

Can the Affordable Care Act Be Used to Mitigate Future Damages?

By Jack Hipp and Caryn L. Lilling

The Affordable Care Act (ACA) adopted by Congress in March 2010 and deemed constitutional by the United States Supreme Court, provides that all persons in the United States be provided health insurance regardless of their health or financial situation. Under the ACA, a medical insurer can no longer deny coverage on the basis of a pre-existing condition. Furthermore, the ACA requires individuals to purchase health insurance or pay a penalty. The purpose of this “individual mandate” is to reduce the overall number of uninsured. Thus, whereas in the past, an injured plaintiff would most likely be denied health insurance now that person can get coverage and has an incentive to get coverage to avoid the penalty.

Mandates and Requirements

The ACA’s so-called “individual mandate” takes effect January 1, 2014 and requires every applicable individual to obtain minimum essential coverage or pay a penalty. The minimum essential coverage required must include ambulatory patient services, emergency room services, hospitalization, maternity and new born care, mental health and substance abuse, prescription drugs, rehabilitative services and devices, la services, preventive and wellness services, chronic disease management, and pediatric services. Furthermore, for these minimum coverage plans, the ACA limits the annual amount of out of pocket medical expenses that can be incurred. In 2014, the out-of-pocket limit for individuals is \$6,350 and \$12,700 for families.

The guaranteed issue requirement bars insurance companies from denying coverage to individuals with pre-existing conditions. It works in conjunction with the community rating requirement, which prohibits insurance companies from charging higher rates to individuals based on their medical history. Insurers also are prohibited from placing lifetime and annual spending limits on the minimum essential benefits. Moreover, health insurance carriers must provide coverage to dependent children until the age of 26.

Collateral Source Rule

The common law collateral source rule prohibits a defendant from reducing damages the plaintiff receives in a tort case by third-party payments received by the plaintiff. Although states differ as to what payments qualify as a collateral source, generally speaking, collateral source payments are payments made by a third-party to the plaintiff or a medical provider on the plaintiff’s behalf as a result of the injuries sustained by the plaintiff. Under the common law rule, collateral source payments, such as private health insurance, employee benefits and gratuities cannot be used to mitigate damages.

- ❖ The main justifications given for the common law collateral source rule have been that it:
- ❖ Promotes deterrence

- ❖ Enforces the fundamental principle of tort law that a tortfeasor pay for the consequences of their actions
- ❖ Prevents a defendant from receiving a windfall of lesser or no damages based on benefits paid by a third party
- ❖ Encourages individuals to purchase insurance
- ❖ Avoids prejudice to the plaintiff because juries can look unfavorably on a plaintiff suing for costs already paid by a collateral source

The collateral source rule, however, developed at a time when insurance was rare. As insurance became more common, states began to question the practicality of the collateral source rule as an evidentiary principle. Furthermore, with the rise of the insurance crisis in the 1980s, many states began to modify or abolish the collateral source rule as a means of tort reform. These modifications were seen as a means of preventing double recoveries and reducing the costs of insurance. Today, only 13 states and the District of Columbia still adhere to the common law collateral source rule. The remaining 37 states have modified the common law rule to varying degrees.

Collateral Source and ACA

The enactment of the ACA arguably undermines some of the main arguments made in support of the common law collateral source rule. First the ACA undermines the rationale that the common law collateral source rule was designed to hide from the jury whether the plaintiff has insurance. Now, given the individual mandate, most jurors will assume that the plaintiff has insurance. Thus, the ACA essentially eliminates the evidentiary purpose of the common law rule. And second, the common law collateral source rule was intended to serve as a deterrent and to prevent a windfall to the defendant. As such, defendants were required to pay the full amount billed by the medical provider for the plaintiff's care. Now, however, most people will have insurance and their insurance company will be billed at a reduced rate.

Despite the elimination of some of the traditional rationales for the common law collateral source rule, barriers to obtaining offsets for future damages still remain. One particular problematic area is a health insurer's right to subrogation. Many insurance contracts now afford the health insurance company the right to seek reimbursement directly from the plaintiff for costs expended to treat injuries caused by third-party tortfeasors. In addition, some states and statutes give health insurers the right to seek reimbursement from the plaintiff or defendant. Where that right exists, a strong argument can be made that juries should be permitted to award the full cost of the amounts actually paid by insurance because ultimately the plaintiff would be out-of-pocket those amounts.

While that argument has continuing validity under the ACA, it should still be recognized that the plaintiff's claimed damages should not reflect the full amount that would be billed to an individual. The amounts claimed in the plaintiff's life care plan should be reflective of only the amounts that would likely be charged to the insurance carrier for such care. Several states already follow this approach, and the ACA provides an opportunity to expand that principle to other states as well.

Another continuing area of concern is the level of proof necessary needed to obtain a collateral source offset. In some states, such as New York, the courts have been reluctant in the past to grant an offset for private health insurance because the defendant failed to prove with reasonable certainty that the plaintiff's insurance benefits will continue for the duration of the jury award. That is because the plaintiff's health insurance was received through the plaintiff's employment and if the plaintiff loses or changes jobs, he or she could lose that insurance. If plaintiff lost that insurance, then he or she might not be able to get insurance because of a pre-existing condition. The ACA has now undercut some of that rationale.

Reducing Future Medical Expenses

Given that a number of states still adhere to common law collateral source rule and have been reluctant in the past to grant offsets, defendants should expand their arguments beyond just the collateral source rule. One such argument derives from the plaintiff's duty to mitigate damages. Generally, a plaintiff has a duty to mitigate damages and render their injury "as light as possible." Under the current tort system, awards for future medical expenses are based on projections made by a life care planner and an economist. Some courts, however, have recognized that this endeavor is inherently speculative and cannot reliably be predicted. Until this implementation of the ACA, there has not been a more reliable alternative.

Now under the ACA, individuals are required to purchase health insurance or pay a penalty. If they fulfill that obligation and purchase insurance, it is highly likely that it will cover many, if not all, of the claimed expenses in a plaintiff's life care plan. Arguable, therefore, an individual should not be permitted to inflate damages by requesting the speculative award of a jury where by law they are required to buy insurance and the defendant's cost to purchase insurance that would cover the care claimed would be less. Furthermore, even where there is a right to subrogation, limiting damages to those amounts actually paid by insurance would still lower the amount currently claimed as damages in many cases.

Defendants, therefore, can attempt to argue that the plaintiff can reduce the amount of damages by purchasing an insurance policy. The defendant then would only be responsible to reimburse the plaintiff for the premiums to maintain the policy, annual increases in those premiums and any other out-of-pocket expenses such as co-pays, deductibles or other expenses not covered by insurance. Under this argument, the defendant would most likely still have to prove which items in the proposed life care plan would be covered by insurance, how much those premiums would be, the projected increases and whether that type of policy will likely be available throughout the duration of the plaintiff's medical needs.

Notably, and even before trial, the availability of private health insurance may be more effectively raised in settlement discussions. For example, in catastrophic injury cases a

defendant can now offer in settlement discussions (after a cost-benefit analysis) to purchase the plaintiff the best plan available; pay for the premiums with projected future increases; pay for all uncovered expenses attributable to the defendant and include future lump sums that can be invested or available in the event premium increases exceed the amount that has been projected.

Alternatively, an argument can be made that the purpose of compensatory damages is to make the plaintiff whole for the losses actually suffered. In the area of medical expenses, a plaintiff suffers an economic loss by taking on liability for the costs of the treatment that he would not otherwise have incurred. Any reasonable and necessary charges, therefore, that the plaintiff has paid or will owe as a result of the accident are recoverable.

It is well known that there is a tremendous disparity between what medical providers often bill their patients and what is actually paid to those providers. With the ACA, even less people will pay or ever be responsible for billed rates. In fact, virtually everyone will either pay the rates agreed between the medical provider and the insurer (negotiated rates) or rates charged under Medicare, Medicaid or other government programs.

To that end, a number of states have already taken the view that the plaintiff's recovery for medical expenses should be reflective of the amount actually paid or incurred on behalf of the plaintiff. Some of those states include California, Iowa, Minnesota, Nebraska, New York, Ohio, and Texas. Other states, such as Hawaii, Illinois, Mississippi, South Carolina, South Dakota, Virginia and Wisconsin, have rejected the use of negotiated rates and continue to use billed rates as the proper measure of damages. Those cases, however, arose prior to the ACA, which now undercuts much of the rationale for the usage of billed rates as the proper measure of damages.

Defendants, therefore, can try to expand upon the successful arguments made in California and elsewhere. They can argue that the court should find that:

The collateral source rule does not apply because the difference between billed and negotiated rates does not reflect an amount paid on the plaintiff's behalf.

When awarding compensatory damages, the plaintiff should only be able to recover for amounts paid or that could be owed.

Even if the collateral source rule applies, the amount of the offset should include the amounts actually paid by a third party on the plaintiff's behalf.

A Sea Change

The ACA has undercut the main rationales that have supported many of the traditional barriers to lowering future damages for medical care. Going forward, therefore, defendants can argue that plaintiffs' damages for future medical care should be limited to health insurance premiums and any additional out of pocket expenses that would not be covered by health insurance. Alternatively, at the very least, medical expenses should not exceed the negotiated amounts paid or to be paid by health insurers. Both of these arguments have the potential to result in significant savings in catastrophic injury cases.

At the early stages of the ACA's implementation, however, counsel should tread carefully and selectively in determining which cases, when and how to make these arguments. Initially, courts may be reluctant to consider such arguments because the full ACA has not yet been implemented and until the ACA has been fully implemented, it is unclear how it will affect premiums and the types of coverage plans available. Careful consideration, therefore, must be given to raising these issues in the right forum, at the right time and in the right manner. That will maximize the chances of success and enable each new success to bolster future cases.



Can the **AFFORDABLE CARE ACT** Be Used to Mitigate Future Damages?

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Shared Responsibility for Employers Regarding Health Coverage

FEDERATION OF DEFENSE & CORPORATE COUNSEL

2014 Annual Meeting
White Sulphur Springs, West Virginia
July 27-August 2, 2014

Cori M. Cook, J.D., CMC Consulting, LLC

This paper has been prepared for general information only.
It is merely a high level overview of the employer mandate.
It is not intended to be relied upon as legal advice.

Cori M. Cook, J.D.
CMC Consulting, LLC

Cori M. Cook is the founder of CMC Consulting, LLC, a boutique consulting and legal practice focused on providing specialized advisory and legal services to third-party administrators, employers, carriers, attorneys, associations and providers. Ms. Cook is an experienced corporate and legal strategist specializing in healthcare, PPACA, HIPAA, ERISA, employment and regulatory matters.

For many years, Cook has been active within the self-funded industry representing legislative and regulatory interests, and she currently serves on the Self-Insurance Institute of America (SIIA) Health Care Committee, as well as the Health Care Administrators Association (HCAA) Government and Regulatory Affairs Committee, and recently finished her term as a Board Member of the Society of Professional Benefit Administrators (SPBA). Her expertise has been widely sought by government and industry in the arena of healthcare and healthcare reform, and she is a national speaker on various related topics.

Shared Responsibility for Employers Regarding Health Coverage

The US Treasury Department published the final regulations on February 12, 2014 implementing the shared employer responsibility requirements under Section 4980H of the Internal Revenue Code. The shared employer responsibility rules originally were intended to take effect on January 1, 2014, but employers received relief when the Internal Revenue Service issued Notice 2013-45 which delayed enforcement until January 1, 2015.

Effective January 1, 2015, applicable large employers (ALE) may be subject to one of two potential excise taxes imposed under Internal Revenue Code Section 4980H if the employer fails to offer a full-time employee (*and their dependent children*) health insurance coverage that satisfies certain requirements prescribed in Section 4980H, during a month, and a full-time employee receives a premium subsidy for health insurance in the Marketplace during a month.

Transition Relief –

Employers are not required to offer dependent coverage to foster children or stepchildren. Employers are only required to offer coverage to biological and adopted children. A dependent child must be offered coverage for the entire calendar month during which the child attains the age 26. Employers are not required to offer spousal coverage.

Potential Excise Taxes

The first potential tax falls under Code Section 4980H(a) and will be imposed when an ALE fails to offer minimum essential coverage through an employer sponsored plan to its full-time employees during a month and one of its full-time employees receives a subsidy in the Marketplace. The employer may be subject to a tax equal to $1/12$ of \$2,000 x the total number of the employer's full-time employees, minus the employer's *allocable share of 30*.

Transition Relief –

For the 2015 calendar year, an employer may exclude the first 80 full-time employees from the tax calculations under Section 4980H(a) then in 2016 this amount will decrease to 30.

The second potential tax falls under Code Section 4980H(b) and will be imposed when an ALE does offer coverage through an eligible employer sponsored plan to its full-time employees but the coverage is either not affordable or it does not provide minimum value and one of its full-time employees receives a subsidy in the Marketplace. The employer may be subject to a tax equal to $1/12$ of \$3,000 x the total number of full-time employees who receive a subsidy for that month.

Who is eligible to receive a subsidy?

It is important for employers to keep in mind which employees may be eligible to receive a subsidy since that is what triggers the tax as set forth above. For an employee to be eligible for a subsidy they:

- 1) Must be receiving benefits in the Marketplace;
- 2) Must not make more than 400% of the Federal Poverty Level (FPL);
- 3) Must not be eligible for affordable minimum value coverage;
- 4) Must not be eligible for Medicare A, Medicaid, CHIP or TRICARE; and
- 5) Must not be an illegal alien.

Section 4980H Analysis

Walking through Section 4980H is a four step analysis:

- 1) Is the employer an ALE?
- 2) Identify the employer's full-time employees and full-time equivalents.
- 3) Does the coverage being offered satisfy 4980H?
- 4) Is the employer going to Pay or Play?

Is the Employer an ALE?

The first step in walking through the 4980H analysis is determining whether an employer is considered an ALE for purposes of the shared employer responsibility requirements. ALE status is determined on a controlled group basis. An ALE is any controlled group employer that employed on average *50 or more full-time equivalents* during the preceding calendar year. Full-time equivalents include both full-time employees and full-time equivalents.

Transition Relief –

Compliance is generally not required until the 2016 plan year for employers with at least 50 but fewer than 100 full-time equivalent employees in the controlled group.

Transition Relief –

For the 2015 calendar year, an employer may determine its status as a large employer by determining whether it employed an average of at least 50 full-time employees during any consecutive period of at least six calendar months during the 2014 calendar year (rather than the entire 2014 calendar year). Starting in 2016 an employer must determine its status for the calendar year by averaging the total number of full-time equivalent employees for each of the 12 months in the preceding calendar year.

When determining the number of employees, only common law employees are counted. Generally, a common law employee is an employee subject to the will and control of the employer, not only as to what must be done, but also how it must be done. The IRS has prescribed a 20-factor common law employee test. Sole proprietors, partners in a partnership, and more than 2% S corporation shareholders are not considered employees.

Identifying full-time employees and full-time equivalents

The second step in walking through the 4980H analysis is determining how many employees the employer has. Under the employer mandate a full-time employee is an employee who is employed, on average, 30 or more hours per week. For purposes of determining who is a full-time employee, employers may use 130 hours of service in a calendar month as the equivalent of 30 hours per week. For purposes of determining full-time equivalents, the employer must look at all employees including those who may not have been full-time employees during each month of the calendar year. The number of full-time equivalents for a given month will be determined by calculating the aggregate number of hours of service (but no more than 120 hours of service for any employee) for all non-full-time employees for that month and dividing that total hours of service by 120. The resulting number, which may be rounded off to the nearest hundredth, is the number of full-time equivalents the employer has for that given calendar month. At this point it is just a matter of doing the math. Adding up the full-time employees and the full-time equivalents. If the sum is *greater than or equal to 50* then the employer is an ALE and therefore subject to 4908H.

Transition Relief –

Compliance is generally not required until the 2016 plan year for employers with at least 50 but fewer than 100 full-time equivalent employees in the controlled group.

It is important to remember that the employer is doing an initial calculation to determine if they are an ALE and therefore subject to Section 4980H. Therefore, the employer is counting all full-time employees of every employer within the controlled group. It is important to get this analysis correct, as it is the driving component of 4980H applicability analysis. If it is determined that the employer is an ALE then the employer continues with the remaining steps in the analysis. However, and this is a very important however, from this point forward we are only concerned about the individual employer. We are no longer concerned about the controlled group.

The employer is required to perform a secondary calculation to maintain accurate records of full-time employees and full-time equivalents on an ongoing basis. ALEs must track all hours of service worked for which payment is made, or due, in order to determine an employee's full-time status. Hours of service do not include any hours worked by a volunteer who does not receive compensation for his or her service, any hours worked for income that is taxed as income from sources outside the US, or hours attributable to a student participating under a federal or state sponsored work-study program. Employers that have employees whose hours are difficult to

track, such as employees who are on call or who are travelling salespeople compensated on commissions are permitted to use a reasonable method to credit hours of service.

Generally speaking, there are two methods of measurement that are recognized in the final regulations for employers to utilize in determining full-time status. There is a monthly measurement period and a look-back measurement period. Under the monthly measurement method, an employer determines whether each employee is a full-time employee by counting the employee's hours of service for each month.

Under the look-back measurement method, an employer determines an employee's full-time status during a future period known as a stability period based upon the employee's hours of service in a prior period referred to as the measurement period. For ongoing employees, employers determine full-time employee status by reference to hours worked during a standard measurement period that is between three and twelve months long. Each ongoing employees who works an average of 30 hours per week during the standard measurement period is treated as a full-time employee during the subsequent stability period.

Employers may use different standard measurement periods and stability periods, as long as the periods selected are consistent for all employees in the same category. Different employer members of the same large employer may use measurement periods and stability periods that differ either in length or in their starting or ending dates. Employers may choose to use an administrative period of up to 90 days between the standard measurement period and stability period to determine full-time employee eligibility.

Does the coverage being offered satisfy 4980H?

The third step in walking through the 4980H analysis is determining if the coverage being offered satisfies the 4908H requirements and to do so the coverage needs to satisfy a three-prong test:

- 1) Is the coverage being offered through an eligible employer sponsored plan to *at least 95% of the full-time employees?*
- 2) Does the coverage being offered provide minimum value?
- 3) Is the coverage affordable?

The coverage being offered to the employer's full-time employees must qualify as an eligible employer sponsored plan as defined by Code Section 5000A(f)(2). If the coverage is being offered through an eligible employer sponsored plan and coverage is offered to *a certain percentage* of the employer's full-time employees then the employer will likely avoid the tax as set forth in 4980H(a).

Transition Relief –

An ALE that offers coverage to at least 70% of its full-time employees for the 2015 plan year will not be subject to the tax under 4980H(a). Starting in 2016, an ALE must offer coverage to at least 95% of its full-time employees in order to avoid the 4980H(a) tax.

Coverage that provides for 60% of the allowed cost of the essential health benefits will likely satisfy the minimum value requirement and thereby avoid the potential tax as set forth in 4980H(b). There are two ways to make this determination, through an actuarial analysis or with the minimum value calculator that has been provided to help us make this determination. The minimum value calculator can be found at <http://www.cms.gov/ccio/resources/regulations-and-guidance/index.html>.

Coverage will be considered affordable if the employee contribution or premium for the lowest cost self-only coverage is less than 95% of his or her household income. The IRS realized at some point that the employer wouldn't necessarily know an employee's household income so they came up with three safe harbor methods to assist in making this determination.

- 1) W-2 Safe Harbor – the premium cannot exceed 9.5% of the calendar year W-2 wages.
- 2) Rate of Pay Safe Harbor – the premium cannot exceed 9.5% of the rate of pay x 130 hours for any given month.
- 3) Federal Poverty Level Safe Harbor – the premium cannot exceed 9.5% of an amount that is 1/12 of the FPL for a single individual for the applicable calendar year.

Will the Employer Pay or Play?

The fourth and final step in the analysis is simply to determine if the employer is going to pay or play. Some employers will go to great lengths to avoid paying any tax and for some, it may make more sense to make a calculated decision of what amount of tax the employer is willing to pay after walking through the analysis.

It is important to advise our respective employer clients to review their plans, their plan procedures and payroll practices to ensure that they have an effective strategy in place to prepare and plan for compliance with the Shared Responsibility for Employers Regarding Health Coverage.

Stop Loss Insurance for Self-funded Employee Benefit Plans in the ACA Era

Nature of the Market, Trends and Practical Aspects of Stop Loss Use

Self-funding has emerged as the principal mechanism for employers to deliver and fund their employee medical benefits, and the ACA has intensified employer and regulator interest in the self-funded approach. A significant and growing percentage of self-funded employers purchase stop loss as a risk management component. Following an overview of current self-funding use and stop loss markets, the presentation will review the nature of stop loss insurance coverage as used to support the financial stability of Plan Sponsors. We'll highlight technical and practical considerations for attorneys in both management and counsel roles.

The program will update attendees on the status and regulation of stop loss markets today, and related trends in the delivery of administrative services used by employers for plan management. A brief review of the nature of the stop loss contract and its legal relationship with Plans and related Plan Sponsors will be offered.

Moving from stop loss contract fundamentals the presentation will focus on the practical and technical aspects of the purchase and use of stop loss coverage. Specific consideration of product distribution, contract features and pricing will be provided. We will also review situations that may give rise to coverage disputes, offering insight that can assist in preventing claim problems. The program will conclude with a snapshot of emerging challenges for stop loss insurers and their employer clients. Attendee questions are welcome throughout the presentation.

Use of Statistics in the Courtroom Views of Two Lawyers and a Scientist

FDCC 2014 Annual Meeting
The Greenbrier – White Sulphur Springs, West Virginia
July 27 through August 2, 2014

Presented to the:
Products Liability Section

by

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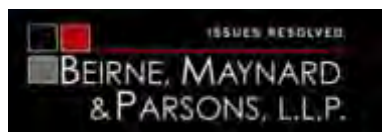


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I. Introduction

While it has been stated that “*facts are stubborn things*”,¹ *but statistics are more pliable*”,² the science of statistics is a serious discipline used in developing public policy, rulemaking, drug approval, medical device clearance and product safety validation. Moreover, statistical analysis is increasingly relied upon by Plaintiffs and Defense lawyers in the courtroom. In the Actos litigation, the District Court observed that “*while this Court might agree with Mark Twain’s oft quoted disdain of statistics, statistics, nonetheless, are firmly woven into the complex tapestries of our day to day lives and both Plaintiffs and Defendants’ legal and evidentiary arguments*”. *Allen, et. al. v. Takeda Pharmaceuticals*, 2014 U.S. Dist. LEXIS 4808 n.34 (W.D. La. Jan. 10, 2014).

This paper combines a legal and technical overview of the use of statistics by trial lawyers and testifying experts in the courtroom. It is divided into four primary topic sections: (1) the standards for admissibility of scientific evidence; (2) basic concepts involved in statistical studies; (3) Comparative Risk Analysis (CRA) in product liability and drug litigation, as well as agency rulemaking; and (4) the use of statistics in epidemiology to prove or disprove an association between a condition or disease and an alleged cause. The authors’ ultimate goal is to present basic statistical concepts so the trial lawyer can be better assured that statistics in the courtroom are both compelling and fair.

II. The Reliability of Scientific Evidence

In any case involving statistical analysis, epidemiology, or comparative risk analysis, the trial lawyer should make sure that the evidence satisfies “*gatekeeping*” thresholds for admissibility. When proffered by the opposing expert, the trial lawyer must be prepared to challenge the appropriateness and reliability of the evidence. Is the evidence relevant? Is it helpful to the jury? Is it proffered by a competent expert? Is the underlying data and methodology

¹ John Adams, *Defense of the British Soldiers on trial for the Boston Massacre* (1770).

² Mark Twain, *infra* note 3.

reliable? Have appropriate statistical exposures been evaluated and incorporated into the study? Have all relevant variables been identified and considered? An understanding of basic concepts will facilitate the lawyer's task.

Federal Rule of Evidence 702

Federal Rule of Evidence 702 governs who may provide expert testimony and what they may rely on to support their expert opinions. Rule 702, entitled *Testimony by Expert Witnesses*, provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

The U. S. Supreme Court took particular care to explain that Rule 702 limits the expert to testimony regarding "scientific knowledge." *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 589–90 (1993). The adjective "scientific" requires that the proffered testimony have "a grounding in the methods and procedures of science," and "the word 'knowledge' connotes more than subjective belief or unsupported speculation." *Id.* at 590. To qualify as scientific knowledge, "an inference or assertion must be derived by the scientific method . . . [and] must be supported by appropriate validation -- i.e. 'good grounds,' based on what is known." 509 U.S. at 590. Thus, to determine if proffered expert testimony meets the standards of admissibility, the court first must determine "whether the reasoning or methodology underlying the testimony is scientifically valid and . . . whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592–93.

Assessing the Expert:

A witness may present expert opinion testimony where it can be shown he possesses not only “skill, experience, training or education,” but also that the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue. However, despite these requirements courts generally hold that Rule 702 “must be read in light of the liberalizing purpose of the rule.” *United States v. Brown*, 776 F.2d 397, 400 (2d Cir. 1985). “[Q]ualification is viewed liberally and is determined by comparing the area in which the witness has superior knowledge, skill, experience, or education with the subject matter of the witness’s testimony.” *In re Fosamax Prods. Liab. Litig.*, 645 F. Supp. 2d 164, 202 (S.D.N.Y. 2009). “[T]he fact that a physician is not a specialist in the field in which he is giving expert opinion does not affect the admissibility of the opinion, but rather the weight the jury may place on it.” *Id.*; see also *Rupolo v. Oshkosh Truck Corp.*, 749 F. Supp. 2d 31 (E.D.N.Y. 2010). Thus, while an expert may be qualified to render an opinion relying on the conclusions in scientific literature, it is an entirely different and more complex matter when what is at issue is the validity of the underlying science itself.

The Federal Rules of Evidence require that a judge, faced with a proffer of expert scientific testimony, must begin by determining, pursuant to Rule 104(a), whether the expert is proposing to (i) testify to scientific knowledge (ii) that will assist the trier of fact to understand or determine fact in issue. This will require a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue. *Daubert*, 509 U.S. at 592-93.

“When making a preliminary finding regarding an expert’s qualifications . . . the court is to examine not the qualifications of a witness in the abstract, but whether those qualifications provide a foundation for a witness to answer a specific question.” *MAR Oil Co. v. Korpan*, 2013 U.S. Dist. LEXIS 121706, 2013 WL 5406078, at *2 (N.D. Ohio 2013); *Newton v. Roche Labs. Inc.*, 243 F. Supp.2d 672 (W.D. Tex. 2002) (A plaintiff claimed that a prescription acne drug caused her to develop schizophrenia, and offered the “expert” testimony of a pharmacist to prove causation). The court will exclude causation testimony where the expert was not, by experience or training, qualified to opine about any discipline relevant

to plaintiff's claim, such as pharmacology, psychiatry, biochemistry or epidemiology.

Who Decides, Judge or Jury?:

In *Accenture v. Wellogix*, the Supreme Court was poised to decide the scope of the charge to the trial court under Rule 702 in light of the commands of *Daubert* and its progeny. *Wellogix, Inc. v. Accenture, LLP*, 716 F.3d 867 (5th Cir. 2013), *cert. denied* (U.S. June 9, 2014) (No. 13-1051). *Accenture v. Wellogix* highlighted the rift among the circuits. On the one hand, the courts in the Second, Fourth, Sixth, Eighth, Ninth and Tenth Circuits look to the trial court to scrutinize the factual predicates and application of scientific principles to ensure that the trial court not abdicate its role as gatekeeper by delegating that role to the jury. *Id*; *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 463–64 (9th Cir. 2014) (en banc). On the other hand, courts in the First, Third, Fifth, Seventh, Eleventh and Federal Circuits are permissive, ruling that questions about the factual underpinnings of an expert opinion are reserved for the jury as matters affecting the weight to be given the testimony. *See, e.g., Stollings v. Ryobi Techs., Inc.*, 725 F.3d 753, 765–68 (7th Cir. 2013); *Milward v. Acuity Specialty Prods. Grp., Inc.*, 639 F.3d 11, 22 (1st Cir. 2011). For these courts identifying “flaws in [the application of] generally reliable scientific evidence is precisely the role of cross-examination.” *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1345 (11th Cir. 2003); *see, e.g., Liquid Dynamics Corp. v. Vaughan Co.*, 449 F.3d 1209, 1221 (Fed. Cir. 2006) (challenge based on admitted errors in applying methodology to facts of the case went to weight not admissibility, especially when “this fact was fully discussed on cross examination”); *Rosenfeld v. Oceania Cruises, Inc.*, 654 F.3d 1190, 1193–94 (11th Cir. 2011). With the Supreme Court denial of *certiorari* in *Accenture*, resolution of the disparity in how the Circuit Courts view the gatekeeper role will need to wait for another day. In the meantime, it is essential for counsel to be aware of and plan for the trial court finding their expert's analysis a “factual matter to be determined by the trier of fact” *Milward Id. at 22*, or a matter that “must be assessed by the court. *Elcock v. Kmart Corp.*, 233 F.3d 734, 754 (3d Cir. 2000).

The Triumvirate: Daubert, Kumho Tire and Joiner

A trio of Supreme Court cases establish the admissibility standards for expert opinions under Rule 702. Fed. R. Evid. 702. They include: *Daubert v.*

Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

Daubert

In *Daubert*, the Supreme Court established a new test for admissibility after concluding that “Rule 702 . . . clearly contemplates some degree of regulation of the subjects and theories about which an expert may testify.” *Daubert*, 509 U.S. 598. *Daubert* requires the trial judge to act as the “gatekeeper” to screen expert testimony to ensure that it is not only relevant, but also reliable. *Id.* at 598.

The Supreme Court explained in *Daubert* that expert testimony cannot assist the trier of fact in resolving a factual dispute unless the expert’s theory is tied sufficiently to the facts of the case. “Rule 702’s ‘helpfulness’ standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.” This consideration, the Court remarked, “has been aptly described by Judge Becker as one of fit. ‘To determine whether proffered scientific testimony or evidence satisfies the standard of evidentiary reliability, a judge must ascertain whether it is “ground[ed] in the methods and procedures of science.” Margaret A. Berger, *The Admissibility of Expert Testimony—Reference Guide on Epidemiology*, in FED. JUDICIAL CTR., REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 13 (3d ed. 2011).

Under *Daubert*, the Court looks to four factors to determine whether a theory or technique has been derived by the scientific method:

1. “[W]hether [a theory or technique] can be (and has been) tested” is the “methodology [that] distinguishes science from other fields of human inquiry”;
2. whether the technique or theory has been subjected to peer review or publication;
3. whether the existence of known or potential error rates has been determined, and whether standards exist for controlling the technique’s operation; and
4. has there been general acceptance of the methodology within the scientific community. See *Daubert*, 509 U.S. at 593–94; Berger, *supra* at 13.

Joiner

In *General Electric Co. v. Joiner*, the Supreme Court ruled that conclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

Kumho Tire

In *Kumho Tire*, the Supreme Court noted that Rule 702 “makes no relevant distinction between ‘scientific’ knowledge and ‘technical’ or ‘other specialized’ knowledge,” and “applies its reliability standard to all... matters within its scope.” The Court held that, “no clear line” can be drawn between the different kinds of knowledge, and “no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience.” *Kumho*, 526 U.S. at 148, 151; Berger, *supra* at 17.

Federal Rule of Evidence 703: “Lies, Damned Lies and Statistics”³

Under *Daubert*, “reliability” refers to evidentiary reliability or trustworthiness, rather than scientific reliability, which asks whether application of the principle produces consistent results. In a case involving scientific evidence, evidentiary reliability is based upon scientific validity, which asks whether the principle supports what it purports to show. *Daubert*, 509 U.S. at 590 n.9.

The Second Circuit stated “[i]n deciding whether a step in an expert’s analysis is unreliable, the district court should undertake a rigorous examination of the facts on which the expert relies.” *Amorgianos v. Nat’l R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir. 2002). Even where the expert’s methodology is reliable for some purposes, the court must determine whether it is a reliable way to draw a conclusion regarding the particular matter to which the expert testimony was directly relevant. Expert testimony that is merely subjective belief or

³ “There are three kinds of lies: lies, damned lies and statistics.” Mark Twain, *Chapters from my Autobiography* 471 (1906), available at <http://www.gutenberg.org/files/19987/19987-h/19987-h.htm>. Mark Twain (1906-09-07).

unsupported speculation should be excluded. *Deutsch v. Novartis*, 768 F. Supp. 2d 420 (E.D.N.Y. 2011) (citing *R.F.M.A.S., Inc. v. So*, 748 F. Supp. 2d 244 (S.D.N.Y. Oct. 12, 2010)).

Federal Rule of Evidence 703 provides:

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

“Because most statistical methods relied on in court are described in textbooks or journal articles and are capable of producing useful results when properly applied, these methods generally satisfy important aspects of the “scientific knowledge” requirement in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*” David H. Kaye & George Sensabaugh, Reference Guide on DNA Identification Evidence, in FED. JUDICIAL CTR., REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 214 (3d ed. 2011). However, a study that uses an appropriate scientific method, but is poorly executed can be challenged as inadmissible under Federal Rules of Evidence 403 and 703. A poorly designed or poorly executed study goes to the “sufficiency” and should be given no weight by being excluded as a basis for an expert opinion.

III.

Assessing the Science

Key Statistical Concepts and Terminology

Statistical Significance and P-Values

Statistics involves selecting and analyzing *known* data collected from a sample to draw conclusions about *unknown* characteristics of a population. A population includes all objects of interest, whereas a sample is only a (typically small) portion of the population. For example a population of interest might be all passenger cars registered in a particular state; a sample might be 200 passenger cars selected at random based on license plate numbers. While

conclusions based on samples cannot characterize the population perfectly, they often can be trusted for decision making if the sample represents the population adequately.

Every statistical estimate based on a sample is subject to some uncertainty; therefore, it is important to be able to quantify that uncertainty in some way. Such quantification and the resulting statistical inferences are based on the laws of probability. A result is called *statistically significant* if it is unlikely to have occurred by chance based on an assumed probability model for the data.

For example, in a study to test the effectiveness of a medicine for reducing heart attacks, people are selected based on specified participation criteria and randomly assigned to two groups. Group A takes the medicine; Group B takes a placebo. The incidence of heart attacks is recorded over the period of the study. At the end of the study, if the resulting rate of heart attacks in Group A is lower than in Group B, one would like to determine whether this is due to chance or the medicine. To answer this question, an analyst makes the assumption that there is no association between taking the medicine and reducing heart attacks, in which case the probability of a person in either group experiencing a heart attack would be equal. Based on this assumption, the analyst calculates the probability of observing a difference in heart attack rates as great as (or greater than) those experienced during the study. If that probability is low, then the analyst may reasonably reject the assumption that the heart attack rates are equal and conclude that the medicine has an effect on reducing heart attack rates. A “*p*-value” is the calculated probability, *p*, of the result based on the assumption (also known as the “null hypothesis”).

In situations like this, *p*-values are interpreted as the probability that an observed positive association could result from random error assuming no association were present. A *p*=0.05 value would mean that the probability is 5% of observing an association at least as large as that found in the study assuming no association were present. In many scientific fields, results with *p*≤0.05 are commonly labeled as “statistically significant,” but this designation is simply a convention, established by long tradition. Kaye and Freedman, *supra*, at 250:

p is the probability of extreme data given the null hypothesis.
p is not the probability of the null hypothesis given extreme data.

Thus, in the example of the heart attack medication study, the resulting p -value is not the probability that the medicine has no effect; it is the probability of the data obtained assuming the medicine has no effect.

So, while the concept of statistical significance is very useful for establishing confidence that an estimate or statistic is reliable *assuming a specific null hypothesis*, it does not guarantee the finding is practically significant or that it has decision-making utility. See Regina Nuzzo, *Statistical Errors*, 506 *Nature* 151 (Feb. 12, 2014) (offering recent discussion of limitations of p -values). Making those determinations often requires additional information about the magnitude of the results (e.g., how big an effect or difference has been identified?), the context of the application (e.g., what are the relevant rules, specifications, regulations, and potential effects on health, environment, finances, etc.), and available scientific theory and research that explain causal relationships.

Confidence Intervals

An alternative for expressing statistical significance that provides information in addition to that obtained from the p -value is a confidence interval and level. A confidence interval provides a range of values likely to contain a population parameter (e.g., mean) being estimated. A confidence level specifies a percentage for which, if the same sampling method were applied repeatedly, the interval would contain the true value of the parameter being estimated. Many people are familiar with confidence intervals in the context of election polling. Media outlets frequently report results of a poll using a “margin of error,” e.g., 45% of those polled favored candidate A, with a 5% margin of error. Typically that margin of error represents a 95% confidence interval. This means that if the same sampling method were applied repeatedly, 95% of the time the confidence interval calculated using the standard formula would contain the true percentage in favor of candidate A.

When poll results show a wide margin of error, it is common to conduct additional sampling or aggregate results of many polls to reduce the margin of error. This reflects an important statistical principle: larger sample sizes reduce uncertainty and enable detection of smaller differences as statistically significant. Thus, the width of the confidence interval provides a measure of uncertainty around the parameter being estimated. A very wide interval may indicate that more data should be collected before making decisions or recommendations based on the estimate. In this way, confidence intervals provide more

information than p -values because they reveal a range of plausible values for the parameter of interest.

Power

The “power” of a study is the probability that it correctly rejects the null hypothesis when the null hypothesis is false or, equivalently, that it correctly detects an effect if the effect actually exists. Power depends on the size of the effect desired to be detected, the level of statistical significance, and sample size. Larger sample size provides higher power and results in smaller confidence intervals. When a study is quoted as evidence that a particular treatment or exposure has no effect, it is important to understand whether the power of the study was sufficient to allow a reasonable chance of detection.

False Positives and False Negatives

A conclusion due to random error that the null hypothesis should be rejected (e.g., that the studied heart attack medication has an effect, or the health risks of exposure to a potentially toxic agent is higher relative to non-exposure), when no difference actually exists, is referred to as a “false-positive” or “Type I error.” Conversely, a conclusion to fail to reject the null hypothesis, when a difference actually exists, is referred to as a “false-negative” or “Type II error.” Type I and Type II errors also are known respectively as α - and β -errors, where α and β are probabilities of these errors. The value α is sometimes identified as “producer risk,” while β is sometimes identified as “consumer risk.”

Statistical testing of hypotheses has been compared to trials in the US criminal justice system. See, e.g., James Kenney, *Hypothesis Testing: Guilty or Innocent*, Quality Progress 55 (Jan. 1988). The null hypothesis, or going-in assumption, is “innocent until proven guilty.” Based on the evidence presented at trial, the defendant is officially judged to be either “guilty” (reject the null hypothesis) or “not guilty” (do not reject the null hypothesis). The term “not guilty” does not necessarily equate to an affirmation of innocence, but means the evidence is not sufficient to demonstrate guilt. By analogy, a failure to reject the null hypothesis in a statistical test does not mean that the hypothesis of no difference is proven true; rather, that the evidence is not sufficient to indicate a difference.

The following table provides a reference for the statistical concepts and terminology outlined so far by organizing results of possible decisions against possible actual conditions.

		Actual Conditions	
		No Difference Null Hypothesis is True <i>"Innocent"</i>	Difference Null Hypothesis is False <i>"Guilty"</i>
Decision or Statistical Conclusion	Conclude no difference Fail to Reject Null Hypothesis <i>"Not Guilty"</i>	CORRECT DECISION $p=1-\alpha$	FALSE NEGATIVE Type II error <i>False Acquitall</i> $p=\beta$ Consumer Risk
	Conclude a difference Reject Null Hypothesis <i>"Guilty"</i>	FALSE POSITIVE Type I error <i>False Conviction</i> $p=\alpha$ Producer risk	CORRECT DECISION $p=1-\beta$ Power

Table 1. Statistical Concepts Organized by Possible Decision against Actual Conditions

Study Error

Even the best designed and executed studies have potential for error. Types of error include the following:

1. **Chance/Random Error:** Because associations between a substance and a disease or an injury and an activity are established based on a sample of the population, there is always the possibility that, due to chance, the sample selected does not represent the population and the association identified is not real. Study error due to chance can be quantified by p -values and confidence intervals. Among the most significant factors that bear on statistical significance and confidence level is the study sample size. Larger studies have less risk of error due to chance than smaller studies.

Michael D. Green, D. Michal Freedman, & Leon Gordis, *Reference Guide on Epidemiology*, in FED. JUDICIAL CTR., REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 553 (3d ed. 2011).

2. **Bias:** It is recognized that even well designed and implemented studies have biases that may need to be accounted for. Even subtle bias can bear on the study results. It may be possible to detect bias by careful analysis of the design and sampling involved in a study. Once data collection is completed, analytical tools sometimes can be applied to evaluate potential sources of bias. After bias is identified, researchers can determine whether the bias would tend to inflate or dilute any association that may exist. *Id.* at 574. Important types of bias include the following:
 - a. **Selection Bias:** This concerns an inappropriate methodology for sample selection so that the sample selected is not representative of the population. For example, selecting traffic accidents for a study concerning automobile safety from only urban areas could create a bias. Selecting control participants for a study of chemical safety for reasons that are related to their having been exposed to that chemical can create a bias.
 - b. **Information Bias:** This results from inaccurate information being provided by participants in a study concerning either the outcome of interest or the potential contributing factors. Information recall bias is where a study participant does not recall exposures or other relevant criteria. The accuracy of information may affect the validity of a research finding. If different data sources are used to collect information from different study participants, differences in the accuracy of recordkeeping of those sources also can affect the validity of the findings. *Id.* at 587-88
3. **Confounding:** Confounding can occur when there is a factor (included or excluded from the study) whose influence differs between groups being compared in a study and which has a significant effect on the association between the outcome of interest and factors under study. If the study does not separate the effects of this factor from the others, the factor is known as a confounding factor. The existence of a confounding factor creates confounding bias that can artificially increase or decrease the observed level of any true association between an agent/substance and a condition

of interest. A common example is that of drinking and emphysema, where a large percentage of drinkers are also smokers. A related example is smoking and lung cancer where the subjects live in an urban environment and where the environment may confound the analysis by contributing to lung cancer.

When assessing the reliability of any statistical study related to the determination of causation, a court must consider whether the study adequately accounted for “confounding factors.” *Id.* at 389. The distortion created by confounding factors can lead to an erroneous result. *Deutsch v. Novartis*, 768 F. Supp. 2d 420 (E.D.N.Y. 2011).

Confounding of known factors can be controlled in the design of an experiment. Confounding due to unknown or unmeasurable factors can be mitigated by a process known as randomization. Randomization maximizes the possibility that factors, other than the one under study, are evenly distributed between the various groups in the study sample. Where the study does not provide for randomization, the lack of randomization can provide a patent challenge to the study results. Green et al., *Reference Guide on Epidemiology*, in FED. JUDICIAL CTR., REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 592 (3d ed. 2011).

IV.

Comparative Risk Analysis

Comparative Risk Analysis (“CRA”) has become a major weapon in the arsenals for both Plaintiffs and Defense counsel seeking to prove or disprove defect allegations in products and drugs. It also has evolved into a major policy making tool in rulemaking for regulatory agencies responsible for consumer protection, transportation safety and food and drug safety. This includes the Consumer Products Safety Commission (“CPSC”), the National Highway Traffic Safety Administration (the “NHTSA”) and the Food and Drug Administration (the “FDA”).

CRA calculates and ranks values of risk for *similar* products or activities. The relative risk for a product or activity under scrutiny in relationship to that of its comparators helps determine the acceptability of its associated risk. For example, a comparative risk analysis can provide insight into whether a product is defective. If the risk involved with use of the product is less than or equal to the risk for other *comparable* products that are not considered defective, then the

analysis suggests there is no empirical evidence of a defect. If, however, the relative risk is higher, then empirical evidence suggests a potential defect that warrants further investigation.

Definition of Risk

In the context of product liability and consumer safety, risk as a quantity can be calculated as

$$Risk = \frac{\text{number of adverse events}}{\text{opportunities for adverse events}} .$$

Both the numerator and denominator of this fraction represent key components of risk. The numerator represents **frequency** and/or **severity**, e.g., number of car accidents, injuries, or cancer cases. The denominator represents **exposure**, e.g., miles traveled, hours involved in an activity, or amount of chemicals in the environment.

Media reports of product related problems often focus on the absolute number of adverse events. Some Plaintiffs' counsel seek to do the same thing in product liability or drug litigation. They may argue the high incidence of adverse effects of a medication or incidence of injuries related to a product without reference to **exposure**. To do so is certainly inflammatory, but also scientifically simplistic and invalid.

A proper analysis of risk accounts carefully for both frequency *and* exposure. Counting only the number of injuries associated with a product/activity, without consideration of the volume of the product in use, conditions of use, and behavioral and environmental factors associated with use, is statistically invalid and not reliable. This observation holds true for a wide variety of consumer products, passenger vehicles, public modes of transportation and pharmaceuticals.

History of Comparative Risk Analysis (CRA)

Documented examples of CRA by US government agencies began in the 1980s. A brief history of important examples was outlined in Dr. Rose Ray, *Comparative Risk Assessment*, in 1 *ENCYCLOPEDIA OF QUANTITATIVE RISK ANALYSIS AND ASSESSMENT* (2008). In 1996, the U.S. Office of Management and Budget (OMB) provided guidance to federal agencies that the regulatory impact analyses

required prior to issuance of major rules should include risk assessments that “generate a credible, objective, realistic, and scientifically balanced analysis; present information on hazard, dose-response, and exposure (or analogous material for non-health assessments); and explain the confidence in each assessment by clearly delineating strengths, uncertainties, and assumptions, along with the impacts of these factors on the overall assessment.” OFFICE OF MGMT. & BUDGET, ECONOMIC ANALYSIS OF FEDERAL REGULATIONS UNDER EXECUTIVE ORDER 12866, (1996), *available at* http://www.whitehouse.gov/omb/inforeg_riaguide/. This guidance was reiterated by the 1997 Presidential/Congressional Commission on Risk Assessment and Risk Management: “Federal regulatory agencies should try a comparative risk analysis approach on an experimental or demonstration to test the effectiveness of seeking consensus on setting priorities for environmental, health, and safety hazards.” Presidential/Congressional Comm’n on Risk Assessment and Risk Mgmt., *Final Report on Risk Assessment and Risk Management in Regulatory Decision Making* 46 (1997).

The National Highway Traffic Safety Administration (NHTSA)

The NHTSA’s National Center for Statistics and Analysis (NCSA) collects and evaluates accident and injury data from motor vehicle crashes throughout the U.S. and has done so for over thirty (30) years. The NCSA provides statistical support to NHTSA regarding several areas, including Comparative Risk Analyses that help identify the human, vehicle, environmental and roadway characteristics as variables in understanding crash frequency and injuries in specific automobiles, trucks or buses as part of defect investigations and rulemaking. These types of studies are used by the NHTSA to better understand injury mechanisms and crash dynamics in motor vehicle crashes generally and regarding crashes in specific classes of vehicles; e.g. light SUVs, mid-size SUVs, vans, passenger cars, light trucks, etc. as part of rulemaking. It also has allowed the NHTSA to make specific inquiries into the existence of potential defects in particular vehicles by comparing target vehicles to other comparable, *peer* vehicles while controlling for the many (and varied) variables involved in vehicle crashes.

NHTSA’s database is vast and varied and, importantly, is available to the trial lawyer and expert consultants. The databases include:

- ***The Fatal Accident Reporting Service (FARS)*** – a census of fatal crashes throughout the United States; it includes any fatal crash on a public roadway; the database includes vehicle makes, models, and year of

manufacture, together with basic accident information including Police Accident Reports (PARs);

- **The *National Automotive Sampling System (NASS)*** – composed of two systems which provide data from crashes selected from a sample of police crash reports:
 - **General Estimates System (GES)** – data from a nationally representative sample of police reported motor vehicle crashes of all types, allowing investigation of trends and the overall crash picture;
 - **Crashworthiness Data System (CDS)** – data from a representative, random sample of thousands of minor, serious, and fatal crashes obtained by trained crash investigators conducting accident reconstructions, providing detailed information on crash performance of passenger cars, light trucks, vans and utility vehicles and increasing knowledge about the nature of crash injuries;
- ***Trucks in Fatal Accidents (TIFA)*** – census of fatal accidents involving trucks; and
- ***Buses in Fatal Accidents (BIFA)*** – census of fatal accidents involving public bus transportation

The Consumer Product Safety Commission (CPSC)

The CPSC uses the National Electronic Injury Surveillance System (NEISS), a national probability sample of hospitals in which patient information is collected on emergency visits involving an injury associated with a consumer product. This data can be used to evaluate the risks or hazards associated with a specific consumer product. It can also be used to evaluate larger studies of entire classes of products for rulemaking purposes. The following list provides a few examples of CRA studies published by the CPSC.

- Comparison of injury rates of unpowered scooters to skateboards, in-line skates, and bicycles. George W. Rutherford Jr., Robin L. Ingle, Alberta E. Mills, CONSUMER PRODUCT SAFETY COMM'N, *Unpowered Scooters: Analysis of Special Study Data and Injury Rates, and a Comparison with Other Riding Products*(Oct. 2001).

- Comparison of risks between 3- and 4-wheel ATVs; comparison of injury rates of ATVs with rates of bicycles. Susan B. Kyle & Prowpit W. Adler, CONSUMER PRODUCT SAFETY COMM'N, *All-Terrain Vehicle Exposure, Injury, Death, and Risk Studies* (Apr. 1998).
- Comparison of toy-related deaths of children by type of toy involved. Risana T. Chowdhury, CONSUMER PRODUCT SAFETY COMM'N, *Toy-Related Deaths and Injuries: Calendar Year 2007* (Nov. 2008).
- Comparative risk of suffocation related to pillows with different kinds of fillings. Suad Wanna-Nakamura, CONSUMER PRODUCT SAFETY COMM'N, *Infant Cushion Briefing Package* (Jan. 2008); *see also* Hazardous Substances and Articles: Administration and Enforcement Regulations, 73 Fed. Reg. 51386 (Sept. 3, 2008) (to be codified at 16 C.F.R. pt. 1500).

Challenging CRA - Lurking and Confounding Variables

Statistical studies are often developed to identify causes of adverse events based on associations with factors measured in the study. A variable that has an important effect on the risk of an adverse event, but not included among the factors under consideration in the study, is known as a ***lurking variable***. For example, one study observed that in a certain urban area an increase in violent crime coincided with an increase in ice cream sales. To identify increased ice cream sales as a contributor to violent crime does not pass the test of common sense; however, knowing that ice cream sales increase in the summer when temperatures are warmer and daylight hours are longer (the influence of lurking variables) helps explain the association and point to other, more reasonable causal factors. Similarly, as discussed above, confounding factors might influence the results of a comparative risk analysis leading to conclusions that a particular item has a higher or lower risk than it actually does because of the effects of a confounding variable. In estimating risk, it is important to delineate and understand the contribution of all relevant factors. A good analysis identifies and controls for lurking and confounding variables. A failure to account for these types of variables may result in studies that are flawed, misleading and unreliable. Knowing to look for these types of variables also may provide the trial lawyer with valuable fodder for cross-examination or an argument to exclude the evidence of an opposing expert altogether.

Lurking and Confounding Variables – An Example

When confronted with adverse statistical evidence, the trial lawyer should search for lurking or confounding variables to make sure that the opposing presentation is not distorted. A compelling example comes from the automotive products liability arena. Many years ago, a foreign auto manufacturer teamed up with a US auto manufacturer for the joint design and manufacture of a sport utility vehicle (SUV) for distribution in the U.S. marketplace. The foreign manufacturer marketed the SUV under its badge. The US entity marketed the SUV under its badge. The retail price points were slightly different; the foreign branded SUV was sold for less. The vehicles were otherwise identical in all aspects of design.

Plaintiffs' counsel sought to introduce evidence of an alleged higher frequency of SUV rollovers of the foreign branded SUV. They claimed that the SUV had an unreasonably high propensity to rollover in single vehicle accidents (SVAs), that it was an outlier, and that it was unreasonably dangerous. But, "facts are stubborn things". The Plaintiffs analysis failed to account for all the relevant variables.

It turns out that the US branded SUV had a lower rollover rate in SVA crashes. When rates for exposure were appropriately controlled, a lurking variable surfaced - - an age demographic. Older, more experienced drivers were purchasing the more expensive US brand. Younger, more naïve drivers were driving the less expensive foreign brand. The data did not reasonably suggest a defect. The problem was the experience of the driver.

The Need for Similarity

When making comparative risk studies of products, it is important to ensure that comparator products are indeed similar, i.e., they serve the same functions and exhibit similar characteristics. Comparisons also should be based on contemporaneous time periods to the extent possible to ensure that characteristics and trends that change with time do not affect compared items differently. It is also important to ensure similarity in the key components of risk. The severity of adverse events should be similar. The severity of exposure should be similar. This includes usage patterns and characteristics of users and usage as well as operating conditions and environment. This is where the law and the science of statistics intersect. The definition of "similarity", and how it is applied

by the Courts, will determine whether CRA is relevant and admissible in evidence in a particular case. Issues relating to “similarity” will drive the relevancy inquiry and whether the probative value of the study outweighs its prejudice.

A common criticism of CRA is that items being compared are not sufficiently similar, e.g., “You can’t compare apples with oranges.” However, “apples and oranges can be compared on price per pound, calories per serving and many other factors. Humans regularly make comparisons between disparate situations, e.g., ‘Should we go to a movie or spend the evening at a fine restaurant?’” Dr. Rose Ray, *Comparative Risk Assessment*, in 1 *ENCYCLOPEDIA OF QUANTITATIVE RISK ANALYSIS AND ASSESSMENT* (2008). Many factors typically contribute to risks. This may pose a challenge to making valid comparisons, but it does not exclude their possibility. If relevant factors related to adverse events, usage, severity, and exposure are identified and demonstrated to be similar and potentially confounding factors are isolated and accounted for in the analysis, meaningful comparisons can be made. See Adam Finkel, *Comparing Risks Thoughtfully*, <http://ipmall.info/risk/vol7/fall/finkel.htm> (last visited May 30, 2014) (elaborating on additional ways to describe and compare risks in “informative and non-manipulative” ways).

The Substantial Similarity Issue – A Matter of Relevance

In the product litigation arena, Plaintiffs’ counsel may seek to introduce evidence of other incidents (and other injuries) involving the same product. Such evidence can certainly inflame the jury, inspiring the inference that “*where there is smoke, there must be fire.*” In response, most jurisdictions impose relevancy thresholds that first must be satisfied. Before other incidents are admitted into evidence, they must first be shown to be relevant and that relevance must outweigh the prejudice that such evidence can have in the eyes of the jury. Thus, “substantially similarity” of incidents has become the proxy for this determination.

The “substantial similarity” inquiry focuses on the similarity of the product and its basic design characteristics, environmental factors associated with its use and user behavior. By way of example, a 4WD drive vehicle is different than its 2WD cousin; an accident on a straight highway at highway speeds is different than off-road maneuvering; wet roads are different from dry roads. The list goes on and on.

There is disagreement among various jurisdictions on the type of evidence to which the “substantial similarity” doctrine applies. On the one hand, it is clear that the doctrine applies to evidence of other incidents offered by a plaintiff from which the jury may draw inferences about what happened in a current incident. Some courts hold that the doctrine only applies in this limited context.

However, other courts (appears to be the minority) expressly reject this narrow application and hold that the substantial similarity doctrine applies equally to protect the plaintiff from a defendant’s evidence of other incidents, including comparative accident statistics. *See Jaramillo v. Ford Motor Co.*, 116 Fed. App’x 76, 79 (9th Cir. 2004) (applying the substantial similarity doctrine to exclude a defendant’s comparative accident statistics).

There is no complete consensus among the federal courts as to how the substantial similarity test should be applied to statistical evidence. Some federal courts apply the doctrine to statistics with the same rigidity that the doctrine is applied to non-statistical evidence of other incidents. *See Jaramillo v. Ford Motor Co.*, 116 Fed. App’x 76 (9th Cir. 2004). Other federal courts apply the doctrine less stringently in the context of statistical evidence. *See Hernandez v. Ford Motor Co.*, CIV. A. C-04-319, 2005 WL 6240743, at *2 (S.D. Tex. July 20, 2005) (explaining the substantial similarity doctrine is applied differently to statistics); *see also Trull v. Volkswagen of Am., Inc.*, 187 F.3d 88 (1st Cir. 1999), *superseded on other grounds*, 320 F.3d 1 (1st Cir. 2002).

In *Jaramillo v. Ford Motor Co.*, the Jaramillos sued Ford in connection with a single vehicle SUV rollover. The Jaramillos swerved to avoid a deer while driving on smooth, dry pavement. 116 Fed. App’x 76, 77 (9th Cir. 2004). The Jaramillos argued that the district court erred by admitting Ford’s comparative accident statistics involving rollover accidents not just on smooth, dry pavement, but for all types of rollover accidents. *Id.* The court agreed, and explained:

While this substantial-similarity doctrine has normally been applied to preclude other-accident evidence offered by plaintiffs, we have explained that the doctrine ‘rests on the concern that evidence of dissimilar accidents lacks the relevance required for admissibility under Federal Rules of Evidence 401 and 402.’ *Cooper v. Firestone Tire & Rubber Co.*, 945 F.2d 1103, 1005 (9th Cir. 1991). Because this underlying concern is not limited to comparative accident statistics offered by plaintiffs, defendants like Ford that attempt to compare

their products to others to show the relative safety of their designs or a lack of notice must show that their comparisons are based on accidents that are similar to the plaintiff's accident. *Id.* at 79.

In contrast, in *Trull v. Volkswagen of America, Inc.*, the First Circuit refused to apply the substantial similarity doctrine to exclude a defendant-manufacturer's statistical evidence, apparently finding that the substantial similarity test is not required when the defendant is the one seeking to admit evidence of other incidents. 187 F.3d 88, 98 n.9 (1st Cir. 1999), *superseded on other grounds*, 320 F.3d 1 (1st Cir. 2002). Specifically, the court explained "in the circumstances here, where *defendants* sought to introduce evidence of other accidents, we think it was adequate for the court to determine more generally whether the evidence was probative and, if so, whether it was unfairly prejudicial." *Id.*

Completeness of Data and Sources

It is not unusual for data available in comparative risk studies to be incomplete, but this is similar to the situation faced daily by people in personal, business, and governmental settings in their normal decision making processes. In dealing with lack of information, it is important to distinguish between uncertainty due to incomplete knowledge and uncertainty due to variability in the circumstances and sources that give rise to the data. Incomplete knowledge can be augmented by further research and analysis. In addition to the NHTSA and the CPSC, many other public sources of information regarding both frequency and exposure are available for research. Organizations such as the National Safety Council (NSC) and US Bureau of Labor Statistics (BLS) also publish information on injuries related to various activities. See, e.g., *Injury Facts* by NSC and the *National Census of Fatal Occupational Injuries* by BLS. Manufacturer trade associations often post information online related to usage rates and patterns of usage that can be helpful for determining exposure; and manufacturers of products subject to litigation may maintain information on product usage that can help determine exposure for their specific products.

If research does not yield sufficient information, statistical methods can be employed to design surveys, studies, or experiments that can generate additional information. Statistical tools also can be applied to address variability. For example, "Rather than reporting only point estimates of risk (e.g. 5 deaths per million exposed persons per year) report confidence bounds, (e.g. with 95% confidence the risk is between 1 and 9 deaths per million). In this way, ranking of

risk can be based upon both the estimated level of risk and the uncertainty associated with the risk,” Dr. Rose Ray, *Comparative Risk Assessment*, in 1 ENCYCLOPEDIA OF QUANTITATIVE RISK ANALYSIS AND ASSESSMENT (2008).

Points for Cross-Examination – CRA Studies

There are many areas for potential cross-examination of an adverse expert presenting statistical evidence. In litigation involving an alleged design defect in a product or drug, some areas might include:

- Did the expert consider the ***exposure*** of the product (e.g., quantity of chemical substance, amount of time operating a particular type of vehicle, etc.) to achieve a proper definition of risk?
- How has the expert ***quantified*** the exposure? (Quantities and durations typically provide better measures than counts of participants or exposed);
- Has the expert fairly compared the risk to other ***comparable*** products or drugs?
- Has the expert considered the many ***variables*** that define a particular event before comparing that event to others: age demographics, environmental conditions? and
- Has the expert identified and properly accounted for all ***lurking or confounding*** variables?

V.

Epidemiology

Epidemiology studies the incidence, distribution, and etiology (cause) of disease in human populations. Epidemiologists testify on the published literature on whether an agent can cause a disease. Thus, they testify as to “general causation” or the proposition of whether a substance is capable of causing a condition and how strongly associated the exposure is to the disease. What epidemiologists do not do is determine whether there is specific causation, or whether an agent did cause a specific plaintiff to contract a specific disease. What they can do is inch close and testify how a plaintiff compares to the study subjects. If a plaintiff would have been excluded as a study subject, then the results of the study or studies should have no relevance.

Epidemiology is a scientific field concerned with identifying a causal nexus between external factors and disease. *Rider*, 295 F.3d at 1198. “Epidemiologic studies are the primary generally accepted methodology for demonstrating a causal relation between the chemical compound and a set of symptoms or a disease.” *In re Meridia, supra*, 328 F. Supp. 2d at 800. (citing *Conde v. Velsicol Chem. Corp.*, 804 F. Supp. 972, 1025–26 (S.D. Ohio 1992)), *aff’d*, 295 F.3d 1194 (11th Cir. 2002); *Berry v. CSX Transp., Inc.*, 709 So.2d 552, 569 (Fla. Dist. Ct. App. 1998). Epidemiologic studies are routinely permitted by courts in cases involving exposure to various substances. *See, e.g., Siharath v. Sandoz Pharms. Corp.*, 131 F. Supp. 2d 1347, 1356 (N.D. Ga. 2001); Green et al., *Reference Guide on Epidemiology*, in FED. JUDICIAL CTR., REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 551 (3d ed. 2011). The purpose of epidemiology is for the scientific and medical community to better understand disease causation with the goal to prevent disease in an identified group (or population) of individuals. Epidemiology assumes that disease is not distributed randomly in a group of individuals and that identifiable subgroups, including those exposed to certain agents, are at increased risk of contracting particular diseases. *Id.* at 551.

Types of Studies

Randomized trials, clinical trials and experiments are studies where the subjects are randomly assigned to one of two groups: one group exposed to the agent of interest and the other not exposed. The study participants in both groups are evaluated for the development of the disease. Researchers conducting clinical trials use study designs that are placebo controlled, which means that the group does not receive the active agent or is given an inactive ingredient that appears similar to the active agent being studied. Double blinding is used when possible. Double blinding means that neither the participants nor those conducting the study know which group is receiving the active ingredient and which group is given the placebo. Green et al., *Reference Guide on Epidemiology*, in FED. JUDICIAL CTR., REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 555 (3d ed. 2011).

Double-blind randomized control trials, and particularly monotherapy trials comparing the product to a placebo, are the “gold standard” of epidemiology. “The best studies are designed and powered to test the outcome of interest (e.g., in this case, the most telling trial would be designed and have adequate subjects needed to study the impact of Avandia on the heart, not its effectiveness in managing blood sugar or other outcomes).” *In re Avandia Marketing, Sales*

Practices and Product Liab. Litig., 2011 U.S. Dist. LEXIS 479, at *4-5 (E.D. Pa. Jan. 3, 2011).

Epidemiological Risk: Relative Risk and Odds Ratio

Where an association between exposure to an agent and disease exists researchers ask whether they occur more frequently than one would expect by chance. Researchers establish a relative risk and an odds ratio to express the strength of an association between exposure and disease. Relative risk (RR) is the association between an agent and disease. It is defined as the ratio of the incidence of disease in exposed individuals over the incidence rate in unexposed individuals:

$$RR = \frac{\text{Incidence rate in the exposed group}}{\text{Incidence rate in the unexposed group}}.$$

Green et al., *Reference Guide on Epidemiology*, in FED. JUDICIAL CTR., REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 566 (3d ed. 2011). A relative risk of 1 means there is no difference in incidence of the disease between the exposed and unexposed groups. A relative risk of two means the incidence is twice as high in the exposed group.

“In a case-control study, the odds ratio is the ratio of the odds that a case ([a case study subject] with the disease) was exposed, to the odds that a control ([a case study subject] without the disease) was exposed. In a cohort study, the odds ratio is the ratio of the odds of developing a disease when exposed to a suspected agent to the odds of developing the disease when not exposed.” *Id.* at 568. The odds ratio is a good approximation of the relative risk when the disease is rare (e.g., 5% or less) in the general population. *Id.* at 569.

Attributable Risk

The numerical results derived from epidemiological studies will sometimes be described in terms of “attributable risk”, instead of relative risk. Attributable risk is the measure of disease in the exposed individuals that can be *attributed* to exposure to the alleged toxin. See Brian MacMahon & Thomas Pugh, *Epidemiology: Principles and Methods* 233 (1970). “It is important to remember that relative and attributable risks provide very different types of information. The relative risk is a measure of the strength of the association between an exposure and disease, and provides information that can be used to judge

whether a valid observed association is likely to be causal. In contrast, the attributable risk provides a measure of the public health impact of an exposure, assuming that the association is one of cause and effect. The magnitude of the relative risk alone does not predict the magnitude of the attributable risk.” Charles Hennekens & Julie Buring, *Epidemiology in Medicine* 93-4 (1987).

Causation: From Association to Causation

When an epidemiologist uses the term causation, it means that there is an increase in the incidence of disease among the exposed subjects that would not have occurred had they not been exposed to the agent. Green et al., *Reference Guide on Epidemiology*, in FED. JUDICIAL CTR., REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 598 (3d ed. 2011). Epidemiology does not prove causation, but provides a basis for those interpreting the epidemiologic data to render opinions as to causation of a disease or condition after exposure to an agent. Importantly, any scientific determination of causation is inherently tentative and remains open to reassessment as new evidence develops. *Id.* at 598.

The Bradford Hill Factors

These criteria, which were “articulated by world-renowned epidemiologist Sir Arthur Bradford Hill in his seminal methodological article on inferences of causality” *Milward v. Acuity Specialty Prods. Grp., Inc.*, 639 F.3d 11, 17 (1st Cir. 2011), help epidemiologists “mak[e] judgments about whether causation may be inferred from an association.” *In re Welding Fume Prods. Liab. Litig.*, 2005 U.S. Dist. LEXIS 46164, 2005 WL 1868046, at *12 (N.D. Ohio 2005).

The Bradford Hill factors provide a framework for testing the validity of an epidemiological assessment. Austin Bradford Hill, *The Environment and Disease: Association or Causation?* 58 Proc. Royal Soc’y Med. 295 (1965). Hill stated that his factors could only serve to assist in the inferential process: “None of my nine viewpoints can bring indisputable evidence for or against the cause-and-effect hypothesis and none can be required as a *sine qua non*.”). See Green et al., *Reference Guide on Epidemiology*, in FED. JUDICIAL CTR., REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 600 (3d ed. 2011). The nine factors are:

1. Temporal relationship – requires that exposure occurs before the disease,
2. Strength of the association -- The higher the relative risk, the greater the likelihood that the relationship is causal. Lower relative risks presents a greater chance that they are the result of uncontrolled confounding or biases.
3. Dose–response relationship -- is there a level of exposure that produces a no-effect?
4. Replication of the findings: This factor recognizes that a single study may not persuasively demonstrate a cause–effect relationship and, as a result, be replicated by different investigators in different case and control populations. Thus, when more than one well designed and executed study is conducted producing the same results a causal relationship is capable of being accepted by scientists. See Green et al., *Reference Guide on Epidemiology*, in FED. JUDICIAL CTR., REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 604 (3d ed. 2011).
5. Biological plausibility: This factor requires an assessment of existing science and a determination of whether the results are plausible. This factor depends on knowledge about the mechanism by which a disease or condition exists in the first place. “A biologic mechanism is a medically plausible process by which a [drug] can cause a particular injury.” *Ryman v. Sec’y of Dep’t of Health & Human Servs.*, 65 Fed. Cl. 35, 39 (Fed. Cl. 2005). “The underlying predicates of any cause-and-effect medical testimony are that medical science understands the physiological process by which a particular disease or syndrome develops and knows what factors cause the process to occur.” *McClain*, 401 F.3d at 1253. “That the mechanism remains unknown does not mean that the one proposed by the [plaintiffs’ experts] is not widely accepted as plausible.” *Fosamax*, 645 F. Supp. 2d at 183 (citing *In re Neurontin Mktg. Sales Practices and Prods. Liab. Litig.*, 612 F. Supp. 2d 116, 149 (D. Mass. 2009) (finding that biologic plausibility supported opinion on causation despite the fact that there was “robust debate in the scientific community” on the proposed mechanism)); *In re PPA Prods. Liab. Litig.*, 289 F. Supp. 2d 1230, 1247 (W.D. Wash. 2003) (“The fact that the mechanism remains unclear does not call the reliability of the opinion into question.”). “[A]ny testimony about the mechanism is

admissible only if qualified in substance with a statement that it remains a theory that, subject to testing, may be proved or disproved.” *Deutsch*, 768 F. Supp. 2d at 420.

6. Consideration of alternative explanations: This factor requires excluding bias and confounding factors.

7. Cessation of exposure: This factor assesses the consequence of removing exposure to the alleged offending agent.

8. Specificity of the association: This factor looks to whether there is something unique about the exposure such as signature illness or condition.

9. Consistency with other knowledge.

Considering these factors and drawing causal inferences after finding an association requires judgment and analysis. Not all factors may be present and drawing of causal inferences relies on scientific expertise. Determination of causation is not made by using an objective methodology by requiring scientific judgment. See Green et al., *Reference Guide on Epidemiology*, in FED. JUDICIAL CTR., REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 606 (3d ed. 2011). *In re Avandia Marketing, Sales Practices and Product Liability Litigation*, 2011 U.S. Dist. LEXIS 479, at *10 (E.D. Pa. Jan. 3, 2011) (“An expert need not consider or satisfy every [Bradford Hill] criteria in order to support a causal inference.”)

Meta-Analysis

A meta-analysis is “a technique used to combine the results of several studies to enhance the precision of the estimate of the effects, size, and reduce the plausibility that [an association] is due to random sampling error.” *Deutsch*, 768 F. Supp. at 452 (citing Green et al., *Reference Guide on Epidemiology*, in FED. JUDICIAL CTR., REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 333, 335 (3d ed. 2011); *In a Avandia Marketing, Sales Practices and Product Liability Litigation*, 2011 U.S. Dist. LEXIS 479, at *7 (E.D. Pa. Jan. 3, 2011) (“To overcome the problem of underpowered studies, researchers may combine data from several studies into a meta-analysis.”). “Performing a meta-analysis on cohort studies allows a researcher to determine the relative risk and the attributable risk to individuals of using a particular drug.” *Rowland v. Novartis Pharms. Corp.*, 2014 U.S. Dist. LEXIS 44865 (W.D. Pa. Mar 31, 2014). Meta-analysis is a recognized process of pooling

study results to arrive at a single conclusion representing the totality of all of the studies reviewed. In a meta-analysis, studies are given different weights in proportion to the sizes of their study populations and other study design characteristics. See Green et al., *Reference Guide on Epidemiology*, in FED. JUDICIAL CTR., REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 607 (3d ed. 2011)..

Meta-analyses are recognized as appropriate when pooling randomized experimental studies that share the most significant methodological characteristics, in particular, use of randomized assignment of subjects to different exposure groups.

The general appeal of an appropriate well designed meta-analysis is that it generates a single estimate of risk and associated confidence interval. Among the difficulties in addressing a meta-analysis, particularly at trial, is when one result is presented as representative of the totality of the scientific literature on the issue, but where no one study taken alone would support the results.

Specific Causation

Even studies demonstrating a doubling of the risk of exposure to a condition or disease with a 95% confidence level does not equate to an individual having met the burden of proof in a case. Whether exposure to a substance can cause a condition is not the same as whether it did so in a specific case. Assuming the science survives challenges to its validity or reliability, the issue is still for the jury to decide.

“The issue of specific causation is material . . . only if plaintiff can demonstrate general causation.” *In re Meridia, supra*, 328 F. Supp. 2d at 799. Where a plaintiff has no admissible evidence to show that the product is capable of causing the alleged condition or disease, it follows that plaintiff has no admissible evidence showing that the product in fact caused his alleged injuries. *DeGidio v. Centocor Ortho Biotech, Inc.*, 2014 U.S. Dist. LEXIS 31258, at *37-38 (N.D. Ohio Mar. 11, 2014).

Differential Diagnoses

The process of differential diagnosis factors into the question of “specific causation.” If other possible causes of an injury cannot be ruled out, or at least the probability of their contribution to causation minimized, then the “more likely than not” threshold for proving causation may not be met. But, it is also

important to recognize that a fundamental assumption underlying this method is that the final, suspected “cause” remaining after this process of elimination must actually be capable of causing the injury. *Cavallo v. Star Enterprises*, 892 F. Supp. 756 (E.D. Va. 1995), *aff’d in relevant part*, 100 F.3d 1150 (4th Cir. 1996). While this approach to causation is highly susceptible to gerrymandering, the expert must “rule in” the suspected cause as well as “rule out” other possible causes. In all events, any expert opinion on the issue of “general causation” or specific causation must be derived from a scientifically valid methodology.

An expert opinion based solely on a differential diagnosis provides no basis for an opinion on causation and therefore cannot constitute sufficient evidence to meet a claimant’s burden. *See Pluck v. BP Oil Pipeline Co.*, 640 F.3d 671, 681 (6th Cir. 2011). An expert simply just calling his causation opinion a “differential diagnosis” is not sufficient to meet the standard of reliability. In *Pluck*, the Sixth Circuit held that merely claiming that an expert used differential diagnosis is alone insufficient to satisfy the reliability requirements of *Daubert*. *Id.* at 678 (citing *Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665, 674 (6th Cir. 2010)). Moreover, the Sixth Circuit restated its’ previous holding in *Tamraz* that:

[c]alling something a “differential diagnosis” or “differential etiology” does not by itself answer the reliability question but prompts three more: (1) Did the expert make an accurate diagnosis of the nature of the diseases? (2) Did the expert reliably rule in the possible causes of it? (3) Did the expert reliably rule out the rejected causes? If the court answers “no” to any of these questions, the court must exclude the ultimate conclusion reached. 620 F.3d at 674.

The Fifth Circuit has held that a “temporal connection standing alone is entitled to little weight in determining causation.” *See Johnson v. Arkema, Inc.*, 685 F.3d 452, 467 (5th Cir. 2012) (citing *Curtis v. M&S Petroleum, Inc.*, 174 F.3d 661, 670 (5th Cir. 1999)). There must be some established scientific connection between exposure and illness to support the causal link. The failure to control for certain risk factors where there is no indication that the experts made informed decisions to exclude factors based on any identifiable expertise or medical literature, will render such a differential diagnosis scientifically unreliable under *Daubert*. *Deutsch*, 768 F. Supp. 2d at 420.

Diagnosis does not equate with etiology. In the practice of medicine a diagnosis is for the purpose of treatment modalities and not as a predictor of what caused the underlying condition. *Zandi v. Wyeth a/k/a Wyeth, Inc.*, No. 27-CV-06-6744, 2007 WL 3224242 (Minn. Dist. Ct. Oct. 15, 2007).

When a treating physician's causation conclusion is excluded as unreliable, he may still be permitted to testify about his examination of the plaintiff, the tests he conducted, and any diagnosis he reached. *Rowland v. Novartis*, 2014 U.S. Dist. LEXIS 44865 (W.D. Pa. Mar. 31, 2014); *See also Heller v. Shaw Indus.*, 167 F.3d 146, 159 n.8 (3d Cir. 1999). Plaintiffs' treating physicians may testify as to personal knowledge gained from their examinations of Plaintiffs, including statements made to them, their own examinations, diagnoses, course of treatment, and prognoses. *Rowland*, 2014 U.S. Dist. LEXIS 44865, at *35. *Damiani v. Momme*, 2012 U.S. Dist. LEXIS 66325, 2012 WL 1657920, at *4 (E.D. Pa. May 11, 2012). "What these treating physicians may not do is offer independent opinions as to the cause of [p]laintiff's injuries." *Id.* at 34-35; *see also Pease v. Lycoming Engines*, 2012 U.S. Dist. LEXIS 6354, 2012 WL 162551, at *13 n.2 (M.D. Pa. Jan. 19, 2012). "Subjective or intuitive guesswork, as well as testimony that is insufficiently connected to the facts of the case, are grounds for rejection of a proffered expert's testimony." Treating physicians designated as non-retained experts under Rule 26(a)(2)(A) are "not . . . permitted to render opinions outside the course of treatment and beyond the reasonable reading of the medical records." *Deutsch*, 768 F. Supp. 2d 420 (E.D.N.Y. 2011) (citing *Lamere v. New York State Office For The Aging*, 223 F.R.D. 85, 89 (N.D.N.Y. 2004); *In re Aredia & Zometa Prods. Liab. Litig.*, 2009 U.S. Dist. LEXIS 71577, 2009 WL 2496859, at *2 (M.D. Tenn. Aug. 13, 2009) ("A treating physician for whom no expert report is supplied is not permitted to go beyond the information acquired or the opinion reached as a result of the treating relationship to opine as to the causation of an injury or give an opinion regarding the view of an expert called by the defendant."))

In *Allen v. Takeda*, the Court ruled that "[l]t is without question, the facts and data upon which an expert may base his or her opinion(s) are admissible on that basis alone; [the expert] needn't be a statistician to rely on statistics and analyses conducted by a statistician, particularly within this factual context when statistical analysis is, in part, one of the foundations upon which epidemiological analyses and conclusions are based and when epidemiological analyses and

conclusions have been shown to be at the center of the scientific debate at hand”. *Allen*, 2014 U.S. Dist. LEXIS 4808, at *72, 73 (W.D. La. Jan. 10, 2014)

Practical Considerations for Cross-Examination

A critical variable in any cross-examination is the lawyer’s understanding of the subject matter at issue. Whitehead and Espel, *Causation and Experts in Toxic Tort Litigation: How to use and Defend against Epidemiology, Toxicology and Biostatistics*, 387 PLI/LIT. 169 (1990). Useful issues to consider when cross examining an expert who is relying on statistical evidence for his opinions are:

1. What was the researcher’s final evaluation of the relative risk attendant to the exposure to the substance at issue?
2. Is the relative risk sufficiently strong to satisfy the legal requirements for causation?
3. What is the confidence interval, as calculated by the researcher or epidemiologist who prepared the study in question?
4. What is the confidence level supporting that confidence interval?
5. Was the epidemiologic study peer reviewed? If not, what evidence exists to confirm acceptance of the methodologies by epidemiologists?
6. Was the epidemiologic study prepared with a public health perspective, or with a scientific attention to disease etiology?
7. Have other epidemiological studies been performed, and what were the findings?
8. Did the study produce statistically significant results? (if so, did the results demonstrate a strength of association, temporality and other factors necessary for a general inference of causation?)
9. What is the magnitude of the risk or incidence rate found in the study at issue?
10. To what extent does exposure produce a specific disease or syndrome?
11. What is the interval between exposure and the onset of symptoms?
12. Have animal or in vitro studies been conducted? (if so, are the findings consistent with the epidemiological study at issue?)

13. What was the duration and level of exposure of the subjects in the study at issue? (and how does that duration and level of exposure compare to that of the plaintiff in your particular case?)
14. What efforts have been documented to account for possible bias or confounding variables?
15. Attempt to get an admission from the expert that, in some instances, statistical association can be misleading (e.g., that association does not prove causation, that associations or correlations can be affected by confounding or lurking variables, etc.)
16. Attempt to get a concession that some people who were exposed to the product have not developed the disease, and that some people with the identical disease have not been exposed to your client's product;
17. Obtain a concession that there are unknown causes for the disease at issue, even without any exposure to your client's product; and
18. Obtain a concession that an epidemiological study cannot answer the question as to whether the defendant's product actually caused injury in a particular case, because epidemiological studies deal with risk of disease in groups of people rather than in particular individuals. *See Id.*

VI. Conclusion

This paper provides a general overview of the use of statistics in the courtroom. By developing a basic understanding of statistics as a science, and how it is applied, the trial lawyer is better equipped to assure that his expert's testimony satisfies the important *gate keeping* requirements of scientifically reliable evidence. The converse is also true. The trial lawyer needs to make sure that the opposing party's expert does not distort and bend the facts rendering the statistics nothing more than a bunch of "damned lies". Fairness and a winning jury verdict may be in the balance.

Starting Your Own Associate Training Program

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Paper by:

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Dick is currently a member of the Supreme Court Committee on Standard Jury Instructions. He has served on The Florida Bar Civil Procedure Rules Committee, and the Appellate Rules Committee, which drafted the current Florida Appellate Rules. He has lectured on appellate practice and product liability in Florida Bar CLE seminars, and is the author of the chapter on "Defenses" in the Florida Bar CLE handbook on product liability, as well as the chapter on "Florida Law" in the *DRIP Product Liability Handbook*.

In addition, he is a member of the Committee on Product Liability Litigation of the Section of Litigation and the Product, General Liability, and Consumer Law Committee of the Tort and Insurance Practice Section, both of the American Bar Association. Dick is also a n emeritus member of the Product Liability Advisory Council.

Dick maintains membership in the Federation of Defense and Corporate Counsel (FDCC), Florida Defense Lawyers Association, the Defense Research Institute, and the Federal Bar Association. He is admitted to practice before the Supreme Courts of Florida, Alabama, and Texas, the United States District Courts for the Northern, Middle, and Southern Districts of Florida, the Northern, Middle, and Southern Districts of Alabama, the United States Court of Appeals for the Fifth, Sixth, and Eleventh Circuits, and the United States Supreme Court. He received his B.A. from the University of Florida in 1965, and then served as a captain in the United States Army from 1965 to 1968. Dick completed his J.D. at the University of Florida College of Law in 1970. He served as Editor of the *University of Florida Law Review* and published a Case Comment and a Note in the *University of Florida Law Review*.

In 1971, Dick served as law clerk for Judge Spencer C. Cross, Fourth District Court of Appeals. He also served as City Attorney and Prosecutor for Ocoee, Florida, from 1973 to 1975.

Arthur J. Reliford, Jr. is an equity partner at Swanson, Martin & Bell, LLP. A general litigator, Art has successfully represented as lead and co-counsel a variety of professionals, businesses, major corporations and municipalities in state and federal courts across the country. He concentrates his practice in the areas of commercial litigation, product liability law, and complex civil litigation. He has tried as lead and co-trial counsel a variety of jury and bench trials to verdict and participated in arbitrations and mediations. Art is co-chair of the firm's diversity committee and a member of the firm's associates committee.

Patrick E. Stockalper is a partner in the Law Firm of Reback, McAndrews, Kjar, Warford, Stockalper & Moore, which specializes in all areas of civil defense litigation. Mr. Stockalper has concentrated his practice in the areas of medical malpractice, dental malpractice, legal malpractice, and general liability.

Mr. Stockalper was the 2009-2010 national President of the Litigation Counsel of America (LCA), a trial lawyer honorary society composed of less than ½ of 1% of American lawyers. Mr. Stockalper is a Charter Fellow of the LCA, a Barrister in one of the LCA's distinguished trial orders, and serves as a Co-Chair of the California delegation of the society. Mr. Stockalper is also the Chair of the LCA Medical Malpractice Committee and has begun formation of the American Academy of Medical Malpractice Lawyers under the auspices of the LCA.

Mr. Stockalper is an Associate member of the American Board of Trial Advocates (ABOTA) and has served in various leadership capacities with the Los Angeles ABOTA chapter. These positions have included service on the Executive Committee (2010 to 2014), faculty member for the Jack Daniels Trial School, Membership Chairman (2012 - 2014), and Program Coordinator for the Master's In Trial Program (2010 and 2012). He was also a presenter at the 2013 Master's in Trial Program for the Los Angeles ABOTA chapter. He has been a Southern California Super Lawyer every year since 2007.

Mr. Stockalper is a member of the Association of Southern California Defense Counsel (ASCDC) and has served on the ASCDC's Board of Directors since 2008. He is also a representative of the California Defense Counsel (CDC) which represents the interests of the civil defense bar before the California Legislature. Mr. Stockalper is a member of the Federation of Defense & Corporate Counsel (FDCC).

Mr. Stockalper has been featured in a national U.S. Legal News publication for a defense verdict involving one of the largest wrongful life cases in U.S. history and has been featured for trial success in the Association of Southern California Defense Counsel (ASCDC) Verdict Magazine. On November 22, 2008, he was featured as the newly named President-Elect for the Litigation Counsel of America on Champions of Justice, the highly rated radio program of LCA Fellow Thomas V. Girardi.

Introduction:

We are currently in the midst of a seismic shift between two tectonic plates underlying our profession. On one side is our clients who are demanding legal services provided efficiently, cost-effectively, and with value added. On the other side of the fault line is the younger generation of lawyers. This generation of lawyers has different expectations about career, the practice of law, work/life balance and society in general. The chart below offers an enlightening comparison to the mindset of what it was like to be an associate when most managing partners and firm leaders were associates and the modern associate.

1980 Associate	2000 and Beyond Associate
Legal Profession	
Approximately 500,000 lawyers in the United States	Over 1,000,000 lawyers in the United States
One lawyer for every 400 people in the United States	One lawyer for every 200 people in the United States
Legal profession well-respected and lawyers viewed as respected members of the community	Legal profession mistrusted and lawyers often ridiculed
Practice of law exclusive domain of independent law firms	Incursion of accounting firms, financial planners, HR consultants, etc.
Clients relatively unsophisticated and willing to accept lawyer advice at face value	More sophisticated clients, many of whom are lawyers themselves
Sphere of business and social interaction was local community	Sphere of business and social interaction is global
Lawyers given <i>carte blanche</i> to litigate cases	Budget squeeze in corporations results in profit squeeze in law firms
Lawyer invoice to client read, "\$15,000 for services rendered"	Invoices subject to voluminous billing guidelines, detailed descriptions of billing activities, limitations on billable events (i.e., travel time), etc.
Clients more accepting of annual fee increases	Clients more sensitive to rising costs of legal services and refuse to subsidize large increases in associate salaries
Marketing activities included lunches, dinners, cocktails, golf outings, sporting events, etc.	Clients inundated with sophisticated marketing devices
Secretary took dictation	Voice recognition software
Lawyer to secretary ratio = 1:1	Lawyer to secretary ratio = 3:1
Legal research tools: Paper library with hardback legal digests, Shepard's, etc.	Legal research tools: Westlaw, Lexis-Nexis, Internet, etc.
Formal dress code preferred, Saturday was considered the only casual day	Casual dress code preferred. Business casual Monday through Friday
Lawyers worked primarily from the office	Lawyers are mobile, with laptops and handheld PDAs, Blackberrys, cellular phones, etc.
Lawyers accessible to clients via telephone, facsimile and mail	Lawyers accessible to clients 24 hours a day via electronic mail, BlackBerrys, cellular phones, laptops, handheld PDAs
Inter-office memos to get messages back and forth	Intranet and internal email to get messages back and forth
Profession dominated by white males	Profession more inclusive of women and people of color
Legal Career	
Jobs plentiful at good law firms for good students	Job market extremely competitive; top schools or top of class required for large firms/best paying jobs
Invited to law firm partnership after 3 to 5 years of good work	Possibly invited to partnership after 8 to 10 years of high productivity, development of a book of business, and some participation in firm management and/or administration
Upward mobility to partnership is the only sure sign of success	Greater desire for alternatives to equity partnership. Success can mean a horizontal move (non-equity partnership, staff attorney, etc.) and not necessarily a vertical move
Lawyers looking for rewards in terms of financial success and elevation to partnership	Lawyers looking for rewards in terms of financial success, flexibility, freedom, autonomy and increase in opportunities
Lawyers looking to build lifetime careers in one law firm	Lawyers looking to leverage their credentials in managing their own careers. A 2000 American Bar Foundation report found that 65% of young lawyers indicated that they would consider switching jobs within two years
Moderate billable hour requirements	High annual billable hour requirements to cover associate salaries and increases in overhead
Expected to stay with firm throughout legal career	Willing to make lateral moves and to transition into new careers
Wait for opportunity for career progression	More impatient in terms of career progression
Diversity accepted as the natural progression of the profession	Diversity expected as the natural way of doing business
Definition of diversity meant more women in the workplace	Diversity has a broader definition and is not limited to race, gender, age, sexual orientation, religion
Interview process for associate consists of being interviewed by partners of the firm	Interview process consists of associate candidate interviewing the firm and its partners as well
Formal feedback once a year if at all	Associates expected constant feedback often informally after each project
Little or no technology training/experience	Grew up with computers in home, school and office. Expectation of latest technology tools and gadgets.

Lawyer Personal Financial Profile	
Little or no debt at law school graduation	Large student loan debt at law school graduation (Often \$60,000 to \$120,000 or more)
Average associate starting salary was \$36,000	Average associate starting salary is \$66,000
Less open about compensation and benefit packages	More open with peers regarding compensation and benefit packages. See www.greedvassociates.com
Early financial success (earning significantly more than contemporaries with bachelors' degrees or MBAs)	Financial mediocrity early in career with possibility of long-term financial success (contemporaries with bachelors' degrees, MBAs make the same or more to begin with)
Expect to pay dues then achieve financial payoff	Expect to receive quicker financial payoff
Lawyer Family Life	
Single-income family	Dual-income family
Little or no childcare outside the home	High-cost childcare outside the home
Lawyers worked full-time	Firms have part-time employees
Lawyers lived to work	Lawyers work to live a balanced life
Stay at home spouse handles most or all household and child care duties.	
Working spouse devotes evenings to client development, bar and community activities	Household and child care duties required by both spouses
Other Sociological Differences	
Don't ask/don't tell society	Society filled with honest information about sex, gangs, drugs, AIDS, violence, etc.
Prefer not to disclose sensitive/important information	Prefer honesty, straightforward information and disclosure
Accustomed to hierarchy, reserve and control	Rejects control, demands flexibility and enjoys more freedom

Virginia Grant and Marci M. Krufka, *The Young and the Restless: Understanding Generational Differences in Today's Law Firms*, Report to Legal Management, July 2003.

Resting squarely on the fault line is the modern law firm. Struggling to keep pace with the demands of the clients and the market, associate training has suffered. No longer can senior and junior partners spend hours of non-billable time training new associates in the business of law and the practice of law. Client will not pay for it and associates will not accept it. As law firms struggle with this new paradigm, they must not lose sight of the fact that associates are still the foundation of a successful and growing law firm. They are the next generations of lawyers who will continue the legacy of the attorneys before them providing the outstanding, cost-effective legal services. To remain relevant in this new market, law firms must adapt to meet the demands of their clients, while at the same time creating a culture to recruit and retain talented associates.

Successful firms must adopt an associate training program that will recruit, retain, and satisfy current and future associates. It should include elements that focus both on the practice of law and the business of law. The associate program should also have clearly defined goals, expectations with an evaluation/reward/incentive program to keep the associates invested in the program. Once the program is developed, it must be implemented in a manner to achieve its stated goal. The program must be ingrained in the culture of the firm and supported by every member of the firm. If buy-in is not achieved the most well-intentioned program is doomed to fail.

I. ELEMENTS OF AN EFFECTIVE ASSOCIATE TRAINING PROGRAM

Regardless of firm size or practice area focus, an effective associate training program should address the practice of law and the business of law. The associate should be provided professional development training on how to be a lawyer. The program should also focus on business development. From day one, the associate needs to appreciate they are a vital member of the success of the firm. A good associate training program should also teach leadership and management skills. Lawyers do not like to be managed and struggle being managers. The program must teach them how to manage people and how to be managed by others. The program

should also teach the associates how to get involved in the community. They must be encouraged to become active, positive forces for good in their communities. This includes providing *pro bono* legal services, but should also discuss charitable work and other leadership opportunities. Lastly, the program should also contain appropriate reward incentive and advancement procedures so the associates could progress through the program and obtain the goals that they and the firm desire collectively.

A. It Begins with Recruiting.

Any associate training program must begin with recruiting talented associates. The recruiting message and recruiting plan should be consistent with the message conveyed in the training program. To ensure this consistency, the firm's recruiting committee, regardless of size, should consist of diverse lawyers from different generations and backgrounds. Consideration should also be given to integrating the recruiting committee with the members of the firm involved in the associate training program. This will ensure that the messages stay consistent, but will also allow the associates to develop a personal relationship with the firm. The practice of law is a relationship business so why not begin with building relationships with your associate.

The law firm web site is an excellent recruiting tool and must offer information regarding the history and focus of the firm. The web site should be truthful about the associate training program, career paths, mentoring, rewards, work/life balance, culture and diversity. Associates are extremely tech savvy and will go to the firm's web site to gather information about the firm. A one size-fits all message is not viable in the current marketplace. Firms that are able to utilize technology to meet the associates at their level will be most successful in recruiting top-tier talent.

Most importantly, with any recruitment effort, these current and future associates expect honesty and transparency, so it is important for them to understanding at the recruitment phase that the legal profession is not an easy profession. The firm should be up front and honest about lifestyle issues, work/life balance issues, and all aspects of what is expected. This message should be carried forward into the associate training program. If this information is conveyed honestly and transparently you are more likely to get associates who are invested.

B. Professional Development: Keeping the Craft Alive

1. The Problem

It is virtually indisputable that the overall numbers of jury trials have been declining across the country. Many judges and lawyers have written scholarly articles on the subject, providing multiple explanations for this phenomenon. Few authorities agree on all the reasons for the decline in jury trials, but the fact of the decline is inescapable. One need not resort to the legal literature to verify the proposition; most trial lawyers need only reflect back upon their own experience over the last couple of decades in order to realize the truth.

This paper will not explore the statistics of the jury trial decline, nor undertake an exposition of all of the factors leading to it. It addresses one consequence of the disappearance of jury trials as we have known them. An inevitable result of the decline in trials is a diminution of opportunity for young lawyers to learn how to try these cases. As fewer and fewer cases go to trial, fewer and fewer opportunities present themselves for young trial lawyers to learn how to prepare a case for trial, present evidence, interact with jurors, marshal legal arguments, and

ultimately win the case. We, as senior trial lawyers in our respective firms, are thus faced with the stark reality that soon there may be few if any lawyers left who can carry on our tradition of excellence in the trial practice.

Although we here in this group face the issue as defense lawyers, and specifically defense lawyers engaged in a products liability practice, this issue is not confined to the defense bar. Virtually every plaintiffs' lawyer with whom the author has spoken over the last 10 years has voiced precisely the same complaints: it is getting more and more difficult to train their young lawyers on how to try plaintiff's case properly, and to a successful conclusion. Plaintiffs' counsel do have a major advantage over us, however: they have somewhat more control over which cases, and the number of cases, that they take to trial. In our products practice, on the other hand, the decision to take a case to trial or to settle is often the result of a group consensus, rather than an individual client listening to his lawyer. Our clients are typically sophisticated manufacturing or insurance entities, with a great deal of experience, as well as skilled in-house counsel and risk managers, to aid them in the decision of whether to take the case to trial.

2. Reasons

As mentioned above, numerous reasons have been assigned for the decline in the number of jury trials. However, from the defense standpoint, there appear to be two primary reasons why more and more cases get settled, and fewer cases proceed to trial. These are (1) the risk of a result which is not only adverse but unacceptable, and (2) the sometimes staggering costs of trying a significant (or even sometimes less than significant) products case. Most of our clients at one point or another have experienced an adverse verdict in the eight or even nine figures. Needless to say, this type of result is often difficult to explain to company management. Most clients have also had the experience of successfully trying a lawsuit, only to have the total of litigation expenses, including legal experts, exhibits and other expenses, far exceed the amount for which the case could have been settled early in the process. In other instances, we as defense counsel have put together such a solid case, at significant expense, that plaintiffs grow discouraged and settle the case on a basis that is so minimal that it simply cannot be refused (see footnote 2). Experiences like these cause companies to look askance at the proposition that this or that case should be tried.

Also, as a matter of ultimate realism, many companies differ from their outside counsel in that they are not truly interested in establishing a world-class track record of winning lawsuits. Litigation is viewed by those entities as an irritant, a distraction from the primary business of the corporation, and one to be disposed of as quickly and cheaply as possible. Most clients are interested in trying enough cases so that they are not perceived by the plaintiffs' bar as an easy target; however, beyond that, eagerness to take cases to trial may diminish sharply.

3. Increased Associate Participation

As justifiable as these concerns are, the result (fewer trials) should be deeply troubling to us as trial lawyers, for the reasons stated above. The question then becomes, in light of this trend to avoid jury trials, how can our younger lawyers obtain the training necessary to become competent, skilled trial counsel in their own right? In broad terms, the answer of course is to encourage our clients to try more cases, even in the face of the contrary factors mentioned above. This can be accomplished in two ways:

- (1) decrease the risk to the client of an unacceptable result, and
- (2) decrease the expense to the client of taking a case to trial.

If we can do this, many clients will not only be more amenable to taking some of their cases to trial, but also to agreeing to allow younger counsel to have a more significant role in the trying the case.

Obviously, not every case is going to be susceptible to attempts to either decrease the risk or decrease the cost. A case involving quadriplegia, brain damage, multiple deaths, or multi-million-dollar property damage, is probably not going to give rise to an increased opportunity for trial leadership on the part of a new lawyer. These types of major cases, however, do provide opportunities for younger lawyers to participate in their defense under the guidance of senior trial counsel. Having younger lawyers undertake the “second chair” is something that we all do as a matter of course in our practice. However, under the current climate, senior trial counsel need to be even more aware of the necessity of maximizing the associates' exposure to trial practice.

The associate needs to be part of the trial team literally from the moment the case comes into the office, and introduced to the client as such. The client should be assured that, although the associate will take an active part in the defense of a lawsuit, the partner will remain in charge and exercise close supervision of all aspects of the defense. Communication between the associate and the client representative(s) should be encouraged. If the associate is as sharp as we flatter ourselves that they all are, the client should soon accept the associate's role in the litigation, and be less likely to object if the associate undertakes a significant event, such as a hearing or deposition. Observation of the associate's success in these roles will encourage client acceptance of the associate as one of “their lawyers”.

4. Lowering the Risk

There is obviously only a limited extent to which trial lawyers can decrease the risk to a client of a truly adverse result in a lawsuit. No one, or at least no one with any sense, is going to guarantee to the client the result of any particular case. Each of us has lost cases which by all rights we should have won, and sometimes obtained the more fortunate opposite result. However, there may be some things which can be done in a given case to reduce the exposure to the client, to the point of providing a greater incentive to take the case to trial. One approach which has been suggested is more aggressive use of “high-low” agreements. With the risk thus quantified and defined, the client (as well as plaintiff) may be more amenable to submitting the case to the jury. This may be particularly true in the instance of cases which may appear smaller in magnitude, but which have some degree of significant upside exposure. Capping the parties' range of risk may, in a given case, remove a major impediment to getting the case tried.

Maximum use should be made of partial summary judgment motions, and other appropriate motions, to prune from the case claims of questionable viability. Having one or more claims removed from a case may well diminish the value of the matter, as well as the expense involved in trying it.

5. Reducing the Cost of Trials

Perhaps a more fertile area of providing incentives to clients to try more cases is a reduction in litigation expenses. This would appear to be particularly true with respect to the smaller cases, which often may seem (at least to the client) to cost more to try than a good result

is worth. A number of different approaches suggest themselves towards this end. Frankly, many of them involve an investment in the future, i.e., accepting a reduction in current fee production from newer lawyers in return for increased value of that lawyer in the long term.

Several techniques may be useful in encouraging clients to try their smaller cases, rather than settling them for nuisance value.

(1) One such technique may be offering the client a species of "contingent fee." Under such an arrangement, the client would only pay normal attorneys fees in the event of a successful outcome. If the case is lost, the agreement could specify that no fee will be due, or only a sharply reduced one. An alternative scenario could provide a "bonus" for extremely good results, "normal" fees for an average result, and a reduced fee for an unsatisfactory ending.

(2) A similar arrangement involves an agreement for the younger lawyer to handle and try the case under a "flat fee" or other type of reduced fee agreement. This flat fee would, and least under normal circumstances, be significantly less than a senior lawyer would charge to handle a like case through to verdict.

(3) Actively solicit smaller cases from clients. Many defense firms, as they have grown and become more successful, have tended to discourage the handling of smaller cases because, almost by definition, they present less of an opportunity for significant fee production. Many clients do have small cases filed against them from time to time, and could be quite receptive to trying them, if the financial exposure discussed above were lessened significantly. This step would require, however, a rethinking of firm strategy with the realization that the opportunities provided for trial training for younger lawyers could compensate to some extent for decreased return.

6. Other Approaches

Several additional avenues exist for increasing the exposure of younger lawyers to trial situations.

(1) Pro Bono Activities. Younger lawyers could be encouraged to take on pro-bono matters. Some firms have assigned multiple associates to their local pro bono organization on a short-term basis, in order to help clear out that organization's case load. If this step is taken, it should be done with the realization that many, if not most, of the cases available to be handled on a pro bono basis from local legal aid societies and the like, will not be of the same nature or category as the work handled by the firm. For example, most of the cases available for assignment from the author's local legal aid organization are domestic (divorce, child custody and the like). Obviously, these types of legal matters give a young lawyer little substantive training in the area of products liability. However, the opportunity to actually get into court, deal with recalcitrant witnesses, judges and court personnel could outweigh any disadvantage of the cases being outside the associates' mainstream practice.

(2) Criminal Law Exposure. Some firms have gone so far as to assign new associates to the local prosecutor's office for a period of months, at the firm's expense, to handle smaller criminal matters and gain immediate access to the courtroom, albeit in a somewhat different setting than they will see in the course of the firm's regular practice.

(3) CLE. There are several multi-day CLE programs which provide "hands on" training in trial situations. These programs by their very nature are expensive, and are sometimes

overlooked by law firms for that very reason. Also, we all realize that every day an associate is out of the firm at a continuing education seminar is a day that the particular associate is not going to be able to devote to his or her billable hours. Taking advantage of such programs, however, is probably cheaper in the long run than having an untrained senior associate (or even junior partner), or losing a valuable associate because of the absence of the trial exposure. The National Institute of Trial Advocacy (NITA) has a number of courses available, as do other organizations.

(4) In-House Mock Trials. Conducting "in-house" mock trials may also provide useful training in trial techniques for young lawyers. Again, NITA provides materials for use by law firms in precisely this type of situation. The disadvantages of conducting these sorts of mock trials are (a) they really do not truly reflect some of the difficulties a new lawyer experiences in handling real cases, and (b) in order to be of real benefit, they presuppose an enormous amount of supervision and participation in this training by the firms' senior lawyers. Such mock trials can, however, help to fill the gap of inexperience and uncertainty on the part of new lawyers in approaching jury trials, particularly if the senior lawyers devote time to the process, including constructive critiques of the associates' performance.

(5) Mediations. Allowing a younger associate to undertake an active role in mediations can also assist in the educational process. Mediations are of course not the same as jury trials. There is no opportunity for cross-examining witnesses, arguing dispositive motions or making impassioned final arguments to a jury. However, exposing an associate to training in marshaling one's thoughts and arguments, supporting of these arguments by appropriate use of exhibits, and doing so in a succinct manner can be very valuable. The associate can learn good negotiation techniques as well.

The above are only examples of how associate training can be enhanced even in the absence of frequent jury trials. With imagination and the will to get the job done, other approaches can be followed with hopefully good results.

7. Perspective of the Client

Our clients, the ones whose products are on the line in the cases which we try, also have an undeniable stake in the preservation of their sources of experienced, skillful trial counsel. Many of the clients have built up long-standing relationships with their lawyers, with obvious benefits to everyone. Time never stands still however, and when a company loses one of its stalwart outside lawyers, through retirement or death, it needs to be able to have assurance that there are others in whom that organization can have confidence.

Efforts to ensure that younger trial lawyers receive good practical training require the support of clients as well as outside law firms. Many possible approaches to this issue require a commitment by the client as well as the lawyers. The requirement to maintain current high standards of performance for outside counsel should not stand in the way of willingness to join in searches for ways to ensure that these standards continue to be met in the future. In-house counsel and risk managers also need to look at their legal requirements 10, 15 or 20 years hence. Will there be available women or men who have courtroom skills equivalent to those of current outside counsel? Even if the diminution of the number of jury trials continues, is there a risk that when that one big case comes along which must be tried, there is no trial lawyer available who inspires confidence?

Consideration of these issues should lead to the realization that everyone in this organization has a real interest in education and training of the new generation of trial lawyers.

8. Our Swan Song?

Some argue that no matter what we as senior defense lawyers do or try to do, the "good old days" of products liability trial practice, and indeed of civil trial practice generally are gone forever. They point out that the trend of declining numbers of jury trials is likely to continue, possibly even on an accelerated basis. The corollary to this proposition is that the need for experienced trial lawyers, brought up in the profession the way that most of us have been, will be significantly decreased in the future.

If this position holds any merit, then we must as a profession consider what different types of training we want to provide to our younger lawyers. What alternative skills do we need to teach our young people besides the classic ones of conducting and resisting discovery, witness interrogation, use of exhibits, drafting legal memoranda and making effective arguments, and in general presenting a case to a jury? Do we need to redirect our focus towards imparting skills directly applicable to negotiation, mediation and arbitration, rather than jury trials?

These latter questions are vexing, have no easy answers, and undoubtedly deserve more in-depth study, both institutionally and by each of us individually. What the paper suggests is that there are ways of dealing with the decreased opportunity to get young lawyers in front of juries, and to make sure that when our young people do get "their day in court," whenever and however often this occurs, they are well trained, competent and able to make us proud of them. The diminution in the number of jury trials is, as suggested above, a fact which will not go away. In light of this, steps need to be taken over and above what we've always done, for our sake and for our successors, to ensure that our profession does not become essentially obsolete.

The one certainty is that, at least for the immediate future, clients will continue to demand experienced, skilled outside counsel to represent them. Given this continuing demand, those who develop creative, effective training programs and opportunities for their younger lawyers will be best equipped to meet their clients' needs. All of us who are outside counsel would like for the results of our efforts to benefit our clients and our successor lawyers within our respective firms. Changes in our traditional and current approaches by both clients and their outside counsel would seem to be in order to achieve those parallel goals of continuing service paired with a continuation of the craft and preservation of the merits of well-trained trial lawyers.

C. Business Development: It Begins on the First Day

Business development begins on the first day. Firms can no longer allow an associate to develop "on the bench" for several years before allowing them into the business development game. They must have a constant focus on business development, even if their first client is the partner under whom they work. They must go into each day asking themselves what they are going to do today to develop business for the firm. As the associate progresses through the program, they should increase their exposure and opportunities to interact with clients and develop business. The program should start by teaching the associate about the firm, the business development principles in general, and then advance to specifics about business development with current and potential clients. The program also needs to discuss that everybody can and must market themselves and the firm to existing and potential clients. Each associates' personal

marketing skills must be identified and then fostered so that every associate understands their role in business development.

Do not be afraid to involve your clients in the business development training. Let your clients participate in the training of the lawyers who will work on their files. The client will be able to help shape the training of the associates and ensure that the lawyers working on the files will understand the client's business, its approach to the legal work it is seeking from that particular firm, as well as it will allow the young associate to form a relationship with the client.

The current generation of associates is very collaborative. They are accustomed to working together to solve problems and achieve common goals. This is another pressure point with the modern law firm model. Firms that have a culture of protectionism with clients and work will not be able to retain top associates. Cultural changes must be made within the firm to encourage more collaborative work amongst partners and associates in both client work and client development. Instill a culture that adequately rewards individuals for their appropriate contribution to the success of the firm.

D. Leadership / Management: Train your Associates to be Good Partners

We have a duty to our profession and our community to use our legal skill to help solve and be active participants in solutions to a problem that affect our communities. For far too long, we have let ourselves be the butt of too many jokes and have allowed the reputation of our profession to be sullied by a few "bad apples" within our ranks and constant attacks from outside of our profession. The best way that we can begin to repair the damage done to our profession is to be active, positive forces in the community. When people in our community see lawyers helping people in a positive way and solving problems within the community, the profession will return to the status it once enjoyed. The new generation of associates already value community involvement and this desire should be fostered, encouraged and made an integral part of the associate's training within the firm. Community leadership should include how associates can become involved in serving on charitable boards, getting involved in charitable organizations, serving and becoming politically active.

In addition to leadership skills, associates must be taught management skills. Well managed firms are more successful. Law firms that invest in management training for their lawyers will thrive. If you want the future partners of your law firm to be successful leaders, managers and experts in the business of law. Business and management skills are not taught in law school, yet every lawyer is going to eventually become a business owner and will be responsible for managing employees. These skills must not only be taught, but the culture of the firm must value excellence in leadership and management. At a minimum, the associate training program must provide lawyers with a solid understanding of management trends in the profession, the fundamentals of law firm economics and profitability, and managerial skills.

Natural leaders should be identified and their natural abilities should be fostered. Additionally, a portion of any associate's reward, compensation and advancement within the program should be tied to demonstrating excellence in leadership and management in the firm. As associates progress through the training program, they should be given more opportunities in leadership and management positions. Excellence in management and leadership must be on equal footing as lawyering and business development.

E. Reward / Incentive / Advancement / Feedback

Opportunities for advancement are critical issues for associates. An effective program should work with associates to design career paths that will provide opportunities for challenging work and increased visibility in the firm and the legal community. Associates should get exposed to meaningful and challenging assignments. Assignments should be fairly distributed.

Associates want timely feedback on their performance. Firms should provide a formal performance evaluation and project-specific feedback. The better the evaluation and feedback process, the better likelihood of greater associate satisfaction and retention. No associate should be confused about how they are progressing through the program. Consider using technology to enhance the quality of the feedback.

Regarding advancement, the training program should provide for multiple opportunities for advancement. Associates should be permitted to move in a number of directions, not just upward to partnership. Offer and support the option of moving laterally within the firm or even moving downward. Associates should not be punished for refusing to follow the old linear model. These options should be clearly defined so the associate knows what to expect with each advancement tract.

Be creative in how you reward associates. The modern associate is not always concerned with a higher salary. Consider other perks like laundry service, car maintenance service or other simple timesaving perks that can be valuable to today's busy dual income families. One firm even bought a vacation home for the exclusive use of associates. The firm saw an increase in both associate satisfaction and productivity. Firms can also offer assistance with a first mortgage or help with student loan debt. Associates who feel valued and are rewarded for their contribution are more likely to work harder for the firm.

II. IMPLEMENTING THE ASSOCIATE TRAINING PROGRAM

Once it is determined what elements will comprise the associate training program, the firm must decide how to implement the program. The specific design of the program will be largely dictated by the size of the firm. Larger law firms are presented with a number of logistical issues regarding implementation of an associate training program that are not present in small or medium size firms. As an example, establishing a mentoring program where each associate is assigned a single lawyer may prove unworkable in a large law firm with multiple offices in multiple locations. Such programs may be more effective in a small to medium size firms.

By the same token, small or medium size firms do not have the financial resources to hire a dedicated person to manage and implement an associate training program across the firm. Additionally, large firms must be careful with not getting too concerned that the plan is implemented in the exact same manner across the entire firm, which may include multiple offices and, in some cases, offices in different countries. The overall philosophy of the program must be implemented uniformly and with consistency, but separate offices should be given autonomy to implement the specifics of the program in a manner that will be most receptive to the associates within that office.

