corporate chemist to the in-house counsel at counsel's request, the court applied the attorney-client privilege. *Id.* On

the second document, however, which was not seeking legal advice and was circulated to numerous employees for informative purposes, the court denied the attorney-client privilege. *Id.*

7. Privilege Is Weakest When Information Is Not Protected

Just as the *Sandra T.E.* decision exemplified how to ensure attorney-client privilege would protect internal documents, so *United States v. Ruehle* exemplifies how to ensure that the privilege will not apply. *See United States v. Ruehle*, 583 F.3d 600, 609-612 (9th Cir. 2009); *see also Socy' of Prof'l Eng'g Employees in Aerospace v. Boeing Co.*, 2010 WL 3083536 at *3-4 (D. Kan. Aug. 5, 2010) (finding privilege waived when steps were not taken to protect e-mail from disclosure). Following public claims that it had backdated stock options, Broadcom Corporation hired a private law firm to conduct an internal review. *Ruehle*, 583 F.3d at 602. William Ruehle, then the Chief Financial Officer of Broadcom, was "intimately involved" in the review. *Id.* During the review, Ruehle was interviewed by attorneys from the private firm, but he never indicated that he needed legal advice in an individual capacity. *Id.* at 604; *see United States v. Graf*, 610 F.3d 1148, 1162-64 (rejecting the assertion of attorney-client privilege because the defendant was not seeking personal legal representation). In fact, the private attorneys testified that they provided Ruehle with *Upjohn* warnings. *Ruehle*, 583 F.3d at 605. Ruehle was well aware that the results of the internal review would be provided to Broadcom's outside auditors, to whom Ruehle was the primary contact, as well as to the Securities and Exchange Commission (SEC). *Id.* at 610, 611. Perhaps most damaging to his case, Ruehle "sat in on the very meetings where his allegedly-privileged information was disclosed." *Id.* at 612. Because Ruehle's statements were not made in confidence, the Ninth Circuit denied attorney-client privilege. *Id.*

In another stock option backdating case with similar facts, the Ninth Circuit held that even if the attorney-client privilege applied, the privilege was waived by the voluntary disclosure of the internal investigation documents to outside auditors, to the corporate board of directors, to the Nasdaq Listing Qualifications Panel, and to the SEC. *See SEC v. Microtune*, 258 F.R.D. 310, 316-17 (N.D. Tex. 2009). In another case, although a defendant waived the attorney-client privilege by disclosing documents to the federal government during an SEC investigation, the discovery request for "all documents compiled during and produced to the SEC during its investigation" was found to be overly broad, and the documents did not

have to be produced without a more particularized request. *Pensacola Firefighters' Relief Pension Fund Bd. Of Trs. v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 265 F.R.D. 589, 596-97 (N.D. Fla. 2010).

8. Affirmative Defenses Can Waive Privilege

Waiver also occurred when the defendant premised its defense on the internal investigation reports. *See Reitz v. City of Mt. Juliet*, 680 F. Supp. 2d 888, 892 (M.D. Tenn. 2010); *Baez v. Superior Court of Los Angeles County*, 2008 Cal. App. Unpub. LEXIS 10190, at *13 (Cal. Ct. App. Dec. 17, 2008). In both *Reitz* and *Baez*, the defendant attempted to refute a sexual harassment claim by asserting that a thorough investigation had concluded the claims were unmerited. *Reitz*, 680 F. Supp. 2d. at 890; *Baez*, 2008 Cal. App. Unpub. LEXIS 10190, at *4-*6. And in light of this defense, both courts refused to allow the defendant to use the report as a sword while shielding its contents. *Reitz*, 680 F. Supp. 2d at 892; *Baez*, 2008 Cal. App. Unpub. LEXIS 10190, at *13; *see also Chevron Corp. v. Stratus Consulting, Inc.*, 2010 WL 3923092, at *10-11 (D. Colo. Oct. 1, 2010) (finding the privilege waived under the sword-shield doctrine). Corporations wishing to protect internal investigation documents thus must be careful with what defenses are raised, so that privilege is not waived. For once the privilege has been waived, it cannot be "unwaived." *Reitz*, 680 F. Supp. 2d at 894.

B. Work Product Doctrine

1. General Rule Requires Anticipation of Litigation Without Waiver or Substantial Need

The second primary legal theory used by defendants to protect internal investigation documents is the work product doctrine. The work-product doctrine protects documents prepared in anticipation of litigation, unless the party seeking discovery can show substantial need for the document and inability to obtain the substantial equivalent without undue hardship. Fed. R. Civ. P. 26(b)(3).

2. "Anticipation of Litigation" Standard Varies

Much recent litigation concerns whether a document's preparation satisfies the "anticipation of litigation" standard. The *Sandra T.E.* court referenced earlier noted the difference between documents "'developed in the ordinary course of business' for the 'remote prospect of litigation,'"

which do not receive protection, and "documents prepared because 'some articulable claim, likely to lead to litigation, [has] arisen,'" which do receive protection. *Sandra T.E.*, 600 F.3d 612, 622 (quoting *Binks Mfg. Co. v. Nat'l Presto Indus., Inc.*, 709 F.2d 1109, 1120 (7th Cir. 1983)). In both *Sandra T.E.* and *Malin*, the court's determination was easy since, prior to the internal investigation, the *Sandra T.E.* plaintiff had filed a lawsuit and the *Malin* plaintiff had filed an EEOC complaint. *Id.*; *see also Malin*, 2010 U.S. Dist. LEXIS 98586, at *5.

a. "Because of" Standard

Without definitive action by the plaintiff, the line between anticipation of litigation and ordinary course of business is more blurred. In *Lewis*, discussed earlier, the defendant argued that compliance audits begun in 2004 were in anticipation of litigation that was not filed until February 2005. *Lewis*, 266 F.R.D. 433, 440. The district court rejected this argument, explaining that a "generalized fear of litigation" did not convert regular business documents into protected work product. *Id.* at 441. Instead, for work product protection to apply, the documents must have been created "because of" the prospect of litigation. *Id.* at 440; *see also Brokaw v. Davol Inc.*, 2008 R.I. Super. LEXIS 154, at *8 (R.I. Super. Ct. 2008) ("Materials prepared pursuant to regulatory requirements are not documents prepared in anticipation of litigation.").

b. "Substantial and Significant Threat" Standard

Another standard of "substantial and significant threat" of litigation was applied by another district court to deny work product protection. *See Resurrection Healthcare*, 2009 U.S. Dist. LEXIS 20562, at *4. Despite the defendant's work product argument, the court pointed out that the disputed internal investigation documents were created from six months to more than one year before the lawsuit was filed, and the defendant had not established that litigation was the sole reason for performing the internal investigation. *Id.* at *6. The defendant's self-proclaimed "reasonable anticipation" of litigation did not satisfy the "substantial and significant threat" of litigation standard applied by the court, thus defeating the work product argument. *Id.* at *5.

c. "Primary Motivating Purpose" Standard

Yet another standard, the "primary motivating purpose" standard,[5] defeated work product protection for internal investigation documents in another case. *See Microtune*, 258 F.R.D. 310, 318. According to the *Microtune* court, a document did not receive work product protection if it would have been created in the ordinary course of business, whether or not litigation was expected to ensue. *Id.* Based on the contents of the documents and the statements of Microtune officials, the court concluded that the internal investigation would have been conducted – and the documents created – notwithstanding any potential litigation. *Id.* at 319.

3. Protection Can Be Waived By Affirmative Defense

Even if the work product standard is satisfied, the asserting party must not have waived its protection. Like the defendants in *Reitz* and *Baez* discussed earlier, the United States Army affirmatively defended a sexual harassment claim by arguing that all the plaintiff's claims had been fully investigated. *See Nelson v. Geren*, 2010 U.S. Dist. LEXIS 89039, at *3-*4 (D. Or. Aug. 27, 2010). Although the internal investigation documents qualified as work product because they were prepared in anticipation of litigation, the district court held the Army waived the protection by raising the affirmative defense. *Id.* at *11. Interestingly, if the investigator had been an attorney, the "core" work product, such as mental impressions, conclusions, or opinions, still would have been protected from discovery. *Id.* at *10; *see, e.g., Reitz*, 680 F. Supp. 2d 888, 895 ("[O]nly the "fact" work product created by [the defendant's internal investigators] – that is, the portions of the documents memorializing the information gathered by the investigators – is discoverable. . . . [T]he court will allow the [defendant] to redact . . . "opinion" work product from the documents."). But since the investigator was not an attorney, no parts of the internal investigation documents were protected. *Id.* at *11.

4. Protection May Not Cover Non-Attorney Activity

Another district court went even farther on the issue of attorneys and work product. *See Mullins v. Dep't of Labor of Puerto Rico*, 2010 U.S. Dist. LEXIS 101168, at *9. As a threshold matter, the *Mullins* court required an

[5] The Fifth Circuit's "primary motivating purpose" rule has been called "increasingly unpopular," and instead most of the federal circuits applying the "because of test." Claudine Pease-Wingenter, *Prophetic or Misguided? The Fifth Circuit's (Increasingly) Unpopular Approach to the Work Product Doctrine*, 29 REV. LITIG. 121, 145 (2009).

attorney to act in the capacity of an attorney for work product protection to apply. *Id.* This requirement, the court said, is "well settled." *Id.* Since the defendant had not shown that the internal investigation done by its Legal Division was more legal than administrative, the court rejected the defendant's work product argument. *Id.*

5. Protection May Cover Non-Attorney Employees

This ruling does not mean work product protection has never been extended to non-attorneys. *See Robinson*, 2010 U.S. Dist. LEXIS 25072, at *10. In *Robinson*, the internal investigator worked in the defendant's human resources department. *Id.* at *2. Yet because the internal investigation document was prepared in anticipation of litigation and thus qualified as work product, it did not matter that the document's author was not an attorney. *Id.* at *10. Furthermore, providing to the plaintiff an investigation summary that did not reveal the underlying facts or analysis of the investigation did not waive work product protection. *Id.* at *12-*13.

The new amendments to Federal Rule of Civil Procedure 26, effective December 1, 2010, offer new protection to expert witnesses.[6] *See* FED. R. CIV. P. 26 (amended 2010). Under the amended rule, draft reports, in any form, are protected under the work product doctrine. *Id.* at 26(b)(4)(B). This new protection could protect valuable documents from discovery and perhaps allow an expert additional latitude in compiling a report for trial.

6. Waiver May Not Occur When Documents Disclosed to Outside Auditing Firm

Work product protection also was not waived when internal investigation documents were disclosed to the corporation's outside auditing firm. *See SEC v. Schroeder*, 2009 U.S. Dist. LEXIS 39378, at *28; *see also United States v. Deloitte LLP*, 610 F.3d 129, 143 (D.C. Cir. 2010) ("[The outside auditing firm's] independent auditor obligations do not make it a conduit to Dow's adversaries."); *but cf. D.G. v. Henry*, 2010 WL 1257583, at *2-3 (N.D. Okla. Mar. 24, 2010) (finding a state agency waived work product protection by providing the document at issue to the state legislature). As part of his defense to a stock backdating enforcement action, Schroeder

[6] Members of the American Bar Association can access an April 2010 program material on this topic entitled, "The Proposed Amendments to Rule 26(b)(4): The Lesser of Two Evils?" authored by Wendy Gerwick Couture, available at http://www.abanet.org/litigation/mo/premium-lt/prog_materials/2010_sectionannual/papers/018.pdf#page=1.

sought discovery of all documents and communications sent by the corporation to its outside auditors in order to properly restate the corporation's finances. *Schroeder*, 2009 U.S. Dist. LEXIS 39378, at *24. Though the court noted a split on this issue, it agreed with another federal district court that "disclosures to outside auditors do not have the 'tangible adversarial relationship' requisite for waiver." *Id.* at *27 (citing *Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 229 F.R.D. 441, 447 (S.D.N.Y. 2004)). After determining that a waiver would have a "chilling effect" on internal corporate efforts to expose and prevent fraud, the court denied Schroeder's discovery request. *Id.* at *28.

III. RECENT CASE LAW ON PUBLIC RELATIONS

A. General Rule Prohibits Prejudicing Public with Statements

The Model Rules of Professional Conduct address statements that lawyers can make to the media.[7] In Rule 3.6(a), a lawyer is prohibited from making extrajudicial statements to the public that "will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." MODEL RULES OF PROF'L CONDUCT R. 3.6(a). Subsection (b) then identifies seven different types of information a lawyer can release to the public, such as who is involved, information in the public record, an investigation is in progress, and scheduled upcoming events in the litigation. *Id.* at 3.6(b).

B. Exception Allows Lawyer to Protect Client with Statements

Lawyers representing companies responding to a mass environmental disaster should carefully review Rule 3.6(c), which says:

> Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or

[7] Extensive analysis of how the Model Rules of Professional Conduct affects attorney statements to the media can be found in the law review article by Michele DeStefano Beardslee, *Advocacy in the Court of Public Opinion, Installment Two: How Far Should Corporate Attorneys Go?*, 23 GEO. J. LEGAL ETHICS 1119 (2010). The impact that public opinion can have on corporate attorney action can be found in the article's first part, *Advocacy in the Court of Public Opinion, Installment One: Broadening the Role of Corporate Attorneys*, 22 GEO. J. LEGAL ETHICS 1259 (2009).

> the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

Two recent decisions have interpreted nearly identical state versions of this rule. *See Joyce v. Town of Dennis*, 2010 U.S. Dist. Lexis, at *4 (D. Mass. Aug. 18, 2010); *Harris v. Kellogg, Brown & Root Servs., Inc.*, 2009 U.S. Dist. LEXIS 18348, at *21 (W.D. Pa. Mar. 11, 2009). In *Joyce*, the plaintiff moved for sanctions after defense counsel told the media the plaintiff had asked for a $500,000 settlement and that any money awarded to the plaintiff would be paid for by the city taxpayers. *Id.* at *5. Beyond establishing that defense counsel had made these statements, the court found the plaintiff failed to show the statements "had a reasonable or substantial likelihood of materially prejudicing or interfering with a fair trial." *Id.* at *7. In the court's opinion, statements made months before a not very publicized trial could be mitigated through voir dire and jury instructions. *Id.* Additionally, the court noted the plaintiff initiated the media coverage. *Id.* For these reasons, the court denied the plaintiff's motion for sanctions. *Id.* at *8.