Firms can also consider a boot camp or retreat-type program where the associates are taken off-site for several days of intensive training in the aspects of the associate training

program. The program could be a one-time event or take place over several months. In addition to dedicated and focused training during these boot camps or retreats, the associates get to interact socially with each other and the partners to develop closer relationships, making them more likely to work harder for themselves, each other, and the firm.

Firms can also consider conducting in-house seminars focusing each session of the program on a different area of the associate training program. The firm can consider getting CLE approval for the sessions to have the added cost-savings of having the associates complete the training program and also satisfying their state-required continuing legal education requirements.

Lastly, the firm can utilize the assistance of local, state and national organizations to supplement their in-house training of their associates. This may be particularly helpful to small or medium sized firms that do not have the resources or time to devote to a fully integrated associate training program.

The only limitation on the associate training program is the boundaries of one's imagination. Do not be afraid to break from conventional wisdom and implement cutting edge approaches to training associates. Re-evaluate the program every year to determine its effectiveness and what can be changed for future generations of associates. Involve associates who have completed the program to participate in training future associates to ensure consistency in the program's implementation plus continued buy-in by future generations of the firm.

If the ultimate outcome is successful recruiting and retention of the highest quality associates, then it is well worth the investment in these training approaches.

III. Conclusion

If you are going to implement an associate training program, do so deliberately but wholeheartedly. Understand that times are different. Instead of trying to conform the current associate generation to a firm model that has clearly seen its better days, develop a program that embraces the difference of the associates, relies on their strengths, talents, and their expectations to develop a firm-wide associate training program where the associate will see that from their first day of work with the firm that they are "partners" in the success of the firm and that their personal success and the success of the senior partners and the firm as a whole are one and the same. The associate training program will inevitably become part of the culture of the firm for better or for worse.

HIPAA FOR LAWYERS AND LAW FIRMS

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Mr. Coffield serves on the Board of the West Virginia Health Information Network, West Virginia's HIE, and is involved in various other health information related projects on the state and federal level. Mr. Coffield is a member of the American Health Lawyers Association and serves as the Vice Chair of Publications for the Health Information Technology Practice Group. Mr. Coffield is a founding Board Member of Create West Virginia. Mr. Coffield has been recognized by his peers for inclusion in Best Lawyer in America – Health Care category since 2008.

Mr. Coffield graduated from Bethany College in 1988 with a BA, English and obtained his JD from the West Virginia University College of Law in 1993. Mr. Coffield was the author of Health Care Law Blog from 2004 through 2012, and now provides social media commentary on health care and technology related law industry news via Twitter at @BobCoffield.

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Jim frequently lectures on the requirements imposed by HIPAA and implementing a HIPAA compliance program, and other health care compliance issues. He authored Chapter 9 of the Health Law Handbook, 2005 edition entitled "The Emergency Medical Treatment and Active Labor Act: Responding to an Active Investigation." Most recently, he co-authored the Alabama Association of Health Information Management's Medical Records Manual as well as numerous articles on health law related topics for publications such as the Birmingham Medical News; Inside Counsel and Pharmaceutical Compliance Monitor.

Jim has been selected for inclusion in The Best Lawyers in America (Health Law) since 2010 and Alabama Super Lawyers in the area of Health Care Law since 2011. Jim is a past-Chairman of the Alabama Bar Health Law Section and past-Chairman of the Board of Trustees of the Alabama Bar Lawyer Referral Service. He currently serves as the Secretary of the Board of Directors for Kid One Transportation, non-profit organization in the State of Alabama. Jim is a member of the American Bar Association, the Alabama State Bar, the Birmingham Bar Association and the American Health Lawyers Association. He is a Martindale-Hubbell AV rated attorney and a former recipient of the Birmingham Business Journal's "Top 40 Under 40" honor.

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I. Introduction

For years now lawyers and law firms providing professional services to health care providers or health insurance plans should have had in place essential safeguards to meet the responsibilities and requirements as business associates under the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”). HIPAA and the related privacy and security rules governing how health care providers, health insurance plans and others (defined under HIPAA as “covered entities”) are allowed to use and disclose health and medical information (defined under HIPAA as “protected health information”) have been in effect since 2003. However, many third parties, including lawyers and law firms, who regularly handle health information on behalf of their client covered entities while providing professional services have not taken seriously their duty and responsibility to safeguard such information in full compliance with HIPAA and its associated regulations.

On January 17, 2013, the Office of Civil Rights (“OCR”) of the Department of Health and Human Services (“HHS”) issued the long awaited final rule (“Final Rule”) amending the HIPAA privacy, security, enforcement and breach notification rules in accordance with the Health Information Technology for Economic and Clinical Health (“HITECH”),¹ which significantly expands certain obligations for health care providers and their business associates. The Final Rule, published in the Federal Register on January 25, 2013, has been described as “the most sweeping changes to the HIPAA Privacy and Security Rules since they were first implemented.”

With the issuance of the Final Rule in accordance with HITECH lawyers and law firms must take compliance efforts seriously or face significant legal and regulatory risk from clients and government agencies tasked with enforcing HIPAA. Under the most recent Final Rule revisions to HIPAA the responsibilities of business associates have increased and the penalty structure for violating the regulations have radically increased. The Final Rule revisions increased enforcement and mandated auditing by the OCR increasing the chances of lawyers and law firms being subjected to liability associated with breaches of privacy or security of client sensitive health information, violation of the regulations or random auditing by OCR and its contracted auditors.

In general, the Final Rule expands HIPAA obligations for business associates and their subcontractors, revises the requirements regarding the use and disclosure of patient information, expands patient rights, clarifies the content of the Notice of Privacy Practices to be provided by healthcare providers, modifies the breach notification requirements, and expands enforcement provisions and penalties. The Final Rule became effective March 26, 2013. However, health care providers and business associates had until September 23, 2013 (and in limited circumstances with respect to amending business associate agreements, until September 23, 2014) to achieve compliance with many of the new provisions.

¹ See Modifications to the HIPAA Privacy, Security, Enforcement and Breach Notification Rules under the HITECH Final Omnibus Rule, 78 Fed. Reg. 5566 (January 25, 2013) (“Final Rule” sometimes referred to as the “Omnibus Rule”).

A copy of the Final Rule can be obtained and downloaded at: <http://www.gpo.gov/fdsys/pkg/FR-2013-01-25/pdf/2013-01073.pdf>.

II. Is My Law Firm A HIPAA Business Associate?

Lawyers and law firms who obtain or access protected health information from a health care provider or health insurance company or other covered entity under HIPAA when providing professional legal services to that client, or to a business associate or subcontractor of that client, are designated as business associates under HIPAA. As a business associate the lawyer or law firm is required to use and disclose that client's protected health information only in accordance with the terms of a signed business associate agreement (commonly referred to as a "BAA") outlining the HIPAA requirements, restrictions on use and disclosure of the information obtained from the client, obligations when sharing the information with other third parties and compliance requirements. Lawyers and law firms need to develop and implement written HIPAA policies and procedures addressing the HIPAA requirements as a business associate, educate and train workforce members and regularly monitor compliance effort.

Compliance Obligations

The Final Rule clarifies that business associates and their subcontractors are now directly liable under HIPAA, must comply with the HIPAA Security Rules and are responsible for limiting uses and disclosures of protected health information ("PHI") as set forth in their business associate agreement and as required by the HIPAA Privacy Rule. Under the Final Rule business associate are now directly liable for impermissible uses and disclosures of PHI. The business associate is also directly liable for failing to provide breach notification to a covered entity when unsecured PHI is lost or inappropriately accessed, used or disclosed. In addition, business associates under the Final Rule are liable for failing to provide access to a copy of the electronic PHI to the covered entity, the individual whose PHI is held by the business associate or the individual's designee or provide an accounting of disclosures of PHI. Further, a business associate can now be held directly liable for failing to disclose PHI to the Secretary of the Centers for Medicare and Medicaid Services related to an investigation by the Secretary on whether the business associate is compliant with HIPAA. Last, business associates and their subcontractors are directly liable for failing to comply with the requirements of the HIPAA Security Rule.

However, not all HIPAA Privacy Rule requirements apply to business associates and their subcontractors. For example, business associates do not need a Notice of Privacy Practices and do not need to designate a privacy officer. However, business associates and their subcontractors are now directly liable for violations of their HIPAA obligations. Further, business associates are liable for failing to enter into a subcontractor business associate agreement with a subcontractor that creates or receives PHI for the covered entity.

The Final Rule grandfathers current business associate agreements for up to one year, until September 23, 2014, if the agreements were in place prior to January 25, 2013, were fully HIPAA compliant and are not renewed or modified during the one year grandfather period. If a

business associate agreement was not compliant as of January 25, 2013, is renewed or modified during the grandfathered period or if a subcontractor agreement with a business associate was not in place, then the compliance date for updating or entering into compliant agreements is September 23, 2013.

Expanded Definition

Under HIPAA, a covered entity (e.g., healthcare providers, health plans and health care clearinghouses) can disclose PHI to a business associate, which is generally a person or entity that performs functions, activities or services on behalf of the covered entity that involve the use and/or disclosure of PHI. For a covered entity to use the services of a business associate, the covered entity must enter into a business associate agreement with the business associate. The business associate agreement obligates the business associate to comply with the HIPAA Security Rule and certain HIPAA Privacy Rule provisions.

For lawyers and law firms the critical question is whether the client relationship they have is one that obligates them and classifies them within the definition as a business associate. If the lawyer or law firm provides professional legal services to a covered entity where the provision of the service involves the disclosure of PHI (e.g., medical or health records, billing records, etc.) to the lawyer then the lawyer or law firm is a business associate under HIPAA. For example, if the firm represents a hospital, physician or other health care provider and needs to obtain from the client PHI to represent the client, such as a professional liability claim, then a business associate relationship exists and the law firm is required to comply with HIPAA, regardless of whether the law firm signed a business associate agreement.

The Final Rule clarified and named three specific types of entities as falling under the “business associate” definition, including entities that transmit and routinely access PHI on behalf of a covered entity (patient safety organizations, health information organizations, e-prescribing gateways, etc.), personal health vendors acting as covered entities, and business associate subcontractors. For lawyers and law firms the most challenging of the three is the extension of HIPAA to subcontractors. Lawyers and law firms who obtain or maintain PHI on behalf of their business associate clients are required to comply with all applicable HIPAA provisions, despite the fact that the client is not an actual “covered entity” under HIPAA. In the role of representing a business associate under HIPAA the lawyer or law firm is required to enter into a Subcontractor Business Associate Agreement. The expanded definition of business associate under the Final Rule causes potential downstream regulatory liability for business associate provisions that it may not even be aware of or contractually liable for. Thus, lawyers and law firms need to closely assess its clients when PHI is provided to them to determine whether there may be some upstream responsibility to covered entities that contract with the client. Further, by expanding the definition of business associate to a person or entity that creates, receives, *maintains*, or transmits PHI on behalf of a covered entity, data storage providers, even if they do not access a covered entity’s PHI, are now considered business associates. However, an entity that is merely a conduit of PHI and does not require access (such as the U.S. Post Office or an internet service provider (ISP)) is not considered a business associate.

Subcontractors

As mentioned above, the Final Rule includes subcontractors in the definition of business associates. A "subcontractor" is defined as a person or entity to which a business associate delegates a function, activity, or service. Accordingly, a subcontractor of a business associate that creates, receives, maintains or transmits PHI on behalf of the covered entity is now considered a business associate and must comply with HIPAA to the same extent as the business associate. For example, if a covered entity hires a business associate to handle PHI document and media shredding and the business associate retains a subcontractor to help with that service, then the subcontractor would be required to comply with the requirements of the HIPAA Security Rules (*e.g.*, with respect to the proper disposal of electronic PHI) and the HIPAA Privacy Rules (*e.g.*, with respect to limiting its uses and disclosures of PHI in accordance with its contract with the business associate.) It is the business associate's obligation, not the obligation of the covered entity, to make sure that a proper subcontractor business associate agreement is in place between the business associate and the subcontractor. Business associates and their subcontractors are directly liable for violations of their HIPAA obligations.

In the context of law firm compliance, this means that law firms need to develop internal procedures that recognize those third party business arrangements that trigger the requirement to put in place a subcontractor agreement. For example, law firms often subcontract for expert witnesses, copy and technology companies, e-discovery services, forensic computer experts and other types of staffing organizations. If these subcontracts regularly handle PHI then the subcontractors must meet the same business associate requirements that are applicable to the law firm. The law firm has a duty and responsibility to its client and is likely contractually required under the business associate agreement to advise and oversee these subcontractors use of PHI and assess the awareness of the subcontractor's regulatory awareness of HIPAA.

III. Security Rule Requirements

The HIPAA Security Rule applies only to electronic PHI ("ePHI") and highlights various requirements on the administrative and technical safeguards required to protect such ePHI. Under the Security Rule there are "required" and "addressable" implementation specifications. The Security Rule takes a very practical approach to compliance – recognizing that business associates come in all sizes. For example, a solo practitioner who is a business associate as compared to a large national or international law firm with thousands of lawyers. The Security Rule provides implementation flexibility by providing general compliance concepts rather than detailed security requirements.

Generally, the Security Rule requires lawyers and law firms to implement a security risk management plan that includes conducting a risk analysis to determine the type of safeguards necessary based on the scope and size of the business associate. The risk analysis included assessing potential risks and vulnerabilities to the confidentiality, integrity and availability of ePHI acquired, used or maintained by the business associate. The business associate law firm is required as a part of the Security Rule to name a person as the security official responsible for implementing and overseeing security for the business associate. The security risk management plan involves core implementation specifications to reduce the risks of a security incident,

including implementing administrative, physical and technical safeguards to protect the confidentiality, integrity and availability of ePHI.

IV. Breach Notifications

HIPAA requires that covered entities provide notification to affected individuals and the Secretary of HHS following the discovery of a breach of unsecured PHI. In some cases, HIPAA requires covered entities to also notify the media of breaches. The term "breach" means the unauthorized acquisition, access, use, or disclosure of PHI which compromises the security or privacy of such information. Prior to the Final Rule, HIPAA allowed covered entity's to determine if the security or privacy of PHI was compromised based on a "harm standard". This standard provided that a breach of PHI would not have occurred unless the disclosure presented a significant risk of financial, reputational or other harm to the individual. Accordingly, a covered entity could analyze a breach of PHI and if it determined that the harm standard was not met then the disclosure of the breach was not required.

The Final Rule eliminates the "harm standard" and instead provides that an impermissible use or disclosure of PHI is presumed to be a breach and therefore notification is required unless a covered entity can demonstrate and document that there is a "low probability that the PHI has been compromised." A covered entity is required to consider and document four factors to determine whether the new "low probability" standard has been met:

1. The nature and extent of the PHI involved, including the types of identifiers and the likelihood of re-identification;
2. The unauthorized person who used the PHI or to whom the disclosure was made;
3. Whether the PHI was actually acquired or viewed; and
4. The extent to which the risk to the PHI has been mitigated.

The Federal Register comments to the Final Rule provide substantial discussion of the analysis that a covered entity must undertake to determine if there is a low probability that the PHI has been compromised. It is clear from the discussion and examples provided in the Final Rule, that the Office of Civil Rights believes that it will be very difficult for a covered entity to demonstrate that a breach meets this new "low probability" standard. However, it is not clear that the new standard for determining a breach will result in a more objective analysis.

As stated above, when a breach of PHI occurs a covered entity has an obligation to report the breach to the affected individual, the Secretary of HHS and possibly the media. The obligation to report, and the time-frame for reporting, occurs once the covered entity "discovers" the breach. The Final Rule maintains the current breach notification requirements without modification, but provides clarification on when a breach is discovered, the time-frame for reporting a breach, methods of notification, and the content of the notice.

- Under HIPAA a breach is discovered once an employee, officer, or other agent of the covered entity "knows or should reasonably have known of the breach." The comments to the Final Rule provide that a covered entity must exercise reasonable diligence to determine a breach, and that such determination is generally a factual one, since what is reasonable depends on the circumstances. Factors to be considered include whether a covered entity took reasonable steps to learn of the breaches and whether there were indications of breaches that a person seeking to satisfy HIPAA would have investigated under similar circumstances.
- HIPAA requires covered entities to notify individuals of a breach within 60 days from the discovery of the breach, except if law enforcement requests a delay. The Final Rule makes it clear that the time period begins to run when the incident becomes known, not when it is determined that a breach as defined by HIPAA has occurred.
- The content of any breach notification is provided for in the HIPAA rules, and generally requires: (i) a brief description of the breach, (ii) a description of the type of PHI involved in the breach, (iii) any steps the individual should take to mitigate harm from the breach, and (iv) a description of what the covered entity is doing to investigate and mitigate the breach, and (v) contact procedures for the individual to ask questions or obtain more information. The Final Rule makes it clear that a notice has not been given if undeliverable, but does allow notification by email in certain circumstances. Further, if more than 10 notices are returned and the covered entity is unable to identify correct addresses or contact information within the 60 day notice period, the covered entity is required to post notices on its website.

Lawyers and law firms need to focus much of their compliance efforts under HIPAA on structuring internal controls that promote the reporting and investigating of data incidents and potential breaches of PHI. Law firms that represent health care clients and regularly deal with PHI are at a high risk for some type of data incident which may require internal investigation and possible reporting as a breach under HIPAA. This type of security incident requires a very fact specific analysis to determine whether such incident rises to the level of a reportable breach under the rules. Most business associate agreements include specific contractual language requiring specific actions by the lawyer or law firm regarding reporting of security incidents and data breaches.

V. The "Enforcement Rule"

The enforcement provisions under the Final Rule became effective March 26, 2013. As it relates to the enforcement provisions, the Final Rule clarifies the categories of violations under HIPAA and factors used to determine civil money penalties. Significantly, the Final Rule also imposes civil money penalties directly on business associates and their subcontractors and provides for liability of covered entities and business associates for violations caused by their agents. Finally, the Final Rule requires (instead of permitting) HHS to conduct compliance reviews and investigations for certain HIPAA violations and no longer requires HHS to first attempt informal resolution of a violation prior to imposing civil money penalties.

Civil Money Penalties

The Final Rule retains the tiered civil money penalty structure that was implemented in the Interim Final Rule. As a refresher, the tiered system uses increasing penalties based on increasing levels of culpability:

- For a violation in which it is established that the covered entity did not know and, by exercising reasonable diligence, would not have known that the covered entity violated such provision, an amount not less than \$100 or more than \$50,000 for each violation;
- For a violation in which it is established that the violation was due to "reasonable cause" and not to willful neglect, an amount not less than \$1,000 or more than \$50,000 for each violation;
- For a violation in which it is established that the violation was due to willful neglect but was corrected during the 30-day period beginning on the first date the covered entity liable for the penalty knew, or, by exercising reasonable diligence, would have known that the violation occurred, an amount not less than \$10,000 or more than \$50,000 for each violation;
- For a violation in which it is established that the violation was due to willful neglect and was not corrected during the 30-day period beginning on the first date the covered entity liable for the penalty knew, or, by exercising reasonable diligence, would have known that the violation occurred, an amount not less than \$50,000 for each violation.

The Final Rule clarifies the "state of mind" requirement required for application of the second tier, which provides that a violation occurred when it is established that the violation was due to reasonable cause and not to willful neglect. "Reasonable cause" is now defined as an act or omission in which the covered entity or business associate knew or by reasonable diligence would have known, that the act or omission violated an administrative simplification provision, but which the covered entity or business associate did not act with willful neglect.

The Final Rule also lists numerous factors that HHS considers in determining the amount of a civil money penalty to impose for a HIPAA violation. The factors include (1) the nature and extent of the violation (including the number of individuals affected and the time period), (2) the nature and extent of the harm resulting from the violation (including whether the violation caused physical harm, financial harm or harm to the individual's reputation), (3) the covered entity or business associate's history of prior compliance with HIPAA, and (4) the financial condition of the covered entity or business associate (including the size of the entity, whether the civil money penalty would jeopardize the ability to continue to provide healthcare and whether the entity had financial difficulties that affected its ability to comply).

To avoid civil monetary penalties that rise to the level of "willful neglect" (not less than \$10,000 for each violation) lawyers and law firms need to be cognizant of the need to put in place the necessary compliance plan and regularly document its compliance efforts. If OCR

conducts an audit or investigation of a law firm business associate, such law firm should be prepared to respond to OCR's request for documentation of its efforts to comply with HIPAA. If the law firm does not have any "written" documentation of its compliance efforts prior to the incident that lead to the investigation or audit, it is likely that OCR will take a position that the law firm's failure to document its compliance efforts are the equivalent of "willful neglect." What written compliance is recommended? Under the HIPAA Privacy the law firm should document in writing its HIPAA privacy policies and procedures, those individuals within the firm responsible for overseeing compliance efforts, maintain a log or database of business associate and business associate subcontractor relationships, including copies of all business associate agreements, maintain evidence of internal staff training that has been conducted and preserve any internal investigation files related to investigated security incidents or potential breaches of PHI. As for documentation on compliance with the Security Rule, law firms should document in writing its HIPAA security policies and procedures, conduct and maintain a record of risk assessments or risk analysis, reviews of information system security, periodic audit logs, workforce training and training materials and records of any security incident investigations.

Direct Liability for Business Associates and Their Subcontractors

As mentioned above, many of the provisions of HIPAA and the HITECH Act now apply directly to business associates and their subcontractors in substantially the same manner as they apply to covered entities. Consequently, business associates and their subcontractors are subject to civil money penalties for HIPAA violations as mentioned in the preceding section.

Liability for the Acts of Agents

The Final Rule also extends liability to covered entities and business associates when a HIPAA violation is caused by one of their agents. Previously, a covered entity would not be liable for a HIPAA violation caused by an agent as long as the covered entity had met the business associate agreement requirements, did not know the business associate was in violation of the agreement and did not fail to act as required by HIPAA if it was aware of a pattern or practice of violations by the agent. Now, covered entities and business associates can be held liable for the acts of their agents acting within the scope of the agency, regardless of whether the covered entity or business associate did no wrong themselves. HHS acknowledges that whether or not a business associate is an agent of a covered entity will be fact-specific, taking into account the terms of the business associate agreement and the totality of the circumstances involved in the relationship. The biggest factor in determining liability for the acts of agents will be the right or authority of the principal (e.g. the covered entity or business associate) to control the conduct of the agent. Other factors HHS will consider include (1) the time, place and purpose of the business associate or subcontractor's conduct, (2) whether the agent engaged in a course of conduct subject to the principal's control, (3) whether the agent engaged in conduct that is of the type a business associate will commonly engage in to accomplish the services provided to the covered entity, and (3) whether the covered entity reasonably expected its business associate to engage in the conduct in question.

VI. Conclusion

Often lawyers and law firms are reluctant to recognize their responsibility as a business associate to comply with HIPAA. However, under today's highly regulated environment, failure to recognize such responsibility and act meaningfully to comply with the requirements may result in significant risk and liability. As discussed above, the Final Rule has significantly increased the financial risk involved in a lawyer or law firm failing to take its compliance obligation under HIPAA seriously. Based on recent actions, audits and settlements, the days of OCR taking an inactive enforcement posture have passed. OCR enforcement activities will continue to increase resulting in the likelihood that your firm will be involved in a HIPAA related investigation or audit.

Good privacy and security practices at your law firm are good business in today's highly data driven world. Lawyers and law firm understand the ethical and business reasons around protecting client confidentiality and client data. The HIPAA privacy and security requirements are largely consistent with these same goals. As such, lawyers and law firms need to dedicate the time, expertise and resources to make sure they are complying with the law.

Lawyer and Law Firm HIPAA Business Associate Compliance Materials, Sample Policies and Procedures and Other Practical Guidance

1. Modifications to the HIPAA Privacy, Security, Enforcement and Breach Notification Rules Under the Health Information Technology for Economic and Clinical Health Act; Final Rule, 78 Fed. Reg. 5566 (January 25, 2013). <http://www.gpo.gov/fdsys/pkg/FR-2013-01-25/pdf/2013-01073.pdf>
2. OCR Unofficial Combined Regulations - HIPAA Administration Simplification (Privacy Rule, Security Rule, Enforcement Rule, and Breach Notification Rule), 45 CFR part 160, 162 and 164, Updated as of March 2013.
<http://www.hhs.gov/ocr/privacy/hipaa/administrative/combined/hipaa-simplification-201303.pdf>
3. OCR Sample Business Associate Agreement Provisions (published January 24, 2013).
<http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/contractprov.html>
4. OCR Guidance on Risk Analysis under the HIPAA Security Rule, 45 CFR 164.302 – 318.
<http://www.hhs.gov/ocr/privacy/hipaa/administrative/securityrule/rafinalguidance.html>
5. Sample Law Firm HIPAA Compliance Policy (Attached).
6. Sample HIPAA BAA Subcontractor Letter (Attached).
7. Sample Law Firm Client Business Associate Letter (Attached).
8. Sample Business Associate Agreement (Attached).

SAMPLE LAW FIRM HIPAA COMPLIANCE POLICY

General HIPAA Compliance Policy

Introduction

The Law Firm ("The Firm," "we," "us" or "our") has adopted this HIPAA Compliance Plan in order to recognize the requirement to comply with the Health Insurance Portability and Accountability Act of 1996, as amended by the HITECH Act of 2009, as well as all implementing regulations.

Assumptions

To the extent we provide services to persons or entities covered by HIPAA (a "HIPAA Client") and in the course of providing such services we create, receive, maintain, or transmit patient health information ("PHI") on behalf of the HIPAA Client, The Firm recognizes its status as a Business Associate under the definitions contained in HIPAA.

To the extent required for Business Associates, The Firm will comply with HIPAA, including entering into a Business Associate Agreement with our HIPAA Clients.

Policy

It is the policy of The Firm to become and to remain in full compliance with all requirements of HIPAA applicable to Business Associates.

It is the policy of The Firm to fully document all HIPAA compliance-related activities and efforts in accordance with our *Documentation Policy*.

All owners, officers, employees, volunteers and other persons whose conduct, in the performance of work for us, is under our direct control (collectively, our "Workforce") are responsible for following this HIPAA Compliance Plan. Workforce members who violate this HIPAA Compliance Plan may be subject to discipline up to and including termination.

Our HIPAA Compliance Plan is reasonably designed, implemented and enforced so that it is effective in preventing, detecting, and remedying the improper use and disclosure of PHI. The specific purposes of our HIPAA Compliance Plan are:

To assist us in identifying PHI.

To assist us in avoiding improper uses and disclosures of PHI.

To assist us in complying with our Business Associate Agreements with HIPAA Clients.

To establish compliance standards and procedures for members of our Workforce that are reasonably capable of reducing the prospect of violating HIPAA.

To appoint a Privacy Officer and a Security Officer who are high-level and trustworthy employees with responsibility to implement and oversee our compliance with the standards and procedures set forth in this HIPAA Compliance Plan.

To effectively communicate the compliance standards, policies and procedures set forth in this HIPAA Compliance Plan to all members of our Workforce by, for example, conducting training and disseminating publications and other materials that explain in a practical manner the HIPAA standards and procedures to be followed.

To take reasonable steps to achieve compliance with the standards, policies and procedures set forth in this HIPAA Compliance Plan by, for example, implementing, monitoring, and auditing systems reasonably designed to detect the improper use and disclosure of PHI.

To establish and publicize a reporting system so that members of our Workforce can report perceived wrongful uses and disclosures of PHI by others without fear of retribution.

To respond appropriately to non-compliance after detection and to prevent recurrence, which may require modifications to this HIPAA Compliance Plan.

Definitions Policy

For purposes of this HIPAA Compliance Plan, the following terms shall have the following meanings:

"Breach" shall mean the unauthorized acquisition, access, use, or disclosure of PHI in a manner not permitted by HIPAA.

"Business Associate" shall mean a person or entity who performs certain functions or activities on behalf of a "covered entity," as such term is defined by HIPAA (*i.e.*, a healthcare provider, health plan, healthcare clearinghouse or personal health record vendor), which involve the creation, receipt, maintenance, or transmission of PHI on behalf of the covered entity.

"Business Associate Agreement" shall mean an agreement which addresses our use, disclosure, creation, receipt, maintenance, or transmission of PHI on behalf of a HIPAA Client.

"Designated Record Set" shall mean a group of records maintained by or for a HIPAA Client that consist of: (a) the medical records and billing records about individuals; (b) the enrollment, payment, claims adjudication, and case or medical management record systems; or (c) records used, in whole or in part, by or for a HIPAA Client to make decisions about individuals. For purposes of this definition, the term "record" means any item, collection or grouping of information that includes PHI and is maintained, collected, used or disseminated by or for a HIPAA Client.

"HIPAA" shall mean: (a) the Health Insurance Portability and Accountability Act of 1996, and regulations promulgated thereunder, including the Privacy, Security, Breach Notification and Enforcement Rules at 45 C.F.R. Parts 160 and 164, and any subsequent

amendments or modifications thereto, and (b) the HITECH Act, and regulations promulgated thereunder, and any subsequent amendments or modifications thereto.

"HIPAA Client" shall mean one of the following types of persons or entities for which we do work for:

Health Care Providers, which are persons or entities who furnish, bill or are paid for health care services in the normal course of business. (Examples include: physician practices, hospitals, skilled nursing facilities, surgery centers, outpatient rehabilitation facilities, home health agencies, pharmacies, and durable medical equipment providers.)

Health Plans, which are individual or group plans that provide or pay the cost of medical care. (Examples include: HMOs, private health insurers, group health plans, and employee welfare benefit plans.)

Health Care Clearinghouses, which are entities that process PHI in a non-standard HIPAA format or containing non-standard data into a standard format. (Examples include: billing companies, repricing companies, and value added networks.)

Personal Health Record Vendors, which are entities offering or maintaining an electronic record of PHI on an individual that can be drawn from multiple sources and that is managed, shared, and controlled by or primarily for the individual.

"HITECH Act" shall mean the Health Information Technology for Economic and Clinical Health Act, found in Title XIII of the American Recovery and Reinvestment Act of 2009, Public Law 111-5.

"PHI" or "Protected Health Information" shall mean any information, whether oral, written or electronic: (a) that relates to the past, present or future physical or mental condition of an individual; or (b) the provision of health care to an individual; or (c) the past, present or future payment for the provision of health care to an individual; and (d) that identifies the individual or with respect to which there is a reasonable basis to believe the information can be used to identify the individual.

"Privacy Rules" shall mean the Standards for Privacy of Individually Identifiable Health Information at 45 C.F.R. Parts 160 and 164, as may be amended, modified or superseded, from time to time.

"Required by Law" shall have the meaning set forth in 45 C.F.R. § 164.103, including, without limitation, a mandate contained in law that compels a HIPAA Client or us to make a use or disclosure of PHI and that is enforceable in a court of law.

"Secretary" shall mean the Secretary of the U.S. Department of Health and Human Services or his/her designee.

"Security Incident" shall mean the attempted or successful unauthorized access, use, disclosure, modification or destruction of electronic PHI.

"Security Rules" shall mean the Security Standards for the Protection of Electronic Protected Health Information at 45 C.F.R. Parts 160 and 164, as may be amended, modified or superseded from time to time.

"Unsecured PHI" shall have the meaning set forth in the HITECH Act, including, without limitation, PHI not secured through the use of encryption, destruction or other technologies and methodologies identified by the Secretary to render such information unusable, unreadable, or indecipherable to unauthorized individuals.

"Workforce" shall include our owners, officers, employees, volunteers and other persons whose conduct, in the performance of work for us, is under our direct control, whether or not they are paid by us.

Privacy Officer Policy

Introduction

This policy governs the designation and duties of a HIPAA Privacy Officer for The Firm. The Privacy Officer shall be a high-level and trustworthy employee of The Firm.

Assumptions

To the extent required for Business Associates, The Firm must comply with HIPAA concerning the assignment of HIPAA responsibilities to a Privacy Officer.

The assignment of overall HIPAA responsibility is an important and integral part of our overall risk management process.

Policy

It is the policy of The Firm to designate a HIPAA Privacy Officer.

The Privacy Officer is responsible for the overall implementation and operation of the privacy of PHI and shall have authority to review all documents and other information relevant to HIPAA activities.

The Privacy Officer shall work closely with the Security Officer in carrying out his/her duties. The position of Privacy Officer and Security Officer may be held by one person.

Privacy activities are a significant component of the Privacy Officer's job description, and therefore his/her performance will be judged, in part, on HIPAA compliance activity and the effectiveness of such activity.

The responsibilities and duties of the Privacy Officer shall focus on the privacy of PHI and include the following:

To assist with the development of our HIPAA Compliance Plan, which sets forth the legal and ethical standards, policies and procedures to be followed by members of our Workforce.

To implement and enforce the standards, policies and procedures set forth in our HIPAA Compliance Plan to ensure our compliance with HIPAA.

To keep apprised of changes to HIPAA. As part of this responsibility, the Privacy Officer will keep track of new regulatory developments, including new HIPAA bulletins and initiatives, many of which can be found at: <http://www.hhs.gov/ocr/hipaa>.

To communicate the contents of this HIPAA Compliance Plan, new HIPAA legal developments, and new policies and procedures to members of our Workforce through training programs, memoranda, and other appropriate means.

To establish and coordinate regular training programs designed to ensure compliance with the standards and procedures set forth in this HIPAA Compliance Plan and to document the regularity and consistency of such training programs, as well as attendance.

To assist with the development and communication of a system for Workforce members to seek guidance on HIPAA issues and to report suspected violations of our HIPAA Compliance Plan or HIPAA.

To establish a record-keeping system designed to document the ongoing operations of our HIPAA Compliance Plan, including documentation of compliance by all members of our Workforce.

To receive and investigate all complaints relating to possible HIPAA violations and/or violations of our HIPAA Compliance Plan, and to record/document the results of any such complaints.

To review and revise (as necessary) our HIPAA Compliance Plan on at least an annual basis in order to enhance our privacy efforts.

To report to our Governing Body on the operation and implementation of this HIPAA Compliance Plan.

Security Officer Policy

Introduction

This policy governs the designation and duties of a HIPAA Security Officer for The Firm. The Security Officer shall be a high-level and trustworthy employee of The Firm.

Assumptions

To the extent required for Business Associates, The Firm must comply with HIPAA concerning the assignment of PHI security responsibilities to the Security Officer.

The assignment of overall HIPAA security responsibility is an important and integral part of our overall risk management process.

Policy

It is the policy of The Firm to designate a HIPAA Security Officer.

The Security Officer is responsible for the overall implementation and operation of the security of PHI, both electronic and other forms, and shall have authority to review all documents and other information relevant to HIPAA security activities.

The Security Officer shall work closely with the Privacy Officer in carrying out his/her duties. The position of Privacy Officer and Security Officer may be held by one person.

Security activities are a significant component of the Security Officer's job description, and therefore his/her performance will be judged, in part, on PHI security compliance activity and the effectiveness of such activity.

The responsibilities and duties of the Security Officer shall focus on the security of PHI and include the following:

To assist with the development of our HIPAA Compliance Plan, which sets forth the legal and ethical standards, policies and procedures to be followed by members of our Workforce.

To implement and enforce the standards, policies and procedures set forth in our HIPAA Compliance Plan to ensure compliance with the Security Rules.

To keep apprised of changes to the Security Rules. As part of this responsibility, the Security Officer will keep track of new regulatory developments, including new HIPAA bulletins and initiatives, many of which can be found at: <http://www.hhs.gov/ocr/hipaa>.

To assist the Privacy Officer in the investigation of alleged violations of our HIPAA Compliance Plan and HIPAA, and to work with appropriate parties to handle violations promptly, properly and consistently.

In conjunction with the Privacy Officer, to report to our Governing Body on the operation and implementation of this HIPAA Compliance Plan.

SAMPLE HIPAA BAA SUBCONTRACTOR LETTER

DATE
NAME
ADDRESS

RE: [Insert Matter]

Dear [Name]:

I am enclosing [explain documents enclosed with letter] with regard to the above referenced matter.

Once you have had an opportunity to review these materials, please contact me so that we can schedule a time for you to speak with [Attorney Name] or [Attorney Name] to discuss your findings. Also, please do not prepare any written report at this juncture.

Please note that the enclosed materials constitute the Protected Health Information of one or more individuals, as that term is defined in 45 C.F.R. § 164.501. These materials are subject to the federal privacy, security and breach notification rules issued under the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) and the related regulations promulgated by the United States Department of Health and Human Services, codified at 45 CFR Parts 160 and 164. In addition, your role as our subcontractor business associate subjects you to certain provisions of the Health Information Technology for Economic and Clinical Health Act, Title XIII of Division A and Title IV of Division B of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5) (the “HITECH Act”), including provisions that impose requirements on you with respect to the privacy and security of the enclosed information. Specifically, you are required to abide by the same restrictions and conditions that apply to our use and disclosure of Protected Health Information and are expressly responsible for complying, in all respects, with HIPAA, the HITECH Act and any other applicable state or federal laws governing the confidentiality, privacy, and security of such information.

Please let me know if there is any additional information which you believe may be helpful in your review, and I will attempt to provide you with that information. Should you have any questions or concerns, please do not hesitate to contact me. Thank you for your assistance in this matter.

Sincerely,

[Insert Name]

Enclosures

SAMPLE LAW FIRM CLIENT BUSINESS ASSOCIATE AGREEMENT LETTER

INSTRUCTIONS:

BEFORE SIGNING ANY BAA REQUESTED BY A CLIENT THE LAW FIRM'S HIPAA PRIVACY COMMITTEE MUST ASSESS WHETHER ONE IS NECESSARY AND REQUIRED TO BE SIGNED.

THE THREE REQUIREMENTS UNDER HIPAA THAT QUALIFY OUR FIRM AS A BUSINESS ASSOCIATE UNDER ARE AS FOLLOWS:

1. IS THE CLIENT A HEALTH CARE PROVIDER, HEALTH INSURANCE COMPANY OR HEALTH TRANSACTIONAL COMPANY AS DEFINED UNDER HIPAA? IF SO THE CLIENT IS A "COVERED ENTITY" UNDER HIPAA.
2. DO WE PROVIDE A SERVICE FOR OR ON BEHALF OF THE COVERED ENTITY CLIENT? (LEGAL SERVICES QUALIFY – IN MOST CASES THIS WILL BE YES)
3. AS A PART OF OUR REPRESENTATION OF CLIENT WILL THE CLIENT PROVIDE US WITH ACCESS OR COPIES OF PHI (MEDICAL/HEALTH INFO) THAT THE CLIENT IS RESPONSIBLE FOR MAINTAINING. IF SO, BAA IS REQUIRED. IF NO, NO BAA IS NOT REQUIRED.

[EXAMPLE – WE ARE ASKED TO REPRESENT A PHYSICIAN IN MEDICAL MALPRACTICE CASE AND ARE PROVIDED MEDICAL RECORDS. YES, BAA IS REQUIRED. HOWEVER, IF WE ARE ASKED TO REPRESENT THE PHYSICIAN IN AN EMPLOYMENT CASE AND GET MEDICAL RECORDS OF THE EMPLOYEE. NO, BAA IS NOT REQUIRED.]

DATE

CLIENT
ADDRESS

RE: Business Associate Agreement – [Client Name]

Dear _____:

[Attorney's Name] forwarded to me your request that our firm execute a Business Associate Agreement under the Privacy and Security Rules of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), as amended by the Health Information Technology for Economic and Clinical Health Act (HITECH).

Since our law firm provides [plans to provide] professional legal services to you and as a part of our representation you will be sharing with us certain medical and health related information known under HIPAA as protected health information we are required to enter into a Business Associate Agreement. We further understand that HITECH imposes additional HIPAA Privacy Rule, HIPAA Security Rule, and new breach notification requirements on covered entities and business associates.

As a client of our firm, we are providing you with our standard Business Associate Agreement so that we can appropriately comply with these rules. We have tailored this Business Associate Agreement to address specific needs unique to the professional legal and business relationship that [Law Firm Name] has with its clients. I have executed the Business Associate Agreement on behalf of our firm. Once you have executed the Business Associate Agreement, please return a copy of the fully executed document to the following address:

Attn: [Name], [Title]
ADDRESS

We value you as a client of our firm and hope that you will find that us providing you with this agreement simplifies your HIPAA compliance efforts. If you have any questions, please contact me at _____.

Sincerely,

Name
Title

Enclosure
cc: [Attorney's Name]

SAMPLE BUSINESS ASSOCIATE AGREEMENT

Business Associate Agreement

This Business Associate Agreement (“Agreement”) is dated and effective on _____, 2014, between **[COVERED ENTITY]** (“Covered Entity”) and **[BUSINESS ASSOCIATE]** (“Business Associate”).

WHEREAS, the Covered Entity and the Business Associate have entered a business arrangement, including providing the following services: _____ [NOTE: ADD DESCRIPTION OF THE SPECIFIC SERVICE] (“Services”).

WHEREAS, as a result of providing such Services, the Business Associate may be considered a “business associate” of the Covered Entity as defined in the Health Insurance Portability and Accountability Act of 1996, as amended (“**HIPAA**”), and including all pertinent regulations issued by the U.S. Department of Health and Human Services, as either have been amended by the Health Information Technology for Economic & Clinical Health Act and the Omnibus Final Rule (78 FR 5566) (“**HITECH**” Act”). The business relationship or arrangement between the Covered Entity and the Business Associate may involve the disclosure of Protected Health Information, as hereinafter defined, by the Covered Entity to the Business Associate that is subject to the federal privacy and security regulations issued pursuant to the HIPAA and the HITECH Act;

WHEREAS, the Covered Entity and the Business Associate mutually agree to the terms of this Agreement, which sets forth the obligations of the parties as required by the Standards for Security and Privacy of Individually Identifiable Information, codified at 45 C.F.R. §§ 160 through 164 (“**Security and Privacy Regulations**”), as applicable, under the HIPAA and the HITECH Act;

WHEREAS, the Security and Privacy Regulations require that the Covered Entity and the Business Associate enter into a written contract or other arrangement that meets the applicable requirements of 45 C.F.R. §§ 164.314 and 164.504.

NOW THEREFORE, the Parties, hereby agree as follows:

1. Definitions.

- a. Except as otherwise defined in this Agreement, all capitalized terms used in this Agreement shall have the meanings set forth in the Security and Privacy Regulations.
- b. “**Breach**” shall have the same meaning as the term “breach” in 45 C.F.R. §164.402.

- c. **“Business Associate”** shall have the same meaning as the term “business associate” in 45 C.F.R. § 160.103.
- d. **“Covered Entity”** shall have the same meaning as the term “covered entity” in 45 C.F.R. § 160.103.
- e. **“Designated Record Set”** shall have the same meaning as the term “designated record set” in 45 C.F.R. §164.501.
- f. **“Electronic Protected Health Information”** shall have the same meaning as the term “electronic protected health information” in 45 C.F.R. §160.103, limited to the Protected Health Information created, received, maintained or transmitted by or on behalf of the Covered Entity to the Business Associate as contemplated by this Agreement.
- g. **“HIPAA Breach Notification Rule”** shall mean the federal breach notification regulations, as amended from time to time, issued under HIPAA and set forth in 45 C.F.R. Part 164 (Subpart D).
- h. **“Individual”** shall have the same meaning as the term “individual” in 45 C.F.R. §160.103 and shall include a person who qualifies as a personal representative in accordance with 45 C.F.R. §164.502(g).
- i. **“Privacy Rule”** shall mean the federal privacy regulations, as amended from time to time, issued under the HIPAA and the HITECH Act and set forth in 45 C.F.R. Parts 160 and 164 (Subparts A & E).
- j. **“Security Rule”** shall mean the federal security regulations, as amended from time to time, issued under the HIPAA and the HITECH Act and set forth in 45 C.F.R. Parts 160 and 164 (Subparts A & C).
- k. **“Subcontractor”** shall have the same meaning as the term “subcontractor” in 45 C.F.R. §160.103.
- l. **“Protected Health Information”** shall have the same meaning as the term “protected health information” in 45 C.F.R. §160.103, limited to the Protected Health Information created, received, maintained or transmitted by or on behalf of the Covered Entity to the Business Associate as contemplated by this Agreement.

2. **Uses and Disclosures of Protected Health Information by the Business Associate.**

- a. The Business Associate agrees to use or disclose Protected Health Information only as specifically permitted or required by this Agreement or as required by law. The Business Associate shall not use or disclose Protected Health Information for any other purpose or in any other manner.

- b. The Business Associate may, if necessary, use or disclose Protected Health Information for the proper management and administration of the Business Associate or to carry out the legal responsibilities of the Business Associate; provided, that (i) any such disclosure is required by law; or (ii) the Business Associate obtains reasonable assurances from the person to whom the information is disclosed that it will be held confidentially and used or further disclosed only as required by law or for the purpose for which it was disclosed to the person, and the person or party immediately notifies the Business Associate of any instances of which it is aware in which the confidentiality of the information has been breached.
- c. Except as otherwise limited by this Agreement, the Business Associate may use Protected Health Information to provide data aggregation services to the Covered Entity.
- d. The Business Associate may de-identify any and all Protected Health Information that it obtains from the Covered Entity, but only if such de-identification is accomplished in accordance with the requirements of 45 C.F.R. § 164.514(a) and (b).

3. Obligations of the Business Associate.

- a. The Business Associate shall use appropriate safeguards and comply with Subpart C of 45 C.F.R. Part 164 with respect to Electronic Protected Health Information, to prevent use or disclosure of Protected Health Information other than as provided for by this Agreement.
- b. The Business Associate shall report to the Covered Entity (i) any use or disclosure of Protected Health Information not provided for by this Agreement of which it becomes aware in accordance with 45 C.F.R. § 164.504(e)(2)(ii)(C); or (ii) any Security Incident of which the Business Associate becomes aware in accordance with 45 C.F.R. § 164.314(a)(2)(i)(C).
- c. The Business Associate shall notify the Covered Entity without unreasonable delay after the Business Associate's discovery of any incident that involves an unauthorized acquisition, access, use, or disclosure of Protected Health Information. In the event of an incident that is required to be reported under the HIPAA Breach Notification Rule, the Covered Entity shall elect in its sole discretion whether the Covered Entity, the Business Associate or a third party shall be responsible for conducting an investigation of the incident and providing any required notices.
- d. The Business Associate shall ensure that any Subcontractors that create, receive, maintain, or transmit Protected Health Information on behalf of the Business Associate agree to the same restrictions and conditions that apply through this Agreement to the Business Associate with respect to such Protected Health

Information in accordance with 45 C.F.R. 164.502(e)(1)(ii) and 45 C.F.R. 164.308(b)(2).

- e. The Business Associate shall provide access to the Covered Entity to Protected Health Information in a Designated Record Set, or, if requested by the Covered Entity, to an Individual or the Individual's designee, all in accordance with the requirements under 45 C.F.R. § 164.524.
- h. The Business Associate shall make available and make any amendments to Protected Health Information in a Designated Record Set, or, if requested by the Covered Entity, from an Individual or the Individual's designee, all in accordance with the requirements of 45 C.F.R. § 164.526.
- i. The Business Associate shall make available to the Covered Entity information to permit the Covered Entity to respond to a request by an Individual for an accounting of disclosures of Protected Health Information, or, if requested by the Covered Entity, to make that information available directly to an Individual, all in accordance with 45 C.F.R. § 164.528.
- j. The Business Associate shall notify the Covered Entity in writing after the Business Associate's receipt directly from an Individual of any request for access to or amendment of Protected Health Information, or an accounting of disclosures, as contemplated by this Agreement.
- f. To the extent that the Business Associate is to carry out the Covered Entity's obligations under Subpart E of 45 C.F.R. Part 164, the Business Associate shall comply with the requirements of that section that apply to the Covered Entity in the performance of such obligations.
- k. The Business Associate shall provide reasonable access to its internal practices, books, and records, including policies and procedures and Protected Health Information, relating to the use and disclosure of Protected Health Information, to the Secretary for purposes of determining the Covered Entity's or the Business Associate's compliance with the HIPAA, the HITECH Act and the Security and Privacy Regulations.
- l. The Business Associate shall request, use and/or disclose only the minimum amount of Protected Health Information necessary to accomplish the purpose of the request, use or disclosure in accordance with 45 C.F.R. §§ 164.502(b) and 164.514(d).
- m. The Business Associate shall not directly or indirectly receive remuneration in exchange for any Protected Health Information as prohibited by 45 C.F.R. § 164.502(a)(5)(ii).
- n. The Business Associate shall not make or cause to be made any communication about a product or service that is prohibited by 45 C.F.R. §§ 164.501 and 164.508(a)(3).

- o. The Business Associate shall not make or cause to be made any written fundraising communication that is prohibited 45 C.F.R. § 164.514(f).
- p. The Business Associate shall take all reasonable steps, at the request of the Covered Entity, to comply with requests by Individuals not to disclose Protected Health Information to a Health Plan in accordance with 45 C.F.R. § 164.522(a).

4. Term and Termination.

- a. The term of this Agreement shall commence upon the effective dated and shall terminate (i) at the conclusion of Business Associate providing the Service to the Covered Entity; (ii) by mutual written agreement of the Parties; or (iii) on the date that the Covered Entity terminates as authorized in this section, whichever is sooner.
- b. Notwithstanding anything in this Agreement to the contrary, if the Covered Entity knows of a pattern of activity or practice of the Business Associate that constitutes a material breach or violation of this Agreement, then the Covered Entity shall provide written notice of the breach or violation to the Business Associate that specifies the nature of the breach or violation. The Business Associate must cure the breach or end the violation on or before 30 days after receipt of the written notice. In the absence of a cure reasonably satisfactory to the Covered Entity within the specified timeframe, or in the event the breach is reasonably incapable of cure, then the Covered Entity may, terminate this Agreement.
- c. Upon termination of this Agreement for any reason, the Business Associate, with respect to Protected Health Information received from the Covered Entity, or created, maintained, or received by the Business Associate on behalf of the Covered Entity, shall:
 - i. Retain only that Protected Health Information which is necessary for the Business Associate to continue its proper management and administration or to carry out its legal responsibilities;
 - ii. Return or destroy, if feasible, all remaining Protected Health Information received from the Covered Entity, or created, maintained, or received by the Business Associate on behalf of the Covered Entity, that the Business Associate maintains in any form;
 - iii. Continue to use appropriate safeguards and comply with Subpart C of 45 C.F.R. Part 164 with respect to Electronic Protected Health Information to prevent use or disclosure of the Protected Health Information, other than as provided for in this section, for as long as the Business Associate retains the Protected Health Information;
 - iv. Not use or disclose the Protected Health Information retained by the Business Associate other than for the purposes for which such Protected Health Information was retained and subject to the same conditions set out above which applied prior to termination; and

- v. Return or destroy, if feasible, all Protected Health Information retained by the Business Associate when it is no longer needed by the Business Associate for its proper management and administration or to carry out its legal responsibilities.
- d. The obligations of the Business Associate under this section shall survive the termination of this Agreement and shall continue to bind the Business Associate, its agents, employees, contractors, successors, and assigns as set forth herein.

5. **Miscellaneous.**

- a. **Entire Agreement.** This Agreement constitutes the entire agreement of the Parties relating to the Business Associate's use and/or disclosure of Protected Health Information.
- b. **Regulatory References.** Any references in this Agreement to a section in the HIPAA, the HITECH Act or the Security and Privacy Regulations means the section as in effect or as amended.
- c. **Interpretation.** Any ambiguity in this Agreement shall be interpreted to permit compliance with the HIPAA, the HITECH Act or the Security and Privacy Regulations.
- d. **Amendment and Assignment.** This Agreement may be amended or modified only by written agreement made by and between the Parties. No party may assign its respective rights and obligations under this Agreement without the prior written consent of the non-assigning party.
- e. **Compliance.** In the event that any provision of this Agreement is held by a court of competent jurisdiction to be invalid or unenforceable, the remainder of the provisions of this Agreement will remain in full force and effect. In addition, in the event that the Covered Entity believes in good faith that any provision of this Agreement fails to comply with the then-current requirements of the HIPAA, the HITECH Act or the Security and Privacy Regulations, the Covered Entity shall notify the Business Associate in writing. For a period of up to 30 days, the Parties shall address in good faith such concern and amend the terms of this Agreement, if necessary to bring it into compliance. If, after such 30 day period, the Agreement fails to comply with the requirements of HIPAA, then the Covered Entity has the right to terminate this Agreement upon written notice to the Business Associate.
- f. **Mediation and Arbitration.** The parties agree to mediate any dispute or claim, including a breach, arising out of or relating to this Agreement, by mutually agreeing on an independent mediator or mediation service, including the mediation services offered by the American Health Lawyers Association. In the event that the parties are unable, within 30 days after written demand for

mediation, to agree to a mutually acceptable mediation or mediation service or mutually agree to an extension of time to mediate and result the dispute or claim, the dispute or claim shall be settled by arbitration administered by and in accordance with the rules of the American Health Lawyers Association. The place of arbitration shall be _____. Judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

- g. **Legal Fees**. In the event that the Covered Entity fails to proceed with mediation or arbitration, unsuccessfully challenges the arbitrator's award, or fails to comply with the arbitrator's award or mediated settlement, the Business Associate shall be entitled to costs, expenses and reasonable attorneys' fees in connection with such collection action as well as the reasonable value of the Business Associate's time, computed according to our prevailing fee schedules and expense policies.
- h. **Choice of Law**. The laws of the State of _____ (without giving effect to its conflicts of law principals) govern all matters under this Agreement.

IN WITNESS WHEREOF, the Parties have executed this Business Associate Agreement.

COVERED ENTITY

Print Company Name

By: _____

Its: _____

BUSINESS ASSOCIATE

[BUSINESS ASSOCIATE]

By: _____

Its: _____

The 21st Century Practice of Law

FDCC Annual Meeting

**The Greenbrier
White Sulphur Springs, West Virginia
July 27 - August 2, 2014**

Presented by:

**Wystan M. Ackerman
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**Michael Lucey
Gordon & Rees, LLP
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Clarksburg, WV**

I. Introduction

There have been warnings in the past about the evolution of the practice of law and the state of the law profession in general. There has always been the notion that lawyers, and law firms, need to remain current in their practice areas, yet foresee the future as it relates to not only the “developing” practice idiosyncrasies, but increased client demands and expectations. Never before, however, has there been such an enormous amount of time and effort put into the study of the evolution. In the past few years, the ever changing law profession, from the study of law schools to the study of law firms, has been the focus of numerous articles, blogs, studies and even books. This paper seeks to identify some of the problems facing the legal profession in the years to come, but hopefully, provides insight not only into the basis for the problems, but the solutions to those problems as well.

This project explores the developmental history of law firms, as well as state and structure of current law firms. Thereafter, the project identifies the current problems and yet, opportunities facing law firms willing to evolve. Solutions and innovate ideas to succeed in the 21st Century, not a one size fits all, but adaptable to most size firms are also explored, from technology, to outsourcing, to legal project management and alternative fee structures. The cutting edge and controversial issue of alternative business structures, including multi disciplinary practices are also explored. Most telling, however, this paper identifies real life practice realities and expectations from corporate and industry clients.

This project was the brain child of Federation of Defense and Corporate Counsel President, Timothy Pratt. With the help of The Federation Foundation, this group will present its findings at the upcoming FDCC Annual Meeting at The Greenbrier Resort in West Virginia.

II. The Evolutionary History of Law Firms

The modern law firm dominates the landscape of our legal society. Varying in size, the majority of practicing lawyers operate as associates, partners, or members in law firms. There are

still solo practitioners, however, a large number of attorneys in the United States practice with at least one other lawyer. While the concept of the law firm can be traced all the way to the Roman Empire, the modern law firm began in the mid nineteenth century. There were two main reasons for this development. First, attorneys needed to adapt their practices to keep up with the expansion of business in the industrial revolution, as well as our expanding nation itself. Second, lawyers who were practicing in groups needed to structure their practice in a way that enhanced and protected the financial interests of the attorneys involved. Thus, the modern law firm evolved.

In the beginning of the 19th century, the majority of law practices consisted of solo practitioners or small groups of two or three lawyers operating out of a small office.¹ Those offices were typically staffed by the lawyers, scriveners, and messengers or errand boys.² The lawyers prepared documents, met with clients, and appeared before the court while the scriveners handwrote copies of documents. Generally, these lawyers were considered generalists who practiced in many different areas of the law depending on the clients' needs. In 1865, American lawyers did not need any particular education or training for admittance to the bar. Typically, the only requirement for admittance was that the applicant be in good moral standing. Of the law partnerships that had formed, all were small with most focused on commercial law. In 1872, there were only three law firms in the nation that had at least five lawyers.³ However, by 1898, there were sixty seven law firms with five or more attorneys. As the industrial revolution

¹ **Error! Main Document Only.**M.H. Hoeflich, *From Scriveners to Typewriters Document Production in the Nineteenth-Century Law Office*, 16 Green Bag 2d 395, 396 (2013). *See also* Lawrence M. Friedman, *A history of American Law* (2005).

² *Id.*

³ James W. Jones and Bayless Manning, *Getting at the Root of Core Values: A "Radical" Proposal to Extend the Model Rules to Changing Forms of Legal Practice*, 84 Minn. L. Rev. 1159, 1169 (2000).

increased the size and reach of businesses, the need for larger firms developed.⁴ The amount and complexity of legal work that large corporations required placed extreme amounts of pressure on the law firms of the time. To accommodate their clients, many new firms began to develop by merging with existing firms to form larger firms. Growth in the size of law firms continued, and by 1915 there were approximately 240 firms with five or more lawyers.⁵

At the end of the 19th century, the day to day duties of a lawyer began to change as well. Throughout the 19th century, a majority of lawyers tried cases and appeared in court. However, with an increase in corporate legal work and firm size, the percentage of lawyers at a firm who regularly attended court began to decrease.⁶ Instead, lawyers began spending more time completing corporate and counseling work. By the middle of the 20th century, the number of lawyers who considered themselves litigators had substantially declined. This number has continually decreased through the years until, presently, “litigation is no longer the dominant form of legal practice.”⁷

The growth in the size of law firms also created a change in the employment status of lawyers. Throughout the 19th century, lawyers were considered private practitioners who worked for themselves on behalf of their clients. However, the growth in law firms caused the development of a new concept -- enter the associate. Around 1900, firms began hiring associates who were not partners in the firm. Essentially, associates were lawyer-employees, who

⁴ *Id.*

⁵ **Error! Main Document Only.** *Id.* at 1174.

⁶ *Id.*

⁷ Jones and Manning, *supra* note 3, at 1175.

performed lawyer tasks yet reported to partners in the firm.⁸ While the concept of the lawyer as a private practitioner remains strong to this day, most graduating law students find employment as associates in firms.

During the late 1800's, at the same time as the aforementioned developments were taking place, many corporations began hiring in-house general counsel. In 1865, The Prudential Insurance Company pioneered the hiring of in house counsel to devote full time attention to the companies' legal needs.⁹ Other corporations followed suit, often hiring former judges and justices as counsel. Thus, whereas, in 1850, it was uncommon for corporations to hire in house counsel,¹⁰ by 1900, it had become well established practice.¹¹ Firms also began to centralize their practices with lawyers devoting most of their time to a specific area of the law.

By the beginning of the 20th century, the need for larger legal services continued to increase. The industrial revolution had cast a large footprint on business concerns. The economy flourished into the 1920's until the Great Depression of the 1930's. Despite the difficulties of the Great Depression, the need for lawyers grew. President F. D. Roosevelt's New Deal legislation created expansive government programs that required the work of lawyers to write, design, and implement.¹² As a result, lawyers flocked to Washington, D.C. In addition to legislation, the number of government programs and agencies exploded. While administrative agencies had already begun their growth in an attempt to regulate industry, the "New Deal" expanded the

⁸ *Id.* at 1170.

⁹ *Id.* at 1169.

¹⁰ *Id.*

¹¹ *Id.*

¹² Lawrence Freidman, *American Law in the 20th Century*, 152 (2004).

number, size, and scope of governmental agencies. This logically increased the size of law firms. As there was more “red tape” than ever for business to wade through; thus, business needed lawyers more than ever.

Over the next thirty years, and into the 1960's, law firms kept growing in size. By 1960's, there were forty seven law firms with at least 100 lawyers.¹³ By the 1960's, the big law firms had entered into what some refer to as the “golden age” for “big law.”¹⁴ Large law firms hired associates out of law school and selectively promoted to partners chosen attorneys. If an associate did not get promoted, it was expected that they would leave. Often, the firm would find other employment for an associate who was not going to be promoted by referring them to smaller firms or the legal departments of their corporate clients.¹⁵ In the 1950's and 1960's, law firms tended to develop long term relationships with their clients, particularly large corporations.¹⁶ The corporations did not try to find lower prices and the firms did not have to look for additional clients or lower their rates. Typically, the firm would rely on its existing group of stable clients for a steady stream of work. It was only at this time that law firms begin to track their billable hours as a method of performance review.¹⁷ During this period, law firms continued to grow. In the 1970's, however, consumerism began to tighten the market.

Over the next thirty years, rapid change in the corporate-firm relationship took place. Corporations sought out ways to cut legal expenses. Thus, they began to shop around for lower

¹³ Milton C. Regan, Jr; *Law Firms, Competition Penalties, and the Values of Professionalism*, 13 Geo. J. Legal Ethics 1, 7 (1999).

¹⁴ *Id.* at 8.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 8.

rates from the various firms.¹⁸ By 2000, corporations had shifted much of their routine legal work to their in-house counsel. Law firms, faced with the reality that they had to compete for their work, began advertising their services after advertising for legal services was upheld as a constitutional right.¹⁹ Additionally, law firms became less stable as work flow was no longer guaranteed and promising associates would “vote with their feet” and leave for perceived greener pastures, often multiple times. Lawyers began to hold leverage over their firms as partners could leave when financial difficulties arose. The lawyers who stayed at the same firm for his or her entire career became an endangered species. Firms began competing for partners that would often bring their clients with them. Firms tried to counteract by writing financial penalties into their contracts with other partners. In the clauses, the firms would typically reduce the amount of equity a partner could receive if that partner left the firm to compete in the same market. Despite many challenges, the majority of these actions failed.²⁰ Mostly, state courts found these penalties essentially to be non-compete clauses, which violated the client’s right to freely choose counsel.²¹ However, one California court upheld a financial penalty as valid.²² Firms adapted though, and continued to grow. By 2000, law firms with several hundred lawyers had become common. Most law firms kept track of billable hours and meticulously scrutinized these numbers when analyzing associate performance.

¹⁸ *Id.* at 9.

¹⁹ *Id.* at 10.

²⁰ *Id.*

²¹ *Id.* at 13.

²² *Id.*

Throughout most of the 20th century, law firms were typically formed as partnerships. After the General Partnership was originally codified in 1914, it became the primary business structure of law firms.²³ In fact, “[l]aw practice in the corporate form was long prohibited in the United States.”²⁴ This, however, led to a new type of business structure. In 1971, Wyoming became the first state to introduce the Limited Liability Corporation (LLC). The Limited Liability Partnership (LLP) followed in 1991 as Texas first enacted this type of structure. The states continued to provide these new business structures through legislation, gaining popularity after the IRS officially recognized the LLC. Accordingly, law firms began to adopt LLC’s and LLP’s as their business structure. LLC’s and LLP’s provided partners with unique liability protection that had not previously been available to partners in law firms. Additionally, LLC’s and LLP’s were taxed as partnerships; thus, they avoided the double taxation placed on traditional corporations. One downside to the LLC was that to become one a new entity had to be formed. Thus, transitioning to an LLC was bothersome for existing firms. Alternatively, LLP’s required only that the partnership complete a filing requirement to put the public on notice that it intended to conduct business under the limited liability shield. One attractive aspect of the LLP is that it provides protection to the individual partners from negligent acts and wrongdoings of other partners. Additionally, partners may continue to participate in management without losing their protection. LLP’s have faults of their own, however. As one commenter described, there are three concerns relative to the LLP: “(1) the uncertainty of vicarious liability, (2) the lack of

²³ Edward S. Adams, *Rethinking the Law Firm Organizational Form and Capitalization Structure*, 78 Mo. L. Rev. 777, 779 (2013).

²⁴ Christel Walther, *LLC and Lawyers: A Good Combination?*, 50 Loy. L. Rev. 359, 363 (2004).

incentive for firms to invest in their associates for fear that they will gain knowledge and then leave for a “better” job, and (3) the ethics mandate preventing non-lawyer ownership.”²⁵

These concerns have caused some to argue for a new type of law firm arrangement- the Multi-Disciplinary Practice (MDP). Current, Rule 5.4 of the Model Rules for Professional Conduct prevents such an arrangement.²⁶ While it is up to each state’s individual bar association to adopt this rule in full or in part, many have done so. Nevertheless, there is a growing movement to consider allowing this type of practice.

Despite the near continual growth and adaptation, not all law firms have been successful. Some of the most prominent failures include Dewey & LeBoeuf, Finley Kumble, and Lord, Day, and Lord have collapsed.²⁷ While these collapses were caused by various factors, one common problem was that each had tremendous amounts of debt that they had acquired prior to collapsing. Today’s economy and competitive environment have created instability. Nevertheless, success is possible when the right strategy is employed. In an interview with some successful partners in large law firms, Cynthia Thomas asked each interviewee questions relating to the successful nature of firms.²⁸ In their responses, the interviewees suggested that firms avoid top-down management and under reacting to the market. They also suggested that firms develop good working environments within the firm and develop succession plans in case a

²⁵ Adams, *supra* note 23, at 784.

²⁶ *Id.*

²⁷ Erin Fuchs, *The Eight Most Crushing Law Firm Implosions in the Nation's History*; *Business Insider*, Business Insider, available at <http://www.businessinsider.com/the-eight-most-spectacular-law-firm-collapses-in-history-2012-6?op=1> (last visited on May 29, 2014).

²⁸ Cynthia Thomas, *What Makes Law Firms Succeed or Fail*, Law Practice Magazine Vol 40 No. 1 (Jan./Feb. 2014), available at http://www.americanbar.org/publications/law_practice_magazine/2014/january-february/what-makes-law-firms-succeed-or-fail.html.

partner does leave.²⁹ One interviewee suggested that firms should act more like corporations. Generally, with a flair for the obvious, they all agreed that firms needed to adapt to market trends appropriately.

The practice of law has evolved dramatically over the years. So has the concept of the law firm. It has evolved from small general partnerships of two or three lawyers to extraordinarily large multinational firms with several thousand lawyers. Lawyers have become employees instead of private practitioners and the market has become competitive. Large firm makeups change so frequently it is a rare lawyer who knows the name of all other equity owners who may be in different locations. The business structure of the law firm has changed from general partnerships to partnership-corporation hybrids, while truly becoming big business. Nevertheless, some push for still more change as does the market. Multi-Disciplinary Practices, where lawyers and non-lawyers form partnerships, might be the next step in the evolution of law firms.

III. The Present Day Law Firm

The present-day law firm has undergone significant changes in the last several years. The Great Recession³⁰ forced law firms to reevaluate all aspects of business management, from firm structure and organization, to employee compensation and client development. Additionally, technological advances have made an undeniable impact on the practice of law in the 21st Century. Emerging technologies promise increased efficiency and mobility, but carry upfront costs and security risks. Finally, these changes are taking place in the context of an

²⁹ *Id.*

³⁰ Defined as the sharp decline in economic activity during the late 2000s, which is generally considered the largest downturn since the Great Depression. The term “Great Recession” applies to both the U.S. recession – officially lasting from December 2007 to June 2009 – and the ensuing global recession in 2009. The economic slump began when the U.S. housing market went from boom to bust and large amounts of mortgage-backed securities and derivatives lost significant value. Investopedia.com

increasingly intergenerational law firm, where ideological differences among employees with a 40 year age gap make it that much more difficult to adapt to the demands of the new economy.

A. A New Firm Growth Model?

The Great Recession is perhaps the single most influential factor affecting views on the structure, organization, and management of the present-day large law firm. Prior to the Great Recession, large law firms were systematically growing, hiring one out of every four law school graduates as entry-level associates.³¹ In 1968 the largest firm in the United States had 169 lawyers. By 1988, the largest firm had 1179 lawyers, and there were 152 firms larger than the largest firm in 1968.³² By 2008, nearly 700 firms employed 50 or more lawyers, 23 firms had over 1,000, the average size of the 250 largest American law firms by headcount was 535, and the smallest of these firms was larger than the largest firm in the country in 1968. Between 2004 and 2008, the 250 largest American law firms collectively increased in size by about 22,000 lawyers, and by 2008 employed a total of roughly 132,000 attorneys.³³ Between 1960 and 1985, the portion of the gross national product and the portion of national income attributable to legal services both doubled.³⁴ By 2007, profits per equity partner at the 100 most profitable large firms averaged \$1.3 million, 68% more than in 2000.³⁵

³¹ Eli Wald, Smart Growth: The Large Law Firm in the Twenty-First Century, 80 Fordham L. Rev. 2867 (2012); Aric Press, *Annual Survey Shows the New Reality of Associate Life*, Texas Law Online, (August 10, 2007).

³² Bernard A. Burk, David McGowan, *Big but Brittle: Economic Perspectives on the Future of the Law Firm in the New Economy*, 2011 Colum. Bus. L. Rev. 1, (2011).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

Enter the Great Recession. The housing bubble burst and capital markets froze. As a result, demand for high-end legal services plummeted. Transactional work was virtually non-existent, and corporate clients, pressured by budget constraints, were forced to avoid all but the most essential legal work.³⁶

In 2009, major law firms laid off more than 12,100 people, a third of which were lawyers.³⁷ The nation's largest 100 law firms also reported a 3.4% decline in gross revenue in 2009.³⁸ The total number of attorneys in the 250 largest American law firms decreased 4.3% in 2009 compared with 2008, and another 1.1% in 2010.³⁹ In addition to layoffs, law firms also reported a dramatic decrease in new hiring. In 2009 and 2010, numerous firms rescinded existing employment offers or "deferred" new hires' start dates 3 to 12 months or more.⁴⁰ Over 100 of the 250 largest American law firms reported deferring a total of nearly 2,800 new associates, constituting 42% of their entering classes.⁴¹ Many firms cut associate bonuses in half for 2008 and in half again for 2009, reducing senior associates' total compensation at some firms by as much as one third compared with 2007.⁴²

This economic downturn has forced many to question the historically accepted firm growth strategy model given the realities of the new economy.

³⁶ *Id.*

³⁷ Neil J. Dilloff, *The Changing Cultures and Economics of Large Law Firm Practice and Their Impact on Legal Education*, 70 Md. L. Rev. 341 (2011).

³⁸ Aric Press & Greg Mulligan, *Lessons of the Am Law 100*, The American Lawyer, (May 2010).

³⁹ Burk, *supra* note 32.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

Historically, the large law firm emerged in the late 19th Century when experienced lawyers with an excess of human capital in the form of skill and connections - partners - came together to form law firms. The firms trained inexperienced lawyers with an excess of labor - associates. Under the historical pyramid model, each partner mentors and supervises several associates, which ensures profit maximizing and efficient utilization of partners' human capital by exploiting associates' labor.

In addition to fueling internal competition for partnership status, the pyramid structure, i.e. high partner-to-associate ratio, addressed three concerns that partners had about associates: grabbing - i.e. usurping the partners' clients and expertise; leaving - quitting after obtaining valuable training but before the firm can capitalize on its investment; and shirking - not working as hard or as effectively as possible.⁴³ For example, the years-long probationary period limits associates' access to the partners' human capital, reducing grabbing opportunities. The deferred compensation scheme whereby associates' income increases significantly upon promotion decreases their incentive to leave. And the tournament competition for the ultimate prize, making partner, provides a strong disincentive to shirk.⁴⁴

Over time, as new partners are continuously elected and begin to mentor new generations of associates, the model yields two important consequences. First, the tournament theory results in an associate-heavy, pyramid shaped organizational structure. Second, the model features an internal growth engine whereby the tournament theory results in a continuous gradual expansion

⁴³ Wald, *supra* n. 31; Marc Galanter & Thomas Palay, *Tournament of Lawyers: The Transformation of the Big Law Firm* (1991).

⁴⁴ *Id.*

in the number of partners, and correspondingly, a continuous increase in the number of associates. The end result is exponential growth within the firm.⁴⁵

Under the historical firm model, the growth of the firm was achieved internally, with a focus on the supply side of legal services. Historical law firm growth was largely dependent on an insatiable client demand for complex legal services in an environment where corporate entities experienced a period of exponential growth and expansion. Thus, the historical law firm growth model implicitly minimized the role of clients in explaining growth by making clients, and their demand for legal services, a necessary background assumption given the economic landscape of the time.⁴⁶ This model might be of little use in predicting the growth patterns of the present-day law firm in a time when the demand for large-scale corporate legal services may be stagnant or in decline.⁴⁷

For instance, in recent years, in-house legal departments have become increasingly sophisticated and technological advances and reduced overhead costs have allowed smaller “boutique” firms to handle to the most complex of legal issues, closing the economies of scale gap. The increased use of in-house legal departments, and corporate downsizing, has reduced the demand on law firms to handle more routine issues, thereby decreasing the demand for large numbers of relatively inexperienced associates. This conflicts with the historical growth model.

To adapt to the changes fueled by the Great Recession, many firms have strayed from the historical model. Firms are shifting focus from the service of large corporate clients to a more diversified client base, transitioning to a partner-heavy structure, and developing niches, specialization, and regional influence. Further, many firms have found a competitive edge in

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

promising hands-on involvement of partners. Perhaps most importantly, firms can no longer rely on a steady demand for legal services, and must pursue strategic “rainmaking” activities, with a focus on client development in emerging markets.

B. The Role of Technology in the 21st Century Law Firm

In addition to the changes brought on by the Great Recession, technology has fostered competition between smaller boutique firms and the historically powerful mega-firms by leveling the technology playing field among those firms willing to embrace emerging technological advances. In order to succeed as a law firm operating in the new economy, firms of all sizes must embrace and capture the benefits of new technologies.

Many can still remember the days when attorneys crowded law firm libraries, when a secretary was outside every office, and when communication was accomplished via messenger. Contrast the modern day firm, where technology is an essential component of every facet of a law practice. Email, electronic data storage, video-conferencing, and research, time management, and accounting software have become commonplace. These technological advances are more or less required for the efficient operation of a law firm in the 21st Century.

Technology costs represent a significant line-item in the present-day law firm budget. Today, 43% of firms spend approximately \$8,000.00-\$14,000.00 per attorney annually on technology related components and advancements.⁴⁸ Top technology purchases in 2013 included desktop hardware (58%), laptops/notebooks (49%), storage area networks (48%), network/server upgrades (44%), and disaster recovery (33%).⁴⁹ 48% of firms reported that 2-4% of firm

⁴⁸ “2013 ILTA/InsideLegal Technology Purchasing Survey,” International Legal Technology Association (2012), *available at* <http://insidelegal.typepad.com/files/2013ILTAInsideLegalTechnologyPurchasingSurvey.pdf> [hereinafter “ILTA survey”].

⁴⁹ *Id.*

revenue is spent on technology, and 43% reported that the firm's technology budget has increased since 2012.⁵⁰

One of the major emerging technology trends in the present-day firm is the use of cloud computing, a web-based service which allows the end user to access data stored on an offsite host server via an internet connection, replacing the traditional on-site servers.⁵¹ One of the most important benefits of cloud computing is the shared nature of resources, including software and servers, which ultimately increases efficiency and significantly decreases IT costs. Drawbacks include the transition cost of moving from a complex internal IT system to the cloud, and security and privacy concerns in relinquishing control of confidential client data to a third party. In fact, security and privacy issues represent the two largest concerns expressed by firms considering a cloud-based system.⁵²

In a recent survey, 70% of firms reported that they were actively researching and considering cloud computing, or were already using the cloud, but overall firms are still split on whether to actually move to the cloud, with 44.5% in favor and 46.3% opposed.⁵³ That said, 83.8% of firms participating recognized that cloud-based computing will ultimately overtake onsite computing within 15 years.⁵⁴

C. The Generation Gap

⁵⁰ *Id.*

⁵¹ Nicole Buck, *Legal IT Professionals 2012 Global Cloud Survey Report*.

⁵² *Id.*

⁵³ ILTA survey, *supra* n. 48.

⁵⁴ *Id.*

As if a shifting economic growth model and constantly advancing technology was not challenging enough, these changes are taking place in the context of an increasingly intergenerational law firm, where ideological differences among employees with a 40 year age gap make it that much more difficult to adapt to the demands of the new economy.

For the first time in history, four generations are working alongside one another. The WWII Generation (or Silent Generation), born before 1945, comprises 5% of today's workforce.⁵⁵ Baby Boomers, born between 1946 and 1964, make up the largest share of the workforce at 38%.⁵⁶ Generation Xers, born between 1965 and 1980, represent 32%, and Generation Yers (or Millennials), born between 1980 and 2000, are 25%.⁵⁷

The Silent Generation values “an honest day's work” and prefers face-to-face communication. Firm loyalty is extremely important to the Silent Generation, members of which are often troubled by the younger generation's willingness to hop from one job to the next. The Baby Boomers gave to birth the “Me” decade of the 70's, and thus are sometimes criticized for being egocentric. The Boomers also started the “workaholic” trend, motivated by a desire to attain wealth and success. Boomers value respect and demand consideration in the decision-making process. Members of Generation X are independent thinkers and value a work-life balance. Gen Xers are not typically viewed as “team players,” and think “job” while Boomers think “career.” Generation Y demands constant feedback, and responds more positively to a mentoring relationship as opposed to an authoritarian environment.^{58 59}

⁵⁵ Matthew Malamud, *Technology and the Intergenerational Law Firm*, Trial, January 2012, at 22, 24.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Nancy Peppard, *Closing the Generation Gap*, Volume 32, No. 4. Law Practice, (June 2006), available at

Millennials are of particular concern in the present-day firm. By 2015, Millennials will overtake the number of Boomers in the workforce.⁶⁰ In a recent survey, 86% of Millennials thought of themselves as hard workers, yet only 11% of HR professionals held that same opinion.⁶¹ The survey also found that 82% of Millennials responded as being loyal to their employers, however, only 1% of HR professional felt that Millennials were loyal employees.⁶² These results reflect a severe disconnect between Millennials and upper management, which is troublesome considering the inevitable influence Millennials will wield in the workplace in years to come.

Technological advances have also highlighted the generational differences in the modern-day law firm. For example, 75% of Millennials use mobile technology in the courtroom, compared to just 23% of Baby Boomers.⁶³ 83% of Millennials use social networking sites like Facebook and LinkedIn, compared to 50% of Baby Boomers.⁶⁴

Although the foregoing descriptions are no doubt generalities, there are certainly tangible differences between the generations which make up today's workforce. These differing, and often conflicting value systems, can present significant managerial and interpersonal challenges

http://www.americanbar.org/publications/law_practice_home/law_practice_archive/lpm_magazine_articles_v32_is4_an1.html.

⁵⁹ Audrey Nelson, Ph.D, *Your Generation or Mine? From the Boardroom to the Courtroom*.

⁶⁰ Deirdre Reid, *The Path to Y: Inviting and Including the Next Generation of Members*, Volume 38, No. 1. Bar Leader, (September-October 2013), available at http://www.americanbar.org/publications/bar_leader/2013-14/september-october/path-y-inviting-including-next-generation-members.html.

⁶¹ *Id.*

⁶² *Id.*

⁶³ Malamud, *supra* n. 55.

⁶⁴ *Id.*

for the 21st Century law firm. Perhaps more importantly, these generational differences can affect marketing efforts and client relations, to jury selection and even outcomes at trial. Therefore, to effectively operate in a now multigenerational workforce, it is critical to recognize and respond to generational variances.

Certainly, the modern-day law firm will be faced with several challenges in the years to come. The traditional firm growth model may no longer be tenable given advances in technology and the increased sophistication of in-house legal departments. Constantly changing technology has forced law firms of all sizes to rapidly embrace emerging technological advancements to stay competitive. These challenges are taking place in the context of an increasingly multigenerational environment in which employees' differing ideological and cultural values undoubtedly affect the manner in which they interact with each other and respond to external pressures. Despite these challenges, those firms which recognize and respond to the demands of the new economy will undoubtedly achieve success practicing law in the 21st Century.

IV. On the Horizon: The Problems and Opportunities Facing Law Firms of All Shapes and Sizes

The current realities of the legal marketplace are harsh these days. Within the recent past, twelve major law firms with more than 1000 partners have collapsed⁶⁵. Included within the list of firms are Dewey & LeBoeuf LLP, Finley Kumble, Coudert Brothers, LLP, Dreier LLP, and Heller Ehrman. At the time of its collapse, Coudert Brothers had been in existence for 153 years. The collapse of these firms, and others, is often said to be the result of increased debt, but

⁶⁵ Noam Scheiber, *Big Law Firms in Trouble: When the Money Dries Up*, New Republic (July 21, 2013), <http://www.newrepublic.com>.

at the end of the day, it comes down to money or the lack thereof. The demand for BigLaw's⁶⁶ services fell precipitously when the economy crashed in 2008. The demand has remained depressed ever since.⁶⁷

With lack of adequate available income to pay the increased debt and salaries, attorneys were let go and eventually, doors were closed. Some have commented that these collapses are indicative a great collapse of "big law".⁶⁸ The flip side, however, is that the concern about law firm collapses is overblown and despite harsh economic times, some firms continue to grow and will continue to increase revenues in the future. Regardless of one's viewpoint on the collapse of "big law", the reality is that the legal world is changing and in order to survive in the future, attorneys must learn from their mistakes, as well as the mistakes of others and overcome those mistakes to create opportunities. Law firms must adapt to the ever changing world that has squarely and abruptly confronted them. For some, the adaptation will be well planned and voluntary, for others, it may be a matter of forced survival.

An analysis of the obvious money shortage problem goes beyond the inadequate cash flow and out of necessity must identify and cure the cause behind the money problem. Quality of life, quantitative legal billing analysis, commodity work and outsourcing all impact cash flow into law firms. "The golden era is gone, but this is not because the law itself is becoming less relevant. Rather, the sea change reflects an urgent need for better and cheaper legal services that

⁶⁶ *Id.* Big Law was defined by the author to be any law firm with 100 or more attorneys.

⁶⁷ Bernard A. Burk, *What's New About the New Normal: The Evolving Market for New Lawyers in the 21st Century* (December 30, 2013). UNC Legal Studies Research Paper No. 2309497. Available at <http://ssrn.com/abstract=2309497> or <http://dx.doi.org/10.2139/ssrn.2309497>.

⁶⁸ Scheiber, *supra* note 30.

can keep pace with the demands of a rapidly globalizing world.”⁶⁹ It does not, however, do away with the need for quality lawyering and accurate client counseling. Somehow the two must find a way to meld into a mutually advantageous relationship.

The top challenges identified by the State Bar of Wisconsin’s Board of Governors’ Challenges to the Profession Committee were reported as economic pressures on the practice; technology and the practice of law; regulation of the legal profession; and new lawyer training/development.⁷⁰ Larry Ribstein identifies seven factors he believes threaten the survival of the traditional law firm model: (1) “the rise of in-house counsel”; (2) “reduced size and scale advantage”; (3) “increasing partner-associate ratios”; (4) “changing clientele”; (5) “limited liability”; (6) “increasing global competition”; and (7) “deprofessionalization of law practice.”⁷¹ A comparison of the two lists establishes more similarities than differences.

Corporate America has had to adapt to changes as a result of the economy. With corporate clients serving as the backbone of many firms, attorneys need to adapt as well. Corporate America is looking to its attorneys to change. With the recognition that certain legal tasks could be managed inside, in-house legal departments have grown, resulting in a necessary

⁶⁹ William Henderson and Rachel Zahorsky, *Law Job Stagnation May Have Started Before the Recession—And It May Be a Sign of Lasting Change*, ABA Journal (July 1, 2011) available at http://www.abajournal.com/magazine/article/paradigm_shift.

⁷⁰ Wisconsin State Bar, *The New Normal: Challenges Facing The Legal Profession*, Board of Governors’ Challenges to the Profession Committee (July 2011), available at <http://www.reinhartlaw.com/Services/BusLaw/CorpGovern/Documents/art1111%20TE.pdf> [hereinafter “Wisconsin Study”].

⁷¹ Daniel Currell & M. Todd Henderson, *Can Lawyers Stay In The Drivers Seat?*, Working Paper No. 629, 2D SERIES (January 2013), available at <http://www.law.uchicago.edu/Lawecon/index.html>. See e.g., Larry E. Ribstein, *The Death of Big Law*, 2010 WISC. L. REV. 749, 760 (2010); Larry E. Ribstein, *Practicing Theory: Legal Education for the Twenty-First Century*, 96 IOWA L. REV. 1649 (2011); Larry E. Ribstein, “Lawyers As Lawmakers,” 69 MO. L. REV. 299 (2004); Larry Ribstein & Erin O’Hara, *The Law Market* (2009).

decrease in corporate client reliance upon private law firms.⁷² With corporate client loyalty to the same law firm declining, corporations are spreading their legal work among a number of firms in order to create competition and control costs.⁷³

While the billable hour may not be dead, law firms are faced with the reality that clients are focusing on added value and increased efficiency.⁷⁴ Recession-induced budget cuts forced law departments to rethink the legal services pricing structure.⁷⁵ Moreover, advances in technology fueled the rapid expansion of document review and information organization outsourcing firms both domestically and abroad.⁷⁶ Clients who recognized that they could pay less, sometimes much less, for their legal process work will continue to expect the reduction in fees and will not pay more. Client willingness to treat legal process work as a commodity service performed at reduced rates will result in even greater price competition⁷⁷ and perhaps less work for law firms unwilling to perform commodity functions. Recognizing client demands, some firms have starting their own internal legal process functions, staffed by less-credentialed

⁷² Currell & Henderson, *supra* n. 71.

⁷³ John S. Dzienkowski, *The Future of Big Law: Alternative Legal Service Providers to Corporate Clients*, Vol. 82, No. 6 Fordham L. Rev. 3000 (2014).

⁷⁴ See Wisconsin Study, *supra* n. 70.

⁷⁵ Burke, *supra* n. 32, citing Karen Sloan, *For Litigators, a Different Kind of Recession*, NAT'L L.J. (August 17, 2009), at 6, available at <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202433112312>; E.g. Erin Marie Daly, *Weak Economy Slows Litigation Growth*, LAW360 (Jan. 4, 2010, 8:04 PM), <http://www.law360.com/articles/141372>; Elie Mystal, *In-House Counsel Don't Intend to Give You Hours*, ABOVE THE LAW (June 1, 2010, 4:18 PM), <http://abovethelaw.com/2010/06/in-house-counsel-dont-intend-to-give-you-hours>.

⁷⁶ Burke, *supra* n. 32, See Rhys Blakely & Alex Spence, *Brief for India's Outsourcing Lawyers: Keep it Cheap*, TIMES (Jan. 15, 2010), http://business.timesonline.co.uk/tol/business/industry_sectors/support_services/article6988773.ece; Debra Cassens Weiss, *Want to Outsource Legal Work? Ohio Can Be as Cheap as India, Report Says*, A.B.A.J. (Dec. 12, 2011, 6:30 AM), http://www.abajournal.com/news/article/want_to_hire_an_outsourced_lawyer_ohio_can_be_as_cheap_as_india_report_says/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email.

⁷⁷ Burke, *supra* n. 32, at 41.

contract and “staff” lawyers at much lower salaries and billing rates, thus allowing the firm to still generate income, but at a cost savings to the client.⁷⁸ This process is referred to as “insourcing.”⁷⁹ Use of commodity firms to do commodity work, however, should not be confused with a client willingness to sacrifice when it comes to handling complex legal issues.

Recognizing the cost savings potential, some general counsel have elected to develop in-house expertise for recurring work, such as common types of litigation, or for recurrent legal process tasks, such as discovery related issues and to determine where and from whom needed documents and information can be gathered.⁸⁰

Law firm leaders have been known to focus on billable hours and profits over people, engage in risk avoidance to the point of stagnation and engage in top-down management. William Pollard once warned, “The arrogance of success is to think that what you did yesterday will be sufficient for tomorrow.”⁸¹ The Darwinian model is more apt to apply – “It is not the strongest of the species that survives, nor the most intelligent that survives. It is the one that is most adaptable to change.”⁸²

Often times, firms promote lawyers to management roles who have poor—or no—management skills.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Charles Darwin

In comparison, despite tough economic times, many small law firms are thriving and doing quite well organizationally and financially.⁸³ Solo owners are growing beyond being solo practitioners and building law firms with 15+ attorneys and 30+ total office personnel.⁸⁴

While some note that the future of law firms as we know it is bleak, law firms, no matter the size, are still in possession of their best asset, their people.⁸⁵ Human capital and knowledge base should be leveraged instead of billable hours.⁸⁶ One commenter noted that “existing practice barriers will giveaway and many firms will create multidisciplinary practices. These firms will function as multidisciplinary professional service firms and their rosters will include specialists from other professions such as accounting, finance, management consulting, psychology, and counseling.”⁸⁷ Of course, without a revision to the Model Rules of Professional Conduct, this type of practice will not give way in most parts of the United States. In this regard, the United States will continue to lag behind other countries.

“Lawyers don’t generally have sophisticated procurement, project management and commercial skills. These skills are important for managing complex legal matters, and there is a large and growing class of non-traditional legal service providers who are cultivating those

⁸³John W. Olmstead, MBA, Ph.D, CMC, *Survival in Turbulent Times: Using a Business Plan to Focus the Small Law Firm*, Olmstead & Associates, <http://www.olmsteadassoc.com/resource-center/Survival-in-Turbulent-Times-Using-a-Business-Plan-to-Focus-the-Small-Law-Firm.aspx> (last visited June 12, 2014) [hereinafter “Survival”].

⁸⁴ *Id.*

⁸⁵ John W. Olmstead, MBA, Ph.D, CMC, *How to reinvent your Law practice to prosper in the 21st Century*, Olmstead & Associates, <http://www.olmsteadassoc.com/resource-center/how-to-reinvent-your-law-practice.aspx> (last visited June 12, 2014) [hereinafter “Reinvent”].

⁸⁶ *Id.*

⁸⁷ *Id.*

skills.”⁸⁸ “Architects supply key intellectual input to a building project. By the same token, law firms could end up supplying key intellectual input to a legal matter.”⁸⁹ “To do the work effectively, lawyers will need to develop procurement, project management and other skills not native to their planet.”⁹⁰

Along this line, one prediction is that products and services will continue their century-old migration away from one another – that is, a legal product (information) will be more easily separable from a legal service, such as analysis of a factual situation.⁹¹ Clients could still go to a single law firm, which would then coordinate all of the activities of various service provider.⁹² In the last decade this has evolved to include things like legal research, document analysis and management, and other higher value-added work. Businesses with large or sophisticated in-house legal departments could coordinate their own legal matters – stitching together a network of LPOs, law firms and individual lawyers to serve their needs.

Olmstead notes, “Law firm members fail to “innovate and think outside of the box.” They simply respond and mimic the actions of other law firms. Twenty-first century law firms will need to know how to be creative and be market leaders with creative client solutions as opposed to market followers.”⁹³ Firms will also have to grasp the concept that all equity attorneys must generate work. Although it is critical to support well-established “rainmakers,” each one has a

⁸⁸ Currell & Henderson, *supra* n. 71.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ John W. Olmstead, Jr., *supra* n. 85.

shelf life as age, death and retirement, thins the number of established contacts. Thus, everyone has to make marketing efforts that bear fruit.

IV. Cockroaches and Crocodiles: A Proactive Approach to Succeeding in the 21st Century Practice of Law.

A. Technology, Outsourcing, and Standardized Forms

Over the past thirty years, advances in technology have affected nearly every aspect of human life. These advances have caused fundamental changes in the way American's communicate, manage their finances, conduct business and even govern their social calendar. Businesses in all industries and professions have had to adapt to keep up. The legal profession is no exception.

From the beginning of the 19th century, through the beginning of the 20th century, practicing lawyers went about their day to day business in roughly the same way.⁹⁴ In the 20th century, the telephone, typewriter, and copy machine changed the way lawyers communicated and alleviated the need for scriveners. Despite the inventions, lawyer's day to day operations changed only slightly. They manually researched published code books and case law, communicated by telephone, mail, or in face to face meetings, prepared documents on typewriters, and physically filed court documents at the clerk's office.

In the 1980's, things began to change. The expanded use of the personal computer provided attorneys with the ability to prepare, edit, and replicate documents more efficiently than ever before. With the invention of the internet, lawyers could send these documents through e-

⁹⁴ M.H. Hoeflich, *From Scriveners to Typewriters Document Production in the Nineteenth-Century Law Office*, 16 Green Bag 2d 395, 396 (2013).

mail. Lawyers no longer had to wait for important documents to arrive via snail-mail.⁹⁵ Instead, technology had provided nearly instantaneous access to this information, as it advanced through the 1990's and to the present. The space needed to store data and the amounts of information that can be stored in that space have increased exponentially. Methods of communication vaguely resemble the traditional land-line phones of a few years ago. Now, smart phones allow lawyers to communicate through voice conversation, video conversation, and text. Additionally, personal devices allow lawyers access to email and other internet based services anywhere at any time. The ability to communicate to individuals in other parts of the world has created an effect, which some authors have referred to as the “flattening of the globe.”⁹⁶

One of the most time consuming parts of legal work is research. While still time consuming, online search engines with expansive databases allow lawyers to be much more efficient. Less time is wasted searching through irrelevant case law. Instead, lawyers use keywords and topics to access information at the click of a mouse and the “law library” is any place with internet access. Law firms subscribe to these databases by paying for varying levels of access. Depending on the plan, lawyers have access to nearly every type of case law or statute at their fingertips.

One of the more recent developments, cloud computing, is completely changing the way lawyers practice. Cloud computing refers to the process, “where data is stored on servers owned

⁹⁵ **Error! Main Document Only.**Nicole Black, *Lawyers, Cloud Computing, and Innovation: How Cloud Computing Facilitates Innovation in the Delivery of Legal Services*, 9 I/S: J.L. & Pol'y for Info. Soc'y 593, 595 (2014).

⁹⁶ Carlo D'Angelo, *Overseas Legal Outsourcing and the American Legal Profession: Friend or "Flattener"?*, 14 Tex. Wesleyan L. Rev. 167 (2008) (referring to Thomas L. Friedman, *The World Is Flat: A Brief History of the Twenty-First Century* 66-67, 189 (2005)).

by third parties and accessed using the Internet.”⁹⁷ Thus, any document that has been saved to the cloud can be accessed by an appropriate device that has internet access. There are several cloud-computing service providers. Because of the popularity of the iPhone, the most used is iCloud. Other cloud services include Microsoft’s Skydrive, and Google Drive. According to author Nicole Black, “[cloud-computing] is one of the most important technological advancements driving change in the delivery of legal services.”⁹⁸ In her article, Black quoted one lawyer as saying: “[W]hen I’m in court and someone claims I never filed an order, I can pull out my iPad and access a copy of the filed order right in court.”⁹⁹ This type of ability provides an attorney with a significant advantage over the opposing counsel. Further, this technology reduces mistakes and miscommunications between lawyers, clients, support staff, and judges all while improving efficiency. It also lets smaller firms who are technologically savvy compete more effectively with the larger firms.

The ability to remotely access information saved in a central location allows lawyers to work on projects together while they are physically located in other parts of the country or world. One lawyer can edit a section of a document and save it to a cloud service then another lawyer can access the same information and work on the same document from a distant geographic location. While these advances in technology have been extremely beneficial to lawyers, they have also made the outsourcing of legal work feasible.

Outsourcing is a popular trend in the legal profession today. Generally, outsourcing involves the sub-contracting of certain aspects of a business’s operations. Most corporations

⁹⁷ Nicole Black, *supra* n. 95, at 593.

⁹⁸ *Id.*

⁹⁹ *Id.* at 593 (quoting from her interview with California attorney, Erin Levine).

outsource some part of their business operations today. While other professions have experienced this phenomenon, many previously thought that outsourcing would not affect the legal profession. This proved to be wrong, at least in part, as previously discussed advances in technology have promoted this development. Realistically, law firms have been outsourcing certain tasks for years.¹⁰⁰ According to one author, “[l]aw firms have been outsourcing research and discovery projects to freelance lawyers and paralegals for some time now.”¹⁰¹ However, recent trends show that domestic outsourcing has been outpaced by offshore outsourcing. In 2008, a report issued by Forrester predicted that the offshore outsourcing of legal services would increase to a 4 billion dollar a year industry by the year 2015.¹⁰² Initially, offshore outsourcing in the legal industry began when corporations decided to outsource work that was traditionally completed by the support staff of their general counsel. Technological advancements such as cloud computing, however, have made the offshore outsourcing of entire corporate litigation departments possible. This led D’Angelo to ponder whether current laws might eventually be changed to allow offshore lawyers to appear before American judges remotely.¹⁰³

A majority of all legal process outsourcing goes to India and the Philippines. There are two main reasons for this. First, a large number of law schools in India and the Philippines provide English based curriculums. Additionally, those curriculums are rooted in the same English common law system as the United States.¹⁰⁴ Second, wage rates in India and the

¹⁰⁰ D’Angelo, *supra* n. 96, at 171.

¹⁰¹ *Id.*

¹⁰² *Id.* at 172.

¹⁰³ *Id.* at 177.

¹⁰⁴ *Id.* at 174.

Philippines are a fraction of those in the United States.¹⁰⁵ In fact, many of the Legal Process Outsourcing (LPO) firms in India pay higher wages than native law firms.¹⁰⁶ Further, many law students from India obtain LLM degrees from American schools. Therefore, Indian L.P.O. firms are able to provide many legal process services to American law firms and corporations at a lower cost without diminishing the quality of the work product.

Many scholars have written on the possible benefits and concerns associated with the offshore outsourcing of legal work. The trend towards offshore outsourcing has led many to predict that a sharp decline in jobs for graduating law students will be a primary concern.¹⁰⁷ In his article on offshore outsourcing, John Okray indicated that Indian lawyers charge about 20% of what American lawyers charge.¹⁰⁸ According to the Economic Times of India, Indian lawyers are charging American law firms as little as \$7 per hour for some services.¹⁰⁹ Additionally, there are more than enough Indian lawyers to complete the work. The availability of cheap alternatives could eventually lead to a decline in legal work, a decline in law school enrollment and an eventual decline in the number of lawyers.

Another concern has been the potential for violations of the rules of ethical conduct. Conflicts of interest could easily occur. If two firms representing opposing counsel submit

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ **Error! Main Document Only.** John Okray, *Legal Process Outsourcing-Coming to A Practice Area Near You?*, Fed. Law, September 2013, at 4, 5.

¹⁰⁸ *Id.*

¹⁰⁹ **Error! Main Document Only.** *Middle Class Americans Reach Out to Lawyers in India via Internet for Legal Aid* (Oct 5, 2013), <http://economictimes.indiatimes.com/news/news-by-company/corporate-trends/middle-class-americans-reach-out-to-lawyers-in-india-via-internet-for-legal-aid/articleshow/23540519.cms> (last visited May 27, 2014) [hereinafter referred to as “Economic Times of India”].

portions of their case load to the same LPO, problems will arise. Even if the LPO firms run conflict checks, who is going to enforce strict adherence. Another area of concern is the likelihood of misunderstandings. While employees at offshore LPO firms have studied English, the language barrier might cause misunderstandings and difficulties in communicating complex subject matter. A final area for concern rests with the work product itself. With LPO firms offering more and more services, the potential for receiving insufficient work product increases.

Until recently, generally the only type of legal work being outsourced has been back office work such as document review and research. However, recent technological advancements have expanded the list of services that LPO firms are offering. One firm, Vee LPO, advertises a variety of legal services consisting of contract drafting, contract review, contract management, bankruptcy, E-discovery, litigation support, deposition summary, legal research and drafting, animated reconstruction of accidents, legal transcription, legal coding, proof reading, medical record, and other miscellaneous services.¹¹⁰ While most LPO services are back-office related, services such as contract management and bankruptcy filing allow LPO firms to take a more active role in the legal process. Indian and Philippine LPO firms are even providing services to individual clients. Americans have begun hiring Indian lawyers via the internet to prepare divorce petitions, contracts, and other legal documents.¹¹¹ With so many offshore firms preparing documents for American law firms and citizens alike, the use of standardized forms has become prevalent. Great caution and professional skepticism should accompany a form driven practice in that all cases are unique.

¹¹⁰ See VEE LPO, www.legalprocessoutsourcing.com (last visited May 27, 2014).

¹¹¹ Economic Times of India, *supra* n. 109.

Standardized forms, specifically contracts, have been used in the American legal system for quite a while, but the scope and breadth of standardized forms has grown to include business areas as diverse as commercial contracts to marital property settlements. Most states have adopted standardized forms for the filing of certain court documents. This has allowed many clients to proceed in their course of action *pro se* or without legal representation. One area where *pro se* is most common is in divorce actions. Among the standardized forms that states have adopted, divorce petitions and related forms are some of the most commonly used.¹¹² It is cheaper for individuals to fill out a standardized form and proceed *pro se* than it is to hire an attorney. Thus, many people, sometimes more than half of divorcing couples, proceed *pro se*. This phenomenon has only grown with the online production of standardized forms.

Clients, lawyers, and LPOs all have access to jurisdiction specific standard forms that are provided online. While access to this information can be beneficial to those who cannot afford representation, there are some concerns. First, research has indicated that “[o]ne-third of pro se litigants who had problems with forms and the legal process did not get help.”¹¹³ Therefore, it is likely that individuals who are proceeding *pro se* or purchasing online kits to prepare legal documents are missing out on relevant and helpful advice that could be obtained through actual representation, often at great cost savings in the long run.

Another type of standardized form is the standard form contract, often referred to as an adhesion contract. These are common in purchase agreements, business contracts, service contracts, and business transactions. The prevalence of such contracts has caused many to cry

¹¹² Robert B. Yegge, *Divorce Litigants Without Lawyers*, 28 Fam. L.Q. 407, 409 (1994).

¹¹³ **Error! Main Document Only.***Id. at 410.*

foul. Some have discussed at length the lack of mutual assent in these contracts.¹¹⁴ Instead, as one judge described, “[t]hey are said to resemble a law rather than a meeting of the minds.”¹¹⁵ While somewhat controversial, standard form contracts have been upheld as a way of increasing efficiency.¹¹⁶ Another area where standardized contracts are used has been in the charters for businesses. While all corporations have standard default rules that govern the structures of those corporations, other types of businesses are less formal. This is intended to allow entrepreneurs to structure their businesses in a way that will be most functional to the business’s goals. However, many entrepreneurs are forming their new business by purchasing standardized forms for charters available in online kits. These kits allow entrepreneurs to avoid hiring attorneys. However, the standard form charters often lack the thought and foresight needed to structure a business properly. Nevertheless, the availability of online standard form legal documents continues to grow.

One such provider of online legal documents is LegalZoom.com. LegalZoom was co-founded in 2001 by Robert Shapiro and offers legal documents ranging from business related documents to personal use documents like wills, trusts, and divorce petitions.¹¹⁷ Other documents offered by LegalZoom include incorporation amendments, trademark registrations, bankruptcy forms, and real estate deed transfer documents.¹¹⁸ Under the real estate deed transfer

¹¹⁴ Donald B. King, *Standard Form Contracts: A Call for Reality*, 44 St. Louis U. L.J. 909, 912 (2000) (citing *Siegelman v. Cunard White Star*, 221 F.2d 189, 206 (2d Cir. 1955)).

¹¹⁵ *Id.*

¹¹⁶ **Error! Main Document Only.**Deborah Zalesne, *Enforcing the Contract at All (Social) Costs: The Boundary Between Private Contract Law and the Public Interest*, 11 Tex. Wesleyan L. Rev. 579, 588 (2005).

¹¹⁷ Lindzey Schindler, *Skirting the Ethical Line: The Quandary of Online Legal Forms*, 16 Chap. L. Rev. 185, 186 (2012); *see also* LegalZoom, <http://www.legalzoom.com>.

¹¹⁸ *See* LegalZoom, <http://www.legalzoom.com>.

section of the website, LegalZoom promises to complete: 1) research to determine the exact legal description of your property; 2) filing of your real estate deed with your County Recorder's Office; and 3) when required, review by an attorney licensed in the jurisdiction of the real property.¹¹⁹ However, LegalZoom has plenty of critics.¹²⁰ Several law suits have been filed against LegalZoom, including one where the plaintiffs gained class action certification.¹²¹ Among other things, the law suits have alleged that LegalZoom participates in the unauthorized practice of law.¹²² While the first suit settled, lawsuits in other states may proceed. This is a result of the differences between the various states definition of the practice of law.¹²³

There have also been critics of the quality of services offered by LegalZoom. Lindzey Schindler, in her article on the ethical implication of online forms, describes the investigation of an estate planning lawyer into Legal Zoom's services.¹²⁴ As part of his investigation, the lawyer used one of LegalZoom's products to create a will.¹²⁵ According to the lawyer, the document contained some mistakes that would have cost him a significant amount of money in probate if he had filed that will.¹²⁶ Accordingly, Schindler asks "if under current ethical rules, a service

¹¹⁹ *Id.*

¹²⁰ Schindler, *supra* n. 117, at 194.

¹²¹ *Id.* at 191-92.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 193.

¹²⁵ *Id.*

¹²⁶ *Id.*

with the potential for such missteps and mishaps is, or should be, allowed to continue selling its services.”¹²⁷ Nevertheless, LegalZoom continues to offer services to anyone willing to pay.

The practice of law has changed dramatically in the last thirty-five years. Advances in technology have changed the way lawyers think and act. However, not all of the effects of this development have been anticipated. With the availability of new document storage and access methods, some back office duties have become transferable. Following the lead of other professions and industries, the legal profession has begun outsourcing certain parts of the legal process to both domestic and offshore firms. Offshore firms have outpaced their domestic counterparts because of their ability to charge rock bottom prices. This has raised several concerns for the future of the legal profession and the quality of work performed in the profession. Despite these concerns, clients continue to ask for cheaper prices and access to standard forms. Thus, combined with the capable employees and the availability of standardized firms, offshore outsourcing appear to be a trend that is going to grow.

As noted by one commentator on the subject, “machines may, at least at first, neither greatly help nor substantially harm other classes of lawyers and some of their functions.”¹²⁸ Oral advocates and litigators are placed in the category of attorneys for whom machines will not impact, purely from the appearance before the tribunal. Also included are thought to be attorneys in specialized practices with fast paced changes. Perhaps the most noted characteristic

¹²⁷ *Id.* at 194.

¹²⁸ **Error! Main Document Only.** John O. McGinnis & Russell G. Pearce, *The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services*, Fordham Law Review, Vol. 82, No. 6, (May, 2014), p. 3042.

of attorney that cannot be replaced by a machine is the art of persuasion.¹²⁹ The future for the journeymen lawyer, contract drafters, document review, is not as bright as noted above.¹³⁰

Perhaps the most concerning aspect of the machine intelligence era is predictive analytics. “Predictive analytics is a new discipline that combines data with analysis to make predictions.”¹³¹ Legal experts predict that law, “with its massive amounts of data from case law, briefs, and other documents, is conducive to machine data mining that is the foundation of this new predictive science.”¹³²

Lawyers, as counselors and advisors, must capitalize on the imperfections of predictive analytics and a machine will not be able to replace the judgment of the lawyer knowledgeable about the judge, the jury and the Court. Accordingly, lawyers as counselors and advisors, must up their game and take advantage of the unique opportunity to provide the service of their skill and judgment to the client.

B. Personnel

This section of the paper will describe how law firms in the 21st Century have made significant changes to their personnel at all levels, including both lawyers and staff.

1. The Reclassification of Associates

Traditionally, most medium-sized to large law firms hired new associates directly out of law school, and they all were placed on a partnership track, expected to be considered for partnership in typically 8 to 10 years. This was typically an “up or out” system, in which the

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* (citing Eric Siegel, *PREDICTIVE ANALYTICS: THE POWER TO PREDICT WHO WILL CLICK, BUY, LIE, OR DIE* 15 (2013)).

¹³² McGinnis & Pearce, *supra* n. 128.

strongest-performing, hardest-working associates would advance to partner, while the majority of them would leave the firm at some point during the first 8 years to become an in-house attorney or join another firm or take some other opportunity.

Recent years have seen a major shift in the associate ranks. Larger firms have started to hire contract attorneys to perform document review and sometimes other smaller tasks, at much lower compensation and lower billing rates. These contract attorneys are not intended to advance in the firm to more significant roles, and are typically supervised, at least in large part, by associates who are on a partnership track. In some circumstances, firms or clients directly have turned to outsourcing rather than using contract attorneys employed (permanently or temporarily) by a law firm.

Other firms have created a position of “practice group attorney,” a role in which these non-partnership track lawyers provide support for the partners and partnership-track attorneys.

Many firms have substantially decreased or eliminated hiring of new associates directly out of law school. This is driven in part by clients’ unwillingness to pay for hours billed by entry-level lawyers. These firms have shifted to hiring lateral associates who were trained by those firms that do hire out of law school, or who gained experience through a judicial clerkship, or government service or public interest position.

One concern that the rise of non-partnership track associates raises for law firms is that young lawyers who do not have a route to partnership will do only the minimum acceptable quality work, work the minimum acceptable number of hours and otherwise not be invested in the future of the firm. Although if all they are doing is document review and other ministerial-type work, maybe that does not make a difference.

For associates who are on a partnership track, the partnership track has lengthened. In some instances associates are promoted first to a “counsel” or “senior associate” title, and then to non-equity partner, and perhaps finally to equity partner if and when they are able to develop or substantially contribute to a book of business. One concern here is that if the road to true partnership (equity partnership) is so long and difficult to navigate, lawyers that might have made excellent partners in years past will give up too easily on achieving equity partnership and move in-house or to other positions. This will leave firms with not enough talent at the highest level, where they need it most.

2. The Non Partnership Track Attorney

Many law firms now have a significant percentage of their lawyers who are non-partnership track attorneys. These are experienced attorneys who have more than 8-10 years of experience and whose expertise is desired but they either choose not to pursue partnership or are viewed as not having or unlikely to have partnership potential. They have various titles such as “counsel” or “of counsel” or “senior associate” or “senior attorney.” They typically command billing rates equal to or greater than senior partnership-track associates. Because of their billing rates, they provide a significant level of profit for their firms. However, these lawyers may take work away from partnership-track lawyers who need the experience in order to develop their skills.

Many law firms also now have a significant number of nonequity partners, some of whom either do not have the interest or are viewed as unlikely to achieve equity partnership. These also might be considered non-partnership track attorneys. They command partner-level rates but are paid a salary and do not have an ownership interest in the firm. In most cases they do not have a significant book of business and instead serve primarily as “service” partners,

working on matters originated by equity partners. They are typically partners in title only (although partnership agreements vary on this) and may have little job security in some firms if their source of work dries up. Their partner title coupled with lack of profit sharing or voting rights in firm decisions can result in a lower morale among this group of lawyers in some firms.

3. Internships

In the “old” days, many large and even medium-sized firms would hire law students as “summer associates.” These programs would involve paid training of the law students as well as “winning and dining” of them to help persuade them to join the firm after law school. The vast majority of summer associates would receive offers of employment after law school. At this time, the largest law firms competed for talent from top 25 law schools.

In recent years, these summer associate programs have been substantially scaled back or completely eliminated by many firms as their entry-level hiring has decreased, and as the market has changed. Many firms have focused on lateral hiring instead, because clients will not pay for the time of entry-level lawyers and the firms do not want to absorb the cost of training them.