Another sanctions motion was denied because the defendant also was responding to negative publicity. *See Harris*, 2009 U.S. Dist. LEXIS 18348, at *22. Harris had moved for sanctions after the defendant distributed two press releases to the local media pointing out factual inaccuracies in recent media coverage. *Id.* at *2-*3. Instead of moving for monetary sanctions against defense counsel, however, Harris sought discovery of documents related to the press releases. *Id.* at *23. After noting that the defendant had not initiated this publicity, the court rejected the Harris' attempt to expand previously ordered discovery. *Id.* at *25.

C. Other Case Law on Lawyer Statements to Public

Other courts have discussed public statements made by lawyers, but only in passing. Under the Illinois Rule of Professional Conduct that mirrors the national rule above, lawyers may disclose information from public records. *See Alva v. City of Chicago*, 2090 U.S. Dist. LEXIS 125614, at *8 (N.D. Ill. Oct. 8, 2009). In New York, an attorney did not prejudice the jury pool by providing a New York Times reporter with a copy of a deposition transcript that was quoted in a subsequent article. *See Jemine v. Cake Man Raven, Inc.*, 2009 U.S. Dist. LEXIS 92083, at *3 (E.D.N.Y. Oct. 2, 2009) (noting as important the fact that discovery had not been completed

and a trial had not been scheduled). Also in New York, a government press release accompanying an indictment did not impermissibly taint a large jury pool for a trial likely six months or more away. *See United States v. Corbin*, 620 F. Supp. 2d 400, 411 (E.D.N.Y. 2009).

IV. A CASE STUDY ON RECENT LITIGATION

Not only must counsel be worried about information that could be obtained in discovery, but counsel must also be aware of the various claims that could arise out of a mass environmental disaster. The Tennessee Valley Authority litigation, relating to the coal ash disaster, serves as good template of these claims.

A. Class Action Plaintiffs

The TVA plaintiffs are bringing multiple lawsuits, both individually and as a class. The class actions attempted to be certified as follows:

- Numerosity – the class claims there are well over a hundred plaintiffs who all have been injured, making joinder impracticable;
- Typicality – the class claims that all plaintiffs were injured as a result of the mass environmental disaster and that their allegations of defendant misconduct are similar;
- Adequacy – the class claims the plaintiffs fairly and adequately represent the class and that the attorneys have substantial experience in mass environmental tort litigation;
- Commonality
    - Whether TVA's maintenance of the Kingston facility constitutes an ultrahazardous activity;
    - Whether Defendants were negligent in the design, inspection, repair, and/or maintenance of the impoundment;
    - Whether Defendants knew or should have known of the risk of the failure of the impoundment;

- Whether Defendants acted maliciously or with reckless disregard with regard to the risk of the disaster;

- Whether Defendants should have warned residents neighboring the Kingston facility of the risk of a spill and resulting environmental contamination;

- Whether the 12/22 disaster constitutes a negligent trespass upon the Plaintiffs' and the Class Members' properties;

- Whether the 12/22 disaster constitutes a nuisance upon Plaintiffs' and the Class Members' properties;

- Whether TVA violated the Tennessee Safe Water Drinking Act, and any permits issued pursuant to the Act;

- Whether TVA violated the Clean Water Act, and any permits issued pursuant to the Act;

- Whether TVA violated the Resource Conservation and Recovery Act of 1976 ("RCRA"), Subtitle D, 42 U.S.C. § 6901, et seq., and any permits issued pursuant to the Act;

- Whether TVA violated the Federal Dam Safety Act and Federal Emergency Management Agency ("FEMA") dam safety procedures;

- Whether TVA violated the Tennessee Hazardous Waste Management Act of 1977, and any permits issued pursuant to the Act;

- Whether TVA violated the Tennessee Solid Waste Disposal Act, and any permits issued pursuant to the Act;

- Whether TVA violated the Tennessee Air Quality Act, and any permits issued pursuant to the Act;

- Whether TVA violated any other state or federal laws;

- Whether Defendants should be liable for damages and future health assessments and medical monitoring costs

- Superiority – the class claims that if each plaintiff were forced to bring a claim individually it would result in costly litigation and deter them from bring the claims

B. Actions Brought by Plaintiffs

The plaintiffs are bringing various claims including trespass, negligence, gross negligence, strict liability, nuisance, negligence per se, and injunctive relief. They also alleged a National Environmental Policy Act ("NEPA") claim, which was successfully dismissed by TVA's attorneys. Specifically, the plaintiffs asked for an injunction precluding TVA "from presently or in the future disposing of coal ash sludge waste and/or other wastes into KIF's facilities, unless and until it prepares and publishes an adequate and complete Environmental Impact Statement ("EIS") for the proposed actions[.]" The plaintiffs also asked for an injunction precluding TVA from "engaging in the dredging plan and CAP [Corrective Action Plan] as presently published, unless and until it prepares and publishes an adequate and complete [EIS]."

Citing to the *Twombly/Iqbal* standard, the court dismissed the NEPA claims. TVA argued that EPA entered a Final Order pursuant to Sections 104(a), 106(a), and 107 of CERCLA. Accordingly, CERCLA precludes "any challenges" to removal or remedial actions under Section 104 of any order issued under Section 106(a), "not simply those brought under the provisions of CERCLA itself." *Costner v. URS Consultants, Inc.*, 153 F.3d 667, 674 (8th Cir. 1998); *see also United States v. State of Colorado*, 990 F.2d 1565, 1577 (10th Cir. 1993) (stating that "the plain language of § 9613(h) [Section 113(h) of CERCLA] bars federal courts from exercising jurisdiction, not only under CERCLA, but under *any* federal law to review a challenge to a CERCLA remedial action") (emphasis in original). Thus, the court found that the plaintiff's injunctive relief would require it to review matters under the exclusive jurisdiction of EPA and dismissed the plaintiff's NEPA claims.

Before this ruling, the plaintiffs also attempted to file an emergency motion:

(1) prohibiting TVA from commencing or conducting removal and remedial plans and requiring TVA to immediately prepare and publish appropriate and comprehensive plans regarding removal and abatement of the contamination;

(2) prohibiting TVA from starting and/or continuing any corrective action plan before submitting an environmental impact study in accordance with the National Environmental Policy Act (the "NEPA"), 42 U.S.C. §§ 4321 *et seq*.;

(3) prohibiting TVA from engaging in various actions relating to the clean-up and operation of the KIF plan and surrounding properties; and

(4) prohibiting TVA from transporting, storing, or disposing of the coal ash until the completion of further environmental analysis.

Again, the court found that Section 113(h) of CERCLA stripped the court from issuing this type of injunctive relief. The purpose of Section 113(h) is to limit the public's ability to challenge EPA clean-up decisions and bolster CERCLA's goal of granting the EPA "full reign to conduct or mandate uninterrupted clean-ups for the benefit of the environment and the populous." *B.R. MacKay & Sons, Inc. v. United States*, 633 F. Supp. 1290, 1292 (D. Utah 1986); *see also Exxon Corp. v Hunt*, 475 U.S. 355, 359-60 (1986).

Thus, based on these rulings, it is important for counsel to take into consideration the jurisdiction of the court and determine if EPA has the ultimate authority to determine how the clean-up and remediation of a mass environmental disaster takes place. If EPA alone has authority, then citizen-suit claims can be challenged and dismissed.

TVA is only one recent example of claims brought after a mass environmental disaster.[8] Lawsuits currently are pending against BP/Amoco following the Deepwater Horizon oil spill in the Gulf of Mexico,[9]

[8] Additional pleadings from the TVA litigation may be found in the docket of the United States District Court for the Eastern District of Tennessee.

[9] These claims are pending as a multi-district litigation in the United States District Court for the Eastern District of Louisiana. An early overview of the BP litigation can be found in the article by Stephen Gidiere, Mike Freeman, and Mary Samuels, *The Coming Wave of Gulf Coast Oil Spill Litigation*, 71 Ala. Law. 374 (2010).

and against Embridge following an oil spill in the Kalamazoo River.[10] Like TVA, the lawsuits filed against BP and against Embridge have been brought both as individual suits and as class action suits, for claims that included negligence, trespass, and natural resource damages.[11] A non-exhaustive list of older environmental disasters would include the 1984 Union Carbide methyl isocyanate gas release in Bhopal, India; 1989 Exxon-Valdez oil spill in Prince William Sound, Alaska; and the 2005 Norfolk Southern train derailment and chlorine release in Graniteville, South Carolina. These cases demonstrate that following an environmental disaster, attorneys must be prepared to defend many lawsuits containing many different claims.

V. CONCLUSION

Attorneys need to be prepared to act in the wake of a mass environmental disaster. Issues likely will arise regarding internal investigations, public relations, and pending litigation. By keeping the court decisions and the recent litigation above in mind, attorneys can prepare to help their company or their client appropriately respond to an environmental disaster.

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[10] These claims are pending in the United States District Court for the Western District of Michigan.

[11] For examples of complaints from these cases, see the complaint Duc Truong Le filed against BP, available at http://oilspilllawsuit.org/wp-content/uploads/2010/06/FL-Filestamped_Lawsuit1.pdf, and the complaint the Volstromers filed against Embridge, available at http://www.battlecreekenquirer.com/assets/pdf/A516181681.PDF.

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Dave Erickson is a partner and a member of the Litigation Division of Shook, Hardy & Bacon. He chairs the Environmental Law Practice Group within the Tort Section in the firm's Litigation Division. He also is a member of Shook, Hardy & Bacon's Toxic Tort Practice Group which includes attorneys from other sections within the Litigation Division and from each of the firm's offices.

Dave has over 25 years of experience in litigation and environmental law. He has first-chaired trials in state and federal courts. He has been responsible for directing and handling litigation in state and federal court on a variety of issues including environmental liability and allocation of responsibility; individual, group, and class action toxic tort claims which have included allegations of personal injuries, property damage, and the need for medical monitoring; commercial and business litigation matters; construction litigation; insurance coverage disputes; intellectual property issues; product liability cases; premises liability cases; and professional liability cases.

For the last 20 years, Dave has devoted his time almost exclusively to environmental litigation, class action and toxic tort litigation, environmental regulatory issues, and environmental transactional issues. He has filed and defended numerous CERCLA allocation actions involving the government and private parties. In addition to handling CERCLA cases instituted by the government or CERCLA allocation litigation among private parties, Dave has also defended citizen suits under federal statutes such as the Clean Water Act and the Clean Air Act for personal injuries, medical monitoring and property damage which have been instituted by individuals on their own behalf or by individuals who purport to be representing others in class actions.

Dave has also represented and defended clients on many different types of administrative and regulatory compliance and enforcement matters. He has represented sellers and purchasers on real estate transactions and corporate or commercial transactions. He has planned and participated in conducting Phase I and Phase II Environmental Site Assessments and advised clients on the potential environmental liabilities and exposure associated with such transactions. He has also participated in the preparation and drafting of Stock Purchase Agreements, Asset Purchase Agreements, and Real Estate Contracts.

Dave is a member of the Missouri Bar; Kansas City Metropolitan Bar Association (former Chair of the Environmental Law Committee); Kansas Bar Association; Johnson County Bar Association; Wisconsin Bar Association; American Bar Association (Section of Litigation - 2009-2010 Programming Subcommittee Co-Chair within the Environmental Litigation Committee and Former Co-chair of the Environmental Litigation Committee); Section of Tort and Insurance Practice; and Section of Environment, Energy and Resources; Federation of Defense & Corporate Counsel (Vice Chair of the Toxic Tort and Environmental Law Section; Trial Tactics, Practice and Procedures; Product Liability Section; Corporate Counsel Symposium); and Defense Research Institute.

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Joe brings over twenty years of legal experience, including areas of manufacturing, mergers and acquisitions, international legal operations, litigation, regulatory compliance, labor and employment matters and SEC reporting management. During his career, Joe has been involved in over 50 negotiated acquisitions, divestitures, mergers, and joint ventures, has had responsibility for managing legal departments of different sizes, has managed global legal operations and has had oversight responsibility for health, safety and environmental compliance.

Joe earned his J.D. from Emory University School of Law and has a B.S. in Business with a double major in Accounting and Finance from Miami University in Ohio. He is a member of the American and Georgia Bar Associations and the Association of Corporate Counsel. Joe is married with four children and has served on various Boards and charitable organizations.

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February 26 – March 5, 2011

OVERVIEW OF BUILDING CODE UPGRADE COVERAGE FOR THE RECONSTRUCTION OF EXISTING BUILDINGS

Presented by
Property Insurance, Reinsurance, Excess and Surplus Lines, and Extra-Contractual Liability Sections

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OVERVIEW OF BUILDING CODE UPGRADE COVERAGE FOR THE RECONSTRUCTION OF EXISTING BUILDINGS

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As building code implementation and enforcement continues to increase, the likelihood of insurance claims for increased costs of construction as a result of compliance with current building codes, or "code upgrades," continues to increase as well. Because both building code standards and the enforcement of those codes have become stricter in recent years, it is likely that the reconstruction of damaged structures that were built as recently as the year 2000 may require additional costs to meet current codes. Not only can ordinances or laws increase the cost to repair or replace damaged or destroyed property, but also, the time to repair or rebuild in accordance with current codes can take longer than it might otherwise take in the absence of new codes. This increased period to rebuild or repair property can increase business interruption or extra expense loss. As a result, a working knowledge of both the applicable building codes and the potential coverage issues associated with code upgrades is imperative to determine the proper amount of covered loss associated with code compliance.

Most property insurance policies contain an "Ordinance or Law" exclusion that excludes from coverage the costs caused by the enforcement of any ordinance or law regulating the construction, use, repair or demolition of a building or other structure, unless specifically provided for in the policy. *See, e.g.,* ISO Form CP 10 30 04 02 § B.1.a. To avoid this exclusion, optional coverage is available to provide a giveback of "code upgrade" coverage for costs incurred because of the enforcement of building codes through Ordinance or Law Coverage endorsements or Demolition and Increased Cost of Construction coverage provisions. *See, e.g.,* ISO Form CP 04 05 04 02. The general principle behind this code upgrade coverage is to cover any increases in construction costs associated with the enforcement of new building code standards for the repair or replacement of a covered structure.

The key to whether an insurance policy will cover increased costs incurred as a result of the enforcement of building codes depends on whether covered damage caused the enforcement of building codes that led to the increased costs of construction. This paper provides a general overview of building code enforcement for damaged structures and important

considerations for the adjustment and coverage of code upgrades associated with the repair of covered damage. Case examples from Texas, Florida, and other jurisdictions are referenced in these materials.

I. OVERVIEW OF APPLICABLE BUILDING CODES

Building codes establish minimum requirements to safeguard life, health, property and public welfare by regulating and controlling the design, construction, use and occupancy and locations of all structures. Historically, three separate organizations-- the Building Officials and Code Administrators International, Inc. (BOCA), International Conference of Building Officials (ICBO), and Southern Building Code Congress International, Inc. (SBCCI)—each developed separate sets of model codes used throughout the United States. In 1992, Hurricane Andrew struck Florida causing over $17 billion in damage. As a result, a push was made to improve building codes. The nation's three model code groups responded by creating the International Code Council. The ICC was established in 1994 to develop a single set of comprehensive and coordinated national model construction codes without regional limitations.[1] It is then left to each jurisdiction to adopt and amend the model codes promulgated by the ICC.[2]

The International Codes generally regulate new or proposed construction. They have little application to existing buildings unless the existing building undergoes reconstruction, rehabilitation, renovation, or alteration, or if the occupancy category of the building is being changed. In addition to the International Codes, other codes also regulate the construction, renovation, alteration, or repair of a structure. For example, the Americans with Disabilities Act and state enacted accessibility codes govern the accessibility of new and existing structures. FEMA floodplain regulations and local land development regulations govern the construction and placement of structures in floodplains and coastal areas. The applicability and enforcement of all of these codes for the repair of

[1] A complete discussion of the origins of the ICC can be found at http://www.iccsafe.org/AboutICC/ (*last visited* Nov. 16, 2010).

[2] A list of the adoption of the model codes by state and by jurisdiction can be found at http://www.iccsafe.org/gr/Documents/stateadoptions.pdf (*last visited* Nov. 16, 2010) and http://www.iccsafe.org/gr/Documents/jurisdictionadoptions.pdf (*last visited* Nov. 16, 2010).

damaged structures depends on the extent of the damage to the structure and the type of repair proposed.[3]

A threshold issue in determining whether and to what extent a policy covers an insured's "code upgrade" claim is determining whether the alleged "code upgrade" – if justified – was triggered by the work performed on the damage caused by an insured peril. While certain states, such as Florida, have a comprehensive statewide building code, analysis of building codes in Texas presents unique challenges because, as of right now, only cities have the power to draft and enforce building codes, and they do so unevenly. Each municipality in Texas has its own set of codes, which may vary significantly from the model codes. Further, coastal structures that are eligible for state windstorm insurance are subject to the codes promulgated by the Texas Department of Insurance. Structures located in unincorporated areas in Texas are not subject to any building codes other than the Texas Residential Construction Commission's recommendations, which are not mandatory building codes.[4]

While each municipality in Texas enacts and enforces its own code, the Texas legislature has set minimum requirements. The 2003 International Building Code applies to any new construction or alteration, remodeling, enlargement, or repair of a commercial building in a municipality. TEX. LOCAL GOV'T CODE ANN. § 214.216 (Vernon 2007). The 2000 International Residential Code applies to all construction, alteration, remodeling, enlargement, and repair of residential structures in a municipality. For electrical systems, the 1999 National Electric Code applies all residential and commercial structures in a municipality. *Id.* § 214.214. Texas law grants a municipality generous authority (1) to amend these model codes, (2) to adapt later versions of these codes, and (3) to apply alternate codes to the alteration, remodeling, enlargement, or repair of existing structures. *Id.* §§ 214.214-216. Further, the Texas Department of Insurance has adopted the 2006 IRC and IBC as amended by the Texas Revisions for the Texas Windstorm Building Code for structures insured under the

[3] For example, FEMA floodplain management regulations only affect existing buildings that are substantially damaged. "Substantial damage" means damage of any origin sustained by a building when the cost of restoring the building to its pre-damaged condition would equal or exceed 50 percent of the market value of the building before the damage occurred. 44 CFR §59.1 Definitions.

[4] This may change in the future because the Texas House Select Committee on Hurricane Ike released a report which recommended counties be given the authority to enact and enforce building codes, and that new buildings within 80 miles of the coast be designed to withstand a Category 3 hurricane's winds.

Texas Windstorm Insurance Association. Therefore, building code standards may vary widely from jurisdiction to jurisdiction.

II. OVERVIEW OF THE RELEVANT PROVISIONS OF THE INTERNATIONAL BUILDING CODE

A. The General Interpretive Scheme for the Code

Because most jurisdictions have adopted a form of the International Building Code, a review of the regulatory scheme of the model code will demonstrate the analytical steps necessary to determine whether a code upgrade claim is covered. While the definitions and code requirements may vary from jurisdiction to jurisdiction, these general steps should apply.[5] It is important to first understand the relevant code provisions in the International Building Code (Building) ("IBCB") and International Existing Building Code ("IEBC"). The IBCB applies to "the construction, alteration, movement, enlargement, replacement, repair, equipment, use and occupancy, location, maintenance, removal and demolition of every building or structure or any appurtenances connected or attached to such buildings or structures." IBCB § 101.2. The IBCB has a prescribed manner in which the code volumes are to be interpreted and broadly distinguishes the IBCB from the International Existing Building Code. *See, e.g.*, IEBC §§ 101.4, 201.3. In addition, the IBCB emphasizes that the more specific and more applicable provisions govern compliance versus more general provisions. *See* IBCB § 102.1.

The IBCB, however, expressly excepts from its application "[e]xisting buildings undergoing repair, alterations or additions and change of occupancy." IBCB, § 202. An "existing building" is defined to mean "[a] building or structure or portion of a building or structure which has been previously legally occupied or used for its intended purpose." *Id.* The IBCB instructs that such existing buildings must comply with the IEBC (Chapter 34 of the IBCB). *Id*. Consequently, the IEBC is both the starting and end point in determining the code provisions that apply to an insured's reconstruction of an existing building, but the IEBC may expressly require the insured to comply with other provisions of the IBCB. IEBC, § 101.2 ("The provisions of the International Existing Building Code ***shall*** apply to the repair, alteration, change of occupancy, addition, and relocation of existing buildings") (emphasis added). Such a scheme is consistent with

[5] Notably, the City of Houston has not adopted many portions of the International Model Codes, including the International Existing Building Code.

the underlying purpose of the IEBC, which is to grant property owners some leeway to perform necessary work on existing buildings: (1) without the need to perform the comprehensive renovations that the IBCB requires of new construction; and, thus, (2) without the costs of such work being so burdensome so as to render such work cost prohibitive.

The basic regulatory framework of the IEBC is relatively straightforward. The IEBC establishes the following relevant classifications for work performed on an existing building:

(1) Repairs;

(2) Level 1 Alterations;

(3) Level 2 Alterations; and

(4) Level 3 Alterations.[6]

These work classifications for an existing building dictate the code requirements (under the IEBC and/or the IBCB) applicable to such work. IEBC, § 302.1, 303.1, 304.1, 305.1. For example, a "repair" must comply with the requirements in Chapter 4 of the IEBC and a "Level 1 Alteration" must comply with the requirements in Chapter 5 of the IEBC. Therefore, the critical inquiry for the purpose of determining the code requirements for the reconstruction of an existing structure is whether such work constitutes a Repair, a Level 1 Alteration, a Level 2 Alteration, or a Level 3 Alteration.

B. <u>The Evaluation Of An Insured's "Code Upgrade" Claim Requires A Determination As To Whether The Work In Question Constitutes A "Repair" Or "Alteration"</u>

Section 202 of the IEBC defines "repair" as "the restoration to good or sound condition any part of an existing building for the purpose of its maintenance." IEBC, § 202; *see also* IEBC, § 302 ("Repairs, as defined in Chapter 2, include the patching or restoration of materials, elements, equipment, or fixtures for the purpose of maintaining such materials, elements, equipment, or fixtures in good or sound condition"). Essentially, if the work only "fixes" what was previously there, then it is classified as

[6] IEBC, § 302, 303, 304, 305. While there are other classifications of work – namely, "Change of Occupancy," "Additions," "Historic Buildings," and "Relocated Buildings" (IEBC, §§306, 307, 308, 309) – these will not be addressed by this paper.

"repair" work. Repair materials do not necessarily have to comply with code requirements for new construction. Structural damage, whether minor or substantial, will be required to comply with the provisions for new construction. Section 202 of the IEBC defines an "alteration" as "[a]ny construction or renovation to an existing structure ***other than repair or addition***." IEBC, § 202 (emphasis added). There are three levels of alteration under the IEBC: Levels 1, 2, and 3. IEBC, §§ 303, 304, 305; *see also id*. at §§ 501, *et seq.*, 601, *et seq. &* 701, *et seq*. Level 1 alterations involving new construction are the least intrusive on existing construction and Level 3 is the most intrusive. Those levels are defined with a brief description of the code work required as follows:

- **Level 1 Alteration:** "Level 1 alterations include the removal and replacement or the covering of existing materials, elements, equipment, or fixtures using new materials, elements, equipment, or fixtures that serve the same purpose." IEBC, § 303.1.

  A Level 1 alteration is similar to a repair except that newer materials, elements, equipment or fixtures are installed that provide the same purpose of the previous items. Replacement equipment and materials comply with IBC and work triggers a very limited extent of upgrade.

- **Level 2 Alteration:** "Level 2 alterations include the reconfiguration of space, the addition or elimination of any door or window, the reconfiguration or extension of any system, or the installation of any additional equipment." IEBC, § 304.1.

  Level 2 alterations must comply with the requirements for Level 1 alterations, as well. Additional limited improvements to systems such as floor openings, smoke barriers, interior finishes, guards, fire protection systems, means of egress, structural, mechanical/plumbing/electrical are triggered.

- **Level 3 Alteration:** Level 3 alterations are Level 2 alterations "where the work area exceeds 50 percent of the aggregate area of the building." IEBC, § 305.1.

  "Work area": is defined to mean "That portion or portions of a

> building consisting of all reconfigured spaces as indicated on the construction documents. Work area excludes other portions of the building where incidental work entailed by the intended work must be performed and portions of the building where work not initially intended by the owner as specifically required by this code." IEBC, § 202.
>
> Level 3 alterations must comply with the requirements for Level 1 and Level 2 alterations and substantial improvements to building systems are triggered.

In addition to these work classifications, if the damage to the building is such that the building is too dangerous or unsafe or unreasonable to repair, the building may be demolished at the code official's discretion. IEBC, § 117.

Each of these work classifications directs application of specific provisions of the IEBC the IBCB, or both. This is a fact specific determination that depends on the specific damage to a particular structure; therefore, an analysis of the code implications of each of these work classifications is impractical for the purposes of this paper. Regardless, it is important to verify that the insured has properly classified the work when seeking any plan approvals and permits. Further, it is extremely important to quantify any work that the insured is performing that is not covered by the policy because this additional work may change the work classification and trigger additional code requirements, which would increase the cost of reconstruction.

III. WHILE THE CODE DETERMINES CONSTRUCTION STANDARDS, THE POLICY DETERMINES COVERAGE

A. Policies Typically Exclude Code Upgrade Coverage

Generally, manuscript commercial property policies and ISO causes of loss forms exclude coverage for any additional costs to repair or replace a building that are necessary because of an ordinance or law that regulates the construction, repair, or use of a building. They also exclude coverage for the additional costs that may arise because property must be demolished due to building codes or other ordinances. Further, ISO building and personal property form CP 00 10 04 02 excludes coverage for the increased cost of enforcing any ordinance or law regulating the construction, use, or repair of properties that have been damaged by a

covered cause of loss. The exclusionary wording exists in the loss payment, valuation, and replacement cost optional coverage sections as follows:

> **4. Loss Payment**
>
> b. The cost to repair, rebuild or replace does not include the increased cost attributable to enforcement of any ordinance or law regulating the construction, use or repair of any property.
>
> ***
>
> **7. Valuation**
>
> b. If the Limit of Insurance for Building satisfies the Additional Condition, Coinsurance, and the cost to repair or replace the damaged building property is $2,500 or less, we will pay the cost of building repairs or replacement. The cost of building repairs or replacement does not include the increased cost attributable to enforcement of any ordinance or law regulating the construction, use or repair of any property.
>
> ***

G. Optional Coverages

3. Replacement Cost

f. The cost of repair or replacement does not include the increased cost attributable to enforcement of any ordinance or law regulating the construction, use or repair of any property.

Despite these exclusions, the ISO commercial property form adds back a limited amount of coverage for such increased costs of construction arising from building codes under Section 4. Additional Coverages, but there are several notable limitations. First, it applies only when the insured selects replacement cost coverage. Second, it is limited to the lesser of $10,000 or 5 percent of the limit of insurance applicable to the building, or, in the case of blanket coverage, the lesser of $10,000 or 5 percent times the value of the damaged building at the time of loss times any applicable coinsurance percentage. Third, it does not cover any code or law that was in place prior to the loss with which the insured was required to comply before the damage. Fourth, there is no coverage for any ordinance or law involving testing for, or remediation of, pollutants or fungus. Fifth, the insurer will not pay the additional code upgrade amount until the property is actually repaired or replaced, and repairs or replacement must be completed within two years, unless the insurer agrees to extend the period *in writing*. Finally, the insurer will pay no more than the increased cost of construction at the same premises, even if the insured elects to rebuild at a different premises.

Examples of courts enforcing code upgrade exclusions: *Southeast Real Estate Inv. Corp. v. Nationwide Mut. Ins. Co.,* No. 1:07cv1197, 2008 WL 4939748, at *3 (S.D. Miss., Nov. 17, 2008) (exclusion applied to code upgrade costs); *Spears v. Shelter Mutual Insurance Co.*, 73 P.3d 865 (Okla. 2003) (where lightning damaged insured's 60-year old home and current building codes required replacement of the 60-year old wiring, the court found that the exclusion applied and the loss was to be calculated as if there were no new building codes); *Farrell v. Royal Ins. Co. of Am.,* 989 F.Supp. 159, 166 (D Conn. 1997) (exclusion precluded coverage for costs to remove corroded underground fuel tank which was required by local

ordinance); *State Farm & Casualty Co. v. Metropolitan Dade County*, 639 S.2d 63 (Fla. Dist. Ct. App. 1994) (exclusion precluded coverage for code upgrade costs).