At least one firm, Greenberg Traurig, has started a “residency” program. “Residents” are entry-level lawyers who are not hired as new associates through the firm’s summer associate program. They are paid substantially less, billed at a much lower hourly rate, and spend a significant part of their time on non-billable training. After a one-year residency, the residents can advance to become a partnership-track associate or take on another non-partnership track position, or leave the firm.

4. The Legal Secretary Replacement

Gone are the days when a legal secretary would work for one or two lawyers. In some cases this has been driven by technological change, with most young lawyers being trained to

type quickly from their elementary school days, and only a few old-timers still using dictation (which can now be done effectively by computer). Most secretaries now serve four, five or six lawyers, or function as part of a pool that serves an entire practice group. Since the financial crisis of 2008, many law firms have substantially decreased their overall secretarial ranks.

Legal secretaries, now often called legal assistants or some other similar title, also perform a variety of additional tasks. This includes, for example, document organization and trial or hearing preparation work that was previously assigned to paralegal, but for which clients are no longer willing to pay for paralegal time. While there was a time when some of the largest firms would charge for secretarial time by the hour, there is probably no client that will still pay for that. As one of the now quite limited number of law firm employees who do not generate income for the firm, legal assistants are continually pressured to be more productive, perform higher-level work, and serve more masters.

5. Is there such a thing as a Law Librarian?

One might think that law librarians in law firms would no longer be needed in light of the cost-cutting measures of recent years. However, generally only the large law firms had librarians, who were small in number during the “golden years,” and their role has generally not been completely eliminated. They are typically capable of efficiently performing high-level paralegal work, and their time can often be billed as such. While there is no longer a need to maintain large rooms full of case reporters, digests, treatises, etc., and many of the resources are available online, law librarians can be quite effective and efficient in using the online resources and performing other work that requires old-fashioned research, such as researching a legislative history that goes back beyond the online era.

C. The Financial Impact of Law Firm Failures and Downsizing

In the last ten years, there have been more big law firm collapses than the combined number over the last 50 years.¹³³ Nearly all of the large firm failures have been a result of extraordinary debt incurred by the firm. Many commenters point to the traditional structure of the Big Law Firm as the culprit. Large firms have traditionally paid lucrative salaries to associates, even first year associates, while billing their client's high hourly rates. In recent years, the clients, usually corporations, have begun to balk at paying such high rates for these hourly charges. As a result, some firms have cut back on associate hiring. Additionally, some firms have necessarily altered their operations by requiring equity partners to produce more billable hours and decreasing the pay structure for junior associates. Other firms have, out of necessity, reduced the number of partners or, in severe cases, collapsed entirely.

Whether a law firm fails or downsizes, there are many financial implications involved with the process. First, the remaining assets and debts need to be allocated properly. Second, any remaining work that has not yet been completed must be finished and the fees allocated. Third, any remaining tax issues must be resolved. Finally, private contracts with third parties need to be addressed.

The first type of financial implication mentioned is the impact felt by partners and associates during the division and allocation of assets and liabilities. Historically, the general partnership has been the most popular business structure for law firms. However, new structures including the Limited Liability Partnership (LLP), Limited Liability Corporation (LLC), and others hybrids have become increasingly popular.¹³⁴ In both a general partnership and a limited liability partnership failure, a firm goes through the process of dissolution when one or more

¹³³ Fuchs, *supra* n. 27.

¹³⁴ Adams, *supra* n. 23, at 779.

partners decide to end the partnership.¹³⁵ A partner's withdrawal from the firm has the same legal consequences as those associated with dissolution."¹³⁶ While dissolution is the end of the current partnership association, it does not mean that the firm is going out of business.¹³⁷ A lawyer's claim to income from a firm does not terminate upon dissolution.¹³⁸ If one or more partners leave the firm, the rest of the partners may choose to continue the firm's business. When this happens, the exiting partner will take his share of the partnership's equity. Generally, the partnership agreement will specify the payout entitlement of each partner. Some agreements have tried to limit the amount of payout that an exiting partner can receive if they join new firms that are competitive with the one they are leaving.¹³⁹ Firms added this type of non-competition clause in an attempt to create firm stability by preventing partners from leaving. This attempt failed though; as courts have generally disfavored restrictive covenants, save for one exception. The new Model Rules of Professional Conduct allow partnership agreements to place restrictions on the payout of retirement benefits when a lawyer leaves to compete with the firm.¹⁴⁰ However, deciding what constitutes a "retirement fund" is difficult. Thus, courts consider many factors when determining whether payments are true retirement benefits or those relating to other types of departure payments.¹⁴¹

¹³⁵ Mark H. Epstein & Brandon Wisoff, *Winding Up Dissolved Law Partnerships: The No-Compensation Rule and Client Choice*, 73 Cal. L. Rev. 1597, 1604 (1985).

¹³⁶ Robert W. Hillman, *Law Firms and Their Partners: The Law and Ethics of Grabbing and Leaving*, 67 Tex. L. Rev. 1, 37 (1988).

¹³⁷ Epstein & Wisoff, *supra* n. 135 at 1604.

¹³⁸ Hillman, *supra* n. 136, at 41. *See also* UNIF. PARTNERSHIP ACT § 38, 6 U.L.A. at 456.

¹³⁹ Hillman, *supra* n. 136, at 46.

¹⁴⁰ *Id.* at 464.

¹⁴¹ *Id.*

After dissolution, the partnership continues to exist until the winding up process is complete.¹⁴² During this process, any remaining debts and assets of the firm are allocated. Creditors are paid first, providing there is enough in assets to cover the debts. Absent additional guarantees, creditors may not recover firm debts from the personal accounts of partners as long as there is limited liability.¹⁴³ Today, limited liability is common with the prevalence of LLP's and LLC's. After the debts have been paid, assets are divided according to the partnership agreement. Additionally, "[t]wo aspects of a law firm's winding up require special attention."¹⁴⁴ Those two aspects include, "the allocation of income generated from the winding-up process" and the "relative responsibilities of lawyers for liabilities arising after dissolution."¹⁴⁵

The first aspect of winding up that requires special attention is work in progress. When a partner withdraws from a firm, he may take clients with him. It is the client's choice. However, he may not keep fees earned from work that had been started before dissolution and remained incomplete at the time of dissolution. Many cases have been litigated due to conflict between the former partners over who will collect fees associated with this incomplete work.¹⁴⁶

This common law doctrine known as the "unfinished business doctrine," prevents partners from collecting fees for work that was unfinished or in progress at the time of dissolution.¹⁴⁷ While firms technically enter dissolution after the withdrawal of a partner,

¹⁴² Epstein & Wisoff, *supra* n. 135, at 1604.

¹⁴³ Adams, *supra* n. 23, at 779.

¹⁴⁴ Hillman, *supra* n. 136, at 41.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Epstein & Wisoff, *supra* n. 135, at 1606-07.

practically, the “unfinished business doctrine” applies only to firms that are completing the winding up process.¹⁴⁸ When a firm enters the winding up process, the fees collected from work in progress, whether on a contingency fee or hourly rate, are considered property of the firm.¹⁴⁹ Accordingly, the doctrine requires former partners or their new firms to account to the partnership all fees from unfinished business.¹⁵⁰ Because the partnership continues to exist until the winding up process is complete, any fee collected as a result of the former firm’s work in progress or unfinished business must be reported.¹⁵¹ Absent a contrary agreement, the doctrine requires the fees to be split evenly among the partners of the old firm. Accordingly, all partners have an interest in income from the completion of the partnership's unfinished business.”¹⁵² However, this doctrine may be dealt with differently by the partnership agreement if the partners so choose.¹⁵³

A second aspect of the winding up process involves the individual partners’ responsibilities and rights. Although partners have the responsibility of completing the winding up process, they have no right to income from those efforts.¹⁵⁴ This requirement of the Uniform

¹⁴⁸ Peter W. Rogers, *Who Gets the Jewels When A Law Firm Dissolves? The Unfinished Business Doctrine and Hourly Matters*, 108 Nw. U. L. Rev. 311, 318 (2013).

¹⁴⁹ Mark I. Weinstein, *The Revised Uniform Partnership Act: An Analysis of Its Impact on the Relationship of Law Firm Dissolution, Contingent Fee Cases and the No Compensation Rule*, 33 Duq. L. Rev. 857, 885 (1995), *See also Jewel*, 203 Cal. Rptr. 13 (Cal. Ct. App. 1984).

¹⁵⁰ Epstein & Wisoff, *supra* n. 135, at 1607.

¹⁵¹ *Id.*

¹⁵² Hillman, *supra* n. 136, at 42.

¹⁵³ *Id.*

¹⁵⁴ Weinstein, *supra* n. 149, at 863.

Partnership Act is aptly known as the “no compensation rule.”¹⁵⁵ Except in the case of a partner’s death, courts generally enforce the no competition rule to further what one commenter describes as, policy reasons.¹⁵⁶ These policy considerations include: “discouraging battles over cases and possession of files, preserving client choice, preserving freedom of contract, encouraging fiduciary duties among partners, and promoting judicial economy.”¹⁵⁷

Taxes are also a consideration that partners should take into account when law partnerships begin the dissolution process. LLP’s are taxed using flow through taxation.¹⁵⁸ Like partnerships, LLP partners are taxed using flow through taxation instead of being double taxed like corporations.¹⁵⁹ However, unlike partnerships, LLP partners receive some liability protection from firm debts.¹⁶⁰ Nevertheless, when a firm partnership goes through dissolution or winds up, there are certain tax implications that partners should be aware of.¹⁶¹ “For tax purposes, termination, rather than dissolution, is the critically important event.”¹⁶² This is because tax laws recognize termination differently than the UPA.¹⁶³ The UPA places an emphasis on the dissolution while tax law recognizes actual termination as the critical event triggering a change

¹⁵⁵ Weinstein, *supra* n. 149, at 863 & n.30, (citing Unif. Partnership Act § 18(f). *See* note 8 for court decisions which have defined the No Compensation Rule).

¹⁵⁶ Weinstein, *supra* n. 149, at 863.

¹⁵⁷ *Id.*

¹⁵⁸ Adams, *supra* n. 23, at 779.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Hillman, *supra* n. 136, at 36.

¹⁶² *Id.* at 36.

¹⁶³ *Id.*

in the payment of taxes.¹⁶⁴ Therefore, a partnership dissolved and terminated under the UPA might not be considered terminated under tax law. This can present a problem when the drafter of a partnership agreement focuses on the UPA without taking the relevant tax law into consideration. Like other financial considerations, taxes can play a role in the eventual survival or failure of a law firm whose partners have separated.

Another potential financial risk of the dissolving law firm is the potential for delayed malpractice suits. In his article on the ethical considerations of “grabbing and leaving,” Hillman tells the story of one attorney who faced potential malpractice liability five years after he had left his previous firm.¹⁶⁵ According to the article, a client retained the services of a firm one year before one of the partners, Walters, withdrew, and the firm dissolved.¹⁶⁶ Before dissolving, one of the partners filed suit on behalf of the client.¹⁶⁷ After dissolution, the remaining partners continued to represent the client.¹⁶⁸ However, five years later the client filed a malpractice suit against all of the original firm partners, including Walters, because they had failed to bring the case to trial within five years.¹⁶⁹ The California Supreme Court found that the client had neither explicitly, nor implicitly released Walters as his client.¹⁷⁰ Thus, the suit could proceed against

¹⁶⁴ *Id.* at 36 & n.183, citing I.R.C. § 708 (1982).

¹⁶⁵ Hillman, *supra* n. 136, at 52, citing *Redman v. Walters*, 88 Cal. App. 3d 448, 152 Cal. Rptr. 42 (Ct. App. 1979).

¹⁶⁶ *Walters*, 152 Cal. at 43.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

Walters despite the fact that he had never even met the client.¹⁷¹

The previous case illustrates the power that clients have in the process. Clients have the freedom to choose their legal representation.¹⁷² Clients may choose to leave with exiting partners or stay with the firm.¹⁷³ Generally, courts have upheld an absolute power of the client to discharge an attorney at will.¹⁷⁴ Therefore, the firm has no power to prevent a client from going with a departing partner if they so choose.

Firm employees and partners are not the only individuals affected by the collapse or downsizing of large law firms. Third parties often have private contracts with the firm and are left out in the cold when that firm closes its doors. One such third party is the landlord of a firm's office space. When a large law firm collapses or downsizes, the firm is no longer in need of the office space that it has been leasing, sometimes for decades. Thus, the owner of that space is left with a large office space which, the lessor has specifically modified to fit the needs of the firm and now has no tenant. Landlords have an uphill battle to recover losses from a failed firm because landlords are almost always unsecured creditors.¹⁷⁵ When a firm fails, it is likely that the assets will be exhausted before the landlord gets his turn to collect. Even when the partners receives considerable assets from the firm, landlords are left without a course of action because most law firms are hybrid business structures, such as LLP's, which provide partners protection

¹⁷¹ *Id.*

¹⁷² Epstein & Wisoff, *supra* n. 135, at 1604.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

from personal liability.¹⁷⁶ According to one commenter, “[l]aw firms have evolved over the years into a measurable credit risk[.]”¹⁷⁷ Because of this increased risk, many landlords have made changes in the way they conduct business with law firms.¹⁷⁸ Accordingly, many building owners now require additional letters of credit to secure leases.¹⁷⁹ Additionally, many landlords now study the law firm’s financials and look at how long the partners have been with the firms during lease talks.¹⁸⁰ If these talks involve renovations of the space, owners sometimes ask for full financial audits to be performed.¹⁸¹ Nevertheless, law firms have remained attractive tenants for landlords of high end office space.¹⁸²

Another concern for the firm involving lease implications when a partner leaves is the liability of the firm towards the landlord. This concern is exaggerated when a firm suffers a large exodus of partners. Ordinarily, the firm remains liable for contracts that it has entered into with third parties unless one of the partners has placed a personal guarantee on the contracts performance. However, liability on the basis of a lease might be problematic if the firm’s reduction in size is substantial. The firm may no longer need the same size office space that it is currently leasing. Additionally, a downsized firm may be working with significantly less capital

¹⁷⁶ *Id.*

¹⁷⁷ Randy Drummer, *Dewey Collapse Gives Lenders Pause, But Landlords Won't Cease And Desist in Pursuing Law Firms*, Costar.com (May 30, 2014), <http://www.costar.com/News/Article/Dewey-Collapse-Gives-Lenders-Pause-But-Landlords-Wont-Cease-And-Desist-in-Pursuing-Law-Firms/138888>, (quoting from an interview with Bob Chodos, a principal in Colliers International’s Chicago office).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* The author quotes executive vice president and San Francisco office branch manager for tenant representation firm Studley, Steve Barker, as saying that law firms “are still reputable, shiny tenants[.]” *Id.*

and may no longer have capability to pay for the same space.

Overall, there are many financial consequences associated with a law firm's failure or loss of partners. Lawyers need to be aware of the risks associated with dissolution and winding up because law firms fail or make changes to their partnership association far more frequently than before. Attorneys no longer stay with the same firm for their entire careers. Additionally, there are differences in the way partnership laws and tax law view the dissolution and winding process of firms. There is a great risk of incurring additional financial expenses during a failure or change in partners because of taxes, lease implications, unfinished business, or conflicts regarding the division of assets. Thus, it is important for attorneys to understand these risk and plan accordingly.

D. Legal Project Management: The Attorney as Conductor

Clients are focusing on value when they hire and retain law firms. "[C]lients are now choosing law firms based on their ability to apply a more systematic and disciplined approach to management that delivers more value, more quickly."¹⁸³ Value can be perceived in many ways, including how much a matter costs and the service a law firm provides.

Cost matters to clients. According to a recent survey of general counsel at 88 major companies, 74% of general counsel would be less likely to use a good lawyer at a pedigreed firm (e.g., AmLaw 20) for high stakes work compared to a good lawyer at a non-pedigreed firm when there was a 30 percent difference in overall cost.¹⁸⁴

¹⁸³ Jim Hassett and Jonathan Groner, *How Legal Project Management Is Changing the Way Services Are Marketed*, BLOOMBERG LAW (Oct. 1, 2013), available at <http://www.bna.com/how-legal-project-management-is-changing-the-way-services-are-marketed/>.

¹⁸⁴ Dina Wang and Firoz Dattu, *Why Law Firm Pedigree May Be a Thing of the Past*, HARVARD BUSINESS REVIEW BLOG (Oct. 11, 2013), available at <http://blogs.hbr.org/2013/10/why-law-firm-pedigree-may-be-a-thing-of-the-past/>.

Service matters to clients, too. Another survey found that the top two reasons clients fired law firms from on-going matters were the firms were either too expensive (19%) or provided poor service (17%).¹⁸⁵ In this regard, clients are looking at legal project management.

Legal project management involves managing the provision of legal services. It can increase efficiency and transparency, improve results, and reduce costs for the client while also increasing profits for the law firm. Legal project management is one of the top trends in 2014 for in-house legal departments.¹⁸⁶ In a 2012 survey, 60% of responding general counsel reported that the quality of a law firm's project management system was essential in the selection of counsel.¹⁸⁷

Some commentators have argued that, with the unbundling of legal services allowing clients to hire multiple vendors for different stages of a matter, law firms must develop project management skills or risk becoming a services vendor managed by a general contractor.¹⁸⁸ While lawyers currently are in the "driver's seat" to serve in the general contractor role, the commentators note that architects once were as well on construction projects. However, architects were replaced by a general contractor position that became more powerful and

¹⁸⁵ Kandy Hopkins, *Clients Hire Firms for Expertise, Fire for High Cost, Survey Finds*, LEGAL EXECUTIVE INSIGHTS (Sept. 10, 2013), available at <http://legalexecutiveinsights.com/clients-hire-firms-for-expertise-fire-for-high-cost-survey-finds/>.

¹⁸⁶ *Ten Law Department Management Trends for 2014*, HURON LEGAL (2014), available at http://www.huronconsultinggroup.com/Insights/Perspective/Legal/~media/Insights-Media-Content/PDF/Legal/LC_TL_LawDeptTrends2014.pdf; see also Gabriella Khorasane, *Top 4 2014 Trends in Legal Department Project Management*, IN HOUSE BLOG (Feb. 5, 2014), available at http://blogs.findlaw.com/in_house/2014/02/top-4-2014-trends-in-legal-department-project-management.html.

¹⁸⁷ Susan Raridon Lambreth, *RFPs/Surveys Show Clients Are Demanding Legal Project Management*, LAWVISION, available at http://lawvisiongroup.com/RFPs_Surveys.html.

¹⁸⁸ Daniel Currell and M. Todd Henderson, *Can Lawyers Stay in the Driver's Seat?*, Chicago Institute for Law and Economics Working Paper No. 629 (2d Series) (Jan. 16, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2201800.

profitable than the architects.

This outline provides an overview of several different issues within legal project management, and how these issues can be addressed to benefit both the client and the law firm.

1. Managing Expectations

“[Anything that has ever happened before is foreseeable,” and “increasingly, clients are holding us accountable for foreseeing the foreseeable.”¹⁸⁹ Because many clients now request and hold law firms to budgets for matters, development of a matter budget has taken on increased importance. Budgets can be prepared by evaluating the case and listing the tasks that likely will need to be performed. The analysis then should estimate the time for each task by each level of timekeeper: partners, non-partner attorneys, and paralegals. The dispositive motion estimate within a budget would include research, drafting, review, and editing of the original motion and any response motion, as well as time for oral argument.¹⁹⁰ Identifying the tasks in the budget development process also will assist in planning the case strategy. For example, the cost-benefit analysis may weigh against briefing and arguing a motion to dismiss with a low likelihood of success.

When preparing the budget, a law firm should work with the client to identify objectives for the matter. The best outcome for a client might not be a jury’s defense verdict; publicity surrounding the case and the case’s legal fees may result in an overall loss to the client. In other situations, the best outcome for a client might not be a quick settlement; that may encourage

¹⁸⁹ Samuel Goldblatt, *The Benefits of Legal Project Management and Advance Budgeting*, INSIDE COUNSEL (Feb. 10, 2014), available at <http://www.insidecounsel.com/2014/02/10/the-benefits-of-legal-project-management-and-advan>.

¹⁹⁰ Jason A. Copley and Kathleen Garrity, *Making Legal Project Management Part of Your Small to Mid-Sized Firm’s Culture*, ABA LAW PRACTICE TODAY (Mar. 2014), available at http://www.americanbar.org/content/newsletter/publications/law_practice_today_home/lpt-archives/2014/march14/making-legal-project-management-part-of-your-small-to-mid-sized-firms-culture.html.

other plaintiffs' attorneys to file similar suits seeking their own quick pay-out. By working together early in the matter, the client and law firm can identify these issues and determine strategies to obtain the outcome most favorable to the client.

The budgeting process does not stop after the budget has been sent to the client. Instead, the firm should constantly evaluate the matter's fees and costs against the budget projections to inform the client that the matter is within budget. The evaluation will be most helpful if it is done on a daily or weekly basis. Waiting for the monthly bill will not allow for mid-month adjustments to stay within budget. In addition, once the matter is concluded, the law firm should compare the budget with the outcome and determine what could have been done better in designing the budget's scope or assumptions.¹⁹¹

The law firm should send progress reports to the client. This will provide accountability in relation to the budget and matter accomplishments. It also will help avoid "scope creep," which can cause the budget to be exceeded.¹⁹² If unforeseen case developments require work that was not contemplated by the budget, the law firm should inform the client and determine an approach to complete the work on terms that are agreeable to both sides.¹⁹³

2. Managing Deadlines and Personnel

Poor planning can cause additional costs to be incurred. In some cases, last-minute fire drills could have been avoided by careful planning for known deadlines. Instead, due to a lack of planning, additional resources must be committed to complete a task. Insufficient planning also

¹⁹¹ See Copley and Garrity, *supra*, n. 190.

¹⁹² See Copley and Garrity, *supra* n. 190.

¹⁹³ See Copley and Garrity, *supra* n. 190.

can reduce the likelihood of obtaining favorable results. Briefs or oral arguments that are prepared at the final hour may muddle or miss key arguments that a judge might find persuasive.

Legal project management involves first identifying all known deadlines. Once deadlines have been identified, action timelines can be created in which quality work product will be prepared and submitted by the deadline. Assignments can then be given for each task on the timeline.

The lead attorney on the litigation is ultimately responsible for the timely completion of each action item. This attorney likely will be best served by delegating oversight to another member of the team, who will be responsible for monitoring the progress of each action item. Junior lawyers can be involved in project management activities with training and software. Equipping these lawyers with legal project management skills will benefit the firm in the future, as these attorneys become more senior and directly provide legal project management benefits to their own clients. A law firm also can hire professional project management experts to assist the firm's attorneys.¹⁹⁴ No matter how a firm decides to address legal project management, what matters is that the firm has a plan in place.

Members of a litigation team should have defined responsibilities and assignments. These roles can be determined as part of the budgeting process, since who is doing what tasks will affect estimated cost. As the matter progresses and availability changes, these roles may change as well. To provide the best value for the client, the law firm should determine the most efficient manner to best complete each task. The goal should be to find the best match between the task and the level of timekeeper.

¹⁹⁴ Michelle Mahoney, *Embedding LPM – What Should You Focus On?*, ILTA Net (Oct. 17, 2013), available at <http://connect.iltanet.org/blogsmain/blogviewer/?BlogKey=9c5c0a26-627b-4e9a-9d57-9b529f71a8d3>.

Assignments should be managed to avoid duplicating efforts. In addition, assignments should be managed to build on previously acquired knowledge in the case. Just as it likely will not be most efficient to have two attorneys performing the same task, it likely will not be most efficient to have one attorney perform a follow-up project completed by a different attorney.

3. Managing Information

Refined internal knowledge management systems can improve efficiencies. Efficiency is especially important for firms operating under alternative fee arrangements, such as fixed fees. Sound knowledge management can avoid reinventing the wheel and provide consistency across matters. Law firms should consider whether they have the best knowledge management systems in place, and whether those systems are being utilized. Some firms may have outdated knowledge management systems that make it more time-consuming to retrieve information than to re-create it. Other firms may have cutting-edge knowledge management systems that few know about or use. Because of the efficiencies and other benefits that knowledge management provides, law firms should pay attention to the status and use of their knowledge management systems.

To improve their use of knowledge management, some firms have hired a “KM director” to oversee knowledge management and work directly with litigation teams. Some firms have hired knowledge management attorneys and created knowledge management solutions group.¹⁹⁵ Knowledge management systems also can allow for increased information available to and

¹⁹⁵ David Rath, *KM Helps Reshape the Practice of Law*, KM WORLD (Jan. 31, 2014), available at <http://www.kmworld.com/Articles/Editorial/Features/KM-helps-reshape-the-practice-of-law-94283.aspx>.

shared with the client. An executive at one firm's client enjoyed showing off the firm's custom tools on his iPad. The firm believed their custom tools had "absolutely won business."¹⁹⁶

Real-time billing information can provide insight into where the matter stands against the budget. In addition, billing data can be stored and retrieved for preparation of future matter budgets. Finally, billing information can allow a law firm to "analyze the value it provides in very fine detail."¹⁹⁷

Data also may provide analytical evidence to consider when determining case strategy and risk reduction. "Big Data" has revolutionized sports, marketing, and politics, and clients and law firms should consider how the power of data can be harnessed for the practice of law.¹⁹⁸ Patent law already is exploring the use of data. Lex Machina and other subscription services allow litigators to evaluate statistics for a forum or a specific judge relating to motions, trial, settlements, and time to resolution.¹⁹⁹

In summary, every law firm always should be looking for ways to provide better value. Legal project management is an important way to provide value. After a matter has concluded, past performance should be analyzed honestly to determine what could have been done better and more efficiently. Learning from the past will improve future services. Legal project

¹⁹⁶ Igor Kossov, *4 Firms Using Tech Savvy to Win Over GCs*, LAW360 (Apr. 26, 2014), available at <http://www.law360.com/articles/530326/4-firms-using-tech-savvy-to-win-over-gcs>.

¹⁹⁷ See Igor Kossov, *supra* n. 196.

¹⁹⁸ James L. Michalowicz, *'Moneyball' for Litigators*, LEGAL TECH NEWSLETTER (Feb. 2014), available at <http://www.huronconsultinggroup.com/Insights/Perspective/Legal/~media/Insights-Media-Content/PDF/Legal/Moneyball%20for%20Litigators.pdf>.

¹⁹⁹ Derrick Harris, *How New Tech Can Help Lawyers Rethink Their Jobs in the Big Data Age*, Gigaom (Dec. 31, 2013), available at <http://gigaom.com/2013/12/31/how-new-tech-can-help-lawyers-rethink-their-jobs-in-the-big-data-age/>.

management does not begin when a case is filed or end when a case is resolved. It should continue from matter to matter, client to client, always evolving and improving.

E. The Billable Hour

Billable hour rates continue to increase. According to a 2013 LexisNexis survey, a law firm partner's time cost \$381 per hour on average across the United States, an increase of 2.7 percent from the previous year.²⁰⁰ The current average rate is equivalent to charging \$6.35 for every minute of the partner's time.

High billable hour rates are becoming more prevalent. According to its 2013 survey of the top 350 firms in the country, The National Law Journal reported that at least one partner at almost 20 percent of responding firms charged more than \$1,000 per hour.²⁰¹ At \$1,000 per hour, a partner is charging more than a quarter for every second of his or her time.

Cost, however, was the number one reason a law firm was fired. A survey of general counsel found that when a law firm was fired from an on-going matter, almost one out of five general counsel (19%) reported that the law firm was fired because it was too expensive.²⁰² Some firms that are too expensive may complete a matter, but may not be hired for future matters due to the high cost.

²⁰⁰ *Enterprise Legal Management Trends Report: 2013 Mid-Year Edition, The Rise of 'Large Enough' Law Firms*, LEXISNEXIS 15-16 (2013), available at <http://www.lexisnexis.com/counsellink/documents/CounselLink-ELM-web.pdf>.

²⁰¹ Karen Sloan, *Nominal Billing Levels Rise, But Discounts Ease Blow*, The NATIONAL LAW JOURNAL (Jan. 13, 2014), available at <http://www.nationallawjournal.com/id=1202637587261/NLJ%20Billing%20Survey%201000%20Per%20Hour%20Isnt%20Rare%20Anymore?mcode=0&curindex=0&curpage=ALL&slreturn=20140411090243>.

²⁰² Kandy Hopkins, *Clients Hire Firms for Expertise, Fire for High Cost, Survey Finds*, LEGAL EXECUTIVE INSIGHTS (Sept. 10, 2013), available at <http://legalexecutiveinsights.com/clients-hire-firms-for-expertise-fire-for-high-cost-survey-finds/>.

The increase in billable hour rates is not translating into equivalent profit increases. In a 2013 survey of 180 firms, billable hour rates increased by 3.7 percent, but law firm revenue increased by only 2.5 percent.²⁰³ Revenue did not increase at the same pace as rates in large part because corporate clients are purchasing fewer billable hours.²⁰⁴

Clients, on the other hand, are increasingly looking for alternatives to the billable hour. These materials provide an overview of alternative fee arrangements (AFAs) and how both clients and law firms can benefit from use of AFAs.

1. Background of Alternative Fee Arrangements

Most clients already are using AFAs, and expect the use of AFAs to only increase. In 2013, a reported 81% of corporate law departments used AFAs.²⁰⁵ Approximately half of in-house counsel respondents (47%) in a 2013/2014 survey predicted an increase in their companies' use of AFAs during the next 12 months.²⁰⁶ AFAs comprise a substantial percentage of some companies' legal budgets. Almost half of companies – 44% – used alternative fee arrangements for more than 20% of their outside counsel spending. One of ten companies used alternative fee arrangements for more than half of their outside counsel spending.²⁰⁷

²⁰³ Greta Rusanow and Dan DiPietro, *Citi Report: Firms Saw Modest Growth in 2013*, THE AMERICAN LAWYER (Feb. 5, 2014), available at <http://www.americanlawyer.com/id=1202641665337>.

²⁰⁴ Aric Press, *Billing Survey Shows Rates Ticking Up as Demand Dips*, THE AMERICAN LAWYER (Mar. 24, 2014), available at <http://www.americanlawyer.com/id=1202648177671/Billing-Survey-Shows-Rates-Ticking-Up-as-Demand-Dips?slreturn=20140411093508>.

²⁰⁵ *Evolution of Alternative Fee Arrangements: From Simple to More Complex*, HURON LEGAL (Nov. 13, 2013), available at http://webcasts.acc.com/handouts/ACC_Nov_2013_LQH_-_Evolution_of_AFAs_from_Simple_to_Complex.pdf.

²⁰⁶ *10th Annual Litigation Trends Survey Report*, NORTON ROSE FULBRIGHT 24 (2014), available at <http://www.nortonrosefulbright.com/us/knowledge/publications/115045/norton-rose-fulbrights-10supthsup-annual-litigation-trends>.

²⁰⁷ *Id.*

Despite their increased use, AFAs still trail billable hours on percent of matters and billings. In total, from July 2012 to June 2013, AFAs were used in 10% of matters and 6% of billings.²⁰⁸ However, given the expected increased use of AFAs, these numbers likely will continue to increase as well.

Fix fee pricing is one type of alternative fee arrangement. The law firm receives a fixed fee for all work on a matter or docket. For example, a client hires a firm for \$100,000 to handle a matter from start to finish. In one survey, the fixed fee was the most used type of AFA, used by 65% of respondents.²⁰⁹

In 2004, Tyco International hired Shook, Hardy & Bacon (SHB) to manage its entire product liability docket of 450 cases on a fixed fee arrangement. The annual fee is paid in monthly installments. Each year the fee has decreased, and SHB's profitability has increased.²¹⁰

Task-based pricing is another type of alternative fees arrangement. Under this arrangement, the law firm receives a fixed fee for all work on a specific task or stage of litigation, such as document review or depositions. For example, a client hires a firm for \$25,000 to complete all of the depositions in a matter.

Yet another alternative fee arrangement is fee cap pricing. Under this arrangement, the law firm agrees to a not-to-exceed ceiling. For example, a client hires a firm and agrees to pay

²⁰⁸ *Enterprise Legal Management Trends Report: 2013 Mid-Year Edition, The Rise of 'Large Enough' Law Firms*, *supra* Section I.A, at 13-14.

²⁰⁹ *10th Annual Litigation Trends Survey Report*, *supra* n. 206.

²¹⁰ Paul Williams, *Chapter 13: Alternative Fee Arrangements – Can You 'Win-Win'?* in *The Lawyer's Guide to AFAs and Value Pricing* (Laura Slater ed., Ark Group 2014), *available at* <http://www.shb.com/attorneys/WilliamsPaul/LawyersGuidetoAFA.pdf>; Steven T. Taylor, *Positioned for Growth*, *LAW PRACTICE MAGAZINE* (Nov./Dec. 2010) (on file with author).

its hours rates, so long as the total of the matter does not exceed \$100,000. Slightly more than half of survey respondents, 51%, used this type of AFA.²¹¹

With a contingency fee arrangement, the law firm receives a percentage of the recovery. For example, a client hires a firm to litigate a matter to resolution, and the firm receives 33% of any verdict or settlement. This type of AFA was used by 26% of respondents in one survey.²¹²

Under the blended rate pricing alternative fee, the law firm agrees to charge a single hourly price for all attorney work, whether partner or associate. For example, a firm agrees to charge a client \$300 for all attorney work on a matter. Four out of ten respondents used this type of AFA.²¹³ Some have claimed that blended rates are not true AFAs because they are simply a variation of hourly pricing.²¹⁴

Performance bonuses are yet another option. Under this system, the law firm receives a bonus if certain agreed-upon targets are achieved. This may include a bonus for obtaining successful outcomes (such as a defense contingency arrangement, which rewards a firm with a percentage of any savings below the expected verdict or settlement), for saving a certain amount or percentage of money, or for resolving a certain percentage of cases within a set period of time. More than one-third of survey respondents (35%) used this type of AFA.²¹⁵

Under the fee collar system, the client and law firm share savings if fees are below an agreed-upon range surrounding a fixed fee, but also share the loss if fees are above the range.

²¹¹ *10th Annual Litigation Trends Survey Report*, *supra* n. 206.

²¹² *10th Annual Litigation Trends Survey Report*, *supra* n. 206.

²¹³ *10th Annual Litigation Trends Survey Report*, *supra* n. 206.

²¹⁴ Kris Satkunas, *Alternative Fee Arrangements: Dispelling Six Misconceptions*, THE CORPORATE COUNSELOR (Aug. 2013), available at <http://www.lexisnexis.com/counsellink/documents/AFAs-DispellingSixMisconceptions-K.Satkunas-Aug2013.pdf>.

²¹⁵ *10th Annual Litigation Trends Survey Report*, *supra* n. 206.

For example, a client hires a firm to litigate a matter for \$50,000 with a 10% fee collar. If the matter costs between \$45,000 and \$55,000, the firm is paid \$50,000. If the matter costs less than \$45,000, the firm shares in the savings. If the matter costs more than \$55,000, the firm shares in the additional expense. A fee collar “allows both parties to share risk by creating a fee range for which the law firm assumes sole responsibility.”²¹⁶

There are a number of benefits to Alternative Fee Arrangements. One such benefit is cost certainty. The client has a greater level of predictability in the amount of its legal spending. According to Tyco’s chief litigation counsel, “[W]hen I submit an annual budget, our business people can count on that number.”²¹⁷ Another benefit is reduced costs to clients. Companies who have entered into AFAs have reported substantial cost savings. For example, Whirlpool saved 40% by hiring one firm to manage its class-action defense.²¹⁸

Faster case resolutions are yet another benefit. The longer a case is active, the more expensive the case will be. Resolving cases quickly saves time and money for both the client and the law firm. In its arrangement with SHB, Tyco has seen case cycle times reduced by 40%.²¹⁹ After it entered into a fixed fee contract for a firm to manage its entire environmental

²¹⁶ Marie Woodbury and Matt Bohnen, *Partnering in Alternative Fee Arrangements*, EXECUTIVE COUNSEL (Aug./Sept. 2010), available at [http://www.shb.com/attorneys/WoodburyMarie/Partnering inAlternativeFeeArrangements.pdf](http://www.shb.com/attorneys/WoodburyMarie/Partnering%20inAlternativeFeeArrangements.pdf).

²¹⁷ *Best Practices and Lessons Learned from ACC’s 2012 Value Champions*, THE METROPOLITAN CORPORATE COUNSEL (Sept. 2012), available at <http://www.metrocorpcounsel.com/pdf/2012/September/36.pdf>.

²¹⁸ *Id.*

²¹⁹ Jennifer J. Salopek, *ACC Value Challenge: Tyco International Ltd. and Shook, Hardy & Bacon L.L.P.*, ASSOCIATION OF CORPORATE COUNSEL (2012), available at http://www.acc.com/valuechallenge/valuechamps/2012champ_profile78.cfm.

docket, average resolution time for Unocal's environmental cases dropped from three years to one year. Settlement payments also decreased by about 50%.²²⁰

Not surprisingly, fewer cases being filed likely will lead to fewer costs. In its arrangement with SHB, Tyco has seen new case filings decline by more than 65%.²²¹

Whirlpool's outside counsel estimated that Whirlpool has saved millions of dollars by watching actions filed against competitors and making "preemptive strikes" to deter filings against Whirlpool.²²²

The client and law firm can both profit by resolving cases quickly and efficiently. The AFA also can reward the law firm for advice and activities that deter new cases from being filed. Reduced administrative issues are a necessary benefit of AFAs. In some AFAs, such as SHB's fixed fee arrangement with Tyco, the law firm hires and manages all vendors, local counsel, and experts. This improves efficiency by allowing the party closest to the services, the law firm, to manage those services. It also allows for cost-savings by purchasing third-party services in bulk.²²³ In addition, law firms and clients do not have to invest as much time in detailed invoice review.²²⁴

²²⁰ Heather Smith, *The Fix Is In*, LITIGATION (2005), available at http://www.drystonecapital.com/pdf/fix_is_in.pdf.

²²¹ Jennifer J. Salopek, *ACC Value Challenge: Tyco International Ltd. and Shook, Hardy & Bacon L.L.P.*, *supra* Section II.C.3.a.

²²² *Best Practices and Lessons Learned from ACC's 2012 Value Champions*, *supra* n. 217.

²²³ Rachel M. Zahorsky, *Facing the Alternative*, ABA JOURNAL (Mar. 2012), available at http://www.abajournal.com/magazine/article/facing_the_alternative_how_does_a_flat_fee_system_really_work/.

²²⁴ *Evolution of Alternative Fee Arrangements: From Simple to More Complex*, *supra* n. 205.

Clients increasingly would rather not pay to train new lawyers. Alternative fee arrangements could provide practical experience opportunities for associates that they otherwise might not have. These new experiences can boost associate morale.²²⁵

2. Making Alternative Fee Arrangements Work

An important key in making alternative fee arrangements work is to understand and define the project. Both sides need to fully understand what is contemplated by the fee arrangement. Understanding and defining the project's scope ensures the expectations of both sides are met in budgeting, costs, and deliverable work product.²²⁶

Another important component is making these arrangements work is to use data to make projections. Corporate legal departments are using advanced tools to analyze law firm bills and understand litigation costs better than could be done previously. A law firm should analyze prior matters it has handled, and when possible, that the client has faced with other firms, to understand how to price an AFA for a new matter or client.²²⁷

²²⁵ Ben W. Heineman, Jr. and William F. Lee, *The Time Has Come*, CORPORATE COUNSEL (Sept. 2009), available at http://www.law.harvard.edu/programs/corp_gov/articles/Heineman-Lee_0909_CC.pdf; Joe Forward, *Post-Recession Gives Rise to New Law Firm Models*, Inside Track (Sept. 2013), available at <http://www.wisbar.org/NewsPublications/RotundaReport/Pages/Article.aspx?ArticleID=11045>.

²²⁶ Julie Zeveloff, *5 Management Strategies Law Firms Should Adopt*, LAW360 (Apr. 12, 2010), available at <http://www.law360.com/articles/156440/5-management-strategies-law-firms-should-adopt>.

²²⁷ Christopher Petrini-Poli and Scott Springer, *Data Analytics: A New Approach to Profit Management in the Legal Business*, ACCOUNTING AND FINANCIAL PLANNING FOR LAW FIRMS (Feb. 2014), available at http://www.hbrconsulting.com/downloads/HBR_ALM_LJN_Account_and_Financial_Planning_2014_02_01.pdf.

Providing clients with “a menu of offerings” is also a critical component in making these arrangements work. In its AFAs for privacy and data security work, SHB offers clients “a menu of offerings.” These services and the resulting AFA can be structured specifically to the client.²²⁸

Helping to assist making AFAs work, some firms designate “alternative fee gurus” by practice area to assist with developing alternative fee proposals. At other firms, a partner serves as a resource for colleagues preparing alternative fee proposals.²²⁹

3. Implementing the Alternative Fee Arrangement

Communication is a key component to implementing an alternative fee arrangement. In this regard, the law firm should provide the client with an initial strategic plan when a case is filed and stay in constant communication with the client until the case is resolved. Keeping the client up to date on the matter will allow the case to stay on track, within budget, and meet the expectations of both the law firm and the client.

Through effective staffing, large law firms can provide superior service to clients and still turn a profit on AFAs. For example, SHB hired more lateral, non-partner track attorneys with 8-10 years of experience to handle Tyco’s product liability docket. These attorneys brought significant experience and expertise, and because they were less costly than senior partners, allowed for greater profitability under the firm’s AFA with Tyco.²³⁰

²²⁸ Allison Grande, *Privacy Attys Capitalize on Creative Fee Arrangements*, LAW360 (July 22, 2013), available at <http://www.law360.com/articles/458665/privacy-attys-capitalize-on-creative-fee-arrangements>.

²²⁹ Drew Combs, *All-Seeing, All-Knowing Alternative Fee Gurus Dispense Wisdom*, THE AMERICAN LAWYER (Jan. 1, 2010), available at <http://www.americanlawyer.com/id=1202437076876/All-Seeing,-All-Knowing> (subscription required).

²³⁰ Rachel M. Zahorsky, *Facing the Alternative*, *supra* n. 223.

Law firms must select the right person to work on the case or perform the task to most efficiently achieve the best result. The firms also must train attorneys and paralegals to be efficient and effective under an AFA.²³¹ As discussed in the section on Legal Project Management, refined internal knowledge management systems can improve efficiencies. This is especially important when operating under AFAs. SHB captures summaries of depositions and court hearings.²³² SHB also logs and analyzes real-time financial and billing data to track expenses and costs. *Id.*

Trust is the name of the game with AFAs. When Tyco hired SHB to manage its entire product liability docket of 450 cases on a fixed fee arrangement, Tyco had not done work with SHB before. With trust “the name of the game,” Tyco and SHB have successfully worked together for almost a decade.²³³

In summary, AFAs are not the best fit for every client or every matter. That said, law firms should be creating and improving processes to better understand AFAs to which they already have agreed, as well as AFAs they might propose in the future. AFAs may never completely replace the billable hour, but they may be a preferred alternative for certain clients or types of matters. The law firms that best understand AFAs will be in the best position to get new business and profit from it.

F. The Art of succession: Letting the Millennials lead

If being a trial attorney teaches you one thing, it is to never ignore your bad facts. Address them and extinguish them, or do your best to bring the boil down to a simmer. In the

²³¹ Paul A. Williams, *Wouldn't You Rather Be Partners?*, CORPORATE COUNSEL (June 7, 2010), available at <http://www.shb.com/value/articles/CorporateCounsel-reprint.pdf>.

²³² Rachel M. Zahorsky, *Facing the Alternative*, *supra* n. 223.

²³³ Melissa Maleske, *A Matter of Time*, INSIDE COUNSEL (Feb. 1, 2010), available at <http://www.insidecounsel.com/2010/02/01/a-matter-of-time>.

context of generations, Millennials have a bit of an image problem. When people think of Millennials the following stereotypes come to mind: entitled, attention seeking, lazy, tech savvy, social media craving, and trophy getting kids. If you are a Millennial lawyer, at first glance, you can't be altogether pleased with the foregoing stereotypes. On the flip side, if you are a Baby Boomer shareholder, you might be worried about the legacy of your firm as you begin to consider the idea of succession. Rest assured, with a little understanding of what Millennials can bring to your firm and how shareholders can embrace that talent, the idea of letting the Millennials lead is not so daunting.

1. Who are Millennials? Understanding their Strengths

While the definition varies, broadly speaking Millennials are anyone born from 1980 to 2000. They are the internet generation. Ask anyone in this generation and you'll be hard pressed to find one who didn't grow up with a computer, or a cell phone. They have grown up with social media, and flourish in it. Law firms should tap into that and allow Millennials to grow or even introduce your firm to a social media platform. While Baby Boomers and previous generations grew relationships out of shaking hands and face to face conversations, today we have access to millions through social media networks. Millennials easily connect with anyone and everyone — their next new relationship is just a smart phone away. Let your Millennials lead and help your firm capture an audience that older generations have not yet tapped in to.

More so than their predecessors, Millennials want a greater work-life balance; this is interpreted by some as being lazy but that is far from the truth. Millennials are more prone to email and text than pick up the phone. By way of being more tech savvy than older generations, they are able to multitask and feel comfortable with all forms of technology. While most shareholders are still dictating deposition summaries, Millennials are concurrently taking the

deposition and typing the deposition summary from their tablets. It's multitasking at its best and frees up time for the Millennial.

Understanding that Millennials seek a greater work-life balance, firms should create and foster opportunities for Millennials to have access to work remotely and with flexible hours. A firm will get a more productive and happy attorney doing so. In line with Millennials' need for a greater work life balance, firms should create transparent tracks to both partnership and "of counsel" career paths. Part-time positions and contract attorney positions are becoming more and more available for those who want a greater balance, whether it be for more family time, or even to launch a second career. Not everyone in this generation wants to become or can become a partner, but hardworking, productive Millennial associates who seek a greater-work life balance should know what options are available to them.

Millennials, unlike other generations, prefer team work. They learn through collaboration. Law firms can foster collaboration and let Millennials lead the way by overseeing projects with younger associates or clerks. Millennials like feedback and allowing them to chair a team project will not only strengthen their management and leadership skills, but will also provide an avenue for them to receive feedback from their peers and supervisors.

2. Mentorship: Succession through Training

Understanding who Millennials are is the key to healthy succession. There is no better way to do that than through a mentorship program. For seamless succession, generational gaps need to be bridged. Partners in a firm should lead by example, demonstrating what they have learned through their many years in practice. They should teach younger generations what works, and what doesn't work. More experienced attorneys should show Millennials how their work makes a difference to their clients and to the community.

While mentorship programs usually occur in the context of a shareholder-associate relationship, they can exist outside of one's firm as well. Millennials may feel more comfortable asking questions and receiving feedback from a mentor who is not their "boss." Legal organizations or local bar associations provide great outlets to grow relationships with Millennial lawyers; some even specifically offer mentorship programs. Transitioning attorneys should keep their eyes out for young talent within their respective organizations and communities. What may start as an informal relationship could lead to a lateral Millennial hire.

Mentoring should take place both inside and out of the court room. Clients need to know who will be trying their cases not only today, but tomorrow. Let Millennials second chair trials, assist in mediations, entertain clients, and attend conferences. Expose your Millennial lawyers to trade associations and legal organizations. They are eager to help build a name for themselves, and the firm. While learning the skills inside the court room is extremely important, so is face time with clients and prospective clients who need to feel comfortable and confident in the young talent that will one day be trying their cases.

3. When to Think of Succession

Transitioning your firm in anticipation of retirement should be thought of well in advance, not when one foot is out the door. It should be a long term plan of any firm, no matter the size, looking at the talent under its own roof, in the community and evaluating where it wants to be in the next ten to fifty years. A firm should evaluate who its clients are now, and the health of that industry. Will that industry be swallowed up by a new technology? What are emerging practice areas it can develop? Failing to ask your Millennials their opinion on the subject matter and include them in development meetings is a mistake. Not only will they offer a fresh

perspective to the conversation, but they will develop a vested interest in the firm that they may not have had before. After all, it will be *their* firm one day.

Transitioning current clients to a firm's Millennial lawyers should start well before a senior lawyer leaves a firm. When thinking of succession, evaluate who your clients are and how long they have been working with you. Some clients may be amenable to working with a younger attorney while others may be more dependent on the transitioning attorney and will need a prolonged period of time to gain confidence in the Millennial.

Just as transitioning clients to younger attorneys is important, firms should also transition its firm management to younger attorneys well in advance. The firm's budget and career paths should be transparent, allowing the Millennial the opportunity to educate herself and ask questions while the senior attorney is still there. Allow the younger attorney to participate in financial planning meetings or other special committees within the firm. Not only does it lead to collaboration (which the Millennial will love), ultimately it fosters a sense of ownership.

If a firm wants to expand its practice areas in the future, they should allow their Millennial lawyers to gain on the job experience and training in those other disciplines; encourage (and pay for) them to attend CLEs (Continuing Legal Education). While there may be a steep learning curve initially, Millennials are eager to learn and connect.

Finally, get Millennials involved in recruitment. Let them participate in the hiring process of younger associates. One day they will be on the mentor side of the mentor-mentee relationship.

While Millennials may be more tech savvy than older generations, the law is a learned profession. Becoming a great lawyer is not taught in law school. It is accomplished by doing.

Technology may alter the way we practice, however, the principles that guide our profession and create exceptional lawyers remain the same.

G. Alternative Business Structures: The Non-Law Firm Law Firm?

Rule 5.4 of the Model Rules of Professional Responsibility addresses the professional independence of a lawyer. Rule 5.4(a) permits lawyers or law firms to share legal fees with nonlawyers in certain exceptional circumstances, i.e., the payment of monies to a lawyer's estate or beneficiaries upon the lawyer's death (a)(1)²³⁴, payment of a purchase price to a deceased attorney's estate for the purchase of the business (a)(2)²³⁵, payment into a retirement plan for nonlawyer employee (a)(3)²³⁶, and the sharing of court awarded legal fees with a nonprofit organization that retained or recommended the attorney (a)(4)²³⁷. There are no other exceptions listed within the model rules regarding the sharing of legal fees between a lawyer and a nonlawyer.

After the noted exceptions, Model Rule 5.4 provides guidance to lawyers and law firms regarding the sharing of legal fees between lawyers and nonlawyers. Rules 5.4(b), (c) and (d) provide,

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

²³⁴ See MODEL RULES OF PROF'L CONDUCT 5.4(a)(1). (Hereinafter "MODEL RULES").

²³⁵ *Id.* at R. 5.4(a)(2).

²³⁶ *Id.* at R. 5.4(a)(3).

²³⁷ *Id.* at R. 5.4(a)(4).

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.²³⁸

Of those noted, Rule 5.4(b) has become the subject of much discussion recently. All states that adhere to the ABA Model Rules of Professional Responsibility prohibit the association of lawyers and nonlawyers for the purpose of the practice of law.²³⁹ The District of Columbia, however, which subscribes to the model rules, permits lawyers and nonlawyers to associate in a limited fashion for the purpose of the practice of law.²⁴⁰

Specifically, the District of Columbia Rules of Professional Responsibility provide,

b) A lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients, but only if:

(1) The partnership or organization has as its sole purpose providing legal services to clients;

(2) All persons having such managerial authority or holding a financial interest undertake to abide by these Rules of Professional Conduct;

²³⁸ *Id.* at R. 5.4(b), (c) and (d).

²³⁹ One author noted that due, in part, to large bank financing, certain non-lawyers already wield immense power over law firm business decisions. Joe Patrice, *Should Non-Lawyers Own Firms? Do They Already?*, Above the Law (Jan. 30, 2014), <http://abovethelaw.com/2014/01/should-non-lawyers-own-firms-do-they-already>.

²⁴⁰ *See* DC R RPC Rule 5.4(b).

(3) The lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1;

(4) The foregoing conditions are set forth in writing.²⁴¹

Under the parameters noted above, lawyers and nonlawyers may form a partnership or organization, based in the District of Columbia, for the purpose of providing legal services to clients. In the comments to the Rules, the drafters discussed the purpose behind liberalizing the rules noting that permitting the association allows nonlawyer professionals to work with lawyers in the delivery of legal services without being relegated to the role of an employee. Examples provided include permitting economists to work in a firm with antitrust or public utility practitioners, nonlawyer lobbyists to work with lawyers who perform legislative services, and certified public accountants to work in conjunction with tax lawyers or others who use accountants' services in performing legal services.²⁴²

In addition to discussing the types of associations permitted under its liberalized rule, drafters of the liberalized rule in the District of Columbia specifically commented on what is not permitted under the Rule. As noted in Comment 8, “Paragraph (b) does not permit an individual or entity to acquire all or any part of the ownership of a law partnership or other form of law practice organization for investment or other purposes. It thus does not permit a corporation, an investment banking firm, an investor, or any other person or entity to entitle itself to all or any portion of the income or profits of a law firm or other similar organization.

²⁴¹ *Id.*

²⁴² *Id.* at R. 5.4 cmt. 7.

Since such an investor would not be an individual performing professional services within the law firm or other organization, the requirements of paragraph (b) would not be met.”²⁴³

Capitalizing on the liberalization of Rule 5.4(b) in the District of Columbia, Clearspire was founded in 2009. Clearspire consisted of a double breasted entity with a law firm side made up of attorneys who were able to work remotely and the management side, which provided support for the law firm. Clearspire was the subject of much publicity in recent years given the speculation surrounding the practice of law. Clearspire desired to take on big law and provide clients with top quality services at a much lower expense. Lawyers were hired under the notion that they would practice law and not be responsible for the management aspect of the practice, a second side of the business entity would handle the management aspects. Despite announcements in 2013 relating to its growth, Clearspire Law exists no longer.

According to its website, prior to the closing of the legal service provider division of the company, Clearspire’s goal was to offer legal services (and related technological and business advice) to clients in the most efficient manner possible consistent with maintaining a traditional attorney-client relationship and delivering high-quality work.²⁴⁴

With a computer program, Coral²⁴⁵, central to its progress, Clearspire provided remote attorney workplaces designed to minimize overhead. Recognizing the needs of the traditional

²⁴³ *Id.* at R. 5.4 cmt. 8.

²⁴⁴ John S. Dzienkowski, *The Future of Big Law: Alternative Legal Service Providers to Corporate Clients*, Vol. 82, No. 6 Fordham L. Rev. 3002 (2014), *citing* The 100-Year-Old Law Firm Model Has Been Reengineered, Finally and Fully, CLEARSPIRE, <http://www.clearspire.com/principle>(last visited June 10, 2014).

²⁴⁵ Dzienkowski, *supra* n. 244, at 3002 & n.63. For a detailed background on Coral and its development, *see* Steve Rosenbush, *How Clearspire Used IT To Reinvent the Law Firm*, WALL ST. J. CIO J. (Apr. 9, 2012, 4:56 PM), <http://blogs.wsj.com/cio/2012/04/09/how-clearspire-used-it-to-reinvent-the-law-firm>; Roy Strom, *Technology Transforms Pockets of the Legal World*, CHI. LAW. (Apr. 2012), <http://www.chicagolawyermagazine.com/Archives/2012/04/Legal-Technology.aspx>.

law firm, Clearspire also provided office space with full support staff for client interactions.²⁴⁶ Coral provided Clearspire with analytics to provide a more efficient delivery of legal services. Under the Coral system, a project manager serves as the legal architect and analyzes the problem at issue. The attorneys are then given a dashboard containing links to prior similar firm work, Lexis and Westlaw searches, and other public and nonpublic information to use in representing the client.²⁴⁷

Along with its novel case handling approach, Clearspire also had a novel approach on billing. Recognizing the perception that Big Law was unhappy with fees being charged, Clearspire favored a fixed fee for services system where clients pay fixed fees, established at the beginning of the representation for services provided.²⁴⁸ Clearspire functioned under the notion that “billable hourly fees are based upon an outdated, century-old system that is no longer viable or justifiable in today’s economy.”²⁴⁹ Consistent with its being an alternative business model to Big Law, Clearspire did not have a partnership compensation system and most of its’ lawyers were salaried employees.²⁵⁰

²⁴⁶ Dzienkowski, *supra* n. 244, at 3002, (citing The 21st Century Workplace, CLEARSPIRE, <http://www.clearspire.com/21st-century-workplace> (last visited June 10, 2014)).

²⁴⁷ *Id.* at 3004 & n.66. See *Explore More Slideshows: Homepage*, CLEARSPIRE, <http://www.clearspire.com/explore-more/360%20Work%20Environment?width=780&height=480> (last visited Apr. 26, 2014). The use of technology to analyze legal problems and propose solutions presents opportunities for significant innovation in the way legal services are delivered to clients. See John O. McGinnis & Russell G. Pearce, *The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services*, 82 FORDHAM L. REV. 3041, 3045–46 (2014).

²⁴⁸ Dzienkowski, *supra* n. 244, at 3004, (citing *End of the Billable Hour*, CLEARSPIRE, <http://www.clearspire.com/end-billable-hour> (last visited Apr. 26, 2014); see also Lisa Nirell, *Re-imagining What a Law Firm Can Be: Scrapping Billable Hours for a More Client-Friendly B2B Service*, FAST COMPANY (Oct. 5, 2011, 1:05AM), <http://www.fastcompany.com/1784753/re-imagining-what-law-firm-can-be-scrapping-billable-hours-more-client-friendly-b2b-service>).

²⁴⁹ Dzienkowski, *supra* n. 244, at 3004.

²⁵⁰ *Id.*

Significant to this discussion, business related and nonlaw related matters were performed by the management division of Clearspire. Through the use of this model, clients obtained the benefit of a multidisciplinary practice controlled by lawyers.²⁵¹ Thus, the Clearspire business model complied with the limitations set forth in Rule 5.4(b) of the District of Columbia Rules of Professional Conduct.

While Clearspire addressed the lawyer and nonlawyer collaboration head-on, locating itself in the District of Columbia, Axiom was formed as a nonlaw firm to provide advice and solutions to the world's largest corporations regarding their complex legal service needs.²⁵² Axiom's website clearly states "Axiom is not a law firm and does not provide legal representation or advice to clients. Axiom attorneys are independent and do not constitute a law firm among themselves." "It prides itself as "the world's largest and fastest growing non-traditional provider of legal services and the only sophisticated end-to-end (as opposed to point solution) provider of corporate legal services that is not a traditional law firm."²⁵³

Axiom Law offers both outsourcing and insourcing to its clients, often times at a significant discount. Axiom provides "managed services" to its clients which creates an efficient work flow required to provide high quality work in an efficient manner. Nonlawyer professionals employed by Axiom to accomplish this task include project managers, systems engineers and information technologists.²⁵⁴

²⁵¹ *Id.*

²⁵² Dzienkowski, *supra* n. 244, at 3008, (citing *Credits*, AXIOM, <http://www.axiomlaw.com/credits-and-disclaimer>).

²⁵³ Dzienkowski, *supra* n. 244, at 3008.

²⁵⁴ *Id.* at 3010, (citing Bill Henderson, *Is Axiom the Bellwether for Disruption in the Legal Industry?*, LEGAL WHITEBOARD (Nov. 10, 2013), <http://lawprofessors.typepad.com/legalwhiteboard/2013/11/is-axiom-the-bellwether-for-disruption-in-the-legal-industry-look-what-is-happening-in-houston.html>).

Where does Axiom's business model fit within Rule 5.4(b) of the Model Rules of Professional Conduct? Professor William Henderson describes Axiom as "a managed service provider who serves as a general counsel's outsourcing agent. Only clients with a general counsel can use Axiom as it uses this structure to comply with the rules of unauthorized practice and sharing fees with a nonlawyer."²⁵⁵ Professor Henderson comments, "I am sure that a state bar regulator, taking a very formalistic approach, can take issue with Axiom's construction of Rule 5.4, which prohibits profit-sharing between lawyers and nonlawyers from income generated from the practice of law. But the purpose behind Rule 5.4 is to preserve lawyer independence so that the quality of the underlying legal advice won't be compromised by the nonlawyer's pursuit of profit."²⁵⁶ Thus, using the limitations imposed by Rule 5.4(b) of the District of Columbia Rules of Professional Conduct, when nonlawyers are providing services within a firm, the lawyers must supervise this work and ultimately take full responsibility for the nonlawyer's involvement in the practice of law.²⁵⁷

With the Clearspire approach to meshing the work of lawyers and nonlawyers alike gaining attention, in 2013, the Commission on Ethics 20/20 completed its work on the revision of the Model Rules to accommodate practice in the twenty-first century. While modifications were made regarding the outsourcing of work to outside lawyers and nonlawyers and the need of lawyers to keep abreast of changes in technology, this issue of the association of lawyers and nonlawyers in a business arrangement was addressed. While the ABA maintains its steadfast

²⁵⁵ Dzienkowski, *supra* n. 244, at 3036, fn. 254, (citing Bill Henderson, *Is Axiom the Bellwether for Disruption in the Legal Industry?*, LEGAL WHITEBOARD (Nov. 10, 2013), <http://lawprofessors.typepad.com/legalwhiteboard/2013/11/is-axiom-the-bellwether-for-disruption-in-the-legal-industry-look-what-is-happening-in-houston.html>).

²⁵⁶ Dzienkowski, *supra* n. 244, at n.255.

²⁵⁷ *Id.* at 3036.

position, the practice of law continues to evolve and modernize with no guidance being provided on that regulation.²⁵⁸ Despite the ABA's position, concerned commentators have noted, "The regulatory structures of the legal profession should address, not ignore, innovations such as the development of alternative legal service providers that seek to represent Big Law clients."²⁵⁹

With the practitioners and innovators in the United States trying to figure out how to recognize the needs of corporate America and meld the nonlawyer professionals with the lawyer professionals, while at the same time complying with the Rules of Professional Conduct, foreign jurisdiction, such as England, Canada, Australia²⁶⁰ and Wales permit alternative business structures, including nonlawyer ownership.²⁶¹ The ABA Commission noted that MDPs (multidisciplinary practices) are permitted in Germany, the Netherlands (but not with accountants), and in Brussels (only with accountants but there must be separate billing).²⁶² "New Zealand permits incorporated law practices, but nonlawyers may only own non-voting shares.

²⁵⁸ *Id.* at 3039. A very interesting commentary suggests that American regulators' decisions to allow Clearspire and Axiom Law to have nonlawyers raise capital and hire lawyers to deliver legal services may be a sign that the practice of law is already deregulated in the United States. *See Is Practice of Law Already Deregulated?*, 3 GEEKS & L. BLOG (Sept. 5, 2011), <http://www.geeklawblog.com/2011/09/is-practice-of-law-already-deregulated.html>. Another commentator notes that he sees cracks in the U.S. regulatory structure. *See* Sam Glover, *Is It Time for Non-lawyer Ownership*, LAWYERIST (Sept. 24, 2013), <http://lawyerist.com/time-for-non-lawyer-ownership/> (quoting Andy Daws, Riverview Law's North American Vice President)).

²⁵⁹ Dzienkowski, *supra* note 110, at 3039.

²⁶⁰ "Australia has adopted an expansive approach to ABS." ABA Commission on Ethics 20/20, p. 7 (citing Murray Hawkins, Director, National Legal Profession Project, "Australian Models of Regulating the Legal Profession," Presentation to the Federation of Law Societies of Canada Semi-Annual Conference, 17-19 March 2011).

²⁶¹ *See* ABA Commission on Ethics 20/20, p. 16. (2011).

²⁶² *See* ABA Commission on Ethics 20/20, p. 16. (2011).

Only lawyers actively involved in providing the incorporated firm's regulated services can be directors."²⁶³

According to The Law Society, in the United Kingdom, an alternative business structure (ABS) is a "regulated organization which provides legal services and has some form of non-lawyer involvement. This involvement can either be at the management level eg as a partner, director or member; or as an owner e.g. an investor or shareholder."²⁶⁴ The Legal Services Act 2007 allows nonlawyers to own and invest in law firms.

Evaluating the benefits to ABS's, The Law Society commented that such an entity permits equity to be raised from a broader source of funds, without the need for nonlawyer involvement at the management level and provides the ability to diversify the range of legal services provided through the practice.²⁶⁵ The impact of nonlawyer managers and/or owners on the culture of the firm is only one of the risks identified in forming an ABS. Getting nonlawyers to understand the culture and obligations of lawyers is also a potential risk.²⁶⁶ Another important risk noted is the perception of the firm's risk profile by not only the regulatory agencies, but professional indemnity insurance companies.²⁶⁷

Perhaps the best argument against implementation of a alternative business structure similar to the that implemented in the United Kingdom is the recognition by The Law Society that lawyers, subject to strict regulation, must examine if the owner's control could interfere with

²⁶³ See ABA Commission on Ethics 20/20, p. 16. (2011).

²⁶⁴ *Alternative Business Structures*, The Law Society (July 13, 2013), <http://www.lawsociety.org.uk/advice/practice-notes/alternative-business-structures>.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

the firm's ability to act in the best interests of clients and, if so, how to mitigate the risk..²⁶⁸ This concern is precisely the purpose behind Rule 5.4, preserving lawyer independence so that the quality of the underlying legal advice won't be compromised by the nonlawyer's pursuit of profit.”²⁶⁹

Along these lines, lawyers must consider whether offering certain services can conflict with that of a duty owed to a client. One example noted relates to the duty of auditors to disclose information while lawyers are required to keep information to clients confidential.²⁷⁰ While it may be that the United Kingdom model does not provide all of the answers, the solicitors and regulators of solicitors in the United Kingdom are much more forward thinking on the issue than the United States. While innovators in the United States are moving along at a rapid pace as to virtual law firms²⁷¹ and non-law firm law firms or alternative business structures, such as Axiom, the Code of Professional Conduct has not caught up with the progression, much to the chagrin of its members.

At its February 2011, the American Bar Association Commission on Ethics 20/20 reported on its examination of alternative business structures in the United States. In its report, the Commission decided “that two options for alternative business structures -- passive equity investment in law firms and the public trading of shares in law firms -- would not be appropriate

²⁶⁸ *Id.*

²⁶⁹ See Model Rules, *supra* n. 234, at R. 5.4(b).

²⁷⁰ See *Alternative Business Structures*, *supra* n. 264.

²⁷¹ Virtual Law firms include Potomac Law Group, VistaLaw, VLP Law Group, LegalForce, to name a few.

to recommend for implementation in the United States at this time, although both have been adopted elsewhere since July 2000.”²⁷²

As one commenter noted, “In order for the profession to stay relevant and thrive, lawyers must examine who can invest in firms, models for publicly traded firms, and lawyer partnerships with other professionals.”²⁷³

V. The Corporate and Industry Perspective

Commentators believe that corporate law departments are under immense pressure with a focus on cost reduction and reducing external expenditures. There is a belief such pressure is coupled with internal pressure to manage an increasing volume and complexity of work. “The dominant management preoccupation of most GCs (General Counsel) today is meeting the more-for-less challenge... How can they deliver more legal service to their businesses at lower cost?... (I)n house lawyers will come to the view... that the cost savings need cannot be secured simply by pricing differently. Rather, the challenge is to work differently.”²⁷⁴ The net result, the role of in-house counsel and legal teams is expected to change.

Richard Susskind, author of “Tomorrow’s Lawyers: An Introduction to Your Future” stated, “Most General Counsel, the leaders of in-house legal teams, tell me that their principal job should be that of managing risk; that ‘legal risk management’ should be the core competence and service of in-house lawyers. . . Legal risk can be managed in many ways, but the emphasis is

²⁷² See *Report of ABA Commission on Ethics 20/20 Working Group on Alternative Business Structures* (April 5, 2011), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/abs_issues_paper.authcheckdam.pdf.

²⁷³ Ari Kaplan, *The Evolution of the Legal Profession: A Conversation with the Legal Community’s Thought Leaders*, available at http://discoverready.com/wp-content/uploads/DOLA34009_Evolution_v01.pdf. In the article, Kaplan opines that these issues will force the legal profession to restructure how it delivers legal services.

²⁷⁴ Richard Susskind, *Tomorrow’s Lawyers: An Introduction to Your Future*, p. 67-68 (2013).

usually on preventing non-lawyers in businesses from inadvertently exposing their organizations to some kind of liability (such as might flow from a breach of some regulation or of an agreement). This control of legal risk can be achieved, for example, by increasing legal awareness, by introducing protocols or procedures, by using standard documents, or by involving lawyers more directly in the affairs of organizations. . . . There is little question that tomorrow's in-house lawyers will become increasingly systematic and rigorous in their management of risk and will require sophisticated tools and techniques to help them. Strikingly, very few law firms have yet recognized the commercial opportunities here.”²⁷⁵

One general counsel commented, “the demand for legal advice and review is increasing, as well as cooperation between the ‘front office’ and legal department. Since the business is expected to become more global and new types of business relations will arise due to new regulations, the lawyers need to be prepared to apply legal knowledge to new spheres. The business spectrum of the legal department will increase along with its importance in relation to other departments”.”²⁷⁶

Another went further, saying, “in the next five years, the legal department’s influence over other departments is expected to grow. Lawyers will need to have more acumen around new policies or products as well as a better understanding of the industries in which the products are

²⁷⁵ See, Susskind, n. 274, p. 62-63.

²⁷⁶ *Above the Law: KPMG’s Global Study of How General Counsel are Turning Risk to Advantage*, KPMG (2012), available at <http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/Documents/general-counsel-survey-2012v2.pdf> [hereinafter “KPMG Survey”].

to be promoted. This will allow them to advise on whether certain policies or products can be introduced“.²⁷⁷

Andrew M. Gilchrest, Counsel – Product Liability/Specialty Environmental for Exxon Mobile Corporation, describing his experience commented, “From the in house perspective, the trend in the practice of law in the 21st century has been away from the pure practice of law to include duties such as leadership, management, finance and administration on large complex cases. Outside counsel are probably familiar with some of these changes, but not others. When I began my in house career we had file rooms, bankers boxes of documents, pleadings and discovery files and a law library. These have all gone the way of the tape cassette. They have completely exited the building. Now we have laptops, SharePoint sites and Westlaw. Obviously, technology has made things more convenient. I now read briefs on my laptop at home and answer emails or calls just about anywhere to my wife’s chagrin. There is a lot less need to be in a traditional office. The workplace is everywhere. This has made things easier, but not always more efficient. A large portion of my day is spent dealing with obtaining and retaining electronic data. Hiring e-discovery vendors, understanding their billing structure, reviewing their bills and insisting they comply with their own rate structure is administrative work and not what many would consider the practice of law. Most cases now involve trying to catch the other side not producing some portion of its electronic data instead of focusing on the relevant issues in the case and how to bring a resolution to them. More attention to focusing counsel on the resolution of the case and providing the leadership to get there is required to avoid getting bogged down in irrelevant issues.”

²⁷⁷ *Id.*

Gilchrest's experience is consistent with the results of a recent survey. According to a survey of general counsel, general counsel believe that their role is changing, to be a more strategic business adviser and a barometer for the business. Boards expect general counsel to be commercially aware and to combine this awareness with their legal knowledge and experience.²⁷⁸

Along those lines, technology has also effected the role of general counsel. "It's not news that advances in technology over the last 20 years have created extraordinary opportunities along with concomitant challenges for virtually everyone, both in business and our personal lives. So, too, for in-house counsel."²⁷⁹ This, according to Neal Winneg, Former General Counsel, of Jumtap, Inc. In a recent interview with In House Advisor, Winneg commented that "the days of one or two law firms handling most of a business's legal needs are over."²⁸⁰ This comment, premised upon the globalization of commerce, tells us that in-house counsel need to be prepared to learn new, technical areas of the law in addition to the areas where they are already strong.

According to Winneg, "the number one factor on which clients focus in evaluating their counsel is responsiveness, and that is an area where in-house counsel have a leg up on outside counsel, in several respects."²⁸¹ Winneg asserts lack of outside counsel's minute-to-minute accessibility as one factor and familiarity with the business as a second factor in giving in-house counsel the leg up. Winneg notes that in-house counsel are "in a position to provide advice more

²⁷⁸ KPMG Survey, *supra* note 2.

²⁷⁹ Shep Davidson, *Tips From the Inside: Neal Winneg, Former General Counsel, Jumtap, Inc.*, The In-house Advisor (June 12th, 2014), <http://www.in-houseadvisor.com/2014/06/12/tips-from-the-inside-neal-winneg-former-general-counsel-jumtap-inc/>.

²⁸⁰ *Id.*

²⁸¹ *Id.*

quickly, needing less background information about how the business operates, because we already know it.”²⁸² Richard Susskind, author of “Tomorrow’s Lawyers: An Introduction to Your Future” observed, “In short, tomorrow’s lawyers will need to be more in tune with tomorrow’s clients...In other words, (today) many law firms lack empathy. They fail to put themselves in their clients’ shoes and see the business from the clients’ perspective.”²⁸³ A recent survey conducted by Legal Market analysts lends support to Winneg’s beliefs. In a recent survey, the Legal Marketing Association reported that more than half of the law firms surveyed did not have a client experience strategy in place.²⁸⁴

According to Dave Galbenski, “Senior business leaders are increasingly asking the legal department to do more with less – to reduce the risk but accomplish this while being cost conscious.”²⁸⁵ Galbenski finds increasingly that general counsel are focused on creating value and leveraging some of the new business models in legal services such as using alternative legal service providers, engaging in legal process outsourcing (LPO) or even shifting corporate legal work to “large enough” law firms.²⁸⁶ “Twenty years from now the acronym “GC” might more accurately define the top corporate legal role as a “general contractor” rather than “general counsel.”²⁸⁷

²⁸² *Id.*

²⁸³ See Susskind, n. 274, p. 67-68.

²⁸⁴ *One North Study*, Strategies: The Journal of Legal Marketing by LMA (May/June 2014), available at <http://www.legalmarketing.org/strategies>.

²⁸⁵ Frank Strong, *Legal Tech Briefs: Future of Corporate Counsel with Dave Galbenski*, (April 16, 2014), <http://businessoflawblog.com/2014/04/future-corporate-counsel/>.

²⁸⁶ *Id.*

²⁸⁷ *Id.*

Susskind notes, “In house lawyers of the future will not only be more demanding on costs; they will be more discerning about the relationships they choose to cultivate with external firms.”²⁸⁸

Gilchrest commented on this aspect of his work as well. “Corporations are much more sophisticated consumers of legal expertise in the 21st century. Likewise, in house counsel have become more sophisticated in law firm management and utilization. There is now greater emphasis on vetting many different types of firms for work and getting the most competitive rates on every matter. Billing rates are tracked electronically and compared to other similar lawyers in the region or practice area. There is also the constant push to keep outside counsel fees flat or down. New technology has also made it easier to review bills and budget case expenses. Big cases are now staffed with virtual (multiple) law firms or teams. An in house attorneys’ responsibilities include coordinating several firms in different geographic regions who are handling different issues in the same lawsuit. Lawyers working on the same matter do not always see eye to eye and often have competing agendas and in house counsel must provide strong leadership and direction to take advantage of using virtual firms. The same is true of managing experts. There is more emphasis on hiring the best experts at the most competitive rates and requiring them to prepare and stick to a budget. Expert costs are also tracked electronically. Technology has made it easier to budget and track costs but there is no substitute for working one on one with outside counsel to achieve the best case result at a fair fee.”

The future of the general counsel role was the study of a recent survey put together by the Association of Corporate Counsel (ACC) entitled Skills for the 21st Century General Counsel. “Eighty-Four percent of those surveyed said that legal management was among the top three

²⁸⁸ See Susskind, n. 274, p. 65-66.

values added to a company by the general counsel today, but that number dropped to only 64% that believed this would hold true in five to ten years.”²⁸⁹ According to the survey, counselor-in-chief skills and strategy are expected to become even more important in the coming years. In fact, “71% of general counsel surveyed expect that “strategic decisionmaking will become a top three value-driver for legal department heads in the next five to 10 years.” “This means both legal strategy, which is already a key part of the game, as well as overall business strategy.”²⁹⁰ “Attorneys must now manage issues with less internal resources and follow directives to utilize outside firms to a lesser degree as cost concerns play an even bigger role in the decision-making process.”²⁹¹

Speaking from their perspective, in a recent survey, Chief Legal Officers indicated on a scale of zero to ten that law firms are at a three in being serious about changing their legal service delivery model to provide greater value to clients as opposed to simply reducing rates, with zero being not serious at all and ten being law firms doing everything that the can.²⁹² Law firm leaders, when presented with the same question, using the same scale, weighed in with a median of five.²⁹³

²⁸⁹ Matt Faustman, *What the Future Holds for General Counsel*, Upcounsel (Jan. 29, 2014), <http://blog.upcounsel.com/general-counsel-of-the-future/>.

²⁹⁰ *Id.*

²⁹¹ Shep Davidson, *Tips From the Inside: Keith Wexelblatt, Associate General Counsel, Reebok International Ltd.*, The In-house Advisor (April 3, 2014), <http://www.in-houseadvisor.com/2014/04/03/tips-from-the-inside-keith-wexelblatt-associate-general-counsel-reebok-international-ltd/#.U7rxxXYaXZc>.

²⁹² Thomas S. Clay & Eric A. Seeger, *2014 Law Firms in Transition: An Altman Weil flash Survey*, Altman Weil (2014), available at http://www.altmanweil.com/dir_docs/resource/f68236ab-d51f-4d81-8172-96e8d47387e3_document.pdf.

²⁹³ *Id.*

Within the same survey, 34.4% of law firm leaders viewed corporate law departments as the most likely change agent in the legal market over the next ten years.²⁹⁴ Other noted change agents include technological innovations (31.6%), non-firm providers of legal services (15.4%), law firms (10.2%) and Gen X lawyers (8.4%).²⁹⁵ While the 34.4% was the comparison of law firms of all shapes and sizes, 62.5% of law firm leaders in law firms with over one thousand attorneys believed that corporate law departments would be the most likely change agent, compared with only 21% of law firm leaders in firms between fifty and ninety-nine lawyers.²⁹⁶

VI. Conclusion

The legal profession is not going to become extinct. Lawyers have valuable services and skills to provide and a host of methods in which to provide those services. Much like any profession or industry, lawyers, law firms, and the legal profession as a whole must evolve to meet their client's needs. As John F. Kennedy stated, "Change is the law of life. And those who look only to the past or present are certain to miss the future." Contrary to the thought process of some, lawyers and corporations are not at odds with one another and evolution into the 21st Century practice should not be considered adversarial. Instead, law firms and their clients, whether corporate, or industry, must work together to develop innovative and effective solutions that make the relationship, not only workable, but beneficial to each other.

Included within the evolution, however, so must go the regulation. The ABA and the State Bar Associations must examine the permitted use of alternative business structures and develop a strategy to regulate the structures. As history has taught us, law firms did not just get created overnight. It took time to develop the internal structure of the law firm and it will take

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

time to develop the regulations to go along with the ever changing structure, practice and client expectations. Nonetheless, the time is now. Law firms must face the problems head on and develop strategies that allow the practice to grow, perhaps not by numbers, but by strength. The legal profession might take advice from one of the most successful athletes of all time, Michael Jordan, “I believe greatness is an evolutionary process that changes and evolves era to era.” In this regard, lawyers, often compared to many animals, should choose to be like the cockroaches and crocodiles, existing for millions of years by changing with the times.

“Affordable Care Act Impact on Medical Technology and Pharmaceutical Industries in an Age of Cost Containment”

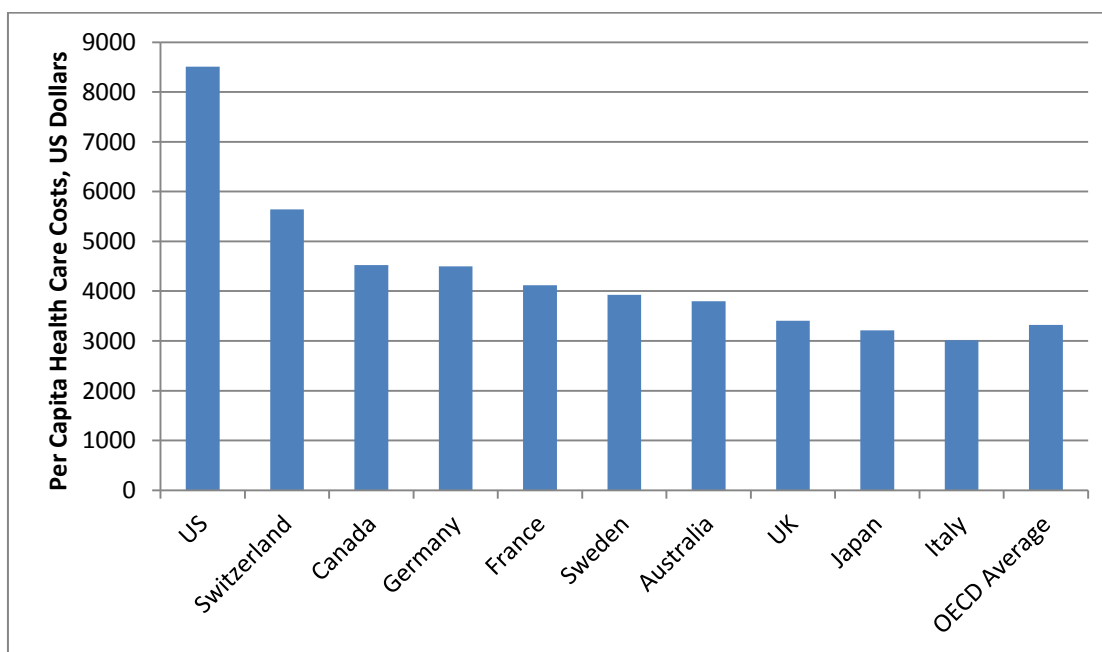
FDCC Drug, Device, and Biotechnology Section
White Sulphur Springs WV
2014 Annual FDCC Meeting

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I. INTRODUCTION

The Patient Protection and Affordable Care Act together with the Health Care and Education Reconciliation Act of 2010, also known collectively as the “Affordable Care Act” (ACA), greatly transformed the U.S. health care system through an expansion of coverage through tax subsidies, regulated marketplaces, and publically-financed government health programs. The ACA also changed what health insurance had to cover and how much health plans could stratify risk based on demographic information.

In addition to the many reforms that changed health insurance, the ACA also focused on improving the quality of our public health and healthcare delivery system, while also focusing on ways to reverse the trend of medical spending that ranks the U.S. as the nation that spends more per person and as a percentage of GDP than any other industrialized country in the world.



Source: OECD, *OECD Health Statistics 2013*, November 2013.

As many health care analysts have pointed out, whether one agrees or not with the ACA's coverage expansion, there is no denying that one side effect of expanding coverage and benefits, will be an exacerbation of the flaws and inefficiencies already embedded in the health care system. The manifestation of those flaws will usually be through waste and higher costs for consumers, payers, and society as a whole.

As medical technology companies and the biopharmaceutical industry continue to innovate through more sophisticated diagnostics and breakthrough therapies, the issue of their contribution to increasing or decreasing health care costs has quickly ascended as a top concern for many policymakers and stakeholders alike. The recent outcry over the unanticipated high utilization of Gilead Science's Hepatitis C drug, Sovaldi™, is the most recent example of the rising focus on the biopharmaceutical industry's role in health care spending.

Similarly, medical device manufacturers, diagnostic companies, and other suppliers are facing a series of headwinds ranging from reimbursement cuts to alternative payment models to competitive bidding.

This paper will provide an overview of major initiatives and provisions that are being implemented this year, either directly as part of ACA implementation, or that are very closely aligned with the ACA to improve the chances for a sustainable, post-ACA system.

Below is a timeline highlighting key ACA provisions that impact the medical technology and pharmaceutical industries. Interestingly, almost all the provisions in the health reform law that related to drugs and devices either aimed to increase access to and/or lower the cost to payers/consumers. However, in some circumstances such as the medical device tax, the sole intent is to help defray costs for other ACA initiatives.

2010		
Regulation	Implementation	Description
Comparative Effectiveness Research (PL 111-148 §6301)	Appropriations beginning FY 2010	Establishes a non-profit Patient-Centered Outcomes Research Institute to conduct research that compares the clinical effectiveness of medical treatments.
Medicare Beneficiary Drug Rebate (PL 111-152 §1101)	January 1, 2010	Provides a \$250 rebate to Medicare beneficiaries who reach the Part D coverage gap in 2010. Further subsidies and discounts to ultimately close the coverage gap begin in 2011.
Medicaid Drug Rebate (PL 111-148 §2501)	January 1, 2010 for Medicaid drug rebate percentage; March 23, 2010 for extension of rebate to Medicaid managed care plans	Increases the Medicaid drug rebate percentage for brand name drugs to 23.1% and to 13% of average manufacturer price for non-innovator, multiple source drugs. Extends the drug rebate to Medicaid managed care plans.
Physician Payments	Final Rule passed	Requires manufacturers of drugs, medical devices,

Sunshine Act (PL 111-148 § 6002)	February, 2013. Collection began August, 2013. Reporting beginning June, 2014.	and biologics that participate in US federal health care programs to collect and report financial relationships with physicians and teaching hospitals.
Generic Biologic Drugs (PL 111-148 §7002)	March 23, 2010	Authorizes the FDA to approve generic versions of biologic drugs and grant biologics manufacturers 12 years of exclusive use before generics can be developed.
Tax on Indoor Tanning Services (PL 111-148 §10907)	July 1, 2010	Imposes a tax of 10% on the amount paid for indoor tanning services.
Expansion of 340(B) Drug Discount Program (PL 111-148 §7101)	Applications beginning August 2, 2010	Expands eligibility for the 340(B) drug discount program to sole-community hospitals, critical access hospitals, certain children's hospitals, and other entities.
2011		
Closing the Medicare Coverage Gap (PL 111-148 §3301)	January 1, 2011 (drug discount)	Requires pharmaceutical manufacturers to provide a 50% discount on brand-name prescriptions filled in the Medicare Part D coverage gap beginning in 2011 and begins phasing-in federal subsidies for generic prescriptions filled in the Medicare Part D coverage gap.
2012		
Annual Fees on the Pharmaceutical Industry (PL 111-148 §9008)	January 1, 2012	Imposes new annual fees on the pharmaceutical manufacturing sector.
Medicare Value-Based Purchasing (PL 111-148 §3001)	October 1, 2012	Establishes a hospital value-based purchasing program in Medicare to pay hospitals based on performance on quality measures. Requires plans to be developed to implement value-based purchasing programs for skilled nursing facilities, home health agencies, and ambulatory surgical centers.
2013		
Tax on Medical Devices (PL 111-148 §9009)	January 1, 2013	Imposes an excise tax of 2.3% on the sale of any taxable medical device.
Closing the Medicare Coverage Gap (PL 111-148 §3301)	January 1, 2013 (federal subsidies)	In 2013, begins phasing-in federal subsidies for brand-name prescriptions filled in the Medicare Part D coverage gap.

Beyond traditional reimbursement cuts, rebates, and other more, draconian methods of cost containment, the ACA authorizes a variety of initiatives that *align payment to ultimately reduce*

costs leveraging alternative payment models (APMs), clinical guidelines, and data reporting. This paper will provide a summary of some of the most significant tools and efforts underway and their implications on the medical technology and pharmaceutical industries. Future actions from policymakers and stakeholders will also be explored.

Transparency has continued to gain traction as a lever that policymakers, especially in publicly-supported health programs like Medicare and Medicaid, have been able to leverage to increase the scrutiny on providers that are far above recent history. The indirect effect on the drug and device industry is likely to be felt in the not-to-distant future as price and utilization continue to face increased public scrutiny.

Finally, the status of the *340B drug discount program* will also be briefly discussed. The ACA expanded the 340B program to a host of different care settings for outpatient drugs, to the chagrin of the drug industry. Recent legal actions have seemingly stymied the federal government's ability to go regulate in some areas of 340 and stakeholders will be closely watching how that impacts an expected "mega-rule" to be published as early as June.

II. ALIGNING PAYMENT, REDUCING COSTS

The ACA set up various programs in an attempt to move the Medicare and Medicaid programs to value based payment systems. The law also created new authorities within the Centers for Medicare and Medicaid Services (CMS), the federal agency charged with administering Medicare and Medicaid, such as the Center for Medicare and Medicaid Innovation ("CMS Innovation Center") which could develop, test, and scale various demonstration projects and the Medicare-Medicaid Coordination Office ("CMS Duals Office") that was charged with aligning financial systems and clinical quality between Medicaid and Medicare payment in various States.

The permanent programs and various demonstrations that continue to be developed have grown in both diversity of topic area and market impact. Although the initial wave of initiatives has mostly focused on inpatient acute care services, the Obama Administration has signaled that future efforts will target the outpatient setting, long term care, and also possibly the drugs, diagnostics, and devices used in expensive outpatient specialty procedures.

This section will describe the evolving APM landscape, the increasing importance of provider-payer engagement, and frameworks for future cost containment for innovative therapies.

A. Medicare Alternative Payment Models

1. Accountable Care Organizations

The ACA promoted the creation of Accountable Care Organizations (ACOs), entities that bring together physicians, hospitals, long term care facilities and others to better coordinate services

while sharing in financial risk.¹ ACO participants are in one of two different tracks: the Medicare Shared Savings (MSSP) program or the Pioneer ACO Model.

The MSSP provision of the ACA requires CMS to create a legal structure that would allow ACOs to receive and distribute payments for shared savings to their participating providers and suppliers. The shared savings are a percentage target set below a historical Medicare trend price, based on the attribution population. There are currently approximately 340 MSSP ACOs participating in various tracks that allow for different levels of shared savings depending on the amount of risk a particular ACO wishes to take.

The Pioneer ACO Model, which was the program set up for more experienced integrated health care systems, tests the effectiveness of a combination of: (1) payment arrangements that place a group of providers at joint risk for quality performance and financial performance for the majority of their patients and revenues (Medicare and non-Medicare); (2) more opportunities to share savings balanced by an immediate and generally higher level of shared-risk (compared to MSSP); (3) required transition to population-based payment by the third performance year; and, (4) technical support in the form of rapid data feedback and shared learning activities.

ACOs are important because they represent two trends that do not appear to be abating: 1) provider consolidation and 2) the shifting of risk from payers to providers. Although group purchasing organizations and pharmacy benefit management have already done a lot to decrease the price of drugs and supplies over the past few decades, ACOs represent another step in even more market share owned by fewer providers and across the care spectrum.

The shifting of risk from payers to providers is most significant because providers are forced to examine their costs from a global level. From imaging use to medical devices and reduction of specialist visits, the ACO model incentivizes providers to take a much more active role in price-quality comparisons for supplies that are designed for similar purposes, but vary in cost and effectiveness. As the ACO model continues to evolve, especially via the Pioneer ACO program, it is likely that CMS will explore additional ways to align payment and modify Medicare rules to support provider decisions based on quality and to also remove incentives that may benefit higher utilization and/or the use of higher priced goods and services.

The Pioneer ACO program is likely where stakeholders will see where CMS is willing to show the most flexibility and simultaneous aggressiveness. While the Pioneer ACO program is only open to the existing 23 ACOs currently participating, on December 20, 2013, CMS published a Request for Information (Pioneer RFI) seeking input on how to create the next generation Pioneer ACOs and re-open an application process. The new Pioneer RFI signals an intent to expand and improve the ACO program via the more flexible and autonomous authority granted to the Innovation Center through the ACA rather than through the permanent MSSP that is currently being administered through normal rule-making processes.

The Pioneer RFI touches on issues currently not at play for any Medicare ACOs e.g. whether Part D, the Medicare drug coverage program, should be included as part of an ACO's total costs; whereas currently, drugs are not included mostly because of stakeholder concerns that reducing

¹ Patient Protection and Affordable Care Act, Pub L No. 111-148, §3022 and §3021

drug utilization could have harmful effects on patient health. The Pioneer RFI also explores the agency’s consideration of the benefits and concerns of reducing payments to Durable Medical Equipment suppliers who sell their products to beneficiaries receiving care from Pioneer ACOs.

Finally, stakeholders are eagerly awaiting a proposed rule for the Round 2 MSSP contracts. CMS is likely to make some changes to the MSSP program, borrowing from some lessons learned in the Pioneer ACO model, for the contract year beginning in January 1, 2016. The MSSP rule, together with the recent RFI that may reopen/broaden the Pioneer ACO program, will be an important step in determining whether a new wave of providers will seek to form ACOs and how meaningful the implications will be for suppliers such as drug and device companies in particular.

2. Bundled Payments

Although some health policy experts view bundled payment approaches only as “stepping stones” to more global approaches to delivery reform such as ACOs, the opportunity to manage a patient’s care with a predetermined price has appealed to providers and policymakers alike since the implementation of the first Diagnostic Related Group (DRG) system in Medicare in 1983.

The ACA and many other legislative efforts have focused on bundled payment approaches to delivery reform, most likely because providers are able to focus all their attention on a particular disease or procedure and redesign the care within a set period of time. CMS has focused on bundled payments in a big way, most notably through their Bundled Payments for Care Improvement (BPCI) initiative.

The BPCI initiative was created to test various forms of episode-based payment relating to specific clinical conditions, such as a joint replacement or stroke. Each BPCI episode groups a family of related DRGs for the condition and contains a set of exclusions based on DRGs and ICD-9 diagnosis codes, as well as a specified episode length and discount rate.

BPCI participants are responsible for virtually all Part A and Part B expenditures in a particular episode, including readmissions regardless of where the readmission occurs. Unlike the ACO program, providers keep all the savings they accrue under the target price, because just like a normal DRG, providers are given a predetermined price for a particular episode of care.

The following description of the most popular bundled payment approaches being tested by CMS today, BPCI Model 2 (acute care + post-acute) and Model 3 (post-acute only), may be helpful in understanding how the bundled payment models are administered.

BPCI Model 2 and Model 3 Description
BPCI Model 2 is a retrospective bundled payment program for acute and post-acute care services. BPCI Model 3 is a retrospective bundled payment program for post-acute services following an acute care hospital stay that occurred in the prior 30 days.

Eligible Participants

Eligible Model 2 participants include Physician Group Practices, Acute Care Hospitals paid under the Inpatient Prospective Payment System (IPPS), health systems, and Physician Hospital Organizations.

Eligible Model 3 post-acute provider participants include Physician Group Practices, Acute Care Hospitals paid under IPPS, health systems, Long-Term Care Hospitals (LTCH), Inpatient Rehabilitation Hospitals (IRF), Skilled Nursing Facilities (SNF), Home Health Agencies (HHA), and Physician Hospital Organizations.

Episode Initiation

- Model 2 episodes are initiated when a beneficiary has an inpatient stay at an episode-initiating IPPS hospital.
- Model 3 episodes are initiated when a beneficiary is admitted to an episode-initiating provider, which can be an IRF, SNF, HHA or LTCH. Within the previous 30 days, the beneficiary must have been discharged from an acute care provider for one of the agreed-upon MS-DRGs (anchor admission).

Episode Length

Episodes may be 30, 60, or 90 days in length.

Target Price

CMS negotiates a discounted target price for a bundle of services that include all Part A and Part B services provided during the 30-, 60-, or 90-day episode, except those that are explicitly unrelated. Target prices are set per MS-DRG and represent what would have been paid to the provider absent of the initiative, but including the discount.

Initial Episode Payments

All care provided under the episode is initially paid under traditional Medicare fee-for-service rules.

Payment Reconciliation

On a quarterly basis, all payments relating to a specific beneficiary, including any readmissions during the episode period, are reconciled against the predetermined discounted target prices. If the actual claims paid are higher than the discounted target price, the payment reconciliation contractor will pull back funds from the awardee. Conversely, if the actual claims are lower than the discounted target price, the contractor will pay out funds to the awardee.

Post-Episode Spending Calculation

In order to discourage cost-shifting, a post-acute payment reconciliation process conducted on an annual basis will evaluate whether there are increases in Medicare costs beyond a risk threshold during the 30-day period following the end of the episode, compared to historical expenditures. The awardee is responsible for the amount of excess spending that extends beyond the risk-adjusted threshold.

Past experience in bundled payment demonstrations indicates that most hospitals will reduce costs through length of stay, negotiating medical device prices and variety of utilization, and better coordination between specialists and care settings to reduce opportunities for infection and readmissions.² As adoption of bundled payment approaches become more pervasive, policymakers and providers will be seeking longer and broader bundles that encapsulate new potential cost savings.

Indeed, CMS has already indicated that they plan to expand their footprint in bundled payments as early as this year. Citing the need to complement a portfolio of pilot projects that focus mostly on primary care and the inpatient setting, CMS released a RFI on February 11th, seeking input on potential payment and care delivery models that focus on outpatient specialty care and complex/chronic disease management care.

As compared to the initiatives currently underway at CMS, this latest RFI has the potential to impact a broader group of health care stakeholders, such as drug manufacturers, diagnostic companies, laboratories, and a variety of physician specialty providers ranging from anesthesiology to radiology.

The new pilots embedded in the latest RFI will address outpatient procedures and chronic disease management. For the outpatient model, the RFI specifically identifies colonoscopy and cardiac catheterization as procedures that could be good candidates for new episode-based payments and identifies services such as anesthesia, pathology, radiology, Medicare Part B and D drugs, diagnostics, and facility payments as potential components to be included in the episode-based payment.

The chronic disease management concept builds on the existing BPCI initiative but focuses on chronic disease for a time period well beyond the 30 or 90 day window traditionally used for more acute care-focused episodes.

With the exception of oncology, which CMS has already spent the better part of a year developing, the RFI proposes a broad array of potential services and conditions that could be candidates for episode-based payment. The considerations for procedures and services that could be targeted are identified as:

1. Historical variation in utilization and payment;
2. Extent to which this variation is under the practitioner's control; and
3. Ease with which the practitioner responsible for the episode can be identified.

² See "Evaluation of Medicare ACE Demonstration" *available at* <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=7&cad=rja&uact=8&ved=0CFMQFjAG&url=http%3A%2F%2Fwww.reginfo.gov%2Fpublic%2Fdo%2FDownloadDocument%3FdocumentID%3D204520%26version%3D1&ei=avGLU5WulpW0sAS04IGYBg&usg=AFQjCNGGMdkLqdi-HaJQCTuV6YPoGMNB1Q>

What is evident from this latest RFI and the direction the BPCI initiative, is that policymakers and providers alike are broadening their scope of delivery reforms to areas beyond physician services and facility fees. Drugs and devices and increasingly advanced diagnostics, are quickly becoming “in-play” for care redesign initiatives and their value will be even further scrutinized.

B. Changing Role of Physicians as Providers

The ACA does not explicitly require providers, and physicians in particular, to transform their role in the health care cost context. Rather, the law aims to leverage quality reporting and performance-based incentives/penalties to create an environment where providers will naturally come to weigh costs against quality, creating a new framework for clinical decision-making focused on “value”.

Health reform created a series of incentives that align reimbursement around quality reporting, such as through the Physician Quality Reporting System (PQRS) which collects data on quality measures for covered professional services furnished to Medicare beneficiaries.³

Medicare’s physician feedback program is also being expanded to include the development of individualized reports. These reports will compare the per capita utilization of resources and services for a specific episode of care between physicians in the Medicare program.⁴

The ACA also implemented value-based purchasing, which ties a percentage of Medicare payments to performance based on quality measures. The resulting pay-for-performance mode, a shift from the current pay-for-care-volume mode, is intended to improve health outcomes and lead to savings over time.

Medicare payments under value-based purchasing will be based on risk-adjusted performance data. The performance data will include measures of quality that reflect health outcomes, as well as resource use or costs of care. Medicare will begin adjusting payments to some physicians based on their performance in 2015.⁵ The performance based payment will apply to all physicians participating in Medicare beginning in 2017.

Beyond the various pay-for-performance and pay-for-reporting provisions directly including in the ACA, there are also important initiatives with an indirect link to the health reform law that could have an even greater impact on the role of physicians as providers.

In December, 2011, the American Board of Internal Medicine (ABIM) Foundation developed a campaign to expand the responsibility of physicians from simply “deliverers of care” to also

³ For more information on PQRS see: Centers for Medicare and Medicaid Services. United States Department of Health and Human Services. Physician Quality Reporting System. <https://www.cms.gov/PQRS/>.

⁴ Patient Protection and Affordable Care Act, Pub L No. 111-148, § 3003.

⁵ Patient Protection and Affordable Care Act, Pub L No. 111-148, § 3007.

“stewards of health care resources”. The idea of health care stewardship was to empower physicians as the closest link between patients and the rest of the health care system. Focusing on evidence-based clinical pathways that would reduce unnecessary testing and procedures, the ABIM Foundation launched their “Choosing Wisely Campaign” that asked physician specialty societies to create public lists of the top five tests or procedures their specialties were potentially over-utilizing.

To date, over fifty clinical specialty societies have created their “Choosing Wisely” top 5 lists. Because of the nature of overutilization, the most common areas of focus are around unnecessary advanced imaging and narrowing the application of certain medical devices. A few examples of “Choosing Wisely” recommendations include:⁶

Society of Nuclear Medicine and Molecular Imaging: Don’t use PET/CT for cancer screening in healthy individuals. The likelihood of finding cancer in healthy adults is extremely low (around 1%), based on studies using PET/CT for screening. Imaging without clear clinical indication is likely to identify harmless findings that lead to more tests, biopsy or unnecessary surgery.

American Academy of Orthopaedic Surgeons: Avoid performing routine post-operative deep vein thrombosis ultrasonography screening in patients who undergo elective hip or knee arthroplasty. Since ultrasound is not effective at diagnosing unsuspected deep vein thrombosis (DVT) and appropriate alternative screening tests do not exist, if there is no change in the patient’s clinical status, routine post-operative screening for DVT after hip or knee arthroplasty does not change outcomes or clinical management.

American Society of Anesthesiologists: Don’t use pulmonary artery catheters (PACs) routinely for cardiac surgery in patients with a low risk of hemodynamic complications (especially with the concomitant use of alternative diagnostic tools). The use of a PAC during cardiac surgery has been associated with increased mortality and a higher risk of severe end-organ complications. There is clear consensus in the literature that the use of a PAC cannot be recommended as a matter of routine, but for a definite role in a very select group of patients undergoing cardiac surgery.

What is novel about “Choosing Wisely”, is that the physician community has itself, identified procedures and tests they believe are unwarranted, or at least should be narrowed in its current application. This affirmative and proactive approach to get out ahead of additional requirements from Medicare, Medicaid and even commercial payers, may serve to moderate a wave of new initiatives that are imposed on physicians without their buy-in. For regulators, the change in utilization (and variation of utilization) in advanced imaging for example, will indicate how payment systems need to evolve.

⁶ For the full list of Choosing Wisely recommendations see: <http://www.abimfoundation.org/Initiatives/Choosing-Wisely.aspx>

A stark example of the changing role of physicians as active participants in the debate over the cost of pharmaceuticals in particular, came as the American Society of Clinical Oncology (ASCO) convened a task force, including payers, to address rising costs of new drugs and technologies used in the diagnosis and treatment of cancer.

Citing the explosion of new biopharmaceuticals to treat cancer and unprecedented prices that accompany them, ASCO determined as a professional society, that if physicians as prescribers did not consider costs more actively, then the ability for patients to be able to afford the therapies in question could ultimately be compromised.⁷

Of critical importance for the biopharmaceutical industry in particular, is ASCO's intent to develop an algorithm for various therapies that could be used to determine the clinical effectiveness and drug toxicity associated with a particular treatment and then integrate those factors with the cost(s). Ultimately, this algorithm could yield a value that would be used to recommend certain drugs over others and simultaneously exert pressure on the biopharmaceutical industry to lower the cost of oncology drugs. ASCO has indicated that they will be adapting the algorithm initially for use on therapies used for advanced non-small cell lung cancer, prostate cancer, and multiple myeloma.

C. Additional Policy Options Ahead

As APMs broaden their scope and physicians take a leadership role in defining value for their patients and the health care system as a whole- commercial and public payers are still cognizant that changing the entire payment system in a few years will be impossible. The fee-for-service system is still in large part, the underlying basis for how virtually all health care in the U.S. is paid for and delivered.

Thus, payers and the drug, diagnostic and device industries alike, have been considering other policy alternatives that could help during the longer transition towards population-based payment. For example, most commercial payers, especially in the individual market that the ACA exchanges were created to mainly serve, are unable to bear the cost of an innovative therapy that may have a very high up front cost, but have long term cost savings over the course of many years.

1. Mortgaging Costs

For programs like Medicare and Medicaid, long term contracts are a matter of basic structure, but for commercial insurers, the eventual cost savings from a very expensive clinical innovation won't be justified within the timeframe that they usually have a particular member contracted for. The idea of "mortgaging" costs for expensive therapies could be one mechanism where a

⁷ Cavallo, Jo, "ASCO Develops New Strategy to Increase Value in Cancer Care", *available at*: <http://www.ascopost.com/issues/may-15,-2014/asco-develops-new-strategy-to-increase-value-in-cancer-care.aspx>

payer reimburses for a drug as an example over the course of several years where the cost benefits from avoided hospitalizations or additional treatment could help mitigate some of the high cost. Additionally, similar to a mortgage on a home, if the patient chooses to move to a new health plan, then that new insurer assumes the remainder of the mortgage because they will benefit from the previous use of the therapy.

The idea of biopharmaceutical mortgages is at best a method to justify up front cost and return on investment, but at worst is simply amortizing unsustainable prices that cannot be justified completely by reduced expenditures in the long term. Yet, in the wake of the Sovaldi™ issue, mortgaging expensive therapies seems to be at least one preferred option over federal government price-setting.

2. Reducing Price Variation

Without fully committing to price-controls, some policymakers believe that an initial step is to reduce the gap between product prices domestically and abroad. Again, the Sovaldi™ example provides a stark contrast where a full three month regimen in the U.S. costs approximately \$84,000 as compared to \$900 in Egypt for the same.⁸ The policy options range from means-testing in the U.S. to average sales price benchmarking on a global scale.

Especially in European countries where costs are very transparent, it is becoming more difficult for companies to obfuscate drastic price differentials for the same products. In general, as transparency increases, stakeholders will demand equity, or at least competitive comparativeness.

3. Comparative Effectiveness

Comparative effectiveness research is designed to test different health care interventions (such as drugs, devices, treatment protocols, or services) against one or more other interventions. The ACA created a new Patient-Centered Outcomes Research Institute (PCORI) to develop research priorities and help fund comparative effectiveness research using \$3.5 billion from the PCOR Trust Fund to fund patient-centered outcomes research through September 30, 2019.⁹

Although comparative effectiveness in other countries such as the United Kingdom take cost into consideration, the ACA expressly prohibited PCORI from using "dollars-per-quality adjusted life year (or similar measure that discounts the value of a life because of an individual's disability) as a threshold to establish what type of health care is cost effective or recommended."¹⁰

Despite the current prohibition in taking cost into account, the efforts of PCORI, coupled with other complimentary efforts from other Federal Government agencies could end up offering

⁸ Seeking Alpha. "Gilead discounts Sovaldi 99% for Egypt" available at <http://seekingalpha.com/news/1639903-gilead-discounts-sovaldi-99-percent-for-egypt> ; March 21, 2014

⁹ Patient Protection and Affordable Care Act, Pub L No. 111-148, §1183 and §9511

¹⁰ *Id.*

critical data to consumers, payers, and providers (in addition to regulators) that will add additional scrutiny over pricing and return on investment.

4. Price/Profit Controls

Besides all-out price controls, stakeholders have suggested numerous possibilities where policymakers could exert stricter limitations on how much a drug, device, or even diagnostic could be utilized and reimbursed for. Beyond coverage decisions and reimbursement formulas however, some stakeholders have suggested that in a post-ACA world, suppliers and manufacturers should be regulated to the same extent as the insurance industry.

A major reform in the ACA was the application of the Medical Loss Ratio (MLR), a formula that calculates per dollar spent on actual medical care versus administrative costs and profits, as a universal threshold for health insurance companies. In the individual market, insurance carriers are required to spend at least 80 percent of every dollar on clinical care (quality improvement and care management activities can also be included) and 85 percent in the group market. If the carriers do not meet that threshold, then they are required to pay back the difference through a rebate check directly to consumers.

Although it would require an act of Congress, commercial insurers have been vocal in pushing for fairness in the regulation of profit in the health care system. Clearly, a MLR for medical technology or pharmaceutical companies would be met with the strongest resistance, but the fact that insurers are starting to publicly socialize the idea is yet another headwind for an industry that justified a majority of their continuously increasing margins on the input costs of research and development. An MLR for drug/device companies would codify and regulate R&D, marketing, and profit- an industry-changing proposition.

III. Rising Use of Transparency to Constrain Costs

A. Public Medicare Data

During the past year, policymakers have focused the public's attention on new releases of raw data that relates to pricing and utilization. Starting in May 2013, CMS published the hospital pricing for the one hundred most common Medicare inpatient stays. In the months that followed, the agency continued to release data including the average estimated submitted charges for 30 types of hospital outpatient procedures, information on Medicare spending and utilization at the county, state, and hospital-referral region, and the prevalence of certain chronic conditions among Medicare beneficiaries.

Then in April 2014, CMS released the 2012 billing data for all physicians who bill Medicare. More than any of the data releases prior to that, the physician billing data was a dramatic move

by CMS, which identified individual physicians as some who made fortunes off of the Medicare program.

Most of the organized physician community organizations strongly rebuked the data release over concerns over the ability to fact-check or change the payment data before its public release. Additionally, they asked CMS to provide more disclaimers with the data to mitigate possible public backlash based on the raw data file. For example, some physicians used one provider identification number as a group, greatly inflating their apparent billing. However, there were other examples of individual physicians who seemed to bill individually far beyond their peers.

All told, the data showed that approximately two percent of physicians accounted for about one quarter of total Medicare spending and only one quarter were responsible for three-quarters of the spending.¹¹ In the face of physician groups' pushback, the agency has committed to even more open data initiatives in the coming months and years, citing the importance of transparency and accountability in our tax-payer funded health programs.

The move to promote price and utilization transparency has not been limited to federal spending either. For example, in 2013, CMS made \$87 million available to states to enhance their rate review programs and further health care pricing transparency initiatives at the state level.

What this means for drug and device manufacturers is at least two-fold: 1) drug and device utilization and prices are likely to be areas where policymakers increase transparency efforts and 2) other stakeholders that are feeling overly scrutinized over costs will look to suppliers as an area where they can reduce costs. The ACA did not explicitly require the use of transparency as part of its implementation of delivery reforms; however, the continuing trend points to an aggressive growth in the use of publically released reimbursement and utilization data as yet another tool in the arsenal to battle rising health care costs.

B. Sunshine Act and other Potential Transparency Legislation

The ACA's one major transparency provision that virtually all health care stakeholders are aware of is the Physician Payments Sunshine Act ("Sunshine Act"), which requires manufacturers of drugs, medical devices and biologicals that participate in U.S. federal health care programs to collect, track, and report financial relationships with physicians and teaching hospitals. Any payment over \$10 must be reported.

Payments for research, speaker's honoraria, travel expenses, meals, entertainment, gifts, educational materials, paid participation on an advisory board, and writing manuscripts must be reported. The law was introduced independently by Senator Chuck Grassley after his multiple investigations into whether relationships between manufacturers and physicians were unethical and incorporated into the final passage of the ACA.

¹¹Whorisky, Peter. "Data uncover nation's top Medicare billers". Washington Post *available at* http://www.washingtonpost.com/business/economy/data-uncover-nations-top-medicare-billers/2014/04/08/9101a77e-bf39-11e3-b574-f8748871856a_story.html

CMS issued a final rule on the provision in February, 2014.¹² Beginning on August 1, 2013, manufacturers were required to begin collecting and tracking payment, transfer, and ownership information. After that, manufacturers must submit data on an annual basis. They were required to report their 2013 data by March 31, 2014, but CMS' build-out of its database was behind schedule. Data submission will now begin on June 1. On September 30, CMS will make most of this data available on a public website.

A major concern for biopharmaceutical and medical device manufacturers is the human and financial resources needed to collect, track, and report financial relationships. Before the rules were finalized, many manufacturers began collecting this information on their own. However, the greater cost is that manufacturers have been concerned, as the physician groups were towards the release of their Medicare billing data, that without proper context patients may misinterpret information about their physicians and trust them less. As a result, physicians may be less willing to engage in partnerships with manufacturers, leading to less frequent and less meaningful interactions.

Beyond the Sunshine Act, policymakers and even private sector companies have focused on additional areas where public disclosure could create efficiencies and potentially lower costs. Such recent examples include:

- A startup called Procured Health secured \$4 million in first round funding from FCA Venture Partners in March, 2014, to build subscription-based software for hospital systems to increase medical device price transparency.
- Senator Ed Markey (D-MA) previously introduced the Trial and Experimental Studies Transparency (TEST) Act in May, 2013, to expand the clinical trials that must be reported to the clinical trial registry bank.
- Rep. Joe Pitts (R-PA) introduced the Improving Regulatory Transparency for New Medical Therapies Act, which aims to improve the transparency and consistency of Drug Enforcement Agency review of pharmaceuticals. It will be marked up in an Energy and Commerce Committee in May 2014.

Finally, states have taken a very active role in transparency initiatives including all-payer databases to publically available itemized billing. A very useful guide for state actions in health care transparency for costs and/or utilization is the National Conference of State Legislatures website (<http://www.ncsl.org/research/health/transparency-and-disclosure-health-costs.aspx>).

¹² Medicare, Medicaid, Children's Health Insurance Programs; Transparency Reports and Reporting of Physician Ownership or Investment Interests, available at <https://www.federalregister.gov/articles/2013/02/08/2013-02572/transparency-reports-and-reporting-of-physician-ownership-or-investment-interests-medicare-medicaid>.

IV. 340B Drug Discount Program¹³

2014 already started off seeming to be a major one for the 340B Drug Discount Program. Stakeholders saw: 1) a first in terms of the Health Resources and Services Administration (HRSA) imposing sanctions on audited entities, (2) written arguments in a lawsuit over the rules governing 340B access to orphan drugs, and (3) increased funding for HRSA oversight through the recently-passed Omnibus Budget Act. But it is HRSA's planned publication of regulations in June (also known as the "mega-rule") that may have the greatest impact on 340B Program operations (most likely before publication of this paper).

In recent years, there has been a constant flow of criticism of 340B Program operations. Drug manufacturers have criticized HRSA for allowing 340B drugs to be used by individuals who have government or private insurance, therefore increasing profits for hospitals and pharmacies. On the other hand, 340B entities have argued that they rely on the promise of proceeds through the 340B Program to expand services to needy populations and argue that manufacturers are needlessly limiting access to 340B drugs and pricing. Congress and the GAO have questioned the dramatic growth in the number 340B covered entities and the use of 340B drugs. A number of critics have focused on HRSA's lack of regulatory guidance as a contributing factor to the perceived problems.

The ACA provides that for certain 340B entities, "the term 'covered outpatient drug' shall not include a drug designated by the Secretary under section 526 of the Federal Food, Drug, and Cosmetic Act [(FFDCA)] for a rare disease or condition." However, when HRSA released their July 2013 regulation, the orphan drug exception only applied to limited types of 340B covered entities, and only applied if the drug at issue is being used for its orphan-approved purpose — meaning that 340B pricing would be available if the drug at issue was being prescribed for another purpose.

The invalidation of the 340B Orphan Drug Exclusion Final Rule is positive for manufacturers that had opposed the rule. However, the reasoning upon which the court relies does not simply invalidate the reasonableness of the policy position that HHS took in the rule; instead, it holds that HHS lacks the authority to issue a rule on this issue at all. The decision could limit HHS' ability to regulate other areas of the 340B program—such as the "patient" definition—for which stakeholders have urged additional clarity and increased regulatory specificity. Accordingly, the ruling could impact the scope and/or release of the pending 340B "mega-rule."

The growing scrutiny of the 340B program is not likely to dissipate regardless of HRSA's ultimate authority to rule on the orphan drug issue. In this particular case, HRSA created exceptions that did not appear in the originating statute. For 340B writ-large, the implementation of an effective and accessible program seems to be squarely in HRSA's authority and necessary for stakeholders. Despite growing scrutiny over how broad 340B is utilized, there remains a great need in many parts of the country to offset the cost of otherwise expensive drugs for the neediest. However, it is clear that policymakers are focused on ensuring that providers are not unduly enriched because of 340B.

¹³ This section written with the assistance of Elyn L. Sternfield, Mintz Levin Cohn Ferris Glovsky and Popeo PC.

“Major Issues Shaping Affordable Care Act Implementation in 2014”

FDCC Drug, Device, and Biotechnology Section

White Sulphur Springs WV

2014 Annual FDCC Meeting

Andrew Shin

I. INTRODUCTION

This paper will provide an overview of where we are today with ACA implementation and what stakeholders can expect to come in the coming months and beyond. The main focus will be to discuss the provisions and milestones that may have the greatest impact on whether the law can be sustained and ultimately hailed as a success or alternatively a failure to deliver on the promise of health care reform.

A. ACA Background and Context for Passage

Shortly after passage of the landmark health care reform legislation, the Affordable Care Act (ACA), on March 23, 2010, most experts and stakeholders supportive of reform praised Congressional Democrats and the Obama Administration for accomplishing what was at several times believed to be an impossible feat.

Indeed, prospects that health care reform would pass looked dim amidst the August town halls filled with what seemed to be a groundswell of public resentment against reform and even dimmer following the January 2010 special election of Scott Brown, a little-known Republican state legislator from Massachusetts, who broke the Democratic filibuster-proof majority by winning the seat once occupied by progressive champion for health care reform, Ted Kennedy.

The House of Representatives had already passed their version of health care reform entitled the *Affordable Health Care for America Act* (HR 3962) on November 7, 2009, by a five vote margin with 39 Democrats voting against and only one Republican voting “yes” in the 435 member chamber. A similar, but significantly different, piece of legislation had passed the Senate a couple weeks later by a 60 to 39 vote margin, just enough to circumvent Republican attempts to stall the legislation through holds and the threat of filibuster.

In order to gain the crucial “60th vote” from moderate and politically vulnerable Democrats, Senate leadership led by Montana Senator and Finance Committee Chairman, Max Baucus,

developed a patchwork of deals and provisions that could be used to satisfy the last few votes and maybe even enough to convince one of the moderate Republicans from Maine to vote with Democrats.

The resulting legislation that was to ultimately become the ACA through a budget maneuver termed, “reconciliation”, was in essence the Senate patchwork bill and not the House version or a hybrid of the two, finished and polished through a conference committee between House and Senate negotiators. Rather, the ACA that is the law of the land today was in some respects, never intended to be the finished product, but an opening salvo from the Senate.

Understanding this historical context offers a small glimpse into the frenzy of regulations and sub-regulatory guidance that proceeded passage of the ACA and has vexed many stakeholders and policymakers alike, as they continue the march towards full health care reform implementation.

II. ANTICIPATING MAJOR ACTIONS AFTER INAUGURAL OPEN ENROLLMENT

At the approximately halfway point into the first year of open enrollment, proponents and opponents of the ACA alike, are taking stock of what worked, what didn’t, and what 2015 enrollment will look like in terms of costs and coverage. Although over 8 million Americans selected a plan through a state-based or federal marketplace, exceeding even some optimistic goals set by Obama Administration officials, the complete story has yet to be written.

Not every state-run exchange has performed well – Hawaii, Oregon, Maryland, Massachusetts, and Vermont all have had significant problems leading some to resort to paper enrollment and even scrapping entire state marketplaces in anticipation for the upcoming 2015 open enrollment season.¹ The Department of Health and Human Services (HHS) continues to push out a series of proposed and final rules that will determine everything from what is included in a Medical Loss Ratio calculation, the formula that regulates profits for insurers, to a much anticipated administrative simplification rule.

There have already been numerous delays of various health care regulations ranging from the large employer penalty for those who do not offer credible health care coverage to the implementation of the ICD-10 medical coding system which was postponed by Congress to at least October, 2015.

Finally, one major issue that the drafters of the ACA did not anticipate was the Supreme Court’s eventual ruling in *National Federation of Independent Business v. Sebelius*, substantially limiting the Federal Government’s ability to require states to expand Medicaid as required by the health reform law. In early 2014, twenty seven states had decided to expand Medicaid coverage for

¹ See Assistant Secretary for Planning and Evaluation Report, Health Insurance Marketplace: Summary Enrollment Report for the Initial Annual Open Enrollment Period, *available at* http://aspe.hhs.gov/health/reports/2014/MarketPlaceEnrollment/Apr2014/ib_2014Apr_enrollment.pdf

individuals and families at or below 138% of poverty (about \$27,000 for a family of three¹ for adults.²

B. Critical Issues to Watch in 2014 Affecting ACA Implementation

For the remainder of this year, there are quite a few expected milestones, and a few unexpected ones, that will significantly shape the direction of ACA implementation. For the purposes of this overview, we will focus on five main topics that seem to be pervasive amongst health care stakeholders and policymakers alike.

Arguably, the top politically pressing issue will be around the 2015 ACA exchange rates and what the Administration can do to mitigate any significant increases as open enrollment rapidly approaches. There has been a tremendous amount of research into the experience data and risk mitigation that will inform the 2015 exchange rates.³ However, this overview will focus on the other pressing issues that will also play significant roles to either help or hurt the ongoing ACA implementation.

The one issue that has pitted staunch ACA opponents against their own political peers has been the issue of Medicaid expansion. Analysts have concentrated their attention in 2014 on the twenty-four states that did not expand Medicaid coverage and whether they will do so and in what manner. The use of waiver authority to expand Medicaid has been a novel tool for the Administration to use to further entice states that are politically opposed to the ACA, but are focused on strategies to lower their overall Medicaid costs.

Many health care analysts will point to cost containment as the pivotal issue that will either sustain the ACA or sink it. Although the health care spending trajectory was already a matter of serious concern before the passage of the law, the ACA has become wedded to the growing cost of care. Through new authorities, the Obama Administration has been rapidly deploying various initiatives and demonstrations to “bend the cost curve”. These efforts are significantly altering the rules for payment and delivery of care which are starting to have market-wide impact and are likely to be accelerated through the end of this year.

For employers and health plans alike, the future of employer responsibility is in flux as policymakers continue to consider modifications ranging from the hours required to define a full work week to the ability for large employers to contribute pre-tax premium payments on the health care exchanges.

Additionally, the firestorm around the anti-kickback treatment of third-party payments for individuals purchasing coverage through the exchanges was an unexpected issue that has created new alliances of providers, nonprofits, drug manufacturers, and others against payers who argue that any leniency in the application of anti-kickback law is the start of a slippery slope and ultimately cost the system more.

² The 2013 federal poverty guideline for a family of three was \$19,530. See: <http://aspe.hhs.gov/poverty/13poverty.cfm>

³ A good analysis by Milliman, “What now? 2015 individual market pricing: Morbidity and other considerations” available at <http://us.milliman.com/insight/2013/What-now-2015-individual-market-pricing-Morbidity-and-other-considerations/>

Finally, two ACA litigation efforts around contraception coverage and the constitutionality of whether federally run exchanges are able to offer tax subsidies could have a significant impact both politically as well as structurally if the Supreme Court were to rule against the Obama Administration.

As a broad overview, the table below may serve as a helpful timeline of all the major ACA rules expected in 2014 and a look ahead in the following several years. As mentioned above, Congress and/or the Administration have already delayed some very significant provisions and more could be postponed by the date of publication.

Date	ACA Provisions To Be Implemented
2014	
1/1/14	• Individual Mandate. Becomes effective, with penalty for noncompliance the greater of \$95 per individual (capped at 300% of the relevant amount for a family) or 0.5% of household income OR 1% of household income. (ACA § 1501(b), § 10106(b), IRC § 5000A(c); HCERA § 1002) • Employer Provisions ○ Employer reporting requirements (ACA § 1514) <i>Delayed until 1/1/15.</i> ○ Employer mandate (ACA § 1513, IRC § 4980H; § 10106(e); HCERA § 1003) <i>Delayed until 1/1/15.</i> • Insurance Reforms ○ Guaranteed issue (ACA § 1201, PHSA §§ 2702, 2705) ○ Guaranteed renewal (ACA § 1201, PHSA § 2703) ○ Modified community rating (ACA § 1201, PHSA § 2701) ○ No preexisting condition exclusions (<i>Note: this provision is effective for plan years beginning 6 months or after the date of enactment for enrollees under 19 years of age.</i>) (ACA §§ 1201, 10103(e), PHSA § 2704; HCERA § 2301(b)) ○ No annual limits on the dollar value of essential benefits. (ACA § 1001, PHSA § 271; § 10101(a); HCERA § 2301(b)) ○ No eligibility waiting periods of more than 90 days for group coverage. (ACA § 1201, PHSA § 2708; HCERA § 2301(a)) ○ Coverage of essential benefits package in individual and small group markets. (ACA §1201, PHSA § 2707) ○ Uniform application of rating rules. (ACA § 1252) ○ Individual market reinsurance program (2014-2016) (ACA § 1341; § 10104(r)) ○ Risk adjustment for individual and small group markets (ACA § 1343) ○ Risk corridors for individual and small group markets (2014-2016) (ACA § 1342) • Consumer Protections/PBOR ○ Provider nondiscrimination (ACA § 1201, PHSA § 2706) ○ Coverage of routine costs for clinical trial participants (ACA § 10103(c)). ❖ Health Insurance Exchange ○ States must establish exchanges (ACA § 1311(b)) ○ Requirements for qualified health plans (ACA § 1301(a)) ○ Coverage of essential benefits package (ACA § 1302(b)) ○ Religious accommodation for mandated contraceptive services ○ Offering of Multi-state Plans through exchanges (ACA § 10104(q)) ○ Other coverage requirements inside the exchange – Equal in scope to typical employer-sponsored plan (ACA § 1302(b)(2)(A))

Date	ACA Provisions To Be Implemented
	– Cost-sharing limits (ACA § 1302(c)) (<i>plan years beginning in 2014</i>) – Requirements for different benefit levels/actuarial values (ACA § 1302(d)-(e)) ○ Coverage requirements outside the exchange – Preventive benefits as above (ACA § 1001, PHSA § 2713) – Coverage of essential benefits for individual and small group plans (ACA § 1201, PHSA § 2707(a)) – Cost-sharing limits for group health plans (ACA § 1201, PHSA § 2707(b)) • State Standards. Date by which states electing to establish an exchange must either adopt federal standards or have in effect state requirements that meet these standards. (ACA § 1321(a)-(b)) • Offering of Exchange-Participating QHBPs through Cafeteria Plans. (ACA § 1515, IRC § 125(f)) • State Basic Health Plan Option. (ACA § 1331; § 10104(o)) <i>delayed until 2015.</i> • Individual Subsidies. <i>Effective for taxable years beginning after 12/31/13</i> ○ Premium credits (ACA § 1401, IRC § 36B; § 10105(a)-(c); § 10107(h); HCERA § 1001(a)) ○ Cost-sharing subsidies (ACA § 1402; HCERA § 1001(b)) • Small Group Subsidies. Tax credits for small employers. (ACA § 1421, IRC § 45R) • Premium Variation for Participation in Employer-Sponsored Wellness Programs. (ACA § 1201, PHSA § 2705) • Medicaid/CHIP ○ Medicaid Expansion to 133% FPL (ACA § 2001; HCERA § 1004(b); HCERA § 1201) ○ Requires Medicaid benchmark benefits to consist at least of minimum essential coverage. (ACA § 2001) ○ Requires states to provide premium assistance to any Medicaid beneficiary with access to employer-sponsored insurance if cost-effective for the state. (ACA § 2003) ○ Requires states to enroll CHIP-eligible children in exchange plans if coverage is unavailable in the state CHIP plan because of a funding shortfall. (§§ 2101(b), 10201(g)) <i>No specific effective date is provided for this provision, but Exchanges effective by 1/1/14.</i> ○ Requires Medicaid the CHIP eligibility to be determined using household income and modified adjusted gross income. (ACA §§ 1401, 2001, 2002, 2101); (HCERA §1004) ○ State option to expand Medicaid to those above 133% FPL. (ACA § 2001) • Medicare Advantage ○ Requires coding intensity adjustment to be no less than 2010 plus 1.3%. (HCERA § 1102(e)) ○ Requires 85% minimum medical loss ratio. (HCERA § 1103) • Administrative Simplification (ACA § 1104) ○ HHS to adopt a transaction standard and a single set of associated operating rules for claims attachments not later than this date [delayed, date TBD]. ○ HHS to adopt rule for health plans to certify compliance with certain HIPAA standards and operating rules not later than this date [delayed, date TBD] ○ Standards related to remittances and EFT to be effective no later than this date. ○ HHS to establish a committee to review standards and operating rules.
3 Years Post-Enactment	Wellness Report. HHS report on the effectiveness of wellness programs for which premium discounts are allowed in promoting health, etc. (ACA § 1201, PHSA § 2705(j))
4/1/14	• HHS, operating through a review committee, must conduct hearings no later than this date (and biennially thereafter) to evaluate and review adopted administrative simplification standards and operating rules. (ACA § 1104) • HHS must begin assessing penalty fees for plans that have failed to meet standards. (ACA § 1104)

Date	ACA Provisions To Be Implemented
5/1/14	HHS to provide a report identifying health plans that have been assessed a penalty for failing to comply with the new administrative simplification standards (and annually thereafter). (ACA § 1104)
7/1/14	Wellness Demonstration. Premium variation for participation in wellness programs for the individual market in 10 states. (ACA § 1201, PHSA § 2705(l))
7/1/14	Administrative Simplification • Date for HHS to adopt a set of operating rules for health claims or encounter information, enrollment/disenrollment, premium payments, referral certification and authorization (to be effective no later than 7/1/16). • Mental Health Parity Final mental health parity rule effective for plan years beginning on or after this date.
8/1/14	Administrative Simplification. Treasury to notify each health plan that has been assessed a penalty fee (and annually thereafter). (ACA § 1104)
Fiscal Year 2014	Pilot Testing of Pay-for-Performance in Medicare. Applies to psychiatric, LTC, rehab, and PPS-exempt cancer hospitals, as well as hospice programs. (ACA § 3004)
11/1/14	Administrative Simplification. Due date for health plans penalty assessments (and annually thereafter). (ACA § 1104)
12/31/14	GAO study on Health Insurance Competition and Market Concentration. Deadline for first report; biennial reports required thereafter. (ACA § 1322(i))
FEDERAL RULES EXPECTED IN 2014	
IRS	• Final Rule on requirements for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services • NPRM on employer reporting and notice requirements under IRC § 6056 • Final Rule on employer shared responsibility requirements • NPRM on employer contributions to HSAs • NPRM on use of contributions or benefits under an HSA in a subsequent year • NPRM on additional permitted election changes for cafeteria plans • Final Rule on determining whether employer coverage is affordable • Final Rule on minimum essential coverage and other rules regarding the premium tax credit • Final Rule on 90-day waiting period limit [jointly with HHS] • NPRM on fees on health insurance and self-funded plans to fund the PCORI (IRS) • NPRM on reporting by issuers of minimum essential coverage under IRC § 6055 (IRS) • Final Rule on tax treatment of payment by qualified plans for medical or accident insurance (IRS) • Final Rule on exchange information reporting (IRS)
DOL	• NPRM on amending rules on excepted benefits under ERISA • NPRM amending reporting, disclosure and valuation requirements for certain multi-employer plans
HHS	• Final Rule on establishment of the Basic Health Program (March) • Final rule establishing methodology and payment rates for a prospective payment system (PPS) for federally qualified health center (FQHC) services under Medicare Part B beginning 10/1/14, in compliance an ACA requirement. • NPRM on Quality Rating System for Qualified Health Plans • Field testing of Marketplace (March-May) and QHP (July-September) consumer experience survey • NPRM on QHP quality improvement strategies • NPRM updating ACA eligibility, enrollment and appeals policies, based on experience with initial open enrollment period (February) • NPRM on the ACA's nondiscrimination provision (§1557) (August)

Date	ACA Provisions To Be Implemented
2015	
1/1/15	• Employer Provisions ○ Employer reporting requirements (ACA § 1514) <i>Delayed from 1/1/14.</i> ○ Employer mandate (ACA § 1513, IRC § 4980H; § 10106(e); HCERA § 1003) <i>Delayed from 1/1/14.</i> • SHOP. FF-SHOP, employee choice delayed from 1/1/14 • State Basic Health Plan Option. (ACA § 1331; § 10104(o)) <i>Delayed from 1/1/14.</i> • Insurer Fee. \$11.3 billion insurer fee. (ACA § 9010; § 10905; HCERA § 1406) • Exchanges must be self-sustaining. (ACA § 1311(d)(5)) • Individual Mandate. Penalty for noncompliance increases to \$325 or 2% of income. (ACA § 1501(b), IRC § 5000A(c); HCERA § 1002) • Medigap Changes. New Medigap plans C and F take effect (removing 1st dollar coverage and including nominal cost-sharing). (ACA § 3210) • Medicare Advantage. From 2015-2019, requires the adjustment to be no less than the previous year plus 0.25%. (HCERA § 1102(e))
1/15/15	Medicare Payment Advisory Board. Beginning on this date and every two years thereafter, Board makes binding recommendations to reduce Medicare growth (exempts hospitals and other providers from recommendations until 2020) and nonbinding recommendations on ways to slow national health spending. Specifically directs Board to look at Medicare private plan profits and administrative costs. (ACA §§ 3403, 10320)
1/31/15	Reporting of Health Insurance Coverage. (ACA § 1502(a), IRC § 6055)
January – September	ICD-10 • Finish revising coverage policies (January-April) • Continue external testing (January-September)
Not earlier than 10/01/2015	ICD-10 Implementation Date (delayed from Oct 2014)
12/31/2015	Administrative Simplification. Health Plans will certify compliance with claims, enrollment, premium payment, claims attachment, and referral standards and operating rules no later than this date. (ACA § 1104)
2016	
1/1/16	• Insurer Fee. \$11.3 billion insurer fee. (ACA § 9010; § 10905; HCERA § 1406) • Individual Mandate. Penalty for noncompliance increases to \$695 or 2.5% of income. (ACA § 1501(b), IRC § 5000A(c); HCERA § 1002). • Insurance Reforms. Requires states to include employers with up to 100 employees in their small group markets. (ACA § 1304(b)(3)) • Interstate Sale of Insurance. Earliest effective date for any “health care choice compacts.” (ACA § 1333(a)) • Fraud, Waste & Abuse. HHS shall competitively bid DME covered by Medicare or use competitive bid prices in paying for DME. (ACA § 6410(b)) • Administrative Simplification ○ Operating rules for health claims or equivalent encounter information, enrollment/disenrollment, premium payments and referral certification and authorization transactions to be effective no later than this date. ○ Transaction standards and single set of associated operating rules for claims attachments effective not later than this date. (ACA § 1104)
2017 +	
1/1/17	• Large Employers in Exchange. States may permit large employers to purchase coverage

Date	ACA Provisions To Be Implemented
	through Exchanges. (ACA § 1312 (f)(2)(B)) • Insurer Fee. \$13.9 billion insurer fee. (ACA § 9010; § 10905; HCERA § 1406)
Plan Years Beginning 1/1/17	Waivers for State Innovation for Exchanges. (ACA § 1332, pp. 212-219)
7/1/17	Demonstration Project: Premium variation for participation in wellness programs for the individual market – date by which HHS may expand program to additional states. (ACA § 1201(l)(2), PHSA § 2705)
1/1/18	• Tax on High-Cost Plans. (ACA § 9001, IRC § 4980I; § 10901; HCERA § 1401) • Insurer Fee. \$14.3 billion insurer fee. (ACA § 9010; § 10905; HCERA § 1406)
1/1/19	• Insurer Fee. From 2018 onward, the fee amount is the previous year's fee indexed by growth from previous year's premium (ACA § 9010; § 10905; HCERA § 1406) • Ongoing Study of Exchanges. Not later than this date, GAO to conduct ongoing study of Exchange activities. (ACA § 1313(b)) • Delivery System Reforms/Cost Containment (Medicare). Directs HHS Secretary to test financial incentives encouraging Medicare beneficiaries to choose high quality providers. (ACA § 10331(h))

1. Alternative Medicaid Expansion Programs

As discussed above, the drafters of the ACA did not anticipate the Supreme Court ruling in *NIFB v. Sebelius* that in essence, made Medicaid expansion for individuals up to 138 percent of poverty, a voluntary state action. With roughly nearly five million uninsured adults who will fall into the “coverage gap” resulting from state decisions not to expand Medicaid, the stakes are high for stakeholders ranging from providers who are counting on the increased patient volume in the face of declining payments to offset the cost of the uninsured, to commercial insurers, who have experienced success in the growing managed Medicaid space.

Most of the remaining states that have not yet expanded Medicaid are controlled either in part or completely by Republicans in the state legislature and/or governorships. Despite the political fervor around the ACA, the economic arguments to decline huge sums of federal funds that are central to the ACA Medicaid expansion provision have pushed at least a few hesitant states to accept the Federal funding through traditional coverage expansions of the Medicaid program.

Other states have utilized more novel approaches to even further distance themselves from the ACA while still being able to bring in the federal dollars attached to a traditional Medicaid expansion. Although the parameters for these novel approaches remains a mystery to many external stakeholders, a review of the approaches under consideration in recent months may provide a useful roadmap for other stakeholders/states considering an expansion utilizing non-traditional parameters.

a. Approaches and Features

To date, the three alternative Medicaid expansion programs approved by HHS for Arkansas, Iowa, and Michigan have been authorized under the Center for Medicare and Medicaid Services’

(CMS) Medicaid 1115 waiver authority.⁴ Arkansas and Iowa chose to use premium assistance to expand their programs, while Michigan relied on its existing managed care infrastructure.

Pennsylvania has an 1115 waiver pending with HHS, while New Hampshire plans to submit its own waiver or state plan amendment following passage of legislation allowing the state to implement an expansion through either premium assistance (if cost-effective) or its existing Medicaid managed care plans. Unlike many earlier 1115 waivers, these expansion programs are not expanding coverage to a population otherwise ineligible for Medicaid coverage, but rather seek to implement the optional Medicaid expansion under the ACA in a manner that brings Medicaid benefits and cost-sharing more in line with commercial insurance.

To date, all of the waivers have been submitted by states in which Republicans hold either partial or full control of the state legislature and governor's office. To varying degrees, the Medicaid expansions in these states are portrayed by their advocates as major departures from traditional Medicaid. In an effort to persuade states to implement the Medicaid expansion option, the Obama administration has shown a willingness to allow states some flexibility, but so far has resisted most proposed benefit changes and increased cost-sharing beyond allowing Iowa and Michigan to charge a monthly premium, and in Iowa's case, premium contributions for persons between 50-100% of the federal poverty level (FPL).

The key themes included in one or more of the approved and pending 1115 waivers are: premium assistance, premiums, health behavior incentives, benefit changes, and work requirements.⁵ Three of these themes – premiums, health behavior incentives, and work requirements – also promote more personal responsibility, a major concern of Republican governors and state legislators.

Brief Summaries of Alternative Medicaid Expansions.

- ❖ **Arkansas** received CMS approval in September 2013 for the Arkansas Health Care Independence Program. The program covers newly eligible adults by paying premiums for private plans available through the state's federally facilitated health insurance marketplace. The newly eligible, or Private Option Beneficiaries, are childless adults ages 19 to 64 with incomes up to 138 percent of poverty, and parents or guardians under age 65 with incomes between 17 and 138 percent of poverty. Beneficiaries have access to additional services that are covered by Medicaid but not included in a private health plan. Enrollees are not required to pay premiums. Cost-sharing for those with incomes above 100 percent of poverty cannot exceed 5 percent of family income.
- ❖ **Iowa** received CMS approval for two Section 1115 waivers in December 2013. The first, the Iowa Wellness plan, (expands Iowa's current Medicaid program to adult residents ages 19 to 64, with incomes up to 100 percent of poverty, through a medical home model. Wellness plan beneficiaries with incomes between 50 percent and 100 percent of poverty

⁴ SEC. 1115. [42 U.S.C. 1315]

⁵ Rudowitz, Robin, et al., "The ACA and Recent Section 1115 Medicaid Demonstration Waivers" *available at* <http://kff.org/medicaid/issue-brief/the-aca-and-recent-section-1115-medicaid-demonstration-waivers/>

are subject to a \$5 monthly premium per household. The second waiver, the Iowa Marketplace Choice Plan, operates like the Arkansas plan.

The state covers residents ages 19 to 64 with incomes from 100 percent to 138 percent of poverty by paying premiums for private plans available through the state's federally facilitated marketplace. And as in Arkansas, beneficiaries have access to extra Medicaid benefits, sometimes called wraparound services. Marketplace Choice enrollees will contribute no more than \$10 per month per household. Premiums for both plans are waived the first year of enrollment and in subsequent years if certain healthy behaviors are met. Beneficiaries are subject to an \$8 copayment for non-emergency use of emergency departments. Total cost-sharing, including both premiums and copayments, cannot exceed 5 percent of family income. Iowa expects 150,000 residents to gain coverage under this plan.

- ❖ **Michigan's** Section 1115 Medicaid waiver received CMS approval in December 2013. Healthy Michigan expands Medicaid coverage to all residents with incomes up to 138 percent of poverty, with those earning between 100 percent and 138 percent making premium payments equal to 2 percent of their household income. Under the plan, all beneficiaries contribute to a "MI health account" to pay their copayments. These copayments can be reduced by meeting certain criteria for healthy behavior, and total cost-sharing cannot exceed 5 percent of family income. Michigan estimates that up to 500,000 newly eligible beneficiaries will gain coverage under the plan. Michigan will also be submitting a second waiver to HHS requiring adults on Medicaid for more than 48 months to either seek coverage through a QHP or increase total cost-sharing to 7% of family income.
- ❖ **Pennsylvania** submitted a Section 1115 waiver (in February 2014 for a program that will use Medicaid funds to pay premiums for private health plans through the state's federally facilitated marketplace. Healthy Pennsylvania would cover childless adults ages 21 to 64 with incomes up to 138 percent of poverty, 19- to 20-year-olds earning between 44 percent and 138 percent of poverty, and parents or guardians ages 21 to 64 earning between 33 percent and 138 percent of poverty. During the first year, beneficiaries would be subject to copayments as outlined by the state's existing Medicaid program. In the second year, enrollees ages 21 to 64, above 100 percent of poverty, would not be subject to copayments but required to contribute to the premium \$25 a month for individuals and \$35 for households). Beginning in the second year, all beneficiaries would be subject to a \$10 copayment for non-emergency use of the emergency department. Premium reductions could be achieved by meeting certain criteria for healthy behavior, as is the case in Iowa and Michigan, or by opting into the state's voluntary Encouraging Employment program. (The state estimates that up to 500,000 residents would gain coverage under this plan.
- ❖ **New Hampshire** will seek a Section 1115 demonstration waiver from CMS or amendments to its state plan to offer newly-eligible adults the option of selecting a cost-effective QHP or an alternative benefit plan (ABP) offered by one of the State's managed care organizations (MCO), respectively. According to the enabling legislation, the State

will focus on promoting the continuity of health insurance coverage and personal responsibility, including but not limited to: co-pays, deductibles, disincentive for inappropriate emergency room use, and mandatory wellness programs.

The State will submit to CMS a waiver by December 1, 2014 and seek federal approval by March 31, 2015. New Hampshire estimates 50,000 newly-eligible beneficiaries will gain access under this plan. While it is seeking waiver authority, New Hampshire will enroll an estimated 12,000 adults into an already existing State-subsidized employer-based coverage program and place another 38,000 adults in the State's Medicaid managed care program by July 1, 2014.

b. Timelines for Approval

The chart below shows the timeline for the three approved 1115 waivers and pending Pennsylvania waiver proposal. The negotiation timeframe for the three approved waivers between the date legislation was signed into law and final approval ranged between three and one-half months to slightly more than six months.

Both Arkansas and Michigan won approval of their final waivers less than a month after the federal comment period closed. On the other hand, Iowa took more than three months to finalize its waiver following the federal comment period, but also eventually received approval for two of its more controversial proposals – a one-year suspension of non-emergency transportation coverage for its premium assistance population and a \$5 monthly premium charge for adults between 50-100% of FPL.

Alternative Medicaid Expansion Timelines

<i>State</i>	<i>Legislative Proposal Released</i>	<i>Draft Concept Paper Released</i>	<i>Start/End of State Com. Period</i>	<i>Proposal Submitted to CMS</i>	<i>Start/End of Federal Com. Period</i>	<i>Approved</i>	<i>Expires</i>
AR*	Health Care Independence Act Legislative Approval: April 18, 2013 Governor Signature: April 22, 2013 Governor Reauth: March 7, 2014	N/A	Start: June 24, 2013 End: July 24, 2013	Aug. 2, 2013	Start: Aug. 6, 2013 End: Sept. 7, 2013	Sept. 27, 2013 Governor Reauth: March 7, 2014 CMS Reauth: March 24, 2014	Dec 31, 2016
IA**	Iowa Health and Wellness Plan Legislative Approval: May 23, 2013 Governor Signature: June 20, 2013	N/A	Start: July 15, 2013 End: Aug. 15, 2013	Aug. 20, 2013	Start: Aug. 23, 2013 End: Sept. 23, 2013	Initial Approval: Dec. 10, 2013 Final Approval: Dec. 30, 2013 Technical Corrections: Feb. 26, 2014	Dec 31, 2016

MI***	Healthy Michigan Plan Legislative Approval: Sept. 3, 2013 Governor Signature: Sept. 16, 2013	N/A	N/A***	Nov. 8, 2013	Start: Nov. 18, 2013 End: Dec. 18, 2013	Dec. 30, 2013	Dec 31, 2018
NH ****	NH Health Protection Program Act Legislature Approval: March 26, 2014 Governor Signature: March 27, 2014	N/A					
PA	N/A	Sept. 16, 2013	Start: Dec. 6, 2013 End: Jan. 13, 2014	Feb. 19, 2014	Start: Feb. 26, 2014 End: April 11, 2014	N/A	N/A
Notes							
*Arkansas law requires the State to reauthorize the alternative Medicaid expansion program annually. CMS approved the changes on March 24, 2014. The State must submit additional state plan amendments or waivers by September 15, 2014 for CMS approval on the following topics: expanding the use of copays, reducing funding for non-emergency transportation, and authorizing enrollees to establish health savings accounts.							
**Iowa received both an initial approval of its Section 1115 waiver and a final approval with term and conditions. The State later received approval of technical corrections reconciling the two versions. While the technical corrections were posted for public comment by the State, the comment period (January 31 to March 8, 2014) is inconsistent with the final approval date (February 26, 2014).							
***Michigan was not technically required to conduct a formal state comment period on its alternative Medicaid expansion proposal because its plan was an amendment to an existing Section 1115 waiver. However, Michigan posted a general description of its amendment on its website in October 2013 and requested public comments. Under the state authorizing legislation, Michigan must receive approval for a second waiver by December 15, 2015. Under this waiver, after 48 months on Medicaid, each adult would have the choice to pay higher premiums/cost-sharing or seek insurance coverage through the marketplace.							
****New Hampshire plans to move the majority of the newly eligible residents onto the State's Medicaid managed-care program beginning July 1. The State needs to submit a waiver to CMS for approval of its alternative Medicaid expansion plan.							

Although the timeline for approval between CMS and some states was shorter than four months, it is important to note that reports indicate that officials in these states were in discussions with CMS and HHS officials well before the passage of final legislation.

Pennsylvania never passed legislation authorizing its waiver proposal and there was little public discussion of the details of its draft plan prior to release in September, 2013. It's also not clear when state and CMS and HHS officials first began to discuss any details. In addition, the Pennsylvania proposal has continued to be a work in progress, with the Governor amending the waiver after formal submission to CMS. Due to these changes, the formal comment period was extended until April 11, 2014. Finally, the Pennsylvania waiver also reorganizes the entire Medicaid benefit structure for existing populations. Given the lack of groundwork laid with CMS/HHS and the scope of changes sought for the existing Medicaid program, it's not unrealistic to expect the negotiations to last a bit longer.

Overall, the federal and state approval processes for these waivers has been very messy. The Iowa waiver was originally approved by CMS in early December of 2013, with no terms and conditions. An amended version that included final terms and conditions was then approved at

the end of that same month. At the end of February, 2014, CMS issued “technical corrections” reconciling the two versions.

Each year, Arkansas is required to seek state legislative approval requiring a two-thirds majority to continue its waiver program. This year’s authorizing legislation also requires the state to submit new waivers to increase co-pays, limit non-emergency transportation, and establish health savings accounts.

Under its Medicaid expansion legislation, Michigan is required to submit a second waiver giving adults between 100-133% of FPL enrolled in Medicaid for 48 months the option to obtain coverage through a QHP or have their total cost-sharing increased to 7% of total income. The two premium assistance waivers are also limited to three years because of the Obama administration’s rationale that, beginning in 2017, states can apply for State Innovation Waivers encompassing different delivery system approaches such as premium assistance. The Michigan 1115 waiver, however, was granted for five years through 2018, the normal timeframe for such waivers.

c. Policy Considerations Moving Forward

The politics surrounding the ACA has resulted in a dearth of serious analysis of the implications of these alternative Medicaid expansions for the underlying Medicaid program. ACA opponents resist efforts to legitimize the law, so with few exceptions, conservative opponents of the ACA have resisted embracing the “private option” premium assistance approach. On the other hand, health care advocates and liberal-leaning think tanks have been reluctant to say anything negative about waiver proposals that could result in the Obama administration granting approval for additional state Medicaid expansions.

Proponents of premium assistance serving as the basis for Medicaid expansion have cited continuity of care as a benefit of this approach for individuals who might otherwise move back and forth between traditional Medicaid and QHP coverage. States such as Arkansas have also made the case that using commercial plans to expand coverage will improve access because providers will be paid higher rates (while simultaneously arguing that increased competition between plans will help to control the overall cost of coverage).

Two issues that have been largely ignored are the degree to which beneficiary protections remain in place for Medicaid recipients under a premium assistance approach and how quality of care for individuals receiving premium assistance in an exchange will be compared to quality of care under a traditional Medicaid expansion that utilizes managed care. And while the two approved premium assistance waivers, as well as the proposed Pennsylvania plan, exclude medically frail populations from QHP coverage, there has also been little public discussion of the assessment processes that will be used to make individual determinations and the cost implications of having these beneficiaries served by separate programs or left in the fee-for-service FFS system.

2. Delivery Reform

Although expanding coverage to the uninsured and underinsured remains out front as the main public message for ACA supporters, most health care experts believe the more insidious and

perhaps more ubiquitous flaw in the American health care system is its skyrocketing costs. At 17 percent of GDP, the U.S. health care system is more than double its nearest global competitor in health spending, but ranks thirty seventh in the world in terms of quality according to the World Health Organization.

The rising cost of health care is not a new trend. However, with the implementation of the ACA, the scrutiny on the health care cost curve has elevated far beyond health policy circles and into the main stream media's daily narrative on the success or failures of the ACA. Thus, stakeholders can expect the Obama Administration to continue a strategy to achieve greater value and sustainability via reimbursement reductions, increasing fraud and abuse audit activity, and also implementing a swath of programs designed to incentivize and/or penalize providers based on the quality of care delivered to Medicare and Medicaid beneficiaries.

This overview will focus on the delivery reform portions of the ACA as they are the most directly linked to the health reform law, with the acknowledgment that the Federal Government is likely to use every tool in its arsenal to constrain costs over the next few years.

a. Accountable Care Organizations, Bundled Payments, and Outpatient/Long Term Care

Where most stakeholders view the Federal Government as regulators and sometimes payors, the opportunity to create new payment and care models is intriguing to many providers, commercial payors, consumers and technology companies. Through demonstrations programs and various grant opportunities, every state in the country is participating in some way to change the way we reimburse and/or deliver care.

The number and variety of pilot and demonstration programs will also increase over the next 6-12 months as CMS attempts to "round out" its existing portfolio and obligate the remainder of the \$10 billion in funding allocated to CMS via Section 3021 of the ACA which also established the CMS Innovation Center, a new component of CMS designed to develop and scale initiatives that lower cost for Medicare and/or Medicaid.

One of the more prominent initiatives include Accountable Care Organizations (ACOs), new entities that bring together physicians, hospitals, long term care facilities and others to better coordinate services while sharing in financial risk. The evolution of ACOs will be a big factor this year as the Federal Government determines how to expand and improve the program.

On January 30, CMS announced top line savings projections from the initial 114 ACOs participating in the Medicare Shared Savings Program (MSSP) – the Medicare program set up by the Affordable Care Act with varying levels of upside and downside risk. CMS reported that nearly half of those ACOs generated \$128 million in Medicare savings. The Pioneer ACO program, a pilot run through the CMS Innovation Center for providers willing to take on more upside and downside risk, has already reported savings of \$147 million in their first performance year.

These savings are impressive more for the potential of the ACO model to achieve substantial Medicare savings than their actual Medicare savings performance to date. The majority of ACOs in both the MSSP and Pioneer programs did not achieve savings that yielded shared savings

bonuses, and, in some cases, were required to reimburse Medicare for going over their spending target.

While ACOs as we know them may be the current model, the structure of what is to come is likely to evolve through several iterations as a result of regulatory and legislative efforts. The fact that some ACOs, which may not have been very experienced with the integrated health care delivery model, were able to achieve substantial savings only reinforces policymakers' desire to accelerate delivery system reform initiatives in 2014.

In late 2013, CMS released a Request for Information (RFI) on how to reopen applications for a potentially much more comprehensive and aggressive Pioneer ACO program. The new Pioneer ACO program which could be finalized and open for applications as early as late summer, could have significant implications for health care stakeholders ranging from Part D plans to DME suppliers and Medicaid programs.

Beyond the ACO models, CMS has also focused on narrower models such as bundled payments or medical homes. On February 11th, CMS released another RFI seeking input on potential payment and care delivery models that focus on: 1) outpatient specialty care and 2) complex/chronic disease management care. As compared to the initiatives currently underway through CMS, this latest RFI has the potential to impact a broader group of health care stakeholders, such as drug manufacturers, diagnostic companies, laboratories, and a variety of physician specialty providers ranging from anesthesiology to radiology.

For the outpatient model, the RFI specifically identifies colonoscopy and cardiac catheterization as procedures that could be good candidates for new episode-based payments and identifies services such as anesthesia, pathology, radiology, Medicare Part B and D drugs, diagnostics, and facility payments as potential components to be included in the episode-based payment. Further, the RFI seeks input on commercial sector examples where models may already be in use, as well as suggestions on how to engage other payers in a Medicare-Commercial, multi-payer approach.

The chronic disease management concept builds on the existing Bundled Payments for Care Improvement initiative⁶ but focuses on chronic disease for a time period well beyond the 30 or 90 day window traditionally used for more acute care-focused episodes. This initiative is in line with several proposals from various health care policy experts such as Dr. Zeke Emanuel, a former top Obama Administration official who has advocated for longer, more comprehensive, episode-based payments focused on chronic disease.

The RFI also aligns with recent Congressional activity focused on alternative bundled payment approaches and the increase in chronic disease coordination legislation. New Senate Finance Committee Chair, Senator Ron Wyden (D-OR), introduced a bill⁷ that would use global capitated payment to help providers better manage Medicare beneficiaries with chronic disease and Representatives Diane Black (R-TN) and Richard Neal (D-MA) also introduced a new bundled payment model.

⁶ Bundled Payments for Care Improvement initiative, <http://innovation.cms.gov/initiatives/Bundled-Payments/>

⁷ (S. 1932) Better Care, Lower Cost Act, <https://www.govtrack.us/congress/bills/113/s1932>

With the exception of oncology, which CMS has already spent the better part of a year developing, the RFI proposes a broad array of potential services and conditions that could be candidates for episode-based payment. The considerations for procedures and services that could be targeted are identified as:

1. Historical variation in utilization and payment;
2. Extent to which this variation is under the practitioner's control; and
3. Ease with which the practitioner responsible for the episode can be identified.

During the past year, policymakers have focused the public's attention on services and procedures with high variation and no clinical support for the disconnect in utilization rates amongst various providers and regions. For example, through the newly created Office of Information Products and Data Analytics, CMS created a public database that contains the past 4 years of claims data for all Medicare beneficiaries in the fee-for-service program to allow researchers to study various trends in spending, utilization, and disease prevalence.⁸ In essence, the agency has provided the data necessary to make its case to reign in the approximately 30% of Medicare spending believed to be unnecessary.

Stakeholders have been expecting CMS to develop a number of new pilots in 2014, especially in the outpatient setting, based on the need to “round out the portfolio” of CMMI initiatives that have focused heavily on primary care settings and acute care hospitals. With almost half of their \$10 billion in funding left to develop and implement a variety of new models that include a new Pioneer ACO model, oncology care redesign, and rural provider innovation, focusing on utilization and payment with high/unexplained variation is the logical next step for the Obama Administration as it ramps up its focus on reducing Medicare costs.

Finally, what is evident amidst a host of new and developing proposals is that health care stakeholders who may have been on the sidelines for the various CMS pilots and other initiatives may not have that luxury in the near future as CMS expands their delivery and payment reform portfolio over the coming year.

3. The Future of Employer Coverage

a. Delays Current State of Employer Coverage Provisions

The so-called employer responsibility or “employer mandate” requirement has long been one of the key touchstones of controversy of the Affordable Care Act, and continues to face opposition and delays. In July of 2013, the Obama Administration announced that the employer responsibility section of the ACA would not be implemented until 2015, making it the highest profile delay of an entire section of the ACA up to that time.

⁸ http://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/Medicare-Geographic-Variation/Downloads/Geo_Var_PUF_Methods_Paper.pdf

In the notice announcing the delay, the Treasury Department suggested it would allow for additional consideration on ways to simplify employer reporting requirements.⁹ The IRS also weighed in on the delay, providing additional guidance on the announcement and clarity on what information sharing requirements would be included in the delay.¹⁰ The IRS made clear that both the information reporting and employer responsibility rules will also take effect beginning in 2015.

The delay brought about a flurry of letters and hearings from many ACA opponents and even some at-risk Democrats running in tight mid-term election races. Republicans generally focused on how this was an example of how broken health reform was and how the law would negatively impact jobs. Democrats countered by diminishing the overall impact of the employer provisions and claiming that a very small fraction of the overall insured would lose coverage because of a delay or even without the employer mandate at all.

Among the most controversial aspects of the employer responsibility requirement has been the definition of a full-time work week. Separate from the 2013 delay of the employer mandate and reporting requirements, the Treasury Department also announced that the employer penalties would be phased in for a percentage of employees depending on firm size of full-time employees.^[1]

Firm Size	2015 Plan Year	2016 Plan Year
1 – 49 full-time employees	N/A	N/A
50 - 99 full-time employees	N/A	Must offer coverage to 95% of full-time employees
100+ full-time employees	Must offer coverage to 70% of full-time employees	Must offer coverage to 95% of full-time employees

The ACA defines a full-time work week as 30 hours—and full-time employees are entitled to employer-sponsored health care coverage. For employers with more than 100 full time equivalent (FTE) employees, coverage must be provided beginning in 2015; for employers with 50 to 99 FTE employees, coverage must begin in 2016. Detractors of the work week definition hold that defining full time as 30 hours is inconsistent with standard employer practices and will greatly increase costs for employers and cause employees to be shifted to part-time work in some cases.

As a result of the 30-hour mandate, employers—concluding that it would be cheaper—had begun to move employees to federal health insurance exchanges. By moving employees to a health

⁹ Department of the Treasury. “Continuing to Implement the ACA in a Careful, Thoughtful Manner.” <http://www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner.aspx>

¹⁰ Internal Revenue Service. “Transition Relief for 2014 Under §§ 6055 (§ 6055 Information Reporting), 6056 (§ 6056 Information Reporting) and 4980H (Employer Shared Responsibility Provisions).” <http://www.irs.gov/pub/irs-drop/n-13-45.PDF>

^[1] Treasury Department. “Shared Responsibility for Employers Regarding Health Coverage (RIN 1545-BL33).” <https://s3.amazonaws.com/public-inspection.federalregister.gov/2014-03082.pdf>

exchange through tax-free contributions to pay premiums, employers sought to shift some of the cost of the mandate back to the government. However, in an IRS ruling in May 2014, the Administration made clear that shifting employees to the exchanges does not meet the requirements of the ACA and employers who did so would be subject to the tax penalty of \$100 per day, per employee and a \$3,000 penalty for violating the employer mandate.¹¹

While employers may no longer provide premium contributions for exchange plans, employers still have the option of providing higher pay to employees more so that they may buy insurance on their own—of course, in this case, the employer would still be subject to payroll taxes, reducing the perceived benefit.

The IRS ruling comes as HHS provided additional guidance to insurers and employers on coverage beginning in 2015. In a new regulation, HHS said that it would provide financial assistance to insurers that experience unexpected losses as a result of the ACA. The goal of these payments would be to stabilize premiums and prevent rate increases.

b. Possible Modifications to Employer Provisions

Currently, there are a number of bills introduced in the House and the Senate that would address the 30-hour work week issue. Most recently, Senator Lamar Alexander (R-TN) and Representative Stephen Fincher (R-TN) introduced the “Certify It Act”, which would require the CMS and Government Accountability Office (GAO) to conduct annual studies on the impact of the ACA and delay the employer mandate for a year if the ACA is found to have a negative impact on small business and jobs.¹²

On April 3, 2014 the House passed the Save American Workers Act (H.R. 2575),¹³ which would repeal the 30-hour definition, restoring the 40-hour threshold. Similarly, the House has passed the Protecting Volunteer Firefighters and Emergency Responders Act of 2014 (H.R. 3979),¹⁴ which exempts emergency services volunteers from counting as part of the headcount to trigger the 50 employee employer health insurance mandate.

Although both pieces of legislation passed the House with support from the Democratic minority—with 18 Democrats voting in favor of S. 2575 and 186 Democrats voting in favor of H.R. 3979—the outlook for both pieces of legislation is not clear in the Senate. Although the Senate rolled H.R. 3979 into a package extending unemployment insurance and held a cloture vote on the measure, as the House did not take up unemployment insurance, the bill has stalled to-date.

¹¹ Internal Revenue Service. “Application of Market Reform and other Provisions of the Affordable Care Act to HRAs, Health FSAs, and Certain other Employer Healthcare Arrangements.” <http://www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner.aspx>

¹² Senate Health, Education, Labor, and Pension Committee. “Fincher, Black, Alexander Introduce Legislation to Protect Small Business Employees from Higher Premiums, Job Losses Related to Obamacare.” <http://www.help.senate.gov/newsroom/press/release/?id=53a27181-8e2a-41a4-afa2-c12eaa09627e&groups=Ranking>

¹³ U.S. House of Representatives. 113th Congress. H.R. 2575, Save American Workers Act. <http://beta.congress.gov/113/bills/hr2575/BILLS-113hr2575rh.pdf>

¹⁴ U.S. House of Representatives. 113th Congress. H.R. 3979, Emergency Unemployment Compensation Extension Act of 2014. <http://beta.congress.gov/113/bills/hr3979/BILLS-113hr3979eas.pdf>

Moreover, Majority Leader Harry Reid (D-NV) is opposed to legislation that would alter the current definition of a full time work week. While there has been legislation introduced in the Senate—namely S. 1188, the Forty Hours Is Full Time Act of 2013¹⁵ and S.2205, the Small Business Fairness in Health Care Act¹⁶—should Reid’s opposition remain staunch, and with the continued support of the White House for the 30-hour threshold, the Senate may never see a vote on the legislation.

The question remains how much the Obama Administration and Democrats are willing to appease the employer community to avoid additional public backlash, especially heading into the 2014 midterm elections.

4. Anti-kickback Treatment of Third-Party Payments in Exchange Plans

a. Evolution of the Anti-Kickback Contradiction

Another unanticipated, but perhaps not completely unforeseen, issue that has gained attention is the treatment of third-party payments that either pay for premiums and/or out-of-pocket costs for individuals receiving coverage under exchange plans. The controversy was elevated to public debate on October 20, 2013, when Rep. Jim McDermott, the ranking Democrat on the Ways and Means Health Subcommittee in the House of Representatives, received a response to his August 6, 2013, letter to Secretary of Health and Human Services, Kathleen Sebelius, on whether Qualified Health Plans (QHPs) sold on the new health care exchanges were considered “federal health care program[s]” under Section 1128B(f) of the Social Security Act.

Sebelius stated that QHPs were not considered “federal health care programs” and therefore not subject to the anti-kickback statute. This conclusion was based upon a careful review of the definition “federal health care program” in consultation with the Department of Justice and applied to:

- State-based and federally-facilitated Marketplaces;
- The cost-sharing reductions and advance payments of the premium tax credit;
- Navigators for the federally-facilitated Marketplaces and other federally funded consumer assistance programs;
- Consumer-oriented and operated health insurance plans; and
- The risk adjustment, reinsurance, and risk corridors programs.

Prior to HHS’s announcement, there was considerable debate as to whether QHPs would fall within the definition of “federal health care program” and whether the financial relationships between plans and providers within the exchanges would be subject to the restrictions of the federal anti-kickback statute.

¹⁵ U.S. Senate. 113th Congress. S. 1188, Forty Hours Is Full Time Act of 2013.
<http://beta.congress.gov/113/bills/s1188/BILLS-113s1188is.pdf>

¹⁶ U.S. Senate. 113th Congress. S. 2205, Small Business Fairness in Health Care Act.
<http://beta.congress.gov/113/bills/s2205/BILLS-113s2205is.pdf>

As a result of the October 30th letter to McDermott, hospitals, branded pharmaceutical manufacturers, and some consumer groups hailed the decision. Exclusion from the anti-kickback regime could mean a green light for hospitals to sign up uninsured patients after presenting in the emergency department in order to be reimbursed by commercial health plans. In another instance, drug manufacturers could potentially provide coupons that would defray out-of-pocket costs for consumers on their branded drugs. However, if the QHPs were considered federal health care programs, then anti-kickback laws would apply, restricting these in-kind or monetary contributions.

On the other hand, a host of industry stakeholders, such as pharmacy benefit managers, generic drug manufacturers, and commercial health plans expressed concern at the new policy. These stakeholders feared that exempting subsidized health insurance from laws that ban rebates or kickbacks would shift utilization away from generic drugs to branded drugs. For example, though drug coupons would drive down copayments for brand-name drugs, often insurers will still pay much more for brand-name drugs than for their generic counterparts – a situation feeding fears that this change will cause health care spending to rise and shift utilization away from generic to branded drugs.

Adding confusion to surprise, on November 4, 2013, the Center for Consumer Information & Insurance Oversight (CCIIO), which is the component of CMS that regulates QHPs, issued a Q&A document, entitled “Third Party Payments of Premiums for Qualified Health Plans in the Marketplaces,” which “discourage[d]” cost-sharing and premium payment support, but did not reverse the assertion that QHPs were not federal health care plans as defined under 1128B of the Social Security Act. Rather, the CCIIO letter seemed to contradict the earlier Sebelius letter’s inference that anti-kickback would not apply, but confirmed that exchange plans were indeed not considered “federal health programs” under the statute.

This apparent contradiction led to a series of questions and increased scrutiny on what the conditions for third-party payments were with respect to exchange plans. Many of the trade groups that represented hospitals for example, claimed that the Sebelius letter was an absolute defense against anti-kickback law, while payers and others looked at the CCIIO letter as an indication that activity constituting anti-kickback behavior, would be prosecuted despite the Secretary’s interpretation of “federal health program”.

b. Industry Implications and Not-for-Profit Foundations

Amidst calls for clarification from Congress and stakeholders, CMS released a new FAQ document on February 7, 2014.¹⁷ The new guidance stated that the intent of the earlier CCIIO document that apparently applied the anti-kickback statute to exchange plans, did “not apply to payments for premiums and cost sharing [in relation to] Indian tribes, tribal organizations, urban Indian organizations, and state and federal government programs or grantees (such as the Ryan White HIV/AIDS Program)” and also did not apply to private not-for-profit foundations, “if [the payments] are made on behalf of QHP enrollees who satisfy defined criteria that are based on

¹⁷ Centers for Medicare & Medicaid Services, “Third Party Payments of Premiums for Qualified Health Plans in the Marketplaces” *available at*: <http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/third-party-payments-of-premiums-for-qualified-health-plans-in-the-marketplaces-2-7-14.pdf>

financial status and do not consider enrollees' health status." CMS further clarified that premium and cost-sharing payments would be expected to cover an entire policy year.

The new guidance was viewed as a much needed arbitration considering at least two commercial insurers (Blue Cross Blue Shield of Louisiana and Blue Cross Blue Shield of North Dakota) with health plans in state exchanges were reported as denying payments from Ryan White organizations in early 2014. Naturally, health plans were lobbying heavily to restrict third-party payments for QHPs, while providers and patient assistance foundations were pushing back.

Yet, although the February 7th CMS FAQ document seemed to clear a path for some organizations like Ryan White HIV/AIDS programs, hospital affiliated charities and premium assistance funds, CMS again muddled the waters when they published an interim final rule on March 11, 2014 that restated insurers were required to accept payments from Ryan White and tribal organizations, but did not mention whether private not-for-profits were also protected as third-party payers.

This prompted yet another series of requests for clarification from providers and foundations resulting in the latest response from HHS Secretary Sebelius in a letter dated May 21, 2014, to American Hospital Association President, Richard Umbdenstock that stated:

"We believe that existing guidance related to third-party payments of premiums and cost sharing made on behalf of Marketplace QHP enrollees by private, not-for-profit foundations is sufficient to put the public on notice that as a general matter, such payments are not prohibited by HHS's rules to the extent they are provided in a manner consistent with the February 7, 2014 FAQ. Therefore, we do not intend to issue additional guidance in this area at this time."

The majority of charitable patient assistance foundations are likely to take this latest clarification from HHS as a pass to continue premium and out-of-pocket cost patient assistance (so long as they provide entire plan year payments). Still, as health plans closely monitor utilization and payments, the possibility for additional scrutiny from the federal government, is still likely to be a looming threat.

Structuring not-for-profit charitable organizations so that patients are not provided payment assistance by hospitals for example, as they arrive in need of expensive services that vastly outweigh the cost of premiums, is still likely to be essential to reduce their scrutiny level.

For example, drug copay coupons have been a hot button issue for many years and there is no indication that the HHS Inspector General or other federal authorities will change their trajectory of increased scrutiny. Yet, even there commercial health insurers such as UnitedHealthcare have walked back attempted policies to outright ban the use of drug coupons, facing pushback from employers and retail pharmacies among others.

The one issue that raises hesitancy among policymakers will be in how the third party payments affect 2015 rates. If commercial insurers point to third party payments, especially those from

hospitals as driving higher costs, HHS will be pressed to apply pressure on third party payers that may be disproportionately gaining from their charitable contributions.

5. ACA Litigation: Contraceptives and Tax Subsidies

Although there have been dozens of cases challenging the constitutionality of parts or the entire ACA, there are two sets of cases that are worth mentioning here. The Supreme Court will be making a ruling on contraception coverage and the tax subsidy issue goes to the heart of the ACA and would be devastating if the courts ultimately ruled against the Obama Administration.

a. Contraception Coverage

The ACA requires that women's preventative healthcare, including contraception, must be covered by health plans with no cost sharing.¹⁸ The requirement currently applies to all employers and educational institutions except for churches and other religious groups opposed to contraception. Religiously affiliated institutions, such as Catholic hospitals and nursing homes, do not enjoy that blanket exemption, but if these quasi-religious institutions file a form asserting religious objections, the coverage is underwritten by insurers, with government reimbursement.

The contraceptive coverage requirement in the ACA has faced numerous legal challenges. In 2013, the Supreme Court announced that it would be taking up cases brought by two for-profit companies, Hobby Lobby, an Oklahoma-based chain of arts and crafts stores with 21,000 employees (*Sebelius v. Hobby Lobby Stores, Inc.*, 13-354), and Conestoga Wood Specialties, a Pennsylvania-based cabinet manufacturer (*Conestoga v. Sebelius*, 13-356).

The challengers to the mandate argue that the birth control mandate violates the 1993 Religious Freedom Restoration Act (RFRA). They object to providing four forms of birth control—the emergency contraceptive pills Plan B and Ella, and copper and hormonal intrauterine devices (IUDs) - which have post-fertilization mechanisms to prevent the implantation of an embryo in the uterus because they believe life begins at conception and that these forms of birth control are “complicit in abortion.”

On March 25th the Supreme Court heard oral arguments on both *Hobby Lobby* and *Conestoga*. There were two main issues raised during oral arguments. The first was the extent to which corporations could practice religion and the degree to which corporations and the people who own it are separate entities. The second issue was the degree to which the contraception mandate violates their religious freedom. A decision is expected in June.

Although any decision would not strike at the legitimacy or constitutionality of the ACA in general, a decision to strike or severely curtail the contraception coverage mandate could be considered a significant political blow to the Obama Administration and ACA supporters in Congress. Many policymakers feel that if the Supreme Court were to severely limit the contraceptive coverage requirement, then other provisions would come next, creating a “pick and choose” environment that could harm insurers' ability to underwrite the broader coverage

¹⁸ Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, § 1001, 124 Stat. 119, 131 (2010)

expansion with lower costs for women and others who have traditionally paid higher for health coverage.

There are several potential outcomes to the case with differing levels of fallout. If the Supreme Court finds that corporations cannot practice religion and that they must be considered separate legal entities then clearly ACA implementation goes on without delay. If this is the case, Senator Orin Hatch (R-UT) has threatened to introduce a constitutional amendment similar to the RFRA to overturn the Court's decision, which is very unlikely to be ratified.

On the other end of the spectrum, if the Court finds that corporations can practice religion, then the government must make exemptions to the coverage requirement for both non-profit and for-profit employers if they can demonstrate the contraception provision violates their religious beliefs. In this case, it is likely that the door will be open for other exemptions ranging from sexually transmitted disease screening to even smoking cessation programs. The implications for 2015 rates could be significant because insurers would have to reassess the actuarial value of their plans, especially as essential health benefits start to disappear.

Finally, the Court could make a narrower argument that closely held companies, such as Hobby Lobby, could take into account their owners' religious beliefs. This would require the government to make more exemptions to the mandate, but would not be a broad statement that corporations can practice religion. Arguably, this would have a limited effect on the exchange market as a whole and be concentrated more in the employer segments. While not ideal from the perspective of providing minimum levels of coverage for services at no additional cost, the effect on ACA implementation as a whole would likely be limited in most markets.

b. Federally-Run Exchange Tax Subsidies

Halbig v. Sebelius involves a major challenge to a key component of the ACA: whether the thirty six federally-run exchanges can distribute federal tax credits for low and middle-income individuals. *Halbig* was heard on appeal with the U.S. Court of Appeals for the D.C. Circuit on March 25, 2014 before a three judge panel consisting of Judges Raymond Randolph, Thomas Griffith, and Harry Edwards. The D.C. District Court had previously sided with the Federal Government holding that the ACA's tax credits for health care insurance were permissible whether individuals purchased insurance through a federally or state-operated Exchange.¹⁹

The plaintiffs in *Halbig* challenged an IRS rule clarifying that both federal and state exchanges could distribute tax credits, on the ground that the ACA authorizes tax credits only for individuals who purchase insurance on state-established exchanges. The plaintiffs argued that the purpose of the tax credits was to induce States to set up their own Health Benefit Exchanges, under penalty of withdrawal of those credits if States refused to implement their own exchanges, instead relying on the Federal Government to do so.

¹⁹ For a good summary of the D.C. Circuit Court proceeding see, Jost, Timothy, "Lunchtime Must-Read: Everything by Timothy Jost About the ACA on Health Affairs" available at <http://equitablegrowth.org/2014/01/22/lunchtime-must-read-everything-by-timothy-jost-about-the-aca-on-health-affairs/>

It is unlikely that there is any evidence that legislators intended to use tax credits as an inducement for states to create exchanges; however, if the Appeals Court were to rule in favor of the plaintiff, the ramifications would essentially gut the heart of the health reform law. In either case, the *Halbig* decision is likely to be the most significant ACA case for the remainder of 2014.

III. CONCLUSION

The ACA is a complex patchwork of various initiatives and reforms that were cobbled together into one large piece of legislation, perhaps without the full intent of being enacted into law in the form they were codified in. That has meant that the federal agencies tasked with implementing the law have had to prioritize, modify, and delay numerous provisions in order to keep the spirit of the ACA intact and to ward off attempts to repeal it. Although President Obama's 2012 re-election was essential in protecting the ACA, the months leading up to the 2014 midterm elections and ultimately the resulting party make-up in the Senate, will also have a tremendous effect on whether the ACA continues or is whittled away.

Understanding the various levers to expanding coverage, controlling costs, preserving freedom and values of organizations and individuals, as well as making sure the infrastructure is there to support it all- is essential in planning for a future where the only certainty is that the health care system of tomorrow will not be the health care system of yesterday.

What Lies Beneath (and Ahead): Developing Trends in Shale Gas Litigation

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I. INTRODUCTION

You've likely heard about the transformative "shale boom" occurring in various regions across the United States. According to some media reports, supplies of hydrocarbons now recoverable from domestic shale could accommodate the country's demand for hydrocarbons at current levels of consumption for more than a hundred years. Domestic hydrocarbon production has wrought tremendous economic benefits, including increased domestic job growth, household income, and manufacturing output. Some commentators have gone so far as to label this newfound abundance of hydrocarbons an "economic renaissance."

This "shale boom" is largely the result of recent technological advancements in drilling and hydraulic fracturing, or "fracking"—a process by which water mixed with certain chemicals is pumped into the ground to create cracks to release hydrocarbons for collection. The process of fracking, however, is not without its critics. Environmental groups have expressed deep concerns regarding the potential human and ecological risks associated with fracking. This, in turn, has exposed the hydrocarbon industry to increased public scrutiny, regulatory attention, and, of course, environmental litigation.

Over the past five years, plaintiffs from states as varied as Arkansas, Colorado, and Pennsylvania have filed fracking-related lawsuits against energy companies. This article will provide a survey of the most recent trends in shale gas litigation with an analysis of the most significant claims alleged. It will also supply legal practitioners with an appreciation for the types of fracking-related claims that can be expected in the future.

II. BACKGROUND

According to a conservative estimate by the United States Department of Energy, U.S. natural gas production is projected to grow almost 30% by 2035. This projected growth is the result of a dramatic increase in domestic shale gas production. Yet how exactly did this “shale boom” come to pass?

Historically, U.S. natural gas production from unconventional reserves, i.e., hydrocarbons trapped within rock layers deep beneath the ground, was limited. Over the past several years, however, technological advancements in directional drilling and hydraulic fracturing coupled with oil prices have allowed energy companies to tap into previously unreachable deposits of shale gas.

Directional drilling allows for the development of wells that extend vertically for a distance below the Earth’s surface and then horizontally through a target deposit or rock formation. According to the Pacific Institute, an American non-profit think tank, “the horizontal section of the well greatly increases exposure to formations containing natural gas compared to conventional vertical wells.” Hydraulic fracturing further improves the productivity of these wells, and together, directional drilling and fracking have allowed for exploitation of hydrocarbons deposits that had previously been uneconomical.

The United States Department of Environmental Protection defines hydraulic fracturing as “a well stimulation process used to maximize the extraction of underground resources,” including oil and other hydrocarbons. Specifically, after a well is drilled, “[f]luids, commonly made up of water and chemical additives, are pumped into a geologic formation at high pressure.” “When the pressure exceeds the rock strength, the fluids open or enlarge fractures that can extend several hundred feet away from the well. After the fractures are created, a

propping agent is pumped into the fractures to keep them from closing and to create spaces sufficient for hydrocarbons to flow when the pumping pressure is released.” Thereafter, “the internal pressure of the geologic formation cause the injected fracturing fluids to rise to the surface.”

Generally, water accounts for approximately 90% of the fracturing mixture, while sand accounts for approximately 9.5%. The remaining .5% of additives used in fracturing fluids typically include sodium chloride, ethylene glycol, borate salts, sodium and/or potassium carbonate, guar gum, and isopropanol. Spent or used fracking fluids are usually recovered during the initial stages of well production, and are either recycled for future use or disposed of via surface discharge or injection into wells.

Although these technological advancements have ushered in a “golden age of energy,” there is significant public debate regarding the potential human and ecological risks associated with fracking. Governmental and non-governmental organizations alike have expressed concerns that hydraulic fracturing and its attendant operations may contaminate groundwater, pollute the air, and cause adverse health effects, such as cancer. For example, one anti-fracking advocacy group’s website claims that:

- Across the country, state regulators have documented over 1,000 incidents of groundwater contamination related to fracking;
- Fracking generates enormous quantities of highly toxic—and even radioactive—wastewater, which is often left to evaporate into the air, or simply dumped into the rivers and streams that supply our public drinking water systems;
- Fracking has been disastrous for air quality nationwide. For example, the toxic smog created from fracking contains large amounts of ultrafine particles, soot, and ozone. In adults, these pollutants are linked to bladder, lung, and breast cancer, stroke, diabetes, and premature death; and
- Recent studies have convincingly demonstrated that natural gas produces more greenhouse gas emissions than coal.

Furthermore, there is growing concern that shale drilling may cause “manmade earthquakes.” For example, a recent study by scientists from the University of Texas at Austin and Southern Methodist University found a link between earthquakes in the Dallas-Fort Worth, Texas area and disposal wells in the Barnett Shale Play. The study, however, which was authored by Professor Cliff Frohlich, has an important caveat – as Professor Frohlich explained in the press release announcing the study:

I didn’t find any higher risks from disposal of hydraulic fracturing fluids than was thought before. . . . My study found more small quakes, nearly all less than magnitude 3.0, but just more of the smaller ones than were previously known. The risk is all from big quakes, which don’t seem to occur here.

In other words, although there may be a link between hydraulic fracturing and seismic activity, this link does not mean that fracking poses any danger to the public.

Notwithstanding these concerns and others, the EPA has expressly approved fracking on safety grounds. And unlike the growing consensus among climate scientists regarding the hazards associated with global climate change, there is no consensus that fracking poses a danger to the environment or human health. As one pro-fracking advocacy group highlights:

- Fracking requires 2 to 4 million gallons of water. Drilling companies work with local water planning agencies to ensure local water needs are not disrupted, and often recycle water for use in other wells.
- Research shows that properly designed and constructed oil and natural gas wells present low environmental risk to our groundwater.
- With proper safeguards in place, fracking poses low risk to air quality from the running of engines and compressors to develop and operate natural oil and gas wells.
- Experts estimate that domestic shale plays hold an additional 24 billion barrels of recoverable oil and natural gas. Fracking is the key to unlocking these resources.
- Clean-burning natural gas produced through fracking reduces our reliance on foreign fuel, resulting in more affordable energy for American businesses and families.

- Hydraulic fracturing has also boosted local economies—generating royalty payments to property owners, providing tax revenues to the government and creating much-needed high-paying American jobs.

These realities, however, have not stopped a variety of plaintiffs from filing fracking-related traditional tort claims against members of the energy industry.

III. CIVIL LITIGATION TRENDS

As noted above, fracking has seen its fair share of controversy—in the media, through regulatory attention, and through the judicial system. Lawsuits, ranging from simple negligence actions to constitutional challenges, have been brought in courts throughout the United States seeking redress for a range of harms allegedly caused by fracking.

A. Civil Tort Actions

The most common fracking-related lawsuits are civil tort actions. While the underlying facts vary, the complaints in these civil tort actions often seek relief under a combination of the following theories: nuisance, trespass, negligence, negligence per se, fraud, strict liability, negligent or intentional infliction of emotional distress, medical monitoring, and violations of various state and federal statutes.

The most well-known scenario giving rise to a civil tort action is alleged contamination of groundwater from a nearby well. As is often the case in toxic-tort lawsuits, these lawsuits hinge on the issue of causation. For example, in *Harris v. Devon Energy Prod. Co., L.P.*, plaintiffs claimed that, as a result of fracking near their property, plaintiffs' groundwater had become contaminated with high levels of hazardous substances. These allegations were based “on the presence of grey sediment in [the plaintiffs'] ground water and tests that allegedly showed elevated levels of various metals that . . . are commonly used in drilling mud.” The

complaint sought relief under theories of nuisance, trespass, negligence, fraud/fraudulent concealment, and strict liability.

The defendant moved for summary judgment, arguing that the plaintiffs' groundwater was not contaminated and that the plaintiffs had not proved any causal link connecting the defendant. Shortly before the plaintiffs' summary judgment opposition was due, the plaintiffs moved to dismiss their complaint without prejudice because the contamination allegedly present in their well at the time the complaint was filed had subsided. Despite the fact that the plaintiffs conceded they could not connect the defendant to the alleged toxic water, the plaintiffs maintained that the dismissal "was not sought to avoid an imminent adverse ruling. . . ."

The Fifth Circuit modified the district court's grant of dismissal without prejudice, holding that dismissal with prejudice was the appropriate disposition. The Fifth Circuit homed in on the plaintiffs' admission that they could not prove that the defendant's activity caused the contamination in their groundwater:

In light of the [plaintiffs'] concession that they could not prove [the defendant's] activity caused contamination, and the absence of any evidence explaining the bare lab report upon which the suit was initially based, we can only conclude that the [plaintiffs'] dismissal of the suit was intended to avoid an imminent adverse result on summary judgment. This is sufficient to cause plain legal prejudice.

Accordingly, the district court's grant of dismissal without prejudice was modified, such that the dismissal was with prejudice.

Although the Fifth Circuit's ruling is based in large part on procedural policy, the crux of *Harris* was causation. The plaintiffs originally claimed that the defendant's fracking contaminated the their groundwater with high levels of hazardous substances. The plaintiffs' theory, however, had a number of problems. First, the plaintiffs could not rule out that their

water well's filter pack was malfunctioning. Second, no evidence of a vertical fracture, which would be required to for the alleged "contaminants" to travel from the shale formation to the aquifer supplying water to the plaintiffs' water wells (the "Paluxy aquifer"), was presented. Finally, even if the defendant's wells were leaking contaminants, expert testimony demonstrated that the well bores that passed through the Paluxy aquifer were too far away from, and the maximum flow of the aquifer was too slow, to produce any contamination on the plaintiffs' property.

Based on the evidence presented, the defendant argued—and the plaintiffs did not refute—that the plaintiffs' water wells themselves were problematic. The plaintiffs had two water wells on their property: one drilled to 330 feet in 1972, and one drilled to 360 feet in May 2008. Plaintiffs ceased using the 1972 water well "due to the presence of excessive gray sediment in the well water." On June 13, 2011, a "downhole video survey" revealed that the 1972 water well had "structural integrity and design problems" allowing sediment to penetrate the well's casing and well bore from which water was pumped.

Coincidentally, the 2008 water well also produced a gray sediment when pumped—one of the plaintiffs' chief allegations against the defendant. After surveying the 1972 water well, the defendant was prepared to conduct a video survey of the 2008 water well. However, the plaintiffs refused to allow the survey. Because of the lack of a video survey for the 2008 water well, the plaintiffs could not show that the 2008 water well did not suffer from the same structural integrity and design problems as the 1972 water well. Thus, the plaintiffs' allegation that "their ground water became polluted with a gray sediment . . . [s]oon after Defendant commenced drilling and fracking operations" appeared to be nothing more than *post hoc ergo propter hoc*.

Next, the defendant demonstrated that its fracking operations could not have contaminated the plaintiffs' property. The Barnett Shale (the target of the defendant's fracking operations) is approximately 6,500 feet (over a mile) beneath the Paluxy aquifer. Yet fracking technology is designed to prevent vertical fractures. The defendant highlighted the technology's design, and the problem it presented for the plaintiffs' claims:

Plaintiffs have no evidence of even the possibility that [the defendant] could have created a vertical fracture stretching from the Barnett Shale all the way up the Paluxy aquifer, nor do they have any evidence that [the defendant] somehow actually managed to do so.

Simply put, the plaintiffs could not prove the existence of a vertical fracture that would be necessary to allow contaminants to flow from the Barnett Shale to their water well.

Finally, the defendant proved that, even if one or more of its relevant wells was leaking contaminants, it was not possible for those contaminants to have reached the plaintiffs' property. The trial court limited discovery to the defendant's wells that are "within a 0.75 mile radius of Plaintiffs' water well **and** have Spud dates occurring no later than April 2008." Six wells met these criteria and pass through the Paluxy aquifer. However, five of the six wells are downstream of the plaintiffs' water wells. Stated another way, the Paluxy aquifer's direction of flow is such that any contaminants from these five wells would flow *away from* the plaintiffs' water wells. With regard to the sixth well, it was too far away to have contaminated the plaintiffs' property:

- The maximum average flow rate at which water moves through the Paluxy aquifer is 44 feet per year;
- The sixth well is approximately 1,640 feet away from the plaintiffs' water wells;
- The sixth well became operational on March 29, 2004;

- Thus, the maximum distance which any contaminants could have travelled over the relevant time period was about 189 feet—well short of the distance between the sixth well and the plaintiffs’ water wells.

The plaintiffs in *Harris* failed to prove both general and specific causation: the plaintiffs did not put forth any evidence to show that it was possible that the defendant’s fracking activities could cause their water wells to be contaminated (general causation), nor did they put forth any evidence that it actually did happen (specific causation). Accordingly, the defendant successfully moved for summary judgment on these grounds.

Given the shale boom, it seems likely that civil tort actions based on fracking will continue to be filed throughout the country at a steady pace. The oil and gas practitioner should keep the importance of causation in mind when determining whether and how to fight what appear to be frivolous claims utterly lacking any indicia of causation. As *Harris* shows, plaintiffs have their work cut out for them when it comes to proving general and specific causation. In the next section, a helpful case management tool—aimed at evaluating causation very early on in litigation—will be discussed.

B. *Lone Pine* Orders

Another arrow in the practitioner’s quiver for addressing the ever important issue of causation is the *Lone Pine* Order. A *Lone Pine* Order, so named for the case from which it originates, is a court order and case management tool that defendants often seek in complex mass-tort litigation, which usually requires plaintiffs to make a prima facie showing on their claims prior to discovery. Although *Lone Pine* Orders vary from case to case, often times plaintiffs are required to produce experts on causation, medical evidence, and environmental and other relevant studies before full discovery, or face dismissal of their claims. Given the consequences that can result from non-compliance with such an order, it should come as no

surprise that such orders are highly sought after by defendants and highly contested by plaintiffs. Fracking litigation is no different.

In *Strudley v. Antero Resources Corp.*, plaintiffs brought suit against several companies claiming that the companies' operation of a nearby gas well had contaminated the air, water, and ground near and around the plaintiffs' home with several harmful chemicals, including: "hydrogen sulfide, hexane, n-heptane, toluene, propane, isobutene, n-butane, isopentane, n-pentane, and other pollutants." Plaintiffs sued under theories of negligence, negligence per se, nuisance, strict liability, and trespass, and also sought a medical monitoring trust.

The trial court issued a *Lone Pine* Order, "which required the Strudleys to present prima facie evidence to support their claims before full discovery could commence." Plaintiffs failed to fully comply with the order, and defendants moved to dismiss the case. The court granted defendants' motion to dismiss, and plaintiffs appealed.

The Colorado Court of Appeals reversed, concluding that Colorado law does not recognize *Lone Pine* Orders. In arriving at its conclusion, the court cited two Colorado Supreme Court decisions disapproving the requirement that plaintiffs provide prima facie evidence of their claims before discovery even begins. Further, the court found that the recent amendments to the Colorado Rules of Civil Procedure did not disturb the Colorado Supreme Court decisions. Finally, the court concluded that, regardless of whether the amendments overruled the Colorado Supreme Court's decisions, a *Lone Pine* Order was not appropriate in this case because this was not the type of complex mass-tort lawsuit in which *Lone Pine* Orders are most often utilized. Defendants have filed a petition for writ of certiorari in the Colorado Supreme Court.

In *Baker v. Anschutz Exploration Corp.*, a group of landowners filed suit against several defendants claiming that, in drilling and operating natural gas wells, combustible gas was

released into plaintiffs' groundwater, and toxic sediments and industrial waste were discharged into the soil and groundwater near plaintiffs' homes. Plaintiffs sued in negligence, negligence per se, nuisance, premises liability, trespass, strict liability, deceptive business practices, fear of developing cancer, and medical monitoring.

The trial court issued a *Lone Pine* Order, requiring plaintiffs to specifically identify:

- “[A]ny additional sampling of Plaintiffs’ residential water wells. . . . If split sampling and testing is desired, the parties shall meet and confer regarding a mutually agreeable sampling protocol.”
- “Defendants shall provide Plaintiffs with all data and documents related to the monitoring wells subject to a pending motion [] to disclose. . . .”
- “Plaintiffs shall provide Defendants with the following:
 1. Expert opinion(s) . . . that establish for Plaintiffs (a) the identity of each and every hazardous substance to which Plaintiffs claim exposure as a result of Defendants’ activities; (b) if other than the Plaintiffs’ residences, the precise location of any claimed exposure; and (c) an explanation of causation.
 2. Each and every study, report, and analysis that contains any finding of contamination on Plaintiffs’ property or at the point of each Plaintiff’s claimed exposure to the extent not already provided.
 3. Identification and quantification of contamination of the Plaintiffs’ real property that Plaintiffs’ claim is attributable to Defendants’ operations.”
- “Defendants shall provide Plaintiffs with expert report(s) with supporting data and facts. . . .”

Defendants moved to strike plaintiffs’ expert reports, claiming that the reports did not comply with the Order. The court rejected defendants’ argument, holding that the case could proceed:

Though Plaintiffs’ expert reports . . . are far from models of clarity, they meet the essential requirements imposed by the *Lone Pine* Order. As to their admissibility, the Court will leave that issue for another day. Therefore, the Court denies Defendants’ motion to strike.

If granted, the *Lone Pine* Order can certainly lead to an expeditious resolution of all claims involved. However, despite the volume of fracking litigation occurring across the country, there does not appear to be a clear majority regarding the use of *Lone Pine* Orders in fracking litigation. Because of this, when a litigant seeks a *Lone Pine* Order, the litigant should focus on the particular facts of the case before the court, and be sure to emphasize the complexities presented by the plaintiffs' claims. "Because issuing a *Lone Pine* order is left to the trial court's discretion, the challenge lies in convincing the judge that the *Lone Pine* order is necessary to protect the defendants' interests while not unfairly prejudicing plaintiffs." As with all procedural aspects of a lawsuit, litigants seeking a *Lone Pine* Order must be mindful of the policy underlying such a mechanism, and be sure to underscore how the granting of such an order is consistent that underlying policy.

C. Class Actions

The class action lawsuit is yet another vehicle that has been employed in an attempt to resolve the alleged wrongs resulting from fracking. Perhaps one of the most notable class action decisions is that of *Ginardi v. Frontier Gas Servs. LLC*. In *Ginardi*, plaintiffs claimed that defendants' operation of nearby natural gas compressor and transmission stations resulted in contaminated air, groundwater, and soil and "incessant and constant noise pollution." The complaint sought relief in strict liability, nuisance, trespass, and negligence, and further sought to certify as a class any Arkansas resident that lives or owns property "within a one (1) mile radius of any natural gas compressor and/or transmission station."

The court denied plaintiffs' motion for class certification, holding that individual issues relating to damages predominated, and thus the class action was the wrong tool for handling the claims asserted:

[T]he individual issues presented in this case predominate over the common issues. Plaintiffs' causes of action would require a detailed look at each plaintiffs' individual damages—including the amount of noise heard, the amount of gases present, and any level of contamination in the air, groundwater, or soil. Each class member would be required to present highly individualized evidence regarding damages and causation. This makes full resolution of an entire class difficult.

Finally, the court also noted that, given the highly individualized issues related to proving damages, the class action was not the “superior” method for resolving the claims.

Despite the Eastern District of Arkansas' decision in *Ginardi*, the class action will likely continue to be a preferred vehicle for claims involving air, soil, and groundwater contamination allegedly due to fracking. As with all mass and toxic-tort class actions, attorneys should be mindful of the strictures imposed by the Federal Rules of Civil Procedure, especially the commonality and typicality requirements of Fed. R. Civ. P. 23(a). Finally, the litigants should be fully prepared to discuss whether the class action truly is the “superior” vehicle by which to remedy the alleged wrongs.

IV. LITIGATION INVOLVING MUNICIPAL REGULATION OF FRACKING

Recent courtroom battles over fracking have not been limited to claims involving traditional torts. According to a recent report by the American Planning Association, many states, cities and towns have enacted a variety of approaches to regulating shale gas development. “Some have passed outright bans, prohibiting either the fracking process in particular or all gas drilling. Others stop short of banning fracking, but limit such activity to certain parts of the municipality, either through zoning or the imposition of specific setback requirements.” These municipal regulations, in turn, have spawned a fair amount of litigation.

Robinson Township v. Commonwealth, a recent Pennsylvania Supreme Court decision, is illustrative. In *Robinson*, the Pennsylvania Supreme Court resolved a variety of state

constitutional challenges to Act 13. Act 13 repealed parts of the Pennsylvania Oil and Gas Act, which had previously allowed Pennsylvania municipalities to effectively ban the use of hydraulic fracturing within their borders. Specifically, Act 13 prohibited local ordinances concerning oil and gas operations, and required uniformity of all local zoning ordinances regarding natural gas development.

In March of 2012, a hodgepodge of Pennsylvania municipalities and private citizens filed a complaint in the Pennsylvania Commonwealth Court, seeking a declaration that Act 13 was unconstitutional. The plaintiffs argued that Act 13 violated the Pennsylvania Constitution; namely, those provisions relating to the “inherent rights of mankind,” the preservation of natural resources, and due process.

The Commonwealth Court held that Act 13’s state-wide zoning rules were unconstitutional. Specifically, the Commonwealth Court found that Act 13’s statewide land use regime violated, among other things, principles of substantive due process secured by the Pennsylvania and United States Constitutions because the Act required local governments to amend their existing zoning ordinances without regard for basic zoning principles, thereby “failing to protect interests of property owners from harm and altering the character of neighborhoods.”

On appeal, the Pennsylvania Supreme Court upheld the decision of the Commonwealth Court. In doing so, a three-justice plurality viewed the central issue in the case as:

an asserted vindication of citizens’ rights to quality of life on their properties and in their hometowns, insofar as Act 13 threatens degradation of air and water, and of natural, scenic and esthetic values of the environment, with attendant effects on health, safety, and the owners’ continued enjoyment of their private property.

The plurality then proceeded to outline how Act 13 violated various rights enshrined in the Pennsylvania Constitution, namely the Environmental Rights Amendment (Article I, Section 27), which provides:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Thus, the Pennsylvania Supreme Court struck down Pennsylvania's state-wide zoning rules. In doing so, the Court essentially barred the Pennsylvania legislature from implementing sweeping, statewide oil and natural gas regulations.

The *Robinson* decision may have profound implications vis-à-vis other states' efforts to regulate the oil, natural gas, and energy industries. Indeed, in Ohio, the City of Munroe Falls recently filed an appeal before the Ohio Supreme Court, seeking an injunction declaring that, notwithstanding Ohio's statewide regulation of oil and natural gas drilling, Ohio municipalities may enact and enforce zoning laws regarding fracking operations.

Like Pennsylvania, Ohio recently amended its Oil and Gas Act in an effort to narrow local authority over natural gas drilling. The new law provides, in part: "The division [of natural resources has sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells and production operations within the state." The central issue of Munroe Falls' appeal is whether "an oil and gas driller, having been issued a permit to by [sic] the State of Ohio to drill for oil within a municipality, may ignore any and all municipal ordinances thereafter, including zoning requirements."

According to the parties' briefs, the appellee, Beck Energy Corporation, obtained a permit from the Ohio Department of Natural Resources' Mineral Resources Management

Division to drill a well within the city limits of Munroe Falls. Prior to drilling, however, Beck Energy did not comply with certain city ordinances, including ordinances specifically regarding oil and gas drilling. These ordinances, among other things, required notice to the citizens of Monroe Falls prior to the commencement of drilling operations. Accordingly, Monroe Falls issued a stop work order to Beck Energy.

When Beck Energy advised Munroe Falls that it had no intention of complying with the City's order, Munroe filed an action seeking an injunction against Beck Energy, which was ultimately granted by the trial court. On appeal, however, the Ohio Ninth District Court of Appeals reversed the trial court as to the notice ordinance, finding that Ohio law preempted local zoning ordinances and any ordinances directly related to oil and gas drilling operations. Munroe Falls, in turn, appealed to the Ohio Supreme Court.

Although the outcome of this case remains uncertain, as the American Planning Association has recognized, "one thing remains clear: the coming years will see more ordinances, more state efforts to preempt local control, and ultimately, the resolution of these disputes in the courts."

V. GOVERNMENT ENFORCEMENT ACTIONS

As mentioned above, the EPA has expressly approved fracking on safety grounds. That being said, when poorly-supervised fracking operations violate existing federal or state environmental laws, a range of enforcement actions can be taken by governmental agencies, from written notices to legal action. And depending on the circumstances of the underlying infraction, federal and state regulators may have the ability to assess severe civil and criminal penalties.

For example, in December 2013, Chesapeake Appalachia, LLC, a subsidiary of Chesapeake Energy, reached an agreement with the EPA, the Department of Justice, and the West Virginia Department of Environmental Protection regarding alleged violations of the Clean Water Act and the West Virginia Water Pollution Control Act. Specifically, Chesapeake agreed to pay an estimated \$6.5 million dollars to restore 27 sites damaged by its unauthorized fracking-related discharges of fill material into streams and wetlands and to implement a comprehensive plan to comply with federal and state water protection laws. In total, Chesapeake's fracking-related discharges impacted approximately 12,874 linear feet of stream and 3.74 acres of wetlands. Needless to say, the scope of Chesapeake's violations culminated in one of the largest fracking-related regulatory settlements in U.S. history.

The federal government has also increased criminal enforcement efforts related to fracking operations. For example, on February 14, 2013, Ben Lupo, the Ohio-based manager of hydraulic fracturing waste disposal company Hardrock Excavating LLC, was charged with violating the Clean Water Act for allegedly ordering one of his employees to illegally discharge brine and oil-based drilling mud into a tributary of the Mahoning River. Specifically, according to an affidavit filed in federal court, the Ohio Department of Natural Resources received a call from an anonymous person who stated that on the night of January 31, 2013, someone would be illegally discharging fracking wastewater from one of Hardrock's facilities in Youngstown, Ohio. Ohio DNR inspectors arrived at the facility and found a hose, connected to a storage tank, discharging wastewater into a storm water drain at the facility. Inspectors then took a sample of the wastewater, which was found to be contaminated. According to the federal government, thereafter "Lupo admitted he directed a Hardrock employee to discharge the contents of the storage drain into the storm water drain, and further admitted that he directed discharge from a

storage tank a total of six times.” On March 25, 2014, Mr. Lupo pled guilty to the indictment, and could face up to three years in prison and/or a \$250,000 fine.

Mr. Lupo’s case represents but one of several instances where fracking-related activities have resulted in criminal prosecution by federal and state environmental agencies. For example, within the last two years:

- XTO Energy Inc., a subsidiary of ExxonMobil, was charged by the Pennsylvania Attorney General with five counts of unlawful conduct under the Pennsylvania Clean Steams law and three counts of unlawful conduct under the Pennsylvania Solid Waste Management Act for allegedly illegally discharging gas well wastewater into a discharge valve;
- RCA Oil & Gas and its owner pleaded guilty to violating the Clean Water Act by using a backhoe to breach the wall of a reservoir that contained nearly 800,000 gallons of oil and gas fracking wastewater into a tributary of the Little Muskingum River in Ohio; and
- Integrated Production Services Inc., a Houston-based natural gas and oil drilling contractor, was sentenced to pay a criminal fine of \$140,000 for violations of the Clean Water Act when it negligently caused rainwater contaminated with hydrochloric acid to flow into Dry Creek in Oklahoma.

These prosecutions demonstrate that companies engaged in hydrocarbon drilling and hydraulic fracturing should have robust environmental compliance programs. As Randall Ashe, the Special Agent in Charge of the EPA’s criminal enforcement program in Ohio, has stated: “As the nation increases its use of natural gas, exploration companies must ensure that the waste water resulting from the drilling process is treated and disposed of safely and legally.” Mr. Lupo’s case “demonstrates that if companies and their senior managers try to save money by circumventing environmental laws, they will be vigorously prosecuted.”

VI. CONCLUSION

Technological advancements in horizontal drilling and hydraulic fracturing have generated unprecedented hydrocarbon development throughout the United States. They have likewise spawned a new generation of oil and natural gas-related lawsuits. Given the

unprecedented scale of ongoing drilling operations—as well as the ongoing public debate regarding the environmental effects associated with fracking—one thing is certain: we have likely just seen the “tip of the iceberg” when it comes to fracking-related litigation.

NEGLIGENCE PER SE

FDCC Annual Meeting
The Greenbrier
White Sulphur Springs, WV
July 28 – August 1, 2014

Presented by: J. Richard Caldwell, Jr.
Rumberger, Kirk & Caldwell
Tampa, FL

Kurt Rozelsky
Smith Moore Leatherwood
Greenville, SC

Negligence per se

What Is It?

The concept of negligence per se has become fairly well entrenched in tort law of at least most jurisdictions in the United States. In essence, the doctrine involves the substitution of a statutory or regulatory provision for the common law "reasonable person" criteria in negligence actions for determining the extent of a duty, and whether there was a breach of that duty. Negligence per se began to be applied in courts across the country over 100 years ago, as legislatures and courts grappled with the difficulty of addressing the increasing number of accidents spawned by industrial and urban growth.¹ In its most elementary context, the doctrine holds that violation of an applicable statute or regulation constitutes negligence as a matter of law. In essence, the statutory or regulatory provision creates a standard of care to be applied by the finder of fact, as opposed to the normal "reasonableness" standard in negligence cases. *Carter v. William Sommerville & Son, Inc.*, 584 S.W. 2d 274, 278 (Tex. 1979); see, A. Twerski, *Negligence Per Se and Res Ipsa Loquitur*, 44 Wake Forest L. Rev. 997 (2009).

Over the last century, as our society has grown increasingly complex, opportunities for application of the negligence per se principle have multiplied. The statement will come as no surprise to experienced practitioners, particularly those engaged in the representation of manufacturers, interstate motor carriers or other transportation entities.

Although the doctrine of negligence per se can, in its broadest context, be stated fairly simply (as set forth above), the several jurisdictions across the United States have seen fit to apply it in a variety of ways, some of which will be addressed below. Anyone engaged in the defense of a case in which a statutory or regulatory violation is alleged as the basis for a plaintiff's cause of action must thoroughly familiarize themselves with all of the intricacies of their jurisdiction's application of the doctrine. It must be conceded, however, that in at least some instances, familiarization can lead to further confusion. For example, the Supreme Court of Florida once acknowledged that the state's law on negligence per se was "... hardly crystal - clear." *deJesus v. Seaboard Coast Line RR. Co.*, 281 So.2d 198, 200 (Fla. 1973).²

All of that said, most jurisdictions recognize that certain elements must be proven in order to make out a submissible claim sounding in negligence per se. These are:

- (1) that the defendant³ violated a certain statute or regulation;

¹ P. Yowell, *Judicial Discretion in Adopting Legislative Standards: Texas's Solution to the Problem of Negligence Per Se?*, 49 Baylor L. Rev. 109 (1997).

² Unfortunately, Florida's law in this regard was not clarified to any extent by that decision or following cases.

³ This principle applies equally to plaintiffs who may have violated some statute or regulation. See, for example, *Rex Utilities, Inc. v. Gaddy*, 413 So.2d 1232, in which Plaintiff failed to wear a helmet while operating a motorcycle, in violation of the then applicable Florida statute. The court agreed that the principle of negligence per se applied to Plaintiff, but found Defendant's proof lacking on the issue of proximate cause.

- (2) that the plaintiff is of the class which the statute or regulation was intended to protect;
- (3) that plaintiff suffered injury of the type the statute or regulation was designed to prevent; and
- (4) that the violation of the statute or regulation was the proximate cause of the injury.

E.g., *Rex Utilities, Inc. v. Gaddy*, 413 So.2d 1232, 1234 (Fla. 3d DCA 1982); *Davis v. Marathon Oil Company*, 356 N.E. 2d 93, 64 Ill.2d 380, 389 – 90 (Ill. 1976); Illinois Pattern Jury Instruction 60.01; California Evidence Code § 669 and CACI § 48; Connecticut Civil Jury Instruction 3.6-13 (2008); see, Restatement (2d) of Torts, Section 286; Restatement (3d) of Torts Sections 14, 15.

The real difficulty encountered in wading through the thicket of case law in this area involves the various degrees or gradations of the principle which have been applied by the courts. Most courts, for example, hold that violation of a speed limit or other traffic ordinance by a motorist is *not* negligence per se. Rather, it is viewed as evidence of negligence which can be taken into account by a jury, along with all the other facts and circumstances of the case. *deJesus v. Seaboard Coastline RR Co.*, *supra*; *Florida Department of Corrections v. Abril*, 969 So.2d 201, 209 (Fla. 2007) (Cantero, J. dissenting). See also, Texas Transportation Code Ann. § 542.206 (Vernon Supp. 1997). Likewise, allowing a puddle to exist at a gasoline station, which theoretically violated the statute governing the general operation of such stations, and violations of an ordinance requiring handrails on stair cases, have been held to be merely evidence of negligence and not negligence per se. *Chevron U.S.A., Inc. v. Forbes*, 783 So.2d 1215 (Fla. 4th DCA 2001); *Lindsey v. Bill Arlin Bonding Agency, Inc.*, 645 So.2d 565 (Fla. 1st DCA 1994).

Some statutes do create a cause of action sounding in true negligence per se. This occurs when the statute (or regulation) is penal in nature, designed to protect a particular class of persons, of which the plaintiff is a member, against a particular type of harm. *Newsome v. Haffner*, 710 So.2d 184, 186 (Fla. 1st DCA), rev. den. 722 So.2d 193 (1998); *El Chico Corp. v. Poole*, 732 S.W. 2d 306, 312 (Tex. 1987). One example was discussed in *Golden Shoreline Ltd. Partnership v. McGowan*, 787 So.2d 109 (Fla. 2d DCA 2001), in which an elevator fell down its shaft for some distance, injuring the occupant plaintiffs. The court held that the Florida statute which provided that the elevator owner was responsible for the safe operation and proper maintenance of the elevator, established a duty to protect those using elevators from injury resulting from poor maintenance of the elevator. *Id.* at 111. Likewise, in *Delfino v. Sloan*, 20 Cal. App. 4th 1429 (1st Dist. 1993), rev. den., 25 Cal. Rptr. 265 (Cal. 1994), the court held that a county ordinance which prohibited domestic animals such as dogs from running loose unleashed, did mandate a negligence per se jury instruction where the defendant owner's dog (which had apparently broken or unfastened its chain) chased plaintiff bicyclist, and knocked her from the bicycle.

It is important to note that, even in these types of cases, in addition to the statutory violation, plaintiffs must still prove that they are of the class the statute was intended to protect, that they suffered injury of the type that the statute was designed to prevent, and that the violation of the statute was the proximate cause of injury. *Golden Shoreline*, *supra* at 111.⁴

Most draconian of all are statutes or ordinances which are said to create a species of strict liability. In this context, the term "strict liability" approaches absolute liability, especially in the sense that contributory or comparative negligence on the part of plaintiff is not a defense. These circumstances are presented when the statute is designed to protect a particular class of persons from their inability to protect themselves. For example, early cases involving allegations of violations of child labor laws, or sales of firearms to minors in violation of a statute prohibiting such, have held that these types of statutes impose this type of strict liability. *J. Ray Arnold Corporation v. Richardson*, 141 So. 133 (Fla. 1932); *Tamiami Gun Shop v. Klein*, 109 So.2d 189 (Fla. 3d DCA), cert. disch., 116 So.2d 421 (Fla. 1959).

⁴ For another phrasing of negligence per se criteria, see, *Tierney v. Black Bros. Co.*, 852 F. Supp. 994, 999-1000 (M.D. Fla. 1994).

Adding to the complexity of this area of the law is the fact that statutory and case law in many jurisdictions speak of "unexcused" violations of the statute, ordinance or regulation in question. California Civil Jury Instruction (CACI) 418 discusses, as mentioned above, negligence per se. CACI 420 addresses possible circumstances which the defendant may present in an attempt to excuse the statutory violation. Several states have legal principles like this, which excuse statutory violations if: (1) the violation was reasonable in light of all the circumstances; (2) despite using reasonable care, defendant was unable to obey the law in question; (3) defendant faced an emergency that was not the result of his or her own misconduct; (4) obeying the law would have caused a greater risk of harm to defendant or others; or (5) some other reason which would validate defendant's conduct and excuse the violation.

Prof. Twerski in his article illustrates the ambiguity which can be created by these types of "excuses." He postulates a young mother-to-be who goes into labor unexpectedly. The prospective father, frantic to get his wife to the hospital, cannot bring his vehicle to stop at an intersection and is involved in a crash with a car having the right-of-way. Prof. Twerski contends that the father should not be held negligent per se. Specifically, he argues that although whether the father acted as a reasonable person under circumstances is perhaps a jury question, the statutory "standard of care" has no place in that controversy. The excuse set forth in (3) above would seem to be logically limited to road-related emergency situations rather than the facts in Prof. Twerski's hypothetical. Twerski, *supra*. Thus, neither the statutory standard of care nor the argument for excusing a violation of that standard are really of much help in assisting the finder of fact to arrive at a just determination of the controversy.

Again, the statutory and case law in any particular jurisdiction is likely to vary in one or more respects from the general principles discussed above. It is therefore of utmost importance that anyone delving into this particular area of law become thoroughly cognizant of all of the particularities of that jurisdiction. This applies with equal force whether the lawyer is setting up a defense to a negligence per se claim, or framing an attack on plaintiff's own conduct.

What keeps defense and corporate counsel up at night?

As mentioned above, as our society has become more complex over the years, our statutory and regulatory framework has become increasingly dense and intricate. Opportunities for exposure to claims sounding in negligence per se have therefore increased exponentially. Environmental statutes and regulations, Federal Motor Vehicle Safety Standards, regulations and procedures of the Consumer Product Safety Commission and federal motor carrier requirements, among many other regulatory schemes at both the federal and state level, have raised the level of risk to an unprecedented level for virtually all companies are care

In the context of the transportation industry, there are large numbers of potential causes of action which could be asserted based on alleged violations of one or more Federal Motor Carrier Safety Regulations. For example, claims involving allegations of negligent vehicle operation (failure to place or provide warning signals for a disabled vehicle, improper placard placement, improper securing of loads, fatigued driver, dangerous driving, etc.), negligent inspection and maintenance (improper brake calibration, tire tread issues, light and reflector placement, etc.), or negligent hiring and retention (failure to perform proper background check, prior repeated violations by driver, log book violations, fatigue, etc.) can all be fertile grounds for the assertion of negligence per se allegations.

A number of cases across the country have held that violations of Federal Motor Carrier Safety Regulations (FMCRS) can form the basis of negligence per se claims. See, e.g., *Inland Steel Corp. v. Pequingnot*, 608 N.E. 2d 1378, 1383 (Ind. App. 1993); *Carroll v. Deaton, Inc.*, 555 So.2d 140 (Ala. 1989).⁵

⁵ 49 CFR § 390.9 specifically provides that the FMCRSs do not preclude or pre-empt state or local laws pertaining to transportation safety, which leaves plaintiffs a wide scope for attempts to invoke the negligence per se principles. The National Traffic and Motor Vehicle Safety Act, 49 USC § 30103, contain a similar savings clause.

In addition, a number of states have adopted portions of these regulations, making violations a matter of state law as well as federal. See, e.g., Connecticut Motor Vehicle Safety Regulations § 14-163c-1 *et seq.*⁶

Allegations of OSHA Violations are always troublesome. Again, counsel responsible for the defense of these types of claims must be keenly aware of the law in the particular jurisdiction, as consideration of OSHA violations as negligence differs from state to state. Some states view evidence of such violations as requiring a negligence per se instruction, while others consider it as merely evidence of negligence, which may be rebutted by the defendant. In California, evidence of violation of at least state OSHA rules may warrant a negligence per se jury instruction. Cal. Labor Code § 6304.5; *Elsner v. Uveges*, 34 Cal.4th 915, 22 Cal. Rptr. 3d. 530, 102 P.3d 915 (2004). Connecticut, on the other hand, treats OSHA violations as evidence of negligence, not negligence per se. *Wendland v. Ridgefield Construction Services, Inc.*, 184 Conn. 173, 178, 439 A.2d 954 (1981). See also, *Canape v. Peterson*, 878 P.2d 83 (Co. 1994), *citing* 29 U.S.C. § 653(b)(4).

Consider the following hypothetical: you are in-house counsel for a company which operates “big-box” retail outlets; among the items sold at these stores are firearms. In the latest case to cross your desk, the company has been accused of having sold a rifle to a minor, in violation of state law. After the sale, the weapon accidentally discharged, the bullet striking the minor in the head, resulting in severe permanent brain damage. The police investigation of the incident reflects that the minor was over 6 feet tall, wore a scraggly beard, and was very familiar with firearms. The file information is conflicting over whether the minor presented false identification (or any identification at all) at the time of sale.

Among the issues which you must first analyze is the extent to which negligence per se applies to this case. The hypothetical is roughly based on *Tamiami Gun Shop v. Klein*, 109 So.2d 189 (Fla. 3d DCA), *cert. disch.* 116 So.2d 421 (Fla. 1959). There, the court held that not only did the statute (and local ordinance) set up the applicable duty, the violation thereof itself supplied causation, without need for further proof. Plaintiff’s own negligence was not a defense. 109 So.2d at 192. This holding was based at least in part on the Plaintiff’s minority status, as one of tender years is presumed to be incapable of exercising self-protective care. *Id.* at 190.

Obviously, the mature appearance of the injured minor, as well as his possible deception in purchasing the weapon, are circumstances which may or may not be important elements of the defense, depending on the law of the particular jurisdiction. The result in Florida might not obtain in California, Connecticut or Illinois.

Or, consider the in-house counsel of a pharmaceutical company who walks into her office one morning to discover a claim on her desk alleging that the patient package insert mandated by the FDA was omitted from the medication as delivered to the patient, who dies as a result of misdosage. Whether the patient had prior experience with the medication, and was aware of the correct dosage levels could obviously be of vital interest in evaluating such a claim, but counsel should be aware of the possibility of a negligence per se claim in such an instance.

⁶ As if all this weren’t scary enough, the Consumer Product Safety Commission (CPSC) has filed a complaint against Craig Zucker, former CEO of Maxfield & Oberton Holdings (M & O), which imported and sold “Buckyballs,” which were magnetic “executive desk toys.” The CPSC sought to force a recall of these items on the grounds that they were ingestion hazards for children. After M & O went out of business, the CPSC added Mr. Zucker individually to its cause of action, seeking to hold him criminally liable, and force him to personally pay for the recall. Mr. Zucker has now filed an action against the CPSC, alleging gross abuse of regulatory power. *Zucker v. Consumer Products Safety Commission*. *Zucker v. U.S. Consumer Products Safety Commission, et al.*, case no. 8:13 – cv – 03355 – DKC (D. Md. 2013).

In automotive product liability litigation, there has been little effort by the plaintiff's bar to utilize negligence per se as a weapon. This is hardly surprising, as strict liability is available to plaintiffs as a theory of action in almost every jurisdiction. California, along with a few other jurisdictions, has gone even further, requiring only that plaintiff show usage of the product and an injury or damage resulting from such use. The burden then shifts to the defendant to prove that the design of the product is not defective. See, CACI 1204. See also, *Montero Saldana v. American Motors Corp.*, 107 DPR 452 (Puerto Rico 1978). In today's climate, counsel for automotive manufacturers would seem to have enough to keep them up at night, even without negligence per se claims.

Battling the reptiles

As most of us are aware, the plaintiffs' bar has, over the last few years, increasingly utilized the so-called "reptile theory."⁷ This theory focuses on the "reptile brain," the primitive, subcortical region of the brain which houses survival instincts. In a variety of ways, starting with discovery, plaintiffs' lawyers attempt to convince the jury that the conduct of the defendant is a danger, not just to the individual plaintiff but to the community, and the jurors themselves. The theory provides that when the reptile brain senses danger, it goes into survival mode to protect itself and the community. Since the courtroom as a safety arena, according to the theory, huge damages awarded by a jury will enhance safety and decrease danger. The core formula is "safety rule + danger = reptile."⁸

In other types of litigation, one of the difficulties sometimes encountered by plaintiffs' lawyers seeking to utilize this theory is convincing a jury that there is actually a safety "rule" which defendant has violated. In the context of the types of actions under discussion here, involving claims of negligence per se because of statutory or regulatory violations, such an issue is not even a consideration, as the rule is usually promulgated in black and white. In these cases, plaintiffs' counsel can focus on whether defendant in fact violated the rule, and then emphasize that such actions created danger to the community (including the individual jurors), which can only be remedied by the imposition of substantial damages. The successful creation of fear of this danger on the part of the jurors typically leads to a verdict in favor of plaintiffs.

In a case in which the client has been accused of violating a statute, ordinance or regulatory provision, countering plaintiffs' use of the reptile theory can be challenging indeed. Allen, Schwarz and Wyzga suggest that one way to counter plaintiffs' tactics is better use of a good, cohesive storytelling narrative. This approach has much to recommend it, and one of the popular themes of presentations before the FDCC membership concerns storytelling at trial. Dr. Kanasky, however, suggests that use of narrative is inadequate in and of itself. He states that what is necessary is a comprehensive understanding of how reptile tactics work, and a well-thought-out plan of how to attack the theory, rather than simply defending and reacting to it. He points out that one of plaintiff's favorite tactics is to cajole defense witnesses, especially corporate representatives to agree on deposition with multiple safety "rules," rendering the defense with dangerous impeachment vulnerabilities, and recommends thoroughly educating these witnesses not fall into the trap.

Of course, in cases where the primary allegation revolves around an alleged statutory or regulatory violation, it becomes much more difficult to avoid agreement that such a "rule" exists. In these circumstances, particular care must be taken with company witnesses (1) to have them acknowledge

⁷ This reptile theory was popularized by plaintiffs' counsel Don Keenan and jury consultant Dr. David Ball, and has been utilized extensively by plaintiffs over the last several years. D. Ball and D. Keenan, *Reptile: The 2009 Manual of the Plaintiffs Revolution* (2009); The "reptile" website is www.reptilekeenandball.com.

⁸ B. Kanasky, *Debunking and Redefining the Plaintiff Reptile Theory*, For the Defense at 14 (April 2014). See also, S. Allen, J. Schwartz and D. Wyzga, "Atticus Finch Would Not Approve: Why a Court Room Full of Reptiles Is a Bad Idea", *The Jury Expert* (May 2010)].

the existence of the statute or regulation (“rule”) to avoid appearing absurd and losing credibility, *but* (2) resist plaintiffs’ counsel’s invitations to extend agreement to various postulates which may amount to an unwarranted extension of the statutory or regulatory requirements. The witness must be thoroughly familiarized with the reptile theory as it applies to the particular case, and armed with appropriate facts to be able to resist counsel’s blandishments. For example, if the Defendant is alleged to have violated an FMCSR, the rule itself may have to be acknowledged, but questions along the line of “A violation of this rule presents a danger to the public, doesn’t it?”, or suggesting unwarranted extensions of the regulation in an attempt to bring plaintiff’s allegation closer to its scope, should be resisted.