Examples of courts declining to enforce code upgrade exclusions: *Dupre v. Allstate Ins. Co.,* 62 P.3d 1024, 1029-30 (Colo. Ct. App. 2001) (coverage for building code upgrades not precluded where "there was no 'physical loss' caused by the building code requirements); *Garnett v. Transamerica Insurance Services*, 800 P.2d 656 (Idaho 1990) (where a fire destroyed a commercial building, the court found no exclusion for the cost of code upgrades; exclusion only applied where the loss itself is caused by law or ordinance, not where a law or ordinance required upgrades after a loss); *Bering Strait School District v. RLI Insurance Co.,* 873 P.2d 1292 (Alaska 1994) (exclusion did not apply because insured's "reasonable expectations" in buying replacement cost coverage was that the insurance would cover the cost to build a replacement code-compliant building).

B. Optional Coverage Is Available To Create Code Upgrade Coverage

To obtain additional coverage, Increased Cost of Construction provisions in manuscript forms and the optional ISO Building Ordinance or Law Coverage endorsement CP 04 05 04 02 provide a giveback of broader ordinance or law coverage. The endorsement provides coverage if:

> **B. Application of Coverages**
>
> 1. The ordinance or law:
>
> a. Regulates the demolition, construction or repair of buildings, or establishes zoning or land use requirements at the described premises; and
>
> b. Is in force at the time of loss.
>
> But coverage under this endorsement applies only in response to the minimum

> requirements of the ordinance or law. Losses and costs incurred in complying with recommended actions or standards that exceed actual requirements are not covered under this endorsement.

The coverage under the endorsement is triggered by an ordinance or law that "regulates the demolition, construction or repair of buildings, or establishes zoning or land use requirements at the described premises; and is in force at the time of the loss." It covers only the minimum requirements of the ordinance or law, and it will not apply to any suggested or recommended repairs or rebuilding that exceeds the ordinance's actual requirements.

The endorsement provides code coverage under two possible scenarios. First, there is coverage if the building sustains direct physical damage that is covered under the policy, and the damage results in enforcement of a building code. The second scenario applies if there is both a covered cause of loss and an excluded cause of loss, such as wind and flood. If damage caused by both of these perils results in additional code requirements, the entire amount of code costs are not covered. *See All Saints Catholic Church v. United Nat. Ins. Co.*, 257 S.W.3d 800, 802 (Tex. App.-Dallas 2008, no pet.). The only covered cost is the proportion of the covered direct physical damage to the total direct physical damage. If the wind damage alone would have triggered the code upgrade, then the entire amount would be payable. *Id.* In the event that only the excluded cause of loss triggers code upgrades, there is no code upgrade coverage even if there is covered direct physical damage. Under the doctrine of concurrent causation, which is applicable in Texas, where covered and non-covered perils combine to create a loss, the insured is entitled to recover only that portion of the damage caused solely by the covered peril. *Travelers Indemnity Co. v. McKillip*, 469 S.W.2d 160, 163 (Tex. 1971). Therefore, non-covered perils cannot create code upgrade coverage.

There are three possible coverages under this endorsement:

> **Coverage A** — Coverage for Loss to the Undamaged Portion of the Building. This covers the loss of value of the undamaged portion of the building when it must be demolished to comply with code requirements.

Coverage B — Demolition Cost. This covers the cost to demolish and clear the site of the undamaged portions of the covered building, where the law requires its demolition.

Coverage C — Increased Cost of Construction Coverage. To the extent of an otherwise covered cause of loss and when increased cost is a consequence of the enforcement of an ordinance or law, if the building is repaired, reconstructed or remodeled, this covers the costs of (1) the repair or reconstruction of the undamaged portions of the building; and/or (2) the reconstruction or remodeling of the undamaged portions, whether demolition is required or not. This coverage also applies to the increased cost of repair or reconstruction of: excavations, grading, backfilling and filling; building foundation; pilings; and underground pipes, flues and drains. These items of property, however, remain as property not covered against their physical loss or damage under the building and personal property and other applicable coverage forms.

If **Coverage A** is invoked, there are two loss settlement possibilities. If the insured has chosen replacement cost coverage, and the property is being repaired or replaced on the same or another premises, the policy may cover the lesser of: (a) the amount the insured would actually spend to repair, rebuild or reconstruct, but not more than it would cost to restore the building to the same height, floor area, style and comparable quality of the original building; or (b) the limit of insurance applicable to the damaged building. The second possibility applies if the insured has chosen replacement cost coverage but elects not to repair or replace the building, or if the insured has not chosen replacement cost coverage. In this event, the policy will reimburse the lesser of the actual cash value of the building at the time of the loss, or the limit of insurance applicable to the damaged building.

If the insured has selected **Coverage B**, the policy covers the cost to demolish and clear the site of undamaged parts of the same building because of enforcement of any ordinance or law requiring demolition of the undamaged portions of the building. The coinsurance additional condition does not apply to this coverage. The policy covers the lesser of the amount the insured actually spends to demolish and clear the site, or the applicable limit of insurance shown for Coverage B.

Coverage C, which may be combined with Coverage B, addresses code upgrades to existing buildings. It covers: (a) the increased cost to repair

or reconstruct damaged portions of a covered building that has sustained loss from a covered cause of loss; or (b) the cost to reconstruct or remodel undamaged portions of that building, whether or not demolition is required; or (c) both (a) and (b). The coverage applies only if the restored building has a similar occupancy as it had prior to the loss, unless the occupancy would be prohibited by ordinance or law. If the building is not repaired, restored, or remodeled, then the coverage provides no payment. If the building is repaired or replaced at the same premises, or if the insured decides to rebuild at another premises, the most the policy will cover is the lesser of the increased cost of construction at the same premises or the limit of insurance for Coverage C. If the ordinance or law requires relocation, the most the policy will cover is the lesser of the increased cost of construction at the new premises, or the limit of insurance for Coverage C. As noted earlier, it is possible to choose a combined limit of insurance for both Coverage B demolition cost and Coverage C increased cost of construction. If this is the case, the policy will not cover more for demolition costs than the amount actually spent to demolish and clear the site. The policy does not cover any increased costs of construction until the repair or replacement is completed at the same or other premises.

C. Important Limitations In Code Upgrade Coverages

The fundamental rule for code upgrade coverage is that code upgrades that are not caused by a covered cause of loss are not covered. *MarkWest Hydrocarbon Inc. et al. v. Liberty Mutual Insurance Co. et al.*, 558 F.3d 1184 (10th Cir. 2009). It is also important to remember in evaluating the code upgrade work that policies generally do not cover any costs for compliance with a code the insured was required to comply with prior to the loss, but failed to do so. In other words, the policy does not cover any loss due to an ordinance or law that the insured failed to comply with if the compliance was required before the loss. *See St. Paul Fire & Marine Insurance Co. v. Darlak Motor Inns, Inc.,* No. 3:97-CV-1559, 1999 WL 33755848 (M.D. Pa. Mar. 9, 1999) (while the code violations may not have been discovered absent the fire, the fire did not cause the code violations); *61 Jane Street Tenants Corp. v. Great American Insurance Co.,* No. 00 Civ. 1049 (GEL), 2001 WL 40774 (S.D. N.Y. Jan. 17, 2001) (where, by ordinance, after a fire, the gas service to building could not be restored until old valves and preexisting leaks were repaired; such repairs were not covered by insurance); *Chattanooga Bank Associates v. Fidelity & Deposit Co. of Maryland*, 301 F.Supp.2d 744, 779-80 (E.D. Tenn. 2004) (where the court found that “to permit a building owner to insure against discovery of existing code violations” would be contrary to “the public

policy concern for public safety"); *but see, Commonwealth Insurance Co. v. Benihana of Tokyo, Inc.*, No. 3:96-CV-0826-R, 1997 WL 361617 (N.D. Tex. June 19, 1997) (where fire damaged four non-code compliant ventilation hoods, court found that insurer also had to replace 12 undamaged ventilation hoods under the policy's code upgrade coverage).

Further, both standard and manuscript forms generally do not provide coverage for enforcement of any ordinance or law requiring demolition, repair, replacement, reconstruction, remodeling, or remediation of property because of contamination by pollutants (as defined in the policy) or because of the presence of fungus (as defined in the policy). *See Laird v. CMI Lloyds*, 261 S.W.3d 322, 330 (Tex.App.-Texarkana 2008, pet. dism'd w.o.j.). These limitations govern costs for which insureds often attempt to seek coverage.

IV. BECAUSE COVERAGE OF CODE UPGRADES DEPENDS ON ENFORCEMENT, IT IS IMPORTANT TO UNDERSTAND HOW ENFORCEMENT WORKS

Building owners often have great leeway in how building reconstruction plans are submitted to local building officials for approval. Importantly, building officials do not: (1) independently inspect a building damaged by a hurricane and determine what work needs to be done to address such damage; and (2) then determine whether the work in question constitutes a Repair or Level 1, 2, or 3 Alteration. Instead, the owner of the damaged building determines what work needs to be performed and then submits that proposal to the local building official. It is that owner-prepared proposal that local building officials rely on to determine with which provisions of the Building Code the owner must comply. Thus, property owners can manipulate the system in such a manner to make it appear that a building official required certain code upgrades, which in reality were not caused by any covered cause of loss. By reclassifying a Repair under the IBC as an Alteration, an insured may make improvements to a structure and attempt to seek coverage for these improvements as a code upgrade to undamaged portions of structures under the guise that they were required by the Alteration requirements of the existing building code.

A building official is not the appropriate gatekeeper to prevent this practice. Building officials are charged with requiring upgrades to existing buildings to the extent required by the code. *See State Farm Fire & Casualty Co. v. Metropolitan Dade County*, 639 So. 2d 63, 66 (Fla. Dist. Ct. App. 3d Dist. 1994). A building official will seldom question an owner

that designates more upgrades than the code requires and would likely not challenge an owner's statement that the repairs being done qualify as Alterations because Alterations trigger more code upgrades than repairs. That choice is not covered by the insurance policy, which expressly provides that it only covers losses due to code upgrades that are required. Therefore, it is imperative to quantify the code upgrades that were actually required by a covered cause of loss and monitor the actual reconstruction plan that is submitted to a code official.

V. INDEPENDENT ANALYSIS DURING THE ADJUSTMENT IS OFTEN REQUIRED TO DIFFERENTIATE COVERED CODE UPGRADE FROM NON-COVERED CODE UPGRADES, REGARDLESS OF ANY APPROVAL FROM BUILDING OFFICIALS

Generally, the interpretation of building codes is a question of law. *Perez v. City of Dallas*, 180 S.W.3d 906 (Tex. App.-Dallas 2005, no pet.). That being said, a building code official's interpretations of those codes may be important in a coverage dispute. As long as a building code official's interpretation is reasonable and consistent with the code, a court will strongly consider an agency's interpretation of a statute, and courts generally will defer to the local enforcement agency's interpretation of the code. *Continental Cas. Co. v. Downs*, 81 S.W.3d 803, 807 (Tex. 2002), *Seibert v. Bayport Beach & Tennis Club Ass'n*, 573 So. 2d 889, 892 (Fla. Dist. Ct. App. 2d Dist. 1990). Furthermore, in the event that a coverage dispute arises, experts may not be permitted to provide opinion testimony as to the meaning of the code. *Seibert*, 573 So. 2d at 891. Therefore, in the event that an insured is able to show that a building official approved code upgrades that were not caused by any covered cause of loss, it will be important to show that these code upgrades (1) were not required by any covered damage or (2) that the code official did not require the code upgrades, but simply approved the code upgrades.

In the event that an insurer can show that a building official did not specifically enforce or require a code upgrade, an insured may attempt to argue that it was the reasonable expectation of the insured that any code upgrade approved by a building official should be covered. Most courts have rejected this reasonable expectations doctrine and enforce the terms of the policy as written, unless the terms of the policy are ambiguous. *See, e.g. Spears v. Shelter Mutual Ins. Co.*, 73 P.3d 865 (Ok. 2003). The reasonable expectations of the insured should not matter in the face of unambiguous policy provisions, and a court will apply the terms of the

policy as written to require that code upgrade coverage only applies to required code upgrades. *Id.* An insured may also argue that the threat of enforcement of the code upgrade is sufficient to trigger coverage in the absence of actual enforcement. *State Farm Fire & Casualty Co. v. Metropolitan Dade County*, 639 So. 2d 63, 66 (Fla. Dist. Ct. App. 3d Dist. 1994). This argument appears to contradict the plain meaning of unambiguous policy language; therefore, it would likely not be successful.

VI. CONCLUSION

In a complex loss in which it appears that the insured is making renovations as well as damage repairs, it may be advisable to hire a licensed architect or engineer to assist with the analysis. This professional can assist in the initial threshold question of which building codes apply. The professional can also assist in determining the classification of the repair work under the building code. Further, the professional can assist in determining whether the insured has submitted the minimum code upgrades required to repair any covered damage to the building official or whether the code submission includes code upgrades associated with non-covered causes of loss or renovations. Proper analysis and monitoring during the adjustment can ensure that the code upgrades to a damaged building are properly allocated between covered and non-covered losses, and prevent an unfavorable analysis from a building official that may be difficult to challenge at a later date.

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FDCC Winter Meeting
Hyatt Grand Champions Resort
Indian Wells, California
February 26 – March 5, 2011

PROPERTY INSURANCE ISSUES ARISING OUT OF THE BP OIL SPILL

Presented by
Property Insurance, Reinsurance, Excess and Surplus Lines, and Extra-Contractual Liability Sections

Steven E. Goldman
Robinson & Cole
Hartford, CT

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Property Insurance Issues Arising out of the BP Oil Spill

FDCC Property Insurance Section

Winter Meeting, 2011

Background

- On April 20, 2010, an explosion occurred aboard the Deepwater Horizon, an offshore oil rig located about 52 miles southeast of Venice, Louisiana, killing 11 people and injuring 17 people.
- On April 22, 2010, the damaged oil rig sank and a one-by-five mile oil slick appeared in the Gulf. One week later, the oil slick was 120 miles long.
- By the time the flow of oil was stopped on July 15, 2010, more than 200 million gallons of oil had leaked into the Gulf, making this the worst oil spill in U.S. history.

The BP $20 Billion Fund

- After a meeting at the White House with President Barack Obama in June, BP agreed to create a $20 billion fund to help victims of the oil spill.
- Kenneth Feinberg has been appointed by the government to oversee administration of the fund. (Feinberg administered a similar fund for families of victims of the Sept. 11, 2001 terrorist attack).
- BP has promised to pay all “legitimate” claims arising out of the oil spill.
- BP reportedly has received about 154,000 claims and has paid out approximately $399 million to individuals and businesses thus far.

MDL Panel Chose Eastern District of Louisiana

- On August 10, 2010, the United States Judicial Panel on Multidistrict Litigation issued a Transfer Order, ruling that the Eastern District of Louisiana is the geographic and psychological “center of gravity” of the oil spill’s effects, and assigning Judge Carl J. Barbier to serve as transferee judge for consolidated pretrial proceedings for certain cases arising out of the oil spill.

Liability Insurance of the Major Players

- BP is self-insured through a captive insurer, Jupiter Insurance. Jupiter has $6 billion in capital, but coverage from Jupiter is limited to $700 million for any single event. Jupiter has already set loss reserves at the policy limit of $700 million.
- BP also gave notice on May 14 to Lloyds of London claiming that it is an additional insured on policies issued to Transocean, which prompted Lloyds to file a declaratory judgment action seeking a ruling that BP is not covered as an additional insured.
- Transocean reportedly has $50 million in liability coverage under its primary policy and $700 million in excess coverage under several policies.
- Cameron reportedly has $500 million in liability coverage.
- Halliburton reportedly has $600 million in liability coverage.
- Anadarko has reported its net insurance coverage will likely total about $177.5 million, less deductibles of $15 million.
- The insurance industry's exposure is estimated at between $1.5 and $3.5 billion.

Conflicts of Law

- Whether the pollution exclusion (and perhaps other exclusions) will apply to bar coverage for certain claims will depend largely on which state's law applies.
- In determining what law to apply to an insurance coverage dispute, courts generally consider where the insured is incorporated and has its principal place of business, and perhaps more importantly, where the policy was negotiated, issued, and delivered.
- See for example, *Breese v. Hadson Petroleum, Inc.,* 955 F.Supp. 648 (M.D. La. 1996)(Court found that Mississippi law applied when policy was issued to a Mississippi Corporation and was negotiated and executed in Mississippi); *The Travelers Insurance Group, Inc. v. O.C.S. Inc.,* 914 F.Supp. 126 (E.D. La. 1996)(Court found that Texas law applied when insured was a Texas corporation with its headquarters in Texas, and policy was negotiated and delivered in Texas); *Harrison v. R.R. Morrison & Son, Inc.,* 37,992 (La. App. 2 Cir. 12/10/03), 862 So.2d 1065 (Court found that Mississippi law applied because policy was issued to a Mississippi corporation with its primary place of business in Mississippi, and importantly, the insurance policy was negotiated and executed in Mississippi.)
- But see, *In re Combustion, Inc.,* 960 F.Supp. 1056 (W.D. La. 1997)(Court held that Louisiana law applied when Louisiana was where the contamination occurred, was the residence of the persons injured, was the location where the injuries and damages occurred, and was the domicile or habitual residence of the injuring parties.)
- Note that just because the majority of cases arising out of the oil spill have been transferred to the Eastern District of Louisiana for consolidated pre-trial proceedings does not necessarily mean that the insurance coverage disputes between the insureds and their insurers will be transferred to the Eastern District of Louisiana. The declaratory judgment action filed by Certain Underwriters at Lloyds London against BP is still currently pending in the Southern District of Texas, Houston Division, although it has been identified as a potential tag-along case and may be transferred later. Conflicts of law rules of other states may apply to these insurance coverage disputes.

MDL Proceedings

- MDL Panel: 7 judges (6 district judges, 1 circuit judge); hold oral arguments bi-monthly at various locations
- Decide whether to transfer individual cases to MDLs (where disputed)
- Transfers are for consolidated pre-trial proceedings (but “bellweather” trials occur)
- Appeals from MDL judge go to MDL circuit

MDL Proceedings

- Jockeying for positions on steering committees
- Consolidated motion practice coordinated by steering committees
- Chinese Drywall – 2 major “bellweather” trials
- Pressure applied towards mass settlements

MDL Proceedings

- Issues arise re: whether insurance coverage cases should be part of an MDL
- Chinese Drywall – Insurers opposed transfer; MDL Panel transferred some DJ actions where underlying suit was pending in the MDL; other cases were not transferred

MDL Proceedings

In re Chinese-Manufactured Drywall Products Liab. LItig., MDL No. 2047, Order of MDL Panel (June 15, 2010) (emphasis added)

"Centralization of insurance litigation with the underlying claims will always depend on the particular facts and circumstances of the litigation.

These cases do have a common factual backdrop involving the general circumstances of imported Chinese drywall and the damage it is alleged to have caused. **However, the cases seem to present strictly legal questions which require little or no centralized discovery. Different circumstances could create a stronger case for transfer. Where insurance coverage actions require and rely on the same factual discovery as the underlying tort actions, transfer may be warranted.** That does not appear to be true here. This is probably the most important consideration in the Panel's decision to deny transfer of these cases."

MDL Proceedings

In re Chinese-Manufactured Drywall Products Liab. LItig., MDL No. 2047, Order of MDL Panel (June 15, 2010)

- Claimed need for consistency in rulings on legal issues is not, by itself, a ground for transfer.
- Facilitating settlement was not a ground for transfer.

Property Coverage

- Covers direct physical loss to buildings and personal property not caused by excluded cause of loss. Some cases find a complete loss of use to be a direct physical loss.
- Does not cover land (except for Pollutant Cleanup and Removal provision, usually with small sublimit).
- Largest exposure likely to be business interruption – some coverages can apply where insured property is not damaged.

Property Coverage

Business Interruption

- Business Interruption coverage
- Dependent Property coverage
- Civil Authority coverage
- Ingress/Egress coverage
- The additional coverages often have sublimits

Property Coverage

Business Interruption Coverage

- Requires covered direct physical loss to insured property / property described in declarations
- Causing "interruption of business" (some courts require complete cessation)
- Causing loss of business income
- Some courts have held that contamination that renders a structure unusable constitutes "direct physical loss." *See*, *e.g.*, *Port Authority of NY and NJ v. Affiliated FM Ins. Co.* (3rd Cir. 2002) (asbestos)

Property Coverage

Business Interruption Coverage

Ramada Inn, Inc. v. Travelers Indem. Co., 835 F.2d 812 (11th Cir. 1988)

- Interruption means inability to use the premises where the loss took place.
- The physical damage must prevent business operations.
- No coverage for decrease in hotel occupancy due to restaurant fire.

The interruption must be caused by covered direct physical loss

- Aesthetic damage or damage to amenities is not covered

Keetch v. Mut. Of Enumclaw Ins. Co., 831 P.2d 784 (Wash. App. 1992) (motel buried in 6 inches of volcanic ash but remained open)

Royal Indem. Ins. Co. v. Mikob Props., Inc., 940 F. Supp. 155 (S.D. Tex. 1996) (insured claimed that fire in one building of apartment complex caused reduced occupancy in other buildings)

Property Coverage – Dependent Property

Dependent Property Coverage

- Covers loss of business income due to direct physical loss or damage by a Covered Cause of Loss to property at the premises of a "dependent property" within the Policy Territory."

"Dependent Property" means property operated by others that the insured depends on to:

a. Supply materials or services to the Insured, or to others for the account of the Insured (Contributing Locations).
b. Accept the Insured's products or services (Recipient Locations).
b. Manufacture products for delivery to the Insrued's customers under contract of sale (Manufacturing Locations); or
c. Attract customers to the Insured's business (Leader Locations).

Dependent Property Coverage – Scenarios

- Insured is hotel in a waterfront area. Local beaches (or hotel's own beach) attract hotel guests, and are closed due to the oil spill.
- Insured is a Louisiana restaurant specializing in local seafood. Its suppliers are unable to provide local seafood due to the oil spill, but other sources of seafood are available.
- Insured supplies linens to hotels and restaurants in a waterfront area that have a substantially reduced need for linens due to closure of local beaches.

Dependent Property Coverage -- Issues

- Was there physical damage to property at the premises of a “dependent property”?
- Was the physical damage to the “dependent property” caused by a Covered Cause of Loss? Does the pollution exclusion apply?
- What are the “premises” of a “dependent property” if the “dependent property” consists of a fishing operation at sea?

Dependent Property Coverage

- *Archer Daniels Midland Co. v. Phoenix Assur. Co of New York*, 936 F. Supp. 534 (S.D. Ill. 1996)

  Supplier does not need to be a direct supplier, but merely someone in the chain of production (even Coast Guard included). Finds coverage where barge traffic on Mississippi River was halted due to flooding.
- *Accord Archer Daniels Midland Co. v. AON Risk Servs. Inc.*, 2002 U.S. Dist. LEXIS 19314 (D. Minn. 2002) (jury properly instructed that a supplier can be an indirect supplier)
- *But see Pentair, Inc. v. Am. Guar. & Liab. Ins. Co.*, 2003 WL 21804874 (D. Minn. July 31, 2003) (no coverage where property damage was to electrical substations that supplied electricity to a supplier of the insured's products)

Civil Authority Coverage

- Covers loss of business income and extra expense "caused by *action of civil authority that prohibits access to your premises* due to direct physical loss of or damage to property, other than at the 'covered premises', caused by or resulting from any Covered Cause of Loss."
- Could potentially be implicated if civil authorities prohibit access to waterfront premises during cleanup.

Civil Authority Coverage

- *730 Bienville Partners, LTD v. Assurance Co. of North America*, 2002 WL 31996014 (E.D. La. Sept. 30, 2002).
  - "While the FAA closure of the airports and cancellation of flights may have prevented many guests from getting to New Orleans and ultimately to plaintiff's hotels, the FAA hardly 'prohibited' access to the hotels." Also held that order was not caused by physical damage.

The Paradies Shops, Inc. v. Hartford Fire Ins. Co., 2004 U.S. Dist. LEXIS 30124 (N.D. Ga. Dec. 14, 2004)

- "Unless the airports were actually closed by some civil authority, access to plaintiff's premises was not specifically prohibited and coverage does not attach." Also held that order was not caused by physical damage.

Ingress/Egress Coverage

- Covers loss of business income where, as a direct result of a peril not excluded, ingress to or egress from the insured property is prevented.
- Some policies use the word “impaired” or “restricted” instead of “prevented.”
- Some policies require physical damage to other property in the vicinity.
- Physical damage to the insured property is not required. *Fountain Powerboat Indus. v. Reliance Ins. Co.,* 119 F. Supp. 2d 552 (E.D. N.C. 2000).

Property Coverages - Exclusions

- Pollution exclusion
- Faulty workmanship exclusion

Pollution Exclusion

- Excludes loss caused by “discharge, dispersal, seepage, migration, release or escape of pollutants”
- “Pollutants” include “any solid, liquid, gaseous or thermal irritant or contaminant”
- Many exclusions have an exception where discharge or release of the pollutant is caused by a fire or explosion.
- Some courts have limited application of the exclusion

Pollution Exclusion - Issues

- Is naturally-occurring oil a "pollutant"?
- Was the release of oil caused by a fire or explosion?
- Does the applicable jurisdiction restrict the scope of the exclusion? *See Doerr v. Mobil Oil Corp.*, 774 So. 2d 119 (La. 2000) (requiring, under a CGL policy, that insured must be a "polluter" that causes the release of the pollutant). Other Gulf Coast states have not imposed such a limitation.

Doerr v. Mobil Oil Corp.

- The Louisiana Supreme Court's latest ruling on the application of the total pollution exclusion is *Doerr v. Mobil Oil Corp.,* 00-0947 (La. 12/19/00), 774 So.2d 119.
- *Doerr* overruled *Ducote v. Koch Pipeline Co.,* 98-0942 (La. 1/20/00), 730 So.2d 432, which had held that the total pollution exclusion was unambiguous, and applied "regardless of whether the release was intentional or accidental, a one-time event or part of an on-going pattern of pollution."
- *Doerr* held that the pollution exclusion is ambiguous as a matter of law because it could lead to absurd consequences if applied literally. *Doerr* further held that the pollution exclusion applies to "environmental pollution only" and should "not be applied to all contact with substances that may be classified as pollutants." *Doerr* explained that the pollution exclusion was "not meant to exclude coverage for routine accidents which incidentally involve a chemical agent."

The *Doerr* (La. Supreme Ct) Test

In applying CGL Pollution exclusion must consider

1. Whether the insured is a “polluter” within the meaning of the exclusion;
2. Whether the injury-causing substance is a “pollutant” within the meaning of the exclusion; and
3. Whether there was a “discharge, dispersal, seepage, migration, release or escape” of a pollutant by the insured

Faulty Workmanship Exclusion

"The Company will not pay for loss or damage caused by or resulting from any of the following:

. . .

Faulty, inadequate or defective: . . .

(2) Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;

. . .

of part or all of any property on or off an insured premises."

However, in the event an excluded cause of loss that is listed [above] results in a Covered Cause of Loss, the Company will be liable only for such resulting loss or damage."

Faulty Workmanship Exclusion - Issues

- Was the oil spill caused by faulty workmanship?
- Is the exclusion intended to apply where the faulty workmanship occurs at sea, many miles away from the insured property?
- Ensuing loss clause: Did the faulty workmanship result in a separate Covered Cause of Loss? (Depends on applicability of pollution exclusion.)

What if a hurricane strikes?

- Storm surge could push ashore oil-laden waters.
- Flood exclusion – strongly upheld in Louisiana and Mississippi in Katrina cases.
- Flood exclusions typically have anti-concurrent causation clauses. Pollution exclusions typically do not. Fire or explosion may have caused release of pollutant, but storm surge flooding brought pollutant ashore.