The cases cited above stand for the proposition that in most cases, even if there was some sort of violation, plaintiffs still must prove that they are one of the class which the statute or regulation is designed to protect, and that the violation was the proximate cause of the incident and of the injury or damages. Deficiencies in proof in these areas are what may be sought to be overcome by use of the reptile approach, and defense counsel should be ready to vigorously attack these evidentiary omissions.

Of course, there is no bright line path to a successful attack on the reptile theory. Dr. Kanasky recommends strongly that attacks to debunk the theory be carried out at trial beginning with voir dire, opening statement, and continuing through cross and direct examination of witnesses, culminating with final argument. Each case will vary; however, the important lesson is to know the theory, recognize it when it rears its head, and to plan a strategy to attack it rather than simply react.

Conclusion

As pointed out above, the opportunities for negligence per se allegations being raised against defendants in a variety of circumstances have multiplied in recent years, due at least in part to the expanding regulatory activities at all levels of government. Some years ago, one economist estimated that the presence of a claim of violation of statute or regulation, giving rise to a negligence per se allegation, results in a statistically significant increase in the success rate of plaintiffs’ cases, as well as the average payout in different types of cases.⁹ Those statistical findings are hardly surprising, given the advantage provided to plaintiffs’ counsel in such cases, and it would be even less surprising to find that plaintiffs’ success rate and average recovery in these types of cases have risen even more in recent years. These are some of the most challenging cases to confront corporate and outside counsel, and call for thoughtful analysis and robust approaches to winning.

⁹ W.K. Viscusi, *Product Liability and Regulation: Establishing the Appropriate Institutional Division of Labor*, 78 *The American Economic Review*, no. 2, pp. 300-304 (1988)

RECENT ASSAULTS ON THE MOST SACRED PRIVILEGE OF ALL: ARE INSURERS PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE?

I. Introduction.

Attorney-client privilege is one the oldest recognized privileges for confidential communications.¹ Its purpose is fundamental: “to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.”² However, where the client is an insurance company, the recognition of this privilege is no longer universal. A growing number of jurisdictions are limiting the application of the attorney-client privilege in the context of insured-insurer litigation, and perhaps redefining the role of the attorney in the insurance industry.

Generally, the attorney-client privilege has been observed to be created “(1) [w]here legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.”³ Where an insurer consults an attorney with respect to its obligations under an insurance policy, courts have found that the attorney-client privilege protects any confidential communications from disclosure.⁴

¹ *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d 584 (1981).

² *Id.*; see *Hunt v. Blackburn*, 128 U.S. 464, 470, 9 S. Ct. 125, 127, 32 L. Ed. 488 (1888) (“The rule which places the *seal of secrecy* upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.”) (emphasis added).

³ 8 Wigmore, *Evidence* (McNaughton ed.1961) § 2292.

⁴ See, e.g., *Aetna Cas. & Sur. Co. v. Superior Court*, 153 Cal. App. 3d 467, 476, 200 Cal. Rptr. 471, 476 (Ct. App. 1984) (explaining that an insurance company’s retention of legal counsel to interpret the policy, investigate the details surrounding the damage, and to determine whether the insurance company is bound for all or some of the damage, is a “classic example of a client seeking legal advice from an attorney.”); *State ex. Rel. Montpelier Ins. Co. v. Bloom*, --- S.E.2d ---, 2014 WL 1408487 (W. Va. 2014)

However, courts in New York, Washington state, and Ohio have found otherwise, articulating unique standards for the availability of the attorney-client privilege to insurers. While the approaches of these three jurisdictions differ, each leaves insurers and their attorneys uncertain as to whether the “seal of secrecy” will hold. Together, these jurisdictions provide a cautionary tale for attorneys and insurers across the country.

II. Cases limiting the attorney-client privilege.

1. New York.

The Supreme Court of New York, Appellate Division, recently held that the attorney-client privilege did not protect insurers’ documents that pre-dated their rejection of the insureds’ claims. *Nat’l Union Fire Ins. Co. of Pittsburgh v. TransCanada Energy USA, Inc.*, 114 A.D.3d 595, 981 N.Y.S.2d 68 (2014). The court reasoned:

The record shows that the insurance companies retained counsel to provide a coverage opinion, i.e. an opinion as to whether the insurance companies should pay or deny the claims. Documents prepared in the ordinary course of an insurer’s investigation of whether to pay or deny a claim are not privileged, and do not become so merely because the investigation was conducted by an attorney.

Id. (citing *Brooklyn Union Gas Co. v. Am. Home Assur. Co.*, 23 A.D.3d 190, 191, 803 N.Y.S.2d 532 (2005)). Thus, according to *TransCanada*, “[d]ocuments prepared in the ordinary course of an insurer’s investigation of whether to pay or deny the claims” are not privileged even if they are drafted by an attorney. This begs the question: what is the ordinary course of an insurer’s investigation?

In *TransCanada*, the appellate court did not specify the precise nature of the documents at issue. Given the court’s reference to counsel being retained to

(holding that the attorney-client privilege protected coverage opinion letters from disclosure).

provide a “coverage opinion,” which often contain legal opinions,⁵ the *TransCanada* holding may be read to apply to attorneys’ legal opinions regarding “whether to pay or deny” claims. A closer examination of the *TransCanada* decision provides some guidance regarding where the line is drawn with respect to an attorney’s “coverage opinion.”

First, the trial court in *TransCanada* reviewed the documents *in camera* and found that they primarily related to the insurers’ factual investigation, observing:

[The documents] reflect that the attorneys were supervising, coordinating and directing the investigation, including collecting documents and hiring investigators . . . The attorneys also prepared reports summarizing the results of the investigation. None of these documents are privileged. Many are not attorney-client communications, and those that involve the investigation of claims do not constitute legal advice.

Nat’l Union Fire Ins. Co. of Pittsburgh v. TransCanada Energy USA, Inc., 2013 WL 4446917, at *5, 2013 N.Y. Slip Op. 31967 (N.Y.Sup. 2013). The trial court did not state whether the documents included any opinion regarding the meaning of policy language, and found that some of the documents at issue contained “communications between an attorney and client to obtain legal advice” and, therefore, were privileged. *Id.* Thus, the nature of the documents discussed in *TransCanada* may suggest that only an attorney’s statement of the results of a factual investigation fall outside the attorney-client privilege.

Second, the authority cited in appellate court’s opinion in *TransCanada* – specifically for the proposition that “[d]ocuments prepared in the ordinary course of an insurer’s investigation of whether to pay or deny a claim are not privileged” – suggests that *TransCanada* may not apply to an attorney’s legal advice regarding policy provisions. *See Brooklyn Union*, 23 A.D.3d at 191.

In *Brooklyn Union*, the court found that a review of the documents in question reveals that the insurers’ attorneys “were acting as claims investigators, not attorneys, and were investigating the issue of whether coverage should be

⁵ *See Bloom*, --- S.E.2d --- (“[A] coverage opinion letter written by outside counsel to the insurer containing legal advice ‘is protected by the attorney-client privilege because it involved confidential communications.’”) (quoting *Howard v. Dravet*, 813 N.E.2d 1217, 1222 (Ind. Ct. App. 2004)).

provided and the cost of such coverage.” *Id.* The court also found that the documents did not contain any “legal advice” or “legal recommendations or attorney thought processes.” *Id.* Thus, to the extent an attorney gives an insurer legal advice regarding policy provisions, the argument could be made that this advice is privileged. However, the precise contours of this distinction may not be immediately apparent from *TransCanada* or *Brooklyn Union*, leaving insurers and attorneys in New York uncertain as to whether an attorney’s work is protected or, instead, is discoverable as documentation created in the “ordinary course” of an investigation.

2. Washington state.

In *Cedell v. Farmers Ins. Co. of Washington*, 176 Wash.2d 686, 700, 295 P.3d 239, 246 (2013), Washington’s Supreme Court held that there is no presumption of attorney-client privilege in “first party insurance claims by insured’s claiming bad faith in the handling and processing of claims, other than UIM claims.”

However, under *Cedell*, “the insurer may overcome the presumption of discoverability by showing its attorney was not engaged in the quasi-fiduciary tasks of investigating and evaluating or processing the claim, but instead in providing the insurer with counsel as to its potential liability.” *Id.* at 699. Thus, like the New York courts in *TransCanada* and *Brooklyn Union*, Washington’s Supreme Court distinguished between an attorney’s work that involves legal opinion and an attorney’s factual investigation. However, unlike the courts in *TransCanada* and *Brooklyn Union*, Washington’s Supreme Court gave an example of a privileged communication: “whether or not coverage exists under law.” *Id.*

The court in *Cedell* also outlined a specific process for determining whether documents are privileged. An insurer “may assert that the attorney was providing counsel to the insurer and not engaged in a quasi-fiduciary function,” and, upon such a showing:

[T]he insured may be entitled to pierce the attorney-client privilege. If the civil fraud exception is asserted, the court must engage in a two-step process. First, upon a showing that a reasonable person would have a reasonable belief that an act of bad faith has occurred, the trial court will perform an in camera review of the claimed privileged materials. Second, after in camera review and upon a

finding there is a foundation to permit a claim of bad faith to proceed, the attorney-client privilege shall be deemed to be waived.

Id. at 700. Thus, while *TransCanada* considered only whether the attorneys' communications qualify as attorney-client communications and involve legal advice, the test in *Cedell* also considers whether any attorney-client privilege that otherwise existed is waived under the crime fraud exception. The *Cedell* inquiry can depend on whether the insurer acted in bad faith.

Although the framework set forth in *Cedell* may provide more guidance for insurers and attorneys than the *TransCanada* holding, the application of this framework raises a number of questions. The first is: what are "first party insurance claims by insured's"? While the term "first party" is often used in insurance to refer to losses involving the insured's own property,⁶ the Washington Supreme Court's use of this term does not appear to be so limited.⁷

Another question raised by the *Cedell* ruling is: what level of showing that the attorney was "providing counsel to the insurer and not engaged in a quasi-fiduciary function" is necessary to avoid the presumption of discoverability? In *Cedell*, the Supreme Court found that an attorney performed "quasi-fiduciary duties" by performing the functions of "investigating, evaluating, negotiating, and processing the claim" of the insured, *Cedell*. *Id.* at 701. Specifically, the Supreme Court identified the following conduct performed by the attorney, Hall:

The record suggests that Hall assisted in the investigation. Hall took sworn statements from *Cedell* and a witness and corresponded with *Cedell*. Hall assisted in adjusting the

⁶ See, e.g., *Olds-Olympic, Inc. v. Commercial Union Ins. Co.*, 129 Wash.2d 464, 479, 918 P.2d 923 (1996)) ("Third party insurance involves protection for the policyholder for liability it incurs to someone else, while first party insurance involves protection for losses to the policyholder's own property.").

⁷ See *Cedell*, 176 Wash.2d at 698 ("First party bad faith claims by insureds against their own insurers . . ."); see also *Carolina Cas. Ins. Co. v. Omeros Corp.*, Case No. C12-287-RAJ, 2013 WL 1561963, at *3 (W.D.Wash. Apr. 12, 2013) (finding *Cedell* applicable to third-party insurance actions because "[t]he *Cedell* court grounded its ruling in the quasi-fiduciary duty of an insurer to its insured, along with the public policy interest in regulating the business of insurance"); *Everest Indem. Ins. Co. v. QBE Ins. Corp.*, 2:13-CV-00828-RSM, 2013 WL 5885277 (W.D. Wash. Oct. 31, 2013) (finding *Cedell* applicable to "third-party bad faith actions").

claim by negotiating with Cedell. Seven months after the fire, Hall wrote to Cedell offering a “one time offer” of \$30,000, which was open for only 10 days, and threatened denial of coverage if the offer was not accepted. It was Hall who was negotiating with Cedell on behalf of Farmers and it was Hall who did not return his calls when Cedell was attempting to respond to the offer.

Id. Although the Supreme Court observed that the attorney may have advised the insurer “as to the law and strategy,” the Court also found that the attorney performed functions that are “among the activities to which an insurer owes a quasi-fiduciary duty” to the insured. *Id.*

The Supreme Court did not resolve whether the insurer made a sufficient showing that its attorney was not engaged in quasi-fiduciary duties. *Id.* The court found that “it is not clear” whether the trial court followed the new test, and remanded the case for further proceedings. *Id.* Thus, the level of showing required to overcome the presumption of discoverability may not be clear under *Cedell*.

Lastly, the *Cedell* court did not apply the second two steps of its framework: (1) “a showing that a reasonable person would have a reasonable belief that an act of bad faith has occurred”; and (2) “a finding there is a foundation to permit a claim of bad faith to proceed.” *See id.* Thus, the precise application of these two standards may not be clear, leaving even insurers that believe that they have not acted in bad faith uncertain of whether their attorney-client privilege will be found to have been waived.

3. Ohio.

The Supreme Court of Ohio limited the application of attorney-client privilege to insurers in 2001, well before the *Cedell* and *TransCanada* courts addressed this issue. Ohio’s Supreme Court took a position that, like the *Cedell* framework, depends on an insurer’s alleged bad faith. *See Boone v. Vanliner Ins. Co.*, 91 Ohio St. 3d 209, 744 N.E.2d 154 (2001). However, unlike *Cedell*, the *Boone* holding is a bright-line rule: “[I]n an action alleging bad faith denial of insurance coverage, the insured is entitled to discover claim file materials containing attorney-client communications related to the issue of coverage that were created prior to the denial of coverage.” *Id.* at 213-14.

Thus, pursuant to *Boone*, an insured need only *allege* bad faith for the insurer to lose its attorney-client privilege for documents created prior to its denial of coverage. *Id.* By comparison, *Cedell* requires the court to conduct an *in camera* review and find “a foundation to permit a claim of bad faith to proceed” for the privilege to be waived. *See Cedell*, 176 Wash.2d at 699. Accordingly, the *Boone* holding is a much broader exception than the framework articulated in *Cedell*. Of note, an *amicus curiae* in *Cedell* unsuccessfully advocated for the adoption of a rule similar to *Boone*’s bright-line rule. *Id.* at 709 n. 2.

Ohio’s Supreme Court based its limitation of the attorney-client privilege on the proposition that “claims file materials that show an insurer’s lack of good faith in denying coverage are *unworthy of protection*.” *Boone*, 91 Ohio St. at 213 (emphasis added). As Justice Cook observed in dissenting, this same rationale has been applied to support the crime-fraud exception. *Id.* at 216 (citing *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d 1032, 1038 (2d Cir. 1984)). However, as Justice Cook also observed, the crime-fraud exception requires a demonstration of “a factual basis for a showing of probable cause,” and the *Boone* rule requires “no similar prima facie showing.” *Id.* at 217 (citing *State ex. Rel. Nex v. Cleveland*, 83 Ohio St.3d 379, 384, 700 N.E.2d 12, 16 (1983)).

Justice Cook’s criticism of *Boone* rule proved to be portentous, as in 2007 the Ohio General Assembly modified the statute governing privileged communications, Ohio Rev. Code § 2317.02(A), to create a testimonial exception to the attorney-client privilege under limited circumstances:

The following persons shall not testify in certain respects:

* * *

(2) An attorney, concerning a communication made to the attorney by a client in that relationship or the attorney's advice to a client, except that if the client is an insurance company, the attorney may be compelled to testify, subject to an *in camera* inspection by a court, about communications made by the client to the attorney or by the attorney to the client that are related to the attorney's aiding or furthering an ongoing or future commission of bad faith by the client, *if the party seeking disclosure of the communications has made a prima facie showing of bad faith, fraud, or criminal misconduct by the client.*

Ohio Rev.Code Ann. § 2317.02(A)(2) (emphasis added). Thus, a communication under § 2317.02(A)(2) is privileged unless the party seeking disclosure “has made a prima facie showing of bad faith, fraud, or criminal misconduct by the client.” Of note, the dissent in *Cedell* advocated for the adoption of a standard “similar” to § 2317.02(A)(2). See *Cedell*, 176 Wash.2d at 710 n. 3.

In modifying § 2317.02(A)(2), the Ohio General Assembly made its intent to protect the attorney-client privilege quite clear, declaring:

[T]he attorney-client privilege is a substantial right and . . . it is the public policy of Ohio that all communications between an attorney and a client in that relation are worthy of the protection of privilege . . . The common law established in *Boone v. Vanliner Ins. Co.*, 91 Ohio St. 3d 209, 744 N.E.2d 154 [and other Ohio cases] is modified accordingly to provide for judicial review regarding the privilege.”

2006 Ohio Laws 2292, § 6 (Am.Sub.S.B. 117). Given that the *Boone* premised its limitation of the attorney-client privilege on the proposition that “claims file materials that show an insurer’s lack of good faith in denying coverage are *unworthy of protection*,” the legislature’s statement that “all communications between an attorney and a client in that relation are *worthy of the protection of privilege*” can be seen as a direct criticism of the *Boone* holding.

Based on the legislative amendment to § 2317.02(A)(2), some courts have held that the *Boone* standard – an allegation of bad faith – has been replaced by a prima facie standard.⁸ However, this application of *Boone* and § 2317.02(A)(2) is by no means uniform. Other courts have held that § 2317.02(A)(2) did not overrule *Boone*, and applies only to an attorney’s testimony, rather than claims file documents.⁹ One such court based its holding on the fact that §

⁸ See, e.g., *Galion Cmty. Hosp. v. Hartford Life & Acc. Ins. Co.*, 1:08 CV 1635, 2010 WL 359126 (N.D. Ohio Jan. 29, 2010) (holding that insured “is required to make a prima facie showing that the privilege should be waived” with respect to documents).

⁹ See, e.g., *Little Italy Dev., LLC v. Chicago Title Ins. Co.*, 1: 11 CV 112, 2011 WL 4944259, at *2 (N.D. Ohio Oct. 17, 2011) (“*Boone* created an ‘exception’ to the attorney-client privilege. The amendment to O.R.C. § 2317.02(A) provides that the *Boone* exception cannot be applied to the testimonial privilege. Thus, while the exception may apply to the production of documents, it cannot be applied to the testimonial privilege absent a *prima facie* showing of bad faith. Accordingly, the Court finds that the amendment to O.R.C. § 2317.02(A) did not overrule *Boone*.”); *Chubb*

2317.02(A)(2) provides that an attorney “shall not *testify*.”¹⁰ Accordingly, despite the Ohio legislature’s attempt to protect attorney-client privilege, it may not be clear in Ohio whether the discoverability of communications between an insurer and its attorney before a claim is denied depends on a *prima facie* showing of bad faith or merely an allegation of a bad faith.

III. Conclusion.

Courts in New York, Washington and Ohio have taken different approaches to the existence of attorney-client privilege for insurers. In New York, privilege depends upon whether the documents at issue were “prepared in the ordinary course of an insurer’s investigation of whether to pay or deny the claims.” See *TransCanada*, 114 A.D.3d 595. In Washington, privilege depends upon: (1) whether the attorney performed “quasi-fiduciary duties”; (2) whether the insured can show that “a reasonable person would have a reasonable belief that an act of bad faith has occurred”; and (3) whether, after an *in camera* review, the trial court “finds there is a foundation to permit a claim of bad faith to proceed.” *Cedell*, 176 Wash.2d at 700. In Ohio, privilege may depend on whether a bad faith claim is alleged, *or* whether a *prima facie* showing of bad faith is made. See *Boone*, 91 Ohio St. 3d at 213-14; Ohio Rev. Code § 2317.02(A).

Despite their differences, the standards in these jurisdictions share some commonality. In New York and Washington, a communication may not qualify as attorney-client privilege if it is a product of the attorney’s factual investigation, as opposed to legal analysis. In Ohio and Washington, attorney-client privilege may be waived in a bad faith case. Moreover, each of these standards raises its own questions of application, leaving insurers and attorneys in each state uncertain of whether their communications will be privileged.

Each of the standards in New York, Washington and Ohio force an insurance company that seeks legal advice from an attorney about a coverage issue to consider the possibility that those communications will be subject to future disclosure. This consideration could potentially threaten the open and honest discourse between attorney and client that the privilege is supposed to protect, a concern aptly articulated by California’s Court of Appeals:

Custom Ins. Co. v. Grange Mut. Cas. Co., 2:07-CV-1285, 2012 WL 1340369 (S.D. Ohio Apr. 17, 2012) (applying *Boone* rule to documents and § 2317.02(A)(2) to a request to depose the insurer’s attorneys).

¹⁰ *Little Italy*, 2011 WL 4944259 at *2.

[A]n insurance company should be free to seek legal advice in cases where coverage is unclear without fearing that the communications necessary to obtain that advice will later become available to an insured who is dissatisfied with a decision to deny coverage. A contrary rule would have a chilling effect on an insurance company's decision to seek legal advice regarding close coverage questions, and would disserve the primary purpose of the attorney-client privilege—to facilitate the uninhibited flow of information between lawyer and client so as to lead to an accurate ascertainment and enforcement of rights.

Aetna, 153 Cal.App.3d at 474.

If courts discourage insurers from seeking advice from attorneys on “close coverage questions,” would that really benefit policyholders? As Justice Cook observed in the *Boone* dissent, limitations on the attorney-client privilege based on the potential for bad faith “assume[] that an insurer will always have some sinister intent to act in bad faith when it discusses a coverage decision with an attorney.” *See Boone*, 91 Ohio St. 3d at 217-218. If limitation on attorney-client privilege hampers insurers’ knowledge of the law, the courts’ encroachment on the supposed “seal of secrecy” may hurt the very interests they are attempting to protect.

CAUTIONARY TALES: MANAGING LAW FIRM NIGHTMARES

**FDCC Annual Meeting
The Greenbrier
White Sulphur Springs, West Virginia
July 27 – August 2, 2014**

**Edward “Ned” Currie
James D. Boone
Currie Johnson Griffin & Myers, P.A.
Jackson MS**

**C. Howard Hunter
Hill Ward & Henderson, P.A.
Tampa FL**

**James A. Dodrill
Corporate Claims Counsel
The Progressive Group of Insurance Companies**

**Douglas R. Richmond
Aon Global Professionals Practice
Chicago IL**

PREFACE

The Canterbury Tales center on a story telling contest among colorful fourteenth century medieval English characters while making a pilgrimage to Canterbury Cathedral. Geoffrey Chaucer described or displayed every human frailty in the characters telling his or her tale, or in the characters about whom each tale is told, in colorful, sometimes scatological, language. Included in vivid language are motifs of avarice, death, misdeeds, going “rogue”, and inventive fourteenth century methods crafted to deal with crises as they erupt in the stories. Similarly, the stories in “Cautionary Tales” include the same motifs based upon real life scenarios.

American motivational author Robert Collier wrote in the nineteenth century:

Sooner or later comes a crisis in our affairs, and how we meet
it determines our future happiness and success. Since the beginning
of time, every form of life has been called upon to meet such crises.

Certain crises can and often do arise in law firms, crises that threaten the existence and enduring business of a firm, some of which spill over into the interests of firm clients. This paper explores hypothetical crises based upon real life experiences and methods to handle them, as well as actual law firm crises that threatened the firms affected.

THE SUMMONER’S TALE

THE FOUR R’S OF GUARDING AGAINST AND SURVIVING LAW FIRM THEFT AND EMBEZZLEMENT

**Edward “Ned” Currie
James D. Boone
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Jackson MS**

INTRODUCTION

Initially, it seemed like it might have only been \$1 million. The amount jumped to \$9 million after he was scrutinized by investigators. Later, it was discovered that \$19 million had been transferred to a foreign bank account. All told nearly \$30 million had been systematically siphoned over almost 15 years. The firm was in shock as it uncovered layer after layer of

betrayal, dishonesty and fraud. How could this have happened to one of the largest regional firms in America? Jonathan Ladrão was perfect. He could do no wrong. Partner after just a few years. Billable hours of 14 to 16 hours a day. This was every law firm's dream—a money making machine. He had never married, never had children, he lived to practice law. More often than not, he slept at the firm and never took vacation time. The partners joked that he should pay them rent since he lived at the office. He appeared to live modestly. He continued to live in the same cheap apartment he had lived in during law school, drove a beat up car and wore old rumpled up suits. Nobody thought he even cared about money. Practicing law was all that seemed to course through Ladrão's veins. He was called the "boy wonder." He was kind, respectful and never reeked of the arrogance one might expect from a man who commanded such authority in his field of law. How? How could this have happened? The other partners sat dumbfounded. Nobody spoke. The IRS and FBI had stayed for a week. Hard drives and financial records were seized. The questioning was ruthless. Even the cleaning staff and runners were examined. The firm was in shambles. Clients had been calling non-stop for two days. Nobody dared answer the phone, because nobody knew what to say. Where would the firm go from here?

Unfortunately, this is not Chapter 1 of the latest legal thriller by John Grisham. The above facts are loosely based on the rise and fall of a prominent partner at one of the South's largest regional law firms. On a smaller scale, the same transgressions take place at law firms throughout the United States each year. The reckless and selfish actions of one lawyer or employee can devastate a firm if permitted. Employee theft is an epidemic, and is one of the fastest growing crimes in America says the Federal Bureau of Investigation.¹ According to a report published by CBS News, small businesses lost around \$33 billion in revenue due to employee theft and at least thirty percent of all corporate bankruptcies result from employee theft.² Citing a report published by the US Chamber of Commerce, the Human Resources Journal indicated that seventy-five percent of employees steal from their employers, and that seventy-five percent of workplace thefts go undetected.³ Law firms are certainly not immune to theft by their own attorneys, as reflected by the growing number of reported decisions imposing attorney discipline.⁴ However, through careful planning a firm can do much to protect itself from employee theft and/or embezzlement, and, should such a situation occur, implement measures necessary to walk away even more successful than before. While not exhaustive, the following are suggestions to assist in the prevention of employee theft and embezzlement, and counter-measures that will assist in remediating such indiscretions.

A. Recognize. Look for the Warning Signs.

¹ "Know the Signs of Employee Theft," William J. Lynott, InTentsMagazine, October 2011, http://intentsmag.com/articles/1011_tt_employee_theft.html

² "Employee Theft: Are You Blind to It?" CBS News, July 14, 2011, <http://www.cbsnews.com/news/employee-theft-are-you-blind-to-it/>

³ "Workplace Theft Statistics for 2012 And How to Prevent Them," Human Resources Journal, May 15, 2014, <http://www.humanresourcesjournal.com/2012/05/workplace-theft-statistics-for-2012-and-how-to-prevent-them/>

⁴ See *Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers*, Lisa G. Lerman, 12 GEOJLE 205 (1999).

There are dozens of potential reasons for law firm theft and/or embezzlement, and no one may be able to entirely explain the motivations behind such misconduct from a trusted member of the firm. However, one theory for law firm theft and embezzlement is Donald Cressey's fraud triangle: "Opportunity, Pressure, and Rationalization."⁵ Cressey believes that "[t]he opportunity to commit fraud arises when there is a lack of internal control, inadequate supervision . . . , a lack of separate authority, and an inadequate system for detecting and punishing fraud. Pressure to commit fraud can result from employees' personal financial problems, vices and addictions, and unrealistic performance goals."⁶ Recognition of an employee's or partner's improprieties all too often begins with the discovery of financial irregularities involving a lawyer in the firm, or after the fact. Therefore, the first step in preventing employee and partner indiscretions is to recognize the signs that may indicate underlying turmoil before the theft or embezzlement occurs. Recognizing these signs not only is preventative, it also serves to allow the firm to help the lawyer before untoward behavior is committed.

In the above example, one of the glaring signs of potential employee fraud and/or embezzlement is the lawyer who refuses to take a vacation day, personal time and/or sick time. Feigning as hardworking, dogged and disciplined, the lawyer actually may be suffering from paranoia due to his/her crimes. As long as the lawyer stays at work, he/she likely believes that they have the ability to cover up their criminal behavior. And, to an extent, the perpetrator is correct. While not mentioned in the story above, it was not until Mr. Ladrao actually took a vacation day that his employer noticed inconsistencies in his billing invoices. If impropriety is suspected in connection with the overachieving lawyer, the simple solution is to request that the lawyer take a mandatory vacation. Tell the lawyer he/she needs to take time away from work to refocus. Having the lawyer away from the office will provide the suspecting firm an opportunity to review the lawyer's billing, time and other records to determine whether any irregularities are detectable. If the lawyer absolutely refuses to take time away from the office, this may be an elevated warning sign that misconduct could be taking place.

Another warning sign is the employee who suddenly appears to be living beyond his/her means. As the employer, you have knowledge of an employee's salary and the type of lifestyle the salary would likely provide. Obviously, the employee's salary standing alone is not a full picture of his/her financial portfolio, and there are many other legitimate factors that could have caused an uptick in lifestyle and spending habits. Nonetheless, drastic employee lifestyle change is one potential warning sign that may signal employee misconduct. In the same vein, knowledge of an employee's gambling addiction, substance abuse problems or indebtedness should also be an indicator that the employee is placing himself/herself in a position where theft may become a necessity to sustain a lifestyle. When an individual becomes desperate, they may take risks that otherwise they would have never contemplated. Identifying irregular behavior can be the difference in legal action against the employee to recover stolen money, versus simply assisting the employee in a difficult time or even firing the employee.

⁵ See *Mutiny by the Bounties? The Attempt to Reform Wall Street by the New Whistleblower Provisions of the Dodd-Frank Act*, Geoffrey Christopher Rapp, 2012 BYULR 73, 104-09 (2012).

⁶ *Id.*

Another indication of employee theft or embezzlement is rapidly disappearing office supplies. It is not out of the question that an employee walks out of the office every night with a ream of paper, a box of ink toner, drinks, paper towels or toilet paper. Again, there are always valid reasons for office supplies being used more quickly, such as: trial preparation, a series of depositions, the addition of a new client, the list could continue. However, the simple truth is that if firm overhead rapidly increases, the employer should be wary of any potential employee dishonesty.

Also, be aware of lawyer relationships with vendors. A common form of impropriety occurs when a member of the firm makes purchases from vendors for the member's personal use at home, but actually charges the firm for his/her purchases. Another familiar method of theft is to use a fictitious vendor for services that are not actually performed, such as: investigative services, copy charges and/or service of process fees. In this situation, an employee creates a phony vendor, and then fabricates invoices and payments that are sent to the imaginary vendor. Unfortunately, these schemes are easiest when the person submitting the fake invoices is a partner or office manager with authority to approve payments. Unfortunately, many employees rarely question anything that comes from a managing partner or firm office manager, even if it seems a departure from the normal, for fear of losing their jobs. Moreover, an office manager who implicitly trusts a particular employee who happens to be submitting phony invoices, often will pay them without question. Then, the invoice is submitted to a client, implicating the firm's relationship with that client.

As mentioned, there are many motivating factors which drive temptation for an employee or partner to secrete money from the firm or even clients, including the lawyer who feels slighted. Employee theft/embezzlement is often motivated by feelings of under appreciation and a perception that the employee is underpaid. The common theme in these type of thefts is that the employee rationalizes in their own mind that their theft is justified as a substitute for the pay, salary raise or other remuneration to which he/she was entitled. This frequently happens when an employee is asked to perform additional duties without an increase in pay, or where an employee helps the company become more profitable but fails to receive the proper recognition. If there are financial irregularities taking place within a law firm, awareness of employees who may not have received a raise, bonus or proper recognition may be the first step in identifying impropriety.

B. Respond Appropriately.

In the event theft or embezzlement takes place in the law firm, it is critical that the managing partners of the firm respond immediately and appropriately. While a timely response is critical, more critical is that an appropriate response is made versus an ill-conceived response done quickly. In addition, the managing/supervising partners in the firm need to ensure that they properly discharge all ethical duties pursuant to the rules of professional conduct, both as to themselves and as it relates to other lawyers in their firm, as failure to do so could theoretically result in disciplinary action. See *Preventing Misconduct by Promoting the Ethics of Attorneys' Supervisory Duties*, Irwin D. Miller, 70 NTDLR 259, 279 (1994) ("failure to

make reasonable preventive efforts [to ensure the ethical conduct of all lawyers in a law firm] theoretically subjects every partner to professional discipline regardless of the partner's remoteness from the violating attorney, regardless of the partner's knowledge or suspicion of any misconduct").

Below are suggestions a law firm may consider when responding to the discovery of employee theft and/or embezzlement.

- First and foremost, prevent the offending lawyer's access to the firm, the firm's post office mailbox, bank accounts, as well as remote access by computer to the firm's servers, email, client files, the firm's accounts and financial records. This will require immediately changing locks on the doors to the firm. This also helps preserve evidence, as it prevents the attorney from spoliating any evidence.
- Maintain confidentiality. This is important for both the law firm and the employee or lawyer. On a practical level, the law firm wants to keep the matter confidential to avoid tarnishing the firm's reputation and sidestep any public embarrassment and humiliation. Obviously, theft of confidential data, money or other sensitive material will already not present well to clients, and spreading the details of a potential crime may lead to the loss of the victimized client's business and the loss of business from future clients. Moreover, leaking confidential details of the theft to the media could actually lead to the client suing the law firm over failing to protect confidential client information. Similarly, the employer must keep the matter confidential so as to avoid any defamation suit from the accused employee.
- Conduct a thorough investigation. Of course each situation is unique; however, if possible the employer should immediately conduct a full and complete investigation before making a decision to terminate the employee. First, a thorough investigation will help uncover whether the employee actually committed the crime, the extent of the crime and whether discharge is warranted. Second, showing that a full and complete investigation occurred will help insulate the employer if the employee should later sue the law firm for wrongful discharge.
- Retain a qualified accountant who is certified as a fraud examiner. The CPA should be provided access to the firm's books. If a client is implicated in the lawyer's misconduct, the CPA should be given access to the lawyer's files, billings, expense payments and disbursements. The certified fraud examiner will be in a position to assist the firm in taking appropriate remedies with bookkeeping methods, if warranted under the circumstances.
- Inform the appropriate authorities. Rule 8.3 of the ABA Model Rules of Professional Conduct requires that, "[a] lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct . . . shall inform the appropriate professional authority." The comment to Rule 8.3 indicates that the appropriate

professional authority is the particular state's bar disciplinary agency. See Model Rules Of Prof'l Conduct R. 8.3, Comment 3. Whether to inform law enforcement authorities can depend on too many factors to be discussed in this paper, and to a large extent may be governed by the scope of the implicated lawyer's misconduct. Suffice it to say, evidence obtained from the investigation may be used in both a criminal or civil suit. The evidence collected could be critical in seeking restitution from the employee in a suit to collect insurance proceeds from the firm's insurer or in defending the employer in a suit brought by the employee.

- Notify the firm's insurance company. Likely the policy issued by the insurance company will require the law firm to report the infraction immediately so that the insurance company can conduct its own investigation if necessary.
- As discussed more fully below, where at all possible and depending on the amount, if and when it is determined that client money is involved in the misconduct (such as theft of client funds through fraudulent billing or outright theft of client money held in the firm's trust account), make restitution to the client.

If it has been determined that an actual employee theft and/or embezzlement occurred, the firm should consider doing the following immediately:

- Engage experienced outside counsel. The firm will need objective advice from a professional separated from the emotional upset caused by the offending partner. Engaging outside counsel at the outset will go far if the firm later gets involved in litigation with the offending lawyer or should criminal laws be implicated.
- Obtain the offending attorney's resignation from the firm and all other firm ventures, or otherwise act to remove the attorney from the firm and other firm ventures.
- Preserve the lawyer's computer, hard drive, and all electronically stored information.
- Preserve all contents of the lawyer's office.
- Remove the attorney's name from firm letterhead, envelopes, firm business cards, the firm website and e-mails.
- If the attorney's name comprises part of the firm name, then immediately change the firm name to remove his/her name.
- Assure continuity of the attorney's existing/ongoing case files. This is important as it shows the client that the firm is bigger than the attorney, and that the firm will

provide quality legal service to the client regardless of the particular attorney who may have handled the client's files in the past.

- Accomplish substitution of counsel as necessary in ongoing litigation in which the attorney was involved.
- Determine the firm's financial obligations, if any, to the partner under the firm's partnership/shareholder agreement.
- Excluding items that potentially qualify as evidence, accumulate the lawyer's personal items for eventual delivery to the attorney.
- Reassure the employees of the firm. This is a most important component. When the discovery of a trusted partner's improprieties is made known in the firm, employees easily may suffer shock at the news. If the partner is a beloved figure in the firm, grief will ensue followed sometimes by anger. Employees may even wonder if the firm is going to survive. Calling a firm-wide meeting and offering reassurances that the firm has the situation under control, the ongoing nature of the firm's normal business and that, after all, life does indeed go on, will go far in offering emotional support to employees.
- In the event the attorney's theft and/or embezzlement becomes public and is broadcast throughout the media, it may be wise to preemptively contact clients not implicated by the lawyer's misconduct to explain the situation and provide assurances of the firm's stability and its ability to adequately represent the client going forward.
- In the event the media becomes involved, preemptively develop a media strategy. In addition, preemptively consider hiring a public relations firm to assist.

C. Restitution

Where client money is involved in the lawyer's misconduct, restitution is a key element, as it is a showing to the client that the firm will be accountable and responsible for the attorney's misconduct. Where the amount of client money at issue can be returned to the client without bankrupting the firm, prompt restitution will go a long way in retaining the client, as well as convincing the client that legal action against the firm is unnecessary. Without prompt and fair restitution being made, it is difficult to imagine a scenario where the victimized client would ever contemplate remaining a client of the firm. Consider the following when formulating a plan to make restitution to the client:

- Make immediate disclosure to the clients who were victims of the attorney's misconduct, and explain to them that the firm is already in the process of determining the amount of restitution that will be paid.

- As discussed above, have a forensic accountant who is a certified fraud examiner analyze each of the files at issue in the attorney's misconduct to determine the amount of restitution needed to be paid to the client.
- Make restitution to the client. Restitution should be the actual amount misappropriated plus interest.
- Obtain restitution from the partner for amounts the firm had to repay to the client.

D. Resolve to Prevent the Crime from Happening, and/or Re-Occurring.

Rule 5.1 and 5.3 of the ABA Model Rules of Professional Conduct require that lawyers who possess "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' and nonlawyers' conduct conform and/or is compatible with the rules of professional conduct." Accordingly, failing to safeguard client funds, data and/or other information potentially can result in disciplinary action against a supervising attorney who fails to implement reasonable procedures to prevent employee misconduct within the scope of the attorney's managerial/supervisory role. *See Matter of Lenard*, 2013 WL 5676040, *8 (Cal. Bar Ct. 2013)(disbarring attorney for, in part, his failure to supervise his employees who embezzled funds from his client trust account in six different client matters); *Mississippi Bar v. Thompson*, 5 So.3d 330, 338 (Miss. 2008)(court determined that disciplinary action was appropriate for, *inter alia*, the supervising attorney's failure to implement appropriate safeguards over support staff to protect client material); *Clayton v. North Carolina State Bar*, 168 N.C.App. 717, 718 (N.C. App. 2005)(noting that attorney was disbarred because he "failed to adequately supervise an employee that had embezzled client funds"). As seen above, it is critical that every firm take the time and forethought to develop a plan that allows the managing/supervising partner(s) to properly supervise employees and properly safeguard client funds, data and other sensitive information.

Before employee misconduct happens, think ahead. This can include the resolve to implement the preventative steps necessary to protect your law firm. In the alternative, if your firm has been the victim of theft or embezzlement, resolve to implement and/or revise procedures that will protect your law firm prospectively. Again, a law firm's failure to implement appropriate measures could expose the law firm to theft and embezzlement, and then to make matter matters worse potentially expose the partners in the law firm to disciplinary action. *See In re Marshall*, 331 S.C. 514, 498 S.E.2d 869 (S.C. 1998)(attorney suspended from practicing law for six months for failing to properly supervise office manager); *See also Law Firm Partners As Their Brothers' Keepers*, Douglas R. Richmond, 96 Ky. L.J. 231 (2008)("[i]f a partner fails to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to ethics rules, she may be sanctioned completely apart and independent from any discipline imposed on the lawyers to whom her failure relates."). Therefore, it is critical that every law firm resolve to formulate appropriate preventative measures as they serve the two-fold purpose of: (1)

guarding against theft and/or embezzlement, and (2) insulating the partners in the firm from disciplinary action.

The following are ideas that might be considered in determining whether the managing/supervising partners in your law firm are discharging their duties to supervise and safeguard.⁷

- Preventing theft and/or embezzlement always begins with the hiring process. Every attorney and/or employee should be comprehensively screened.
- Safeguard all checks and deposit slips. Further, maintain the firm's trust account checks and deposit slips separately from the operating account. This will make misconduct more difficult, and guard against mistakenly writing a check from the wrong account.
- The signer of a check should be a different person than the person requesting the check.
- Consider circulating all deposits and disbursements to and from the law firm trust account to partners as they are made. The managing partner should double check all deposits and disbursements when reconciling the trust account each month.
- A periodic report should be circulated to all partners listing all balances by client matter.
- Do not leave cash in the office. Deposit all monies received daily, and make sure that all bank statements are reconciled monthly. Monthly reconciliation allows a firm to quickly detect any irregularities.
- When a check is requested from the firm's trust account, the bill or other supporting documentation should be attached to the deposit and disbursement request, and reviewed by the person signing the check.
- Cancel all invoices, and write the date paid, amount paid, and check number on the invoice. While this process is more time consuming, it will prevent the same invoice from being paid twice.
- During monthly account reconciliation, any outstanding checks should be traced by the bookkeeper or managing shareholder to determine why the checks have not yet been negotiated.

⁷ We note that many of the suggestions found in this section are based on information found in the article, *"How A Partner or Employee Can Steal From Your Firm"*, Michaelis, Beverly, 70-JAN Or. St. B. Bull. 34 (2010).

- Be wary of ATM cards for your trust account. An ATM card is one more access point for criminal behavior. Consider cancelling all PIN codes and destroying all existing ATM cards.
- Online trust account access. Again, online accounts are another access point for criminal behavior. Every firm should weigh the convenience online accounts provide versus the potential risk and temptation they pose for criminal misconduct.
- Analyze payroll and office expenses and other similar groups. Historically, employees most often use these categories for misconduct by paying for personal expenses, but charging the expenses to the law firm. In a larger firm, false identities can easily be created so that payments from these groups appear legitimate.
- Periodic audits. Audits will assist in determining if there are any missing or altered documents, or “overdue” notices for bills that should have been paid. Further, they will ensure that all billing statements match monies collected by the firm. Along the same lines, an occasional surprise audit by an outside auditing firm will decrease an employee’s chances of manipulating financial records in anticipation of an audit.
- Password protect all protectable electronic equipment. Consider requiring employees to password protect all cellphones, tablets and other computer devices that contain firm data. Security measures should be mandatory as long as they contain firm data, even if such devices are personally purchased by the attorney or support staff.
- E-mail access. Employers should create an employment policy that gives them free access to all of an employee’s e-mail. On many levels this is a good idea. It allows the law firm to monitor for theft and embezzlement, but also gives the firm the opportunity to ensure that employees are conducting themselves appropriately, and not engaging in in other unbecoming behavior.
- Depending on the size of the firm, consider alternating accounting and/or bookkeeping duties between staff members. Rotating these duties makes it more difficult to misappropriate funds, and also makes it easier to detect any misconduct.
- Separating financial duties. Never allow a lawyer to both write checks and reconcile bank statements. Similarly, no one employee should handle all incoming and outgoing funds. Splitting these responsibilities deters illegal behavior, takes away the opportunity to cover up misconduct and ultimately allows the firm to more easily identify irregularities.
- Bank mail should be delivered to the reviewing partner date-stamped and unopened. Otherwise, an employee involved in misconduct has opportunity to steal mail and cover up any theft.

- Safeguard signature stamps, or consider eliminating their use. Signature stamps provide an easy way to sign financial documents, legal documents and/or otherwise perpetrate fraud.
- Adequately insure the firm. Surprisingly, many law firms are woefully underinsured in the area of employee dishonesty insurance coverage. This coverage insures against forgery, alteration, unauthorized electronic transfers, credit card fraud and counterfeit fraud. Frequently analyze your coverage limits to ensure that the limits match your firm in terms of employees and the economic reality of your firm.
- If the firm maintains cameras in supply rooms where checks are stored, and/or where other sensitive data is stored, such can greatly deter employee theft and assist in identifying the culprit should any theft occur. Obviously, cameras should not be installed in areas where employees have an expectation of privacy. Also, video surveillance should not include sound, as courts have held that audio surveillance has been found to violate an individual's right to privacy in certain circumstances. See *Thompson v. Johnson Cnty. Cmty. Coll.*, 930 F. Supp. 501, 506 (D. Kan. 1996); *DeVittorio v. Hall*, 589 F.Supp.2d 247, 255 (S.D.N.Y. 2008).

Trust among the partners and employees in a firm is essential in making the firm function as it should. However, never believe that any particular attorney in the firm is above reproach. Having in place appropriate preventative measures will reduce the temptation for misconduct and deter your employees and attorneys from engaging in impropriety.

CONCLUSION

It is not a good thing for a firm to assume that employee theft and/or embezzlement will never happen in the firm. History has proven the irrelevancy of the length of time attorneys have been friends, how many trials they have handled together, the kindness of a secretary, how down to earth the runners are or how many sports teams children have played on together. Given the right circumstance and pressures, anybody is vulnerable to engaging in actions that they may never consider otherwise. Believing your firm is too noble, upright, successful or righteous will potentially expose your firm to theft and/or embezzlement. Remember the old Russian proverb used by Ronald Reagan, "Trust but verify." Resolve to make the necessary changes in your law firm's structure to guard against attorney misconduct, or to prevent theft and/or embezzlement from again occurring. Implementation of the policies discussed may prevent your law firm from being victimized. Although, even if your law firm has put in place some or all of the procedures discussed above, the most determined individuals may find ways to circumvent the safeguards presented herein. As such, always be aware of the warning signs that could signify potential employee theft and/or embezzlement. Constant vigilance and attention are oftentimes the best defense.

THE PARDONER'S TALE

Dealing with the Unthinkable: **Sudden Death of a Partner and Friend**

C. Howard Hunter
Hill Ward & Henderson, P.A.
Tampa FL

Shortly before 4:00 a.m. on the morning of May 17, 2000, the bedside telephone rang at nuclear alert volume. The caller, nearly hysterical, finally managed to pierce the groggy fog and identify herself as Connie Freeman, beloved wife - no, widow - of my partner, Grover Freeman.

Grover Cleveland Freeman, 54, husband, father, partner, confidant, friend, and consummate lawyer, had been murdered in his bed by his ex-wife, Kathy Freeman. Having skipped like the proverbial summer grasshopper through three years of rehabilitative alimony, Kathy squandered her divorce settlement on lavish living and day trading, and losing what was left in the "tech wreck" in the spring of 2000. With every credit card and credit source maxed out and no income, she faced choices that she deemed unacceptable: seeking assistance from Grover or giving up custody of their daughter. She chose a murderous alternative: she procured an "untraceable" Taurus 9mm handgun, bided her time for several weeks, then used her daughter's key to gain access to Grover's lakefront home. She planned to stage a "robbery," kill both Grover and Connie, throw the Taurus in the lake, then return to her nearby home to be roused from bed and "shocked" when authorities arrive to advise her daughter that she was fatherless.

Had the plan worked, Kathy, as their daughter's surviving guardian, would have regained control of Grover's home, estate, and insurance proceeds. This and the proceeds from the sale of her own home would have cured her financial ills.

The trouble was that after shooting Grover 16 times, the Taurus jammed as Connie confronted Kathy in a desperate flight for survival. In the fight that ensued, Connie managed to escape with a fractured skull, a broken finger, and cuts and bruises. Kathy panicked and fled the scene, leaving the murder weapon with its final shell stovepiped in the chamber. After several hours, she jumped from the Sunshine Skyway Bridge, but apparently survived impact with the waters of Tampa Bay 175 feet below due to high crosswinds. Kept afloat by cosmetic prosthetics, she survived to plead guilty to avoid the death penalty, and is now serving life plus 30 years at the Homestead Correctional Institute on the southern tip of Florida's Everglades.

The harrowing story that Connie Freeman lived to tell emerged amid terror and tears that morning. In the midst of the turmoil, it emerged that Kathy Freeman may have been no

stranger to homicidal tendencies; detectives related that, unbeknownst to any of us, she had apparently been at least a person of interest, if not a suspect in the murder of a previous paramour.

It fell to us to pick up the pieces.

Personal emotions must be dealt with, even when there is no time or opportunity to do so. The first task is to gain control, however tenuous, of yourself, the office, and the staff. Reaction to sudden death, particularly violent sudden death, is unpredictable; as in combat, some expected to be strongest will be weakest, and those thought undependable may become stalwarts.

That morning we were able to reach virtually the entire staff by telephone before the work day began. As a result, each had some opportunity to deal with the news privately before arriving at the office. This was invaluable; most of the staff had the opportunity to prepare themselves for what they would face in the office, where reminders of a wonderful, vibrant, and dominant personality were literally overwhelming.

The violent death of a prominent lawyer is big news. Reporters lack both sensitivity and conscience. Before the beginning of business hours, a TV reporter trailed by a cameraman, brandishing a microphone, barged into our office and attempted to accost traumatized staff. Others began gathering in our building lobby.

If you have building security, use it. Secure the office from the outside and admit only law enforcement, friends, family and staff. Modern communications are invaluable in effectuating this.

If you have contacts in the media, or access to a publicist, use them. One of Grover's great friends is a network photojournalist; he interceded with the local NBC affiliate to organize a pool interview later in the day. This basically amounted to a deal with the press: in exchange for peace, we made ourselves available at an agreed upon time and place for print, radio, and TV representatives.

There is always someone who does not get the message, or some media outlet that simply *must* try to scoop the others, but this technique can obviate a complete feeding frenzy. In the absence of some kind of accommodation, media *will* make your life (more) miserable. After all, even if the office is secure, you still have to come and go; the absence of a gauntlet is beneficial.

Law enforcement has to do its job. No matter how obvious the crime, its nature, or details, colleagues of a murder victim *will* be interviewed on some level. If the circumstances make it possible, try to cooperate as much as possible; not infrequently, your cooperation will

be reciprocated, which may be very helpful.⁸ Working with law enforcement can be jarring, particularly when dealing with the medical examiner and the details of the murder. *Someone*, incidentally, has to formally identify the victim's remains. We are all better equipped and conditioned to do that than the family.

Dealing with traumatized staff and lawyers is difficult, and requires a different approach for each person. To the extent possible, it should be done on an individual basis, at least initially.

Unlike other scenarios that will be discussed in this presentation, ours generally resulted in a great deal of sympathy from our colleagues, opponents, and the courts. For the first 30 to 60 days after Grover's death, we pretty much got anything we needed in terms of extensions, rescheduling events, etc. We were careful not to take advantage of this, but we did not hesitate to ask when needed.

Consider contacting your chief judge; an email from him or her works wonders. We found very few attorneys who would not accommodate any reasonable request.

The process of dealing with files in progress is one of triage and priority. First get control of the calendar and review the decedent's email traffic and desk; work with their assistant and immediate colleagues to identify the most active, pressing and dangerous matters. We attempted to stratify these into primary, secondary and tertiary priority, and to work through them in that order to notify, clients, insurers, opponents, and tribunals in some kind of reasonable order. Generally, the first round of telephone calls and mailings can be analogized to a "save the date," i.e., "we are pulling things together, please bear with us." The response to this is almost uniformly sympathetic. The initial point, however, is to buy time, preferably 30 to 60 days, to mourn, make arrangements, and support the family and staff, then move into the process of determining how best to handle the cases triaged and prioritized going forward.

While this process is best accomplished in a stratified prioritization, it must also be based upon ethical considerations and available expertise. We were fortunate to have sufficient talent available to deal with most of Grover's caseload. That fact notwithstanding, our formal notification to clients presented them the opportunity to transfer the file should they so desire. The overwhelming majority did not, but elected to permit Grover's senior associate to continue handling the files; when he, traumatized by Grover's death and unable to face walking past his office, elected to move to another firm, this was accommodated.

All lawyers carry information, vital information, in their head. Obviously, this information, frequently a missing link, is not available. For this reason, we found it vital to re-

⁸ Cooperation may yield unexpected and interesting results. One of the prosecutors we got to know during this ordeal was Pam Bondi, who did a fabulous job prosecuting the murderess and protecting Connie, and who is now Attorney General of Florida.

review and update our file inventory and status on an almost ongoing basis. It really was not until 60 to 90 days out that we really felt comfortable that we knew about almost *everything*.

As the process proceeds, you will deal with more than just professional considerations and obligations; you must deal with your own emotions. Make time to do it; failure will have repercussions.

Not only will you have lost a friend, your friend's family will look to you. You may be asked to become executor or personal representative; you may be asked to consider assuming guardianship of surviving children. If at all possible, do neither. Bear in mind that your position as part owner of a major asset of the decedent's estate poses a very real potential conflict that militates against your serving in any formal role with the estate or family. Gently and diplomatically decline. Remember that what was viewed as a valuable service at an emotional time may later be viewed differently. Be available as an advisor and friend, but remember that the advice you give comes from a lawyer and must be tempered, as appropriate, with gentle but firm disclosure and consent, and in many cases, outright abstinence.

We were dumb lucky; we dealt with wonderful and sincere people who deeply respected our having done business on a handshake. Do not leave this to chance. Invest the time and money to have your business relationship documented; have a partnership or stock agreement with buy-back provisions prepared by dispassionate professionals. Make due allowance for key person insurance. (Most readers probably have sense enough to know this, but for those, like me, who did not, harken to my words.)

Understand that you will lose staff, potentially key staff. Some will be unable to deal with the general situation and constant reminders of the deceased. Some will panic at the possibility of losing a job in an organization dependent upon a key person. While we were fortunate, some may view the situation as a macabre opportunity to start their own practice. In dealing with each employee, lawyer or staff, the message should be one of stability and reassurance.

Try to be transparent. In the months following Grover's death, I deemed myself unable, and became unwilling, to continue both the pace of my trial practice and assume his role as manager of the firm, particularly given the demands of managing the remainder of his practice. I therefore elected to liquidate the firm and merge my practice with the best firm on earth, Hill Ward Henderson. We advised employees of this as soon as practicable after the decision was made and about three months in advance; we offered a substantial bonus for employees who rode out the liquidation and assisted therewith, *provided* they advised their new employers of the circumstances and the timing. In all but isolated instances, this resulted in both employee loyalty and cooperation in the community.

Last, but not least, if you feel the need to consult other counsel, or if for some reason it "just doesn't feel right," consult with *independent* outside counsel on a formal basis. While you

are likely to have a lot of advice from both your friends and those of the decedent, this, too, can sometimes be tinged with the emotion of moment.

May this never happen to any of you.

THE MAN OF LAW'S TALE

CLIENTS IN CRISIS: WHEN OUTSIDE COUNSEL GOES ROGUE

James A. Dodrill
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The Progressive Group of Insurance Companies

I. RULES OF PROFESSIONAL CONDUCT

The most appropriate place to start in considering the options available to the client when faced with lawyer misconduct are the Model Rules of Professional Conduct. Most jurisdictions have adopted a version of the Model Rules so, with small variances, the Model Rules likely apply in your jurisdiction.

A. The Client-Lawyer Relationship

Rule 1.4 of the Model Rules sets the minimal requirements for the communication flow from the lawyer to the client. At a minimum, the lawyer must “keep the client reasonably informed” about the status of a matter and “promptly comply with reasonable requests for information”. Additionally, the lawyer must “explain a matter to the client reasonably necessary to permit the client to make informed decisions regarding the representation”. This includes keeping the client informed about negative case developments and, in the unlikely event of the lawyer’s misconduct or some other, similar adverse development in the case, promptly advising the client so the client can make an informed decision regarding the negative or adverse development in the case as well as the client-lawyer relationship.

B. Advocate

1. Candor Toward The Tribunal

Rule 3.3 of the Model Rules addresses the requirements for a lawyer’s candor toward tribunals and essentially mandates truth in the presentation of pleadings, making arguments and in presenting evidence. The rule prohibits false statements of fact or law and requires lawyers to correct prior false statements of fact or law once uncovered. Importantly, the rule not only prohibits the giving of false information, but it also mandates affirmative disclosure of legal authority that is adverse to the client’s position, even if opposing counsel fails to disclose it.

Similarly, the rule prohibits the presentation of evidence the lawyer knows to be false. As with the prohibition against false statements of fact or law, if a lawyer later learns that evidence previously presented is false, the lawyer must take appropriate steps to correct the situation, and this includes notifying the tribunal.

2. Fairness To Opposing Party And Counsel

Rule 3.4 governs an attorney's obligations with respect to what he or she can do and cannot do when it comes to producing or offering evidence and testimony during discovery and at trial, and concealing or altering documents or other items that might have evidentiary value. This rule also governs an attorney's conduct with respect to a tribunal's rules and orders as well as arguments and representations during trial.

Not surprisingly, the rule prohibits obstructing an opponent's access to evidence. It likewise prohibits the alteration, destruction or concealment of any items that might have evidentiary value in the case. Similarly prohibited is conduct whereby an attorney falsifies evidence, counsels a witness to give false testimony or offers some legally prohibited inducement to a witness. Thus, by way of example, if an attorney instructs the client to discard or destroy adverse evidence, i.e., advises the client to "clean up" his Facebook page by removing damaging photographs or posts, such conduct likely runs afoul of this rule.

The rule also bars intentionally disobeying the rules of a tribunal, service of frivolous discovery requests as well as failing to make reasonably diligent efforts to comply with opposing, proper discovery requests. Thus, knowingly failing to comply with local procedural rules, scheduling orders and the like is conduct proscribed by this rule. Additionally, serving voluminous or boilerplate discovery where the discovery is not reasonably calculated to lead to the discovery of admissible evidence, i.e., seeking wage/salary information (where they are not relevant for some other reason or purpose) in an action when there is no claim for lost wages or other income, would be improper conduct under this rule. Likewise, since this rule requires attorneys to make reasonably diligent efforts to comply with proper discovery requests, intentional conduct calculated to avoid producing documents or other evidence harmful to the client's claims or defenses is prohibited.

Also prohibited is certain trial conduct, including alluding to matters that are irrelevant or not supported by admissible evidence, injecting personal knowledge or opinion about the justness of the case or a witness' credibility or the culpability of a litigant. Similarly, except for a couple narrow exceptions, an attorney cannot request someone who is not the client to refrain from giving relevant information to another party. An example here might be where the client no longer possesses the relevant information or evidence, but the attorney is aware that someone else has the evidence and is prepared to give it to the opposing party, the attorney cannot ask the non-client to refrain from giving the evidence to the other party.

C. Maintaining The Integrity Of The Profession

Rule 8.4 of the Model Rules is a catch-all provision that proscribes dishonest, fraudulent and criminal conduct, and also makes violating or attempting to violate of the balance of the Model Rules a violation in and of itself. Most pertinent to this topic are the provisions of this rule proscribing “conduct involving dishonesty, fraud, deceit or misrepresentation” and “conduct that is prejudicial to the administration of justice”.

It is apparent that conduct intentionally calculated to conceal, alter or destroy evidence would not only violate the aforementioned rules specifically designed to address such behavior, but would violate this rule as well. This rule likewise forbids less blatant, yet intentional conduct, i.e., serving frivolous discovery requests or failing to comply with proper requests since such conduct could easily be identified as prejudicial to the administration of justice.

II. THE CLIENT’S EXPECTATIONS

Generally speaking, the corporate client can and should expect its attorney to know and comply with the Model Rules – to conduct himself or herself during the representation so that the client’s claim or defenses are advanced without running afoul of the Model Rules. This is an expectation that goes along with every attorney-client relationship and need not be stated separately or additionally in any engagement letter or other writing. In short, the expectation is that the attorney will conduct himself or herself ethically.

Often, however, corporate clients do set forth these expectations in writing in order to reinforce them. This is often accomplished via engagement letters, but most often, especially in the case of a large corporate client or insurers, in defense counsel guidelines documents.

For example, in its outside counsel guidelines available publicly via Internet search engines, Wal-Mart Stores, Inc. sets forth its expectations of ethical conduct by its outside counsel as follows:

Wal-Mart conducts its business in accordance with the highest ethical standards and expects the same of its Outside Counsel. Outside Counsel should advise the RLDA of the Company’s responsibilities under applicable laws and regulations and any legal risks of a proposed course of action. If Outside Counsel believes that a Wal-Mart Associate (including any Legal Department personnel) has or will engage in illegal or unethical activity as a representative or agent of the Company, the most senior Outside Counsel responsible for the matter through which such activity is discovered must immediately and confidentially contact the RLDA (or a Wal-Mart Associate General Counsel or General Counsel, as appropriate). No Wal-Mart Associate has authority to instruct Outside Counsel to act in an unethical manner in connection with any Wal-Mart matter.

Wal-Mart Outside Counsel Guidelines, effective June 1, 2007, p. 14.

Wal-Mart's *Outside Counsel Guidelines* echo, emphasize and expand on the requirements and prohibitions of the Model Rules. Addressing litigation conduct, Wal-Mart expects its outside counsel to:

...[h]onor the spirit, intent, and requirements of all rules of civil procedure and rules of professional conduct; [c]onduct themselves in a manner that enhances and preserves the dignity and integrity of the system of justice; [a]dhere to the principles and rules of conduct which further the truth seeking process so that disputes will be resolved in a just, dignified, courteous and efficient manner; [m]ake reasonable responses to discovery requests and not interpret them in an artificially restrictive manner so as to avoid disclosure of relevant and nonprivileged information; [b]ase discovery objections on a good faith belief in their merit and not for the purpose of withholding or delaying the disclosure of relevant and non-privileged information; [m]ake good faith efforts to resolve disputes concerning pleadings and discovery; [a]gree to reasonable requests for extension of time and waiver of procedural formalities when doing so will not adversely affect Wal-Mart's legitimate rights; and [p]repare and submit discovery requests that are limited to those requests reasonably necessary for the prosecution or defense of an action, and not for the purpose of placing an undue burden or expense on another party.

Id., at 17. Notably, Wal-Mart advises its outside counsel, up front, of the consequence of failing to adhere to these expectations – termination. *Id.*

Finally, Wal-Mart drills down a little deeper when it comes to outside counsel's conduct in discovery. Here, the *Outside Counsel Guidelines* provide that:

Outside Counsel are ultimately responsible for all discovery responses filed on behalf of the Company. Outside Counsel are expected to make informed, ethical decisions with respect to discovery responses. As noted above, Outside Counsel representing Wal-Mart are required to conduct discovery in a manner that enhances and preserves the dignity and integrity of the justice system. *Under no circumstances shall Outside Counsel engage in or encourage a violation of any discovery or ethical rule concerning the timely and appropriate disclosure of information to which a litigant is entitled.*

Id., p. 23 (emphasis in original).

Whether or not in writing in the form of an engagement letter or defense counsel guidelines, the expectations of corporate clients are as set forth above, with few, if any, exceptions. These expectations and the Model Rules set the baseline for outside counsel's conduct when acting on the client's behalf.

III. SOME RECENT REAL-LIFE EXAMPLES

A. Mississippi Bar v. Land

The Mississippi Bar charged attorney John W. (Jack) Land with violations of Rules 3.3, 3.4, and 8.4 of the Professional Rules of Conduct. The charges stemmed from a personal injury lawsuit in which Land had been hired by State Farm to defend its homeowner insured. The facts giving rise to that injury action were as follows.

While Stevens was driving slowly past Guthrie's (the State Farm insured) house, something struck Stevens in his left eye causing him to lose most of his vision in that eye. Stevens heard a lawn mower and, although he was unsure what struck his eye and he did not have the object, he thought he'd been struck by a rock thrown from a lawn mower.

When State Farm investigated the incident, however, its adjuster learned that the Guthries' minor son had used the mower earlier in the day, but not at the time Stevens drove past their house. The adjuster further learned that the Guthries' son and a friend were outside their house at the time Stevens drove by, shooting a BB gun at a target on the opposite side of their street. In fact, the boys gave the State Farm adjuster a description that matched the car driven by Stevens and even ran away to hide the BB gun for fear that they'd hit Stevens' car while firing. The State Farm adjuster also took photos of the lawn mower and of the BB gun. This information and the photos ended up in a report prepared by the adjuster, and the report ended up in Land's attorney file after he was retained by State Farm to defend the Guthries.

As mentioned, Stevens sued Guthrie, alleging negligent operation of the lawn mower. Attorney Land was aware of the BB gun incident and accompanying photograph as investigated and determined to have occurred by State Farm. While he had the adjuster's report and photos in his file, Land placed a notation in his file that the BB gun did not relate to the case and, further, that information concerning the gun was not to be produced in discovery. In this regard it is quite notable that contained within the adjuster's report was an admission by Guthrie's 11-year-old son that he and his friend had been firing the BB gun in the direction of a slow moving car at about the same time Stevens claimed he was passing by the Guthrie home.

Some of Land's (Guthrie's) responses to the plaintiff's written discovery are important as they were central to the Supreme Court's conclusion of misconduct on the part of attorney Land.

Land responded to the plaintiff's production requests as follows:

REQUEST NO. 4: A copy of any statements taken, concerning the accident, by you or anyone acting on your behalf.

RESPONSE: Defendant objects on the ground that any statements taken are work product, trial preparation and contains mental impressions and conclusions of Defendant's insurer and indemnifier

REQUEST NO. 5: A copy of any investigative report made by you or anyone acting on your behalf.

RESPONSE: Defendant objects on the same ground as to Request No. 4 above.

REQUEST NO. 6: A copy of any photograph or motion picture, made by you or anyone acting on your behalf, which in any manner relates to this lawsuit, including a photograph taken of the subject lawn mower as it appeared on May 26, 1990.

RESPONSE: Will produce.

Land (Guthrie) answered the plaintiff's interrogatories as follows:

INTERROGATORY NO. 2: Please identify the name and address of each and every person known to you to have been involved in or observed any part of the accident in question.

ANSWER: I have no knowledge of anyone involved in or having observed any such accident. The lawn mower was in operation on the date of the alleged accident by David Nelson Guthrie and he was assisted by neighbor's son, Ashley McAlexander, under the supervision of my wife, Sherrye Guthrie, at my direction. Excepting that I had not sanctioned Ashley's presents [sic] or use of my lawn mower.

INTERROGATORY NO. 3: Please identify all persons, whether you or anyone acting on your behalf, who obtained statements from or interviewed anyone during the course of investigating this case and for each statement, please state when, where, and to whom the statement was made and what was said.

ANSWER: State Farm Representative, Rachel Cole, and attorneys.

INTERROGATORY NO. 6: Please state the name, age, and address of the person operating the lawn mower at the time of the accident.

ANSWER: [Same response as No. 2].

INTERROGATORY NO. 11: Please state whether or not the results of the investigation, if any, were reduced to writing. If so, please furnish the name, address and employment of the person or persons having possession of such report.

ANSWER: I have no personal knowledge of any written reports.

INTERROGATORY NO. 12: Please describe the conclusions, if any, reached by you or anyone acting on your behalf, as a result of your investigation as to the cause of the accident.

ANSWER: I have no information that convinces me that the alleged accident occurred.

INTERROGATORY NO. 13: Please state whether you or anyone acting on your behalf made any photographs or motion pictures and, if so, please state when such photographs or motion pictures were taken and describe what each purports to depict.

ANSWER: Rachel Cole inspected the lawn mower in the Fall of 1990 and took a picture of it.

Importantly, Land deposed Stevens very shortly after serving the discovery responses. In that deposition he learned that Stevens knew nothing about any BB gun and, as far as he knew, he'd been struck by a flying rock discharged from a lawn mower. It was also revealed as a result of depositions in the Bar complaint proceeding that questions were asked of, and comments were made by, Land at this deposition which the Supreme Court found to be further evidence of Land's misconduct. For example, Stevens' attorney testified that, at Stevens' deposition, "he inquired of Land if the photographs Land showed him of the lawn mower were 'everything,' and that Land responded that the photos were everything, without mentioning or showing him photos of the BB gun". *Mississippi Bar v. Land*, 653 So.2d 899, 908 (1994)

After the foregoing discovery responses were served, a runner for Land mistakenly delivered Land's file to the plaintiff attorney's office. When the plaintiff's attorney went through the file he discovered the adjuster's report and the photos of the BB gun. Stevens' complaint in the action was quickly amended to include claims against State Farm and Land for tortious interference with the suit by concealing evidence and giving false discovery responses.

It is important to keep in mind that before serving the discovery responses referenced above, Land had in his file the State Farm adjuster's investigation report as well as the photos of the lawn mower and the BB gun. Land had also placed the following notation

in his file: "Gun does not relate to civil action as worded in Complaint! Do not produce." Stevens' attorney found all this when Land's file was delivered to his office.

The Mississippi Bar charged Land, as a result of the foregoing discovery responses with violating the following Rules of Professional Conduct:

Rule 3.3(a)(1) (making a false statement of material fact or law to a tribunal); Rule 3.3(a)(2) (failing to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client); Rule 3.4(a) (unlawfully obstructing another party's access to evidence or unlawfully altering, destroying or concealing a document or other material having potential evidentiary value, or counseling or assisting another person to do such act); and Rule 8.4 (c & d) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, and engaging in conduct prejudicial to the administration of justice).

Id., at 904.

The Supreme Court agreed and concluded that Land committed the misconduct as charged by the Bar, finding that,

Land's conduct clearly included the deliberate concealment of evidence intended to deceive opposing counsel and client from pursuing their claim, as well as the court in learning all the facts of this case. Such conduct is certainly prejudicial to the administration of justice.

The Supreme Court suspended Land's license to practice law for one year.

The decision of the Supreme Court in *Land* was not unanimous. The lone dissenter found great fault with the majority's analysis and felt the decision set the profession on a dangerous path. Justice Lee voiced his concerns as follows:

In the case *sub judice*, the Mississippi Bar asks this Court to establish a dangerous precedent — one that allows attorneys to use the Mississippi Rules of Professional Conduct (hereinafter MRPC) as a weapon by which one attorney may coerce or blackmail his opponent into a settlement. The Mississippi Bar's position rewards those that draft broad, vague and sweeping discovery requests and punishes the attorney who interprets those broad discovery requests narrowly. Likewise, the Mississippi Bar's position clearly ignores the duty of confidentiality that an attorney owes his client.

Id., at 910.

Justice Lee focused on the wording of the discovery requests themselves, finding that a fair reading of them, as well as of the complaint, made it clear that the specific act at issue in the injury action was whether Guthrie operated his lawn mower in a negligent manner and, as a result, injured Stevens.

Thus, the interrogatories propounded to Guthrie were calculated to discover what Guthrie knew about the alleged lawn mower accident and not whether Guthrie knew of any other explanations for the plaintiff's injury, plausible or not. The responses given by Guthrie were specifically addressed to the plaintiff's allegation that he was injured by Guthrie's negligent operation of a lawn mower. Guthrie was not asked to provide the plaintiff with any additional hypotheses as to how the plaintiff's injury occurred nor did he volunteer any such hypothesis.

Id., at 911. In closing his dissent, Justice Lee made it clear he felt Land's discovery responses were appropriately within bounds. The responses, while not identifying either the adjuster's report or the photos of the BB gun, did advise the plaintiff of the adjuster's identity and the fact that she had investigated the claim, obtained statements and taken photos. Justice Lee felt that with the discovery responses that were served, "given some diligence on the plaintiff's part, through depositions, he could have obtained admissible evidence which could have led to the discovery of the BB gun". *Id.*, at 912.

B. The 9/11 Insurance Litigation

The following was obtained from the *Opinion and Order Granting Sanctions for Pleadings and Discovery Abuses* of the U. S. District Court for the Southern District of New York in Case # 03 Civ. 332 (AKH), *In Re September 11th Liability Insurance Coverage Cases*. The sanctions were leveled jointly against Zurich American Insurance Company, the law firm of Wiley Rein, L.L.P. and the law firm of Coughlin Duffy, L.L.P.

Zurich provided commercial general liability coverage on the World Trade Center buildings on September 11, 2001. Together with excess and reinsurance coverage, there was \$1 Billion in coverage on the buildings. After the terrorist attacks, numerous lawsuits were filed by the survivors and successors of the dead and injured victims. Additionally, the insureds brought a third-party declaratory judgment action against Zurich to determine Zurich's obligations to the various parties. Zurich responded with a fourth-party declaratory action against the insureds and others seeking resolution of issues not raised in the third-party action. The third- and fourth-party actions were consolidated into this *In Re September 11th Liability Insurance Coverage Cases* matter.

As you might imagine, because of the ultimate exposures involved, the issues were hotly contested and the litigation was, in a word, spirited. There were extensive discovery and discovery motions proceedings. Rule 11 allegations as to Zurich's pleadings were asserted as were Rule 37 motions arising out of alleged discovery abuses by Zurich. It

was these allegations that led the district judge to look into what Zurich and its attorneys knew, when they knew it and whether that knowledge exposed them, for their pleadings and discovery conduct, to sanctions.

The pre-litigation history of the case is laid out in some detail in the *Opinion and Order*, as is the chronology of pleadings, motions and discovery events that lead to the *Opinion and Order*. In short, the district judge found instances of lengthy delays in producing documents, documents that, when produced many months late, were couched with explanations of “mistakenly not previously produced” “due to counsel’s error”, failures to comply with discovery orders, the need to concede defenses following depositions of Zurich witnesses coupled with production of documents demonstrating that certain defenses lacked merit, and contentions which were, in the words of the district judge, “either dishonest, or objectively unreasonable, or the product of a failure to make reasonable inquiries”. *Opinion and Order*, at 22.

Importantly for purposes of sanctions, the district judge determined that Zurich knew at the time of filing certain of its pleadings that some contentions contained within those pleadings were contrary to evidence within its possession. Despite this knowledge, Zurich “stubbornly maintained its position...”. *Id.*, at 24. As for Zurich’s attorneys, the district judge found instances where either they “‘forgot’ what [they] had learned” or that there was some other reasons for inconsistencies between the evidence in the possession of Zurich’s witnesses and the contentions set forth in Zurich’s pleadings. In fact, with respect to one of the most important, if not the most important, documents in the coverage litigation, the district judge seemed quite critical of the attorneys’ position that it “became ‘lost’ midst Zurich’s delivery of documents to its lawyers...only to be found in response to specific prying by adverse lawyers”. *Id.*, 24-25.

Particularly with respect to the Rule 37 motion, the district judge was very critical of the discovery conduct. In March, 2004, the judge had ordered Zurich to produce additional documents via a single supplemental production within two weeks. However, over the course of the following 11 months or so, Zurich made 14 supplemental productions. Notably, the document that was arguably of most import in the case, referenced above, was not produced until the last of the 14 productions in February, 2005. The district judge found that “Zurich’s ‘culpable state of mind’ [was] established by evidence that it intended to delete, and deleted...” an electronic version of that all-important document and that both it and its attorneys had the paper copy of the document but failed to produce it. *Id.*, at 29. The district judge stated,

Wiley Rein attorneys obtained and copied the 9/11 Document in March of 2003, but they left it buried in a box for nearly two years and failed timely to produce it. Counsel’s failure to recognize the importance of this document, and to produce it timely, especially when alerted to its possible existence by opposing counsel, also constitutes a violation of discovery obligations. Indeed, at the sanctions hearing on April 19, 2007, counsel for Zurich properly conceded that it

should have been produced, attributing Zurich's failure to produce it to "inadvertence." See Sanctions Hearing Tr. 62–64. The explanation is not apt. A finding of negligence or worse would appear to be a more appropriate characterization, and I so find.

Id., at 30. In laying out the basis for the sanctions imposed, the district judge stated,

Zurich's decision to assert and maintain its denials and defenses regarding the Port Authority's status as Additional Insured multiplied proceedings, caused substantial expense to the parties, caused substantial waste of court time, and insulted public and judicial expectations of the standard of conduct expected of attorneys and insurance carriers.

Id., at 31. The district judge further held that,

Zurich, as the lead insurer on the case, and its attorneys, as lead counsel in the proceedings before me, owed the Court and the public better conduct than the conduct described herein; at a minimum, they had a duty to comply with Rule 11 of the Federal Rules of Civil Procedure. And, having multiplied proceedings by asserting denials and defenses that could not be supported by the evidence, the conduct of Zurich and its counsel, in their efforts to do away with evidence, to not produce evidence, and to slow up production of evidence until its utility might be attenuated, compounded the wrongdoing that they perpetrated.

Id., 31-32.

The district judge levied a Rule 11 sanction of \$750,000, jointly against Zurich and its attorneys, essentially advising that while substantial, it could have been even more so. In imposing a Rule 37 sanction, the district judge noted that the discovery conduct compounded the Rule 11 violations. Notably, the two opposing parties seeking the Rule 37 sanctions sought \$2,086,787 and \$2,979,021, respectively, for the time of both in-house and outside counsel in litigating the issue ultimately conceded by Zurich. However, these requests were reduced "by a flat and sizeable amount" to a total of \$500,000, with \$250,000 going to each of the two moving parties.

C. The Apple-Samsung Litigation

If the very first words in a court order are like the following from U. S. Magistrate Judge Paul Grewal's sanctions order in the Apple-Samsung litigation, your day, regardless of how it may have been to the point of reading the order, just got a whole lot worse,

A junior associate missing one redaction among many in an expert report is not exactly a historical event in the annals of big-ticket patent litigation. Even if regrettable, these things can happen, and almost certainly do happen each and

every day. But when such an inadvertent mistake is permitted to go unchecked, unaddressed, and propagated hundreds and hundreds of times by conscious – and indeed strategic – choices by that associate’s firm and client alike, more significant and blameworthy flaws are revealed.

Order Granting Motion for Sanctions, Apple, Inc. v. Samsung Electronics Co., Ltd., et al., U.S.D.C., N.D. CA, Case No. 5:11-cv-01846-LHK, at 1.

In this long-standing patent battle between Apple and Samsung, an agreed protective order addressing the disclosure and use of discovery materials was entered in January, 2012. Both Apple and Samsung eagerly sought to put the order, a lengthy protective order that addresses the disclosure and use of discovery materials in excruciating detail, in place.

However, during discovery that followed the protective order’s entry, a Quinn Emanuel (attorneys for Samsung) associate failed to redact some confidential material from a lengthy expert report while working late one night. The expert report, marked “Highly Confidential, Attorney Eyes Only”, was then provided to the client, Samsung, which in turn shared the report with more than 200 people all over the World, many of whom had nothing to do with the patent lawsuit. Several months later, another Quinn Emanuel associate uncovered the error and reported it to a more senior associate, but the law firm took no action beyond ordering the deletion of the document – they did nothing to determine whether any damage had occurred as a result of the error over the several months that had passed since the improper disclosure.

In levying sanctions, Judge Grewal placed the blame for the serious breach squarely on the law firm’s self-described “lean” structure. Grewal found fault with the structure, described to the court by firm founder John Quinn as “650 lawyers wide and one lawyer deep”. Quinn Emanuel was ordered to reimburse Apple, Nokia and their counsel “for any and all costs and fees incurred in litigating this motion and the discovery associated with it”. *Id.*, at 18. Notably, the sanctions levied against Quinn Emanuel included the “public findings of wrongdoing” as described at length in the *Order*. The monetary sanction, coupled with the “public findings of wrongdoing” were, according to Judge Grewal, “sufficient to both remedy Apple and Nokia’s harm and to discourage similar conduct in the future”. *Id.*, at 19.

D. The “I ♥ hot moms” Facebook Case

Jessica Lester was killed in 2007 when the car in which she was riding was struck head-on by a concrete truck owned and operated by Allied Concrete in Charlottesville, Virginia, after the truck crossed the roadway centerline. Lester’s husband, Isaiah Lester, injured in the crash, filed an injury and wrongful death action against Allied Concrete and its driver in the Circuit Court of the City of Charlottesville, Virginia. Lester’s attorney was Mathew Murray of the Virginia law firm of Allen, Allen, Allen & Allen, then arguably

the largest personal injury firm in Virginia. Murray was the managing attorney in the Allen firm's Charlottesville office and was a former vice president of the Virginia Trial Lawyers Association. The jury returned a verdict for Lester in the amount of \$8.5 Million.

During pre-trial discovery, instead of putting a proper legal hold in place, Murray instructed Lester to "clean up" his Facebook page. In fact, Murray's assistant sent an e-mail to Lester in which she advised, "[w]e do NOT want blow ups of other pics at trial so please, please clean up your facebook and myspace!" Notably, this email was sent to Lester on the morning after Murray had received a discovery request targeting Lester's Facebook account. In compliance with his attorney's advice, Lester deleted 16 photos from his Facebook page. After multiple hearings on discovery motions and at least one trial continuance, a defense computer forensics expert was able to recover 15 of the 16 deleted photos. One of the deleted photos was of Lester holding a beer can and wearing a T-shirt that read: "I ♥ hot moms."

Notably, all of the deleted photos were ultimately made available to the defendants before trial and the spoliation, as the trial judge determined, caused the defendants no prejudice at trial. However, while the jury was told about the deleted photos at trial, the string of emails, including the one referenced above, between Murray, his assistant and Lester were not provided to the court until after the trial. When the trial judge confronted Murray he first blamed his assistant, but ultimately confessed that he had concealed the emails because he was worried the court would grant another continuance of the trial.

In its final order in the case, entered October 21, 2011, the court ordered Murray and Lester to pay Allied Concrete's legal fees and expenses of \$722,000. Of this, Murray was ordered to pay \$542,000 and Lester had to pay \$180,000. Murray resigned from the Allen firm and, in July, 2013, agreed to a five-year suspension of his law license.

IV. CRISIS MANAGEMENT

A. Really Rogue

Quite frankly, in the nearly unfathomable scenario where outside counsel has truly gone rogue, meaning there is no complicity on the part of the corporate client or its representatives, an outcome other than that mandated, for example, by Wal-Mart in its *Outside Counsel Guidelines*, which states, "*Wal-Mart will terminate its relationship with any Outside Counsel who fails to adhere to the foregoing standards in connection with Wal-Mart litigation*" is difficult to imagine as within the realm of available options. *Wal-Mart Outside Counsel Guidelines*, effective June 1, 2007, p. 17.

In such a scenario, the attorney representing the corporate client has engaged in actionable misconduct that not only exposes himself/herself to monetary and other

sanctions by the tribunal, but also jeopardizes his/her ability to practice law. It is difficult to conceive of any means to salvage this attorney-client relationship. More importantly, at least from the perspective of the corporate client that must go forward in the litigation, why would the client want to maintain the relationship?

Of the four scenarios discussed above, the Mississippi and Virginia Facebook examples are ones in which, arguably, the client was not culpable in the misconduct. In the Virginia Facebook case the monetary sanction of \$180,000 against the client, from a reading of the original order discussing the matter, appears to have been aimed at the client's separate misconduct involving false deposition testimony and the like, but had nothing to do with the evidence spoliation. Assuming this was the case, since the sanctions were not imposed until after the verdict, we will never know whether the attorney-client relationship would have been maintained to proceed in the litigation.

Some will argue, and have argued, that the Supreme Court of Mississippi simply got it wrong in *Land* – that it was not a case of misconduct, but was a mere discovery dispute, as argued by the lone dissenting justice, and that there were other forces at play in the case. Since the purpose of this paper is not to critique decisions like the one in *Land*, this writer will not do so here. Suffice it to say, and this is pure speculation, however, that since the Court itself in *Land* was not unanimous regarding the propriety of his conduct, State Farm, once Land's license was reinstated in 1996, restored him to its panel of outside defense lawyers.

B. Reality....Not So Rogue

The more true-to-life issue, however, is that due to the sheer size and level of sophistication of larger corporate clients as well as the presence and involvement of its internal legal team alongside outside counsel in litigation, it is extremely unlikely that outside counsel misconduct of the caliber discussed here will ever occur in a vacuum – the possibility that such misconduct will ever occur in the total absence of at least some level of culpability on the part of the corporate client as well is exceedingly remote. This fact is evidenced by at least one of the three foregoing real life examples themselves. It was determined, for example, that Zurich possessed and knew about the withheld piece of key evidence and, jointly with its attorneys, it was sanctioned for its active role in the misconduct.

The question becomes whether, in a situation where both the client and the attorney are culpable in the misconduct, the attorney-client relationship can, or should, be saved. While the degree of culpability on the part of the client might and should affect the imposition of appropriate sanctions by the tribunal, the resultant considerations with respect to the relationship between the attorney and the client remain the same. As with the unlikely scenario where the outside attorney truly goes rogue and there has been no client involvement, nothing exists to compel termination of the attorney-client

relationship. However, it remains difficult to conceive of reasons that warrant maintaining the relationship as well as any workable means to salvage it.

CLIENTS IN CRISIS: WHEN OUTSIDE COUNSEL GOES ROGUE

**FDCC Annual Meeting
The Greenbrier
White Sulphur Springs, West Virginia
July 27 – August 2, 2014**

Presented by:

**James A. Dodrill
Corporate Claims Counsel
The Progressive Group of Insurance Companies**

**101 Washington Street East
Suite 107
Charleston, West Virginia 25301
(681) 313-4320**

I. RULES OF PROFESSIONAL CONDUCT

The most appropriate place to start in considering the options available to the client when faced with lawyer misconduct are the Model Rules of Professional Conduct. Most jurisdictions have adopted a version of the Model Rules so, with small variances, the Model Rules likely apply in your jurisdiction.

A. The Client-Lawyer Relationship

Rule 1.4 of the Model Rules sets the minimal requirements for the communication flow from the lawyer to the client. At a minimum, the lawyer must “keep the client reasonably informed” about the status of a matter and “promptly comply with reasonable requests for information”. Additionally, the lawyer must “explain a matter to the client reasonably necessary to permit the client to make informed decisions regarding the representation”. This includes keeping the client informed about negative case developments and, in the unlikely event of the lawyer’s misconduct or some other, similar adverse development in the case, promptly advising the client so the client can make an informed decision regarding the negative or adverse development in the case as well as the client-lawyer relationship.

B. Advocate

1. Candor Toward The Tribunal

Rule 3.3 of the Model Rules addresses the requirements for a lawyer’s candor toward tribunals and essentially mandates truth in the presentation of pleadings, making arguments and in presenting evidence. The rule prohibits false statements of fact or law and requires lawyers to correct prior false statements of fact or law once uncovered. Importantly, the rule not only prohibits the giving of false information, but it also mandates affirmative disclosure of legal authority that is adverse to the client’s position, even if opposing counsel fails to disclose it.

Similarly, the rule prohibits the presentation of evidence the lawyer knows to be false. As with the prohibition against false statements of fact or law, if a lawyer later learns that evidence previously presented is

false, the lawyer must take appropriate steps to correct the situation, and this includes notifying the tribunal.

2. Fairness To Opposing Party And Counsel

Rule 3.4 governs an attorney's obligations with respect to what he or she can do and cannot do when it comes to producing or offering evidence and testimony during discovery and at trial, and concealing or altering documents or other items that might have evidentiary value. This rule also governs an attorney's conduct with respect to a tribunal's rules and orders as well as arguments and representations during trial.

Not surprisingly, the rule prohibits obstructing an opponent's access to evidence. It likewise prohibits the alteration, destruction or concealment of any items that might have evidentiary value in the case. Similarly prohibited is conduct whereby an attorney falsifies evidence, counsels a witness to give false testimony or offers some legally prohibited inducement to a witness. Thus, by way of example, if an attorney instructs the client to discard or destroy adverse evidence, i.e., advises the client to "clean up" his Facebook page by removing damaging photographs or posts, such conduct likely runs afoul of this rule.

The rule also bars intentionally disobeying the rules of a tribunal, service of frivolous discovery requests as well as failing to make reasonably diligent efforts to comply with opposing, proper discovery requests. Thus, knowingly failing to comply with local procedural rules, scheduling orders and the like is conduct proscribed by this rule. Additionally, serving voluminous or boilerplate discovery where the discovery is not reasonably calculated to lead to the discovery of admissible evidence, i.e., seeking wage/salary information (where they are not relevant for some other reason or purpose) in an action when there is no claim for lost wages or other income, would be improper conduct under this rule. Likewise, since this rule requires attorneys to make reasonably diligent efforts to comply with proper discovery requests, intentional conduct calculated to avoid producing documents or other evidence harmful to the client's claims or defenses is prohibited.

Also prohibited is certain trial conduct, including alluding to matters that are irrelevant or not supported by admissible evidence, injecting personal knowledge or opinion about the justness of the case or a witness' credibility or the culpability of a litigant. Similarly, except for a couple narrow exceptions, an attorney cannot request someone who is not the client to refrain from giving relevant information to another party. An example here might be where the client no longer possesses the relevant information or evidence, but the attorney is aware that someone else has the evidence and is prepared to give it to the opposing party, the attorney cannot ask the non-client to refrain from giving the evidence to the other party.

C. Maintaining The Integrity Of The Profession

Rule 8.4 of the Model Rules is a catch-all provision that proscribes dishonest, fraudulent and criminal conduct, and also makes violating or attempting to violate of the balance of the Model Rules a violation in and of itself. Most pertinent to this topic are the provisions of this rule proscribing "conduct involving dishonesty, fraud, deceit or misrepresentation" and "conduct that is prejudicial to the administration of justice".

It is apparent that conduct intentionally calculated to conceal, alter or destroy evidence would not only violate the aforementioned rules specifically designed to address such behavior, but would violate this rule as well. This rule likewise forbids less blatant, yet intentional conduct, i.e., serving frivolous discovery requests or failing to comply with proper requests since such conduct could easily be identified as prejudicial to the administration of justice.

II. THE CLIENT'S EXPECTATIONS

Generally speaking, the corporate client can and should expect its attorney to know and comply with the Model Rules – to conduct himself or herself during the representation so that the client's claim or defenses are advanced without running afoul of the Model Rules. This is an expectation that goes along with every attorney-client relationship and need not be stated separately or additionally in any engagement letter or other writing. In short, the expectation is that the attorney will conduct himself or herself ethically.

Often, however, corporate clients do set forth these expectations in writing in order to reinforce them. This is often accomplished via engagement letters, but most often, especially in the case of a large corporate client or insurers, in defense counsel guidelines documents.

For example, in its outside counsel guidelines available publicly via Internet search engines, Wal-Mart Stores, Inc. sets forth its expectations of ethical conduct by its outside counsel as follows:

Wal-Mart conducts its business in accordance with the highest ethical standards and expects the same of its Outside Counsel. Outside Counsel should advise the RLDA of the Company's responsibilities under applicable laws and regulations and any legal risks of a proposed course of action. If Outside Counsel believes that a Wal-Mart Associate (including any Legal Department personnel) has or will engage in illegal or unethical activity as a representative or agent of the Company, the most senior Outside Counsel responsible for the matter through which such activity is discovered must immediately and confidentially contact the RLDA (or a Wal-Mart Associate General Counsel or General Counsel, as appropriate). No Wal-Mart Associate has authority to instruct Outside Counsel to act in an unethical manner in connection with any Wal-Mart matter.

Wal-Mart Outside Counsel Guidelines, effective June 1, 2007, p. 14.

Wal-Mart's *Outside Counsel Guidelines* echo, emphasize and expand on the requirements and prohibitions of the Model Rules. Addressing litigation conduct, Wal-Mart expects its outside counsel to:

...[h]onor the spirit, intent, and requirements of all rules of civil procedure and rules of professional conduct; [c]onduct themselves in a manner that enhances and preserves the dignity and integrity of the system of justice; [a]dhere to the principles and rules of conduct which further the truth seeking process so that disputes will be resolved in a just, dignified, courteous and efficient manner; [m]ake reasonable responses to discovery requests and not interpret them in an artificially restrictive manner so as to avoid disclosure of relevant and nonprivileged information; [b]ase discovery objections on a good faith belief in their merit and not for the purpose of withholding or delaying the disclosure of relevant and non-privileged information; [m]ake good faith efforts to resolve disputes concerning pleadings and discovery; [a]gree to reasonable requests for extension of time and waiver of procedural formalities when doing so will not adversely affect Wal-Mart's legitimate rights; and [p]repare and submit discovery requests that are limited to those requests reasonably necessary for the prosecution or defense of an action, and not for the purpose of placing an undue burden or expense on another party.

Id., at 17. Notably, Wal-Mart advises its outside counsel, up front, of the consequence of failing to adhere to these expectations – termination. *Id.*

Finally, Wal-Mart drills down a little deeper when it comes to outside counsel's conduct in discovery. Here, the *Outside Counsel Guidelines* provide that:

Outside Counsel are ultimately responsible for all discovery responses filed on behalf of the Company. Outside Counsel are expected to make informed, ethical decisions with respect to discovery responses. As noted above, Outside Counsel representing Wal-Mart are required to conduct discovery in a manner that enhances and preserves the dignity and integrity of the justice system. *Under no circumstances shall Outside Counsel engage in or encourage a violation of any discovery or ethical rule concerning the timely and appropriate disclosure of information to which a litigant is entitled.*

Id., p. 23 (emphasis in original).

Whether or not in writing in the form of an engagement letter or defense counsel guidelines, the expectations of corporate clients are as set forth above, with few, if any, exceptions. These expectations and the Model Rules set the baseline for outside counsel's conduct when acting on the client's behalf.

III. SOME RECENT REAL-LIFE EXAMPLES

A. Mississippi Bar v. Land

The Mississippi Bar charged attorney John W. (Jack) Land with violations of Rules 3.3, 3.4, and 8.4 of the Professional Rules of Conduct. The charges stemmed from a personal injury lawsuit in which Land had been hired by State Farm to defend its homeowner insured. The facts giving rise to that injury action were as follows.

While Stevens was driving slowly past Guthrie's (the State Farm insured) house, something struck Stevens in his left eye causing him to lose most of his vision in that eye. Stevens heard a lawn mower and, although he was unsure what struck his eye and he did not have the object, he thought he'd been struck by a rock thrown from a lawn mower.

When State Farm investigated the incident, however, its adjuster learned that the Guthries' minor son had used the mower earlier in the day, but not at the time Stevens drove past their house. The adjuster further learned that the Guthries' son and a friend were outside their house at the time Stevens drove by, shooting a BB gun at a target on the opposite side of their street. In fact, the boys gave the State Farm adjuster a description that matched the car driven by Stevens and even ran away to hide the BB gun for fear that they'd hit Stevens' car while firing. The State Farm adjuster also took photos of the lawn mower and of the BB gun. This information and the photos ended up in a report prepared by the adjuster, and the report ended up in Land's attorney file after he was retained by State Farm to defend the Guthries.

As mentioned, Stevens sued Guthrie, alleging negligent operation of the lawn mower. Attorney Land was aware of the BB gun incident and accompanying photograph as investigated and determined to have occurred by State Farm. While he had the adjuster's report and photos in his file, Land placed a notation in his file that the BB gun did not relate to the case and, further, that information concerning the gun was not to be produced in discovery. In this regard it is quite notable that contained within the adjuster's report was an admission by Guthrie's 11-year-old son that he and his friend had been firing the BB gun in the

direction of a slow moving car at about the same time Stevens claimed he was passing by the Guthrie home.

Some of Land's (Guthrie's) responses to the plaintiff's written discovery are important as they were central to the Supreme Court's conclusion of misconduct on the part of attorney Land.

Land responded to the plaintiff's production requests as follows:

REQUEST NO. 4: A copy of any statements taken, concerning the accident, by you or anyone acting on your behalf.

RESPONSE: Defendant objects on the ground that any statements taken are work product, trial preparation and contains mental impressions and conclusions of Defendant's insurer and indemnifier

REQUEST NO. 5: A copy of any investigative report made by you or anyone acting on your behalf.

RESPONSE: Defendant objects on the same ground as to Request No. 4 above.

REQUEST NO. 6: A copy of any photograph or motion picture, made by you or anyone acting on your behalf, which in any manner relates to this lawsuit, including a photograph taken of the subject lawn mower as it appeared on May 26, 1990.

RESPONSE: Will produce.

Land (Guthrie) answered the plaintiff's interrogatories as follows:

INTERROGATORY NO. 2: Please identify the name and address of each and every person known to you to have been involved in or observed any part of the accident in question.

ANSWER: I have no knowledge of anyone involved in or having observed any such accident. The lawn mower was in operation on the date of the alleged accident by David Nelson Guthrie and

he was assisted by neighbor's son, Ashley McAlexander, under the supervision of my wife, Sherrye Guthrie, at my direction. Excepting that I had not sanctioned Ashley's presents [sic] or use of my lawn mower.

INTERROGATORY NO. 3: Please identify all persons, whether you or anyone acting on your behalf, who obtained statements from or interviewed anyone during the course of investigating this case and for each statement, please state when, where, and to whom the statement was made and what was said.

ANSWER: State Farm Representative, Rachel Cole, and attorneys.

INTERROGATORY NO. 6: Please state the name, age, and address of the person operating the lawn mower at the time of the accident.

ANSWER: [Same response as No. 2].

INTERROGATORY NO. 11: Please state whether or not the results of the investigation, if any, were reduced to writing. If so, please furnish the name, address and employment of the person or persons having possession of such report.

ANSWER: I have no personal knowledge of any written reports.

INTERROGATORY NO. 12: Please describe the conclusions, if any, reached by you or anyone acting on your behalf, as a result of your investigation as to the cause of the accident.

ANSWER: I have no information that convinces me that the alleged accident occurred.

INTERROGATORY NO. 13: Please state whether you or anyone acting on your behalf made any photographs or motion pictures and, if so, please state when such photographs or motion pictures were taken and describe what each purports to depict.

ANSWER: Rachel Cole inspected the lawn mower in the Fall of 1990 and took a picture of it.

Importantly, Land deposed Stevens very shortly after serving the discovery responses. In that deposition he learned that Stevens knew nothing about any BB gun and, as far as he knew, he'd been struck by a flying rock discharged from a lawn mower. It was also revealed as a result of depositions in the Bar complaint proceeding that questions were asked of, and comments were made by, Land at this deposition which the Supreme Court found to be further evidence of Land's misconduct. For example, Stevens' attorney testified that, at Stevens' deposition, "he inquired of Land if the photographs Land showed him of the lawn mower were 'everything,' and that Land responded that the photos were everything, without mentioning or showing him photos of the BB gun". *Mississippi Bar v. Land*, 653 So.2d 899, 908 (1994)

After the foregoing discovery responses were served, a runner for Land mistakenly delivered Land's file to the plaintiff attorney's office. When the plaintiff's attorney went through the file he discovered the adjuster's report and the photos of the BB gun. Stevens' complaint in the action was quickly amended to include claims against State Farm and Land for tortious interference with the suit by concealing evidence and giving false discovery responses.

It is important to keep in mind that before serving the discovery responses referenced above, Land had in his file the State Farm adjuster's investigation report as well as the photos of the lawn mower and the BB gun. Land had also placed the following notation in his file: "Gun does not relate to civil action as worded in Complaint! Do not produce." Stevens' attorney found all this when Land's file was delivered to his office.

The Mississippi Bar charged Land, as a result of the foregoing discovery responses with violating the following Rules of Professional Conduct:

Rule 3.3(a)(1) (making a false statement of material fact or law to a tribunal); Rule 3.3(a)(2) (failing to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client); Rule 3.4(a) (unlawfully

obstructing another party's access to evidence or unlawfully altering, destroying or concealing a document or other material having potential evidentiary value, or counseling or assisting another person to do such act); and Rule 8.4 (c & d) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, and engaging in conduct prejudicial to the administration of justice).

Id., at 904.

The Supreme Court agreed and concluded that Land committed the misconduct as charged by the Bar, finding that,

Land's conduct clearly included the deliberate concealment of evidence intended to deceive opposing counsel and client from pursuing their claim, as well as the court in learning all the facts of this case. Such conduct is certainly prejudicial to the administration of justice.

The Supreme Court suspended Land's license to practice law for one year.

The decision of the Supreme Court in *Land* was not unanimous. The lone dissenter found great fault with the majority's analysis and felt the decision set the profession on a dangerous path. Justice Lee voiced his concerns as follows:

In the case *sub judice*, the Mississippi Bar asks this Court to establish a dangerous precedent — one that allows attorneys to use the Mississippi Rules of Professional Conduct (hereinafter MRPC) as a weapon by which one attorney may coerce or blackmail his opponent into a settlement. The Mississippi Bar's position rewards those that draft broad, vague and sweeping discovery requests and punishes the attorney who interprets those broad discovery requests narrowly. Likewise, the Mississippi Bar's position clearly ignores the duty of confidentiality that an attorney owes his client.

Id., at 910.

Justice Lee focused on the wording of the discovery requests themselves, finding that a fair reading of them, as well as of the complaint, made it clear that the specific act at issue in the injury action was whether Guthrie operated his lawn mower in a negligent manner and, as a result, injured Stevens.

Thus, the interrogatories propounded to Guthrie were calculated to discover what Guthrie knew about the alleged lawn mower accident and not whether Guthrie knew of any other explanations for the plaintiff's injury, plausible or not. The responses given by Guthrie were specifically addressed to the plaintiff's allegation that he was injured by Guthrie's negligent operation of a lawn mower. Guthrie was not asked to provide the plaintiff with any additional hypotheses as to how the plaintiff's injury occurred nor did he volunteer any such hypothesis.

Id., at 911. In closing his dissent, Justice Lee made it clear he felt Land's discovery responses were appropriately within bounds. The responses, while not identifying either the adjuster's report or the photos of the BB gun, did advise the plaintiff of the adjuster's identity and the fact that she had investigated the claim, obtained statements and taken photos. Justice Lee felt that with the discovery responses that were served, "given some diligence on the plaintiff's part, through depositions, he could have obtained admissible evidence which could have led to the discovery of the BB gun". *Id.*, at 912.

B. The 9/11 Insurance Litigation

The following was obtained from the *Opinion and Order Granting Sanctions for Pleadings and Discovery Abuses* of the U. S. District Court for the Southern District of New York in Case # 03 Civ. 332 (AKH), *In Re September 11th Liability Insurance Coverage Cases*. The sanctions were leveled jointly against Zurich American Insurance Company, the law firm of Wiley Rein, L.L.P. and the law firm of Coughlin Duffy, L.L.P.

Zurich provided commercial general liability coverage on the World Trade Center buildings on September 11, 2001. Together with excess and reinsurance coverage, there was \$1 Billion in coverage on the buildings. After the terrorist attacks, numerous lawsuits were filed by the survivors and successors of the dead and injured victims. Additionally, the insureds brought a third-party declaratory judgment action against Zurich to determine Zurich's obligations to the various parties. Zurich responded with a fourth-party declaratory action against the insureds and others seeking resolution of issues not raised in the third-party action. The third- and fourth-party actions were consolidated into this *In Re September 11th Liability Insurance Coverage Cases* matter.

As you might imagine, because of the ultimate exposures involved, the issues were hotly contested and the litigation was, in a word, spirited. There were extensive discovery and discovery motions proceedings. Rule 11 allegations as to Zurich's pleadings were asserted as were Rule 37 motions arising out of alleged discovery abuses by Zurich. It was these allegations that led the district judge to look into what Zurich and its attorneys knew, when they knew it and whether that knowledge exposed them, for their pleadings and discovery conduct, to sanctions.

The pre-litigation history of the case is laid out in some detail in the *Opinion and Order*, as is the chronology of pleadings, motions and discovery events that lead to the *Opinion and Order*. In short, the district judge found instances of lengthy delays in producing documents, documents that, when produced many months late, were couched with explanations of "mistakenly not previously produced" "due to counsel's error", failures to comply with discovery orders, the need to concede defenses following depositions of Zurich witnesses coupled with production of documents demonstrating that certain defenses lacked merit, and contentions which were, in the words of the district judge, "either dishonest, or objectively unreasonable, or the product of a failure to make reasonable inquiries". *Opinion and Order*, at 22.

Importantly for purposes of sanctions, the district judge determined that Zurich knew at the time of filing certain of its pleadings that some contentions contained within those pleadings were contrary to

evidence within its possession. Despite this knowledge, Zurich “stubbornly maintained its position...”. *Id.*, at 24. As for Zurich’s attorneys, the district judge found instances where either they “‘forgot’ what [they] had learned” or that there was some other reasons for inconsistencies between the evidence in the possession of Zurich’s witnesses and the contentions set forth in Zurich’s pleadings. In fact, with respect to one of the most important, if not the most important, documents in the coverage litigation, the district judge seemed quite critical of the attorneys’ position that it “became ‘lost’ midst Zurich’s delivery of documents to its lawyers...only to be found in response to specific prying by adverse lawyers”. *Id.*, 24-25.

Particularly with respect to the Rule 37 motion, the district judge was very critical of the discovery conduct. In March, 2004, the judge had ordered Zurich to produce additional documents via a single supplemental production within two weeks. However, over the course of the following 11 months or so, Zurich made 14 supplemental productions. Notably, the document that was arguably of most import in the case, referenced above, was not produced until the last of the 14 productions in February, 2005. The district judge found that “Zurich’s ‘culpable state of mind’ [was] established by evidence that it intended to delete, and deleted...” an electronic version of that all-important document and that both it and its attorneys had the paper copy of the document but failed to produce it. *Id.*, at 29. The district judge stated,

Wiley Rein attorneys obtained and copied the 9/11 Document in March of 2003, but they left it buried in a box for nearly two years and failed timely to produce it. Counsel’s failure to recognize the importance of this document, and to produce it timely, especially when alerted to its possible existence by opposing counsel, also constitutes a violation of discovery obligations. Indeed, at the sanctions hearing on April 19, 2007, counsel for Zurich properly conceded that it should have been produced, attributing Zurich’s failure to produce it to “inadvertence.” See Sanctions Hearing Tr. 62–64. The explanation is not apt. A finding of negligence or worse would appear to be a more appropriate characterization, and I so find.

Id., at 30. In laying out the basis for the sanctions imposed, the district judge stated,

Zurich's decision to assert and maintain its denials and defenses regarding the Port Authority's status as Additional Insured multiplied proceedings, caused substantial expense to the parties, caused substantial waste of court time, and insulted public and judicial expectations of the standard of conduct expected of attorneys and insurance carriers.

Id., at 31. The district judge further held that,

Zurich, as the lead insurer on the case, and its attorneys, as lead counsel in the proceedings before me, owed the Court and the public better conduct than the conduct described herein; at a minimum, they had a duty to comply with Rule 11 of the Federal Rules of Civil Procedure. And, having multiplied proceedings by asserting denials and defenses that could not be supported by the evidence, the conduct of Zurich and its counsel, in their efforts to do away with evidence, to not produce evidence, and to slow up production of evidence until its utility might be attenuated, compounded the wrongdoing that they perpetrated.

Id., 31-32.

The district judge levied a Rule 11 sanction of \$750,000, jointly against Zurich and its attorneys, essentially advising that while substantial, it could have been even more so. In imposing a Rule 37 sanction, the district judge noted that the discovery conduct compounded the Rule 11 violations. Notably, the two opposing parties seeking the Rule 37 sanctions sought \$2,086,787 and \$2,979,021, respectively, for the time of both in-house and outside counsel in litigating the issue ultimately conceded by Zurich. However, these requests were reduced "by a flat and sizeable amount" to a total of \$500,000, with \$250,000 going to each of the two moving parties.

C. The Apple-Samsung Litigation

If the very first words in a court order are like the following from U. S. Magistrate Judge Paul Grewal's sanctions order in the Apple-Samsung litigation, your day, regardless of how it may have been to the point of reading the order, just got a whole lot worse,

A junior associate missing one redaction among many in an expert report is not exactly a historical event in the annals of big-ticket patent litigation. Even if regrettable, these things can happen, and almost certainly do happen each and every day. But when such an inadvertent mistake is permitted to go unchecked, unaddressed, and propagated hundreds and hundreds of times by conscious – and indeed strategic – choices by that associate's firm and client alike, more significant and blameworthy flaws are revealed.

Order Granting Motion for Sanctions, Apple, Inc. v. Samsung Electronics Co., Ltd., et al., U.S.D.C., N.D. CA, Case No. 5:11-cv-01846-LHK, at 1.

In this long-standing patent battle between Apple and Samsung, an agreed protective order addressing the disclosure and use of discovery materials was entered in January, 2012. Both Apple and Samsung eagerly sought to put the order, a lengthy protective order that addresses the disclosure and use of discovery materials in excruciating detail, in place.

However, during discovery that followed the protective order's entry, a Quinn Emanuel (attorneys for Samsung) associate failed to redact some confidential material from a lengthy expert report while working late one night. The expert report, marked "Highly Confidential, Attorney Eyes Only", was then provided to the client, Samsung, which in turn shared the report with more than 200 people all over the World, many of whom had nothing to do with the patent lawsuit. Several months later, another Quinn Emanuel associate uncovered the error and reported it to a more senior associate, but the law firm took no action beyond ordering the deletion of the document – they did nothing to determine whether any damage had occurred as a result of the error over the several months that had passed since the improper disclosure.

In levying sanctions, Judge Grewal placed the blame for the serious breach squarely on the law firm's self-described "lean" structure. Grewal found fault with the structure, described to the court by firm founder John Quinn as "650 lawyers wide and one lawyer deep". Quinn Emanuel was ordered to reimburse Apple, Nokia and their counsel "for any and all costs and fees incurred in litigating this motion and the discovery associated with it". *Id.*, at 18. Notably, the sanctions levied against Quinn Emanuel included the "public findings of wrongdoing" as described at length in the *Order*. The monetary sanction, coupled with the "public findings of wrongdoing" were, according to Judge Grewal, "sufficient to both remedy Apple and Nokia's harm and to discourage similar conduct in the future". *Id.*, at 19.

D. The "I ♥ hot moms" Facebook Case

Jessica Lester was killed in 2007 when the car in which she was riding was struck head-on by a concrete truck owned and operated by Allied Concrete in Charlottesville, Virginia, after the truck crossed the roadway centerline. Lester's husband, Isaiah Lester, injured in the crash, filed an injury and wrongful death action against Allied Concrete and its driver in the Circuit Court of the City of Charlottesville, Virginia. Lester's attorney was Mathew Murray of the Virginia law firm of Allen, Allen, Allen & Allen, then arguably the largest personal injury firm in Virginia. Murray was the managing attorney in the Allen firm's Charlottesville office and was a former vice president of the Virginia Trial Lawyers Association. The jury returned a verdict for Lester in the amount of \$8.5 Million.

During pre-trial discovery, instead of putting a proper legal hold in place, Murray instructed Lester to "clean up" his Facebook page. In fact, Murray's assistant sent an e-mail to Lester in which she advised, "[w]e do NOT want blow ups of other pics at trial so please, please clean up your facebook and myspace!" Notably, this email was sent to Lester on the morning after Murray had received a discovery request targeting Lester's Facebook account. In compliance with his attorney's advice, Lester deleted 16 photos from his Facebook page. After multiple hearings on discovery motions and at least one trial continuance, a defense computer forensics expert was able to recover

15 of the 16 deleted photos. One of the deleted photos was of Lester holding a beer can and wearing a T-shirt that read: "I ♥ hot moms."

Notably, all of the deleted photos were ultimately made available to the defendants before trial and the spoliation, as the trial judge determined, caused the defendants no prejudice at trial. However, while the jury was told about the deleted photos at trial, the string of emails, including the one referenced above, between Murray, his assistant and Lester were not provided to the court until after the trial. When the trial judge confronted Murray he first blamed his assistant, but ultimately confessed that he had concealed the emails because he was worried the court would grant another continuance of the trial.