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This article was originally published in the Brooklyn Law School Journal of Law and Policy, Volume XVI, No. 1, 2007, and is being reprinted here with the permission of the Brooklyn Law School. The Federation of Defense and Corporate Counsel and Professor Shari Seidman Diamond thank the Brooklyn Law School for permission to republish.

Journal of Law and Policy

Science for Judges IX

How Jurors Deal with Expert Testimony and How Judges Can Help

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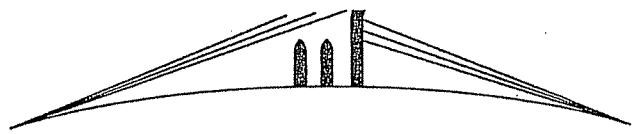

BROOKLYN LAW SCHOOL

VOLUME XVI 2007 No. 1

HOW JURORS DEAL WITH EXPERT TESTIMONY AND HOW JUDGES CAN HELP*

*Shari Seidman Diamond***

INTRODUCTION

Expert evidence is a familiar but challenging feature in the modern trial.[1] Judges must decide on the admissibility of expert testimony,[2] and jurors must grapple with the testimony if it is admitted. If courts are uneasy about the ability of the jury to handle the expert evidence, they may be inclined to play a more active role as gatekeeper in monitoring what the jury will be permitted to consider. Critics of the jury often assume that lay jurors are incapable of understanding and assessing the claims of

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* This article is based on my presentation at the Science for Judges IX conference at the Brooklyn Law School in April, 2007. I drew on research supported, in part, by research grants from the State Justice Institute (Grant SJI-97-N-247), the National Science Foundation (Grant SBR9818806), and the American Bar Foundation, with additional support from Northwestern University Law School and Duke University Law School. For previously published work based on this research, see *infra* at notes 6, 11, 23, 27 and 29. Thanks to my collaborators, Mary R. Rose and Beth Murphy, for their comments on an earlier version of the draft. Thanks also to Professor Margaret Berger, Suzanne J. & Norman Miles Professor of Law at Brooklyn Law School and monitor of the Symposium, whose leadership at the interface of science and law has inspired and informed all of us.

** Howard J. Trienens Professor of Law and Professor of Psychology, Northwestern University Law School and Senior Research Fellow, American Bar Foundation.

[1] *See* Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1114 (1991).

[2] Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993); *see also* FED. R. EVID. 702–703; Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. 137 (1999); Gen. Elec. Co. v. Joiner, 522 U.S. 136 (1997).

experts who present technical, scientific, or pseudo-scientific testimony.[3] What may happen if jurors indeed cannot competently evaluate expert testimony? One possibility is that they will ignore crucial evidence. An alternative possibility is that the jurors will be naively uncritical of expert testimony, overawed by an expert with imposing credentials, impressed by jargon they do not understand, and misled by "its aura of special reliability and trustworthiness."[4] Neither of these threats comports with the picture of jury reactions to experts that emerges from empirical research on jury behavior.[5]

That is not to say that juries always understand expert evidence. No layperson, juror, or judge faced with complex technical or scientific evidence can be expected to master all of this challenging material, so it is not surprising to find occasions on which the trier of fact reaches a decision that appears to be inconsistent with the weight of the evidence. Indeed, one of the advantages of appellate review is that it can provide some check on these errors. But before drawing any conclusions about deficiencies in how jurors deal with expert testimony, a more systematic analysis of the evidence is required. I begin with an overall picture of jury decision-making drawn from a variety of empirical studies. I then turn specifically to research addressing how jurors respond to expert testimony. Finally, I consider the particular challenges posed by experts and what judges can do to optimize how jurors deal with expert testimony.

Throughout this analysis, I draw on several different approaches to the empirical study of jury behavior. Together these different ways of studying the jury provide a more grounded and comprehensive picture of juries than would be obtainable from one method—or from the selective newspaper coverage of unusual trials.[6] The methods include archival studies of jury verdicts;[7] post-

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[3] *See, e.g.*, PETER W. HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM (1991).

[4] United States v. Amaral, 488 F.2d 1148, 1152 (9th Cir. 1973).

[5] Neil Vidmar & Shari Seidman Diamond, *Juries and Expert Evidence,* 66 BROOK. L. REV. 1121, 1149–67 (2001).

[6] Shari Seidman Diamond, *Truth, Justice, and the Jury*, 26 HARV. J. OF LAW & PUB. POL'Y 143 (2003); Michael McCann et al., *Java Jive: Genealogy of a Juridical Icon*, 56 U. MIAMI L. REV. 113, 142 (2001); Laura Beth Nielsen

trial surveys of jurors;[8] surveys of jury observers, such as judges and attorneys;[9] simulations;[10] and a unique study, the Arizona Jury Project, in which we were able to videotape and analyze actual civil jury deliberations.[11]

Each of these sources has strengths and weaknesses. Archival studies can collect information on large samples of cases but depend on the information that courts or jury verdict reporters have collected. As a result, a significant amount of relevant information is often missing. Post-trial surveys and interviews with jurors enable researchers to reconstruct juror understandings and deliberations with input from the jurors themselves, but even cooperative jurors may provide incomplete and misleading impressions. Jurors who are questioned after trial know how the trial came out and have publicly endorsed the verdict. The outcome can have a powerful impact on the jurors, leading them in

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& Aaron Beim, *Media Misrepresentation: Title VII, Print Media, and Public Perceptions of Discrimination Litigation*, 15 STAN. L. & POL'Y REV. 237 (2004); Daniel S. Bailis & Robert J. MacCoun, *Estimating Liability Risks with the Media as Your Guide: A Content Analysis of Media Coverage of Tort Litigation*, 20 LAW & HUM. BEHAV. 419 (1996).

[7] Gross, *supra* note 1.

[8] Sanja Kutnjak Ivkovic & Valerie P. Hans, *Jurors' Evaluations of Expert Testimony: Judging the Messenger and the Message*, 28 LAW & SOC. INQUIRY 441, 450–452 (2003); Daniel W. Shuman & Anthony Champagne, *Removing the People from the Legal Process: The Rhetoric and Research on Judicial Selection and Juries*, 3 PSYCH. PUB. POL. & L. 242, 253–56 (1997).

[9] HARRY KALVEN, JR., & HANS ZEISEL, THE AMERICAN JURY (1966); Larry Heuer & Steven Penrod, *Trial Complexity: A Field Investigation of Its Meaning and Its Effects*, 18 LAW & HUM. BEHAV. 29 (1994); Theodore Eisenberg et al., *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel's The American Jury*, 2 J. EMPIRICAL. LEGAL STUDIES 171 (2005).

[10] Margaret B. Kovera et al., *Reasoning About Scientific Evidence: Effects of Juror Gender and Evidence Quality on Juror Decisions in a Hostile Work Environment Case*, 84 J. APP. PSYCHOL. 362 (1999); Brian L. Cutler et al., *Expert Testimony and Jury Decision Making: An Empirical Analysis*, 7 BEHAV. SCI. & L. 215 (1989).

[11] Shari Seidman Diamond, Neil Vidmar, Mary R. Rose, Leslie Ellis, & Beth Murphy, *Juror Discussions During Civil Trials: Studying an Arizona Innovation*, 45 ARIZ. L. REV. 1 (2003) [hereinafter *Juror Discussions During Civil Trials*].

retrospect to view the ultimate verdict as inevitable and affecting their recall of the process that produced the jury's decision.[12]

In jury simulations—the method most frequently used to study jury behavior—it is possible to systematically test the impact of variations in evidence or procedure on jurors, thereby providing strong causal evidence on how these variations affect behavior. Mock jurors participating in simulations, however, even those simulations using members of the jury venire and presenting full-length videotaped trials, know that they are in a simulation. In addition, both the trials and the jury deliberations in simulations are predictably short in duration.[13] The extent to which these characteristics affect the behavior of mock jurors is likely to vary, depending on the nature of the case and the behavior being measured.

Finally, one study of deliberating juries deciding actual cases provides for the first time a direct window into real jury deliberations, even though it too has a potential weakness: although the jurors were assured that, under court order, no one other than the researchers would ever view the deliberations, and the cameras were unobtrusively positioned in the ceilings, the jurors knew that their deliberations were being videotaped.[14] While each of these methods thus has both strengths and weaknesses, the weaknesses vary across methods. Together, this large body of research shows a consistent pattern of results, both in describing jury behavior overall and in revealing how jurors react to experts.[15]

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[12] *See* Baruch Fischhoff, *Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty*, 1 J. EXPERIMENTAL PSYCH. 288, 288 (1975).

[13] For a discussion of the value and limitations of jury simulations, *see* Shari Seidman Diamond, *Illuminations and Shadows From Jury Simulations*, 21 LAW & HUM. BEHAV. 561, 562 (1997).

[14] For a detailed description of the taping and consent procedures, *see Juror Discussions During Civil Trials*, *supra* note 11, at 23.

[15] *See* Vidmar & Diamond, *supra* note 5, at 1174.

I. THE JURY'S APPROACH TO THE TRIAL

A jury is not a blank slate that merely absorbs trial evidence and instructions on the law before applying the law to the evidence in order to arrive at a verdict. Indeed, courts recognize that something more is afoot when they tell jurors to consider all of the evidence in the light of reason, common sense, and experience. Jurors consider all of the evidence in this manner—as they must—when arriving at their decisions. All human decisionmakers (judges as well as jurors) find it necessary to draw on their prior experiences to make sense of what they see and hear. Those prior beliefs and expectations unavoidably filter and organize perceptions,[16] often assisting and occasionally impairing reasonable inferences about the evidence. For example, a juror in one of the cases in the Arizona Jury Project submitted a question during trial asking whether the fact that a young man had been drinking prior to being injured in a serious accident was likely to have affected the severity of his injury.[17] This juror was implicitly drawing on his beliefs about the effects of alcohol, and perhaps his prior experiences with drinking.[18] The ubiquitous impact of prior experience on judgment was reflected in an insightful observation from United States Supreme Court Justice John Paul Stevens in a recent interview.[19] Justice Stevens said that he was sure that his views on the Supreme Court had been influenced by the "totally unjust conviction" of his father for embezzlement.[20]

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[16] Charles G. Lord, Lee Ross, & Mark R. Lepper. *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERS. & SOC. PSYCH. 2098 (1979).

[17] The Project is described in *Juror Discussions During Civil Trials, supra* note 11, and discussed further *infra* text accompanying notes 28–33.

[18] In Arizona, where jurors are permitted to submit questions for witnesses during trial, a juror posed this question for the defense expert. The expert responded that the plaintiff's drinking would have had no effect. It was a particularly credible response because a different answer might have assisted the defense. The issue was never mentioned during deliberations.

[19] Jeffrey Rosen, *The Dissenter*, N.Y. TIMES MAGAZINE, Sept. 23, 2007, at 50, 54.

[20] *Id.*

Research on jurors indicates that they typically are strongly motivated to reach a correct verdict, and that they actively process what they see and hear in the courtroom to arrive at that decision.[21] Jurors apply commonsense norms of behavior to evaluate the reasonableness of behavior and to sort out competing claims.[22] They are also aware that they are in an adversary setting, that all of the witnesses and attorneys are attempting to persuade them, and that it will be up to the jurors to decide which of the conflicting accounts is convincing. As a result, jurors are alert to signs that witnesses are dissembling, and they "cross-check" claims, seeking consistency across sources.[23] Jurors are particularly interested in evidence that appears to be less subject to manipulation and more reliable than the claims of an interested party or other witness. As the jurors watch the trial unfold, they also realize that at the trial's conclusion they will have to reach a group decision which may involve convincing fellow jurors who have different reactions to the evidence. Although individuals tend to expect others to see the world the way they see it,[24] the anticipation of having to defend one's views and persuade others tends to promote active

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[21] *See generally* W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM (1981); Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991); Nancy Pennington & Reid Hastie, *Explaining the Evidence: Tests of the Story Model for Juror Decision Making*, 62 J. PERSONALITY & SOC. PSYCHOL. 189 (1992); Shari Seidman Diamond & Jonathan D. Casper, *Blindfolding the Jury to Verdict Consequences: Damages, Experts, and the Civil Jury*, 26 LAW & SOC'Y REV. 513 (1992).

[22] NORMAN FINKEL, COMMONSENSE JUSTICE: JUROR'S NOTIONS OF THE LAW (1995); *see also* Jason Schklar & Shari Seidman Diamond, *Juror Reactions to DNA Evidence: Errors and Expectancies*, 23 LAW & HUM. BEHAV. 159, 180–81 (1999).

[23] Shari Seidman Diamond, Mary R. Rose, Beth Murphy & Sven Smith, *Juror Questions During Trial: A Window Into Juror Thinking*, 59 VANDERBILT L. REV. 1927, 1954–62 (2006) [hereinafter *Juror Questions During Trial*].

[24] Lee Ross, David Greene, & Pamela House, *The "False Consensus Effect": An Egocentric Bias in Social Perception and Attribution Processes*, 13 J. EXPER. SOC. PSYCHOL. 279 (1977); Joachim Krueger & Russell W. Clement, *The Truly False Consensus Effect: An Ineradicable and Egocentric Bias in Social Perception*, 67 J. PERS. SOC. PSYCH. 596 (1994).

engagement and processing.[25]

This engagement by jurors does not eliminate their need to struggle with some of the judgments they are asked to make and the tools (e.g., jury instructions) they are expected to use in reaching those judgments. Jury interactions during deliberations generally do not represent a linear decision-making process, yet by the end of deliberations, this group process generally results in a verdict that most jurors see as fairly reflecting the facts that led to the trial and comporting with the law as they understand it.

II. JUROR RESPONSE TO EXPERTS

Complex evidence presents a particular challenge for both the experts who must communicate with a lay audience and the audience members themselves—the triers of fact. Jurors recognize the value of expert evidence for assisting them in reaching their decisions, but surveys of jurors indicate that while jurors find expert testimony to be useful, they are also wary of experts. For example, in one survey of jurors, 30 percent said, "experts provided biased testimony."[26] Other studies have shown that jurors expect experts to be relatively competent and likely to be knowledgeable, but jurors also anticipate that the experts will be influenced by the side that called them to testify.[27] Thus, countervailing forces influence juror perceptions of expert testimony because the credibility of a communicator is influenced by the communicator's expertise and trustworthiness. The expectation of potential bias acts as a brake on the persuasiveness of an expert.[28]

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[25] Philip E. Tetlock, *Accountability: A Social Check on the Fundamental Attribution Error*, 48 SOC. PSYCHOL. Q. 227, 233 (1985).

[26] Daniel W. Shuman, Elizabeth Whitaker & Anthony Champagne, *An Empirical Examination of the Use of Expert Witnesses in the Courts—Part II: A Three City Study*, 34 JURIMETRICS J. 193, 203 (1994).

[27] Shari Seidman Diamond, *Beyond Fantasy and Nightmare: A Portrait of the Jury*, 54 BUFF. L. REV. 717, 746 (2006).

[28] *See* Shari Seidman Diamond & Jonathan D. Casper, *Blindfolding the Jury to Verdict Consequences: Damages, Experts, and the Civil Jury*, 26 LAW & SOC'Y REV. 513, 558 (1992).

The Arizona Jury Project, in which we observed actual jury deliberations, presented a unique opportunity to observe how juries handle expert testimony.[29] The opportunity to study these jury deliberations arose because an innovative group of judges and attorneys in Arizona, encouraged by the Arizona Supreme Court, took a close look at their jury system. As a result, Arizona decided to make some changes aimed at facilitating jury performance, including a controversial innovation instructing jurors that they were permitted to discuss the case among themselves during breaks in the trial. To evaluate the effect of allowing discussions, the Arizona Supreme Court issued an order permitting a team of researchers to conduct a randomized experiment in which some jurors in some cases were instructed that they could discuss the case and others were given the traditional admonition not to discuss the case.[30] The court order also permitted us to videotape the jury discussions and deliberations.[31]

The jurors, attorneys, and parties were promised that the tapes would be viewed only by the researchers and only for research purposes. Jurors were told about the videotaping project when they arrived at court for their jury service. If they preferred not to participate, they were assigned to cases not involved in the project.

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[29] *See Juror Discussions During Civil Trials*, *supra*, note 11. Other published articles drawing on data from the Arizona Project include: Shari Seidman Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857 (2001); Shari Seidman Diamond, Neil Vidmar, Mary Rose, Leslie Ellis, & Beth Murphy, *Inside the Jury Room: Evaluating Juror Discussions During Trial*, 87 JUDICATURE 54 (2003); Diamond, *supra* note 6; Shari Seidman Diamond, Mary R. Rose, & Beth Murphy, *Jurors' Unanswered Questions*, 41 CT. REV. 20 (2004); Shari Seidman Diamond, Mary R. Rose & Beth Murphy, *Revising the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 NW. U. L. REV. 201 (2006); *Juror Questions During Trial*, *supra* note 23.

[30] *See Juror Discussions During Civil Trials*, *supra* note 11.

[31] *See id.* at 17, for a detailed report on the permissions and security measures the project required, and the results of the evaluation. As part of their obligations of confidentiality under the Supreme Court Order as well as additional assurances to parties and jurors undertaken by the principal investigators, the Authors of this Article have changed certain details to disguise individual cases. The changes do not, however, affect the substantive nature of the findings that are reported.

The juror participation rate was over 95 percent.[32] Attorneys and litigants were less willing to take part in the study. Some attorneys were generally willing to participate when they had a case before one of the participating judges; others consistently refused. The result was a 22 percent yield among otherwise eligible trials.

We also videotaped the trials themselves and collected the exhibits, juror questions submitted during trial, jury instructions, and verdict forms. In addition, the jurors, attorneys, and judge completed questionnaires at the end of the trial. The fifty cases in the study reflected the usual mix of cases dealt with by state courts: 26 motor vehicle cases (52 percent), four medical malpractice cases (8 percent), seventeen other tort cases (34 percent), and three contract cases (6 percent).[33] Awards ranged from $1,000 to $2.8 million, with a median award of $25,500.

In the prior analysis of the discussion innovation, we looked for indicators of how the opportunity for discussion affected jurors' response to expert testimony. The opportunity to discuss the case appeared to be particularly helpful in the more complex cases. When factual questions arose about the evidence, discussion tended to improve the accuracy of recall. Moreover, jurors permitted to discuss the case reported significantly greater ease in comprehension of the expert testimony.[34] Thus, the opportunity to discuss the case appeared to provide assistance precisely where advocates of the innovation expected it would be most valuable.

After completing our evaluation of the impact of the discussions innovation on the Arizona juries, we turned to analyses of the deliberations from this unique data set to answer other questions about the jury. Some of these analyses provide insights

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[32] Although we cannot be certain that the cameras had no effect on their behavior during deliberations, the behavior during deliberations at times included comments that the jurors presumably would not have wanted the judges or attorneys to hear.

[33] This distribution is similar to the breakdown for civil jury trials for the Pima Country Superior Court for the year 2001: 62 percent motor vehicle tort cases, 8 percent medical malpractice cases, 23 percent other tort cases and 6 percent contract cases (figures provided by Nicole M. Waters of the National Center for State Courts).

[34] *Juror Discussions During Civil Trials*, *supra* note 11, at 74–76.

into how jurors respond to expert testimony. Forty-three of the fifty cases had experts who gave live testimony, a median of three per case. Half of the cases (24 of the 50) had opposing experts who testified on the same issue. The 122 live expert witnesses included physicians, mental health professionals, biomechanical engineers, financial analysts, and academic scientists. The jurors in these cases had an opportunity to submit questions for these experts during trial. In Arizona, as in a small but growing number of jurisdictions, jurors are permitted to submit questions for witnesses during trial.[35] The 257 questions the jurors submitted for experts revealed what jurors were thinking about as they were being exposed to expert testimony,[36] and their deliberations provide some insights into juror reactions to the experts.

Research on cognitive processing distinguishes between two reactions to attempts at persuasion.[37] The first is peripheral or heuristic processing which occurs when decision makers are either unmotivated or unable to evaluate the arguments that a communicator is making. Under those circumstances, the decision maker is inclined to use a short cut—a heuristic—to decide whether or not to accept the claims being made. The prestige of the communicator, e.g., her occupation or education, provides a peripheral cue to the decision maker that, all other things being equal, he should accept the claims that the expert is making. If jurors were motivated to avoid the effort of evaluating expert evidence, or if they simply were unable to process the information

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[35] A few states, including Arizona, now require judges to tell jurors that they may submit questions during trial. Most leave the choice to judicial discretion, although a few explicitly forbid it. The 2005 ABA Principles for Juries and Jury Trials endorses the practice. AMERICAN BAR ASSOCIATION, PRINCIPLES FOR JURIES AND JURY TRIALS, PRINCIPLE 13(C).

[36] This section is based in part on *Juror Questions During Trial*, *supra* note 23, focusing on the 257 questions jurors submitted for experts out of the 829 total questions they submitted for all witnesses.

[37] ALICE H. EAGLY & SHELLY CHAIKEN, THE PSYCHOLOGY OF ATTITUDES 326–27 (1993); Shelly Chaiken, *The Heuristic Model of Persuasion*, *in* 5 SOCIAL INFLUENCE: THE ONTARIO SYMPOSIUM 3 (Mark P. Zanna et al. eds., 1987); RICHARD E. PETTY, COMMUNICATION AND PERSUASION: CENTRAL AND PERIPHERAL ROUTES TO ATTITUDE CHANGE 3 (John T. Cacioppo ed., 1986).

an expert was offering, they could simply defer and accept the conclusions without engaging in further processing. Jurors would be engaged in peripheral processing if they merely compared the credentials of two opposing experts and accepted the opinions of the more prestigious source.

A second form of processing, called central or systematic processing, occurs when a decision maker is motivated to understand and evaluate a persuasive communication, scrutinizing the quality of the arguments and not simply deferring to the claims of a prestigious source.[38] The questions jurors submitted to the experts reveal how jurors attempted to deal with expert testimony as it was being presented during trial.

The clearest evidence of peripheral processing would emerge if jurors failed to submit questions to the expert witnesses at all or if they asked only about credentials or experience. In fact, jurors submitted questions for almost half (47.5 percent) of the expert witnesses, averaging 2.11 questions per witness. Even though jurors are instructed that they should consider the qualifications and experience of expert witnesses in judging their credibility,[39] only fifteen (5.8 percent) of the 257 questions directed to the experts concerned credentials or experience. Instead, the nature of the questions generally reflected attempts by the jurors to get further information that could assist them in evaluating the content of the testimony. Many of the questions focused on alternative

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[38] Chaiken, *supra* note 37, at 3; *see generally* Ronald J. Allen & Joseph S. Miller, *The Common Law Theory of Experts: Deference or Education?*, 87 NW. U. L. REV. 1131 (1993).

[39] ARIZONA STATE BAR, REVISED ARIZONA JURY INSTRUCTIONS (CIVIL) 6, 7 (3d ed. 1997)

> A witness qualified as an expert by education or experience may state opinions on matters in that witness's field of expertise, and may also state reasons for those opinions. Expert opinion testimony should be judged just as any other testimony. You are not bound by it. You may accept it or reject it, in whole or in part, and you should give it as much weight as you think it deserves, considering the witness's qualifications and experience, the reasons given for the opinions, and all the other evidence in the case.

Id.

possible causes for the plaintiff's injury.

Although overall, issues of causation were the focus of 21.1 percent of the juror questions, they accounted for 34.6 percent of the questions for experts. For example, in a medical malpractice case a juror asked: "What were other potential causes for the . . . damage that you observed and why were they less plausible causes for [the plaintiff's injury] than the cause that you have ascertained?" Other questions simply sought clarification on what the witness had said. For example, in one case involving a claim of infliction of emotional distress, a juror asked the psychologist, "What does the term 'reasonable psychological probability' mean?" In some of the questions, jurors probed the basis for the expert's conclusions. In a motor vehicle case, a juror asked the engineer who testified about his description of what must have happened to the passenger at the time of impact, "Not knowing how he was sitting, or his weight, how can you be sure he hit his shoulder?" In a products liability case, the jurors questioned a scientist on his methods for testing and evaluating the product. And in several cases, experts testified about standards of reasonable care and jurors submitted questions asking whether specific governmental or industry regulations applied and, if so, what the codes or regulations said. In sum, the questions as a group reflect a picture consistent with central rather than peripheral processing. In some cases, the expert testimony did not turn out to be pertinent for the jurors in reaching their verdicts (e.g., when a physician testified about the extent of a plaintiff's injury and the jury concluded that the defendant had not been negligent), but in other cases the jurors discussed the content of the expert testimony extensively during deliberations.

Examples from the deliberations reveal some of the cues jurors used to evaluate the trustworthiness of the expert testimony.[40] Jurors were suspicious of experts who appeared to be obfuscating. As one juror complained, "He won't give you a straight answer." They also occasionally expressed concern that an expert's opinion was unrepresentative. For example, in a medical malpractice case in

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[40] We will present a comprehensive analysis of the role played by expert testimony in these deliberations in a future article.

which opposing experts made opposing claims about the reasonable standard of care, a juror expressed concern about the difficulty of evaluating which was more accurate: "What I would like to have is 40 [specialists] and show them the [test results] and okay, get a survey and is this significant or is this not significant and would they have [done what the defendant did]?"

We asked the judges to indicate on their post-trial questionnaires the names of any witnesses who were "particularly important or crucial" on the issue of liability for the plaintiff's case and for the defendant's case. In five of the cases the judges named two expert witnesses in the same general field (e.g., medicine, engineering) who gave opposing testimony on the same liability issue. In these five cases, the evidence presented by the experts was clearly contested and, in the judge's opinion, central to the case. I examined the trial evidence and jury deliberations in these cases to get an overall picture of the extent to which the juries dealt with the testimony given by these experts, and how they attempted to resolve the differences between them. During their deliberations, the jurors discussed the testimony of all of these witnesses, although they did not discuss the testimony of each expert in detail in each case:

> *Case 1*: The principal dispute between the experts concerned the need for surgery to relieve pain following an accident. The medical issue was whether the surgery was actually done in response to a preexisting injury or degenerative condition. The defense claimed that the accident had not caused any injury, and that surgery was unwarranted. The jurors spent much of their time analyzing the circumstances of the accident in light of the testimony of lay witnesses who were on the scene, concluding that the accident had caused some injury. Nonetheless, the jurors were doubtful about the credibility of the plaintiff who appeared to give inconsistent testimony about his injuries. In discussing the competing medical testimony, the jurors consulted the MRI results as well as the expert testimony about the alleged injury. Several jurors expressed disapproval in response to the defense attorney's argument that the plaintiff's expert, a "doctor that teaches at a

university," was offering junk science and was not being reputable. Nonetheless, the jurors were persuaded that the plaintiff was exaggerating his pain, as the defense expert suggested. The jurors concluded that the plaintiff would have been better off "if [defense expert] had been his doctor from the beginning."

Case 2: In a medical malpractice case, the opposing experts disagreed on whether the defendant met the relevant standard of care, the diagnosis, and the causal impact of the defendant's behavior. Both experts were well-credentialed and experienced. The jurors viewed both of them as good teachers, although they found the defense expert somewhat longwinded. They were also impressed by the experts' credentials ("Have you seen the credentials on this doctor? Have you read his resume? It's the size of a small book.") But they viewed with some cynicism what they perceived as the attempt to impress them with it ("That's part of the reason why they gave that to us to read."). There were many other witnesses in the case, but the jurors spent the bulk of their time during deliberations discussing the content of the testimony from these opposing experts, comparing what they said on all three of the relevant contested issues they covered. The jurors in the end were persuaded that the outcome would probably have been different if the defendant had treated the patient according to what they were convinced was reasonable care.