In its final order in the case, entered October 21, 2011, the court ordered Murray and Lester to pay Allied Concrete's legal fees and expenses of \$722,000. Of this, Murray was ordered to pay \$542,000 and Lester had to pay \$180,000. Murray resigned from the Allen firm and, in July, 2013, agreed to a five-year suspension of his law license.

IV. CRISIS MANAGEMENT

A. Really Rogue

Quite frankly, in the nearly unfathomable scenario where outside counsel has truly gone rogue, meaning there is no complicity on the part of the corporate client or its representatives, an outcome other than that mandated, for example, by Wal-Mart in its *Outside Counsel Guidelines*, which states, “*Wal-Mart will terminate its relationship with any Outside Counsel who fails to adhere to the foregoing standards in connection with Wal-Mart litigation*” is difficult to imagine as within the realm of available options. *Wal-Mart Outside Counsel Guidelines*, effective June 1, 2007, p. 17.

In such a scenario, the attorney representing the corporate client has engaged in actionable misconduct that not only exposes himself/herself to monetary and other sanctions by the tribunal, but also jeopardizes his/her ability to practice law. It is difficult to conceive of any means to salvage this attorney-client relationship. More importantly, at least from the perspective of the corporate client that must go forward in the litigation, why would the client want to maintain the relationship?

Of the four scenarios discussed above, the Mississippi and Virginia Facebook examples are ones in which, arguably, the client was not culpable in the misconduct. In the Virginia Facebook case the monetary sanction of \$180,000 against the client, from a reading of the original order discussing the matter, appears to have been aimed at the client’s separate misconduct involving false deposition testimony and the like, but had nothing to do with the evidence spoliation. Assuming this was the case, since the sanctions were not imposed until after the verdict, we will never know whether the attorney-client relationship would have been maintained to proceed in the litigation.

Some will argue, and have argued, that the Supreme Court of Mississippi simply got it wrong in *Land* – that it was not a case of misconduct, but was a mere discovery dispute, as argued by the lone dissenting justice, and that there were other forces at play in the case. Since the purpose of this paper is not to critique decisions like the one in *Land*, this writer will not do so here. Suffice it to say, and this is pure

speculation, however, that since the Court itself in *Land* was not unanimous regarding the propriety of his conduct, State Farm, once Land's license was reinstated in 1996, restored him to its panel of outside defense lawyers.

B. Reality....Not So Rogue

The more true-to-life issue, however, is that due to the sheer size and level of sophistication of larger corporate clients as well as the presence and involvement of its internal legal team alongside outside counsel in litigation, it is extremely unlikely that outside counsel misconduct of the caliber discussed here will ever occur in a vacuum – the possibility that such misconduct will ever occur in the total absence of at least some level of culpability on the part of the corporate client as well is exceedingly remote. This fact is evidenced by at least one of the three foregoing real life examples themselves. It was determined, for example, that Zurich possessed and knew about the withheld piece of key evidence and, jointly with its attorneys, it was sanctioned for its active role in the misconduct.

The question becomes whether, in a situation where both the client and the attorney are culpable in the misconduct, the attorney-client relationship can, or should, be saved. While the degree of culpability on the part of the client might and should affect the imposition of appropriate sanctions by the tribunal, the resultant considerations with respect to the relationship between the attorney and the client remain the same. As with the unlikely scenario where the outside attorney truly goes rogue and there has been no client involvement, nothing exists to compel termination of the attorney-client relationship. However, it remains difficult to conceive of reasons that warrant maintaining the relationship as well as any workable means to salvage it.

THE LAW FIRM LIABILITY TERRAIN: PUBLICLY-REPORTED SETTLEMENTS AND VERDICTS

By

**Douglas R. Richmond
Managing Director
Aon Professional Services**

It is no secret that law firms and lawyers face significant professional liability and responsibility risks. There are at least 64 publicly-reported settlements by or verdicts against large and sophisticated law firms that exceed \$20 million dating back to the mid-1980's.¹ The largest is a \$108 million settlement reached in 2004, with the second largest being a \$103 million verdict returned in 2010. The \$20 million plus cases break down this way:

- 41 attributable to dishonest clients
- 11 attributable to conflicts of interest
- 3 attributable to mistakes
- 3 attributable to a combination of a dishonest client and a conflict of interest
- 2 attributable to malicious prosecution
- 1 attributable to a mistake coupled with a conflict of interest
- 1 attributable to a dishonest client and a mistake in an extended representation of a client
- 1 attributable to a firm's dishonesty (Milberg LLP's payment of secret fees to class action plaintiffs)
- 1 attributable to a lawyer's dishonesty (The O'Quinn Law Firm's settlement of allegations that it over-charged clients for expenses in a breast implant class action)

There are, of course, other settlements exceeding \$20 million that have not been publicly-reported.

Additionally, there are numerous settlements and verdicts in the \$3-20 million range, with the \$3 million floor being significant because it exceeds all but the very largest law firms' self-insured retentions.² Information on cases in this range is difficult to

¹ The information on settlements and verdicts reported here is derived from data collected and maintained by Aon Professional Services. All information is current as of May 15, 2014.

² With respect to settlements and verdicts in the \$3-20 million range, it is surely true that numerous matters are not publicly-reported, or are reported in such obscure fashion that they go unnoticed. Accordingly, while the \$3-20 million claims statistics are believed to be representative of matters within the range, they are not all-inclusive.

locate and verify, but, based on available data, recent cases may be characterized as follows:

- 31 attributable to mistakes
- 17 attributable to dishonest clients
- 12 attributable to conflicts of interest
- 1 attributable to fraud

What is perhaps most interesting about the settlements and verdicts in the \$3-20 million range is the prevalence of mistakes as the cause of loss, which distinguishes cases of this size from those exceeding \$20 million. There probably are two reasons for this. First, the cases in the \$3-20 million range include a number of matters involving small law firms. Because lawyers in small firms often do not work in teams in the same way that their counterparts at large law firms do, there is a greater likelihood that mistakes will escape notice until they allegedly harm clients. Lawyers working in teams in large law firms tend to catch mistakes before work gets out the door. Second, dishonest client claims and conflict of interest allegations often put “heat” in cases, thus driving up settlement and verdict value, while simple negligence rarely is an aggravating factor. Thus, it is logical that most of the largest settlements and verdicts would be rooted in allegations of dishonesty and conflicts of interest.

Regardless of whether one examines the cases exceeding \$20 million or those in the \$3-20 million range, it is important to recognize that these figures do not include defense costs. Defense costs commonly equal or exceed amounts paid in settlement or to satisfy judgments. Additionally, there are other serious risks that do not necessarily result in large settlements or judgments. For example, a lawyer’s misconduct may have significant personal consequences, ranging from professional stigma to court-imposed sanctions to professional discipline to criminal prosecution. Lawyers’ misconduct may bruise their firms’ reputations or seriously impair client relationships. Any claim against a firm necessarily forces lawyers within the firm to devote time and energy to its resolution—time that could be more productively spent on billable matters, business development, or other positive activities intended to advance the firm’s interests.

THE FOUR R'S OF GUARDING AGAINST AND SURVIVING LAW FIRM THEFT AND EMBEZZLEMENT

INTRODUCTION

Initially, it seemed like it might have only been \$1 million. The amount jumped to \$9 million after he was scrutinized by investigators. Later, it was discovered that \$19 million had been transferred to a foreign bank account. All told nearly \$30 million had been systematically siphoned over almost 15 years. The firm was in shock as it uncovered layer after layer of betrayal, dishonesty and fraud. How could this have happened to one of the largest regional firms in America? Jonathan Ladrao was perfect. He could do no wrong. Partner after just a few years. Billable hours of 14 to 16 hours a day. This was every law firm's dream—a money making machine. He had never married, never had children, he lived to practice law. More often than not, he slept at the firm and never took vacation time. The partners joked that he should pay them rent since he lived at the office. He appeared to live modestly. He continued to live in the same cheap apartment he had lived in during law school, drove a beat up car and wore old rumpled up suits. Nobody thought he even cared about money. Practicing law was all that seemed to course through Ladrao's veins. He was called the "boy wonder." He was kind, respectful and never reeked of the arrogance one might expect from a man who commanded such authority in his field of law. How? How could this have happened? The other partners sat dumbfounded. Nobody spoke. The IRS and FBI had stayed for a week. Hard drives and financial records were seized. The questioning was ruthless. Even the cleaning staff and runners were examined. The firm was in shambles. Clients had been calling non-stop for two days. Nobody dared answer the phone, because nobody knew what to say. Where would the firm go from here?

Unfortunately, this is not Chapter 1 of the latest legal thriller by John Grisham. The above facts are loosely based on the rise and fall of a prominent partner at one of the South's largest regional law firms. On a smaller scale, the same transgressions take place at law firms throughout the United States each year. The reckless and selfish actions of one lawyer or employee can devastate a firm if permitted. Employee theft is an epidemic, and is one of the fastest growing crimes in America says the Federal Bureau of Investigation.¹ According to a report published by CBS News, small businesses lost around \$33 billion in revenue due to employee theft and at least thirty percent of all corporate bankruptcies result from employee theft.² Citing a report published by the US Chamber of Commerce, the Human Resources Journal indicated that seventy-five percent of employees steal from their employers, and that seventy-five percent of workplace thefts go undetected.³ Law firms are certainly not immune to theft by their own attorneys, as reflected by the growing number of reported decisions imposing attorney discipline.⁴ However, through careful planning a firm can do much to protect itself

¹ "Know the Signs of Employee Theft," William J. Lynott, InTentsMagazine, October 2011, http://intentsmag.com/articles/1011_employee_theft.html

² "Employee Theft: Are You Blind to It?" CBS News, July 14, 2011, <http://www.cbsnews.com/news/employee-theft-are-you-blind-to-it/>

³ "Workplace Theft Statistics for 2012 And How to Prevent Them," Human Resources Journal, May 15, 2014, <http://www.humanresourcesjournal.com/2012/05/workplace-theft-statistics-for-2012-and-how-to-prevent-them/>

⁴ See *Blue-Chip Billing: Regulation of Billing and Expense Fraud by Lawyers*, Lisa G. Lerman, 12 GEOJLE 205 (1999).

from employee theft and/or embezzlement, and, should such a situation occur, implement measures necessary to walk away even more successful than before. While not exhaustive, the following are suggestions to assist in the prevention of employee theft and embezzlement, and counter-measures that will assist in remediating such indiscretions.

A. Recognize. Look for the Warning Signs.

There are dozens of potential reasons for law firm theft and/or embezzlement, and no one may be able to entirely explain the motivations behind such misconduct from a trusted member of the firm. However, one theory for law firm theft and embezzlement is Donald Cressey's fraud triangle: "Opportunity, Pressure, and Rationalization."⁵ Cressey believes that "[t]he opportunity to commit fraud arises when there is a lack of internal control, inadequate supervision . . . , a lack of separate authority, and an inadequate system for detecting and punishing fraud. Pressure to commit fraud can result from employees' personal financial problems, vices and addictions, and unrealistic performance goals."⁶ Recognition of an employee's or partner's improprieties all too often begins with the discovery of financial irregularities involving a lawyer in the firm, or after the fact. Therefore, the first step in preventing employee and partner indiscretions is to recognize the signs that may indicate underlying turmoil before the theft or embezzlement occurs. Recognizing these signs not only is preventative, it also serves to allow the firm to help the lawyer before untoward behavior is committed.

In the above example, one of the glaring signs of potential employee fraud and/or embezzlement is the lawyer who refuses to take a vacation day, personal time and/or sick time. Feigning as hardworking, dogged and disciplined, the lawyer actually may be suffering from paranoia due to his/her crimes. As long as the lawyer stays at work, he/she likely believes that they have the ability to cover up their criminal behavior. And, to an extent, the perpetrator is correct. While not mentioned in the story above, it was not until Mr. Ladrao actually took a vacation day that his employer noticed inconsistencies in his billing invoices. If impropriety is suspected in connection with the overachieving lawyer, the simple solution is to request that the lawyer take a mandatory vacation. Tell the lawyer he/she needs to take time away from work to refocus. Having the lawyer away from the office will provide the suspecting firm an opportunity to review the lawyer's billing, time and other records to determine whether any irregularities are detectable. If the lawyer absolutely refuses to take time away from the office, this may be an elevated warning sign that misconduct could be taking place.

Another warning sign is the employee who suddenly appears to be living beyond his/her means. As the employer, you have knowledge of an employee's salary and the type of lifestyle the salary would likely provide. Obviously, the employee's salary standing alone is not a full picture of his/her financial portfolio, and there are many other legitimate factors that could have caused an uptick in lifestyle and spending habits. Nonetheless, drastic employee lifestyle change is one potential warning sign that may signal employee misconduct. In the same vein, knowledge of an employee's gambling addiction, substance abuse problems or indebtedness should also be an indicator that the employee is placing himself/herself in a position where theft

⁵ See *Mutiny by the Bounties? The Attempt to Reform Wall Street by the New Whistleblower Provisions of the Dodd-Frank Act*, Geoffrey Christopher Rapp, 2012 BYULR 73, 104-09 (2012).

⁶ *Id.*

may become a necessity to sustain a lifestyle. When an individual becomes desperate, they may take risks that otherwise they would have never contemplated. Identifying irregular behavior can be the difference in legal action against the employee to recover stolen money, versus simply assisting the employee in a difficult time or even firing the employee.

Another indication of employee theft or embezzlement is rapidly disappearing office supplies. It is not out of the question that an employee walks out of the office every night with a ream of paper, a box of ink toner, drinks, paper towels or toilet paper. Again, there are always valid reasons for office supplies being used more quickly, such as: trial preparation, a series of depositions, the addition of a new client, the list could continue. However, the simple truth is that if firm overhead rapidly increases, the employer should be wary of any potential employee dishonesty.

Also, be aware of lawyer relationships with vendors. A common form of impropriety occurs when a member of the firm makes purchases from vendors for the member's personal use at home, but actually charges the firm for his/her purchases. Another familiar method of theft is to use a fictitious vendor for services that are not actually performed, such as: investigative services, copy charges and/or service of process fees. In this situation, an employee creates a phony vendor, and then fabricates invoices and payments that are sent to the imaginary vendor. Unfortunately, these schemes are easiest when the person submitting the fake invoices is a partner or office manager with authority to approve payments. Unfortunately, many employees rarely question anything that comes from a managing partner or firm office manager, even if it seems a departure from the normal, for fear of losing their jobs. Moreover, an office manager who implicitly trusts a particular employee who happens to be submitting phony invoices, often will pay them without question. Then, the invoice is submitted to a client, implicating the firm's relationship with that client.

As mentioned, there are many motivating factors which drive temptation for an employee or partner to secrete money from the firm or even clients, including the lawyer who feels slighted. Employee theft/embezzlement is often motivated by feelings of under appreciation and a perception that the employee is underpaid. The common theme in these type of thefts is that the employee rationalizes in their own mind that their theft is justified as a substitute for the pay, salary raise or other remuneration to which he/she was entitled. This frequently happens when an employee is asked to perform additional duties without an increase in pay, or where an employee helps the company become more profitable but fails to receive the proper recognition. If there are financial irregularities taking place within a law firm, awareness of employees who may not have received a raise, bonus or proper recognition may be the first step in identifying impropriety.

B. Respond Appropriately.

In the event theft or embezzlement takes place in the law firm, it is critical that the managing partners of the firm respond immediately and appropriately. While a timely response is critical, more critical is that an appropriate response is made versus an ill-conceived response done quickly. In addition, the managing/supervising partners in the firm need to ensure that they properly discharge all ethical duties pursuant to the rules of professional conduct, both as to themselves and as it relates to other lawyers in their firm, as failure to do so could theoretically

result in disciplinary action. *See Preventing Misconduct by Promoting the Ethics of Attorneys' Supervisory Duties*, Irwin D. Miller, 70 NTDLR 259, 279 (1994) (“failure to make reasonable preventive efforts [to ensure the ethical conduct of all lawyers in a law firm] theoretically subjects every partner to professional discipline regardless of the partner's remoteness from the violating attorney, regardless of the partner's knowledge or suspicion of any misconduct”).

Below are suggestions a law firm may consider when responding to the discovery of employee theft and/or embezzlement.

- First and foremost, prevent the offending lawyer's access to the firm, the firm's post office mailbox, bank accounts, as well as remote access by computer to the firm's servers, email, client files, the firm's accounts and financial records. This will require immediately changing locks on the doors to the firm. This also helps preserve evidence, as it prevents the attorney from spoliating any evidence.
- Maintain confidentiality. This is important for both the law firm and the employee or lawyer. On a practical level, the law firm wants to keep the matter confidential to avoid tarnishing the firm's reputation and sidestep any public embarrassment and humiliation. Obviously, theft of confidential data, money or other sensitive material will already not present well to clients, and spreading the details of a potential crime may lead to the loss of the victimized client's business and the loss of business from future clients. Moreover, leaking confidential details of the theft to the media could actually lead to the client suing the law firm over failing to protect confidential client information. Similarly, the employer must keep the matter confidential so as to avoid any defamation suit from the accused employee.
- Conduct a thorough investigation. Of course each situation is unique; however, if possible the employer should immediately conduct a full and complete investigation before making a decision to terminate the employee. First, a thorough investigation will help uncover whether the employee actually committed the crime, the extent of the crime and whether discharge is warranted. Second, showing that a full and complete investigation occurred will help insulate the employer if the employee should later sue the law firm for wrongful discharge.
- Retain a qualified accountant who is certified as a fraud examiner. The CPA should be provided access to the firm's books. If a client is implicated in the lawyer's misconduct, the CPA should be given access to the lawyer's files, billings, expense payments and disbursements. The certified fraud examiner will be in a position to assist the firm in taking appropriate remedies with bookkeeping methods, if warranted under the circumstances.
- Inform the appropriate authorities. Rule 8.3 of the ABA Model Rules of Professional Conduct requires that, “[a] lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct . . . shall inform the appropriate professional authority.” The comment to Rule 8.3 indicates that the appropriate professional authority is the particular state's bar disciplinary agency. *See Model Rules Of Prof'l Conduct R. 8.3, Comment 3.* Whether to inform law enforcement authorities can depend on too many factors to be discussed in this paper, and to a large extent may be governed by the scope of the implicated lawyer's misconduct. Suffice it to say, evidence obtained from the investigation may be used in both a

criminal or civil suit. The evidence collected could be critical in seeking restitution from the employee in a suit to collect insurance proceeds from the firm's insurer or in defending the employer in a suit brought by the employee.

- Notify the firm's insurance company. Likely the policy issued by the insurance company will require the law firm to report the infraction immediately so that the insurance company can conduct its own investigation if necessary.
- As discussed more fully below, where at all possible and depending on the amount, if and when it is determined that client money is involved in the misconduct (such as theft of client funds through fraudulent billing or outright theft of client money held in the firm's trust account), make restitution to the client.

If it has been determined that an actual employee theft and/or embezzlement occurred, the firm should consider doing the following immediately:

- Engage experienced outside counsel. The firm will need objective advice from a professional separated from the emotional upset caused by the offending partner. Engaging outside counsel at the outset will go far if the firm later gets involved in litigation with the offending lawyer or should criminal laws be implicated.
- Obtain the offending attorney's resignation from the firm and all other firm ventures, or otherwise act to remove the attorney from the firm and other firm ventures.
- Preserve the lawyer's computer, hard drive, and all electronically stored information.
- Preserve all contents of the lawyer's office.
- Remove the attorney's name from firm letterhead, envelopes, firm business cards, the firm website and e-mails.
- If the attorney's name comprises part of the firm name, then immediately change the firm name to remove his/her name.
- Assure continuity of the attorney's existing/ongoing case files. This is important as it shows the client that the firm is bigger than the attorney, and that the firm will provide quality legal service to the client regardless of the particular attorney who may have handled the client's files in the past.
- Accomplish substitution of counsel as necessary in ongoing litigation in which the attorney was involved.
- Determine the firm's financial obligations, if any, to the partner under the firm's partnership/shareholder agreement.
- Excluding items that potentially qualify as evidence, accumulate the lawyer's personal items for eventual delivery to the attorney.
- Reassure the employees of the firm. This is a most important component. When the discovery of a trusted partner's improprieties is made known in the firm, employees easily may suffer shock at the news. If the partner is a beloved figure in the firm, grief will ensue followed sometimes by anger. Employees may even wonder if the firm is going to survive. Calling a firm-wide meeting and offering reassurances that the firm has the situation under control, the ongoing nature of the firm's normal business and that, after all, life does indeed go on, will go far in offering emotional support to employees.
- In the event the attorney's theft and/or embezzlement becomes public and is broadcast throughout the media, it may be wise to preemptively contact clients not

- implicated by the lawyer's misconduct to explain the situation and provide assurances of the firm's stability and its ability to adequately represent the client going forward.
- In the event the media becomes involved, preemptively develop a media strategy. In addition, preemptively consider hiring a public relations firm to assist.

C. Restitution

Where client money is involved in the lawyer's misconduct, restitution is a key element, as it is a showing to the client that the firm will be accountable and responsible for the attorney's misconduct. Where the amount of client money at issue can be returned to the client without bankrupting the firm, prompt restitution will go a long way in retaining the client, as well as convincing the client that legal action against the firm is unnecessary. Without prompt and fair restitution being made, it is difficult to imagine a scenario where the victimized client would ever contemplate remaining a client of the firm. Consider the following when formulating a plan to make restitution to the client:

- Make immediate disclosure to the clients who were victims of the attorney's misconduct, and explain to them that the firm is already in the process of determining the amount of restitution that will be paid.
- As discussed above, have a forensic accountant who is a certified fraud examiner analyze each of the files at issue in the attorney's misconduct to determine the amount of restitution needed to be paid to the client.
- Make restitution to the client. Restitution should be the actual amount misappropriated plus interest.
- Obtain restitution from the partner for amounts the firm had to repay to the client.

D. Resolve to Prevent the Crime from Happening, and/or Re-Occurring.

Rule 5.1 and 5.3 of the ABA Model Rules of Professional Conduct require that lawyers who possess "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' and nonlawyers' conduct conform and/or is compatible with the rules of professional conduct." Accordingly, failing to safeguard client funds, data and/or other information potentially can result in disciplinary action against a supervising attorney who fails to implement reasonable procedures to prevent employee misconduct within the scope of the attorney's managerial/supervisory role. *See Matter of Lenard*, 2013 WL 5676040, *8 (Cal. Bar Ct. 2013)(disbarring attorney for, in part, his failure to supervise his employees who embezzled funds from his client trust account in six different client matters); *Mississippi Bar v. Thompson*, 5 So.3d 330, 338 (Miss. 2008)(court determined that disciplinary action was appropriate for, *inter alia*, the supervising attorney's failure to implement appropriate safeguards over support staff to protect client material); *Clayton v. North Carolina State Bar*, 168 N.C.App. 717, 718 (N.C. App. 2005)(noting that attorney was disbarred because he "failed to adequately supervise an employee that had embezzled client funds"). As seen above, it is critical that every firm take the time and forethought to develop a plan that allows the managing/supervising partner(s) to properly supervise employees and properly safeguard client funds, data and other sensitive information.

Before employee misconduct happens, think ahead. This can include the resolve to implement the preventative steps necessary to protect your law firm. In the alternative, if your firm has been the victim of theft or embezzlement, resolve to implement and/or revise procedures that will protect your law firm prospectively. Again, a law firm's failure to implement appropriate measures could expose the law firm to theft and embezzlement, and then to make matters worse potentially expose the partners in the law firm to disciplinary action. *See In re Marshall*, 331 S.C. 514, 498 S.E.2d 869 (S.C. 1998)(attorney suspended from practicing law for six months for failing to properly supervise office manager); *See also Law Firm Partners As Their Brothers' Keepers*, Douglas R. Richmond, 96 Ky. L.J. 231 (2008)("[i]f a partner fails to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to ethics rules, she may be sanctioned completely apart and independent from any discipline imposed on the lawyers to whom her failure relates."). Therefore, it is critical that every law firm resolve to formulate appropriate preventative measures as they serve the two-fold purpose of: (1) guarding against theft and/or embezzlement, and (2) insulating the partners in the firm from disciplinary action.

The following are ideas that might be considered in determining whether the managing/supervising partners in your law firm are discharging their duties to supervise and safeguard.⁷

- Preventing theft and/or embezzlement always begins with the hiring process. Every attorney and/or employee should be comprehensively screened.
- Safeguard all checks and deposit slips. Further, maintain the firm's trust account checks and deposit slips separately from the operating account. This will make misconduct more difficult, and guard against mistakenly writing a check from the wrong account.
- The signer of a check should be a different person than the person requesting the check.
- Consider circulating all deposits and disbursements to and from the law firm trust account to partners as they are made. The managing partner should double check all deposits and disbursements when reconciling the trust account each month.
- A periodic report should be circulated to all partners listing all balances by client matter.
- Do not leave cash in the office. Deposit all monies received daily, and make sure that all bank statements are reconciled monthly. Monthly reconciliation allows a firm to quickly detect any irregularities.
- When a check is requested from the firm's trust account, the bill or other supporting documentation should be attached to the deposit and disbursement request, and reviewed by the person signing the check.
- Cancel all invoices, and write the date paid, amount paid, and check number on the invoice. While this process is more time consuming, it will prevent the same invoice from being paid twice.

⁷ We note that many of the suggestions found in this section are based on information found in the article, "How A Partner or Employee Can Steal From Your Firm", Michaelis, Beverly, 70-JAN Or. St. B. Bull. 34 (2010).

- During monthly account reconciliation, any outstanding checks should be traced by the bookkeeper or managing shareholder to determine why the checks have not yet been negotiated.
- Be wary of ATM cards for your trust account. An ATM card is one more access point for criminal behavior. Consider cancelling all PIN codes and destroying all existing ATM cards.
- Online trust account access. Again, online accounts are another access point for criminal behavior. Every firm should weigh the convenience online accounts provide versus the potential risk and temptation they pose for criminal misconduct.
- Analyze payroll and office expenses and other similar groups. Historically, employees most often use these categories for misconduct by paying for personal expenses, but charging the expenses to the law firm. In a larger firm, false identities can easily be created so that payments from these groups appear legitimate.
- Periodic audits. Audits will assist in determining if there are any missing or altered documents, or “overdue” notices for bills that should have been paid. Further, they will ensure that all billing statements match monies collected by the firm. Along the same lines, an occasional surprise audit by an outside auditing firm will decrease an employee’s chances of manipulating financial records in anticipation of an audit.
- Password protect all protectable electronic equipment. Consider requiring employees to password protect all cellphones, tablets and other computer devices that contain firm data. Security measures should be mandatory as long as they contain firm data, even if such devices are personally purchased by the attorney or support staff.
- E-mail access. Employers should create an employment policy that gives them free access to all of an employee’s e-mail. On many levels this is a good idea. It allows the law firm to monitor for theft and embezzlement, but also gives the firm the opportunity to ensure that employees are conducting themselves appropriately, and not engaging in in other unbecoming behavior.
- Depending on the size of the firm, consider alternating accounting and/or bookkeeping duties between staff members. Rotating these duties makes it more difficult to misappropriate funds, and also makes it easier to detect any misconduct.
- Separating financial duties. Never allow a lawyer to both write checks and reconcile bank statements. Similarly, no one employee should handle all incoming and outgoing funds. Splitting these responsibilities deters illegal behavior, takes away the opportunity to cover up misconduct and ultimately allows the firm to more easily identify irregularities.
- Bank mail should be delivered to the reviewing partner date-stamped and unopened. Otherwise, an employee involved in misconduct has opportunity to steal mail and cover up any theft.
- Safeguard signature stamps, or consider eliminating their use. Signature stamps provide an easy way to sign financial documents, legal documents and/or otherwise perpetrate fraud.
- Adequately insure the firm. Surprisingly, many law firms are woefully underinsured in the area of employee dishonesty insurance coverage. This coverage insures against forgery, alteration, unauthorized electronic transfers, credit card fraud and counterfeit fraud. Frequently analyze your coverage limits to ensure that the limits match your firm in terms of employees and the economic reality of your firm.

- If the firm maintains cameras in supply rooms where checks are stored, and/or where other sensitive data is stored, such can greatly deter employee theft and assist in identifying the culprit should any theft occur. Obviously, cameras should not be installed in areas where employees have an expectation of privacy. Also, video surveillance should not include sound, as courts have held that audio surveillance has been found to violate an individual's right to privacy in certain circumstances. *See Thompson v. Johnson Cnty. Cmty. Coll.*, 930 F. Supp. 501, 506 (D. Kan. 1996); *DeVittorio v. Hall*, 589 F.Supp.2d 247, 255 (S.D.N.Y. 2008).

Trust among the partners and employees in a firm is essential in making the firm function as it should. However, never believe that any particular attorney in the firm is above reproach. Having in place appropriate preventative measures will reduce the temptation for misconduct and deter your employees and attorneys from engaging in impropriety.

CONCLUSION

It is not a good thing for a firm to assume that employee theft and/or embezzlement will never happen in the firm. History has proven the irrelevancy of the length of time attorneys have been friends, how many trials they have handled together, the kindness of a secretary, how down to earth the runners are or how many sports teams children have played on together. Given the right circumstance and pressures, anybody is vulnerable to engaging in actions that they may never consider otherwise. Believing your firm is too noble, upright, successful or righteous will potentially expose your firm to theft and/or embezzlement. Remember the old Russian proverb used by Ronald Reagan, "Trust but verify." Resolve to make the necessary changes in your law firm's structure to guard against attorney misconduct, or to prevent theft and/or embezzlement from again occurring. Implementation of the policies discussed may prevent your law firm from being victimized. Although, even if your law firm has put in place some or all of the procedures discussed above, the most determined individuals may find ways to circumvent the safeguards presented herein. As such, always be aware of the warning signs that could signify potential employee theft and/or embezzlement. Constant vigilance and attention are oftentimes the best defense.

**Taking Action: Recognizing and
Responding to Depression and
Substance Abuse in the Legal
Profession**

**FDCC 2014 Annual Meeting
The Greenbrier
White Sulphur Springs, West Virginia
July 30, 2014**

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Taking Action: Recognizing and Responding to Depression and Substance Abuse in the Legal Profession

In a period of 18 months, six lawyers died by suicide in South Carolina. In late 2008, a student at the Charleston (SC) School of Law committed suicide. Around that same time, a student at the USC School of Law died of alcohol poisoning. Recent studies show that lawyers are three times as likely to suffer from depression as members of other professions. The rate of substance abuse among lawyers is twice that of the general population.

The South Carolina Bar formed the HELP Task Force in November 2008 to shine a bright light on these problems. The HELP mission was to raise awareness and promote prevention of substance abuse, mental illness, and suicide within the legal profession. The Bar already had a confidential service for lawyers who suffer from substance abuse and mental illness--Lawyers Helping Lawyers (LHL). HELP complemented the work of LHL by educating lawyers, law firms, law students and judges about the services available through LHL. HELP also promoted a better understanding of mental health issues in the legal profession. This paper was prepared to support that effort.

The HELP Task Force hoped to save lives and restore integrity to our profession, by bringing an end to the epidemic of depression, suicide, and substance abuse among lawyers.

I. DEFINING THE PROBLEM

A. Lawyers

- A 1990 study by Johns Hopkins University found that among more than 100 occupations studied, lawyers were the most likely to suffer from depression and were 3.6 times more likely than average to do so. ("Occupations and the Prevalence of Major Depressive Disorder," 32 Journal of Occupational Medicine 1079 (1990)).
- A research study of 801 lawyers in the State of Washington found that 19% suffered from depression. ("The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers," 13 Journal of Law and Psychiatry 233 (1990)).

- Some studies estimate that of the 1 million lawyers in this country, approximately 250,000 suffer from some form of depression. ("Depression is the Law's Occupational Hazard," The Complete Lawyer, 3/1/08, Daniel Lukasik).
- 1 in 4 lawyers suffer from elevated feelings of psychological distress, including feelings of inadequacy, inferiority, anxiety, social alienation, isolation and depression (Benjamin Sells, "Facing the Facts About Depression in the Profession," Florida Bar News, March 1995).
- Male lawyers in the United States are two times more likely to commit suicide than men in the general population (1992 study by the National Institute for Occupational Safety and Health).
- Estimates from around the country indicate that the incidence of substance abuse among lawyers is as much as double the national average. Substance abusers are 10 times more likely to commit suicide.
- The quality of life survey by the North Carolina Bar Association in 1991 revealed that almost 26% of respondents exhibited symptoms of clinical depression, and almost 12% said they contemplated suicide at least once a month. (Michael J. Sweeney, The Devastation of Depression; research conducted by Campbell University)
- The North Carolina study was prompted in part by "the tragic suicides of eight Mecklenburg County lawyers in a seven year period." ("Reclaiming our Roots – Understanding Law as a 'Learned Profession' and 'High Calling'," The North Carolina State Bar Journal (Spring 2009), Carl Horn, III)
- Surveys of lawyers in Washington and Arizona show that most lawyers suffering from depression also had suicidal thoughts. (Depression Among Lawyers, 33 Colorado Lawyer 35 (January 2004)). This study found that lawyers have a much greater risk of acting on their suicidal thoughts and succeeding in doing so.
- Suicide ranks among the leading causes of premature death among lawyers. (Utah State Bar Journal August/September 2003).

B. Law Students

- “According to studies conducted by Dr. Andrew Benjamin, et. al., in the 1980s and 1990s, depression among law students approximated that of the general population before law school (about 9-10%). However, it rose to 32% by the end of the first year of law school, and rocketed to an amazing 40% by the third year, never to return to pre-law school levels.” (“Depression is Prevalent Among Lawyers – But Not Inevitable,” The Complete Lawyer, 12/2/08, Susan Daicoff).
- “Represented graphically, this would indicate that depression rises as steeply as a ski slope. Now, either the pre-law students assessed two weeks before law school classes begin were uncharacteristically ‘happy,’ at the top of their game, and scored as less often depressed than they really were, or law school has a significant, permanent deleterious affect on them.” (Daicoff).
- Lawrence Krieger, a professor at Florida State University College of Law, has conducted research showing that practicing lawyers exhibit clinical anxiety, hostility and depression at rates that range from 8 to 15 times those of the general population. (The National Law Journal).
- Despite law schools’ reputations as grueling and highly competitive, Krieger does not advocate changes in their operations. Instead, making students aware that feeling anxious or depressed is common during law school is the best way to help them. (The National Law Journal).
- Krieger’s research also indicates that the loss of intrinsic values may be responsible for at least a lowered sense of well-being among first-year law students. (Daicoff).

II. THE PRACTICE OF LAW

A. Perfectionism: The Perfect is the Enemy of the Good

- Research suggests that those who suffer from intense perfectionism are at higher risk for suicide. They are driven by an intense need to avoid failure. To these people, nothing seems quite good enough, and they are unable to derive satisfaction from what

ordinarily might be considered even superior performance. (Dr. Sidney J. Blatt, "The Destructiveness of Perfectionism: Implications for the Treatment of Depression," *American Psychologist*, Volume 49, Number 12 (1997)).

- Why are lawyers more prone than anyone else to the dangerous disease of depression? Psychologist Lynn Johnson points to two personality traits many lawyers have: perfectionism and pessimism. (Lynn Johnson, *Stress Management*, Utah State Bar Journal, January/February 2003).
- It is no secret that the legal profession attracts perfectionists and rewards perfectionism. Perfectionism drives us to excel in college, in law school, and on the job. Perfectionism has a dark side; it can produce "a chronic feeling that nothing is good enough." (Johnson, *Stress Management*).
- According to Johnson, perfectionism raises levels of stress hormones and high levels of such hormones lead to various health problems, including depression. And when we make the inevitable mistake, perfectionism magnifies the failure. "Perfectionists are more vulnerable to depression and anxiety, harder to treat with either therapy or drugs, and much more likely to commit suicide when things go very wrong." (Johnson, *Stress Management*).
- In "Stress Management for Lawyers," Dr. Amiram Elwork notes that perfectionism is rewarded in both law school and the practice of law. However, it can lead to negative thinking: "If I don't do it perfectly, I'm no good; it's no use; I should just give up," or "I have to do it perfectly and I can't quit until it's perfect." This type of thinking can lead to isolation and depression. (Daicoff).
- "Perfectionism can also lead to an overdeveloped sense of control and responsibility so that individuals believe they are responsible for situations over which they actually do not have complete control. If things do not turn out well, these individuals often blame themselves: they didn't work hard enough or they weren't sufficiently prepared or vigilant. They then either 'beat themselves up' or resolve to 'work harder' next time, not acknowledging that some things are out of their control. This erroneous belief causes a great deal of angst, which is then expressed either as depression or

irritability and anger, which are really two sides of the same coin.” (Daicoff).

B. Pessimism

- Less intuitive than the prevalence of perfectionism is the prevalence of pessimism among lawyers. A Johns Hopkins study in 1990 showed that in all graduate school programs in all professional fields except one, optimists outperformed pessimists. The one exception: law school.
- Pessimism helps lawyers excel: it makes us skeptical of what our clients, our witnesses, opposing counsel, and judges tell us. It helps us anticipate the worst and thus prepare for it. The pessimism is bad for our health: it leads to stress and disillusionment, which makes us vulnerable to depression. (“Depression, The Lawyers’ Epidemic: How You Can Recognize the Signs,” Raymond P. Ward, 3/16/05).

C. Unrealistic Expectations

- “Depression can also arise if prospective lawyers harbor unrealistic expectations about their chosen profession. Reich (1976) found that many pre-law students wished to be seen as confident, socially ascendant, and in control, but that inwardly they felt awkward, anxious, cautious, and unsure.” (Daicoff).
- “[Reich] suggested that they may have chosen law as a career because it allows them to hide behind a professional mask of confidence, leadership, and dominance; they don’t have to expose more tender feelings of discomfort and social awkwardness. In other words, lawyers can interact with clients, other lawyers, and judges at a comfortable professional distance and according to professionally defined ‘roles’ with clear expectations and obligations, often imposed by the lawyers’ code of ethics.” (Daicoff).
- “For some, this might reduce their anxiety. However, it can also be isolating, lonely, and discouraging – and ultimately lead to depression. As a result, lawyers often end up feeling alone as they are surrounded by clients, assistants, other lawyers, paralegals, and law office personnel. The very psychological dynamic that may

have in part driven them to choose the law as a career may ultimately contribute to debilitating depression necessitating treatment and behavioral change.” (Daicoff).

III. DEPRESSION

A. What is depression?

- Clinical depression is a serious health problem that affects the total person. In addition to feelings, it can change behavior, physical health, appearance, professional performance, social activity, and the ability to handle everyday decisions and pressures. (“Assisting the Depressed Lawyer,” Texas Bar Journal, Vol. 70, No. 3, Ann D. Foster).
- “Depression is more than the blues or the blahs; it is more than the normal, everyday ups and downs. When that ‘down’ mood, along with other symptoms, last for more than a couple of weeks, the condition may be clinical depression.” (Foster).
- “We all experience periods of depression, typically in reaction to some difficult life experience, such as the end of a relationship or the death of a loved one. But for most of this, these times of sadness are brief and don’t affect our ability to function.”
- “In contrast, clinical depression is more extreme and more prolonged. The lows are lower, and the periods spent in these emotional depths are longer. Depression in its most severe forms can render people unable to carry out the day-to-day necessities of life and can lead to suicide.” (“The Depressed Lawyer,” Texas Bar Journal, March 2007, Greg Miller).

B. What are the symptoms?

- Depressed mood
- Loss of interest or pleasure
- Change in appetite or weight
- Change in sleeping patterns
- Fatigue or loss of energy
- Speaking and/or moving with unusual speed or slowness
- Feelings of worthlessness or excessive or inappropriate guilt

- Diminished ability to think or concentrate, or indecisiveness
- Recurrent thoughts of death or suicide
- Suicide attempts

At least several of these symptoms must be present during the same two-week period in order to meet the diagnostic criteria for a major depressive episode.

C. What are the types of depression?

1. Major depression

An extreme or prolonged episode of sadness in which a person loses interest or pleasure in previously enjoyed activities.

An untreated major depressive episode can last from six months to two years, with the average duration being nine months.

See William Styron's book, *Darkness Visible*.

2. Dysthymia

Continuous low grade symptoms of major depression and anxiety, and chronic depression.

3. Manic-depressive illness (bipolar disorder)

Alternating episodes of mania ("highs") and depression ("lows").

The main point here is that we are not talking about the ordinary blues or occasionally feeling down; major depression is when the condition takes over your life.

See *The Unquiet Mind* by Kay R. Jamison.

D. What causes depression?

1. Functional abnormalities or chemical imbalances in the brain
2. Heredity
3. Biological factors
4. Environmental influences (job, marriage, family, economic and social influences)

Medical research outlines the biological and physiological factors involved in mental disorders, including depression. Despite this research, there remain many myths, misinformation, and misconceptions about mental illness.

71% of Americans believe that mental illness is due to some moral or emotional weakness.

65% believe that it is a result of bad parenting and at least 35% believe that it is a result of sinful behavior.

43% of those polled thought that mental illness was brought on by the individual.

E. Who gets depression?

- 10% of Americans (more than 19 million people) suffer from depression every year.
- More Americans suffer from clinical depression than heart disease and cancer.
- 62% of Americans personally know someone with a mental illness.

1. Men and women

Women are twice as likely to have depression as men.

Why the difference: biological differences; women more likely to seek treatment; fewer men diagnosed because

depression is masked behind alcoholism or antisocial behavior.

2. Children and adolescents

10% of American children have a mental or emotional disorder.

3. Young people

A *Parade Magazine* survey found that 46% of young people 18 to 24 years of age personally know someone who should be receiving help for mental health problems but is not.

F. What is the treatment for depression?

Effective treatment for depression is available for 90% of those with a depressive illness. The most important component of a treatment protocol is information, with accurate, current facts on causes, symptoms, treatment options, and tips for coping.

- Medication

- There are several different classes of medications for depression. Many of the more recent medications have fewer side effects than other types of anti-depressants.
- There are many misconceptions about anti-depressant medications. These medications are not mood elevators or tranquilizers. If a person is depressed, the anti-depressant medication will probably make the individual feel better. If a person is not depressed, the medication will not make the person “extra happy”. Anti-depressant medications are like aspirin in that aspirin will *reduce fever*, but *will not affect* the normal temperature. And, anti-depressant medications are not known to be addictive.
- While 70% of the American population have said they would take medication for a headache, only 12% would take an antidepressant. This is further evidence of the

current misconceptions about medications used to treat depression and other mental illnesses.

- Individuals with depression should consider consulting a mental health professional for adequate diagnosis and treatment.
- Ask for help!
 - The most important - and sometimes most difficult - step toward overcoming depression is asking for help.
 - “Often people don’t know they are depressed so they don’t ask for or get the right help. Most people fail to recognize the symptoms of depression in themselves or in other people. Also, depression can zap energy and self-esteem and thereby interfere with a person’s ability or wish to get help.” (Foster).
 - “Although effective help is out there, attorneys often have a hard time availing themselves of it. Trained to be impersonal and objective, lawyers are often reluctant to focus on their own feelings. Attorneys tend to be more comfortable in the role of counselor, solving the problems of others, than being the person seeking help.” (Miller).
 - A whole host of people are out there who are sick and hurting, and for whatever reasons refuse to get help—perhaps because they are too embarrassed or too ashamed. That is why it is important to let people know that depression is a medical problem so they can get help and there will be no stigma associated with seeking treatment.
 - It has often been said that there is a stigma associated with mental illness. The word “stigma” in the dictionary is defined as a “scar” left by a hot iron, a brand or mark of shame or discredit. People with mental illness should not be made to feel as though they have been branded, that they bear a mark of shame. We must work to ensure that this attitude dies a quick death.

G. How to Help

- The most important thing you can do for someone who is depressed is to get the person to a professional for an appropriate diagnosis and treatment.
- Do not assume that someone else is taking care of the problem. Negative thinking, inappropriate behavior, or physical changes need to be addressed as quickly as possible. (Foster).
- Your help may include the following:
 - In South Carolina, call Robert Turnbull, program director for Lawyers Helping Lawyers, on the toll-free helpline at 866-545-9590 or on his cell at 803-603-3807.
 - Give the person the number for the National Helpline for Lawyers, 1-866-LAW-LAPS.
 - In South Carolina, refer them to CorpCare, toll-free at 855-321-4384, for a referral to a counselor in their area, 24 hours a day.
 - Give suggestions of names and phone numbers of reputable therapists or psychiatrists.
 - Encourage or help the individual to make an appointment with a professional and accompany the individual to the doctor.
 - Encourage the individual to stay with treatment until symptoms begin to abate.
 - Encourage continued communications with the physician about different treatment options if no improvement occurs.
 - Offer emotional support, understanding, patience, friendship, and encouragement.
 - Engage in conversation and fellowship. Listen.
 - Refrain from disparaging feelings; point out realities and offer hope.

- Take remarks about suicide seriously; do not ignore them and don't agree to keep them confidential. Report them to the individual's therapist or doctor if your friend or colleague is reluctant to discuss the issue with you or his or her doctor.
- Invite the individual for walks, outings, to the movies, and other activities. Be gently insistent if your invitation is refused.
- Encourage participation in some activity that once gave pleasure—hobbies, sports, religious, or cultural activities.
- Don't push the depressed person to undertake too much too soon; too many demands may increase feelings of failure.
- Eventually with treatment, most people get better. Keep that outcome in mind and keep reassuring the depressed person that with time and help, he or she will feel better. (Foster).

IV. SUICIDE

- In 2006, suicide was the third leading cause of death among attorneys, after cancer and heart disease. The rate of death by suicide for lawyers is nearly six times the suicide rate for the general population.
- 15% of people with clinical depression commit suicide.
- Women attempt suicide at least two times more than men, but men are "successful" four times more than women.
- Substance abusers are ten times more likely to commit suicide than the general population.
- Although most depressed people are not suicidal, most suicidal people are depressed. It is important to learn how to distinguish depression from ordinary sadness.
- Suicide can be prevented. While some suicides occur without any outward warning, most do not.
- We can prevent suicide among lawyers by learning to recognize the signs of someone at risk, taking those signs seriously and knowing how to respond to them.

- The emotional crises that usually precede suicide are most often recognizable and treatable. Colleagues, family members and friends play important roles in recognition of depression symptoms and helping those in need get treatment.

A. What are the warning signs of suicide?

- Observable signs of serious depression
 - Unrelenting low mood
 - Pessimism
 - Hopelessness
 - Desperation
 - Anxiety
 - Inner tension
 - Withdrawal
 - Sleep problems
- Increased alcohol and/or other drug use
- Recent impulsiveness and taking unnecessary risks
- Threatening suicide or expressing a strong wish to die
- Making a plan
 - Giving away prized possessions
 - Sudden or impulsive purchase of a firearm
 - Obtaining other means of killing oneself such as poisons or medications
- Unexpected rage or anger

B. What to do when you fear someone may take his or her life

- Take it seriously
 - 75% of all persons who commit suicide give some warning of their intentions to a friend or family member.
 - All suicide threats and attempts must be taken seriously.

- Be willing to listen
 - Take the initiative to ask what is troubling them and persist to overcome any reluctance to talk about it.
 - If professional help is indicated, the person you care about is more apt to follow such a recommendation if you have listened to him.
 - If your friend or loved one is depressed, do not be afraid to ask whether he is considering suicide, or even if he has a particular plan or method in mind.
 - Do not attempt to argue anyone out of suicide. Rather, let the person know you care and understand, that he is not alone, that suicidal feelings are temporary, that depression can be treated and that problems can be solved.
 - Avoid the temptation to say, "You have so much to live for," or "Your suicide will hurt your family."
- Seek professional help
 - Be actively involved in encouraging the person to see a physician or mental health professional immediately.
 - Individuals contemplating suicide often do not believe they can be helped, so you may have to do more.
 - Some may resist seeing a psychiatrist until a friend offers to accompany him on the visit.
 - You can make a difference by helping the person in need of help find a knowledgeable mental health professional or reputable treatment facility.
- In an acute crisis
 - In an acute crisis, take your friend or loved one to an emergency room or walk-in clinic at a psychiatric hospital.

- Do not leave him alone until help is available.
- Remove from the vicinity any firearms, drugs, or sharp objects that could be used in a suicide attempt.
- Hospitalization may be indicated and may be necessary at least until the crisis abates.
- If a psychiatric facility is unavailable, go to your nearest hospital or clinic.
- If the above options are unavailable, call your local emergency number or the national suicide prevention lifeline at 1-800-232-TALK.
- Follow-up on treatment
 - Suicidal patients are often hesitant to seek help and may run away or avoid it after an initial contact unless there is support for their continuing.
 - If medication is prescribed, take an active role to make sure they are taking the medication and be sure to notify the physician about any unexpected side effects.
 - Often, alternative medications can be prescribed.

V. SUBSTANCE ABUSE

A. Lawyers and Addiction

- The National Institute on Alcohol and Alcohol Abuse estimates that 10% of the U.S. population is alcoholic or chemically dependent.
- In the legal profession, the abuse may be as high as 20%.
- Lawyers are at risk for problems with addiction at almost twice the rate as the general population.
- Alcoholism is a factor in 30% of all completed suicides.

- Reports from lawyer assistance programs indicate that 50%-75% of lawyer discipline cases nationwide involve chemical dependency.
- Most substance abusers are functional in the workplace. Nearly three out of four are employed, though the risks for the employer are high.
- The defenses of denial, rationalization and justification often make it difficult for people abusing substances to recognize they have a problem.

B. How do you know?

- The CAGE Questionnaire was developed in 1970 by Dr. John A. Ewing and is used for screening of patients for alcoholism.
- According to Dr. Ewing, two or more “yes” answers indicate a positive history of alcoholism.

○ **Cut Back?**

Have you ever felt the need to reduce the level of your consumption?

○ **Annoyed?**

Have people ever annoyed you with their criticism of your drinking or using habits?

○ **Guilty?**

Have you ever felt guilty while you were drinking or using?

○ **Eye-opener?**

Have you ever started the day with a drink or drug, either to wake yourself up, to relax or to cure a hangover?

C. Signs of Substance Abuse

- Signs of substance abuse are sometimes subtle and can be mistaken for other problems, such as depression. Some of the observable signs are:
 - smell of alcohol
 - bloodshot eyes or a puffy face
 - slurred or rapid speech
 - hyper-vigilance or suspiciousness
 - failure to return from lunch or break
 - pattern of being late or a no-show on Mondays
 - leaving early from work
 - failure to return phone calls
 - missing appointments
 - failure to meet deadlines
 - change in mood or general demeanor
 - deterioration of personal appearance or hygiene

D. How to Help

- You may want to explain to your friend that you know that alcoholism is an illness. You now know that treatment works so you want to urge your colleague to get an assessment, go to treatment, or even head straight for the nearest AA meeting.
- There are those who call for help on their own, go to AA, go to outpatient or inpatient treatment, and stop drinking or drugging. But, the truth is that most active alcoholics and drug addicts are not ready and willing to quit simply because someone suggests it. Lawyers may be particularly resistant to admitting a drinking or drug problem.
- What are some general guidelines for helping an addicted lawyer?
 - Get some education about the illness that you are up against.
 - Talk to therapists, doctors, or someone with your state's lawyer assistance program; AA members may have practical experience with the disease and may be helpful.

- Get assistance and coaching from the experts. Members of AA, NA, local treatment centers, therapists, doctors, and professional interventionists are great resources. Someone who has recovered from the same illness may be an ally when you have these conversations. They have instant credibility; you may not.
- Leverage a bad day. Timing is sometimes important. Approaching someone who is struggling with the negative consequences of his addiction or dependency on a bad day may be more receptive to your suggestions than during the “good” times.
- Do not try to talk to someone when he is impaired. It does not work.
- Do not label the individual with a diagnosis. Expressions of concern, offers of hope, and specific ideas for a solution are helpful. Speaking honestly about how the individual’s drinking or drug use has affected you, giving specific examples, is recommended. Labeling someone an addict or an alcoholic will backfire.
- Be armed with solutions. Offer ideas about how to get help. Have phone numbers available and offer to get the individual to help immediately. If your friend seems even remotely receptive, act quickly; the small opening in the hard shell of addiction will not stay open long. You may not get another chance.
- Do not enable. Never do for John what John can do for himself. Stop protecting him from consequences. Be honest. Do not cover up, lie, stand in, or do his work. Do not ignore the problem. Do not be a scapegoat. Do not try to control her drinking or his drug use. Respect his dignity. Be realistic about events. Allow success or failure. Share your hope for recovery. Participate in his good behavior. Offer concrete solutions.
- Whether you are the husband, wife, employee, judge, law student, law partner, law firm associate, friend, or colleague of a person challenged by drugs or alcohol, your understanding of the nature of

the problem can play a vital part in helping that individual to achieve and maintain recovery. Please remember that there is hope, and there is help. You are not alone. (Foster).

VI. LAWYER ASSISTANCE PROGRAMS

Lawyers Helping Lawyers (LHL) is the South Carolina Bar lawyer assistance program. LHL provides programs and services to assist members of the legal profession in South Carolina who suffer from problems of substance abuse or depression, which affect their professional and/or personal life. Members of the Lawyers Helping Lawyers Committee comprise a support network of recovering judges and lawyers who assist in carrying the recovery message. LHL provides referral services, peer support, monitoring services, and education.

LHL is not a 12-step program; however, it often recommends participation in programs such as Alcoholics Anonymous, Narcotics Anonymous or other recovery programs as major resources for a lawyer's or judge's recovery. LHL is not a treatment program, counseling center, employment agency, legal referral center or employee assistance program; however, all of these services can be accessed through LHL resources and referrals.

- Free helpline

South Carolina lawyers can call the Lawyers Helping Lawyers toll free helpline at (866) 545-9590.

- Free counseling services

CorpCare will also provide up to five free hours of intervention counseling for South Carolina attorneys experiencing emotional or stress-related issues. Lawyers using the service will remain completely anonymous. Bar members may call CorpCare toll-free at (855) 321-4384 to be referred to a counselor in their area 24 hours a day.

- J. Robert Turnbull, Jr., Director
1-866-545-9590 (toll free helpline)
(803) 576-3781 (office)
(803) 603-3807 (cell)
rturnbull@scbar.org

- South Carolina Bar
950 Taylor Street
Columbia, South Carolina 29201
(803) 799-6653 (Phone)
(803) 799-4118 (Fax)
www.scbar.org

A directory of lawyer assistance programs in each state can be found on the ABA website. Lawyers may also call the National Helpline for Lawyers at 1-866-LAW-LAPS.

VII. HOW LAWYERS CAN AVOID THE VULNERABILITY TO DEPRESSION, SUICIDE AND SUBSTANCE ABUSE

We have addressed the prevalence of depression and substance abuse in the legal profession, and why lawyers are vulnerable to these problems. Let's turn our focus now to how lawyers can avoid these problems and achieve a balanced life and fulfillment in the practice of law.

In 2003, the ABA published a book, *Lawyer Life – Finding a Life and a Higher Calling in the Practice of Law*, written by the Honorable Carl Horn, III, who at that time was the U.S. Magistrate Judge for the Western District of North Carolina. Judge Horn later retired from the bench and entered private practice in Charlotte, North Carolina. Judge Horn's book addresses the daily problems facing lawyers and the general dissatisfaction many lawyers experience with their profession. After a thorough examination of the profession and its various problems, including lawyers' vulnerability to depression and substance abuse, Judge Horn set forth "12 Steps Toward Fulfillment in the Practice of Law," which is based on choices that the individual lawyer can make to enhance professional fulfillment.

A. Face the Facts

By honestly and openly asking the right questions, we increase our chances toward a balanced, fulfilling professional life. Do you feel good where you are professionally and personally, and where your life appears to be going? Let honesty be the rule here. We must face these facts on a regular basis if our lives are to remain balanced and on-course. Lawyers who do not ask these kinds of questions, who fail to engage in periodic introspection, are more likely to experience what has been described as "the lingering feeling of emptiness despite material success."

B. Establish Clear Priorities

Judge Horn says that if we aim to live balanced lives, lines must be drawn beyond which we are not willing to go, at least not on a regular basis. He suggests making time with your family a top priority, and to be sure your daily and weekly schedules reflect it. Clearly, making enough money should be a priority. However, the proper priority, in a balanced life, that should be given to making enough money, must not be a license for workaholism or what one commentator has called a money-centered world view. If balance and happiness are among our life goals, we must be vigilant not to allow money to become an end in itself.

C. Develop and Practice Good Time Management

Whatever time we spend on our work should be arranged for maximum productivity. Judge Horn suggests that there are at least five areas in which many lawyers could begin to make significant progress simply by paying close attention. These include better planning; minimizing interruptions by phone or in person; more careful scheduling and planning of meetings; mastering the paper flow; and more thoughtful and efficient delegation. He suggests that if you live by the rule that the way to get things done right is to do it yourself, get over it. The time and energy you alone have to give, can and will soon run out. What you can accomplish by the thoughtful and efficient delegation to others is significantly less limited. Anything that can be done by others, should be done by them. Those who learn to delegate effectively, will free up many of their own hours and see their productivity significantly rise.

D. Implement Healthy Lifestyle Practices

Judge Horn suggests that there is a positive correlation between lawyers who self-reported a sense of subjective well-being and those who engaged in certain habits or practices that are deemed “healthy.” Those practices include regular exercise, attending religious services, personal prayer, hobbies, engaging in outdoor recreation, pleasure reading, and taking weeks of vacation.

Lawyers with other serious interests, those who successfully resist the “all work and no play” syndrome, also consider themselves the happiest.

E. Live Beneath Your Means

The focus of Judge Horn's comments in this section is that unless we actively struggle against it, we will find ourselves engaging in consumer spending that severely limits our ability to choose a healthier, more balanced life.

F. Don't Let Technology Control Your Life

How we do this is something each individual must work out. Some get up early and work, either at home or in their offices, so they can have dinner with their families most evenings. Others decline to carry cell phones or check email or voicemail much of the time they are away from the office. Whatever our strategy, the core objective is the same: to establish boundaries that prevent technology from controlling our lives.

G. Care About Character – And Conduct Yourself Accordingly

Judge Horn exhorts us to vow to do what most of us already know is right: strive to conduct ourselves honorably, which means refusing to lie, cheat or steal, however much pressure we are under, or however profitable the wrong choices may appear to be at that moment. Do not pad your timesheets; do not tell lies to partners or clients or opposing counsel; do not misrepresent legal authority to judges; do not break your promises. Do not do anything else that is contrary to the values that you now hold. If we care about our character, and conduct ourselves accordingly, we will be able to sleep well at night.

H. "Just Say No" to Some Clients

Judge Horn suggests that we should be scrupulously honest with our clients, including but not limited to, the work we choose to do and how it is billed. We must be exceedingly careful not to cross the ethical lines and to keep a measure of professional distance, particularly where an objective third party might see our client's conduct as deceptive. We should strive to provide wise counsel, which often requires more of a big picture approach to problem solving and conflict resolution. And sometimes we should "just say no" to some clients.

I. Stay Emotionally Healthy

Judge Horn suggests that we must seek a healthy balance between our rational, cognitive sides, on the one hand, and our feelings, emotions, heart and

imagination on the other. We must pursue balance not only in how we spend the limited hours of our lives, but also between our outer and inner selves.

J. Embrace Law as a “High Calling”

If we are to have a realistic hope of regaining professional self-confidence, Judge Horn says we must reaffirm ideals that transcend self-interest, including our individual and profession-wide commitment to the common good. We must not allow the legal profession to become an amoral, dollar-driven business; indeed, we should not be afraid to make value-based decisions or give advice surrounded in moral conviction. In short, if we are to find fulfillment in the practice of law, we must embrace law as a high calling.

K. Be Generous With Your Time and Money

Judge Horn acknowledges that his primary point here is fairly selfish, that being generous with our time and money will make us feel better about our profession and our lives generally. He notes that those who have been revered for their wisdom and empathy are often people who believed that the very purpose of life is to be of service to others.

L. Pace Yourself for a Marathon

Striving for professional excellence is a good and worthy goal. In sharp and important contrast, trying to achieve perfection is not. Alan Dershowitz wrote a brief reflection which he titled “The Perfect is the Enemy of the Excellent,” in which he observed that “every book, painting, symphony or speech could be improved. The search for perfection is illusory and has no end.”

We would do well to strive for professional excellence but be wary of any tendency we may have toward perfectionism.

The challenges set forth by Judge Horn are those with which we can expect to struggle for the rest of our lives. Thankfully, they are not impossible struggles and if we diligently take these steps, we can realistically expect to move closer to our goal of finding balance, success and fulfillment in the practice of law.

INNOVATION TRUMPS IMITATION: OUTRUNNING THE BOOTLEGGERS

How To Litigate Your Client's Counterfeit Product Claims

**FDCC 2014 Annual Meeting
The Greenbrier—White Sulphur Springs, West Virginia**

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Presented to the:

**Commercial Litigation Section;
Intellectual Property Section; and
Corporate Counsel Section**

Presented by:

**Gerald B. Kline, Esq.
Michael Q. Walshe, Jr., Esq.
Brian D. Walters, Esq.**

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Formerly the *President* of the Pennsylvania Defense Institute, Mr. Walters has testified before the House Labor Relations Committee of the Commonwealth of Pennsylvania regarding litigation reform. A graduate of Boston College and Duquesne University School of Law, Mr. Walters was a member of the *Order of Barristers* and a published author and editor of the Duquesne Law Review.

INNOVATION TRUMPS IMITATION: OUTRUNNING THE BOOTLEGGERS

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INTRODUCTION

In what has become an all too familiar occurrence in the corporate world, your client's Vice-President of Marketing calls you early Monday morning. Over the weekend, a routine Google search revealed numerous foreign websites selling counterfeit versions of your client's best-selling product. To make matters worse, further investigation reveals that those products are already available in the United States as well. This paper will highlight various civil remedies available to your client under both federal and state law to decisively address such threats immediately, as well as thoughtful strategies to protect your client's business and brand from falling prey in the future to these prevalent and highly damaging types of counterfeiting activities.

Although it is beyond the scope of this paper, it should be noted that counterfeiting is a crime for which significant penalties and remedies are available. Accordingly, any company faced with a counterfeiting problem should consider contacting its local United States Attorney's office to see if prosecutorial assistance is available. For more information on criminal penalties and remedies for counterfeiting, see 18 U.S.C. § 2320 and 2 Anne Gilson LaLonde, *Gilson on Trademarks* § 5.19[5] (Matthew Bender).

One final note on criminal counterfeiting is worth mentioning. Currently, criminal and civil remedies and penalties address the counterfeiters and their accomplices. But a recently proposed law may change that. New York City Council Member Margaret Chin, whose district includes Canal Street in Manhattan, has proposed a law that would criminalize the "purchase of a tangible item containing a counterfeit trademark when [the purchaser] knows or should have known such trademark is counterfeit [.]". At this time, the effect that such a law would have on anticounterfeiting efforts is unclear. For further analysis of this law, see Maurine

M. Wall, Fake Bags, Real Consequences, available at www.americanbar.org/publications/tyl/topics/criminal-law/fake_bags_real_consequences.html.

Part One: Anti-Counterfeiting Remedies Under the Lanham Act

The primary source of remedies for victims of product counterfeiting is the federal trademark statute, the Lanham Act (15 U.S.C. § 1051 et seq.). "Counterfeiting is a subset of trademark infringement." 2 Gilson § 5.19[2][a]. Thus, the claims available to a trademark owner in a counterfeiting case are the same ones that are available to a trademark owner in an ordinary infringement matter. These claims generally include the following:

- (1) Infringement of a registered mark under 15 U.S.C. § 1114(1), which prohibits the unauthorized use of a counterfeit of a registered mark in connection with the sale of any goods or services when such use is likely to cause confusion in consumers;
- (2) Unfair competition under 15 U.S.C. § 1125(a), which may provide relief in the event the trademark owner has not obtained a federal registration for its mark; and
- (3) Dilution under 15 U.S.C. § 1125(c), which protects "famous" marks from dilution by non-competing goods. A dilution claim can be useful when the counterfeiter uses a mark on a good or service that the trademark owner does not have covered by a federal trademark registration.

The ultimate issue in both counterfeiting and infringement cases is whether "consumers are likely to be confused about the source of goods or services and the defendant is benefitting from the plaintiff's good will." 2 Gilson, § 5.19[2][a]. Accordingly, "[t]he unique aspect of civil anticounterfeiting actions under the Lanham Act lies in the availability of extraordinary remedies, not in the claims themselves." Lisa Pearson, George Nahitchkevansky, Christopher P. Bussert, and James H. Sullivan, Jr., *An Overview of Legal Remedies Against the Trafficking in Goods Bearing Counterfeit Trademarks and Gray Market Goods Under United States Law*, Intellectual Property Desk Reference (6th Ed.) found at www.kilpatricktownsend.com.

I. WHAT IS COUNTERFEITING?

Counterfeiting is the "practice of placing a fake trademark on a product, often of inferior quality, in order to make the product superficially indistinguishable from the genuine article." 2 Gilson, § 5.19[2]. Counterfeiting has also been defined as "producing or selling a product with a sham trademark that is an intentional and calculated reproduction of the genuine trademark." 4 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, § 25:10 (4th ed.).

Counterfeiting is big business. In fiscal year 2013, U.S. Immigration and Customs Enforcement ("ICE"), Homeland Security Investigations ("HSI"), and U.S. Customs

and Border Protection ("CBP") executed 24,361 seizures of counterfeit goods. *See*, www.ice.gov/news/releases/1403/140324washingtondc2.htm. This was a 7% increase in seizures from fiscal year 2012. *Id.* HSI and CBP averaged "slightly over 66 seizures per day, with an average MSRP of each seizure being more than \$71,500." *Id.* The MSRP of all the seized goods totaled \$1.74 billion. In addition, the National Intellectual Property Rights Coordination Center ("IPR Center") seized 1,413 domain names. *Id.* Since the IPR Center began seizing domain names in 2010, it has seized more than 2,700 domain names. *Id.*

Counterfeit goods are not limited to luxury items and sports apparel. Counterfeit goods include apparel, accessories, music, software, medications, cigarettes, automobile parts, airplane parts, consumer goods, toys, and electronics. *See*, website of the Anti-Counterfeiting Coalition: <http://www.iacc.org>. The website www.havocscope.com/products estimates the following black market values for counterfeit goods:

- Aircraft parts - \$2 billion
- Auto parts - \$45 billion
- Batteries - \$23 million
- Clothing - \$12 billion
- Cosmetics - \$3 billion
- Drugs - \$200 billion
- Electronics - \$169 billion
- Foods - \$49 billion
- Lighters - \$42 million
- Pesticides - \$5.8 billion
- Purses - \$70 million
- Sporting Goods - \$6.5 billion
- Toys - \$34 billion
- Watches - \$1 billion
- Weapons - \$1.8 billion

The information from the Havocscope website shows that the goods being counterfeited present a real threat to an individual's personal health and safety. Indeed, a recent USA Today article, *Knockoffs Bought and Sold on the Internet* (April 30, 2014) chronicled the story of a Texas physician who nearly died after taking a counterfeit version of the Alli weight loss drug he had purchased online.

The USA Today articles and others like it show how the internet has fueled the growth of the counterfeiting industry. Websites such as Alibaba, Ebay, and Amazon.com have all faced issues due to counterfeit goods. Recognizing the significance of the online counterfeiting issue, the International Trademark Association ("INTA") has prepared a report on how to address online counterfeiting. *See* INTA, *Addressing the Sale of Counterfeits on the Internet*, www.inta.org. According to the INTA report, the following factors have "spurred the growth of counterfeit sales online":

- (1) Because of the Internet, counterfeiters can reach consumers all over the world, meaning that consumers have more opportunities to knowingly or unknowingly purchase counterfeit goods;
- (2) Payments are made online, so anyone with a credit card, including consumers, retailers, wholesalers, or re-sellers can purchase counterfeit goods via the Internet; and
- (3) The Internet provides anonymity, which allows counterfeiters to fool consumers into thinking they are purchasing authentic products. For example, Internet merchants can post pictures of genuine products, but then ship counterfeit goods to the consumer who has not been able to actually handle the goods before buying.

The INTA report concludes with lists of best practices for search sites, marketplace and shopping sites, payment service providers, and trademark owners for dealing with the problem of Internet sales of counterfeit goods.

Even outside of the Internet, it is growing increasingly difficult to avoid counterfeit goods. While there is still a large market for itinerant street vendors, counterfeits can also be found in brick and mortar stores. Even the largest retailers are not immune to the counterfeiting problem. In one of the more famous cases, Fendi sued Wal-Mart in federal court in New York alleging that counterfeit versions of Fendi brand bags and wallets were being sold in Sam's Club stores. *Fendi v. Wal-Mart*, 06-CV-4370 (SDNY 2006). According to the complaint, some of the Fendi bags for sale at Sam's Club were priced at \$295 instead of the \$925 price attached to the genuine goods. Wal-Mart ultimately settled the case, agreeing to pay Fendi an undisclosed sum and offering refunds to consumers who had purchased the bags. *See*, Wal-Mart, Fendi Settle Lawsuit Over Knockoff Bags, Bloomberg.com (June 6, 2007).

Clearly, no industries or consumers are immune from the scourge of counterfeiting.

II. WHAT IS A COUNTERFEIT?

A. Counterfeit Marks

The Lanham Act contains two definitions of counterfeit. A "counterfeit" is defined as "a spurious mark which is identical with, or substantially indistinguishable from, a registered mark." 15 U.S.C. § 1127. The Lanham Act also contains the following more detailed definition of a counterfeit mark:

- (i) a counterfeit of a mark that is registered on the principal register in the United States Patent and Trademark Office for such goods or services sold, offered for sale, or distributed and that is in use, whether or not the person against whom relief is sought knew such mark was so registered; or
- (ii) a spurious designation that is identical with, or substantially indistinguishable from, a designation as to which the remedies of this

chapter are made available by reason of section 220506 of Title 36; but such term does not include any mark or designation used on or in connection with goods or services of which the manufacturer or producer was, at the time of the manufacture or production in question authorized to use the mark or designation for the types of goods or services so manufactured or produced, by the holder of the right to use such mark or designation.

15 U.S.C. § 1116(d)(1)(8).

The distinction between a "counterfeit" and a "counterfeit mark" is significant because the extraordinary anti-counterfeiting relief provided by the Lanham Act only applies to counterfeit marks. For example, the unauthorized use of the federally registered mark APPLE on fountain pens would satisfy the Lanham Act's definition of counterfeit. But, unless the owner of the APPLE mark had also registered its mark for fountain pens, the unauthorized use of APPLE would not be a counterfeit mark. Accordingly, the owner of the APPLE mark would not be entitled to an *ex parte* seizure order, among other remedies reserved for the use of counterfeit marks.

Courts have not required exact reproductions of registered marks in order to find a counterfeit mark. In certain instances, the unauthorized use of the original label has been found sufficient. For example, in *United States v. Petrosian*, 126 F.3d 1232 (9th Cir. 1997) the court found that filling genuine Coca-Cola bottles with a cola-like beverage and selling it as Coca-Cola created a counterfeit mark. *See also*, *Westinghouse Elec. Corp. v. General Circuit Breaker and Electrical Supply*, 106 F.3d 894 (9th Cir. 1997) (used and reconditioned equipment that bore the original WESTINGHOUSE label without disclosing the used nature of the equipment was counterfeit) and *General Electric Co. v. Speicher*, 877 F.2d 531 (7th Cir. 1989) (selling non-General Electric parts in genuine boxes marked GENERAL ELECTRIC was counterfeiting). In addition, adding non-genuine parts to a genuine watch has been found to constitute counterfeiting. *See, e.g.*, *Rolex Watch, U.S.A., Inc. v. Michel Co.*, 179 F.3d 704 (9th Cir. 1999) and *Cartier v. Symbolix*, 386 F. Supp. 2d 354 (S.D.N.Y. 2005) (adding diamonds to steel Cartier watches was counterfeiting).

Other terms that may be used to describe counterfeits are knockoffs and replicas. There is no statutory definition of knockoffs. A knockoff is "generally understood as a cheap copy intended to evoke the original product." 2 Gilson, § 5.19[2][b]. In many cases, knockoffs are counterfeits, but some, for example, dresses sold the week after the Academy Awards that copy the dresses worn by celebrities are not counterfeits. *Id.* Bills have been proposed in Congress to remedy the problem of copied fashions, but none have been passed. *Id.* Replicas, on the other hand, are counterfeits. *See, e.g.*, Jenny T. Stocum and Jess M. Collen, The Existing Threat and Enforcement of Replica Goods, 33 Western New England Law Review 789.

B. Gray Market Goods/Parallel Imports

Gray market goods, also known as parallel imports, are not counterfeits, but their sale can cause similar problems for trademark owners. "A gray-market good is a foreign-manufactured good, bearing a valid United States trademark, that is imported without the consent

of the U.S. trademark holder." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 285, 108 S. Ct. 1811, 1899, 100 L.Ed. 2d 313 (1988). The Lanham Act's definition of "counterfeit mark" does not apply to gray market goods because the marks on such goods were "placed on the product 'at the time of manufacture' by a manufacturer 'authorized to use the mark . . . by the holder of the right to use the mark.'" *Martin's Herend Imports, Inc. v. Diamond & Gem Trading USA Co.*, 112 F.3d 1296, 1306 (5th Cir. 1997). Nevertheless, as noted by one commentator, "[f]ew issues of trademark law have engendered as much litigation and uncertainty as whether gray market imports infringe upon the rights of U.S. trademark owners." 2 Gilson, § 5.20. This uncertainty even extends to the identification of these goods by the name gray market goods as opposed to parallel imports. One court noted as follows:

The term "gray-market goods" refers to foreign manufactured goods, for which a valid United States trademark has been registered, that are legally purchased abroad and imported into the United States without the consent of the American trademark holder. [Defendants] in the present case note that the term 'gray-market' unfairly implies a nefarious undertaking by the importer, and that the more accurate term for the goods at issue is "parallel import." We agree that the term parallel import accurately describes the goods and is, perhaps, a better term because it is devoid of prejudicial suggestion. For that reason, we use that term in this discussion. However, we also employ the term "gray-market" goods because, for better or worse, it has become the commonly accepted and employed reference to the goods at issue.

Weil Ceramics & Glass, Inc. v. Dash, 878 F.2d 659, 662 n. 1 (3d Cir. 1989).

Regardless of the name given to these goods, "the ultimate issue in a trademark infringement suit against the importer of gray market imports is the factual question of likelihood of confusion of U.S. customers." 5 McCarthy, § 29:46. "Traditionally, resolution of the question depended on whom U.S. customers identified as the source of the goods bearing the mark: the foreign manufacturer or the U.S. importer." *Id.* Now, however, the focus is on the nature of the goods. "If there is a material difference between the gray market imported goods and the goods authorized for sale in the U.S., then confusion of customers and infringement can occur." *Id.*

For example, in *Original Appalachian Artworks, Inc. v. Granada Electronics, Inc.*, 816 F.2d 68 (2nd Cir. 1987), the owner of the U.S. trademark for CABBAGE PATCH DOLLS prevailed on its trademark infringement claim against the owner of a license to sell CABBAGE PATCH DOLLS in Spain. Even though the dolls that were imported from Spain bore the plaintiff's trademark and were manufactured under a license with plaintiff, the imported dolls were not genuine because they differed from the dolls for sale in the U.S. in that their adoption papers were in Spanish rather than English. Subsequent courts have followed the Second Circuit's approach. In *Societe des Produits Nestle, S.A. v. Casa Helvetia, Inc.*, 982 F.2d 633, 640 (1st Cir. 1992), the First Circuit agreed that the question of trademark infringement under the Lanham Act turned on the existence of a material difference between the products:

[i]n this case, all roads lead to Rome. Whether the fulcrum of the plaintiffs' complaint is perceived as section 32(1)(a), section 42, or section 43, liability necessarily turns on the existence vel non of material differences between the products of a sort likely to create consumer confusion.

The *Nestle* court also outlined a test for determining if the differences between the products were material. Noting that the materiality analysis must proceed on a case-by-case basis, the Court concluded that "the existence of any difference between the registrant's product and the allegedly infringing gray good that consumers would likely consider to be relevant when purchasing a product creates a presumption of consumer confusion sufficient to support a Lanham Act claim." *Nestle*, 982 F.2d at 641.

Defendants in gray market goods cases, often rely on the first-sale rule as a defense to infringement. Under the first sale rule, the buyer of a genuine good from the trademark owner may resell the product under the original mark without the consent of the trademark owner.

Martin's Herend is a good example of the application of the first sale doctrine in gray market goods cases. The plaintiffs were the exclusive distributor and sole importer for HEREND porcelain and the manufacturer. The defendant also sold HEREND porcelain in the United States, but its product was purchased from other American or foreign sources. The court affirmed the plaintiffs' injunctive relief relative to the sale of HEREND porcelain that had not previously been offered for sale in the United States, finding that it was materially different from what defendant was selling. But, with respect to goods that had previously been authorized for sale in the United States, the first sale rule applied and plaintiff was not entitled to injunctive relief. The court explained as follows:

[a]s long as plaintiffs have ever approved a piece for importation and sale in this country [defendant] is free to sell any individual piece of the same quality from the same product line. [Defendant] is, for example, allowed to sell any Herend piece offered in Martin's catalogue.

Martin's Herend, 112 F.3d at 1304. Accordingly, the first sale rule is a defense to trademark infringement in gray market goods cases when there is no material difference in the products.

III. THE LANHAM ACT'S ENHANCED REMEDIES FOR COUNTERFEITING

As previously noted, the primary differences between anticounterfeiting litigation and ordinary infringement litigation are the enhanced remedies and penalties available to a plaintiff in a counterfeiting case.

A. *Ex Parte* Seizure Orders

Almost every plaintiff in a trademark infringement lawsuit requests some type of injunctive relief, be it a temporary restraining order, a preliminary injunction, or a permanent injunction. The purpose of seeking such relief is to stop the infringing action and thereby

preserve the plaintiff's brand. Counterfeiting cases are no different. Stopping the defendant's infringement is critical to the plaintiff. What is different, however, is that a plaintiff in a counterfeiting case can obtain an *ex parte* order "providing for the seizure of goods and counterfeit marks." 15 U.S.C. § 1116(d)(1)(A).

The *ex parte* seizure order has significant advantages over ordinary injunctive relief. Because the defendant does not receive notice of the case, it does not have a chance to move to another jurisdiction or simply destroy the evidence. This ability to preserve evidence is important to prevailing in a counterfeiting case. See, *In re Lorillard Tobacco Co.*, F.3d 982 (9th Cir. 2004). As one commentator has also noted:

In cases of outright counterfeiting by marginal imitators, traditional civil remedies have proven largely ineffective. The retailer of counterfeit goods is often a vendor peddling memorabilia merchandise at a rock concert, a transient street vendor or merchant at a flea market. The counterfeiter or its distributor who is served with a civil summons to appear at a hearing on a preliminary injunction will either disappear or quickly dispense of existing inventory of counterfeit items [leaving the trademark owner without an effective remedy].

McCarthy, § 30:34

Courts around the country have recognized that *ex parte* seizure orders without notice are the only effective means to stop the illegal actions of professional distributors and itinerant vendors of counterfeit merchandise. See *Vuitton v. White*, 945 F.2d 569, 574 (3d. Cir. 1991); *SKS Merch, LLC v. Barry*, 233 F. Supp. 2d 841 (E.D. Ky. 2002) ("*ex parte* seizures [are] a necessary tool to thwart bad faith efforts of fly-by-night defendants to evade the jurisdiction of the court"); *Fimab-Finanziaria Maglificio v. Helio Import/Export, Inc.*, 601 F. Supp. 1 (S.D. Fla. 1983) (the weight of authority around the country appears to favor the granting of such *ex parte* relief in trademark counterfeiting cases, where fake versions of well-known brands are deliberately passed off to the public as the genuine article"). As one might imagine, *ex parte* seizure orders are not without controversy. For example, there are questions regarding whether the use of *ex parte* seizure orders in advance of a large event simply to clear bootleggers from the streets is compatible with congressional intent. See, Daniel Grobman, *Preemptive Ex Parte Seizure Orders and Substantive Relief: A Far Cry from Congressional Intent*, 33 Cardozo Law Review 1185 (2012). Other courts have been concerned with entering such orders without specific information regarding the identity of the defendants. See, *World Wrestling Entertainment, Inc., infra*.

Two recent events in New Orleans, Louisiana exemplify different approaches to the granting of *ex parte* seizure orders. On February 3, 2013, New Orleans hosted Super Bowl XLVII. Based on its experience in past Super Bowls and playoff games, the NFL knew that there would be an increase in counterfeiting activity in connection with the Super Bowl. Accordingly, on January 24, 2013, NFL Properties, LLC ("NFLP"), the Baltimore Ravens, and the San Francisco 49ers filed a Verified Petition for Injunctive Relief and Other Damages against John Does 1-100 in Louisiana state court in New Orleans. See *NFL Properties, a Delaware*

Limited Liability Company, et al. v. John Does 1-100, Inclusive, No. 13-779, Civil District Court for the Parish of Orleans, State of Louisiana. The verified petition was supported by multiple affidavits, including affidavits from NFLP representatives and law enforcement personnel, establishing that there would be significant counterfeiting activity in connection with the Super Bowl. Along with their verified petition, the plaintiffs also filed an *Ex Parte* Motion for Temporary Restraining Order, Preliminary Injunctive Relief and Order of Delivery, Seizure and Impoundment, seeking, among other things, an *ex parte* seizure order.

The seizure order requested by the plaintiffs was narrowly tailored for the Greater New Orleans area. It was proposed to go into effect starting at noon on the Thursday before Super Bowl XLVII and last until 11:59 p.m. on the Monday following the Super Bowl. After a hearing in chambers, the court granted the relief as requested and set a hearing for a preliminary injunction for the Wednesday following the Super Bowl. The plaintiffs posted the bond required by the court, and the seizure order became effective. The plaintiffs prevailed at the preliminary injunction stage as well, and ultimately obtained a permanent injunction.

In April 2014, New Orleans hosted World Wrestling Entertainment, Inc.'s ("WWE") WRESTLEMANIA XXX. On March 26, 2014, WWE filed a Verified Complaint for Injunctive Relief and Demand for Jury Trial in the United States District Court for the Eastern District of Louisiana. *See World Wrestling Entertainment, Inc. v. Various John and Jane Does, et al.*, No. 14-688 (E.D. La., March 26, 2014). WWE's complaint included similar allegations to the one filed by the NFLP, but differed significantly in the scope of the injunctive relief and seizure order being sought. The injunctive relief sought by WWE was requested to begin on April 3, 2014 and continue, nationwide, until March 23, 2015.

On April 1, 2014, United States District Judge Helen G. Berrigan denied WWE's *Ex parte* Motion for Temporary Restraining Order, Order for Seizure of Counterfeit Marked Goods, and Order to Show Cause Why a Preliminary Injunction Should Not Issue. According to Judge Berrigan, the problem with WWE's request was that it was "not directed against a single named, identified, or even described person . . . and Plaintiff provides no particular information about the identity of any of them." Because the judge could not know "the person against whom the seizure would be ordered," she could not evaluate the requirements of 15 U.S.C. § 1116(d), which governs the granting of *ex parte* seizure orders. Judge Berrigan also noted that the plaintiff's failure to identify an actual defendant prevented her from finding that the plaintiff had shown a likelihood of success on the merits or that the threatened injury to plaintiff outweighed the harm that the injunction could cause the defendant. Accordingly, she also denied plaintiff's request for injunctive relief.

Judge Berrigan did not mention the nationwide scope or length of the injunction requested by WWE, but one has to presume that those factors had something to do with her decision. As a practical matter, a plaintiff seeking an *ex parte* seizure order under the Lanham Act should probably present a more narrowly tailored request for a seizure order and injunctive relief.

B. Procedure for Obtaining *Ex Parte* Seizure Orders

A plaintiff seeking an *ex parte* seizure order must file a verified complaint or submit affidavits "establishing facts sufficient to support the findings of fact and conclusions of law required for such order." 15 U.S.C. § 1116(d)(3). The facts alleged must allow the court to make the following specific findings:

- (1) a finding that an order other than an *ex parte* seizure order is not adequate (15 U.S.C. § 1116(d)(4)(B)(i));
- (2) a finding that the applicant has not publicized the requested seizure (15 U.S.C. § 1116(d)(4)(B)(ii));
- (3) a finding that the applicant is likely to succeed in showing that the defendant used a counterfeit mark (15 U.S.C. § 1116(d)(4)(B)(iii));
- (4) a finding that the plaintiff will suffer immediate and irreparable injury absent such a seizure (15 U.S.C. § 1116(d)(4)(B)(iv));
- (5) a finding that the matter to be seized will be located at the place identified in the application (15 U.S.C. § 1116(d)(4)(B)(v));
- (6) a finding that the harm the plaintiff will suffer if the request is denied outweighs the harm that the defendant will suffer if the seizure is ordered (15 U.S.C. § 1116(d)(4)(B)(vi)); and
- (7) a finding that the defendant would destroy, move, or hide the matter to be seized if notice were given (15 U.S.C. § 1116(d)(4)(B)(vii)).

The plaintiff must also post a bond to pay any damages that the defendant may be entitled to in the event of a wrongful seizure. 15 U.S.C. § 1116(d)(4)(A). The plaintiff must also give notice to the United States attorney for the judicial district in which the order is sought so that the U.S. attorney's office may participate if warranted. 15 U.S.C. § 1116(d)(2).

There is currently a split in the circuits over whether the denial of an *ex parte* seizure order is immediately appealable. 2 Gilson, § 5.19[H]. The Third Circuit has held that denials of requests for such orders are appealable, *see, e.g., Vuitton v. White*, 945 F.2d 1991 (3d Cir. 1991), but the Ninth Circuit has reached the opposite conclusion. *In re Lorillard Tobacco Co.*, 370 F.3d 982 (9th Cir. 2004). In the recent *World Wrestling Entertainment* case, Judge Berrigan's order denying the plaintiff's requested order, urged the Fifth Circuit to take up the matter on appeal. It does not appear from the record, however, that the plaintiffs ever sought relief from the Fifth Circuit.

When a trademark owner is seeking to stop the sale of counterfeit goods by itinerant street vendors in connection with a specific event, Judge Berrigan's concerns notwithstanding, the required evidence and findings should be easy to obtain. But, when dealing with online counterfeiting, the evidence needed to obtain the seizure order may be more difficult to obtain, and the actual effect of the seizure order may be somewhat limited.

C. Monetary Remedies

Regardless of whether the trademark owner is faced with counterfeiting by street vendors or online merchants, the Lanham Act's enhanced monetary remedies for counterfeiting are powerful weapons.

In an ordinary trademark infringement case, a successful plaintiff is entitled to recover the defendant's profits, any damages sustained by the plaintiff, and the costs of the action. 15 U.S.C. § 1117(a). In assessing an award based on the defendant's profits, the court may increase or decrease the award if it feels that the amount of recovery based on profits is inadequate or excessive. *Id.* In exceptional cases, the court can award reasonable attorney fees to the prevailing party. *Id.*

A successful plaintiff in a counterfeiting case, however, is generally entitled to an award of treble damages or defendant's profits. The Lanham Act provides that a court assessing damages in a counterfeiting case "shall, unless the court finds extenuating circumstances, enter judgment for three times such profits or damages, whichever is greater." 15 U.S.C. § 1117(b). The successful plaintiff is also entitled to recover a reasonable attorney's fee. *Id.* Prejudgment interest may be awarded as well. *Id.*

To obtain treble damages in a counterfeiting case, the plaintiff must make two showings regarding the defendant's intent. The plaintiff must show that the defendant intentionally used a mark in connection with the sale of goods with knowledge that the mark was counterfeit. 15 U.S.C. § 1117(b)(1). Willful blindness is no defense to the knowledge requirement and is sufficient to trigger the mandatory provisions of § 1117(b). *Hard Rock Café Licensing Corp., v. Concession Services, Inc.*, 955 F.2d 1145, 1151 (7th Cir. 1992); *see also Chanel, Inc. v. Italian Activewear of Florida, Inc.*, 931 F.2d 1472 (11th Cir. 1991) (retailer who buys "obviously poorly crafted goods from an itinerant peddler at bargain-basement prices" is guilty of willful blindness); *Lorillard Tobacco Co., Inc., v. A&E Oil, Inc.*, 503 F.3d 588 (7th Cir. 2007) (gas station owner should have been alerted by warning signs on counterfeit NEWPORT cigarettes such as fraudulent tax stamps).

There is also a rebuttable presumption that a counterfeiting violation is willful under the following circumstances:

the violator, or a person acting in concert with the violator, knowingly provided or knowingly caused to be provided materially false contact information to a domain name registrar, domain name registry, or other domain name registration authority in registering, maintaining, or renewing a domain name used in connection with the violation.

15 U.S.C. § 1117(e). This presumption could be very helpful in obtaining a damages award against an online counterfeiter.

The only exception to the award of treble damages or profits, *i.e.*, extenuating circumstances is interpreted narrowly. *See Levi Strauss & Co. v. Shilen*, 121 F.3d 1309 (9th Cir. 1997). The Seventh Circuit has held that the extenuating circumstances is limited to extreme

cases where "the imposition of treble damages would mean that the [the defendant] would be unable to support his or her family." *Louis Vuitton, S.A., v. Lee*, 875 F.2d 584, 590 (7th Cir. 1989).

Plaintiffs in counterfeit cases may also elect to recover statutory damages instead of actual damages and profits. 15 U.S.C. § 1117(c). This is very useful in a counterfeiting case where the defendant may have no business records. The statutory damages available to a successful plaintiff in a counterfeiting case can range between \$1,000 and \$200,000 per counterfeit mark per type of good sold. *Id.* The upper range of damages can be increased up to \$2,000,000 per counterfeit mark per type of goods sold if the court finds that the use of the counterfeit mark was willful. *Id.*

Part Two: Additional Statutory and Common Law Remedies

The remedies available for victims of product counterfeiting do not end with the Lanham Act. Indeed, subject to the venue involved, the business owner's arsenal of claims can include additional federal or state statutory and common law remedies. The following discussion highlights notable examples of some of those remedies with the caveat that they may not be universally assertable in all jurisdictions.

I. THE FEDERAL RICO ACT

The federal Racketeer Influenced and Corrupt Organizations Act (the "RICO Act"), 18 U.S.C. § 1961 *et seq.*, provides for civil private causes of action as well as federal criminal prosecution against "persons" and "enterprises" that engage in "patterns of racketeering activity" that result in "prohibited activities"; 18 U.S.C. 1964(c).

The RICO Act's definition of "racketeering activity" (18 U.S.C. §§ 1961(1)(A), (B), (C) and (D)) enumerates a multitude of federal criminal statutes, including the following criminal conduct that is frequently linked to international product counterfeiting: (i) trafficking in goods or services bearing counterfeit marks; (ii) criminal conspiracy; (iii) money laundering; and (iv) smuggling goods into the United States. Trafficking in goods and services in counterfeit marks violates the Stop Counterfeiting in Manufactured Goods Act enacted in 2006; 18 U.S.C. §2320.

A "pattern of racketeering activity" "requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity," 18 U.S.C. § 1961(5).

When persons and enterprises engage in a pattern of racketeering activity, they commit the "prohibited activities" described in 18 U.S.C.A. § 1962. Victims of those prohibited activities may file civil suits in any federal district in which the wrongdoer resides, is found, has an agent, or transacts his affairs; and the victim can recover treble damages and attorney's fees; 19 U.S.C. §§ 1964(c) and 1965(a).

Given the chain of actors, abettors and entities and the multiple acts of infringement involved in product counterfeiting, the RICO Act vests commercial and intellectual property litigators with a powerful civil remedy in addition to their clients' Lanham Act remedies.

II. STATE RICO ACTS

After the RICO Act was legislated, many states followed suit by enacting their own RICO statutes, commonly known as "baby RICO" statutes. Currently, more than thirty states have followed that legislative trend. Baby RICOs generally piggyback off the legislative scheme of the RICO Act and may even incorporate the enumerated federal "racketeering activities" into their state statutory list of crimes that constitute "racketeering activity" within their borders. State courts rely on the wealth of reported civil RICO Act cases to interpret and enforce baby RICO statutes.

In some instances, the baby RICO statutes tend to be more forgiving to civil plaintiffs than the RICO Act is in pleading requirements, proof burdens, available remedies and statutes of limitation. Moreover, the coupling of the federal list of "racketeering activities" with the states' counterpart lists of crimes expands the number of illegal predicate acts on which civil plaintiffs can assert their recovery theories. For example, the Georgia baby RICO act, O.C.G.A. § 16-14-1 *et seq.*, allows the civil victim to obtain certain injunctive relief without proof of irreparable damage. It also allows the recovery of treble damages, attorney's fees and punitive damages; O.C.G.A. § 16-14-6(b) and (c). Its definition of "racketeering activity" includes any conduct defined as "racketeering activity" under 18 U.S.C. § 1961(1)(A), (B), (C) and (D). Moreover, it provides a limitations period for civil filing up to five years after the violative conduct terminates or the cause of action accrues (O.C.G.A. § 16-14-8); and its civil remedies are supplemental and not exclusive to other available remedies (O.C.G.A. § 16-14-9).

Thus, the RICO Act and state baby RICO acts can provide a virtual civil claim trifecta to a company that sustains product counterfeiting injury: (i) a powerful civil damages and injunction remedy that complements their Lanham Act claims; (ii) a federal statutory claim with far-reaching ramifications to the chain of defendant illegal enterprises; and (iii) a parallel state RICO remedy that may be quite user-friendly. Outside litigation counsel and in-house counsel should fully evaluate how RICO legislation can buttress and advance the client's Lanham Act claims.

III. STATE TRADEMARK INFRINGEMENT LEGISLATION

In some instances, businesses that have had their trademarks counterfeited can avail themselves of state anti-infringement statutes. For example, Georgia law provides injunctive and damage remedies to businesses that have registered their marks with the Georgia Secretary of State. O.C.G.A. § 10-1-450 imposes civil liability and prescribed damages on any person that reproduces, counterfeits or makes a colorable imitation of a Georgia-registered trademark or service mark or that applies that reproduction, counterfeit or colorable imitation to trade packaging or in connection with distribution and sale within the state. Correspondingly, O.G.C.A. 10-1-451 provides injunctive relief to a mark owner to enjoin the manufacture, use, display or sale of any counterfeits or imitations of those marks and for corresponding

disgorgement of the wrongdoer's profits. See, e.g., *Tommy Hilfiger Licensing, Inc. v. Goody's Family Clothing, Inc.*, 2003 WL 22331254 (N.D. Ga. May 9, 2003) (count alleging breach of Georgia's infringement statute); and *The York Group, Inc. v. Horizon Casket Group, Inc. et al*, 2007 WL 2120419 (S.D. Tx. July 10, 2007) (count alleging breach of Texas' infringement statute).

IV. STATE UNIFORM DECEPTIVE TRADE PRACTICE LEGISLATION

Depending on the case venue, a business that has suffered counterfeiting injury may also be able to pair its Lanham Act claims with an available state-enacted Deceptive Trade Practice Act ("DTPA") violation. DTPAs are the progeny of the Uniform Deceptive Trade Practice Act promulgated by the National Conference of Commissioners on Uniform States Laws and federal fair trade and advertising legislation. These state statutes typically remedy wrongdoing by one who is "passing off" another's goods or services or is causing confusion as to the source, affiliation, sponsorship or certification of goods and services. Some state DTPAs only grant standing to a state regulatory agency or attorney general to assert the statutory breach. Other states have crafted their DTPAs to bestow a private right of action. Even then, some states only allow private actions to consumers; whereas other state DTPAs afford a private remedy to business competitors; see, Zaretsky, *Trademark Law And Consumer Protection Law-- Deception Is A Cruel Act: "Uniform" State Deceptive Trade Practices Acts and Their Deceptive Effects On The Trademark Claims Of Corporate Competitors*; 32 W. New Eng. L. Rev. 549 (2010) (herein, "Zaretsky"). These disparities among the states require outside litigation counsel and their in-house colleagues to evaluate local DTPAs in determining which forum best advances their overall litigation strategy and remedies.

Lanham Act claims filed in the Eleventh Circuit have included pendent Florida and Georgia DTPA claims. For example, in *Babbitt Electronics, Inc. et al. v. Dynascan Corporation*, 38 F.3d 1161 (11th Cir. 1994), plaintiff Dynascan, a licensor of Cobra-brand telephones, asserted infringement and false-designation-of-origin claims against its former licensee along with state law claims of unfair and deceptive trade practices under Fla.Stat. § 501.204(1). The licensee had procured telephones from a third party source that had originally been "MCE"-branded phones on which Cobra labels had been pasted over the "MCE" labels. Without Dynascan's knowledge or approval, the licensee also ordered Cobra nameplate labels and Cobra gift boxes. The court affirmed the district court's holding that the licensee had breached the Lanham Act, Florida's DTPA and Florida's "trademark dilution" statute; Fla.Stat. § 495.151. The court further held that the licensee's officers and directors that participated in the counterfeiting had personal liability.

Similarly, in *DC Comics Inc. v Unlimited Monkey Business, Inc. et al*, 598 F.Supp. 110 (N.D.Ga. 1984), DC Comics, holder of copyrights and trademarks on "Superman" and "Wonder Woman" and their names and attributes, won across-the-board summary judgments against "singing telegram" franchisors for violations of: § 32 of the Lanham Act, 11 U.S.C. 1141(1) [trademark infringement as to confusion over the source of the services and the affiliation of the litigants] and § 43(a) of the Lanham Act, 11 U.S.C. 1125(a) [as to false origin, description and representation of services]. DC Comics also asserted and prevailed on two pendent Georgia statutory claims:

A claim under the state DTPA statute, O.C.G.A. §10-1-372, for deceptive trade practices through:

- Causing likelihood of confusion/misunderstanding as to source, sponsorship, approval or certification of goods or services; or
- Causing likelihood of confusion or misunderstanding as to affiliation, connection or certification by another; (Georgia's version of the Uniform Deceptive Trade Practices Act); and
- A claim under the Georgia Fair Business Practices Act, O.C.G.A. § 10-1-393, for unfair or deceptive acts or practice in the conduct of consumer transactions and consumer acts or practices.

Other states impose pleading and proof hurdles on businesses that attempt to invoke a DTPA. For example, the Massachusetts DTPA, Mass. Gen. Laws Ch. 93A, §§ 2 and 11 (2008), address "... unfair or deceptive acts or practices" between corporate competitors "... in the conduct of any trade or business." Massachusetts' DTPA limits a corporate plaintiff's ability to bring a trademark suit against a competitor. The act requires a plaintiff competitor to prove that the wrongdoer acted with "rascality," resulting in actual loss; *Levings v. Forbes & Wallace, Inc.*, 396 N.E.2d 149, 153 (1st Cir. 1979) (the challenged conduct must attain a level of rascality that would raise an eyebrow in the "rough and tumble of the world of commerce"), *abrogated by Massachusetts Employers Insurance Exchange et al v. Propac-Mass, Inc.*, 420 Mass. 39 (Supreme Court/Suffolk 1995); 648 N.E.2d 435 (1995). *See, Zaretsky, supra*, at 568-570.

New York's DTPA appears at N.Y. Gen. Bus. Law § 349 (McKinney 2014). The statute declares as unlawful, "... deceptive acts or practices in the conduct of any business, trade or commerce ... in the furnishing of any service in this state" and allows "... any person who has been injured by reason of [such] violation" to bring suit, N.Y. Gen. Bus. Law §§ 349(a) and (h). An injured business claimant can invoke that statute by showing that the defendant competitor's conduct has harmed the public interest; *Securiton Magnalock Corp. v. Schnabolk*, 65 F.3d 256, 264 (2d Cir. 1995). In those business-to-business suits, the courts have interpreted the "public interest" requirement to require the plaintiff to demonstrate that an injury to the public at large is in dispute; *Karam Prasad, LLC v. Cache, Inc.*, 2007 WL 2438396 at *2 (S.D.N.Y. Aug. 27, 2007.) If the suit allegations do no more than demonstrate an injury to another business, courts have routinely rejected corporate competitors' claims made under § 349; *see, e.g., Sports Traveler, Inc. v. Advance Magazine Publishers, Inc.*, 1997 WL 137443 at *3 (S.D.N.Y. March 24, 1997). *See, Zaretsky, supra*, at 570-572.

Under New Jersey's DTPA, "[a]ny person who suffers any ascertainable loss of moneys or property, real or personal," has standing if that person has suffered the loss through "... any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate"; N.J.S.A. § 56:8-19 and N.J. Stat. Ann. § 56:8-2 (West 2001). The New Jersey DTPA is designed "to protect consumers who

purchase 'goods or services generally sold to the public at large,'" *Arc Networks, Inc. v. Gold Phone Card Co.*, 756 A.2d 636, 637-38 (N.J. Super. Ct. Law Div. 2000). Thus, a corporate suitor relying on the New Jersey DTPA must prove that it was acting as a consumer purchasing "goods . . . sold to the public at large" in the transaction in question. "[T]he mere fact that a corporation purchases the goods for use in its business does not preclude invocation of the [New Jersey DTPA] and its regulations," *Marascio v. Campanella*, 689 A.2d 852, 857 (N.J. Super. Ct. App. Div. 1997), *disagreed with by Lithuanian Commerce Corporation, Ltd. v. Sara Lee Hosiery et al*, 179 F.R.D. 450 (D.N.J. 1998). *See, Zaretsky, supra*, at 572-573.

The foregoing discussion shows that DTPA remedies are readily available in commercial law controversies among businesses in some states yet relegated solely to consumers in other states.

V. UNFAIR COMPETITION; TORTIOUS INTERFERENCE; AND CONTRACT BREACH

Companies pursuing counterfeiting claims may also align their Lanham Act violations with state law "unfair competition" and "tortious interference" counts, especially in multi-defendant cases. Notably, corporate officers and directors who authorize or participate in an entity's unlawful competitive acts may be held liable; *Rolex Watch U.S.A., Inc. v. Zeotec Diamonds, Inc.*, No. 02-01089 (C.D. Cal. Nov. 7, 2002); *Babbitt Electronics, supra*; *Hewlett-Packard Co. v. Repeat-O-Type Stencil Manufacturing Corp.*, 1995 WL 552168 (N.D. Cal. August 30, 1995).

Similarly, a plaintiff can pursue contract breach claims against defendants who are or were previously the plaintiff's distributors and licensees; *see, International Cosmetics Exchange, Inc. et al v. Gapardis Health & Beauty, Inc.*, 303 F.3d 1242 (11th Cir. 2002) (cosmetics manufacturer's contract claim against its former distributor); *The York Group, Inc. v. Horizon Casket Group, Inc. et al*, 2007 WL 2120419 (S.D. Tx. July 10, 2007) (casket manufacturer asserted contract breach and tort interference claims against its former distributor).

Section 20 of the *Restatement (Third) of Unfair Competition* (1995) addresses trademark rights and sets forth the following "standard of infringement":

(1) One is subject to liability for infringement of another's trademark, trade name, collective mark, or certification mark if the other's use has priority under the rules stated in § 19 and in identifying the actor's business or in marketing the actor's goods or services the actor uses a designation that causes a likelihood of confusion:

- (a) that the actor's business is the business of the other or is associated or otherwise connected with the other; or
- (b) that the goods or services marketed by the actor are produced, sponsored, certified, or approved by the other; or
- (c) that the goods or services marketed by the other are produced, sponsored, certified, or approved by the actor.

(2) One is also subject to liability for infringement of another's collective membership mark if the other's use has priority under the rules stated in § 19 and the actor uses a designation that causes a likelihood of confusion that the actor is a member of or otherwise associated with the collective group.

Similarly, Section 766 of the *Restatement of Torts (Second)* (1979) addresses third party intentional interference with a mark holder's contracts with others:

One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

Representative Lanham Act cases that include these state law unfair competition and tortious interference-with-contract relations include the following:

- *The York Group, Inc. v. Horizon Casket Group, Inc. et al*, 2007 WL 2120419 (S.D. Tx. July 10, 2007) and *The York Group, Inc. v. Horizon Casket Group, Inc. et al*, 2007 WL 2329693 (S.D. Tx. Aug. 13, 2007). York, a casket manufacturer, asserted that third parties, including its former distributor, imported Chinese-made, counterfeit caskets and were passing the caskets off in commerce as York's caskets. York pleaded Texas law claims of unfair competition, contract breach, tortious interference with contract and trademark infringement along with its Lanham Act § 43 claim for false designations of origin, description and representation.
- *Tommy Hilfiger Licensing, Inc. v. Goody's Family Clothing, Inc.*, 2003 WL 22331254 (N.D. Ga. May 9, 2003). Goody's bought and resold counterfeit shirts and jeans bearing labels similar to Hilfiger's registered trademarks. Hilfiger filed a Lanham Act complaint for infringement, counterfeiting and false designation-of-origin. It also sued under Georgia law for unfair competition and under the state's "false-designation-origin" statute.
- *Monsanto Company et al v. Campuzano*, 206 F.Supp.2d 1239 (S.D. Fl. 2002). Monsanto sued over a trade dress infringement dispute arising from alleged counterfeit packaging of its "Equal" and "NutriSweet" marks. The district court allowed Monsanto's Florida common law unfair competition claim because the facts showed: (i) deceptive or fraudulent conduct of a competitor coupled with (ii) the likelihood of consumer confusion, *Id.* at 1250), citing *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486, 1493-94 (11th Cir. 1990).

- Rolex Watch U.S.A., Inc. v. Canner et al.; 645 F.Supp. 484 (S.D. Fl. 1986). Rolex sued flea market sellers of \$25 imitation Rolex watches. It asserted violations of: Lanham Act § 32 for trademark infringement through the sale of imitations or counterfeiting of a registered mark; Lanham Act § 43 for false designation of origin in connection with goods, services and packaging; and unfair competition under Florida common law. The court found the defendants liable on all counts. It held that the fact that the infringers may not have intended to pass off the imitations as genuine Rolexes did not preclude a finding that Rolex had established the requisite element of intent to infringe on its registered mark. The Court opined that common law unfair competition had occurred through the infringers' tarnishing of Rolex's reputation, thereby undermining its sales credibility and reducing the demand for the genuine product.

VI. CIVIL CONSPIRACY

Some, but not all, states recognize a joint tortfeasor claim for "civil conspiracy" against peripheral wrongdoers that participate, directly or indirectly, in aiding or advancing the underlying wrongful conduct. The essence of a civil conspiracy claim is "damages"; 16 Am.Jur.2d *Conspiracy* §§50-53 (2009).

Jurisdictions are divided on the tort "duty" associated with civil conspiracy claims. Some view the claim as a derivative one that requires an underlying tort to exist before civil conspiracy can be alleged; *see* Finch, *Governmental Conspiracies to Violate Civil Rights*, 57 Mone L. Rev. 1, 8 (1996). Others courts recognize the claim as an independent tort; *see* Addison, *Civil Conspiracy in the Employment At Will Context: Where does South Carolina Stand After Angus v. Burroughs & Chaplin Co.?*; 56 S.C.L. Rev. 803, 805 (2005). As still other commentators observe:

If civil conspiracy is a derivative tort action, then it follows that civil conspiracy requires an independent duty of care because the underlying tort action would require breach of duty. On the other hand, if civil conspiracy is a stand-alone tort, it could, at least theoretically, not require an independent duty, although this would make it an aberration in tort law; Behrens and Appel, *The Need for Rational Boundaries in Civil Conspiracy Claims*, 31 N. Ill. U. L. Rev. 37, 42 (Fall 2010) (hereinafter, "*Behrens/Appel*").

States that have adopted the "independent duty" requirement for civil conspiracy claims include California, Texas, Maryland, Georgia and Missouri. States that do not require an underlying "independent duty" include Delaware and New Mexico; *Behrens/Appel, supra*, at 44-47. Accordingly, litigation counsel and in-house counsel must evaluate the availability of and local law pleading requirements for asserting a civil conspiracy claim when they are considering asserting that potential cause of action in any Lanham Act suit. Demonstrative cases include:

- California: The California Supreme Court has held that by its nature, tort liability arising from a conspiracy presupposes that the co-conspirator is capable of committing the tort – that is, he owes a duty to the plaintiff

under law and is potentially subject to liability for that duty breach; *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 869 P.2d 454 (Cal. 1994). Therein, the court held that "conspiracy" is not an independent tort; therefore, a cause of action for conspiracy does exist ". . . if the alleged co-conspirator, though a participant in the agreement underlying the injury, was not personally bound by the duty violated by the wrongdoing," *Id.* at 459 (citing *Doctors' Co. v. Superior Court*, 775 P.2d 508 (1989)); *accord*, *Chavers v. Gatke Corp.*, 132 Cal. Rptr. 2d 198, 199-200 (Cal. Ct. App. 2003).

- Texas: Likewise, the Texas Supreme Court has held that civil conspiracy must be based on an independent, underlying duty of the defendant co-conspirator to the plaintiff; *Firestone Steel Products Co. v. Barajas*, 927 S.W.2d 608, 612 (Tex. 1996).
- Maryland: In *BEP, Inc. v. Atkinson*, 174 F.Supp.2d 400 (D. Md. 2001), a federal court sitting in Maryland adopted the California holding in *Applied Equipment Corp.*, *supra*.
- Georgia: *Mosley v. Garlock, Inc.*, No. 2002CV59552, 2003 WL 22331284, at *1 (Ga. Super. Ct. June 25, 2003) held that: "A cause of action for civil conspiracy does not arise against a defendant who is not bound by the duty violated by the alleged wrongdoing."
- Missouri: *Hunt v. Air Prods. & Chems.*, No. 052-9419, 2006 WL 1229082, at *3 (Mo. Cir. Ct. Apr. 20, 2006) held that while the plaintiffs alleged many actions by the defendants to conceal or misrepresent the hazards of welding fumes, they still failed to aver that those actions independently caused any harm to the plaintiffs.
- Delaware: In *Nicolet, Inc. v. Nutt*, 525 A.2d 146 (Del. 1987), the Delaware Supreme Court held that an independent tort was not a condition precedent to a civil conspiracy claim. The court distinguished a situation where a party fails to speak, which would not be actionable unless a fiduciary or contract duty existed, and where a party engages in active misconduct of intentionally suppressing information. Upon proof that the defendant participated with others to actively suppress and conceal material facts with the intent of inducing the plaintiff to his injury, the defendant would be jointly and severally liable with its co-conspirators; *Id.* at 150.

- New Mexico: In *Valles v. Silverman*, 84 P.3d 1056 (N.M. Ct. App. 2003), defendant Wal-Mart contended that the defendants (who had countersued the plaintiffs and Wal-Mart for malicious use of process and civil conspiracy) had to be able to recover on the underlying "abuse of process" counterclaim against each of the defendant conspirators before each such defendant could be held liable for its part in the conspiracy. The New Mexico Court of Appeals rejected Wal-Mart's argument.
- Illinois: Illinois courts have reached seemingly inconsistent results and engendered corresponding scrutiny on the question of whether civil conspiracy must be grounded on an independent tort duty. Several appellate court decisions between 1997 and 2005 have allowed a civil conspiracy claim to proceed without an underlying independent tort in some cases yet required the underlying tort duty in others. *See, e.g., Doe v. Noe*, 690 N.E.2d 1012, 1022 (Ill. App. Ct. 1997), *vacated on other grounds*, 707 N.E.2d 588 (Ill. App. Ct. 1999) in contrast to *McClure v. Owens Corning Fiberglas Corp.*, 698 N.E.2d 1111 (Ill. App. Ct. 1998), *rev'd on other grounds*, 720 N.E.2d 242 (Ill. 1999); *Behrens/Appel* at 47-50.