Case 3: The plaintiffs in this case claimed they had suffered emotional trauma due to a serious injury the defendant had caused. The opposing experts offered testimony on the evidence for the emotional distress and its probable cause. The defense expert claimed that other conflict in the family and prior events could explain the emotional trauma allegedly experienced by one of the plaintiffs. The jurors spent little time discussing the expert testimony, although they discussed the likely causes of the plaintiff's emotional disturbance. Unlike the other expert testimony that appeared technical or scientific on its face, the jurors did not struggle to work through the meaning of the clinical

testimony on mental health. They appeared comfortable in drawing conclusions about the alleged trauma based on their own experience. The jurors were also inclined to discount the testimony of the plaintiff's expert who they viewed as arrogant. Although they also specifically rejected his analysis of the extent of the plaintiff's psychological injury as overblown and only partially agreed with his causal account of its source, they ultimately arrived at a modest damage award on this claim.

Case 4: The plaintiff hired the defendant to repair her furnace. The defendant repaired the furnace, but informed the plaintiff that she needed to replace it due to its age. The plaintiff adjusted some wiring next to the furnace after the defendant completed the repair. When the furnace caught fire a short time later, the plaintiff alleged that the defendant was responsible. The opposing experts testified on the likely cause of the fire, and much of the deliberation focused on that testimony, as the jurors struggled to make sense of the competing paths that might have led to the fire. Ultimately, the jurors were not convinced that the repairman had been careless or negligent, and they were unpersuaded that the plaintiff had shown that the causal mechanism the expert identified was the cause of the fire. Several jurors concluded that the weight of the evidence was evenly balanced, so the defendant should prevail.

Case 5: The opposing experts the judge identified as important in this automobile collision were both engineers who offered testimony on how the accident had occurred, including its physical impact on the plaintiff. Liability for minor injury to the plaintiff was not in dispute, but the point of impact and liability for the major injury the plaintiff claimed he had sustained, were hotly contested. The plaintiff's expert had more education (a Ph.D), while the defense expert had more experience as a consultant in accident reconstruction. The jurors explored this difference, but ultimately concluded that it was not significant and focused their attention on the content of the testimony. Much of their discussion of these experts occurred during

> breaks in the trial.[41] During the deliberations, the jury focused on both the medical testimony and the impact analyses. The jurors concluded that the defense medical expert was correct when he testified that all, or at least part, of the plaintiff's medical condition had been caused by a pre-existing injury, rather than by damage resulting from the collision. The jury also discussed how the plaintiff's failure to wear his seatbelt had contributed to the injury.

Many of the themes reflected in the jurors' questions for experts and in these deliberations mirror patterns we have observed in other research on juries: the jurors do not accept expert testimony on face value. They consider credentials and expertise, but are actively engaged with the content and attempt to assess the accuracy of what the experts say. Although the jurors vary in their understanding of the evidence, jurors who appear to have greater mastery of the evidence assist the others and tend to be most influential. Thus, juries draw on the expertise of their most competent member to assess the strength of the evidence.[42]

Nonetheless, although jurors typically work diligently and ordinarily succeed as a group in understanding the major elements of the expert testimony, they are sometimes confused by what experts say.[43] Jurors are instructed to base their verdicts on the evidence and legal instructions, but their ability to fully process the evidence may be reduced if the expert fails to teach as well as to attempt to persuade. Even when this occurs, jurors generally are not overwhelmed and misled by the complexity of expert evidence. Instead, they use reasonable strategies to evaluate it[44] When faced

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[41] The jury in this case was told that jury members were permitted to discuss the evidence during breaks.

[42] *See* Diamond & Casper, *supra* note 28.

[43] MOLLY SELVIN & LARRY PICUS, THE DEBATE OVER JURY PERFORMANCE 27–28 (1987). *See generally* Joseph Sanders, *Jury Deliberation in a Complex Case:* Havner v. Merrell Dow Pharms., 16 JUST. SYS. J. 45 (1993).

[44] *See* Richard O. Lempert, *Civil Juries and Complex Cases: Taking Stock After Twelve Years*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 181 (Robert E. Litan ed., 1993); Irwin Horowitz & Kenneth S. Bordens, *An Experimental Investigation of Procedural Issues in Complex Tort Trials*, 14

with technical testimony, jurors look for cues about the trustworthiness of the source, sometimes using the language itself as a cue. They do use credentials and experience as cues, but not in the absence of an evaluation of the message itself. That is, there is little evidence to suggest that jurors adopt the position of an expert based solely on peripheral cues.[45] What is more likely to happen is that the juror will reject unintelligible expert testimony—a pattern that should create an incentive for experts (and for the attorneys who hire them) to maximize the clarity of the expert's presentation.

When jurors do understand the expert's testimony, impressive credentials and technical language may boost the influence of an expert.[46] When the expert's lack of clarity prevents jurors from understanding the testimony, the expert is less likely to successfully persuade the jurors.[47] This pattern is consistent with the literature on persuasion which indicates that use of obscure and unusual words generally reduces persuasiveness[48] and with models of attitude change that emphasize reception as a precondition to yielding.[49] Jurors may give less credence to an expert who uses jargon if the jurors interpret it as obfuscation or if the expert displays other evidence of potential bias such as an unusually high rate of pay.[50]

The jury has one advantage over judges when dealing with expert evidence. Neither judge nor jury is likely to be an expert on

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LAW & HUM. BEHAV. 269, 284 (1990); Vidmar & Diamond, *supra* note 5 at 1143.

[45] *See* sources cited *supra* note 37 and accompanying text.

[46] *See* Joel Cooper, Elizabeth A. Bennett, & Holly L. Sukel, *Complex Scientific Testimony: How Do Jurors Make Decisions?*, 20 LAW & HUM. BEHAV. 379, 382 (1996).

[47] *See* Diamond & Casper, *supra* note 21, at 542, 543.

[48] *See generally* John Waite Bowers, *Language Intensity, Social Introversion, and Attitude Change*, 30 SPEECH MONOGRAPHS 345 (1963).

[49] *See* William J. McGuire, *Attitude Change: The Information Processing Paradigm*, *in* EXPERIMENTAL SOCIAL PSYCHOLOGY 108 (Charles Graham McClintock ed., 1972).

[50] *See* Joel Cooper & Isaac M. Neuhaus, *The "Hired Gun" Effect: Assessing the Effect of Pay, Frequency of Testifying, and Credentials on the Perception of Expert Testimony*, 24 LAW & HUM. BEHAV. 149, 150–51 (2000).

the technical substantive content that an expert may offer, but the jury is more likely to have at least one member who has a substantive technical background or some training in science. How jurors should use this quasi-expertise in the jury room is the subject of some debate,[51] but there is no doubt that jurors do draw on their experience, whether such experience is technical, scientific, or otherwise, when responding to the evidence at trial. Although there is no evidence that complexity induces a greater rate of disagreement between judges and juries on the appropriate verdict,[52] complexity nonetheless presents a general and unavoidable challenge to legal decision-making that is not unique to jury trials.

III. WHAT JUDGES CAN DO

A judge who is motivated to optimize how juries handle expert testimony has a number of tools available. As most studies of the jury show, when jurors enter the courtroom, they are interested in learning and eager to reach a correct decision. Judges can facilitate the learning process. In 1993, Judge Michael Dann provided a blueprint for how to optimize juror understanding when he offered an education model that included innovations such as allowing juror note-taking, permitting juror questions during trial, and instructing the jury on the relevant law before the trial begins.[53]

Some courts have adopted these procedures, but the changes have been slow and the old ways persist.[54] As we have learned from the Arizona Jury Project, permitting jurors to submit questions for witnesses reveals that the jurors have substantive questions for the experts that can be answered promptly and can

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[51] *See, e.g.*, People v. Maragh, 729 N.E.2d 701 (N.Y. 2000).

[52] KALVEN & ZEISEL, *supra* note 9, at 56; *see also* Heuer & Penrod, *supra* note 9, at 49; Eisenberg et al., *supra* note 9, at 171–72.

[53] B. Michael Dann, *"Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries*, 68 IND. L.J. 1229, 1251–53 (1993).

[54] For a summary of current patterns in federal and state courts, *see* National Center for State Courts, The State-of-the-States Survey of Jury Improvement Efforts Executive Summary, www.ncsconline.org/D_Research/cjs/pdf/sos_exec_sum.pdf (last visited Nov. 30, 2007).

dispel some sources of confusion when they arise.[55] Other research has shown that note-taking improves recall and understanding,[56] and providing mock jurors with summaries of expert reports before the experts testify can facilitate juror understanding of the testimony.[57] If the aim is an informed decision maker, whose common sense judgments are not sabotaged by technical obstacles, the judge and attorneys can provide trial notebooks with glossaries and interim statements in order to offer further assistance in a complex expert-laden trial.

Another promising potential tool that has not yet been the subject of systematic study but is worth consideration is the scheduling of back-to-back experts. To facilitate ease in comparing the testimony of opposing experts who would otherwise testify days or even weeks apart, it may be worth adjusting the typical trial order to permit the experts to testify back-to-back. If this innovation is introduced, the judge should explain how and why this is being done (e.g., "to make it easier for you to understand the parties' evidence on these complex issues"). The advantage of the judge's explanation at this point is that it informs the jury how to deal with the change in the order of the evidence and also alerts the jurors to the fact that the evidence they will be hearing is likely to be strongly contested.

After the Science for Judges IX Conference held at Brooklyn Law School in April, 2007, Judge Jack Weinstein asked for suggestions on "any special instructions that should be given jurors in a case that turns on scientific evidence about how to handle the evidence."[58] My own sense from studying juror efforts to use

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[55] *Juror Questions During Trial, supra* note 23.

[56] David L. Rosenhan, Sara L. Eisner & Robert J. Robinson, *Notetaking Can Aid Juror Recall*, 18 LAW & HUM. BEHAV. 53, 59 (1994); Irwin A. Horowitz & Lynne ForsterLee, *The Effects of Note-Taking and Trial Transcript Access on Mock Jury Decisions in a Complex Civil Trial*, 25 LAW & HUM. BEHAV. 373, 382–89 (2001).

[57] Lynne ForsterLee, Irwin Horowitz, Elizabeth Athaide-Victor, & Nicole Brown, *The Bottom Line: The Effect of Written Expert Witness Statements on Juror Verdicts and Information Processing*, 24 LAW & HUM. BEHAV. 259 (2000).

[58] E-mail from Margaret Berger, Suzanne J. & Norman Miles Professor of Law, Brooklyn Law School to Shari Seidman Diamond, Howard J. Trienens

expert testimony appropriately is that the typical jury instruction that a judge delivers at the end of the trial comes too late. A better approach to focus and assist jurors would involve an earlier intervention: an instruction just before an expert testifies noting that the complexity of some expert testimony poses a special challenge, and the jurors may find it useful to submit questions for the expert at the end of the expert's testimony.

Explicit judicial acknowledgement of the complexity of expert testimony, coupled with an indication from the judge that juror questions would be appropriate at the conclusion of the witness's testimony, would serve a dual purpose. First, it would signal to the jurors that the witness will be delivering important and potentially difficult information. Second, it would convey the message that it is acceptable for a juror to ask what might appear to be a "dumb" question. Although there is no reason to permit jurors to submit questions only for expert witnesses, this special instruction on submitting questions for experts could occur whether or not juror questions are permitted for other witnesses.[59]

The easiest path for judges to take in conducting jury trials is to avoid any unnecessary communication with the jury during the trial, to follow traditional orders and procedures, and to depend solely on the efforts of the parties to enable the jurors to understand the evidence. Adopting this passive judicial model avoids criticism; moreover, attorneys may prefer judges to stay in the background as much as possible during trial. It does make some sense to be cautious because jurors are aware of the alignment of witnesses and attorneys, and, viewing the judge as a more trustworthy source of information, jurors may look for cues from the judge.[60] As one of the Arizona Jury Study deliberations made

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Professor of Law and Professor of Psychology, Northwestern University School of Law (April 27, 2007, 11:49 EST) (on file with author) (Judge Weinstein's question was conveyed by Professor Berger in an E-mail to Shari Seidman Diamond and Valerie Hans).

[59] Warren D. Wolfson, *An Experiment in Juror Interrogation of Witnesses*, 12 CHI. B. ASS'N REC. 1, 12, 13 (1987).

[60] Peter David Blanck & LaDoris Hazzard Cordell, *The Appearance of Justice: Judges' Verbal and Nonverbal Behavior in Criminal Jury Trials*, 38 STAN. L. REV. 89, 93 (1985).

clear, the judge is never invisible:

> Juror #1: I've got to say, the judge is really good at keeping a poker face. (Several other jurors: Yeah) Because I mean through all that testimony, through the little heated debates that go on. The attorneys sure seemed to get upset a couple of times or acted like they were.
>
> Juror #4: You've got to have an opinion on something.
>
> Juror #1: I know! I looked at him the whole time, and he never. . .
>
> Juror #6: [interrupting] So did I!
>
> Juror #1: [continuing] Well, not the whole time, but he never made a face. I never got the feeling that he thought one thing or another. And that's a skill.
>
> Juror #5: Yeah.

None of the procedures suggested here, many of them currently used in the Arizona Jury Study courtroom that produced this juror exchange, alter the impartial position of the judge in this example. All are neutral ways to reduce unnecessary juror confusion. The judge who uses these methods thus can serve all of the trial participants—parties, jurors, and experts—without favoring, or appearing to favor, any one of them.

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She practiced law at Sidley Austin in the areas of Litigation and Intellectual Property. She has also taught at the University of Chicago, Harvard, and the U. of Illinois at Chicago, served as editor of the *Law & Society Review*, and was president of the American Psychology-Law Society. She received the 2010 Harry Kalven, Jr. Award from the Law and Society Assoc. for contributions to research in law and society, and the 1991 American Psychological Association for Distinguished Contributions to Research in Public Policy. She has lectured widely to scholarly and judicial audiences, and has served as an expert witness in American and Canadian courts on matters concerning juries, trademarks, and deceptive advertising. As a member of the ABA's American Jury Project, she helped draft the Principles for Juries and Jury Trials adopted in 2005; served on the executive committee of the American Jury Project Commission of the Seventh Circuit Bar Association; and currently serves on the Seventh Circuit Committee on Pattern Criminal Jury Instructions. Professor Diamond's research on real civil jury deliberations was a unique field experiment in which cameras record jury deliberations. Publications from the project have appeared in the *Arizona L. Rev., Court Rev., Harvard J. of Law & Public Policy, Judicature, Law & Human Behavior, Northwestern U. L. Rev., Vanderbilt L. Rev.*, and *Virginia L. Rev.*