VII. CONTRIBUTORY LIABILITY CLAIMS

Commercial litigators should also evaluate whether their clients can include state law "contributory liability" claims against third parties involved in the counterfeiting chain. As noted above, corporate officers and directors of infringing defendant companies may be held personally liable in tort; *Rolex Watch U.S.A., Inc., supra*; *Babbitt Electronics, supra*; *Hewlett-Packard Co., supra*. Increasingly, other third parties that are not directly affiliated with the infringers are finding themselves added as co-defendants, charged with contributory and vicarious conduct or subjected to governmental penalties. For example, New York's landlord-tenant statutes include a summary holdover law, allowing landlords to summarily dispossess tenants that use leased premises for illegal activities; N.Y. Real Prop. Acts Law § 715 (McKinney 1997). Landlords that do not file the summary holdover dispossessions in those illegal activity situations are subject to statutory forfeiture proceedings.

Infringed companies are also joining flea market operators and swap meet participants as defendants in counterfeiting litigation. In *Hard Rock Café Licensing Corp. v. Concession Services, Inc.*, 955 F.2d 1143 (7th Cir. 1992), the court held that Hard Rock could assert a cause of action against the flea market's owner for contributory liability in connection with its vendor's trademark infringement violations. *See, also, Arista Records v. Flea World, Inc.*, 78 U.S.P.Q.2d 1339 (D.N.J. 2006).

In *Mallatier, S.A. v. Carroll*, No. 05-CV-3331 (S.D.N.Y. June 27, 2005), Louis Vuitton sued New York commercial property owners whose lessee-vendors were selling counterfeits of the plaintiff's products from the leased premises. The remedies afforded to Louis

Vuitton included injunctions mandating that the defendant landlords evict the vendors, the posting of exterior building signage about counterfeit products and the implementation of lease clauses in prospective leases that provided for eviction of tenants selling counterfeit products.

In *Tiffany (NJ) Inc. et al v. eBay, Inc.*, 600 F.3rd 93 (2nd Cir. 2010), Tiffany sued eBay in eBay's role as an online auction proprietor, for contributing to the counterfeiting by one of eBay's registered online sellers. Tiffany asserted that eBay was contributory liable for trademark infringement, false advertising and trademark dilution. The Second Circuit affirmed the district court's judgment in part and remanded in part on the false advertising claim. Based on a detailed factual record of what eBay knew or should have learned about the infringer, the Circuit Court affirmed the district court's conclusion that Tiffany had not made out its case for proving contributory liability for trademark infringement, "willful blindness" to the counterfeiter's activities and for contributory dilution. In part, the court based its holding on the Supreme Court's analysis of contributory trademark infringement in *Inwood Laboratories, Inc. v. Ives Laboratories*, 456 U.S. 844, 102 S.Ct. 2182, 72 L.Ed.2d 606 (1982).

In contrast, the Seventh and the Ninth Circuits have applied *Inwood* to impose contributory liability for counterfeiting on owners of swap meets and flea markets. See, *Hard Rock Café, supra*, and *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3rd 259 (9th Cir. 1996) (adopting *Hard Rock Café's* reasoning and *Inwood* to a swap meet owner situation).

Part Three: Anticounterfeiting Programs

Any company whose business could be harmed by counterfeiting should consider establishing an anticounterfeiting program. The program should be tailored to the specific needs of the company so that it addresses the actual risks faced. At a minimum, the company should make sure that its marks are registered with the United States Patent & Trademark Office, as possibly in the state where the company is doing business, so that the specific anticounterfeiting remedies that come with registered marks are available.

In Pearson, et al., *An Overview of Legal Remedies Against the Trafficking in Goods Bearing Counterfeit Trademarks and Gray Market Goods Under United States Law*, Intellectual Property Desk Reference (6th Edition) (found at www.kilpatricktownsend.com), the authors recommend the following as "basic components of an effective anticounterfeiting program in the United States":

- (1) Establish Means for Identifying Genuine Goods. Trademark owners must be able to easily identify counterfeit goods. Coding, tags, or other devices on products and labels can be used for this purpose;
- (2) Understand the Scope of the Problem in Each Country. Trademark owners should try to collect as much information as possible about the nature and extent of counterfeiting activities. Market sweeps, Internet monitoring, and interviews of employees,

customers, and private investigators can help a trademark owner gather the necessary information;

(3) Develop a Coordinated Global Approach;

(4) Establish Procedures for Reporting Problems. A trademark owner can identify a specific person in its organization to whom suspected counterfeits are reported. All employees should be educated to look for counterfeits and to report their findings;

(5) Establish Procedures for Documenting Purchases, Maintaining Evidence of the Chain of Custody, and Authenticating Product;

(6) Build a Centralized Database. The database should contain information about sellers and possible sources of counterfeits. Other information in the database should include the date, the product sold, the action taken, how the seller was identified, etc.;

(7) Register Key Trademarks in Each Country of Concern;

(8) Record Trademark Registrations with Customs. This increases the likelihood that customs will assist in enforcement;

(9) Provide Training and Authentication Materials to Customs and Law Enforcement. When law enforcement officials are aware of counterfeiting problems with a specific brand, they may act on their own initiative to identify fakes;

(10) Assemble a Network of Anticounterfeiting Investigators;

(11) Monitor Websites and the Online Market;

(12) Take Appropriate Action Against Sellers and Sources of Counterfeits. Trademark owners with a reputation for being vigilant in enforcing their rights often get better results; and

(13) Participate in Brand Owners' Groups and Trade Lobbying Groups. Joint efforts can reduce the costs borne by any one trademark owner.

CONCLUSION

The counterfeiting of registered marks and products is a virulent and toxic international business with wide-reaching economic, security and health ramifications to legitimate companies, consumers and regulators. By 1985, counterfeiting was considered to be "the world's fastest growing and most profitable businesses"; Grossman & Shapiro, *Counterfeit-Product Trade*, 78 Am. Econ. Rev. 59 (1988) (quoting Bus. Wk., Dec. 16, 1985). New York

City's counterfeiting trade has recently exceeded \$80 billion annually; *Counterfeit Goods are Linked to Terror Groups*, N.Y. Times, Feb. 12, 2007. The international counterfeit trade funds gangs, has been traced to international terrorists, can involve money laundering and exploits child labor overseas; Goodwin, *The Human Cost of Fakes*, Harper's Bazaar (Jan. 1, 2006). In 2012, the United States Customs and Border Protection made 22,848 intellectual property rights seizures. Goods from China alone accounted for seventy-two percent of the \$1.26 billion manufacturer's suggested retail value of those seizures; *Intellectual Property Fact Sheet*, U.S. Customs & Border Protection (Dec. 2012). Today, we are besieged with and exposed to counterfeits a/k/a knockoffs a/k/a replicas a/k/a imitations in all areas of consumer commerce, including by mere example: luxury goods, cosmetics, health products, clothing, toys and automotive parts. While legitimate companies endeavor to advance their product development and sale through innovation, rogue manufacturers and the vertical distribution lines below them respond by flooding the international markets with damaging imitation.

Given the continuing and expanding proliferation of counterfeit products, especially in an internet-driven economy, clients of all sizes that are manufacturing and selling into many market sectors are increasingly and perhaps unwittingly at risk. Consequently, their legal professionals must develop the skillset to readily understand and assess the nature of the infringement, to identify formidable claims and remedies, to develop a cogent litigation strategy and to successfully launch that strategy in a short time period. As such, cases in this area of law offer the opportunity for ongoing interaction and relationship-building among a tripartite team of company management, in-house counsel and outside litigation counsel. That team's continuing mission is to strategize, plan and keep abreast of the developing laws so that at any critical point in time, the client and counsel can respond dynamically and aggressively to thwart an infringement event.

“Supreme Court Practice: Strategies for Getting to and Litigating Your Case in the Highest Court of Our Land”

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This Paper has been prepared for general information and
is not intended to be relied upon as legal advice.

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In 2012-2013, Wystan successfully represented The Standard Fire Insurance Company (a Travelers affiliate) in the United States Supreme Court in *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013), in which the Court held that the named plaintiff in a putative class action may not evade federal jurisdiction under the Class Action Fairness Act by stipulating that he would not seek more than \$5 million on behalf of the putative class. This was the Court’s first decision under the Class Action Fairness Act.

Wystan received his B.A., summa cum laude, from Bowdoin College, and his J.D. from Columbia Law School. He is admitted to practice in Connecticut, Massachusetts, the U.S. Supreme Court, the U.S. Courts of Appeals for the First, Second, Third, Fourth, Fifth, Eighth, and Eleventh Circuits, and various federal district courts. He serves as the Vice Chair of the Appellate Section of the FDCC.

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Mr. Babbington successfully argued *Kumho Tire Co. v. Charmichael*, 526 U.S. 137 (1999), a seminal case in the Supreme Court addressing the trial judge's expert testimony "gate-keeping" obligation.

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Supreme Court Practice – Strategies for Getting To and Litigating Your Case In The Highest Court of Our Land

Wystan Ackerman

This paper will discuss in detail, with a focus on practicalities, the process of taking a case through the Supreme Court of the United States, from the initial process of evaluating whether to file a petition for certiorari, through the petitioning process, the briefing on the merits, oral argument and decision. My personal experience is limited to participating in one case that was heard on the merits: *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013). This paper draws from my experience in that case, including some discussion of unwritten rules and customs and other tips and background information about the process that may be helpful to you, should you have a case that you hope to take to, or that reaches the Supreme Court.

I. Evaluating “Cert-Worthiness”

In deciding whether to seek Supreme Court review, you need to determine whether your case presents an issue or issues that are potentially worthy of a grant of certiorari. The Court’s official standard for granting certiorari is found in its Rule 10, which provides as follows:

A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court’s discretion, indicate the character of the reasons the Court considers:

- (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court’s supervisory power;
- (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
- (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

One critical criterion here is that your case involves a question of federal law. Although the Court technically has the power to review lower federal court decisions in diversity jurisdiction cases that are decided under state law, the Court has not done so in decades. Unless your case clearly presents a question of federal law (constitutional, statutory or procedural), petitioning the Court is probably a complete waste of time and money.

Another critical criterion is that your case present a question of law. While the Court has to apply the law to the facts of your case to some extent since it is not in the business of simply answering abstract questions, the Court wants to decide questions of law and is not particularly interested in deciding issues that turn more on the facts. The Court is not going to be interested in delving deeply into trial transcripts – if that is the kind of thing you would be asking the Court to do, again that is probably a waste of your time.

Some lawyers think the Court decides only really important questions. But that is in the eye of the beholder. Of course the Justices want to decide important questions, but many of the “important” questions are only important to the practitioners in some small area of the law, and are completely irrelevant to the vast majority of lawyers and members of the public. If you look at some of the decisions the Court issues in obscure cases in areas that are far afield from your practice area, you will be surprised that the Court even took the case. There are a significant number of these obscure cases every Term. So don’t worry too much about how important your issue is. If it is important in the applicable area of the law, it may be important enough. Whether the issue is important to the parties is less significant. The issue is always important to the parties, and, as Rule 10 says, the Court is not particularly interested in merely correcting erroneous results in individual cases except in rare circumstances, and that is typically where what appears to be a really gross miscarriage of justice really pulls at the heartstrings (these instances are rare but more typical in a criminal case or prisoner’s rights case).

Other lawyers think the Court will consider hearing their case only if the issue is one on which there is a very clear and “deep” circuit split (or splits among state supreme courts and federal circuits). While part of the Court’s docket is devoted to resolving these deep circuit splits, the Court takes a significant number of cases that barely involve an arguable split between a couple of circuits, or do not really involve any circuit split at all. My case, *Standard Fire Ins. Co. v. Knowles*, did not involve a clear split; at most an arguable split arose after the petition was filed and before it was granted. Instances where the Court might grant certiorari in the absence of a deep split among the lower courts include, for example, where the lower court in your case (and perhaps others) is not following one of the Court’s own (typically recent) decisions, or where one of the Court’s prior has created some confusion and its application is unclear, or where the issue is important enough or impacting a substantial number of cases, such that it needs to be resolved by the Court before a deep circuit split has developed. The Court does, on occasion, act to correct a lower court where it has erred in a way that is going to impact a significant number of other cases. These are often unanimous or near-unanimous decisions that do not receive a lot of media attention.

Another important factor is whether the issue you intend to seek certiorari on is simple or complex to resolve, and whether it is presented cleanly by the record. Having a simple, straightforward issue and one on which the facts are undisputed or clearly established by the trier of fact can help your chances at obtaining certiorari. Remember that the Court would like to be deciding more cases than it does. A relatively simple issue that is cleanly presented requires a lot less time and effort to resolve than an issue that is complex, or an issue that at first blush seems straightforward, but is embedded in a complex case involving other issues or unclear facts that might have to be sorted through. The Court also does not want to grant certiorari and then, after delving into the case, realize that the issue really is not clearly or cleanly presented by the record or the pertinent facts are murky. That can result in a denial of certiorari as improvidently granted (in the Supreme Court vernacular, a “DIG”). The Court

wants to avoid those circumstances because it is waste of the Court's resources. No law clerk wants to recommend that certiorari be granted and then have it later result in a DIG.

One thing you can do in evaluating the "cert-worthiness" of your case is check whether there are cases in previous Terms that have raised the same issue on a petition for certiorari, and review the briefing on those petitions. SCOTUSBlog is a very good resource for this. But don't get too discouraged if you find that the same issue you intend to present was previously raised and certiorari was denied. Sometimes the second or third time is the charm. The issue may now be better developed in the lower courts. Or the Court may realize from seeing multiple petitions that the issue truly is an important one. Or your case may present the issue more clearly and cleanly. Or you may have a new angle on the issue that makes your petition more compelling. Or the Court simply may have more available space on its calendar than it did the last time. My case is an example of one where certiorari had been denied on the same issue in the previous Term, but was granted in our case. So while the fact that certiorari was denied on your issue previously is worth considering, particularly if the Court has denied certiorari a number of times, don't give up simply because certiorari was previously denied on your issue.

II. The Petition for Certiorari

Taking your case to the Supreme Court begins, of course, with the petition for certiorari. The treatise *Supreme Court Practice* by Eugene Gressman et al. is an excellent resource for the entire process. Here is a brief summary of some key mechanics: In order to file a petition for certiorari you need to be a member of the Court's Bar, so if you are not yet a member you should promptly take steps to become a member (you can do this on paper without making a trip to Washington, although the swearing-in ceremonies in Court are nice), or find someone who is.

While the leading members of the Supreme Court Bar file plenty of petitions, having their name on a petition does not necessarily add significant weight. The leading practitioners are often hired to file petitions because of a perceived advantage of having their name on them, and many of their petitions

are denied. Plenty of the petitions that are granted are filed by lawyers who do not practice regularly in the Court, and in some cases are filing their first petition.

You will also need to have the petition professionally printed, unlike most appellate briefs in other courts. There are several good printers who specialize in Supreme Court work.

I will discuss below the timing of the petition, and each of the principal sections of the petition.

A. Timing

Your petition is due 90 days after entry of the judgment or order by the lower court that is sought to be reviewed. Note that it is the entry of judgment, not the issuance of the mandate, that starts the 90-day clock. S. Ct. Rules 13.1, 13.2. If a petition for rehearing is filed in the lower court, the time to file the petition for certiorari runs from the denial of rehearing or, if rehearing is granted, from the subsequent entry of judgment. S. Ct. Rule 13.3. If you really need more time, an extension of time of up to 60 days may be sought from the Circuit Justice for the applicable circuit under Supreme Court Rule 13.5.

In considering when to file your petition for certiorari, within the 90-day window or any extension you obtain, you should take into account the Court's Term, which runs from the first Monday in October to the end of June. If your time to file the petition runs in the middle of the Term, you won't have a choice about which Term you want your case heard during. You may have a choice, however, if the end of a Term is approaching. If you file your petition such that it will be fully-briefed near the end of the Term, it may be given less attention because the law clerks and Justices are busy finishing the opinions to be released by the end of the Term. The Court, however, still may be looking to fill its calendar for October and November, so you might benefit from that if that calendar is not yet full. If you decide to file your petition so that it is not fully briefed until after the end of the Term, it will be reviewed by the new law clerks who take over their responsibilities over the Summer. The petition will be acted on in the weeks approaching the beginning of the new Term, or, in some cases, late in the

Summer. Your petition may be given more careful attention by the new law clerks, who are fresh and eager to begin their duties. The Court will also be looking to fill its docket for the Fall and Winter. However, a large number of petitions tend to pile up over the Summer, so yours will be competing with all of those for the Court's attention.

There is no clear answer to whether it is better to file when the Court is approaching the end of the Term or wait so that the petition is considered over the Summer. In making that decision, you may want to check SCOTUSBlog to determine to what extent the Court has filled its calendar for the Fall, and what types of cases have been granted. In some years the Court's membership may be about to change as well after the end of the Term.

B. Content of the Petition

The content of the petition is governed by Rule 14. The key components of the petition are discussed below. Overall, the strongest petitions are often quite concise as well as compelling.

1. Questions Presented

This is a short statement of the issue or issues on which you seek review. While short, this could be the most important section because if it is not compelling, the law clerk or Justice reading it may not read much further. It needs to be crafted with great care. Fewer questions are preferable. Frequently if the petition contains more than one question the Court may narrow them if it grants certiorari. Throwing in the kitchen sink is a very bad idea. If it makes sense in your case, presenting only one question is preferable. While the rule says that the question should not be argumentative, good lawyers will always put some spin on them, subtly. Each question presented should demonstrate that the issue presented is a question of federal law, is important, was clearly presented and decided below, and at least potentially meets the criteria for certiorari. Just pack all of that into a short paragraph and you're all set.

2. Statement of the Case

This is a brief summary of the pertinent facts of the case and its procedural history. This is your opportunity to explain why your case is a good one to review the questions presented, which the reader hopefully has already realized are important questions potentially worthy of review. The statement of the case should convey how your case is a great candidate for deciding those questions because the facts are relatively straightforward, and the issue was clearly presented to the lower courts and decided by them. The statement of the case should not be a pedantic recitation, and it should not include any facts or procedural history that are not relevant to the issue(s) on which you are seeking review. Don't feel you are precluded from including in this section other pertinent background, such as history of other litigation on the issue, where relevant.

This section should be treated as a critical part of the petition, in which every sentence included should be directed to the objective of convincing the reader that your case is the right case to decide the issues presented. It is likely to hurt your chances if this section conveys the impression that your case is very complicated or that the relevant facts are unclear or that the relevant portions of the record necessary to be reviewed in order to decide the issue presented are quite voluminous. While the Court sometimes will engage in that type of review, that is rare. It has limited resources to devote to that type of very time-intensive work.

3. Reasons for Granting the Writ

Here is your big chance to convince the Court to take your case. It is important to remember that the purpose of this section is very different from what you typically write in an appellate brief to an appellate court that is required to hear your case, or even to a state supreme court in which review is discretionary but lots of cases are granted. The main objective here is to convince the Court that the issues presented are really worthy of review, and to a lesser extent that the lower courts were wrong.

You need to get out of the weeds of your case and look at the issue(s) you want to present from a big-picture perspective. Ignore, for the most part, how your case in particular was wrongly decided and focus on why the issue is important for many other cases. Be honest here – don’t try to manufacture a circuit split where there is none, or exaggerate the extent of the split when it is not a clear split. The law clerks and Justices (if your petition reaches a culled-down number that may be reviewed by the Justices) will see right through that. If your case fits one of the nonstandard reasons for granting certiorari other than a “deep” circuit split, focus on those reasons. If there is also a quasi-split between the circuits, explain that too without overstating it. Devote some space to explaining why the issue presented is really important to development of the law in a certain area, to the proper functioning of the federal court system as a whole, or to the public or a particular industry (if applicable). Explain and show how the issue is a recurring one, and what problems have been created or will be created by the lack of final resolution by the Court. If your case is one in which there is no “deep” circuit split but there are strong reasons why the Court should not wait for one to develop, explain that.

C. Amicus Briefs in Support of Certiorari

Seeking amicus support for your petition for certiorari is a very good idea. The U.S. Chamber of Commerce is an ideal amicus to have on your side in a business case. If you have amicus support from well-recognized national organizations that choose their cases carefully, that will certainly help. And typically the party opposing certiorari has no amicus support because few amici want to spend their resources arguing against certiorari, and filing that type of brief may send the message that the opposing party really thinks the case is one in which there is a good chance of certiorari being seriously considered.

It also can be effective to have on your side an amicus group that might not always be aligned with your client’s position but is aligned on the issue you are presenting. In *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013), for example, the Center for Class Action Fairness supported our

petition for certiorari on behalf of The Standard Fire Insurance Company (a Travelers subsidiary). The Center, although often adverse to corporate defendants, felt that it was unfair to absent class members to allow named plaintiffs to stipulate to an amount in controversy under \$5 million in order to avoid federal jurisdiction under the Class Action Fairness Act, the issue we were raising.

Whether it is helpful to have amicus support from organizations that are strongly conservative or liberal in their political leanings is debatable, and may depend on the nature of the case and what type of support you are hoping to elicit on the Court. Many civil cases do not have a political bent to them. You don't want to create a political bent when there should not be one. You want all nine votes.

III. Opposing Certiorari

If you are on the receiving end of a petition for certiorari, you have a choice to make. Filing a brief in opposition to certiorari is not required (except in a criminal death penalty case), and you may submit what is called a "waiver letter" to the Clerk waiving the right to file a brief in opposition to certiorari. The term "waiver letter" is a misnomer to some extent. If a "waiver letter" has been filed and the Court is considering a grant of certiorari, the Court's practice is to issue an order requesting the respondent to file a brief in opposition. By that point, however, if you are the respondent, you have a strike or two against you. The needle has moved towards granting certiorari and you probably have a more difficult time preventing that from happening. For that reason, the conventional wisdom is to typically file a brief in opposition, unless perhaps the petition is frivolous or nearly so (for example, if it raises only state law issues), or the client simply does not want to pay for the cost of drafting the opposition and having it printed.

A strong brief in opposition to certiorari typically argues (where possible) that the issue presented is not one on which the lower courts have actually disagreed, or have not done so squarely. The opposition also often argues that this particular case is not a good vehicle to resolve the issue presented. Unlike the petition, where you don't want to focus too much on the facts of your case, the

opposition typically tries to do so and present the case as factually complex. Reasons why the case might not be a good vehicle to resolve the issue presented include, for example, that the issue was not squarely raised or not clearly and explicitly decided below, that the issue is fact-laden and the relevant facts were not undisputed or squarely decided by a factfinder below, or there are alternative bases for the lower court's decision, or there is a lurking state-law basis for the decision. There are plenty of cases in which the Court is presented with an interesting and important issue on which there is a clear circuit split, and certiorari is denied. Although the Court does not explain its denials of certiorari, it appears likely that many denials of certiorari are because a case does not present a good vehicle for deciding the question. The Court has also had prominent cases in recent years in which it grants certiorari but then ends up either issuing a DIG order, or deciding the case really on a different ground, because of problems with the record below, something that the Court tries to avoid. Two prominent examples of that last Term were *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013) and *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013). The Court may be looking to avoid those kinds of results in the future, and thus placing even more importance on whether a particular case is a good vehicle for review.

It is important to recognize that the rule governing briefs in opposition to certiorari does not allow you to hold back for merits briefing arguments as to whether the questions presented are properly before the Court. The rule provides that “the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition. Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition.” S. Ct. Rule 14.2.

IV. Reply In Support of Certiorari and Supplemental Briefs

As the petitioner, you have the opportunity to file a reply brief in support of certiorari within ten days after the filing of the brief in opposition. See S. Ct. Rules 15.5, 15.6. The length of the reply brief is quite short (3,000 words), see S. Ct. Rule 33.1(g), and it should be limited to responding to new matters raised in the opposition. The reply brief is typically used to clarify any issues about the case raised by the respondent as reasons why the case is not a good vehicle for review, and also to address any contentions about the extent of disagreement in the lower courts. If there have been new developments in the law since the petition was filed, you can include them in the reply brief. And reiterate your strongest arguments for granting review.

Either party also may file a supplemental brief to address any significant new developments.

V. Decision on the Petition

The dates of Court conferences are listed on the Court's website, and the online docket for your case will tell you when the briefing on the petition has been distributed to the Court for a particular conference. That does not mean it will necessarily be decided at that conference – in some cases, the petition is held over for a subsequent conference. But often petitions are decided at the first conference after they are distributed.

If the Court grants certiorari, the lawyers who are listed as Counsel of Record on the petition and brief in opposition (only one lawyer can be listed as Counsel of Record) will receive a phone call from the Clerk's office advising them. Recently, grants of certiorari have typically been announced on a Friday, and denials of certiorari appear on an order list the next Monday. (If your petition is one of the many that appear on the denial list, you won't receive a phone call.)

If certiorari is granted, after you and your client have gotten over the shock, your client will likely consider whether to retain a leading member of the Supreme Court Bar (if one is not already in the case at the petitioning stage), or leave the case with counsel who has handled it all along. The leading

Supreme Court practitioners have conducted an increasing number of the oral arguments over the last couple of decades, particularly in business cases, and large companies typically will select one of those. But there are still plenty of cases that are argued by first-timers. Oral arguments at the Court are not that much different from other appellate arguments, and some first-timers do very well.

If your client decides to go with a leading Supreme Court lawyer, try to make sure it is one who will work well with you and your client on the merits briefing and oral argument preparation.

VI. Merits Briefing

When the Court grants certiorari, the schedule for briefing and oral argument moves quickly, much faster than you may be accustomed to in most federal courts of appeals and state supreme courts. The petitioner's brief on the merits is due 45 days after the order granting certiorari, and the respondent's brief is due 30 days thereafter. S. Ct. Rules 25.1, 25.2. A short extension of a week or two typically can be obtained from the Clerk, if necessary. The reply brief is due 30 days after the respondent's brief, unless the Court schedules oral argument earlier than that, in which case the reply is due no later than one week before the argument. S. Ct. Rule 25.3. It is common for the Court to schedule oral argument less than 30 days after the reply brief is filed, much faster than federal courts of appeals. And there will be no pre-argument settlement conference; the Court is not interested in reducing its docket.

The briefing on the merits is fairly similar to merits briefing in other appellate and supreme courts. The question presented may be modified from that contained in the petition, but new issues not raised in the petition generally cannot be raised. One thing to keep in mind is that the Court is most interested in the primary sources of law and its own precedent, which is in some cases only at the margins of the issue presented, articulating principles that may be relevant but that were applied in very different contexts. The conventional wisdom is that the Court is not interested in having briefs explore

in any depth the precedent in the lower courts on the issue. The Justices are giving the issue a complete and fresh look, not evaluating the reasoning of the lower courts and whether it was correct.

One strategy that that some respondents use in merits briefing is to try to convey to the Court that the case was not really suitable for decision by the Court. They want to subtly suggest that certiorari should be denied as improvidently granted. This strategy is probably more common where the respondent appears likely to lose on the merits because the certiorari was probably granted for the purpose of correcting the lower court.

You will want to recruit prominent amici, such as the U.S. Chamber of Commerce in a business case, the Defense Research Institute, or a group of state attorneys general or law professors whose opinion may carry significant weight. Amicus briefs are due 7 days after the brief of the party that the amicus is supporting. The rule requires amici to file motions for leave unless consent of the parties is obtained. *See* S. Ct. Rule 37. In modern times the Court has always granted leave, and thus typically parties consent to all amicus filings. Parties now often file blanket consents to the filing of any amicus brief, although it is probably preferable to consent individually so that you become aware of each brief that is going to be filed in advance of its filing, and, with respect to briefs filed in support of your position, you can try to obtain a draft in advance for review. Every Supreme Court case in which certiorari is granted seems to generate a plethora of amicus filings.

Someone on the team should be assigned to coordinate with the amici and try to “keep them in line” with your position. Also keep in mind that the Solicitor General’s office may decide to weigh in on a statutory or constitutional issue. You will probably want to reach out to them early and find out whether they are considering participation in your case. If they are, they may grant you an opportunity to present your position to them and try to convince the Government to weigh in on behalf of your client.

VII. Oral Argument Preparation

Lawyers arguing Supreme Court cases typically write out lengthy Q and A sheets, and conduct several moot courts. There should probably be at least one moot with the team that has handled the case in the lower courts and is most familiar with the record. Your client may want to participate in that session or have a separate one. Typically at least one moot court is conducted in Washington. The U.S. Chamber of Commerce likely will be willing to host a moot if they have weighed in as an amicus on your side, and they can pull several leading Supreme Court advocates or brief writers to serve as moot court justices. Professors at the D.C.-area law schools also like to conduct moot courts. Moots generally should be scheduled far enough in advance of the argument to allow sufficient time to refine the argument presentation.

VIII. Oral Argument

So what is it really like to have your case heard by the Supreme Court? Here is an inside view: On the day of oral argument, the lawyer arguing the case on your side and those sitting at counsel table (up to 3 additional lawyers) will be ushered into the Lawyers' Lounge. Lawyers being admitted to the Bar that day will also be brought to the Lounge. The day of argument may be a great opportunity to get lawyers from your client or your firm admitted on the same day (plan for that adequately in advance). A lawyer admitted to the Supreme Court Bar will get to stand up and orally move the admission of any new admittees. Lawyers being admitted to the bar get better seats as well. A relatively small number of seats in the audience are reserved for your side as well.

In the Lawyers' Lounge, the Clerk will review the procedures for all that will happen in Court that day, and remind the advocates to address the Court properly ("Mr. Chief Justice, May It Please The Court....") and to stop talking, absent permission from the Chief, when the red light goes on. If yours is the second case being argued, there is an "on deck" table where you will sit while the first case is being

argued, and then you will move up. Each lawyer sitting at counsel table will receive a quill pen as a memento. The Court also prints a hearing list and counsel's card that you may wish to keep.

The courtroom is quite intimate, with the counsel tables and lectern about as close to the Court as they can be. Except in an extraordinary case, each side will have 30 minutes, with 5 minutes typically reserved for rebuttal. The questioning, of course, is extensive and rapid-fire (although if you get a question or comment from Justice Thomas that is probably a once-every-7-years event).

The transcript of the oral argument is generally made available on the Court's website later the same day, although you will need notes for the immediate debriefing. The audio recording is typically released a week later.

If your case is one that receives significant media attention, representatives of the media typically congregate on the steps of the Court after the argument and will seek to ask questions of arguing counsel. Your side should have a well-thought out plan for that in advance. It is not typically good form to refuse to comment, nor is it appropriate to try to predict an outcome regardless of how well the argument may seem to go for your side.

IX. Decision Day

Unless your case is argued late in the Term or held for decision until the end of the Term, it is difficult to predict when a decision will come down. You will not receive any notice of the decision before it is announced in open Court. Unless you can and want to have someone attend every Court session starting about a month or so after the oral argument (longer for more complicated cases), you will find out first through media sources. SCOTUSBlog is a good resource. It is often the first to announce new decisions and do so accurately (some other major media outlets have been known to sometimes make mistakes in their announcements, as occurred with the major Obamacare ruling). If your case is not of general public interest, it may not get any major media attention when the decision is announced. Shortly after the announcement, the opinion will become available on the Court's website.

As with the oral argument, you should be prepared in advance for media inquiries on decision day. You should have draft statements written and reviewed by your client for both positive and negative results, taking into account possible ways the decision might be written, although some tweaking may have to be made after the decision is released.

After the opinion is released, the Clerk will issue a Judgment, and 25 days thereafter the mandate will issue to the lower court. See S. Ct. Rule 45. Rehearing petitions (governed by Rule 44) are rarely filed and very rarely granted.

X. Conclusion

Except for those lawyers who have a Supreme Court practice, taking your case to the highest court in our land is typically a once-in-a-lifetime experience. It is stressful and extraordinarily time-consuming as compared with other appeals, but also a tremendous experience.

Age Bias in the Workplace: Strategies for Preventing Lawsuits In-House and In Your Firm

FEDERATION OF DEFENSE & CORPORATE COUNSEL

**2014 Annual Meeting
The Greenbrier, West Virginia
July 27-August 2, 2014**

**Prepared in connection with the
Employment Practices and Workplace Liability Section Meeting**

**Moderator
Eric Schneider
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It is not intended to be relied upon as legal advice.

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Overview of the Age Discrimination in Employment Act¹

This outline attempts to provide a summary introduction to the provisions of the Age Discrimination in Employment Act. This summary covers only selected cases and material. It does not address state laws or many of the complexities of employment law. It is not intended to be a substitute for the advice of legal counsel in specific situations.

I. Overview of the Statutory Scheme

The Age Discrimination in Employment Act of 1967 (“ADEA”) is a federal law prohibiting discrimination against individuals who are at least 40 years of age in private and public employment. 29 U.S.C. § 621-34. The ADEA covers hiring, termination, compensation, and other terms and conditions of employment. 29 U.S.C. § 623(a)(1).

Borrowing heavily from Title VII’s substantive provisions and the Fair Labor Standards Act’s (“FLSA”) remedial and enforcement mechanisms, Congress created a complex statutory scheme in the ADEA. Congress hoped that the critical elements of the ADEA’s statutory scheme, as summarized below, would eradicate the age-based stereotypes detrimentally affecting older American workers.

II. Scope of Protection

The ADEA currently extends protection to private and public sector individuals who are at least 40 years of age. 29 U.S.C. §§ 631(a), 631(b) and 633a. There is no upper age cap. Covered individuals include not only persons employed within the United States, but also United States citizens employed overseas by United States corporations or their subsidiaries. 29 U.S.C. § 630(f).

Although individuals who are at least 40 years of age fall within the ADEA’s protected class, the Supreme Court recently held that individuals over 40 cannot establish an age discrimination claim when they were treated less favorably than older individuals. General Dynamics Land Systems, Inc. v. Cline, 540 U.S. 581 (2004). In General Dynamics, the Court concluded that a collective bargaining agreement that preserved health benefits for retired employees over 50 years old while discontinuing such benefits for younger employees did not violate the ADEA. In resolving a dispute amongst the Circuit Courts of Appeals, the Supreme Court reasoned that the ADEA’s text, structure, purpose, history and relationship to other statutes show that the ADEA is not intended to stop an employer from favoring older employees over younger ones. The General Dynamics decision is consistent with the Court’s previous decision in O’Connor v. Consolidated Coin Caterers Corp., 116 S. Ct. 1307 (1996), in which the Court held that an inference of age discrimination does not arise when one worker is replaced with an insignificantly younger worker.

¹ This section of the paper was authored by Kay Hodge, partner, Stoneman, Chandler & Miller LLP (Boston).

A. Prohibited Practices

Congress enacted Section 4 of the ADEA (29 U.S.C. § 623) as the primary vehicle for combating age discrimination in employment.

Employers: Subsection (a) delineates that it is unlawful for an employer: (1) because of age, to fail or refuse to hire a protected individual, to discharge a protected individual, or to otherwise discriminate against an individual with respect to his or her compensation, terms, conditions, or privileges of employment; (2) because of age, to limit, segregate, or classify employees in any way which would deprive a protected individual of employment opportunities or adversely affect his or her status as an employee; or (3) to reduce one's wage rate to comply with the Act. 29 U.S.C. § 623(a).

Employment Agencies: It is unlawful, because of age: (1) to fail or refuse to refer any individual for employment; (2) to classify or refer any individual for employment; or (3) to otherwise discriminate against an individual. 29 U.S.C. § 623(b).

Labor Organizations: It is unlawful, because of age: (1) to exclude or expel any individual from membership; (2) to limit, segregate, classify its membership, or fail or refuse to refer any individual for employment in any way which would deprive or limit employment opportunities or affect the individual's status as an applicant or employee; or (3) to cause or attempt to cause an employer to discriminate against an individual. 29 U.S.C. § 623(c).

Retaliation. The ADEA prohibits employers, employment agencies, and labor organizations from discriminating against an individual because such individual has opposed any prohibited practice, made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under the Act. 29 U.S.C. § 623(d).

Employment Advertising. Subsection (e) prohibits employers, labor organizations, and employment agencies from printing any notice or advertisement relating to employment or membership that indicates an age-based preference, limitation, or specification. 29 U.S.C. § 623(e). Accordingly, EEOC regulations prohibit advertisements containing age-based "trigger words," such as "age 25 to 35," "young," or "recent college graduate." 29 C.F.R. § 1625.4(a).

B. Definitions

The ADEA defines an "employer" as a person engaged in an industry affecting commerce with twenty (20) or more employees for each working day in twenty (20) or more calendar weeks in the current or preceding calendar year. The term "employer" was intended to include a state, a political subdivision of a state, and an interstate agency, but not the United States. 29 U.S.C. § 630(b). However, the U.S. Supreme Court held that although Congress intended the ADEA to abrogate the States' Eleventh Amendment immunity, such abrogation exceeded Congress' authority under Section 5 of the Fourteenth Amendment when the substantive requirements the ADEA imposes on state and local governments are disproportionate to any unconstitutional conduct that could be targeted by the ADEA. Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000).

The ADEA defines an "employment agency" as "any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States." 29 U.S.C. § 630(c).

The term “labor organization” is defined as “a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.” 29 U.S.C. § 630(d). A “labor organization” is deemed to affect commerce if: (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer; or (2) if it has twenty-five (25) or more members and satisfies various other statutory criteria. 29 U.S.C. § 630(e).

The ADEA defines an “employee” as “an individual employed by any employer except that the term ‘employee’ shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer’s personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office.” The term “employee” also includes “any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.” 29 U.S.C. § 630(f). However, the ADEA does not cover foreign nationals who apply in foreign countries for jobs in the United States. See Reyes-Gaona v. North Carolina Growers Association, Inc., 250 F.3d 861 (4th Cir.), cert. denied, 534 U.S. 994 (2001).

C. Defenses

Although the ADEA prohibits a broad array of age-based discriminatory practices, Congress has carved out numerous exceptions to these prohibitions. Some of these exceptions are traditional defenses, whereas others have been crafted or interpreted as affirmative defenses that must be pled and proven by the defendant.

Section 4(f) of the Act, 29 U.S.C. § 623(f), establishes six defenses to an ADEA claim. This Section has undergone numerous amendments since 1967, the most recent and significant being the Older Workers Benefit Protection Act of 1990 (“OWBPA”). Currently, Section 4(f) provides that it shall not be unlawful for an employer, employment agency, or labor organization to take any action otherwise prohibited by the Act: (1) where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business; (2) where the action is based on reasonable factors other than age (29 U.S.C. § 623(f)(1)); (3) where the practice involves an employee in a workplace in a foreign country, and compliance with the ADEA would cause the employer to violate the laws of the country in which the workplace is located (29 U.S.C. § 623(f)(1)); (4) to observe the terms of a bona fide seniority system (29 U.S.C. § 623(f)(2)(A)); (5) to observe the terms of a bona fide employee benefit plan (29 U.S.C. § 623(f)(2)(B)); or (6) to discharge or discipline an individual for good cause.

The EEOC defines the bona fide occupational qualification (“BFOQ”) defense as follows:

An employer asserting a BFOQ defense has the burden of proving that (1) the age limit is reasonably necessary to the essence of the business, and either (2) that all or substantially all individuals excluded from the job involved are in fact disqualified, or (3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age.

29 C.F.R. § 1625.6(b). See also Western Air Lines v. Criswell, 472 U.S. 400 (1985).

Prior to the Supreme Court's decision in Hazen Paper Co. v. Biggins, 113 S. Ct. 1701 (1993), numerous courts had rejected the “reasonable factors other than age” defense when raised with regard to employment practices empirically correlated to age, such as pension status or seniority. Clarifying the scope of the defense, the Hazen Court held that “[w]hatever the employer’s decision making process, a disparate treatment claim cannot succeed unless the employee’s protected trait actually played a role in that process and had a determinative influence on the outcome.” Hazen, 113 S. Ct. at 1706. Thus, when an employer’s motivating factor is pension eligibility, salary, or some other correlate with age unrelated to stereotypes, the employer’s decision does not constitute actionable disparate treatment, and the employer may raise the “reasonable factors other than age defense” to any such claim.

In addition to the § 4(f) defenses, the ADEA delineates other statutory “defenses,” including good faith reliance on administrative interpretations, knowing and voluntary release or waiver of liability (29 U.S.C. § 626(f)), compliance with the Act’s administrative exemptions (29 U.S.C. § 628), and failure to comply with the Act’s procedural requirements (29 U.S.C. § 626).

For example, Section 7(e) of the ADEA, 29 U.S.C. § 626(e), incorporates § 10 of the Portal-to-Portal Act, 29 U.S.C. § 259, which provides that:

[N]o employer shall be subjected to any liability ... if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation of the ... [EEOC], or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged.

29 U.S.C. § 259(a). See also 29 C.F.R. § 1626.18.

The “definitions” section of the ADEA may also be raised in defense to an age discrimination charge. For example, a defendant may contend that it is not an “employer” because it does not employ the requisite number of employees, or that the plaintiff is not an “employee” because s/he is an elected public official of a state. 29 U.S.C. § 630 et seq.

D. Enforcement

The ADEA charges the Equal Employment Opportunity Commission (“EEOC”) with administration and enforcement responsibilities. Section 9 of the Act, 29 U.S.C. § 628, also provides that the EEOC “may establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest.” See 29 C.F.R. §§ 1625.13, 1627.15, 1627.16. The EEOC has issued regulations, interpretations, guidelines, policy statements, opinion letters, and other directives regarding various issues arising under the Act. These publications have elicited varying degrees of judicial deference.

E. The Administrative Process

An ADEA claimant must comply with the Act’s procedural requirements as a prerequisite to filing an administrative charge and commencing a lawsuit in state or federal court. First, the claimant must file a timely and substantively sufficient charge with the EEOC. To be sufficient,

a charge must be in writing, name the respondent, and generally allege the discriminatory acts. 29 C.F.R. § 1626.6.

In order to be timely, the charge must be filed with the EEOC within 180 days after the alleged unlawful practice occurred if there is no state deferral agency. If, however, the state has a deferral agency, the charge must be filed within 300 days after the alleged unlawful practice occurred or 30 days after receipt of notice of termination of proceedings under state law, whichever is earlier. 29 U.S.C. § 626(d). Under limited circumstances, this limitations period may be subject to equitable tolling.

In addition, the claimant must file a charge with a state deferral agency, if such an agency exists. 29 U.S.C. § 633(b). Although filing a charge with the state deferral agency is mandatory, the failure to file in a timely manner is not fatal to a later ADEA action. See Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979).

Claimants may commence a civil action no earlier than 60 days after filing an EEOC charge and no later than 90 days after receiving notice of dismissal or termination of EEOC proceedings. 29 U.S.C. § 626(d) and (e), as amended by the Civil Rights Act of 1991, Pub. L. No. 102-166, § 115(3), 105 Stat. 1071, 1079. Representative actions are cognizable under the ADEA. With regard to non-federal employees, representative actions under the ADEA differ substantially from class actions under Title VII, the significant difference being that representative actions under the ADEA do not follow the procedures specified by Rule 23 of the Federal Rules of Civil Procedure.

F. Remedies

With a few exceptions and clarifications, the ADEA incorporates the remedial provisions of the FLSA. 29 U.S.C. § 626(b). The ADEA's enforcement mechanisms permit the EEOC to bring a suit on behalf of an aggrieved individual, or the aggrieved individual may commence a civil action "for such legal or equitable relief as will effectuate the purposes of" the Act. Id. at § 626(c)(1). In either case, the ADEA provides the right to a jury trial, whether legal or equitable relief is sought. Id. at § 626(c)(2). But see Guillory-Wuerz v. Brady, 785 F. Supp. 889, 891 (D. Colo. 1992) (U.S. government employees are not entitled to jury trials in ADEA actions). Equitable remedies include injunctive relief, reinstatement, instatement, and promotion. See 29 U.S.C. § 626(b) (courts may grant "without limitation judgments compelling employment, reinstatement or promotion"). Legal remedies include back pay, front pay, liquidated damages for willful violations, attorneys' fees, and interest. But see Wildman v. Lerner Stores Corp., 771 F.2d 605 (1st Cir. 1985) (front pay "should not be awarded unless reinstatement is impracticable or impossible"). Although compensatory and punitive damages generally are not available under the ADEA, such damages may be recovered pursuant to a pendent state law claim if permitted by state law.

In cases of alleged discriminatory discharge, failure to hire, and layoff, the claimant has a duty to mitigate damages by seeking new employment with reasonable care and diligence. The claimant's failure to mitigate damages will result in a reduced back pay and/or front pay award. Hansard v. Pepsi-Cola Bottling Co., 865 F.2d 1461 (5th Cir. 1989) ("A plaintiff may not simply abandon his job search and continue to recover back pay."). Other circumstances that may result in reduced awards include plaintiff's refusal of an unconditional offer of reinstatement, plaintiff's receipt of payments that would not have been made but for the discriminatory action (i.e., severance pay or pension benefits), and plaintiff's demand for speculative damages. See Ford Motor Co. v. EEOC, 458 U.S. 219, 241 (1982) ("[A]bsent

special circumstances, the rejection of an employer's unconditional job offer ends the accrual of potential back pay liability."); Rhodes v. Guiberson Oil Tools, 82 F.3d 615 (5th Cir. 1996) ("The purpose of the ADEA is to make the plaintiff whole.... Therefore, in order to properly calculate damages, post-termination economic benefits should be subtracted from a plaintiff's economic losses attributable to the termination.... Severance pay is a post-termination economic benefit that [the plaintiff] would not have received had he remained employed"); Guthrie v. J.C. Penney Co., 803 F.2d 202 (5th Cir. 1986) (reducing back pay award by amount of pension benefits received from employer).

The courts are divided as to whether workers' compensation and unemployment compensation benefits should be deducted from an ADEA award. Citing the "collateral source rule," some courts have noted that an employer may not benefit from a payment made to the plaintiff by a third party, such as the government. See EEOC v. Kentucky State Police Dept., 80 F.3d 1086 (6th Cir. 1996) (deeming unemployment compensation benefits collateral benefits that should not be deducted from back pay awards, but noting that it may well have decided differently were it a matter of first impression); Thurman v. Yellow Freight Systems, Inc., 90 F.3d 1160 (6th Cir. 1996) ("The unemployment compensation and workers' compensation [plaintiff] received are collateral sources that should not have been deducted from back pay.... Permitting an employer to benefit from other sources of income like unemployment compensation and workers' compensation would not serve the deterrence function of the statute."). But see Lussier v. Runyon, 50 F.3d 1103 (1st Cir. 1995) (describing a four-to-three circuit split on whether collateral benefits should be deducted from back pay, and siding with those courts that have given trial courts discretion to deduct such benefits, at least with regard to front pay); Bonura v. Chase Manhattan Bank, 629 F. Supp. 353 (S.D.N.Y.) (refusing to engage in "rear-view fortune telling" to award an ADEA plaintiff discretionary bonuses which he may or may not have received had he not been terminated), aff'd, 795 F.2d 276 (2nd Cir. 1986).

G. Education & Research Programs

Along with proscribing numerous employment practices, the ADEA, through education and research, attempts to eliminate the stereotypical views that prompted Congress to enact the ADEA in 1967. Among other measures, § 3 of the Act directs the Secretary of Labor to undertake studies and provide information to labor unions, management, and the general public concerning the needs and abilities of older workers, their potential for continued employment, and their contribution to the economy. 29 U.S.C. § 622.

III. Proving Age Discrimination

A. Disparate Treatment

In a disparate treatment case, the central issue is whether the employer's actions were motivated by discriminatory intent. The plaintiff may prove discriminatory intent by direct or circumstantial evidence. Direct evidence, often regarded as "smoking-gun" evidence (e.g., an office memorandum directing a supervisor to discharge the plaintiff because of his age), is less frequently produced. When direct evidence of discriminatory intent is produced, however, the plaintiff may rely on such evidence to establish a prima facie case of intentional discrimination. Typically, the defendant will respond by disputing the plaintiff's proffered evidence, by justifying its action under one of the Act's statutory defenses (i.e., age was a bona fide occupational qualification for the job), or by proving that the same decision would have been reached even absent the presence of the evidence.

If an ADEA plaintiff cannot proffer direct evidence of discriminatory intent, the plaintiff is left to prove intentional discrimination indirectly by circumstantial evidence. The basic legal principles governing the proof methodology in circumstantial evidence discrimination cases were articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), Texas Department of Community Affairs v. Burdine, 450 U.S. 248 113 (1981), and St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993). Although each of these cases arose in the Title VII context, courts have applied the analytical framework in ADEA cases, except that in Gross v. FBL Financial Services, Inc., 490 U.S. 228 (2009), the U.S. Supreme Court held that (unlike a plaintiff in a Title VII case) a plaintiff under the ADEA must meet the higher burden of showing that age was the “but-for” cause of the challenged action. In other words, under the “but for” standard, the plaintiff must show that “but for” his/her age, the adverse action would not have happened. This standard is considerably more difficult for plaintiffs to meet than showing, according to the standard set forth in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), that age was one of several motivating factors in causing the adverse action. Thus, in ADEA cases, the employer does not need to be able to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.

The Supreme Court explained in Gross that the ADEA is materially different from Title VII with respect to the relevant burden of persuasion, so decisions are not controlled by case law developed under Title VII, such as Price Waterhouse. Specifically, while Title VII was amended to explicitly authorize discrimination claims when an improper consideration was one of several motivating factors for the decision, the ADEA requires that the adverse action be “because of” age so age must be the reason the employer decided to act and if the action was taken for any other reason other than age, no age discrimination should be found.

In response to the Gross decision, Democrats introduced a bill entitled “Protecting Older Workers Against Discrimination Act” that would reverse the Gross decision. This bill would essentially eliminate the “but for” standard and replace it with the motivating factor test applicable in Title VII cases. As such, after an employee proves that age discrimination was a motivating factor in an adverse employment decision, the employer will have the burden of showing that it had legitimate, nondiscriminatory reasons for its decision. As of May 2014, the bill is currently in committee.

B. Disparate Impact

Prior to the U.S. Supreme Court’s decision in Smith v. City of Jackson, Miss., 125 S. Ct. 1536 (2005), the federal circuit courts were split on the question of whether a disparate impact theory should apply in age discrimination cases under the ADEA. The crux of a disparate impact claim is that the respondent’s facially neutral policy or practice is unlawful simply because it has an adverse impact on the protected class.

In Smith, the Court held that the ADEA allows for such disparate impact claims. While the plaintiff in a disparate impact case is not required to prove discriminatory intent, the plaintiff is required to establish a prima facie case of discrimination through statistical evidence (e.g., selection rates, pass/fail comparisons) demonstrating a significant impact on the protected class. Once the plaintiff establishes a prima facie case of adverse impact, the employer may defend its policy or practice by proving that it was based on reasonable factors other than age.

In Smith, the plaintiffs were members of the City of Jackson police department, which granted raises to police officers in an effort to make their starting salaries more competitive with

market rates so the City would attract and retain qualified officers. A result of the salary increase was that officers with less than five years of tenure on the City's police force received greater proportional increases than more senior members of the department who happened to be older. While the Court's majority opinion held that that disparate impact claim was viable, the Court also held that the plaintiffs could not prove that the City had violated the ADEA because the City's reason for granting greater salary increases to lower echelon employees – to bring their pay in line with that of surrounding police departments – was a decision that was reasonably based on factors other than age and that addressed the City's goal of attracting and retaining qualified officers. Thus, the plaintiffs could not succeed on their disparate impact claim.

IV. Waivers of ADEA Claims in Employee Severance Agreements

In 1990, the ADEA was amended by the Older Worker Benefit Protection Act ("OWBPA") to prohibit the waiver of age discrimination claims unless the waiver was "knowing and voluntary." The OWBPA requires the following 7 minimum requirements:

(1) The waiver must be a part of an agreement that is written in a manner that can be clearly understood.

(2) The waiver must specifically refer to the rights or claims arising under the ADEA.

(3) The waiver must advise the employee in writing to consult with an attorney before accepting the agreement.

(4) The waiver must provide the employee with at least 21 days to consider the offer. The time period runs from the date of the employer's final offer and is reset whenever there are material changes to the offer. The parties may agree that changes, whether material or immaterial, do not restart the running of the 21 day period.

(5) The waiver must give the employee 7 days to revoke his or her signature.

(6) The waiver must not include rights and claims that may arise after the date on which the waiver is executed.

(7) The waiver must be supported by consideration in addition to that to which the employee already is entitled.

If a waiver fails to meet all of the seven requirements, the waiver is invalid and unenforceable. In addition, an employer may not "cure" a defective waiver by issuing a subsequent letter containing the required language.

If a waiver is requested in connection with a voluntary or involuntary exit incentive or other employment termination program offered to a group or class of employees, the employee must be given at least 45 days (instead of 21) within which to consider the agreement. In addition, the affected employees must be informed in writing of the following:

(a) any eligibility factors for such program and any time limits applicable to such program;

(b) the job titles and ages of all individuals eligible or selected for the program and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

The question of whether a “program” is involved will be determined by the facts and circumstances of each case. Typically, an exit incentive program involves consideration in addition to what the employee is otherwise entitled to receive which is designed to induce employees to sever their employment voluntarily. “Other employment termination program” refers to a package of benefits offered to two or more employees who are offered additional consideration for their involuntary terminations.

In any dispute involving a waiver, the party asserting the validity of a waiver has the burden of proof in a court of competent jurisdiction that the waiver was knowing and voluntary. Further, no waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the EEOC.

The EEOC’s regulations on waivers are at 29 C.F.R. 1625.22. It has also published general policy guidance entitled “Understanding Waivers of Discrimination Claims in Employee Severance Agreements” and Part IV specifically addresses waivers under the ADEA. See http://www.eeoc/policy/docs/qanda_severance-agreements.html.

Notably, the EEOC’s regulations provide that an individual challenging compliance with the ADEA requirements does not need to tender back the consideration before filing a lawsuit or a charge of discrimination. Further, the regulations prohibit any condition precedent, penalty or any other limitation which adversely affects an individual’s right to challenge the agreement. This includes, but is not limited to, provisions requiring employees to tender back consideration received, and provisions allowing employers to recover attorneys fees and/or damages because of the filing of an ADEA lawsuit. See 29 C.F.R. 1625.23

V. The Present and Future State of ADEA Litigation

Since its enactment in 1967, the ADEA has spawned a significant amount of litigation. Indeed, EEOC data reveals that in fiscal year 2013, 22.8 percent of the administrative charges filed alleged age discrimination. See United States Equal Employment Opportunity Commission data, compiled by the Office of Research, Information, and Planning at www.eeoc.gov. In comparison, 35.3 percent of the charges alleged race discrimination; 29.5 percent alleged sex discrimination; 11.4 percent alleged national origin discrimination; 4.0 percent alleged religious discrimination; 27.7 percent alleged disability discrimination. Id. Although the total number of discrimination charges based on age declined during the 1990s to a low of 14,141 in 1999, the total number of age discrimination charges at the EEOC has increased to a total of 21,396 in 2013.

Ultimately, education may prove to be the most powerful weapon in the fight against age discrimination. Employers must be made aware that old age is not synonymous with decreased job productivity, and that employee performance often improves with age. Until this relatively simple lesson is learned, however, the over-40 population will continue to suffer from the physical, mental, and financial consequences of age discrimination.

Recent Age Discrimination Cases²

While there have been a number of cases over the past year where age discrimination was a factor, very few specifically address age discrimination in particular. This section of the paper will discuss those few cases where age discrimination was the primary issue.

Various forms of discrimination can be differentiated in certain respects. Race, ethnic origin, and (for the most part) sex are immutable. Religion and perhaps sexual orientation entail some degree of choice. Disability is a matter of happenstance. Aging is a certainty for everyone.

There is another element of age discrimination (and harassment) that in our experience differs from the other forms. Typically, people of the same race, ethnicity, religion, sexual orientation, and gender do not discriminate against others who fall into the same category. We find, however, that old people do not seem to hesitate in discriminating against other old people. There can be a logical, although in many instances unlawful, basis for age discrimination. Depending upon the particular field, while older workers have the benefit of experience and perhaps wisdom, over time physical skills diminish. Kobe Bryant does not jump as high at age 35 as he did at age 25. Even in less physical fields, the deterioration of vision, hearing, and the ability to sit for long periods can serve to render employees less productive. And as a practical matter, businesses are less willing to invest in the training of older workers than they are in younger workers as a matter of economics.

The California legislature took the unusual step of legislatively overruling an appellate court decision in enacting Government Code §12941. The preamble to that statute provides:

The Legislature hereby declares its rejection of the court of appeal opinion in *Marks v. Loral Corp.* (1997) 57 Cal.App.4th 30, and states that the opinion does not affect existing law in any way, including, but not limited to, the law pertaining to disparate treatment. The Legislature declares its intent that the use of salary as the basis for differentiating between employees when terminating employment may be found to constitute age discrimination if use of that criterion adversely impacts older workers as a group, and further declares its intent that the disparate impact theory of proof may be used in claims of age discrimination. The Legislature further reaffirms and declares its intent that the courts interpret the state's statutes prohibiting age discrimination in employment broadly and vigorously, in a manner comparable to prohibitions against sex and race discrimination, and with the goal of not only protecting older workers as individuals, but also of protecting older workers as a group, since they face unique obstacles in the later phases of their careers.

Cal. Govt. Code § 12941. Put more succinctly, employers looking to reduce labor expense must be mindful of the impact of doing so by way of lopping off the biggest wage earners if to do so would have the impact of disproportionately disadvantaging older workers.

We also tend to find that jurors are particularly sympathetic to age discrimination claims. Barring bad luck (death or total disability) or really good luck (the lottery or acquisition of an

² This section of the paper was contributed by Eric A. Schneider, partner, Anderson, McPharlin & Connors LLP (Los Angeles).

obscenely wealthy spouse), jurors are concerned that they will face the specter of age discrimination in the distant or near future.

- EEOC v. Baltimore County, 921 F.2d 1066, 1071 (4th Cir. 1991)

Baltimore County Maryland had engaged an actuarial firm (Buck Consultants) to assist it in ascertaining the amount of money that employees would have to contribute relative to their obligations in connection with their pension benefits. In order to achieve certain objectives and to insure that all employees received the same level of pension benefits, Buck based its calculations for employee contribution rates on the number of years that an employee would contribute to the plan before becoming eligible to retire at age 65. Buck ultimately concluded that older employees who enrolled in the plan would have to contribute a higher percentage of their salaries because their contributions would earn interest for fewer years than the younger employees' contributions.

Two county employees filed charges of discrimination with the EEOC alleging that the County's plan and disparate contribution rates discriminated against them based upon their ages. The EEOC filed a District Court action on behalf of the two employees and a class of similarly situated other county employees who were over 40 years of age when they enrolled in the pension plan.

The District Court concluded that the plan's employee contribution rates were not motivated by age, but instead by the number of years remaining until an employee reached retirement age. The lower court concluded that age based rates were permissible based upon the financial consideration of "the time value of money." The EEOC appealed.

The Fourth District found in favor of the EEOC. It used the example of a 20 year old employee and a 40 year employee enrolling in the plan at the same time where both to retire after 20 years of service. Under those circumstances, the older employee would have contributed a greater percentage of his annual salary to the plan despite receiving the same level of pension benefits as the younger employee. As a consequence, the plan on its face violated the ADEA.

Comment: The employee ended up on the short end even though no evidence pointed to any discriminatory intent.

- Barnett v. PA Consulting Group, Inc. 715 F.2d 1339 (4th Cir. 1983)

Judith Barnett was 57 years of age when her employer, PA Consulting Group, Inc., fired her as part of a reduction in staff. The company selected her for layoff and kept on a 41 year-old man (Gao) whose performance ratings were similar but not as good as Barnett's. She sued for age and sex discrimination. The employer successfully moved for summary judgment, and Barnett appealed.

The Fourth Circuit considered the discrimination claims under the standard Title VII analysis: "Once an employer has offered a legitimate reason for an employee's dismissal, the question at the summary judgment stage is whether the employee has 'produced sufficient evidence for a reasonable jury to find that the employer's asserted non-discriminatory reason was not the actual reason and that the employer intentionally discriminated against the employee.'" The court looks to see if there is evidence from which a reasonable jury could find

that the stated reasons for her firing is pretext and whether there is other evidence that there had been unlawful discrimination.

PA had decided that it needed to downsize and “eliminate its non-core activity.” On that basis, it elected to terminate the employee who scored better in her evaluation because her skills did not fit the work that the company would be focusing on in the future. The appellate court then evaluated whether a reasonable jury could conclude that that explanation was pretext, *i.e.*, that the real reasons were her age and gender.

In that regard, PA’s explanation did not withstand scrutiny because the younger male “was similarly situated to Barnett.” Further, “[t]he most significant differences between the two are that Gao is male and younger than Barnett. Those are differences a jury should be allowed to consider.”

The court also regarded as significant a spreadsheet which reported the ages of the employees under consideration. The trial court disregarded that evidence because Kelly, who made the decision, testified that he did not see the spreadsheet and did not consider any prodding from two other people who saw the spreadsheet. The Circuit Court found that the district court was “too quick to resolve this issue in PA’s favor[, and that a] reasonable jury could find the spreadsheet to be probative of discrimination, because the jury might infer that PA’s leadership included age as a factor in its personnel decisions. In addition, the jury might choose not to accept Kelly’s testimony that he did not consult with the people who had seen the spreadsheet.

Comment: The *Barnett* case illustrates the risks employers face in making difficult layoff decisions where they are terminating qualified employees. While PA may indeed have made this particular decision on an age and gender blind basis, and there was no direct evidence to the contrary, juries can and do employ simplistic approaches where the bare facts show that the older, female employee was selected for layoff, and a younger, male employee with a somewhat lower evaluation was kept on. It is not difficult to see how reasonable inferences can point to unlawful discrimination.

- *EEOC v. Propak Logistics, Inc.*, 746 F.3d 145 (4th Cir. 2014)

In facing statutory employment claims, employers must factor into the decision as to whether to defend on an aggressive basis, not only the likelihood of success of the claim on the merits, the damages exposure, and defense expense, but plaintiff’s attorney’s fees as well. Furthermore, the playing field is far but level with regard to fee recovery, both because courts are loath to award fees against plaintiffs and because an award of fees against a plaintiff is often moot because the plaintiff lacks any assets to pursue.

This case however stands for the proposition that plaintiffs are not immune from adverse fee awards in every instance. The EEOC is not judgment proof, and at least in this instance, it can be guilty of an overbearing approach (*i.e.*, the notion that “we’re the government, and you’re not”) with a remarkable combination of exceedingly poor judgment and exceedingly poor execution. The result was a fee award rendered against it, and a district court decision upheld on appeal.

In January, 2003, Michael Quintois filed a charge with the EEOC claiming that he had been discriminated against on the basis that he was an “American,” and that he had been

denied opportunities for supervisory positions because Hispanics were favored. The EEOC proceeded at a snail-like pace such that it did not initiate litigation until the summer of 2009. In the interim, Quintois obtained a right-to-sue letter which resulted in resolution between himself and Propak within four months.

By the time the EEOC filed its suit, which included class claims, Propak closed the facilities in question. As a result, the injunctive relief sought was moot, and Propak's ability to defend itself was compromised because many of its witnesses were no longer available. As a consequence, Propak moved for summary judgment on the basis of laches.

The district court not only granted the motion, but awarded attorney fees for almost the entirety of the \$192,000 that Propak sought.

Interestingly, the basis for the fee award was not the unconscionably longer period of time (six and one-half years) between the filing of the charge and the filing of the lawsuit and the basis for the summary judgment, but instead that the class action suit was moot at its inception. The EEOC was unable to identify any victims of the alleged discrimination. In addition, injunctive relief could not be awarded because the facilities in question had all closed such that there were no supervisory positions for any potential class member to be placed in.

It is important to note that the holding in this case does not change the standards for awarding fees to defendants in Title VII claims. The court cited *Christianburg Garment Co. v. EEOC* 434 U.S. 412, 98 S. Ct. 694, 54 L.Ed.2d 648 (1978) in stating "[i]n contrast to a prevailing private plaintiff, who generally will be awarded attorney's fees under this provision, a prevailing defendant is eligible to receive such an award only when the court finds that the plaintiff's action was 'frivolous, unreasonable, or without foundation.'"

This case featured a well-reasoned concurring opinion that pointed out a perceived an "unfortunate implication" that federal agencies generally and the EEOC in particular should be treated differently from private parties with regard to attorney fee determinations.

The EEOC had argued that the large number of claims it handles necessarily overburdens the agency resulting in the delay in this case. While individual employers of course do not see such volume, they of course have more limited resources available to contest claims. As a consequence, they are compelled to settle unmeritorious claims because of economics.

Comment: While we can enjoy seeing the EEOC get its comeuppance, we must recognize that the circumstances for this sort of award of fees are rare. The mere fact that the employee prevailed alone will not give rise to a fee award. The circumstances will have to be of a similar egregious nature to those in the *Propak* matter.

The following two cases have nothing to do with age discrimination or harassment, and one of them is not an employment case at all. Both however are U.S. Supreme Court decisions that merit discussion.

- Am. Exp. Co. v. Italian Colors Rest., 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013)

This case follows *AT&T Mobility, LLC v. Concepcion* (563 U.S. 321, 131 S.Ct. 1740, 179 L.Ed.2d 742, 2011) and like its predecessor, voices approval of the Federal Arbitration Act (FAA).

Put very simply:

The text [of the FAA] reflects the overarching principle that arbitration is a matter of contract. ... And consistent with that text, courts must 'rigorously enforce' arbitration agreements according to their terms, ... including terms 'that specify *'with whom* [the parties choose to arbitrate their disputes,' ... and 'the rules under which that arbitration will be conducted.' ... That holds true for claims that allege a violation of a federal statute, unless the FAA's mandate has been 'overridden by a contrary congressional command,' [Cites omitted.]

The Court upheld the FAA in this instance because no contrary congressional command required rejection of the waiver of class arbitration.

- Univ. of Texas Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 186 L. Ed. 2d 503 (2013)

Naiel Nassar sued his former employer, a university medical center, claiming that one of his supervisors harassed him because of his religion and ethnicity to the extent that he was constructively terminated from his position as a faculty member and physician, and that a second supervisor retaliated against him for complaining about harassment by working to prevent him from being hired a doctor at an affiliated hospital.

With regard to the retaliation claim, the Supreme Court held that causation must be established pursuant to "but-for causation" principles. That presents a more difficult hurdle for claimants than would the standard in §2000e-2(m) where it would suffice that the claimant show that the motive to discriminate was one of the employer's motives, even if the employer had other, lawful motives for the decision.

MEDIATION AND THE MEDIATOR: THE CHARACTERISTICS AN EFFECTIVE MEDIATOR MUST POSSESS

By Christopher P. DePhillips, Director, Gibbons, P.C., Newark, N.J.
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Morristown, N.J.

Mediation is a non-adversarial dispute resolution process where an agreed-upon impartial third party (the mediator) facilitates and encourages negotiations among the parties. During a mediation, the mediator's main goal is assisting the parties in reaching a mutually agreeable settlement. Notably, mediations are often not required during litigation and a mediator has no power to make binding decisions. Nevertheless, any mediated agreement is enforceable in court.

One of the significant benefits of mediation is that it saves the parties time and money. When considering today's economy, mediations provide a cost-effective and trustworthy means to mitigate expense and minimize risk associated with an uncertain jury process. Given the significant differences between mediation and traditional litigation, it should come as no surprise that varied skill sets are required to be an effective mediator.

Choosing a mediator who possesses the characteristics necessary to help the parties come to an amicable solution is essential to a successful mediation. Mediators must be solution-oriented individuals possessing the right temperament to hold a neutral path and lead parties to consensus. They are individuals who must listen to your dispute with the goal of helping the parties reach an agreement that is beneficial to all sides. They must be diligent, compassionate, flexible and well-trained individuals who possess characteristics suited for creative problem solving.

Interestingly, both the New Jersey Court Rules ("Court Rules") and the Standards of Conduct set forth by the New Jersey Association of Professional Mediators ("Standards of Conduct") have been drafted in a manner which implicitly call for mediators to embody certain characteristics. In this regard, the Court Rules and Standards of Conduct require mediators to analyze the dispute from different vantage points and help the parties formulate an amicable solution. As a result, the Court Rules and Standards of Conduct ensure that New Jersey mediators provide the most effective support.

While not an exclusive list, a successful mediator must embody the following characteristics: Integrity, Trustworthiness, Impartiality, Excellent Listening Skills, Empathy, Ability to Facilitate Communication, Competence, Ethics, Diligent Training, and Flexibility. What follows is an analysis of how each quality is embodied in the Court Rules and Standards of Conduct.

Integrity/Trustworthiness

Integrity, Trustworthiness, and Impartiality are essential for any mediator. If the parties cannot trust the mediator, they will never value any suggestions the mediator makes. N.J. Ct. R 1:40-4(d) states that "unless the participants in a mediation agree otherwise or to the extent disclosure is permitted by this rule, no party, mediator, or other participant in a mediation may disclose any mediation communication to anyone who was not a participant in the mediation." Additionally, Standard 1(D) of the Standards of Conduct, states that a "mediator shall not undermine Party self-determination by any Party for reasons such as higher settlement rates, egos, increased fees, or outside pressure from court personnel, program administrators, provider organizations, the media or others." Similarly, R. 1:40-4(f)(1)(A) requires every mediator to make inquiries to determine facts which could affect the mediator's capacity to be impartial.

The Standards of Conduct also require a mediator to “guard against partiality or prejudice based on a participant’s personal characteristics, background, values and belief” and “should neither give nor accept a gift, favor, loan or other item of value that would be likely to raise a question as to the mediator’s actual or perceived impartiality.” Standard II (B)(1)-(2). Lastly, a mediator must withdraw “at any time, a mediator realizes that s/he is unable to conduct a mediation in an impartial manner, and that no reasonable effort is likely to ameliorate the problem.” Standard II(C)

As represented above, the integrity, impartiality, and trustworthiness of the mediator are vital to the mediation process. If the mediator cannot be relied upon to represent the interests of both parties, creative solutions will be impeded. Thus, it is no surprise that the Court Rules and Standards of Conduct focus on these qualities. By blending these characteristics into the Court Rules and Standards of Conduct, the New Jersey Courts ensure that a mediator will embody the core characteristics necessary to succeed.

Good Listener/Empathy/Ability to Facilitate Good Communication

Mediation also provides a safe avenue for decision makers to communicate, while at the same time testing several avenues for resolution. To maximize the communication process, a mediator should have enhanced listening skills, but also facilitate quality communication. In short, the mediator should possess the ability to coach the parties to an optimal solution.

R. 1:40-4(h)(2)(A) requires a mediator to terminate the mediation if there is a failure of communication, which cannot be remedied and impedes effective discussion. A mediator is also required to terminate the mediation if, while conducting the mediation, it becomes apparent that there is an imbalance of power which cannot be overcome. R. 1:40-4(h)(1)(A). Similarly, “[a] mediator shall make reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator.” Standard III (B).

As you can see, an effective mediator isn’t limited to asking the right questions; she must also listen well to the answers received. One of the mediator’s primary duties is to manage the parties’ expectations. The mediator must make appropriate inquiries to help both parties recognize they each have strong and weak arguments. The mediator must listen to what the parties are saying as well as what they are not saying. Mediators must also analyze body language. The mediators who appreciate these truths are best suited to help all parties succeed. While in stark contrast to Court proceedings, these efforts are necessary to help the parties come to a resolution where everybody wins.

Competence/Ethical/Well-Trained

To ensure competent mediation, the Court Rules and Standards of Conduct require rigorous and continuous training.

In New Jersey, all mediator applicants must complete a minimum of 18 hours in an approved mediation course. R. 1:40-12(b)(1). The 18 hour course shall include “lectures, demonstrations, exercises and role plays, [and] teach the skills necessary for mediation practice, including but not limited to conflict management, communication and negotiation skills, the mediation process, and addressing problems encountered in mediation.” R. 1:40-12(b)(3). Additionally, all applicants for mediation must be mentored by an experienced mediator for at least five hours unless the applicant can demonstrate that they have previously served as a mediator in at least five Superior Court cases (other than Special Civil) or in a comparable mediation program or have satisfactorily completed at least 10 hours in an approved advanced mediation course. R. 1:40-12(b)(1). Any potential applicant must also have an advanced degree, including, but not limited to a Juris Doctorate, Advanced Degree in Business, Finance or

Accounting, or an undergraduate degree.¹ R. 1:40-12(a)(3). Lastly, the New Jersey Court Rules require that all mediators attend four hours of continuing education at a minimum. R. 1:40-12(b)(2).

Similarly, the Standards of Conduct state that a “mediator shall only mediate when the mediator believes s/he has the necessary competence to satisfy the reasonable expectations of the Parties.” Standard IV (A). Indeed, the title of “mediator” carries a significant amount of responsibility and expectation. Those responsibilities and expectations require “experience in mediations, skills, cultural understanding, and other qualities . . . necessary for mediator competence.” Standard IV (A)(1). Like the New Jersey Court Rules, the Standards of Conduct also encourage any potential mediator to “attend educational programs and related activities to maintain and enhance the mediator’s knowledge and skills related to mediation.” Standard IV(A)(2).

While a mediator must be an effective and empathetic listener, a mediator is not an untrained push over. Although mediation is not always required, the New Jersey Courts value this process and seek to provide all litigating parties with the best trained mediators. Often times, mediators face an array of ethical issues which could stop a mediation in its tracks. The only way to confront these issues is through diligent preparation and proper training. By requiring such an onerous level of instruction and accreditation, the New Jersey Court’s ensure that each mediator has the skill set necessary to overcome even the staunchest advocate.

Flexibility

Mediator flexibility is essential to helping the parties focus on problem-solving instead of battle. In this regard, the mediator must think about what each party needs in order to put everyone on the same path toward resolution. Whenever the parties are having difficulty comprehending the process, issues, or options, the mediator should explore all circumstances and possible adjustments to the mediation process that would increase “the Party’s capacity to comprehend, participate and exercise self-determination.” Standard VI (10). Likewise, the Standards of Conduct require that a mediator “promote honesty and candor between and among all the participants” and “not knowingly misrepresent any material fact or circumstance.” Standard VI (4).

The only way mediation works is if all parties, and the mediator, enter the process with an open mind. This can be difficult, however, when each party enters mediation with a position that is generally in opposition to the other. Mediation requires the mediator to explore all options and create new possibilities for success. Only through creative thinking and flexibility can a mediator maximize the benefit of mediation and create a solution that satisfies the needs of both parties.

Conclusion

With litigation remaining cost-prohibitive for many litigants, mediation provides a cost effective, cooperative, and viable option for dispute resolution. As discussed above, the New Jersey Court Rules and Standards of Conduct require individuals with creative and inventive minds to assist litigants in resolving their disputes. While New Jersey mediators are fair, well-trained, and often possess advanced degrees, they must embrace the opportunity to present novel ideas to the parties and assist them in coming to mutually agreeable solutions. Unlike trial, in mediation all parties have control over the outcome. Although mediators cannot create binding decisions, they can bring parties to consensus and avoid the risk of trial through effective communication and creative problem-solving. The more creative the mediator, the more that

¹ Utilizing an undergraduate degree also requires evidence of successful mediation of at least ten Superior Court cases within the last five years.

opportunities exist for dynamic solutions. Given today's economy, mediation is an attractive alternative to full battle at trial as long as the parties have an effective mediator who is trustworthy, flexible and solution-oriented.

The Effective Mediator

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The effective mediator is the person who can get the job done, and resolve the dispute. The key to resolution is to craft a process to remedy the gap between each party's position and a new area of understanding.

KNOWLEDGE IS POWER

To accomplish this, a mediator must possess three things:

- Knowledge of the parties;
- Knowledge of that area of the Law in question;
- KNOWING THE Value of the remedy.

Absent any of those three, the mediation is doomed to failure.

Why the PARTIES?

The ability to read and respond to the human condition is essential to motivating and or persuading a party to redirect her priorities and focus. If the moving party is a control freak, a hard tough guy push is not called for.

Likewise, if the moving party is insecure and timid, a hands-off approach will not assist in resolution. Should the mediator not know the parties going in, research is called for. Check out similar cases the attorney has tried. If the party is a corporation, do they settle or try everything?

Why the LAW?

How can you possibly hope to resolve a class action without keeping up with the plethora of U.S. Supreme Court cases changing the direction of class action decisions?

If you have an Environmental case and you are unaware of both State and Federal laws, how can you even hope to craft a solution to a particular event?

KNOWING WHAT VALUE REALLY IS?

Remedies do not always equal money damages.

Clearly in employment discrimination cases back pay is important but reinstatement may be more important. An apology and reformation of workplace issues may have been the driving force for a lawsuit.

Natural resource damages in the forms of credits for projects benefitting the public good may be more important than injunctive relief.

Sometimes paying for the explanting of a defective product plus cash is better than just the cash.

KNOWING THE WHEN AND WHERE OF RESOLUTION

When resolution is made is truly the art of the deal. If the parties start **too early** there may not be an incentive to resolve, i.e., no trial, e-discovery costs have not hit.

Waiting until after all the discovery is done, sometimes may be **too late**.

A good mediator will speak with the parties before any in person meeting and LISTEN to what is being asked of the mediator. More often than not, the parties will tell you when the time is right. The talent of a good mediator is to listen for the truth.

WHERE to hold the mediation may sometime affect the outcome. If you are ordered by the court to use a conference room at the courthouse across from chambers that is a bazooka pointed at the parties' heads.

If however, one party insists that the mediation take place at corporate headquarters, the likelihood of success is low. Likewise, mediating a pollution case at the home of a victim is front end-loaded for failure.

To a great extent, the effective mediator must think about the tangible and intangible factors involving resolution. The effective mediator must create the optimum conditions conducive to resolution without a theatrical production overwhelming the greater purpose-form over substance.

Above all, the effective mediator must hold his/her credibility even if there is no resolution. The seeds planted by a truthful, ethical and practical mediation may not bloom that day but may in days or weeks to come. Don't be surprised if one

of the lawyers tells you that they did not really need a mediator, they settled,
“ALL ON THEIR OWN.” Just keep smiling and keep doing what you do best!

**BEHIND THE CURTAIN: THINGS YOU DON'T KNOW BUT PROBABLY
SHOULD ABOUT WHAT DRIVES YOUR CLIENTS' DECISIONS**

**FDCC Annual Meeting
The Greenbrier
White Sulphur Springs, West Virginia
July 27-August 2, 2014**

**Presented by:
Heidi G. Goebel
CHRISTENSEN & JENSEN, P.C.
Salt Lake City, Utah**

When communications are clear and the client and outside counsel are seeing eye-to-eye on how to handle pending litigation, the pair can be formidable. However, there are times when the requests and directives from in-house counsel to the outside attorney may not mesh quite as well. Outside counsel may feel that they are dealing with the great Wizard of Oz - a formless booming voice emanating behind a curtain – doling out seemingly random tasks such as bringing the Wicked Witch of the West’s broom to the Wizard with no explanation as to how that broom furthers the goal of getting Dorothy back to her beloved Kansas. Outside counsel may feel like the hapless band of characters facing opposing counsel who resemble flying monkeys and preparing lengthy motions as sleep inducing as a field of poppies with no explanation as to how that furthers the goal of getting Dorothy back to her beloved Kansas. In-house counsel may feel frustrated and unsupported when outside counsel seems to be lacking in “buy in” on the ideas proposed.

Sometimes just having a view from behind the curtain illuminates the purpose of the tasks. This paper, and the presentation which will accompany it, will provide insight into some of the common, and not so common, nuances that drive the decisions of the people who are purchasing the litigation services. Further, included are tips which can help you find out what is pushing your clients towards certain goals and how to reconcile those goals with litigation strategy and tactics.

Although each business organization is different, there are some guiding principles which can be used as a road map to understanding what is driving your client’s litigation decisions.

Follow the Yellow Brick Road – and the Model Rules of Professional Conduct

“The Wizard of Oz” was a satire of the economic status of the United States. The yellow brick road was a thinly veiled reference to the gold standard. The majority of businesses have the goal of making a profit and many of their decisions are driven by the desire to reach that goal. A great place to start in looking towards the best way to serve your client is a review of Rule 1.4 of the Model Rules of Civil Procedure. It states:

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Using this template should keep you in the good graces of your client and away from any grievance committee. But, aside from following the rules for the sake of following rules, it is important to understand the impact they have.

Budgeting

Quite possibly the most common underlying factor of decisions in litigation is economic. Likewise, one of the most common requests for information from a lawyer has to do with budgeting. While in-house counsel is your boss in the litigation, it is important to remember that with very few exceptions, each in-house counsel has someone that he or she reports to, whether it be a president of the company, a board of directors or shareholders. Because litigation is a cost for the corporation, being able to accurately estimate the amount of that expense and often when those expenses will come in is crucial to managing cash flow and corporate expectations. The need to have up to date and accurate reports of estimated legal expenses is often driven not by anything directly related to the litigation or its expense but because of an unexpected expense in some other area of the business, or an unexpectedly low revenue period.

Take inquiries regarding budgets seriously. These budgets may drive the strategy and timing of various aspects of your litigation. Cash flow in a given month may dictate waiting a few weeks to take that key deposition, or anticipated year end expenses may mean that accomplishing some legal tasks early in the year is crucial. Setting mediation or timing of settlement payments all may be controlled by company-wide budgets.

When evaluating legal counsel it is common to look at success in the following arenas: (i) keeping within the budget; (ii) effectiveness in handling the matter; and (iii) communication with the client and commitment to client satisfaction.

Make realistic projections

Many folks believe that they need to put in some extra fat in their budgeting to ensure that there aren't surprises of extra expense. Some believe that coming in "under budget" earns them kudos with their clients. There is some truth to each of these theories. Like a construction project, in litigation there are often unexpected twists that arise. An ill-advised motion filed by the other side which nonetheless requires time and energy on your part to respond. An unusually large cache of documents which need to be reviewed. An odd ruling from a judge on

a discovery issue. But, significantly over budgeting and consistently over budgeting only leaves your client with unreliable numbers for their own budgets. That over budgeting could be the difference between issuing quarterly dividends and bonuses.

The litigation budget should be a conversation starter. Pick up the phone and discuss the budget with the client. Make sure you have the same goals.

“Step reserves” don’t help. This is when you incrementally increase the reserve as the case goes along. Changing the reserves affects the company’s metrics and information. It causes the actuarial folks to lose confidence in the Clams adjustor’s work. Give a good analysis early in the case. Change it if you have to but keep in communication with the adjuster.

Stated another way, the clients do not like surprises. Of course there are sometimes turns of events which you couldn’t, or at least, didn’t foresee that come along from time to time. But, be diligent when doing your initial evaluations. If opposing counsel is someone you’ve never run across before, survey your colleagues to find out if they have heard of this person, what their experiences were. Often, opposing counsel has more impact on the cost of litigation and the anticipated outcome than any facts or rules. Try to take that into consideration when making your projections.

Likewise, if something happens which substantially changes the face of the litigation or the parameters you utilized in making your projections, advise the client of those changes immediately. Allowing them to adjust their reserves as soon as possible is important to running a successful business.

Know your client

The lawyer ought to know what the client considers “a win.” In order to do this, the lawyer needs to know what the client values. Ask the client what it values. You need to focus on the client’s business. Consider having quarterly meetings or conference calls with key clients to make sure things are going smoothly. Use these calls to undertake a general review of matters and of the relationship.

Add your client to your Twitter feed, and your Lexis/Nexis alerts. Periodically peruse their websites. Follow their blogs. Google them. Your client shouldn’t have to call you to tell you developments in their company that are in the news. You should be showing enough interest that you are aware that they’ve given sponsorship large enough to have a major sports stadium named after them, or that they had a recent product recall and be able to tailor your advice accordingly.

This goes not only for the company, but for the individual with whom you are working as well. Find their LinkedIn or Avvo pages. Having information regarding this person’s

background allows you to avoid underestimating their experience. It allows you to tailor your reports and response to explain the matter in a way which is neither too basic, nor over the head of the person receiving the information. Learning the daily pressures faced by your contact with the client can make life easier for both of you. Find out what their responsibilities are and then provide them with the information targeted to their needs

Comply with Litigation Management Guidelines

A slightly different approach that touted essentially the same message was to “be remarkable.” Really understand your client’s business. This means not just the insurer who issues the CGL policy, but the insured’s business. You want to become the “trusted advisor” to the business. You want to be the “go to gal (or guy).”

The art of being a successful practitioner is to deliver the expected outcome. Don’t overdo things at your expense. Don’t fall short at the client’s expense. Deliver the expected outcome. For example, rather than submitting the 25-page law review article, just give the client the specific answer to the specific questions. You want to be honest and focused, and working with integrity. Good lawyers give basic, practical advice in a clear and concise manner.

There are case reserves or the reserve on your claim, and there are actuarial reserves that have to deal more with the general profitability of the company. Getting the reserves wrong can be catastrophic. One guy made reference to Tower Insurance, which apparently is melting down because of errors in the company’s reserves. Claims people can bring a carrier down pretty fast.

Give your client the information it requests

Generally, the client initially is trying to figure out whether to settle or defend a case. In order to answer that discussions, once of the most important issues is what is the claim worth? In order to help them wade through the evaluation of this matter, streamline the reporting process. Give them the facts of the case and the litigation process. Tell them what has changed. Answer these questions up front. Don’t put the answers on page 25 of a long report. Make your client’s life easier. Give solid recommendations. Use reasonable ranges.

Do not surprise the client. Delight the client. A looming trial date is never a good reason to change liability or damages estimates. Likewise, vacations or other personal issues should never be the reason to change an evaluation. Your reports should be less fluff and more substance: here is what has happened over the month and this is what has changed. Do not send “justify the bill” letters.

Follow the guidelines. Follow the format of the reports. Give the clients what they want.

Do self-evaluations of your performance

At the conclusion of your case, go back and compare your initial estimates with the actual results and expenses. Try to use the same metrics that your clients use. Often there is no harsher critic of your work than you would be. If you are meeting your own standards, there is a good chance you are meeting the clients standards as well.

Make sure you understand the impact your case has on the client

Handling a small one of a kind matter has a much different impact on a corporation than “bet the company litigation” or handling a claim which has tens or hundreds or even thousands of brethren claims with similar facts. Make sure you understand if your actions in this case have an impact on other litigation

Be mindful of insurance coverage issues

Your clients pay a lot of money to you for your services. They also pay a lot of money to their insurance carriers. Make sure you are following the insurance carriers’ guidelines. Creating work and batters between our client and their insurance company does not win you any points in the litigation arena.

Likewise, make sure you understand what claims are covered, and if there are nay which are not. Winning on that novel, complex and involved motion for partial summary judgment on the one and only claim that triggers insurance coverage may end up costing your clients a lot of money in defense costs and settlement or liability payments in the long run

Remember to provide the pros and cons of all the options available

Your role as counsel and advisor is to provide all the relevant information your clients would need or want to make well informed decisions. So make sure that you have thought through the risks of various recommendations and that you provide that information to them.

Rules of Ethics

All of the advice above is supported by the Model Rules of Professional Conduct. But what is a lawyer to do when he and the client do not see eye to eye on a course of conduct. Model Rule of Professional Conduct 1.2 defines the relationship between a lawyer and a client:

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Basically, unless it is against the law or violates local rules, the client is King. On occasion there may be a local rule or custom that is unfamiliar to the client and is contrary to the plan proposed by the client. In those events where pressure is being applied to skirt the local rules of civil procedure providing a copy of the rule to the client with an explanation of how the clients goals can be met while still keeping within the local rules and guidelines.

Conclusion

Ask your clients what is important to them. Do your due diligence to find out what their goals are and partner with them to meet those goals. Touch based with them regularly throughout the litigation to make sure that you are both on the same page and that both the lawyer and client are aware of any changes in the clients' business or the litigation that may impact the goals previously set forth. By doing so it increases the likelihood that the client will be satisfied with its retention of the lawyer and the results.

Pssst...

Secrets of Highly Successful Law Firms

FDCC Annual Meeting

The Greenbrier

White Sulphur Springs, West Virginia

July 27-August 2, 2014

Neil Goldberg, *Goldberg Segalla*, Buffalo NY

Deborah Kuchler, *Kuchler Polk*, New Orleans LA

Michele Miller, *Miller Law Group*, San Francisco CA

Michael Tanenbaum, *Sedgwick*, Newark NJ

Richard Traub, *Traub Lieberman*, Red Bank NJ

Moderator: Brett J. Preston, *Hill Ward Henderson*, Tampa FL

VALUES THAT FOSTER EFFECTIVE STRATEGIC PLANNING FOR THE SUCCESSFUL LAW FIRM
OF THE PRESENT AND THE FUTURE

Neil A. Goldberg, Esq.

What Values are Required to Successfully Implement a Strategic Plan?

- Successful communities agree to enforce shared values.
- Education
- Leadership
- Proper support and resources for our community
- Compliance is enforced and reinforced, if necessary with consequences.
- An inability to adhere to the community's values requires disassociation with the community.

Our Commitment to Each Other

- Create a supportive environment.
- Focus on TEAM – Together Each Achieves More.
 - Marketing
 - Planning
 - Administrative
 - Client Matters
 - Success, not “credit” is what motivates us
- Leaders embrace being “managed” on compliance and mentor others.
- We strive to exceed expectation
- We embrace innovation and creativity
- Invest in superior support staff, internal systems and technologies.

Key Team Values

1. “Get it done” attitude – Customer/client satisfaction is a top priority at our firm. Solve the problem – don’t blame or make excuses.
2. Ethics – Zealous advocates who play fair and by the rules.
3. Appreciate and Listen – We devote non-billable time to helping each other when facing sensitive client or personal issues.

4. TEAM FIRST – No Lone Rangers – One office, practice group or person does not take priority over another. We do everything as a team and must always think as a team.
5. We must learn and develop new skills, and encourage others to do the same.
6. Accountability
7. Reliability
8. Open Door – Approachable
9. Integrity & Ethics – no lies, no agendas.
10. No jerks! – Diplomacy, courtesy, professionalism is key, no drama, judgment, respect
11. We WILL create opportunities for each other

Unacceptable

- Abuse of power or position
- Any disrespect shown by anyone else
- Anyone who is abusive
- Back stabbing
- One office, practice group or person doing anything unilaterally
- Being late to meetings. (On-time is 5 minutes early)
- Not responding to e-mail or other requests

What We Must Be Intolerant Of

- Failing to keep information confidential
- Bullying
- Rivalry
- Political Agendas
- Cross-departmental rivalry
- Cruising
- Dealing in blame
- Derogatory statements
- Drama
- Disrespect of any kind
- Risky clients, where there is the potential of failure from a relationship standpoint
- Clients who abuse our people
- Gossiping, whining, complaining.
- Hiding from accountability
- Lack of teamwork
- Bad coaches
- Non-compliance with standards
- People who try to make their own rules
- Screaming

- People who don't hold up their end of the deal
- Shirking or dumping responsibility.

Additional Values for Success

Financially successful firms outperformed the rest on 85% of the following:

1. Generating enthusiasm and morale
2. Encouraging the best work out of everybody
3. Fostering commitment and loyalty
4. Listening to our people
5. Being trustworthy
6. Operating in accordance with the firm's overall philosophy and values: "practicing what we preach"

Value Proposition

- Create a Climate where truth is heard through firm, offices and practice groups
- Don't let vision and self-confidence get in the way of dealing with truth
- Autopsies without blame
- Build mechanisms to turn information into red flags that cannot be ignored
- Commit to a values statement and have community sign endorse it

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PHILOSOPHY LEADS TO PROFIT

Deborah Kuchler

Developing that essential collaborative atmosphere requires firm leaders to ask the critical question: What are the firm's overarching principles? These principles should be the

beacon by which key strategic decisions are guided. Firm culture should reflect those principles. And, to promote diversity in the workplace, flexibility needs to be woven into the fabric of the firm.

The Issues

The core issue is whether the firm will chart its course based on how much money can be made or saved by each decision *or* based upon the firm's principles. Often business owners put profits above all else, assessing problems and solutions in the way that maximizes money in the coffers. While being profitable is certainly a key component of any business – including running a law firm – it's not the sole goal.

Can the firm adhere to solid principles and philosophies and earn higher profits in the long run? Absolutely.

The Challenges

In the busy world of today's lawyers, it's hard to find time to reflect on the firm's core principles and strategic goals. Deadlines, client needs, trial settings and the like keep our attention focused on immediate needs. So, it is a challenge to find time to thoughtfully consider what the firm stands for. Yes, the firm stands for delivering high quality legal services for a good value. But, that's really the base line. That's the firm's invitation to the ball. Keeping the glass slippers past midnight requires much, much more.

Even when the firm has taken the time to define the philosophies by which it will be guided, putting those principles into action is often challenging. It's tempting to take short cuts or make exceptions under the guise of efficacy. Resist the temptation!

Creating a workplace culture that fosters excellence, individuality and independent thinking is a laudable goal but one which is harder to do than to say. People need to feel appreciated and valued. Again, because of busy schedules, law firm leaders often forget to acknowledge a job well done or say "thank you." That costs nothing and engenders good morale and loyalty.

Work-life balance is a term often tossed around. Yet, providing flexibility to permit that balance is often seen as an insurmountable obstacle to many firms. Diversity involves more than representation of women and minorities in the workplace. Diversity means allowing people the freedom to develop the work-life balance that matters to them as long as the work is done reliably and well. Much consideration is given to working moms. But, what about working dads? Fathers are more involved in their kids' lives than ever. Many want flexibility to coach the soccer team, attend the chess match or video the dance recital. Apart from

parenthood, some lawyers face eldercare issues requiring flexibility. Others want flexibility to pursue issues apart from the law.

Steps in the Right Direction

How do we address these challenges?

- Set aside uninterrupted time for firm leaders to outline the principles by which the firm will be guided. Some examples include:
 - Do the right thing and not necessarily the convenient thing.
 - Be scrupulously honest.
 - Always take the high road.
 - Do not fudge on client conflict issues.
 - Remain loyal to clients based on relationships and not based on perceived dollars in the door.
 - Never compromise quality.
 - Value people for their individual strengths.
 - Be wisely compassionate to employee needs.
 - Keep the firm debt free.
 - Pay people what they are worth and not the least you can get away with.
 - Give back – be a giver and not a taker.
 - Promote the good of the team, build each other up, share the glory and the blame.
 - Check your ego at the door.
- Communicate those principles to firm employees and make it clear that they, too, are expected to comport themselves in a way that honors these principles.
- Model these principles every day. Acknowledge, where appropriate, when others reflect the firm's principles. Take corrective action when they don't.
- Broaden your view of "diversity."
- Be creative in formulating solutions to work-life balance issues.

While many of these concepts sound intuitive, it will take a concerted effort by the firm to articulate them and then put them into action. The result can be a workplace where integrity is the guiding light, high quality legal work is done *and* people are happier doing it.

THE IMPORTANCE OF BRAND

Michele Ballard Miller

There are many reasons why we choose to start our own businesses, merge with another business, or expand an existing business. A recent (and informal) survey conducted by Inc.com uncovered the top reasons why small business owners started their own businesses. Key motivators include wanting to reap greater financial rewards; have more control over your destiny; have a work-life balance; choose the people you're working with; find new challenges; and connect directly with clients.

But is a hunger for financial success, challenge, or balance enough to ensure success in a new or growing business or partnership? Probably not. It's no secret that law firm failure rates are high, and even many law firm mergers fail, despite the passion and drive of the founders. So what is a key differentiator between firms that succeed and those that fail? How can you build a business that is sustainable and successful?

Fifteen years ago, I left the partnership at a large national firm to start my own firm. My vision was to build a women-owned law business that focused on employment litigation specifically for California employers, but also provided a work-life balance for our lawyers and staff. That was our niche – it was how we were going to be different from the firms at which I'd spent my career thus far. I knew enough, however, to recognize that just having a vision doesn't translate into new clients walking through the door. We had to figure out how to turn the vision into our Brand.

Issues and Challenges

The reality is that, with some exceptions, there is not a lot of "new" work to be had for law firms. As a result, new business for you means taking business from someone else. By the same token, there are a lot of law firms that do the same types of work that your firm does. And many of them, like your firm, perform quality work. Building your firm's book of business means finding a way to stand out from the pack, be recognized, and resonate with clients and potential clients. And that's where branding comes in.

For law firms, a successful brand is not just about a fancy logo or catchy slogan. It's about communicating who/what your firm is, along with your strengths and differentiators. What makes your firm distinctive? It's a promise of what your firm will deliver. For example, a firm's brand might focus in on specific practice areas or unique services, focused industry segments, or regional (or even global) expertise. A brand can also emphasize, for example, alternative fee arrangements, value-added benefits, client service values, or firm culture.

Creating your brand is the first step. From there, you have to build the brand, making sure that it is strengthened through your firm's business and marketing efforts. Then the brand

has to be maintained through focus and consistency. And even the strongest brand has to be continually evaluated and to adapt and evolve to meet the changing needs of clients and the legal services market.

Steps In The Right Direction

Having a strong brand will help put your firm on the radar, and lay the foundation for building, developing and maintaining lasting relationships with valued clients. Here are some steps firms can take to create, build, maintain, and adapt their brands:

- *Find your differentiators.* How are you different from your competitors? What can you offer that's unique? And which of those factors will resonate with your intended client base?
- *Be focused.* In developing your brand, stay focused on the fundamental differentiators for your firm. Going in too many directions and trying to be too many things to too many sectors will more likely dilute your identity than enhance it.
- *Develop a strategy.* Determine how your firm wants to be positioned. Make sure you incorporate research on who your audience is, the legal market, your competitors, and other relevant factors. From there, your branding, in all its forms, should reflect that positioning strategy.
- *Be creative.* Find innovative and imaginative ways to market your brand, always staying attuned to reach your target audience.
- *Be consistent.* From printed materials to websites, to social media posts and speaking engagements, to one-on-one meetings and recruiting, advertisements, and sponsorships, your branding initiatives should be consistent with each other and consistent with your firm's strategy.
- *Be proactive.* Periodically assess and update your brand in light of changes in market conditions, the legal practice, and within your firm.
- *Raise brand awareness internally.* Make sure that your lawyers and staff understand the brand, and their roles in building and communicating the brand, as applicable.

In closing, I want to share one of the most important marketing lessons I've learned over the 15 years since I started my firm: Whether the law firm brand is specialized legal expertise, experience with an industry sector, alternative fee arrangements, diversity, work-life balance, or something else, a brand that is only "skin deep" won't help you stand out in the long term. Marketing your brand may help get your foot in the door at a new client – but that client will keep coming back, or refer you to others, only if you've delivered on your promise, and your brand.

TRANSFORMATIVE LEADERSHIP IN THE NEW AGE

Michael Tanenbaum

Cross your arms. Now cross them the other way. And since something as simple as that feels uncomfortable, imagine how hard real change feels.

Diverse leadership broadens intellectual horizons, cultural understanding and improves performance at all levels. Having divergent views to consider allows a broader and more inclusive understanding and improves the final work product we provide our clients – the classic example for trial lawyers is the increased understanding and communicating with witnesses, jurors, and judges who will inevitably come from various cultural and ethnic backgrounds and perspectives. Despite efforts to increase diversity in leadership roles, we must acknowledge the reality that lawyers hate change, and that transforming leadership will not happen overnight. The following will discuss the issues, challenges, and solutions affecting the transformation of law firm leadership to a new diverse platform.

The Issues

The core issue is that law firm leadership, as a whole, has not kept pace with the changes in diversity reflected in our clients and groups related to the practice of law. Law firm leadership remains OWMD - Old White Men Dominated. Whether leadership opportunities are highly structured or ad hoc, too few of them are filled by women, LGBT or ethnically diverse attorneys. One contributor to this is the lack of structured and focused on-the-job leadership training opportunities. Even if law firms wanted to implement such programs, they lack the resources to develop in-house leadership training programs that other industries have – both due to limited economy of scale or because the legal industry has traditionally not made this as much of a priority as others.

In addition, billable hours lead to profits for a firm and standing for an attorney, so even as non-billable training is made available, it is uncertain attorneys would take advantage of the opportunity. And, ironically, as clients and law firm attorneys increasingly expect law firm leadership be reflective of their demographics, those not responding quickly enough will lose client work and further diminish the resources to support training and provide diverse attorneys the opportunity to gain experience and profile.

The Challenges

Imposing diversity simply does not work. Law firm leadership at various levels is elected, and, too often, there are not enough diverse attorneys who can be credibly put forth. In advance of putting a candidate forward, firms also have traditionally failed to provide the leadership training that would help qualify a candidate. Further, advancement into leadership positions often requires the skills to navigate internal political minefields – something that law firms typically teach through trial by combat. And, for women, American culture has created

certain expectations for family style needs and desires which create barriers to advancement into leadership.

Steps In The Right Direction

No single artistic leap will make these challenges disappear – but there are solid steps that will move us to a new age:

- Openly identify attorneys who have the potential to become leaders. Do so by first gathering information and perspectives about candidates broadly, engaging your partners in the process and ensuring a diverse participation that will support a diverse result. After that broad opportunity for engagement, move to decisive and courageous selection by firm leadership.
- Hold senior leaders accountable for one-on-one mentoring and coaching to assist leadership candidates navigate the inevitable political minefields.
- Deliver innovative and effective leadership training for these diverse attorneys at different stages of their careers. Use firm professional resources including professional development, marketing and human resources.
- Firms should be educated about and openly recognize and discuss the cultural expectations causing barriers into leadership ranks for women and determine what they can do internally to overcome them.

Law firms have a unique responsibility and an equally important need to ensure that all views are given the opportunity to be heard. Successful education and integration assures institutional success by meeting client needs, advancing the quality of legal work and improving client service. Firms that do all of this add substantially to an essential collaborative atmosphere that provides a competitive edge to meet the increasing demands of the age that we live in.

NOT SO SECRET SECRETS OF MANAGEMENT AND LEADERSHIP

Richard K. Traub

When I was asked to participate in this panel and discuss the secrets to starting and managing a successful law practice, my first thought was the old joke – how do you make a million dollars and not pay taxes. First, you make a million dollars and then, you don't pay taxes. My second thought was to the old movies were the neighborhood kids say: hey gang, let's put on a show and it comes off flawlessly. In other words, first – you start a law firm, and then you worry about the business.

While there is a bit more to it, starting a law practice is in some respects just like that. Find the best talent, the brightest and hardest working attorneys, convince them that they should become your partners; and the clients will come. But that is when the hard work starts. How do you keep the partnership together, grow it, manage it, and make it an enjoyable, profitable, and excellent place to work – while at the same time providing the clients with top quality legal representation in the manner they wish. It is not a simple undertaking. Like the advise one of my friends gave me when we first opened - “make sure your expenses don’t exceed your revenue.” A good idea for sure, but there is so much more to it.

Most firms have the same strategy: provide outstanding client service, be a team player, provide a good place to work, invest in the future. Truth be told, that is the only reasonable business strategy. Just because we all have the same strategy or understand these basic concepts, however, doesn’t mean we are doing it or that it is easy. The real skill lies not in figuring out what to do, but figuring out how to do it and then doing it. And sometimes, it takes courage to do it.

Some firms choose to grow organically, some thru acquisition or merger, some have an open pay structure, some closed, some are national, some regional and some local, some step ladder salary and others are merit based, there is no one right way. But there are certain things that should be uniform and are almost certainly and consistently found in all successful firms. They include understanding the role of administration, management and leadership, the difference between them, placing the right people in the right job based on their talents, and knowing the importance of understanding the client and their business. Again, recognizing what needs to be done in your firm is the easy part, making it happen is the true test. As you will see, I am a disciple of David Maister.

Management and Leadership

Management

First, recognize that it is no sin not to be a good manager. But ask yourself, where do I make a difference? Is it administration or perhaps marketing or maybe client relations? Success is not all about “can you generate business”. Nor is it about being a good administrator or being good with numbers - in fact, I have come to realize that everything I learned while obtaining a degree in finance, plus 2 years of statistics and year in the study of Monte Carlo Simulation, is now found in the basic package of Microsoft Excel. So again, examine the critical parts of nurturing a practice and identify how much time should be spent on each.

1. Administration and Finance
 - a. Be involved at the most critical points – where you can make the biggest difference. Give the rest to the professional administrators.
 - b. Should be low percentage of your time.
2. Marketing and Selling – as distinguished from client relations. This relates to new business. If you are good at this, clearly 500 hours of time developing \$1 Million

in business is more productive than billing \$100,000 (plus or minus) – but not if this isn't your niche.

3. Client Work – being a superior lawyer. Each and every lawyer must reach this goal first. Young lawyers should not even think about marketing before they think about improving their skills to the point of excellence. Performing and providing excellent legal services is the best marketing they can do.
4. Client relations – talking with people at your existing clients' organizations. What is new with your business; what is important to you and your business; what are you worried about; are you happy with what we are doing?
5. Spending time with the people in your firm. Most of you will be surprised to hear this, but in my experience, this is the single most valuable trait of a great leader and manager, and my number 1 secret.

A leader or manager does not build a business. Rather, the successful leader builds an organization that builds the business. That is – teach others to generate business, teach others to be the best lawyer they can be, teach others how to keep clients happy and engaged, allow staff to be happy and engaged. These things require you to spend time with your people.

The least value added of the above talents is administration and finance. That is not because it is unimportant; it is because it is unimportant for the attorney leader or manager to be involved so deeply in that process. The single most important talent of a leader is talking/listening to your people, keeping them enthused, energized and maintaining a strong bond.

Leadership

So, what are some tips or “secrets” for the leader?

1. Excite, energize and infuse your attorneys and staff. Is your staff excited to do their work? Creating that energy is not “systems” – it's the talent and energy of the leader.
2. “Emotional intelligence”- the ability to understand, interpret, and respond to the emotions of others in your firm. Use this to energize, excite and infuse the others in your firm. Be intellectually obvious and emotionally hard. You do not want your firm to be a random collection of individuals – there is no value in that. There is only value if you operate as a firm.
3. Most law-firms are superbly administered and poorly managed. Work on the management and leadership, not the bean counting.
4. Incentives alone don't do it – you must actually talk to people. The key is effective communication.
5. Agree on what the job is – it's not just watching the numbers.
6. Do you have the guts to do the hard thing? To have values - i.e., if you don't get along, get a divorce.
7. Help people see work as exciting. Help them find the magic in the mundane.

8. Practice what you preach; you have rules, now follow them. Ambiguity is the problem. If there are no rules or standards, then you can't manage.
9. Making mistakes IS NOT A PROBLEM. Not trying IS A BIG PROBLEM.
10. If we hate what we do and hate our clients - slit your wrists or find something else to do. Do not do tolerate things or tolerate people just because they pay us.
11. Reaching your billable hour goal is important, but not the sole objective. If you can delegate a task, delegate it and use that time to work on talking to your people and clients.
12. Choose your managers on the correct criteria – i.e., he or she must embrace and be energized with helping others exceed their goals and raising their game. This is not the person with the sharpest pencil or the biggest rain-maker. It is the person who can excite and motivate others to build the business.
13. Knowing business and managing is very different. Being smart is not sufficient in and of itself – we tend to reward people for the wrong things. Getting your team to raise its level – how well the team does is the best measure.
14. The way to make money is not by focusing on the money; rather, it is by doing the things that make money and getting your team to do those things together.
15. Trust: make sure the person you are trying to coach understands your motives - i.e., a senior attorney in your office may already believe himself to be successful. Make sure they understand why they should listen to you.
 - a. You will have more fun and success by helping others achieve their goals rather than doing it on your own. So, to get something from Mr. X, what are you going to give him? Show him that you care. Making another person do what you want by giving them something they want.
 - b. i.e., NOT – your “hours are too low, bring them up”. Rather, “what do you need to increase your hours”
 - c. Don't talk about firm, talk about the person and his or her value to the firm.
 - d. Reinforcement of ideas (positive) not criticism. If you are trying to get someone to move forward, don't criticize. If you want to have influence, don't criticize.
 - e. Do you want to be right or do you want to get what you want?
16. Performance appraisals are useless if it does not motivate improvement. If you are not ready to help them, you are not ready for the review.
 - a. Drop by and discuss things with each attorney. No need to save up a full year for a formal evaluation nor is there a need to save up a full year's worth of criticism for evaluation time. Provide feedback as things happen – one issue at a time when it does not impact salary. Give attorneys an opportunity to improve while the issues are still fresh. How can we expect improvement if we do not advise of a problem.

Once you have a manager in place, how do you judge the success of that managing partner? Simply put, it is the success of the group that matters. The same standard used to evaluate individual performance should be applied to evaluate the manager. Leadership is not

about saying “Charge”; it is about saying “Follow Me”. What are some of the qualities of a good leader and where should the leader be prepared to give feedback?

- a. Be prepared to be held accountable for your performance. I am accountable for my performance, now how about you?
- b. Causes one to push the envelope and performance goals.
- c. Concerned with long term vs. short term.
- d. Constructive feedback is given to employees – not criticism.
- e. Is a source of creative ideas about the business.
- f. Helps others be creative and helps them grow and develop.
- g. Conducts meetings in a manner that breeds involvement.
- h. Makes all feel part of a well functioning team; a well oiled team will sell itself. An individual will not.
- i. Emphasizes cooperation.
- j. Prompt in dealing with under performers.
- k. Helps you understand your tasks.
- l. Keeps you informed of what your role is.
- m. Encourages the volunteering of ideas and suggestions.
- n. Keeps the level of politicking down.
- o. Accessible.
- p. Consultative in decision making – builds a consensus.
- q. Is more of a coach than a boss.
- r. Publicly generous with credit.
- s. Effective at communication.
- t. Do the unexpected occasionally – don’t take each other for granted.
- u. Work really hard at listening.
- v. Celebrate individual or group achievements.
- w. Make sure this list is reviewed, updated, modified often and as needed.
- x. Maintain the gold standard – create high standards and enforce them and offer help on how to get there. NOT – “we are no worse than anyone else”. If you don’t live up to the standard, you are gone.
- y. Do you want to be a firm that grows or one that coasts?
- z. Do not hire dynamos and then leave them alone – Manage properly and even the dynamos will be manageable.

So You Can Sell

Brains: For unique or complex cases, bet the business type cases, sell the talent and brains you have in the firm along with their creativity.

Gray Hair: Sell your experience in the area of practice discussed.

Procedure: Sell efficiency. For certain run of the mill matters, most firms will have your experience – so sell you procedures for efficiency.

Some clients are result oriented. Those are the ones that really don't care about anything else. It's like brain surgery, they will be unconscious for the procedure and pretty much just want to wake up alive and healthy with cost being no object. On the other end of the spectrum are those who value procedure perhaps even more than the result. We can liken them to a headache and keep in mind, more people have headaches than need brain surgery. For these clients, they are equally as "results oriented" i.e., make the headache go away, but it has to be cost effective. Most, particularly in the insurance world, are "results plus clients"; that is, they want to be informed, involved in the case and both are as important as the result. That is like going to your family doctor (if there is such a thing anymore). He or she knows your family history, your health history and probably genuinely cares about your health.

What does this tell you? That we must apply the correct amount of time and talent to the right case. How much of your time is spent doing work that does not require your level of experience or talent? It can work the other way as well. Is the matter outside your talent and experience? Are we wasting time and efficiency to the detriment of the client? You cannot and should not stop being a brain surgeon to run the clinic for four to five years and then go back to brain surgery. You have to stay a brain surgeon while you are managing – at least $\frac{3}{4}$ of your time.

At the end of the day, treat every client as if they are your only client. Build relationships with them. Do not rely on one night stands. Work smart and apply the right time and talent to each matter.

Take-Aways: Some Hard and Fast Rules:

1. Build a consensus on every major decision, once that is reached, shut up and live by it.
2. Never borrow money unless it is to meet your payroll and if you have to do that, something else is terribly wrong. Figure that out.
3. With clients, it is not about being right, it is about being helpful.
4. Treat every client as if they were your only. Client satisfaction is the top priority at our firm.
5. There can be no room for personal agenda being placed ahead of the interest of the clients or those of the firm.
6. There must be team work and it must be enforced. An assembled and quality team will sell itself.
7. Those that contribute to the overall success of the total office are the most highly rewarded.
8. The best management gets the best work out of everyone in the office.
9. You must learn and develop new skills all of the time. Maintain your excellence.
10. Invest in those things that will pay off in the future. Do not be afraid to invest.
11. Treat everyone with respect and make sure that everyone in the office does the same.
12. High quality supervision on all client matters.
13. Maintain the quality of your professionals as high as possible.

BEST PRACTICES FOR WORKING WITH INTERNAL CLIENTS AND OUTSIDE COUNSEL

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This manuscript supplements the joint presentation of the Insurance Industry and Corporate Counsel Committees at the 2014 FDCC Annual Meeting.

The duties of in-house attorneys require frequent interaction with both internal clients and outside counsel. This manuscript addresses how in-house attorneys can maximize those relationships.

An important disclaimer: This manuscript is not intended to be an exhaustive list of “best practices,” whatever that term means. Indeed, as in any lawyer-client relationship — and in any relationship between any two human beings — context matters. Techniques that help an in-house counsel communicate with, for example, her company’s chief financial officer might differ from the techniques the in-house counsel employs when working with an internal salesperson.

Put another way, the principles described here are seeds of general applicability that can be planted to grow meaningful and beneficial relationship. Context-specific factors, however, will always play a large role in that growth.

I. WORKING WITH INTERNAL CLIENTS

A. Learn your company’s business.

A key step to having meaningful communications with internal clients is learning the company’s business. This seems like common sense, but it is too central a part of in-house life to skip over.

A more probing question is how an in-house lawyer — especially a lawyer newer to a company — can or should actually go about learning about the company’s business. While the answer might be context-driven, the following approaches are good starting points:

- Seek out in-house counsel and employees who have been with the company for a long time. Prepare questions to ask them to learn about the company's business, its internal operations, and anything else you can think of.
- Volunteer and listen. Your company might have groups, special projects, or committees that you can volunteer or freely join. Joining these groups offers exposure to areas of the company that you might not otherwise see. Being an active listener in these groups can open up new opportunities; indeed, you might have the opportunity to form relationships with an entirely new segment of internal clients.
- Respect personalities and culture. A corporation functions only through its personnel. The better you understand the company's officers, leaders, and key employees on an individual level, the greater the chance of understanding his or her needs, of providing the proper advice, and of establishing deep and trusting relationships.

Likewise, a corporation's leadership and workforce reflect its culture. When you understand and respect that culture, you can identify and select communication methods and channels that fit the culture.

- Use the company's internal resources. Minutes from the meetings of the board of directors, and of key committees, can contain a wealth of information. Staying current on the issues raised in these meetings can help identify new ways you can help the company. The company's organizational chart, too, serves as an important reference.
- Study external resources. Public filings, shareholder reports, press releases, and industry reports can all provide additional information to help you understand the company.

B. Be a problem-solver.

When an internal client seeks your advice, that client usually wants your blessing concerning a business initiative. What happens, though, when the initiative faces significant legal hurdles?

The natural lawyer reaction is simply to list all of the hurdles and emphasize the greatest risks. Legal training, after all, centers on issue-spotting. And issue-spotting provides value; no business wants to charge full steam ahead with an initiative that could result in major legal problems.

An in-house lawyer who merely spots risks, however, falls short of answering the client's real question: How can the business actually accomplish the initiative in the face of the spotted legal risks?

Answering this question usually requires creative thinking and clear communication — and this is where a lawyer provides the most value. Being a problem-solver also sets a (good) expectation for your internal client: The client knows she can turn to you on any issue without getting her idea reflexively quashed.

Notably, this same problem-solving paradigm applies to outside counsel. No client engages a lawyer to advise the client not to do anything, unless that is truly the only legal option. A client wants to know and to assess risks and, based on that assessment, chart a forward path.

C. Figure out what's important to your company.

It's one thing to understand your company, its workforce, and its culture. It's another thing to study all of this information and discern the company's most pressing issues. Doing so likely requires numerous discussions with the company's most knowledge resources and decision-makers.

When you are clear on what really matters to the company, though, you can assert yourself to provide advice on these matters. Creating these clear intentions — rather than bouncing from matter to matter, without prioritizing issues — will maximize your time and value to the company.

(Here again, this advice would seem to apply equally to private-practice attorneys. It's easy to work on whatever matter seems hottest, or to reply to e-

mails because they arrive in your inbox; it's more beneficial, however, to assess the most important priorities and to take steps to address those priorities regardless of how many e-mails are pinging your inbox.)

D. Understand how to approach conversations about settlement authority.

For in-house litigation attorneys, obtaining settlement authority is a critical opportunity in every case. How to obtain that authority, however, can vary significantly by client. In particular:

- Who needs to be involved in the decision? The answer might be a single person, or it might be an array of executives, heads of business units, key employees, or others. Assembling the right team ensures that no one feels left out — and that you can actually obtain the authority you need.
- Will everyone involved have aligned interests? The answer might be “no.” Imagine, for example, a matter in which the leader of a company's business unit has a vested interest in being proven “right,” whatever that means. For this person, no settlement is tenable. That person's superior, however, might want to settle the case for any number of reasons. How is this tension resolved, and who resolves it? Understanding these conflicting interests, and how to resolve them, will be critical to obtaining authority.
- How do I most convincingly communicate risks and costs? Especially clear communication about the risks and costs of proceeding with litigation might be needed for the in-house client who views paying any settlement money as distasteful. In these situations, consider working with outside counsel to develop a budget for larger stages of the case, such as dispositive motions, expert discovery, and trial preparation. Explaining these unavoidable costs in detail — rather than a sweeping statement that “this is going to be expensive” — might help persuade the intransigent client.

E. Have an electronic discovery plan.

Electronic discovery has become a major — if not the most significant — leverage-shifting element in complex litigation. A party that has not preserved electronic materials, or that cannot collect and identify those materials, will likely spend the entirety of a case fending off discovery motions, including sanctions motions.

Though litigators should be attuned to these risks, internal clients will probably not be. In-house lawyers, then, have an opportunity at the outset of every matter to work closely with the company's business people to ensure that the relevant documents are preserved and collected.

This requires planning. For example, who is going to identify the recipients of a litigation hold? Who is going to draft the litigation hold? Which custodians will need to be interviewed? Who will handle data collection? Do you have in-house IT resources with adequate time and expertise to assist? To what extent would an electronic-discovery vendor help?

Addressing these issues at the very moment litigation is anticipated can significantly increase your settlement leverage.

F. Seek a mentor.

In the law-firm environment, mentor relationships grow from working on cases with a more senior attorney, from a formal mentorship program, or simply from working within the same group in the firm.

An in-house legal environment, however, can differ significantly. Though some in-house legal departments might operate like firms, others can be very lean; you could be the only in-house litigator.

Whatever the case, the readily-apparent benefits of mentorship in private practice apply equally to in-house counsel. If you cannot find a mentor within your company, look externally for a mentor. The FDCC, of course, is a fertile ground for finding a mentor. Other mentors can be found in local organizations, like a chapter of the Association of Corporate Counsel.

At bottom, the advantages of finding and utilizing a mentor outweigh whatever time it takes to find the mentor.

II. WORKING WITH OUTSIDE COUNSEL

A. Set specific expectations.

In-house lawyers are (rightfully) frustrated when outside counsel fall short of expectations. How, then, can in-house lawyers avoid this frustration?

Setting and communicating your expectations at the outset of the engagement.

This probably falls under the category of common sense, but lawyers as a group have little training about how to set expectations — let alone an understanding of the benefits of clear expectations.

Clear expectations, more than anything, are about respect — both for you and for your outside counsel. When you set clear expectations, you are honoring what's important to you and to your client. You are also honoring your time and your litigation budget — both fixed and precious commodities. Clear expectations help ensure that your outside-counsel's work is efficient and valuable.

Clear expectations also respect your outside counsel's time and resources. Your outside counsel wants to do the work you want. Your outside counsel wants to communicate in the fashion you want. Your outside counsel wants to know your objectives. The more that outside counsel knows about your expectations, the better your outside counsel can structure her time and resources to meet those expectations. Empowering your outside counsel to do so is an exceptional sign of respect. Moreover, when treated with this type of respect, outside counsel will reciprocate it.

What types of expectations should you set? Whatever expectations are important to you. The following areas, however, seem especially likely to be important:

- Objective. What's the purpose of this litigation? The answer to this question in each case is never too obvious to discuss expressly. A general statement to outside counsel that "we want you to help with this engagement" can be perceived to a blank check for outside counsel to do whatever she deems appropriate for the matter. It's unlikely you intended to give outside counsel such unfettered discretion.

- Timing. For example, how far in advance of a brief's submission to the court do you want to see a draft?
- What's billable and what's not? Are there any tasks or time entries that your client will not pay for? If so, list them — especially if they are in a grey area.
- Budget. When your outside counsel knows how much you expect to pay, she can make staffing and resource decisions accordingly.
- Level of involvement. In which decisions do you want to be involved? Will you flyspeak outside counsel's work product, provide general comments, or something in-between? How often do you want to receive updates — on regular intervals, when key events happen, or something else? What method of update (e-mail, phone call, written report) do you prefer? How extensive should the update be? The answers might vary by the case.
- Communication methods. For day-to-day activity, who will be the primary contact at the company? At the outside firm? How do you like to communicate — e-mail, text, phone, or something else? For any substantive issue, what is the desired presentation method? E-mail, memorandum, PowerPoint, or something else?
- Billing method. Does your company use an electronic billing system? If so, who is the point person for that? Is there a manual or guide for proper billing? If your company does not do e-billing, to who should invoices be sent? Within how many days will the invoice be paid?
- Staffing. Do you care which lawyer(s) work on a matter, and what particular work each lawyer is doing? This involves a careful balance of maximizing resources while not micromanaging; ultimately, though, your outside counsel will handle the matter how you want it to be handled — once you tell them.
- Electronic discovery. The questions raised on page 5 of this manuscript apply equally, if not more forcefully, in connection with outside counsel.

- Feedback. Outside counsel always want to know how they're doing. Likewise, you don't want to keep your criticisms to yourself. Talk to your outside counsel about how you will provide feedback and how they can best seek it from you.

In the end, identifying and clearly communicating these expectations will create an ease for both you and your outside counsel. No one will need to guess what the other side wants, and everyone's time and brainpower can be focused on the matter at hand.

B. Trust your outside counsel.

This concept goes hand-in-hand with setting expectations; if everyone is singing from the same hymnal, mutual trust will follow. Without expectations, you might feel the need to micromanage — which, in turn, might create insecurity for your outside counsel.

Having significant trust in your outside counsel has another important benefit: You can turn to the same trusted lawyer for multiple matters without reinventing the wheel of expectations. Using the same lawyer saves you and your company time and money. In addition, the outside lawyer learns more and more about your company, making her more efficient in future matters and, moreover, a better advocate.

C. Develop an intentional strategy for hiring outside counsel.

Questions of expectation-setting and trust-building beg more fundamental questions: When should you hire outside counsel in the first place, and how should you select outside counsel?

Many factors can drive the need to retain outside counsel, but two factors in particular merit mention here:

- Subject-matter expertise. You have come across an issue with which you lack sufficient knowledge, and the more efficient course is hiring an external lawyer who already has this knowledge.

- Timing. You might have the knowledge and ability to handle the matter, but other matters take priority for your own schedule, as well as your colleagues' schedules.

These two topics touch on a separate but related issue: If you find yourself turning to outside counsel for the same subject matter, or because of repeated timing and workload issues, you might consider whether enhancing your company's in-house capabilities provides a more efficient long-term solution.

The selection of outside counsel, like the decision to hire in the first place, requires intentional thought. Here, the key is being intentional; in-house lawyers, after all, are unlikely to agree collectively on a "best" way to hire outside counsel. Some companies might prefer an exhaustive evaluation and interview process. Other companies rely on referrals from trusted advisors. Some companies hire full-service firms to handle their spectrum of needs; other companies hire individual lawyers regardless of the size or practice areas of her firm.

No matter the method, the key point here is simply to adopt a strategy to which all stakeholders agree. Your company's culture might play a role in which strategy to adopt.

Importantly, different engagements might call for different hiring strategies. For example, is the company looking for an attorney in a specialized field to handle a discrete matter? Does the company need long-term counsel for a variety of needs? A referral might be more appropriate for the former need, while a more exhaustive search might be more appropriate for the latter need.

For those in-house attorneys who use an RFP process, the process will benefit from selecting and clearly defining the hiring criteria; concepts like "quality," "value," and "client service" are nebulous in the abstract. By identifying the characteristics that matter and then figuring out what they mean, you have the best chance to accurately gauge whether outside counsel has those characteristics.

III. CONCLUSION

I sincerely welcome your feedback on this manuscript. My e-mail is stephen.feldman@elliswinters.com, and my direct dial is 919-865-7005. I am grateful for the chance to write this manuscript.

Class Actions in East Asia (Taiwan, Japan, China and Korea)

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I. INTRODUCTION

Although class action/group action¹ originates and derives from the common law, class action/group action has broadly developed in many jurisdictions in the world. In past decades, class action/group action has also been increasingly adopted in East Asia, including in Taiwan, Japan, South Korea and China.

The reason that I chose to talk about “***Class action in East Asia (Taiwan, Japan, China and Korea)***” is that these four nations not only share some common legal and cultural background but also take similar (though differing in details) measures to reform their respective legal regimes on class action in the past decades. However, these four jurisdictions have each developed its own unique procedures about the class action/group action.²

For example, traditionally, to increase efficiency in dispute resolution, the class action/group action has been more frequently used to resolve disputes arising from cases of product liability and securities fraud, which cases more likely involve numerous claimants.

Regarding product liability, China is well known as the “world’s factory”, while Taiwan, South Korea and Japan are famous for their high-tech/consumer products. As a result, these four nations are facing the reality of having to deal with the increasing demands of greater consumer protection. Some of these 4 jurisdictions (e.g. Taiwan, Japan and China) have reformed their legal regimes in this regard and adopted the class action/group action procedure as an important measure in protecting consumers’ interests.

As to securities fraud cases, the economies of these four nations have developed rapidly in the past decades and they all play an important role in the word economy. Under the globalization trend, many companies from these four nations have sought to have their stocks publicly traded so that they may raise funds from domestic or foreign capital markets. Since these companies may be listed on domestic or foreign stock exchanges, their investors may come from any place around the world. In such cases, because the number of investors who suffer financial loss may be high (though, perhaps, the amount suffered by each individual claimant may not be significant),

¹ Group action is the most general term and is used to describe the laws in those jurisdictions whose procedures cannot accurately be characterized as class actions in the precise sense. *WORLD CLASS ACTIONS* xxxix (PAUL G. KARLSGODT eds., 2012).

² *Id.* at 429.

some of the four nations (i.e., Taiwan, South Korea and China) have adopted measures reforming their legal regimes so that potential claimants can more easily initiate claims for compensation through the class action/group action mechanism.

Because these four nations are civil law-based countries, the nature and the legal system of which differ greatly from the common law system such as that in the United States, I would like to give a general introduction about the civil legal system of these four nations so that the attendees from the common law-based countries may have a basic understanding of how the class action/group action works in these four civil law-based countries.

Therefore, my presentation will consist of three main parts to give an overview about the development of class action/group action in East Asia (i.e. Taiwan, Japan, China and Korea). Part I will introduce the legal system and how class action/group action works in these four nations. Part II will talk about the significant developments concerning class action/group action in these four nations. Part III will briefly describe the future prospect of class action/group action in these four nations.

II. Outline of the presentation

1. The legal system of these four nations

- 1.1 How does class action/group action work under the civil law-based legal system of these four nations?
- 1.2 Whether any of these four civil law-based nations also adopt discovery procedures (including depositions), and whether jury trial is available in a class action/group action case?
- 1.3 How does the court system function in these four civil law-based jurisdictions?

2. The significant development of class action/group action in these four nations

2.1 Taiwan

- 2.1.1 What is the prevalence of class action/group action in Taiwan?
 - a. Product liability related cases (Consumer Protection Law).

b. Securities Fraud related cases (Securities Investor and Futures Trader Protection Act).

2.1.2 Does Taiwan's class action/group action adopt the "Opt-In"³ or "Opt-Out"⁴ procedure?

2.1.3 Are punitive damages allowed in class action/group action in Taiwan?

2.1.4 What have been the significant reforms of the legal regime about class action/group action in Taiwan?

a. 1935- amendment of Code of Civil Procedure⁵ to allow multiparty actions⁶ and representative actions⁷.

b. 1994- enactment of Consumers Protection Act⁸ to allow representative actions initiated by certified consumer associations/organizations.

c. 2002- enactment of Securities Investor and Futures Trader Protection Act to allow representative actions initiated by the Securities and Futures Investors Protection Center.

d. 2003- amendment of the Code of Civil Procedure to expand the applicable scope of multiparty actions and representative actions.

2.2 Japan

2.2.1 What is the prevalence of class action/group action in Japan?

a. Product liability related cases (Product Liability Law).

2.2.2 Does Japan's class action/group action adopt the "Opt-In" or "Opt-Out" procedure?

³ Opt-in procedure: Procedure of class action that requires individual consent to be bound. *Id. at xxxix.*

⁴ Procedure of class action that allow for absent persons to benefit or be bound even if they take no affirmative action. *Id. at xxxix.*

⁵ Code of Civil Procedure, Art. 41, 53.

⁶ Multiparty actions are often described as a procedure that requires actual participation in a lawsuit by the persons affected. *PAUL G. KARLSGODT, at xxxix.*

⁷ Representative actions typically describe a lawsuit where one party is designated to act on behalf of others, alleviating the need for those other parties to participate. Under this definition, representative actions would be distinct from multiparty actions. Representative actions can include class actions brought by associations/groups or private litigants on behalf of the victims. *Id.*

⁸ Consumers Protection Act, Art. 49, 50.

- 2.2.3 Are punitive damages allowed in class action/group action in Japan?
- 2.2.4 What have been the significant reforms in the legal regime about class action/group action in Japan?⁹
- a. Before 1996- allowance of multiparty actions and representative actions under the Code of Civil Procedure.
 - b. 1998- amendment of the Code of Civil Procedure to expand the applicable scope of representative actions.
 - c. 2006- amendment of the Consumer Contract Act to allow representative actions initiated by certified consumer associations/organizations for injunctive relief.
 - d. 2013- enactment of the Act on Special Provisions of Civil Court Procedures for Collective Recovery of Property Damage of Consumers¹⁰ (Act No. 96 of 2013. Known as the “Japanese version of class action”) to allow representative actions initiated by certified consumer associations/organizations for monetary claims.

2.3 China

- 2.3.1 What is the prevalence of the class action/group action in China?
- a. Product liability related cases (Protection Act of Consumer Rights and Interests).
 - b. Securities Fraud related cases.
 - c. Environmental Pollution related cases,
- 2.3.2 Does China’s class action/group action adopt the “Opt-In” or “Opt-Out” procedure?
- 2.3.3 Are punitive damages allowed in class action/group action in China?
- 2.3.4 What have been the significant reforms in the legal regime about class action/group action in China?
- a. 1991- enactment of the Code of Civil Procedure¹¹ to allow multiparty actions and representative actions.
 - b. 2012- amendment of the Code of Civil Procedure¹² to allow representative actions initiated by certified

⁹ PAUL G. KARLSGODT, *supra* at 434-437.

¹⁰ This Act will take effect within 3 years from the date of promulgation and on a date which will be separately designated by a cabinet order.

¹¹ Code of Civil Procedure, Art. 53, 54.

¹² *Id.*, Art. 55.

- associations/organizations.
- c. 2013- amendment of the Protection Act of Consumer Rights and Interests¹³ to allow representative actions initiated by certified consumer associations/organizations.
- d. 2014- amendment of the Environment Protection Act¹⁴ to allow representative actions initiated by certified associations/organizations.

2.4 South Korea

- 2.4.1 What is the prevalence of the class action/group action in South Korea?
 - a. Securities Fraud related cases (Securities Related Class Action Act).
- 2.4.2 Does class action/group action in South Korea adopt the “Opt-In” or “Opt-Out” procedure?
- 2.4.3 Are punitive damages allowed in class action/group action in South Korea?
- 2.4.4 What have been the significant reforms in the legal regime about class action/group action in South Korea?
 - a. 1960- enactment of the Code of Civil Procedure¹⁵ to allow representative actions.
 - b. 2004- enactment of Securities Related Class Action Act¹⁶ to allow for the filing of class actions approved by courts.

3. The future prospect of class action/group action in these four nations

- 3.1 Will class action/group action continue to develop in these four nations?
- 3.2 What impedes the development of class action/group action in these four nations?
- 3.3 What are the opportunities for the class action lawyer in these four nations?

¹³ Protection Act of Consumer Rights and Interests, Art. 47.

¹⁴ Environment Protection Act, Art. 58 (effective on January 1, 2015).

¹⁵ Code of Civil Procedure, Art. 53.

¹⁶ This Act became effective on January 1, 2005.

FDCC Annual Meeting 2014 – CLE Materials

CLASS ACTION: THE FRENCH “*ACTION DE GROUPE*”

PARLIAMENT ACT OF MARCH 17th, 2014

By Christophe Adrien, Attorney at Law, Paris Bar

1. Context:

France has been trying to introduce a class action procedure in its legal system for many years, even decades.

France witnessed from the US threatening and massive class actions against tobacco companies, energy providers, pharmaceutical laboratories, etc. resulting in colossal damages.

French politicians worried about the excesses of the US system, such as forum shopping, blackmailing corporations with such lawsuits, as well as plaintiff lawyers seeking excessive fees prior to defending their clients’ best interests...

This is what discouraged many attempts to introduce a comparable system in France.

However, these collective actions were needed to fulfill a legal void, which left more and more consumers, discouraged by the cost and length of legal proceedings, without recourse for small prejudices.

Finally, France just passed into law a Class Action procedure last March 2014, which is a kind of revolution in its legal system, given the fears induced by the US experience.

That being said, France wanted to mark its difference: the French Class Action differs from the US one in many ways; the political message sent to French corporations is:

Don’t fear our French “*Action de Groupe*”.

It is very different from the US Class Action!

Will this message be proven to be true?

2. The Consumer Protection Act – March 17th, 2014:

The Law n° 2014-344 enacted on March 18th, 2014, introduced the French Class Action in Articles L 423-1 & seq. of the consumer code. A governmental decree still needs to be issued in order to define the procedural details of this new form of litigation.

A. The scope:

The scope of the French class action is defined in a restrictive manner; the main characteristics are as follows¹:

1. An action limited to disputes arising out of **consumer law** as well as **anticompetitive practices** having an effect on consumers. Legal actions based on other areas of the law, such as Health or Environment, are excluded (French lawmakers are currently discussing a new legislative framework in the area of the Environment).
2. **A consumers-only** action (as opposed to businesses or corporations): consumers placed in a “similar or identical situation” are the only persons entitled to enter the class action.
3. A **sale of goods** or **provision of services** must have contributed to the damage.
4. The **common cause** of the damage to consumers must be **a breach of a legal or contractual obligation by a “professional”**.
5. **A financial loss** coming from a **“material damage”** (as opposed to bodily injury or emotional distress, which has to be assessed individually): no other damage can be compensated.

Obviously, joining a class action does not prevent a consumer from bringing a separate lawsuit for personal losses not included in the scope of the class action².

Consequently, despite French recent scandals in health-related matters like the “Mediator” or the PIP’s breast implants, lawmakers have excluded the class action option for such claimants.

B. The implementation:

The following points are supposed to prevent the excesses of the US system.

¹ Article L 423-1 of the consumer code

² Article L 423-22 of the consumer code

1. Class Actions can only be brought by one of the 16 official **representative consumer protection associations**¹.

Lawyers, as well as any other organizations, are not entitled to bring class actions. One of the reasons is that frivolous lawsuits must be prevented.

Such provision was hotly debated between the French Bar and lawmakers, since lawyers took this exclusion of right as a personal affront regarding their skills or even honesty. But the terrible image created by plaintiff lawyers in the US led the French Parliament to exclude attorneys, so as to assign the right of action to authorized consumer associations only.

2. The “**opt-in**” system:

Once again, the US experience prompted lawmakers to adopt the opt-in system: consumers must express their decision to join the group³.

The Civil Courts will have to:

- define the relevant group of consumers;
- decide the adapted measures in order to inform the consumers potentially interested in joining the group;
- determine the time limit to join the group (between 2 and 6 months).

The opt-in system is seen as favorable to corporations which will be able to know the number of consumers really involved in the action. Consequently, they would not be at risk of setting aside excessive reserves that, ultimately, might not be allocated.

3. Option for a **simplified class action**: a disguised opt-out system?

When the identity and number of consumers are known in advance, and where the same amount of damages applies for each consumer, the Court is allowed to award damages directly and individually to each consumer⁴.

Such a simplified class action allows the Court to award damages to consumers who did not initiate any positive action to become part of the group: this seems very close to the **opt-out** system that French lawmakers wanted to avoid.

³ Articles L 423-3 to L 423-9 of the consumer code

⁴ Article L 423-10 of the consumer code

Such a simplified class action could be implemented where listings of clients exist, such as in the insurance, mobile phone or pay TV industries.

4. Mediation:

The Law stresses that a mediation process is still possible instead of going forward with the class action. But only one of the authorized consumer associations is entitled to participate in this process to defend the consumers' rights⁵.

3. What's next?

French Class Action is aimed at simplifying the handling of massive litigation, in a cost-effective manner.

Although there is, so far, no feedback or case law, some questions are already foreseen:

- Limited scope of class actions – do they address the real needs of consumers?
- What will be the interpretation of the notion of consumers placed in an “identical or similar situation”?
- There is no threshold for the number of members in a group: a limited number of consumers could be sufficient to set up a group...
- The impossibility of predicting the final amount of the claim.
- What will be the interpretation of the provisions of the new Law by French Courts? It seems that Courts will have a broad power of interpretation.

Before this new legal action can be implemented in Court, a governmental decree was yet to be passed when these lines were written.

We will have to keep abreast of the class actions to be brought in order to better understand the French approach.

But the limited scope defined by Law makes it unlikely that class actions will become a major tool in the French legal system.

* * *

⁵ Articles L 423-15 and L 423-16 of the consumer code

FDCC Meeting
Product Liability Class Actions in Europe
The Future for Lawyers

Peter Lennon, Maples and Calder

Whilst product liability has long been a fertile ground for class actions in the US Europe has traditionally eschewed US style class actions and collective litigation in this area has been relatively rare.

You will have heard from our other international practice speakers on the reforms proposed by the European Commission and in particular their non-binding recommendation 2013/396 encouraging EU Member States to adopt collective action procedures generally.

In the light of this the question arises as to what is the future for product liability class actions in the Republic of Ireland, as well as how collective actions have developed in some other key EU jurisdictions and how those jurisdictions have reacted to the recommendation.

Current Irish Position

Currently Ireland does not provide for collective redress as a procedural mechanism but does have group litigation orders pursuant to the Irish Rules of the Superior Courts where case management tools are used to enable multiple claims involving common or related issues of either fact or law to be managed under the same umbrella.

In those cases however each Claimant must initiate proceedings by issuing their own individual claim.

Once the individual claims have been issued generally the same firm of attorneys acting on behalf of the Claimants will apply to the Court for case management and directions and generally the Court will direct that a pathfinder action be case managed and that it be heard in advance of the other actions which will back it up and once the decision has been given on the same facts it would be binding on all of the following actions which are linked in under the group litigation order.

In Ireland there have been a significant number of high profile product liability matters dealt with in this way and Irish plaintiff Attorneys have been inventive in advertising for claimants to join in what are advertised as being somewhat class actions but are in fact individual claims under which group litigation orders would be made.

I highlight a number of the advertisements which have been placed in the Irish media, the content of which will be well known to practicing product liability lawyers here in the States dealing as they do with matters which are probably the subject matter of significant class actions in the United States given the causes of action to which they refer (see Slides). In Ireland as it can be seen Plaintiff's Attorneys have become quite sophisticated in following the trends of product liability matters in the USA and throughout the European Union where there is a direct effect on Plaintiffs in Ireland.

In 2005 the Irish Law Reform Commission recommended the following:

- (a) The Commission recommends that a formal procedural structure to be set out in the Rules of Court to be introduced to deal with instances of multi-party litigation.
- (b) The Commission recommends that reform of current procedures to deal with multi-party litigation should be based on the following principles: procedural fairness for the Plaintiff and Defendant, procedural efficiency and access of justice.
- (c) The Commission recommends that the proposed procedure for dealing with multi-party litigation should be called a multi-party action (MPA).

To date nothing has happened and the recommendation from our Law Reform Commission carries only moral or intellectual authority.

Plaintiff Attorneys suggest that a multi-party action (MPA) would permit the taking of representative legal proceedings where large numbers of persons had suffered from effectively the one wrong. The class of wronged persons would be the beneficiaries of the judgment and the judgment would reflect the totality of the loss of the class.

There are still no procedures to achieve this result and in the writer's view it is unlikely that the position will change in Ireland directly unless it arises as a result of a European Regulation/and/or Directive.

The position in the United Kingdom

In its response to the recommendation from the Commission, the UK Government agreed that any EU system should avoid a US style class action system with its related problems and abuses.

The English government considers that Part 19 of their IRCPR Rules in that jurisdiction are broadly in line with the principles identified in the EU recommendation but it is not in favour of a generic collective redress mechanism covering all sectors either in the domestic jurisdiction of England and Wales or at EU level.

The English government has proposed an opt out regime for competition law claims and it is not actively looking to make any changes in any other area such as product liability.

This means that in the UK as in Ireland product liability actions would be restricted to GLOs or individual claims.

It would be useful to look at the list of common principles which the EU Commission recommendation proposes.

The Commission's Proposals

The idea of a common collective litigation procedure has been debated for some time at EU level. In 2011, the Commission consulted on the issue, and the responses to that consultation were set out in a communication that accompanied the publication of the recommendation in June 2013 (http://ec.europa.eu/dgs/health_consumer/dgs_consultations/ca/replles_collective_redress_consultation_en.htm).

The recommendation states that member states should, within two years, have in place collective redress mechanisms for both injunctive and compensatory relief. Those mechanisms should comply with the basic principles set out in the recommendation and apply to all situations where EU law rights may be, or have been, violated or prejudiced.

The Commission supports collective redress as a means of increasing access to justice and improving efficiency (in terms of both time and cost) for EU citizens, businesses, courts and public resources generally. From a manufacturer's or distributor's perspective, in the event that something has gone wrong with a product, it can be advantageous in terms of time and costs to be able to deal with multiple complaints about the product in one set of court proceedings.

At the same time, the Commission recognises the potential for abuse. It expressly rejects the US-style class action and recommends a number of procedural safeguards to avoid the development of an abusive litigation culture.

The Commission's next steps are to use information gathered from member states to decide, in two years' time, what further action is required, such as the introduction of binding legislation (see box "*List of common principles*").

List of common principles

The European Commission's Recommendation 2013/396/EU states that collective redress procedures should:

- Be fair, equitable, timely and not prohibitively expensive.
- Be available in all the different areas where EU law grants rights to citizens and companies.
- As a general rule, operate on an opt-in basis. Opt-out systems should be adopted only where they can be justified on the basis of sound administration of justice.
- Contain certain fundamental procedural safeguards to avoid the development of an abusive litigation culture, including:
 - no contingency fees (if an EU member state exceptionally allows such fees they should be subject to appropriate national regulation);
 - no punitive damages; and
 - entities representing claimants should be non-profit making and have a direct relationship to the rights that are alleged to have been violated.
- Ensure that manifestly unfounded cases are identified and discontinued at the earliest possible stage.
- Encourage parties to collectively settle disputes either consensually or through alternative dispute resolution.
- Give the central role in the litigation to the judge.

EU reaction

While none of the following member states has yet issued a formal response to the recommendation, various different responses are expected:

Germany

Like the UK, Germany has traditionally been wary of collective redress mechanisms. It has, however, introduced procedural means for managing mass claims in certain circumstances. In 2005, for example it introduced the Capital Investors' Model Proceeding Law in response to 15,000 shareholders' claims against Deutsche Telekom in the Frankfurt regional court. The procedure involves the establishment of a model case that is considered by the court while all the other claims are stayed. Certain representative actions are permitted for some competition and consumer law claims, but not in respect of product liability claims.

There has, as yet, been no official response by the German government to the recommendation. However, the German *Bundesrat* (a legislative body that represents the federal states in Germany) issued a statement that, rather than rejecting the proposal outright, suggests how the recommendation might be improved, particularly in relation to the funding of claims issued by non-profit consumer bodies. For example, by establishing a public fund for such claims using money generated from administrative fines imposed on companies in breach of EU competition law.

Like the UK government, the *Bundesrat* agrees that there is a specific need for collective redress mechanisms in the area of competition law. Although the *Bundesrat's* statement is not binding on the German government, its relatively positive reaction may be an early indicator of how it will respond to the recommendation in due course.

The Netherlands

The Netherlands is unique among member states in having an opt-out settlement approval procedure for mass damages claims. Once approved by the Court of Appeal of Amsterdam, agreements made under the *Wet Collectieve Afwikkeling Massaschade* (WCAM) are binding on all affected persons except for those class members who choose to opt out. The decision to opt out must be communicated in writing within a period determined by the court, which will be at least three months. Those who choose to opt out can still pursue their own individual claims.

Although the WCAM legislation was originally introduced to settle mass damages claims arising from product liability litigation, the procedure is now widely used in the corporate sphere too (*see box "Des-dochters"*). It has also been used to settle actions with little connection to the jurisdiction. In *Converium*, for example, a settlement was approved even though fewer than 2% of the claimant shareholders were domiciled in the Netherlands (*Amsterdam Court of Appeal, 12 November 2010, NJ 2010, 683*).

Des-dochters

The Wet Collectieve Afwikkeling Massaschade legislation (WCAM) came into force in 2004. WCAM was born out of product liability litigation known as Des-dochters.

The litigation involved allegations of serious harm (including infertility) caused to approximately 17,000 daughters of women who had taken the hormone product "Des" during pregnancy. The case was the reason the Dutch legislator chose to implement a collective damages procedure that would allow an agreement to be declared binding on all.

In addition, to the availability of collective settlement agreements, collective actions can be brought by representative entities under Article 3:305a of the Dutch Civil Code provided that certain qualifying criteria are met. Such an action cannot be used to claim damages, but can be used to obtain a declaratory judgment from which follow-on damages could be claimed. Other collective action procedures used in the Netherlands include the use of test cases and/or a two party declaratory judgment.

France

Although the French Parliament is discussing a bill aimed at facilitating collective actions, redress is currently limited to representative actions by specific authorised bodies. In the fields of consumer, finance and environmental law, representative actions can be brought by certain authorised entities where two or more people have suffered harm as a result of the same action.

In addition, under Article 421-1 of the French Consumer Code, an authorised consumer body can bring an action in the collective interests of consumers (*action exercée dans l'intérêt collectif des consommateurs*). While product liability claims are eligible as collective actions, they remain rare.

Spain

The Spanish Law of Civil Procedure permits claims to be brought by a consumer organisation on behalf of specific, individual consumer claimants (a collective action), or for the common interest of consumers whose identity may be unknown (a class action: *acción para la protección de intereses difusos*). Consumers can, but do not have to, opt in but there is no option to opt out. While the collective action procedure has been widely used in product liability claims in Spain, class actions have rarely been so used.

The US Model

In the recommendation and the response respectively, both the Commission and the Irish and UK governments have emphasised their wish to avoid US style class actions. While often maligned, such actions have long been a feature of your litigation and continue to be used frequently in a variety of areas of law at both federal and state level.

It is worth considering the use of such class actions in US product liability claims, as it may explain some of the reasons why, policy aside, fewer collective product liability claims are brought in the EU.

US class actions

In the US, class actions enable a lead claimant to bring an action on behalf of other similarly affected individuals who need not be named in the action, but who will be bound by the outcome of the case unless they choose to opt out.

There is an attraction to resolving what would otherwise be numerous individual claims through a single decision that is binding on all class members. However, the availability of contingency fee arrangements and the rule that each party bears its own costs mean that there is little, save for good faith pleading requirements, to dissuade claimants from bringing unmeritorious actions.

Jury trials and the availability of punitive damages also contribute to a more litigious cultural environment than in the EU. Measures to try to mitigate more negative features have been introduced in recent years (such as the Class Actions Fairness Act of 2005), and there has also been a recent trend of US Supreme Court decisions preventing putative class treatment for groups of claimants (*AT & T Mobility v Concepcion* 131 S Ct 1740 (2011); *Wal-Mart Stores, Inc v Dukes* 131 S Ct 2541 (2011)). Despite this, there continue to be significant numbers of high-value product liability class actions across the US, particularly involving pharmaceuticals (see box "US class criteria").

US class criteria

The US Federal Rules of Civil Procedure (FRCP) permit opt-out class actions where the action satisfies the four prerequisite criteria of:

- Numerosity: the class must be so numerous that joining all members of the class is impracticable.
- Commonality: there must be common issues of law or fact among all putative members.
- Typicality: the claims or defences of representative parties must be typical of the class.
- Adequacy of representation: putative class counsel must be experienced in handling class actions and capable of adequately representing the putative class members' interests.

Even if these criteria are satisfied, the claim may only proceed if certain other conditions are satisfied, including that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently determining the issue (FRCP 23(b)(2)).

Recent US example

In a recent federal class action in the US District of New Jersey, investors alleged fraud relating to the concealment of test results on the efficacy of the anti-cholesterol drug, Vytorin (*In re Merck & Co Inc Vytorin / Zetia Securities Litigation, Case No 2:08-cv-02177 (D NJ)*; *In re Schering-Plough Corp Enhance Securities Litigation, Case No 2:08-cv-00397 (D NJ)*).

The court approved a \$688 million settlement that ended claims brought by all but 187 claimants, who opted out of settlement. The court also awarded an additional \$140 million in attorneys' fees to the claimants' counsel.

While many of the largest sums are awarded in pharmaceutical cases, class actions are popular across a range of industries in the US where there are allegations of defective products, including in the automobile, medical device and information technology industries.

Why is Europe / UK / Ireland different?

Clearly the global world that we live in today means that consumers in the EU and the US buy the same products with the same problems and the same defects.

It is noticeable however that there is a lack of collective product liability claims in the EU as compared with the US.

The most common method for managing multiple product liability claims in the UK and Ireland is a GLO/MPA but even then this is being used sparingly.

The English Ministry of Justice indicates that as few as 72 GLOs have been granted since 2000 of which only 8 relate to product liability claims.

In the Republic of Ireland the similar statistics for MPA's are likely (if they were available) to mirror that.

In a recent case in which I acted for the Defendants who were a quarry which supplied allegedly defective fill material which was used under floor slabs of domestic buildings and which was found to have reactive Pyrite in it there were some 1000 home owners in a basket of claimants all of whom had individually issued proceedings and who were represented by three sets of lawyers and the Irish High Court directed that a basket of 25 houses be put together and used as test cases in which investigations would take place and in which findings would be made in relation to liability etc.

These cases settled after the largest multi-party mediation in the history of Irish Product Liability claims.

A range of cases in the EU involve defective contraceptive devices, hot drinks containers, breast implants, medication, hip replacements and furniture.

Clearly litigation funding is an issue in the European Union as most individuals have to fund their claims up front and not all claimants have the ability to do that.

Furthermore damages are assessed on an individual basis that each claimant must separately prove its loss.

Contingency fee arrangements or damage based agreements in the UK have only been permitted in contentious proceedings since 1st April 2013 in the UK and there is a cap of 25% of the damages awarded in personal injuries cases and a 50% cap in all other cases.

Whilst outlawed in the Republic of Ireland it has been traditional for Plaintiff litigators to charge a percentage of the sum recovered in addition to the costs recovered from the Defendants and/or their insurers.

In the UK success fees under contingency fee agreements and after the event insurance premiums are no longer recoverable from the other side which is clearly a significant development and one that is likely to be a further nail in the coffin of the type of class actions that one sees in the US.

One of the major differences between the Republic of Ireland, UK and US is that in the US each party only ever bears its own costs.

In our jurisdictions the loser pays and this deters claimants.

In US class actions they operate on an opt out basis.

In the Republic of Ireland and the UK not only must claimants be identified from the outset but they must be willing and able to initiate their own proceedings.

Indeed in the Republic of Ireland they must have issued their proceedings and these proceedings must be extant if an application is made to the Court for case management or for a leader case to be granted case management.

In the UK and the Republic of Ireland exemplary damages are very rarely awarded and these cases are heard by Judge alone and not by juries.

In essence therefore despite the marked trend in the EU over recent years towards introducing collective litigation procedures they remain relatively rare in product liability cases and there is a general aversion to US style class actions.

The European Commission intended a recommendation to introduce a more coherent and consistent approach to collective redress in all areas where EU law rights may be violated or prejudiced including claims relating to product liability.

In my view it seems unlikely that this will happen quickly or be brought about by voluntary actions from member states.

In those circumstances I believe that the class actions which are so commonplace in the US are not likely to feature on the judicial or Attorney horizons in the immediate future and that group litigation orders and/or case management are as far as the relative jurisdictions are going to go at this time.

Recent Developments in Class Action Certification in Canada

FDCC 2014 Annual Meeting

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In Canada, class actions are commonly viewed as a U.S. invention, imported into this country by provincial statutes. Certainly, the Canadian statutes that have created class proceedings have provisions related to certification that are very similar to those found in Rule 23 of the US *Federal Rules of Civil Procedure*. And yet a review of Canadian class action jurisprudence shows that Canada has followed its own path, diverging from that followed in the United States. This divergence is apparent from a number of recent Canadian appellate level decisions that will be discussed in this paper. The Supreme Court of Canada's recent trilogy of decisions on class action certification (the "**Trilogy**"),³ for example, shows that Canadian courts will apply their own evidentiary standard on motions for certification, distinct from the approach taken by US courts.

Beginning with the Trilogy, this paper will discuss recent appellate decisions and their expected impact on Canadian class actions. We will highlighting matters that are of particular importance for companies operating in the Canadian marketplace, and note some of the important areas of difference that have emerged between Canadian and U.S. approaches to class certification.

Certification of Class Actions in Canada

The great majority of class actions in Canada are governed by provincial legislation. This is a function of the provinces' constitutional jurisdiction over property and civil rights, and the administration of justice. Class action statutes in the common law provinces are quite similar to each other, however, including with respect to the certification of class actions. Typically,

³ *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 [*Pro-Sys*]; *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58 [*Sun-Rype*]; *Infineon Technologies AG v. Option Consommateurs*, 2013 SCC 59 [*Infineon*].

certification requires that (a) the pleadings disclose a cause of action; (b) there is an identifiable class; (c) the claims of the class members raise common issues; (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and (e) there is a suitable representative plaintiff.⁴ In the Trilogy, the Supreme Court confirmed the evidentiary standard that applies at the certification stage of a class proceeding is the standard of “some basis in fact”, discussed in more detail below. Aside from the requirement that pleadings disclose a cause of action, this standard applies to each of the elements listed above.

The Trilogy

All three of the decisions in the Trilogy involved the certification of claims for alleged price-fixing.

Pro-Sys Consultants Ltd. v. Microsoft Corporation (“Pro-Sys”) was a class action for alleged price-fixing related to Microsoft operating systems.⁵ The defendants were alleged to have formed a vertical cartel to inflate prices faced by the ultimate consumers. A motion judge in British Columbia certified the action on behalf of a class of both direct and indirect purchasers.

Sun-Rype Products Ltd. v. Archer Daniels Midland Company (“Sun-Rype”) was a certification of a class action in British Columbia for the alleged price-fixing of high-fructose corn syrup (“HFCS”).⁶ The plaintiffs were both direct and indirect purchasers of the HFCS. The direct purchasers brought a claim in constructive trust. The indirect purchasers’ claim was for

⁴ See for example, the Ontario *Class Proceedings Act*, S.O. 1992, c. 6. Note that Quebec’s civil code has a distinct class proceedings regime from the common law provinces.

⁵ *Pro-Sys*, *supra* note 3.

⁶ *Sun-Rype*, *supra* note 3.

breach of the *Competition Act*, economic tort and unjust enrichment.⁷ The indirect purchasers claimed that the price-fixing defendants orchestrated high prices for the direct purchasers that were in turn passed on to the indirect purchasers. This argument posed methodological challenges for proving the existence of a class, since HFCS and liquid sugar were used interchangeably by food processors during the class period. Also, labelling requirements did not oblige food processors to identify which products had HFCS as opposed to liquid sugar. Notwithstanding this difficulty, the class was certified.

In both *Pro-Sys* and *Sun-Rype*, the British Columbia Court of Appeal reversed the lower court's decision to grant certification.⁸

Infineon Technologies AG et al. v. Option Consommateurs, et al. (“*Infineon*”) was a Quebec class action related to alleged price-fixing by the producers of Dynamic Random Access Memory (DRAM) computer chips.⁹ The proposed class included both direct and indirect purchasers. The judge of first instance found that he did not have the jurisdiction to certify a class, as the alleged price fixing occurred in the U.S.¹⁰ The judge also concluded that the indirect purchasers had no way of proving that they suffered harm. However, the Quebec Court of Appeal found that the indirect purchasers were not required at the certification stage to show a clear methodology under the Quebec regime and reversed the decision.¹¹

⁷ *Ibid* at 9.

⁸ 2011 BCCA 186; 2011 BCCA 187.

⁹ *Infineon*, *supra* note 3.

¹⁰ *Ibid* at 16.

¹¹ *Ibid* at 33.

As noted above, the Trilogy included some important conclusions relating to competition law. We survey these briefly as they provide essential context for a discussion of the class proceedings issues in the Trilogy. First, expanding the application of its earlier decision in *Kingstreet Investments Ltd. v. New Brunswick (Department of Finance)*,¹² the Supreme Court found that “passing on” is not available as a defence in respect of “the whole of restitutionary law”.¹³ In the price-fixing context, this means that defendants cannot rely on the fact that intermediaries passed on higher prices to end-consumers as a bar to recovery. On the other hand, the fact that higher prices were passed on to indirect plaintiffs *can* form the basis of their claims for recovery.¹⁴ By so finding, the Supreme Court settled a split between the British Columbia and Quebec appellate courts, which had reached different conclusions as to whether indirect plaintiffs had a valid cause of action. Furthermore, with respect to the class issue requirement for certification in competition cases, the Supreme Court found that plaintiffs need only a “credible and plausible methodology” for calculating damages on a class-wide basis.¹⁵ The methodology must be grounded in the facts of the case and must not be purely theoretical. However, conflicting expert evidence should be left to the trial judge to resolve.¹⁶

The Trilogy: Standard of proof at the certification stage

In *Pro-Sys*, the Supreme Court of Canada addressed the important question of the standard of proof that should apply at the certification stage. Citing its decision in *Hollick v.*

¹² 2009 ONCA 506.

¹³ *Pro-Sys*, *supra* note 3 at 29.

¹⁴ *Ibid* at 60. In so finding, the Supreme Court explicitly rejected the American approach in the *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (U.S. Ill. S.C. 1977).

¹⁵ *Pro-Sys*, *supra* note 3 at 118.

¹⁶ *Ibid* at 126.

Toronto City,¹⁷ the Supreme Court declined to follow U.S. case law that imposes a more rigorous test for the certification of class actions.¹⁸ Instead, the Supreme Court confirmed that in common law Canadian provinces a plaintiff need only demonstrate “some basis in fact” supporting each of the certification requirements, except the disclosure of a cause of action.¹⁹ The threshold for the disclosure of a cause of action is that it must not be “plain and obvious” that the action would fail if it proceeded to trial.²⁰

At the Supreme Court, Microsoft argued that the “some basis in fact” standard requires that the evidence establish the commonality and preferability requirements on a balance of probabilities.²¹ It also submitted that the Court should adopt the U.S. approach of making factual and legal determinations at the certification stage, even where they overlap with the merits of the case.²² The Supreme Court rejected Microsoft’s argument. The Court found:²³

The "some basis in fact" standard does not require that the court resolve conflicting facts and evidence at the certification stage. Rather, it reflects the fact that at the certification stage "the court is ill-equipped to resolve conflicts in the evidence or to engage in the finely calibrated assessments of evidentiary weight"

The Supreme Court contrasted Canadian class proceedings legislation with the certification regime in the U.S., observing:²⁴

¹⁷ 2001 SCC 68.

¹⁸ *Pro-Sys*, *supra* note 3 at 101.

¹⁹ *Ibid* at 99.

²⁰ *Hunt v. T&N*, [1990] 1 W.D.C.P. (2d) 523 at 21.

²¹ *Pro-Sys*, *supra* note 3 at 101.

²² *Ibid*.

²³ *Ibid*.

²⁴ *Ibid* at 105.

[...] Canadian courts have resisted the U.S. approach of engaging in a robust analysis of the merits at the certification stage. I think it important to emphasize that the Canadian approach at the certification stage does not allow for an extensive assessment of the complexities and challenges that a plaintiff may face in establishing its case at trial. After an action has been certified, additional information may come to light calling into question whether the [certification] requirements ... continue to be met. It is for this reason that enshrined in the [*Class Proceedings Act*] is the power of the court to decertify the action if at any time it is found that the conditions for certification are no longer met (s. 10(1)).

The Supreme Court's clarification in *Pro-Sys* of the standard of proof at the certification stage was applied to the facts in *Sun-Rype* with the result that the class' certification was overturned. The respondents in *Sun-Rype* argued successfully at the Supreme Court that the indirect purchasers of HFCS did not meet the identifiable class requirement because no individual could know with certainty that it was a member of the class.²⁵ The proposed plaintiffs provided evidence about the enormous volume of HFCS consumed in the Canadian market, but they could not track the product to specific end purchasers. The Court contrasted this with the situation in *Pro-Sys*, where end purchasers could be identified through records of purchase and the existence of the relevant applications and software on their computers.²⁶

Because of the frequent substitution of liquid sugar for HFCS and the imprecise labelling, consumers had no way of knowing that they in fact purchased HFCS. Even the proposed representative plaintiff testified that she did not know whether she had.²⁷ The Court concluded:²⁸

²⁵ *Ibid* at 54

²⁶ *Ibid* at 61.

²⁷ *Ibid* at 55.

²⁸ *Ibid* at 69.

In this case, the problem is that the indirect purchaser plaintiff did not offer any evidence to show some basis in fact that two or more persons could prove they purchased a product actually containing HFCS during the class period and were therefore identifiable members of the class.

Accordingly, the Supreme Court found that the indirect purchasers in *Sun-Rype* did not meet the requirement of an identifiable class and therefore could not be certified. The direct purchasers also failed to meet the requirements for certification, but on the basis that their pleadings did not disclose a cause of action.²⁹

The decision in *Sun-Rype* included a dissent by Justice Karakatsanis. Her view was that the “some basis in fact” threshold was met for identifiable class members notwithstanding the factual difficulties in showing individual loss. She examined various aspects of the class action legislation, including the “aggregate damages” and “*cy-près* awards” provisions, which she said provide access to justice and behaviour modification – both are goals of class proceedings legislation - even where individual membership in the class is difficult or impossible to determine.³⁰ She also pointed to the availability of restitutionary remedies under the legislation as an indication that class identification does not require any individual to demonstrate individual loss.³¹

The majority addressed Justice Karakatsanis’s dissent in its reasons. It said that “[a]llowing such a class to be certified in such circumstances would be to lower the evidentiary

²⁹ *Ibid* at 80.

³⁰ *Ibid* at 102

³¹ *Ibid* at 107.

standard necessary to satisfy the criteria at the certification stage from some basis in fact to mere speculation.”³² [Emphasis added].

The Supreme Court’s articulation and application of the “some basis in fact” standard in the Trilogy is important for two reasons. First, the Supreme Court has made abundantly clear that the regime for certifying class actions in Canada is not to be conflated with that in the U.S. In Canada, the evidentiary standard is a low one during certification. On the other hand, the Trilogy provides an example of a situation where the very low standard of “some basis in fact” was not met. Thus, it reveals that the standard is not so low that it can be satisfied by mere speculation, even if it is statistically informed speculation.

The preferability requirement - some basis in fact

Shortly after the release of the Trilogy, the Supreme Court of Canada addressed the “some basis in fact” standard in peculiar circumstances in *Fischer v. IG Investment Management Ltd.* (“*Fischer*”),³³ in the context of the preferability requirement. The proposed plaintiff sought to certify a class in an action against investment fund managers who were implicated in “market timing” practices, allegedly causing investors to suffer losses. The managers had separately settled a regulatory action with the Ontario Securities Commission (“OSC”), which included some compensation to the investors pursuant to provisions of the *Securities Act*. The certification judge was, therefore, required to evaluate the preferability of a proposed class action relative to a

³² *Ibid* at 70.

³³ 2013 SCC 69 [*Fischer*].

regulatory procedure that had already concluded.³⁴ The judge found that he was prevented from second-guessing the access to justice function of the OSC, and consequently found that the OSC proceeding was the preferable procedure, and not a class proceeding. Thus, the judge refused to certify the class proceeding.

Reversing the certification judge's decision, the Divisional Court focused on the level of recovery under each of the alternatives, finding that a class proceeding was preferable from the perspective of available recovery.³⁵ On a further appeal to the Ontario Court of Appeal, that court found that the proper focus of the preferability analysis was on the *nature* of the alternative procedures, rather than their substantive outcomes.³⁶ The Court of Appeal nevertheless upheld the decision of the Divisional Court to certify the class.

The Supreme Court of Canada took a different view from all of the courts below, finding that the preferability analysis was necessarily both substantive and procedural in nature.³⁷ Its decision focused heavily on the access to justice issues that inform class proceedings legislation. The Supreme Court observed that, "class actions overcome barriers to litigation by providing a procedural means to a substantive end."³⁸ However, the Court also emphasized that this analysis must occur within the proper evidentiary framework of a certification hearing. On this point, the Court observed that "some basis in fact" does not require an exhaustive evidentiary record.³⁹ The

³⁴ The Supreme Court of Canada observed in its decision that Canadian class proceedings legislation is distinct from Rule 23 of the U.S. Federal Rules of Civil Procedure, which uses language that "invites comparisons with other forms of court action, and has tended to limit reliance on comparisons with non-judicial alternatives." *Fischer*, *supra* note 33 at 20.

³⁵ *Fischer*, *supra* note 33 at 2.

³⁶ *Ibid*.

³⁷ *Ibid* at 25.

³⁸ *Ibid* at 34.

³⁹ *Ibid* at 40-42.

Court reviewed its recent decision in *Pro-Sys* as well as other cases discussing the “some basis in fact” standard. Applying this standard to the issue of preferability in the present case, the Supreme Court upheld the motion judge’s decision to certify the class.

In the unusual circumstances of *Fischer* – where the alternative proceeding had already concluded – the Court observed that “when the results or the limits on recovery of an alternative procedure are known at the time of the certification motion, those uncontested facts cannot be ignored.”⁴⁰ However, comparisons of substantive access to justice would be more limited where the outcomes of alternative procedures are entirely unknown. The Supreme Court appears to be saying that while the evidentiary analysis at the certification stage is not exhaustive, the depth of that analysis will vary depending on the factual record available.

On the facts of the case, the Supreme Court upheld the earlier decisions to certify the class. The large number of small claims by investors posed the sort of economic barrier that class actions were designed to remedy.⁴¹ The OSC proceeding had been insufficiently addressed to compensation and was not an open process.⁴² Finally, there was evidence at the certification hearing to support a very large range of possible damages, potentially far exceeding the compensation involved in the OSC proceeding. The Court emphasized that it is precisely the certification judge’s role to compare access to justice provided by alternative proceedings, within

⁴⁰ *Ibid* at 47.

⁴¹ *Ibid* at 50.

⁴² *Ibid* at 54.

the limited evidentiary scope of a certification hearing, in terms of both substantive and procedural dimensions.⁴³

The commonality requirement – some basis in fact

Two recent decision of the Ontario Court of Appeal illuminate a careful distinction that courts will draw between issues that are common to a class and issues that are widespread, but do not meet the commonality requirement for certification. Often the distinction will turn on whether causation can be established on a class basis or will necessarily require a separate analysis for each class member. To prove that the loss-related issues meet the “some basis in fact” standard, some assurance is required that the questions are capable of resolution on a common basis.⁴⁴

In *Fresco v. Canadian Imperial Bank of Commerce* (“*Fresco*”), the Ontario Court of Appeal overturned the decisions of the trial judge and Divisional Court to deny certification for lack of a common issue.⁴⁵ The proposed plaintiff had sought to have a class certified in an action against the employer bank for its alleged systemic failure to properly compensate employees for overtime work. The lower courts found that differences among the experiences of bank employees and different record keeping practices among the bank’s branches meant that each employee’s potential claim would require an individual analysis. Therefore, the lower courts concluded that the proposed class failed to satisfy the commonality requirement. On appeal to

⁴³ *Ibid* at 62.

⁴⁴ *Pro-Sys*, supra note 3 at 114; For example *Stanway v. Wyeth Canada Inc.* (2012 BCCA 260) was a class action relating to a hormone replacement therapy. There was contradictory expert evidence about causation. There was evidence that, if accepted at trial of common issues, might answer a general causation question as to whether there was a causal connection between the hormone therapy and breast cancer. Accordingly, the appeal of certification by the defendants was dismissed.

⁴⁵ 2012 ONCA 444 [*Fresco*].

the Court of Appeal, that court found that the trial judge erred by focusing on the individual circumstances of the plaintiffs. The proposed issue of the bank's liability for its systemic failure to track overtime work was a common issue, supported by some basis in fact.⁴⁶ The Court of Appeal found that "[t]he fact that individual issues — including whether particular class members actually worked uncompensated overtime hours, and if so, how many overtime hours they worked — would remain after the common issues trial does not prevent a finding of commonality."⁴⁷

The decision in *Fresco* provides a good comparator for the subsequent decision of the same Court of Appeal in *Dennis v. Ontario Lottery and Gaming Corp.* ("*Dennis*").⁴⁸ In *Dennis*, a motion judge refused certification of a class of problem gamblers who had been allowed to gamble at casinos despite signing self-exclusion forms. Two classes of plaintiffs claimed general and special damages of \$2.5 billion, and one of the classes sought the restitutionary remedy of waiver of tort to disgorge the profits generated from the problem gamblers.⁴⁹ They brought their claims in contract and tort. The Court of Appeal upheld the decisions of the courts below to deny certification on the basis that a finding of liability would necessarily require an analysis of the circumstances of each individual class member. The Appellant plaintiffs argued at the Court of Appeal that there was a common issue of liability as to whether the Ontario Lottery and Gaming Corporation committed a systemic wrong by operating a predictably ineffective system of self-

⁴⁶ *Ibid* at 68.

⁴⁷ *Ibid* at 106.

⁴⁸ 2013 ONCA 501 [*Dennis*].

⁴⁹ *Ibid* at 18.

exclusion.⁵⁰ The Court of Appeal surveyed cases where a systemic failure supported a common question of liability. About those cases, the Court observed:⁵¹

In these cases, liability essentially turns on the unilateral actions of the defendant, is not dependent to any significant degree on the individual circumstances of class members, and the only remaining issues requiring individualized determination are whether and to what degree that conduct harmed the class members.

The Court of Appeal distinguished such cases from the case of problem gamblers, where the existence of a duty of care would have to be determined with reference to each gambler's personal circumstances, including their vulnerability and whether they returned to gamble after self-excluding due to their addiction.⁵²

The Court of Appeal relied on *Singer v. Schering-Plough Canada Inc.*⁵³ for the proposition that “common issues cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant.”⁵⁴ In this case, there could be no common issue because of the “inescapably individual nature of the claims at their core.”⁵⁵

Fresco and *Dennis* demonstrate the careful analysis that courts will undertake to determine whether the common issues requirement has been met. Evidence of a systemic failure will not necessarily give rise to a common issue if liability in the case of each claimant will require an individual analysis.

⁵⁰ *Ibid* at 51.

⁵¹ *Ibid* at 54.

⁵² *Ibid* at 56.

⁵³ 2010 ONSC 42 [*Singer*].

⁵⁴ *Dennis*, *supra* note 48 at 66.

⁵⁵ *Ibid* at 68.

The cause of action requirement – plain and obvious

As we have seen above, the Trilogy confirmed that the Canadian “some basis in fact” evidentiary threshold for certification is considerably lower than that applied in the United States. The “some basis in fact” test does not apply, however, to the issue of whether the claim discloses a legal cause of action. Appellate cases that predate the Trilogy suggest that Canadian courts will dispose of claims at the certification stage based on the absence of a legal cause of action, regardless of whether there is a basis in fact for assuming the other certification requirements are met. Whether a court will do so, however, depends upon how clearly it is shown that there is no viable cause of action. It must be “plain and obvious” that the claim will fail.

In *Williams v. Toronto (City)* (“*Williams*”) the Ontario Court of Appeal upheld a decision of the divisional court that reversed the certification judge’s initial denial of certification.⁵⁶ The proposed plaintiff wished to bring an action against a municipality for negligence for its failure to deliver statutory rent reduction notices to residents. The certification judge took the view that there was not sufficient proximity between the parties to give rise to a duty of care in the circumstances, and that a duty of care would be negated by policy considerations in any event. The judge held that it was, therefore, plain and obvious that the claim would fail at law, and thus could not be certified. The Court of Appeal disagreed. It said that the plain and obvious test was an exacting one.⁵⁷ The Court of Appeal concluded that on the facts of the case it was arguable

⁵⁶ 2012 ONCA 915 [*Williams*].

⁵⁷ *Ibid* at 13

that a duty of care was owed.⁵⁸ The Court of Appeal found that unsettled or novel matters of law should be allowed to go to trial so that they can be settled on the basis of a complete evidentiary record.⁵⁹

Williams can be contrasted with the decision of the same Court of Appeal in *Arora v. Whirlpool Canada LP* (“*Arora*”).⁶⁰ In *Arora*, an Ontario judge was prepared to deal with the duty of care analysis at the certification stage. The proposed plaintiffs purchased washing machines that they alleged were defective and prone to developing an unpleasant smell. They claimed damages for breach of express and implied warranty, breach of the *Competition Act*, negligence and waiver of tort.

With respect to the warranty claims, the certification judge found that as a matter of contract interpretation, it was clear that the plaintiffs’ claim was not covered by any warranty and there was no public policy reason (as might be the case with a dangerous product) for not enforcing the express terms of the contract, including its exculpatory provisions.⁶¹ The judge also found that there was no reasonable cause of action against the manufacturer defendant under the *Sale of Goods Act*.⁶² The certification judge also rejected the plaintiffs’ argument that a failure to disclose the shortcomings of the washing machines amounted to a “representation” giving rise to an offence under the *Competition Act*.⁶³

⁵⁸ *Ibid* at 18.

⁵⁹ *Ibid* at 13.

⁶⁰ 2013 ONCA 657 [*Arora*].

⁶¹ 2012 ONSC 4642 at 181.

⁶² R.S.O. 1990, c. S.1.

⁶³ *Arora*, *supra* note 60 at 48.

The judge then addressed the plaintiff's negligence claim for economic loss. Relying on the Canadian jurisprudence surrounding pure economic loss, including *Winnipeg Condominium Corporation No.36 v. Bird Construction Co.*,⁶⁴ the certification judge found that no duty of care was owed by the manufacturer to the purchaser for negligently designed non-dangerous consumer products. The judge also found that if a *prima facie* duty could be made out, policy reasons would favour negating such a duty.⁶⁵ Accordingly, the judge denied certification on the basis that the claim disclosed no reasonable cause of action.

The Ontario Court of Appeal upheld the certification judge's decision on all of these issues, even though it took the view that the law of pure economic loss was not entirely settled. In its reasons, the Court of Appeal cited Supreme Court Justice Abella's decision in *D.(B.) v. Children's Aid Society of Halton (Region)* for the proposition that "[i]f there is no legally recognized duty of care ... there is no legal justification for a protractive and expansive trial."⁶⁶ The Court of Appeal added that "[a]ccess to justice would not be served by forcing these parties on to an even more costly trial."⁶⁷ *Arora* demonstrates that on the eve of the Trilogy, judges in Ontario were increasingly willing to deal with difficult legal questions at the certification stage and the Court of Appeal had endorsed this approach.

What appears to distinguish *Arora* from *Williams* is the existence of strong authorities in *Arora*, supporting the certification judge's disposition without the need for a full trial, and the contrasting novelty of the situation in *Williams*. We may assume then that Canadian courts will

⁶⁴ [1995] 1 SCR 85.

⁶⁵ *Arora*, *supra* note 60 at 62.

⁶⁶ *Ibid* at 94, citing 2007 SCC 38, [2007] 3 S.C.R. 83 (S.C.C.), at 19.

⁶⁷ *Arora*, *supra* note 60 at 94.

dispose of class proceedings at the certification stage where there is clear authority addressing the viability of the proposed plaintiffs' cause of action.

Plain and obvious – unresolved issues

As far as class actions are concerned, the plain and obvious requirement is in one sense a recipe for continued uncertainty in many areas of the law. Unless the law is clear that an action will fail, any uncertainty in the law will remain unresolved by the court on a certification motion and the case will proceed as a class action, provided there is some basis in fact for the other certification requirements.

Neither the Trilogy nor any other Canadian decision has settled a hotly debated legal question that arises frequently in the context of class proceedings – whether common law restitutionary remedies are available for breach of a statute. Such remedies, including the claim based on the common law theory of waiver of tort, are attractive from the perspective of a plaintiff trying to certify a class. Because such claims are founded upon an alleged right to disgorgement of the wrongdoer's ill-gotten gains, success is arguably independent of any proof of damage or loss. In practice, this can make class certification easier since the plaintiffs do not face the problem of proving causation and loss. Causation and damage issues frequently pose a challenge to plaintiffs in demonstrating some basis in fact for the existence of an identifiable class, the existence of common issues, and the preferability of a class proceeding. Those challenges are swept away if proof of causation and damage are unnecessary for liability to be established.

Opinions differ as to whether waiver of tort requires an independent underlying tort separate from the violation of a statute.⁶⁸ In the fog of this ongoing debate, classes have been certified partly on the basis that the unsettled state of the law means that it is not plain and obvious that the plaintiffs' action will fail. In the Trilogy, for example, by finding that it was not the proper occasion to decide whether an independent tort was necessary to underpin a claim for waiver of tort, the Supreme Court left the question open for further debate and litigation.⁶⁹ As two recent British Columbia Court of Appeal cases demonstrate, this question is not merely academic. It has significant implications for class action litigation.

In *Koubi v. Mazda Canada Inc.* ("Koubi"), the British Columbia Court of Appeal addressed the ongoing academic and jurisprudential debate about the availability of a restitutionary remedy to underpin a class action for breach of consumer protection legislation.⁷⁰ The Court of Appeal found that despite there being an open question as to whether waiver of tort could provide a remedy for breach of statute in general, the British Columbia *Business Practices and Consumer Protection Act*⁷¹ ("BPCPA") is a "complete code", and cannot be supplemented by common law remedies.⁷²

The proposed plaintiff bought a car manufactured by the defendant that was subsequently revealed to have defective door locks. While other purchasers had experienced break-ins, the plaintiff had not suffered any loss. She brought an application for certification of a class,

⁶⁸ *Koubi v. Mazda Canada Inc.*, 2012 BCCA 310 [*Koubi*] at 79.

⁶⁹ *Pro-sys*, *supra* note 3 at 97.

⁷⁰ *Ibid.*

⁷¹ S.B.C. 2004, c. 2.

⁷² *Ibid* at 64.

pleading waiver of tort and seeking disgorgement as a remedy for the manufacturer's statutory breach of the provisions of the BPCPA and the *Sale of Goods Act*⁷³ ("SGA"). She wished to disgorge the defendant manufacturer of the profits it made from the allegedly offending product.

The plaintiff was initially successful in her certification application. The certification judge observed that the law was unsettled as to whether waiver of tort and other restitutionary remedies were available to remedy breach of statute. Therefore, her cause of action was not bound to fail and should be permitted to proceed.⁷⁴

On appeal, the British Columbia Court of Appeal agreed that the relationship between restitutionary remedies and breach of statute was unsettled.⁷⁵ However, the Court turned its attention to the BPCPA and the SGA specifically. The Court observed that the existing case law "establishes there is no tort of 'breach of statute', and pointed to the importance of legislative intent in determining what consequences flow from a statutory breach."⁷⁶ Justice Neilson, writing for the Court, concluded "I find nothing in the BPCPA to support the view that the legislature intended to augment its statutory remedies by permitting consumers to mount an action against a supplier for restitutionary relief based on the novel doctrine of waiver of tort."⁷⁷

⁷³ R.S.B.C. 1996, c. 410.

⁷⁴ 2010 BCCA 650 at 70-71.

⁷⁵ *Koubi*, *supra* note 68 at 40.

⁷⁶ *Ibid* at 49.

⁷⁷ *Ibid* at 64.

While the decision in *Koubi* relates only to a particular provincial statute and is binding only in British Columbia, a subsequent decision of the same Court of Appeal applied similar reasoning to the federal *Competition Act*.⁷⁸

In *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soin de la Sante Inc.* (“*Wakelam*”), the proposed plaintiff purchased several bottles of cough syrup while her son was under the age of six.⁷⁹ Some time later, in 2008, Health Canada revised its position on the safety of cough syrup for children under six and introduced new labelling requirements. Ms. Wakelam did not allege breach of contract, negligence or any form of tort, and did not allege that her son suffered any harm.⁸⁰ Rather, she claimed that several manufacturers of cough syrup had committed “deceptive acts or practices” contrary to the BPCPA and made representations contrary to the *Competition Act* by marketing the product as safe and effective for children under six.⁸¹

Like the BPCPA, the *Competition Act* includes a carefully crafted civil liability regime that provides for compensatory damages. The Court of Appeal reviewed its own decision in *Koubi* and went a step further, finding that the federal statute was also a complete code, which meant that Ms. Wakelam’s claim for restitutionary damages was bound to fail. It concluded:⁸²

⁷⁸ R.S.C. 1985, c. C-34.

⁷⁹ 2014 BCCA 36 [*Wakelam*].

⁸⁰ *Ibid* at 3.

⁸¹ *Ibid* at 4.

⁸² *Ibid* at 90.

Section 36 clearly limits recovery for pecuniary loss to "the loss or damage proved to have been suffered" by the plaintiff, together with possible investigatory costs incurred by the plaintiff. I see nothing in the *Competition Act* to indicate that Parliament intended that the statutory right of action should be augmented by a general right in consumers to sue in tort or to seek restitutionary remedies on the basis of breaches of Part VI.

[Emphasis added].

Another important aspect of the *Wakelam* decision is that the Court of Appeal found it insufficient for a plaintiff to simply allege in her pleading that she suffered damages as a result of the defendant's conduct. The Court of Appeal quoted *Singer* for the proposition that under the relevant provision of the *Competition Act*, the "plaintiff must plead a causal connection between the breach of the statute and his damages."⁸³ Accordingly, Ms. Wakelam's pleadings were deficient, as she had not pleaded any facts to support a causal link between the defendant's actions and any damages.

The effect of *Wakelam* is to deny restitutionary remedies from prospective classes in actions for breach of the *Competition Act* as well as the BPCPA. This means that the prospective plaintiffs who seek to recover for breaches of those acts will have to demonstrate some basis in fact to support a common issue of causation.

Courts in other Canadian jurisdictions will doubtless consider *Wakelam* carefully. In the meantime, the plaintiff in *Wakelam* has sought leave to appeal to the decision to the Supreme Court of Canada. Since *Wakelam* concerns a federal statute, there is at least a good argument that it raises a question of national importance, which is the threshold for the granting of leave for appeals to the Supreme Court. If the Supreme Court were to affirm the Court of Appeal's decision in *Wakelam*, it would narrow of the scope for the certification of class actions across

⁸³ *Ibid* at 91.

Canada. Conversely, a reversal of *Wakelam* may result in the certification of increasing numbers of class proceedings based on alleged statutory breach of both federal and provincial statutes.

Conclusion

The Trilogy has clarified the standard of proof that applies at the certification stage of all class actions in Canada. It shows that the path of class action law in Canada has diverged materially from that taken in the United States on this important issue. Canadian plaintiffs face a lower evidentiary threshold in certifying class proceedings, requiring that they show only “some basis in fact” for concluding that the certification requirements are met. The Trilogy and the other appellate decisions reviewed here demonstrate the impact of this lower threshold on various issues to be determined on a certification motion.

While the evidentiary standard is relatively low as far as certification motions are concerned, that standard does not apply to the requirement that a legal cause of action be properly pleaded. On that issue, the plaintiff need only show that it is not plain and obvious that the plaintiff’s claim will fail. This is a low threshold for plaintiffs, and yet Canadian appellate courts have shown that they will refuse certification where the authorities make it clear that the claim will fail at law.

Some substantive legal issues that arise frequently in class action litigation remain unresolved in Canada, particularly in the area of restitutionary remedies. Because of the plain and obvious standard, uncertainty will generally favour the plaintiff on a certification motion. The decisions in *Koubi* and *Wakelam* show that some Canadian courts are prepared to resolve important legal issues on certification motions, and that the resolution of such issues has

important implications for class action litigation. It remains to be seen, however, whether other Canadian courts will follow that example, and whether the Supreme Court of Canada will endorse it.



FDCC Annual Meeting 2014 – CLE Materials

The Status of Public and Private Enforcement of Law in the EU Innovation and Transformation

Christopher Hodges¹

A. EXECUTIVE SUMMARY

The European legal system is undergoing a significant period of innovation, and significant transformation. Traditional methods of both private enforcement (litigation) and public enforcement (prosecutions brought by the police or regulators) are developing in Europe. The distinction between those two areas is becoming blurred, and new techniques are achieving considerable success in various situations, such as ADR, ombudsmen, private parties joining criminal prosecutions, and regulators' redress powers. ADR and regulators are working increasingly closely together, and being prioritised over litigation and collective actions. Criteria such as cost, duration, effective outcomes are being applied to legal techniques and systems, in addition to traditional criteria of justice and fair procedures. The design of the new techniques is important to their achieving success.

B. BACKGROUND TO REDRESS: SUBSTANTIVE LIABILITY LAW

This Report is about how legal rights, such as commercial or consumer rights, are enforced after they have been breached. It describes enforcement mechanisms, not the substantive rights themselves. Very many legal rights exist, under the national law of every EU Member States, many of which have been harmonized by EU legislation. The major 'families' of rights arise under contract law and tort law. In commercial transactions, the general principle is not to interfere with the freedom of contracting parties to agree terms and conditions.

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Claims for breach of contract depend on the terms of the contract that have been agreed, and can include payment for economic loss that arise as a result of the breach of contract. In contrast, in contracts between traders and consumers, in order to reflect the imbalance of power between the contracting parties, the law provides considerable protection for consumers, such as banning unfair contract terms.

European law falls into two broad categories: private law and public law. Private law gives rise to the individual rights described above. The behaviour of traders is also subject to control by public authorities, which are usually regulatory authorities that cover consumer trading, financial services, communications, and so on, but can also link in with the police. Public authorities usually have the power to make rules for trading and to take enforcement action, such as investigating breaches, requiring changes in trading behaviour, ordering the withdrawal of unsafe products from the market, and ultimately bringing prosecutions against traders, or removing their licence to operate.

C. ACCESS TO JUSTICE AND THE THREE PILLARS FOR ENFORCEMENT: PRIVATE ENFORCEMENT THROUGH COURT LITIGATION, PUBLIC ENFORCEMENT THROUGH REGULATORY AGENCIES AND THE POLICE, AND NEW ADR MECHANISMS

A number of techniques for enforcing law can be mapped. The principal techniques fall into the following ‘three pillars’:

1. *Public enforcement by public authorities.* The police or public prosecutor instituting criminal proceedings in a criminal court. A public regulatory body can also usually commence criminal or administrative proceedings (in a criminal or administrative court) and/or civil proceedings for civil sanctions in a civil court.
2. *Private enforcement by private parties.* The private parties may be those who own the right that is being enforced. In a number of situations, especially in collective actions, a representative or intermediary is required (representative association, third-party funder, or lawyer).

The ‘tribunal’ that processes the complaint may be a state entity (court, administrative court/tribunal, or some other tribunal), or private entity (arbitrator, ombudsman, ADR entity, some other third party).

Many consumer complaints involve very small amounts of money, for which it would not be rational to waste time or money in consulting a lawyer or using a court.² Further, a substantial proportion of European consumers encounter problems when buying goods and services in the internal market. In 2010, this was the case for approximately 20% of European consumers.³ The losses incurred by European consumers because of problems with purchased goods or services are estimated at 0.4% of the EU GDP.

² See summary of the evidence in C Hodges, ‘Consumer Redress: Ideology and Empiricism’ in K Purnhagen and P Rott (eds), *Varieties of European Economic Law and Regulation. Festschrift for Hans Micklitz*, (Springer, 2014).

³ Eurobarometer 342, ‘Consumer Empowerment’, p 169.

These statistics demonstrate a growing need to provide an effective means of access to justice to resolve consumer disputes. Whilst a decade ago policy included providing public funds as legal aid for small claims to be brought, and to simplify court procedures so as to provide simplified ‘small claims’ tracks, the first mechanism has failed as governments have cut public expenditure programmes and the small claim mechanism has not been universally successful. This collapse in access to justice has prompted policy-makers to look for delivery of justice by means other than through courts (or lawyers), in more accessible, cheaper and more effective ways.

Accordingly, in recent years EU states have expanded a third pillar in relation to consumer-to-trader or citizen-to-state complaints:

3. *Bring a complaint to an ADR entity.* ADR is ‘alternative dispute resolution’. In commercial disputes, it may involve using arbitration or mediation or some other ADR technique, instead of the courts. In consumer-to-trader disputes (C2B), there is a unique body of ‘consumer ADR’ (CDR) entities, who from 2015 are formed into a pan-EU network of CDR entities.

The pathways that exist in practice often offer a mixture of ‘public’ and ‘private’ enforcement. The variables that may be either ‘public’ or ‘private’ are: the actor, the tribunal, the procedure, and the remedy. A classification into ‘public’ or ‘private’ does not tell us much, since there are several variables in what is public or private, and particular pathways can be mixtures of both.

For example, two variations exist under pillar 1. Firstly, criminal courts can award compensation to victims of violent crime.⁴ As of 2013, criminal courts in the UK are required to consider making a compensation order to victims.⁵ Secondly, in many states, private parties can ‘piggy-back’ their private claim onto criminal proceedings: after a defendant has been convicted of a criminal offence, the same court will deal with the civil law claims for compensation. This technique exists in theory but has not been widely used in European states: it has been used successfully when the criminal court is *required* to deal with civil claims (as opposed to having a discretion to process them), such as in Belgium, where a class action mechanism did not exist and the *partie civile* mechanism was used to process a series of large cases involving product

⁴ Directive 2004/80/EC of 29 April relating to compensation to crime victims, OJ L 261/15, 6.8.2004, arts 1 and 2. **CHECK** See also Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA), and Proposal for a Directive establishing minimum standards on the rights, support and protection of victims of crime COM(2011) 275 final, 18 May 2011; and *Proposal for a Directive on the freezing and confiscation of proceeds of crime in the European Union*, COM(2012) 85, 12.3.2012, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0085:FIN:EN:PDF>. See also Council of Europe Recommendation No. R(85) 11 on the position of the victim in the framework of criminal law and procedure; Recommendation No. R(87) 21 on assistance to victims and the prevention of victimization; Recommendation No. R(2000) 19 on the role of the public prosecution in the criminal justice system; and the European Convention on the compensation of victims of violent crimes (1983). In UK see the Victims of Violent Intentional Crime (Arrangements for Compensation) (European Communities) Regulations 2005/3396.

⁵ The Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 63. The same approach was previously mandated under ‘Purpose (e)’ of the purposes of sentencing set out in s 142 of the Criminal Justice Act 2003: “Any court dealing with an offender in respect of an offence must have regard to the following purposes of sentencing ... (e) the making of reparation by offenders to persons affected by their offences.”

liability, gas explosions, or investors.⁶ In essence, the private parties are saved the bother and expense of investigating and prosecuting a case, and their claims for damages are adjudicated by the court (or a special civil master appointed and overseen by the criminal judge) in a second phase of the proceedings.

Thirdly, a highly significant change has emerged recently in Denmark and the UK, under which regulatory authorities are able to force traders to deliver redress to consumers. This technique is described in detail below: it has proved to be very effective, fast and cheap.

The position is complicated by the fact that the ‘enforcement architecture’ differs in every Member State. In other words, some countries prioritise enforcement by private actions and other countries prioritise public enforcement. Some have hybrid forms, such as in Germany where both (private sector) trade associations and consumer associations can enforce trading law through actions in the courts: this might be described as private sector bodies performing enforcement of both public and private law. Given this diversity, EU legislation has to provide for all possible means of enforcement, without specifying which techniques might be preferable.⁷

D. EU HARMONISATION OF CIVIL PROCEDURE AND FACILITATION OF CROSS-BORDER CLAIMS

The civil procedure of many Member States is subject to constant evolution, usually to make procedures more efficient and quicker. For example, major reforms were introduced in England and Wales in 1999⁸ and 2013.⁹

Since 1999 the policy of the European Union has been to establish ‘an area of freedom, security and justice’.¹⁰ The EU is slowly seeking to align the civil procedures of all Member States. This is a difficult task, for various reasons, including that the models of civil procedure differ. For example, the civil law system in Germany is more ‘inquisitorial’, with the judge assembling a file of all the evidence and the parties and their lawyers playing a relatively passive role after their initial statements. This contrasts with the more ‘adversarial’ common law model in England, where the parties assemble all written, oral and expert evidence, and the judge is traditionally more passive. The EU harmonisation process will take several decades.

So far, the EU has harmonised two main areas. One area concerns the laws relating to the proper law,¹¹ jurisdiction and enforcement¹² of cross-border litigation. The second area includes

⁶ S Voet, ‘Public Enforcement & A(O)DR as Mechanisms for Resolving Mass Problems: A Belgian Perspective in C Hodges and A Stadler (eds), *Resolving Mass Disputes: ADR and Settlement of Mass Claims* (Edward Elgar, 2013 forthcoming).

⁷ Directive 2011/83/EU on consumer rights, art 23, therefore, contemplates enforcement by one or more of: (a) public bodies or their representatives; (b) consumer organisations having a legitimate interest in protecting consumers; (c) professional organisations having a legitimate interest in acting.

⁸ This fundamental revision of civil procedure introduced the idea that the objective of litigation is to *settle* rather than to *fight*, so mediation and the whole procedure was re-aligned. The new Civil Procedure Rules were planned by a senior judge:

⁹ These related to saving costs, and included many detailed reforms. The plan was drawn up by a senior judge:

¹⁰ This was agreed at the Tampere European Council and later included in the Treaty of Amsterdam and a related agreement of the Council.

¹¹ Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to contractual obligations (Rome II) [2007] OJ L199/40; Commission Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), [2008] O.J. L 177/6.

harmonised rules for various simple procedures, such as service of documents,¹³ cooperation in taking evidence,¹⁴ insolvency,¹⁵ a European Small Claims Procedure for monetary claims of a total value not exceeding €2,000,¹⁶ a European Order for Payment Procedure (EOP) for uncontested pecuniary claims in cross-border cases,¹⁷ a European Enforcement Order for Uncontested Claims (EEO) for uncontested claims,¹⁸ and cross-border injunctions to stop breaches of consumer trading law.¹⁹

The European Small Claims Procedure came into force from January 2009, for cross-border claims under €2,000.²⁰ It does not require representation by a lawyer but the loser must pay costs. This regulation eliminates the intermediate step of requiring the recognition of the case and its enforcement in another state. However, a 2007 study has shown that the cost, length or complexities of these procedures are still too high to allow effective access to justice.²¹ Amendments have been proposed in 2013 but the procedure may simply be useful for small businesses rather than consumers.

One rule which is similar in many jurisdictions is that the losing party in litigation must pay the legal costs of both his own and the other side. This rule is justified as a matter of fairness, as an incentive against starting litigation without merit, and as an encouragement for parties to settle claims. There was an attempt to promote legal aid (state funding for lawyers) to support litigation by poor individuals,²² but after the financial crisis produced economic stringency on state budgets, that mechanism has not been pursued.

E. CLASS ACTIONS

Individual European countries have introduced class action laws since around 2000. Some of the main examples are given in Table 1. The national procedure was usually introduced as a political

¹² Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and enforcement of judgments in civil and commercial matters [2001] OJ L12/1 (Brussels I); Regulation (EC) 1215/2012 of 12 December 2012 on jurisdiction and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1.

¹³ Regulation (EC) 1348/2000.

¹⁴ Regulation (EC) 1206/2001.

¹⁵ Regulation (EC) 1346/2000.

¹⁶ Regulation (EC) 861/2007 Establishing a European Small Claims Procedure. It is proposed to raise this to €10,000: see proposal COM(2013) 794 final, 19.11.2013.

¹⁷ Regulation (EC) 1896/2006 Creating a European Order for Payment Procedure.

¹⁸ Regulation (EC) 805/2004 Creating a European Enforcement Order for Uncontested Claims.

¹⁹ Directive 2009/22/EC on injunctions for the protection of consumers' interests (initially Directive 98/27/EC).

²⁰ EC, *Commission Regulation (EC) 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure*, [2007] O.J. L 199/1, see art 2 and Annex 1 art. 7. The legal basis under art. 61 EC for coverage of domestic disputes as well as cross-border ones was a matter of debate. Art 16 provides that the court shall not award costs to the extent that they were unnecessarily incurred or are disproportionate to the claim. See G Haibach, *The Commission Proposal for a Regulation establishing a European small claims procedures: an analysis*, *ERPL* 2005, pp. 293-601; E Hondius, "Towards a European Small Claims Procedure", in: L Thévenoz & N Reich (eds), *Liber amicorum Bernd Stauder, Consumer Law*, (Geneva: Schulthess, 2006), p. 131 *et seq.*; J Baldwin, "Is there a limit to the expansion of small claims?", in: MDA Freeman (ed), *Current Legal Problems*, vol. 56, (Oxford: Oxford University Press, 2004), pp. 313-343; CJ Whelan (ed), *Small claims courts - A comparative study*, (Oxford: Clarendon, 1990), p. 253 *et seq.*

²¹ See J Stuyck, below.

²² Directive 2003/8/EC to Improve Access to Justice in Cross-border Disputes by Establishing Minimum Common Rules Relating to Legal Aid for such Disputes.

response to a particular event: faced with public and media pressure to ‘do something’ the politicians responded by introducing a class action. Accordingly, the model adopted by every national procedure is individual and different. For example, they are usually restricted to a particular type of claim, such as by consumers.

Table 1. Some national collective action laws, their origins and coverage

State	Origin	Type
England & Wales GLO 1999	medicinal products	horizontal
Spain 2000	adulterated rape seed oil	consumer
UK CAT 2002	competition damages policy	competition
Sweden 2002	academic	horizontal
Germany <u>KapMuG</u> 2005	Deutsche Telekom	investors
Netherlands 2005	DES, blood products <u>etc</u>	settlement
Denmark, Finland, Norway 2008	Sweden	consumers
Italy 2008→2010	<u>Parmalat etc</u>	consumers, financial
Poland 2010	collapsed building	horizontal
Malta	competition	consumers and competition
Lithuania 2014	Failed banks	?
France 2014	... France Telecom Mediator, PIP	consumers?
Belgium 2014	Explosions, collisions, bankruptcy, Fortis nationalisation	consumers?

A particularly interesting national model exists in the Netherlands, based on encouraging settlement of mass disputes. There is a procedure that permits collective actions for a declaration, but this does not permit damages to be awarded. The separate Collective Actions Settlement Law (WCAM) has no ‘front end’ in the form of a procedure under which the court may declare that a class proceeding is created that may result in awards of damages, but only a ‘back end’ in which the Amsterdam Court of Appeal may review a settlement that the parties have reached themselves, and declare that it is fair and should be binding on all potential members of the class.²³ This procedure has been successful in resolving a series of major international disputes, such as those involving class members outside the U.S. There has been some controversy when the Dutch courts assumed jurisdiction in a case involving a Swiss defendant company was sued on behalf of investors in many jurisdictions, only 3% of whom were in the Netherlands.²⁴

The EU has been debating how to deal with multiple similar individual claims for many years. The outcome has been to reject the U.S. model of class action (or multi-district) litigation and to prefer, first, new techniques such as Consumer ADR and regulatory redress and, second, a European model of a ‘collective action’. Many senior European politicians have condemned the

²³ The procedure was invented to approve a settlement in a long-running case involving a drug (DES) that had caused cancer in pregnant women: *The Companies, The Insurers, Stichting DES Centrum and Stichting BD v W, X, Y and Z* (2005).

²⁴ The *Converium* decision of 2012: see C Hodges and A Stadler, ‘Introduction’ in C Hodges and A Stadler (eds), *Resolving Mass Disputes: ADR and Settlement of Mass Claims* (Edward Elgar, 2013).

U.S. class action as producing abuse, such as ‘blackmail settlements’ in which it is cheaper for companies to settle unmeritorious claims than fight them. The abuse is said to arise as a result of a ‘toxic cocktail’ of elements, including punitive damages, contingency fees, opt-out, pre-trial discovery procedures, jury trials.²⁵ The EU model put forward by the European Commission in 2013²⁶ contains a series of safeguards,²⁷ including:

- *Admissibility*. Collective actions should only be brought when certain admissibility conditions are fulfilled.
- *Standing*. In representative actions it should be ensured that the representative entity acts genuinely in the best interests of the group represented. The Commission defines the conditions for standing in representative actions in the commission Recommendation.
- The ‘*opt-in*’ model is preferred, but since some Member States already have ‘opt-out’ mechanisms, that approach should be “duly justified by reasons of sound administration of justice”.
- Effective provision of *information* to potential claimants.
- *Interplay with public enforcement*. In certain areas (competition, environment and data protection), public enforcement plays a major role, which must not be put in jeopardy by litigation being commenced before the conclusion of the public investigation. The Commission proposes that this can be achieved by rules restricting public access to documents obtained or produced by the public authority and by suspending limitation rules. Punitive damages should not be permitted.
- *Effective cross-border enforcement*. The Commission is not persuaded to introduce a specific rule for collective claims beyond the existing rules.²⁸
- Availability of *consensual dispute resolution*. This should be encouraged²⁹ but remain voluntary, although judges should not be prevented from inviting parties to seek a consensual solution.³⁰ Where a consensual solution is reached, the court should verify the legality of the outcome and confirm it.³¹
- *Funding* of collective action. The ‘*loser pays*’ principle should apply to collective redress cases. “An inappropriate system of third party financing runs the risk of stimulating abusive litigation or litigation that does little to serve the best interests of litigants.” Therefore, third-party financing should be made subject to certain conditions. The Commission did not find it necessary to recommend direct support from public funds.

The combined effect of mechanisms such as opt-in, loser pays, no punitive damages and no jury trials will restrict the financial incentives that operate in the U.S.A. to attract lawyers and other

²⁵ European Commission DG SANCO, MEMO/08/741, 4.

²⁶ Commission Recommendation of 11 June 2013 on common principles for collective redress mechanisms in the Member States for injunctions against and claims on damages caused by violations of EU rights, COM(2013) 3539/3, 11.6.2013. See also Communication from the Commission “Towards a European Horizontal Framework for Collective Redress”, COM(2013) 401/2, 11.6.2013.

²⁷ See R Money-Kyrle and C Hodges, ‘Safeguards in Collective Actions’ (2012) 19.4 *Maastricht Journal of International and Comparative Law* 477-504.

²⁸ Regulation (EC) No 4412001 on jurisdiction, recognition and enforcement of judgments in civil and commercial matters (‘the Brussels I Regulation’), as amended by Regulation (EC) no 1215/2012 that will enter into application 10 January 2015. OJ L 351, 20.12.201.

²⁹ points 27-30 of the Commission Recommendation.

³⁰ This is already the case for mediation in cross-border disputes, where, in accordance with Article 5 of Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters, courts before which an action is brought may invite the parties to use mediation in order to settle the dispute.

³¹ point 30 of the Commission Recommendation.

litigation funders to mass litigation, and therefore limit the number of collective actions in Europe.³²

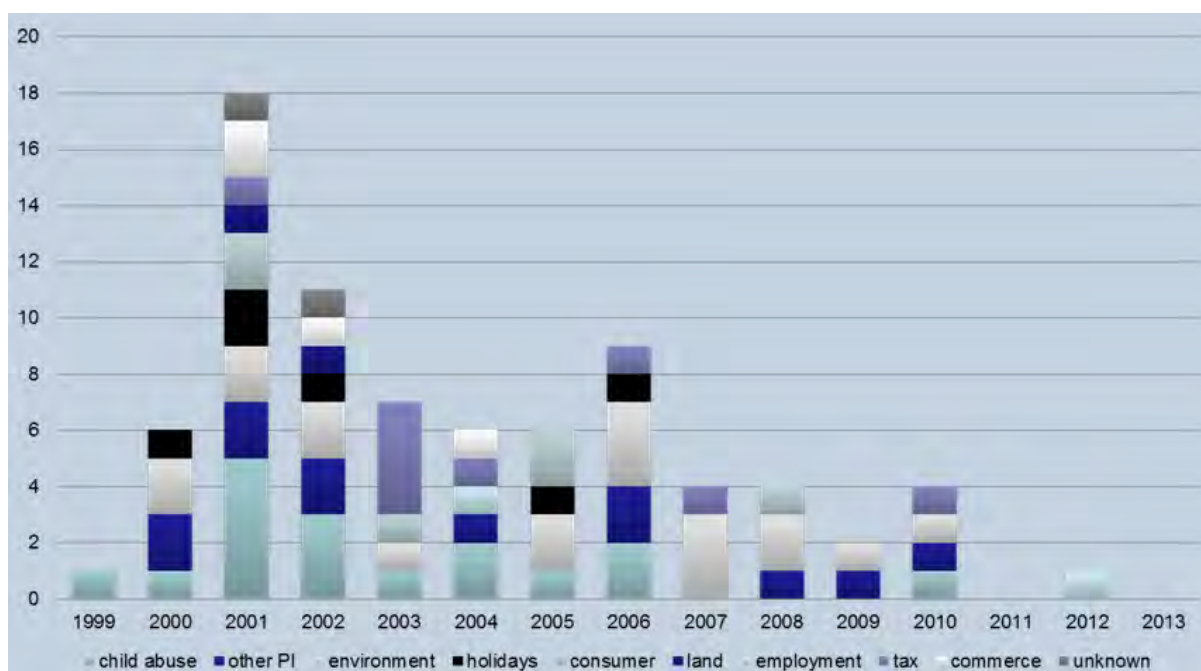
This limited phenomenon of mass litigation is exactly what is found in those Member States that have introduced national collective action procedures. Detailed information reported at the Swiss Re conference ‘Building Effective Markets – The Role of an Integrated Legal System’ held on 29th-30th January 2013 at the Swiss Re Centre for Global Dialogue, Rüschlikon, Zürich, Switzerland showed:

Spain	Collective procedure under 2000 Civil Procedure Law revision. Only a handful of cases in 12 years.
Sweden	Class Actions Law 2003. Reportedly 12 class actions filed. Many against the government. 2011, class action brought by the Consumer Ombudsman on behalf of approx. 2,100 customers against a power supplier over a breach of the supply agreement.
Finland	Class Action Law 2007, only for consumer disputes, only brought by the Consumer Ombudsman. First case 2010 for misleading information against a construction company, heard by the Consumer Disputes Board
Norway	Class Action Law 2008. The main rule is opt in, but opt out can apply in some cases. To Nov 2011, 38 cases were registered. There were 22 rulings: 13 were approved and 9 denied. The largest case involved 3,500 claimants (the smallest 6). There is a range of types: building contractors, breach of confidentiality by MoJ itself, shareholders, franchising against the tax authorities.
Denmark	Class Action Law 2007 (opt-in). First case judgement in 2012, a shareholders' association re share redemption scheme in Bank Trelleborg. Two other class cases approved, and two pending as at March 2012. Mainly re financial investment issues.
Portugal	1995 Law with two proceedings that are exercisable by citizens and qualifying associations, opt-out. Only 3 cases. The most celebrated was settled by Portugal Telecom in 1999, by giving free calls.
England	Ancient but restricted representative action procedure. Group Litigation Order (GLO) procedure. 75 GLO since 2000, but use of GLO procedure appears to be declining. 2012 proposal for opt-out class action re competition.
Scotland	No class actions law. Succession of large oil rig disaster cases. Vioxx litigation 2009 -.
Germany	No general class action law (indeed, strong opposition). Deutsche Telekom case involving 15,000 individual investors, copycat of U.S. settlement, led to passing of Capital Investors Law (KapMuG) 2005. But the case was dismissed 2012.
Austria	Consumer association VKI has brought consumer representative case with (German) third party funding, e.g. contaminated water supply, real estate investment, and holiday food poisoning.
Belgium	No class actions law. Piggy back on criminal proceedings.
Ireland	No class action procedure: long debate. Mass litigation in individual cases over soldiers' deafness.
Bulgaria	Class Action Law 2008. A tobacco case failed.
Lithuania	Litigation in 2010 re failed banks, led to Class Action Law proposal 2012.

³² C Hodges, ‘Collective Redress: A Breakthrough or a Damp Sqibb?’ ³² (2014) 34 *Journal of Consumer Policy* 67–89.

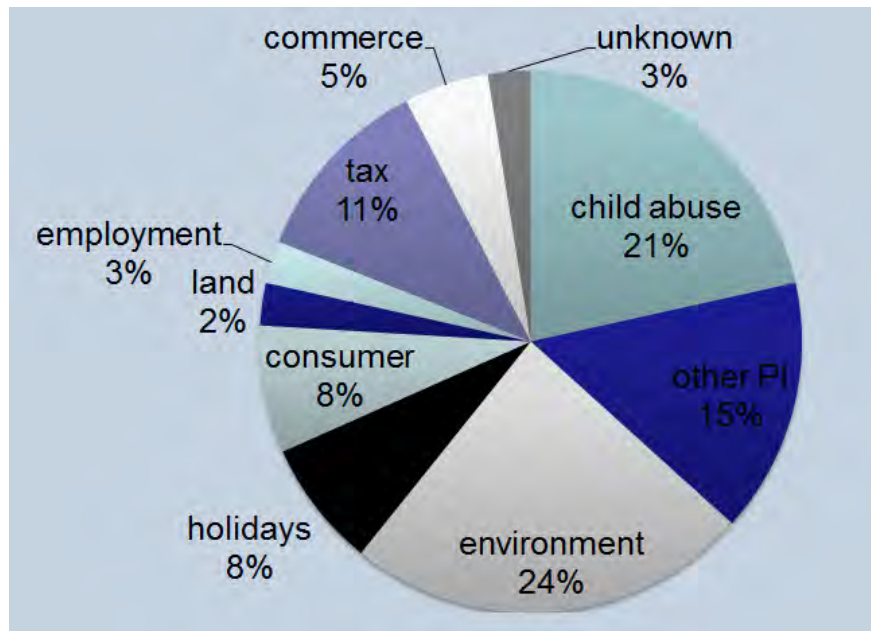
Poland	Class Action Law 2010 – From Jan to Aug 2011 there were 42 applications for class actions (18 were admitted). Types vary: banking services, mortgages, public authorities' failure to prevent flooding, contamination in a hospital. No mediation
Netherlands	A preferred forum for resolving mass claims. Various successful settlement of large cases (now a significant industry), e.g. • <u>DES</u> (DES vs. drug manufacturers) • <u>Dexia</u> (investment product purchasers vs. bank) • <u>Shell Petroleum</u> (shareholders alleging securities fraud related to restatement of petroleum reserves by Royal Dutch Shell) • <u>Vedior</u> (shareholders alleging securities fraud related to M&A) • <u>Converium</u>: extra-territorial controversy

The drop in collective actions can be illustrated by a jurisdiction that has been historically active in collective actions, England and Wales.³³ During the 1980s and 1990s a series of mass actions were brought, almost all funded by legal aid, mainly against pharmaceutical companies; the failure rate was high. The incidence of collective actions in the country can be mapped against the availability of public funding for the lawyers and the suspension of the normal 'loser pays costs' rule at certain periods.³⁴



³³ See C Hodges, *Multi-Party Actions* (Oxford University Press, 2001).

³⁴ The rule was suspended under the legal aid regime from 1957 to 1999; from 2001 to 2013 successful claimants were permitted to recover, in addition to normal costs, a success fee for their lawyer and a (usually very high) premium for an after-the-event insurance policy against the risk of having to pay their opponents' legal costs if they had lost; from 2013 the loser pays rule is again suspended under a 'qualified one way cost shift' rule in the case of personal injury claims.



It is likely that collective action procedures will be introduced in every Member State within the next five years. However, it is possible that they may not be much used, for two reasons. Firstly, if the various safeguards are kept in place, it will be difficult and risky in costs to bring a large action. Secondly, more attractive and effective mechanisms for delivering collective redress are beginning to become available, and likely to spread: these are regulatory redress, CDR schemes and injury compensation schemes.

F. REDRESS BY REGULATORS

This technique is particularly interesting, since it can offer very efficient, fast and effective resolution of the totality of the public and private aspects of a case in one go. The technique is used by regulators in diverse Member States.³⁵ Leading examples can be seen in Denmark and the UK.

The Danish national consumer law enforcement officer (called, slightly misleadingly, the Consumer Ombudsman) has a toolbox of enforcement powers, which include the normal prosecution powers but also, since 2005, the power to commence proceedings for mass redress. The redress power has confused some commentators, since it is contained in the Class Action Law: whilst any party affected may start a class action on an opt-in basis, only the Consumer Ombudsman may do so on an opt-out basis. Almost no private class actions have been commenced in Denmark (a large bank case failed after several years' litigation). But the Consumer Ombudsman uses the threat of his collective redress power regularly in enforcement discussions with traders. Since it is a powerful weapon in amongst a powerful armoury, he has not yet had to commence redress proceedings, since traders agree settlements, which include *all* aspects, such as agreement to cease infringement, undertaking not to repeat, agreement to make changes in systems and practice, repayment of customers, and maybe public sanctions. This is an

³⁵ The author has seen highly effective examples adopted by the Lithuanian Telecommunications Authority, and a less successful attempt by the Irish Financial Services Ombudsman.

extremely efficient and effective system, and offers advantages for traders, consumers and the state.

The same approach has been adopted by virtually all public regulators in UK. The history is complex and has taken several years to develop. The main feature is the promulgation of a Regulators' Compliance Code, which makes regulators subject to a requirement to aim to eliminate any financial gain or benefit from non-compliance.³⁶ Regulatory agencies have been required to publish enforcement policies, which include this restorative approach and explain how they will apply it in their particular contexts. A number of regulators have also been given extended powers to seek civil sanctions, which can include restoration notices and accept undertakings to compensate.³⁷ Some have also been given express powers to impose a requirement on traders to pay compensation. The financial services regulator has powers to seek or make a Restitution Order³⁸ and, in particular, a scheme that multiple firms review past business, which would determine the nature and extent of the failure, establish the liability of authorised persons to make compensation payments, and determine the amounts payable by way of compensation payments.³⁹ Since 2010 it also has a power to make a consumer redress scheme⁴⁰ where the regulator considers a widespread problem exists and a court would award redress to consumers.⁴¹ The regulator can make rules requiring a relevant firm to establish and operate a consumer redress scheme, which may include requirements for the firm to investigate whether it has failed to comply with the law, to determine whether the failure has caused or may cause loss to consumers, to determine what the redress should be, and to make the redress to the consumers.⁴² Where a consumer makes a complaint to the Ombudsman in relation to an act or omission of a firm that is covered by a consumer redress scheme, the Ombudsman is required to determine the complaint by reference to what, in the Ombudsman's opinion, the determination under the consumer redress scheme should be or should have been, and may make an appropriate payment award.⁴³ In effect, therefore, the Ombudsman applies the solution mandated by the regulator, and decides if the business has done what the regulator required. Compensation has been paid in a sequence of cases since 2010, either as a result of agreements between the financial services regulator and financial institutions, or as a result of the use of the formal powers.

³⁶ *Regulators' Compliance Code: Statutory Code of Practice for Regulators*, (BERR, 17 December 2007), at <http://www.berr.gov.uk/files/file45019.pdf>, para 8.3. The Code is made under the Legislative and Regulatory Reform Act 2007, s 22.

³⁷ Empowering Orders may be made under the Regulatory Enforcement and Sanctions Act 2008. Examples are The Environmental Civil Sanctions (England) Order 2010/1157 and The Environmental Civil Sanctions (Miscellaneous Amendments) (England) Order 2010/1159.

³⁸ Financial Services and Markets Act (FSMA), s 383.

³⁹ FSMA, s 404.

⁴⁰ Financial Services Act 2010, s 14 and 26(3), significantly extending s 404 of the FSMA. The new rules were brought into force from 12th October 2010 by The Financial Services Act 2010 (Commencement No. 1 and Transitional Provision) Order 2010/2480. The FSA decided not to apply for civil sanction powers under RESA since it concluded that having them would not make a material difference to the effectiveness of its enforcement action.

⁴¹ FSMA s 404, as amended by Financial Services Act 2010, s 14: the power for the Authority to make rules requiring each relevant firm (or each relevant firm of a specified description) to establish and operate a consumer redress scheme arises where it appears to the Authority that there has been a widespread failure to comply with applicable requirements and as a result, consumers have suffered loss or damage in respect of which, if they brought legal proceedings, a remedy or relief would be available.

⁴² FSMA s 404 (4)-(7). A firm may apply to the Tribunal for a review of any rules made by the Authority: s 404D.

⁴³ FSMA s 404B. The award is subject to the Ombudsman's upper limit, but he may recommend that the firm pay a larger amount: s 404B(5) and (6).

Similar powers are being given to regulators in the energy sector so as to improve both payment of redress to consumers, and the regulator's leverage in bringing redress about.⁴⁴ Some regulators have brought about payment of redress simply by leveraging their influence, and that of the ability to 'name and shame' traders who value their reputations in competitive markets. On 9 March 2012 Ofgem accepted an energy company's offer to invest £4.5 million to help vulnerable customers and consequently reduced a penalty for breach of marketing rules to £1.⁴⁵ In November 2012, Ofgem secured a commitment from E.ON to pay back around £1.4 million (an average rebate of £14.83, including eight percent interest) to approximately 94,000 consumers who were incorrectly charged exit fees or overcharged following price rises that were incorrectly implemented too early.⁴⁶ In addition, E.ON agreed to make an additional payment of around £300,000 as a goodwill gesture to a consumer fund which they run in partnership with Age UK.⁴⁷

These regulatory techniques are extremely powerful and extremely effective. They deliver full compensation (without deduction of transactional cost) to consumers, often in small individual amounts, very quickly, with minimal transactional cost to the public budget. Ensuring that payments are made properly by traders can be overseen by the regulator. The regulator is also in a position to engage in ongoing monitoring of traders' behaviour, to ensure that it has changed.

The 'class action' introduced in 2013 in the revised Chinese Consumer Law can be classified as a regulatory redress mechanism, rather than a private-litigation-style class action.

G. CONSUMER ADR

It has been widely recognised that ADR can settle and shorten court litigation. Arbitration is a form of ADR, and is widely used in relation to commercial disputes. Since around 2000, ADR has been introduced into many court procedures. The influential pioneer was England and Wales in the fundamental reform of the Civil Procedure Rules introduced in 1999.⁴⁸ A key feature of the English reform was to combine court procedure with mediation, and make settlement a formal goal of civil process. The Directive on mediation, in force from 21 May 2011, requires every Member State to ensure that voluntary mediation is available as a viable alternative to litigation in providing access to justice, and includes requirements on confidentiality of processes, and enforceability of agreements.⁴⁹ However, that Directive applies

⁴⁴ Energy Act 2013. See the *Consultation on a proposed new power for Ofgem to compel regulated energy businesses to provide redress to consumers* (Department of Energy and Climate Change, April 2012), 12D/060, available at <http://www.decc.gov.uk/assets/decc/11/consultation/4975-consultation-on-a-proposed-new-power-for-ofgem-to-.pdf>

⁴⁵ Details of Ofgem's decision are available at:

<http://www.ofgem.gov.uk/Media/PressRel/Documents1/EDF%20press%20notice%20March%209%202012.pdf>

⁴⁶ *Ofgem secures £1.7 million for consumers following E.ON error*, (Ofgem press release, 27 November 2012)

http://www.ofgem.gov.uk/Media/PressRel/Documents1/20121127_EON_Press_Release.pdf

⁴⁷ The Engage Fund is run in partnership with Age UK Group helps fund services to maximise incomes of older people by providing benefits advice and financial help through benefits health checks carried out either face to face or by telephone in local Age UK offices enabling some to be lifted out of fuel poverty.

⁴⁸ Pursuant to Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales*, (HMSO, 1995) and Lord Woolf, *Access to Justice: Final Report* (HMSO, 1996).

⁴⁹ EC, *Commission Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters*, [2008] O.J. L 136/3.

to cross-border mediation only. Those civil law systems that implement the Mediation Directive but fail to integrate it with civil procedure may struggle to realise benefits.

The architecture of CDR is not the same as ADR. ADR is a number of *techniques* that may be used in particular settings, such as mediation, conciliation, early neutral evaluation, mini-trial, binding or non-binding decision, such as arbitration (where both parties agree to be bound) or the defendant agrees in advance (or is required by law) to be bound by the result. ADR is most frequently associated with court procedures, such as mediation before or during a court case.⁵⁰

CDR exists within its own distinct architecture of CDR bodies. CDR uses many of the traditional ADR techniques. Many CDR bodies adopt a sequencing of techniques: triage/advice, mediation, decision. This produces a pyramid in the number of claims, as more are resolved at the bottom of the pyramid. The first stage (the very bottom layer of the pyramid) should always be direct contact between consumer and trader. All large retailers have substantial in-house customer care or complaint departments for this purpose, whose function is vital. The existence of effective (downward) pressure from CDR bodies and regulators usually exerts incentives for resolution of complaints at the in-house stage: in those countries where CDR is undeveloped, the absence of this phenomenon can be seen.

ADR and CDR have been growing over several years at EU level. Key building blocks in this process have been two European Commission Recommendations on the principles that apply to ADR. The 1998 Recommendation on the principles applicable to out-of-court settlement of litigation, specified (a) minimum criteria guaranteeing the impartiality of the body, the efficiency of the procedure and the publicising and transparency of proceedings and (b) the principles of independence, transparency, adversarial, effectiveness, legality, liberty and representation.⁵¹ The 2001 Recommendation on the principles for out-of-court bodies involved in consensual resolution of consumer disputes included the principles of impartiality, transparency, effectiveness, fairness.⁵² A Voluntary European Code of Conduct for Mediators was introduced in 2004, covering:

- Competence, appointment, fees of mediators.
- Independence and impartiality.
- Ensuring the understanding by the parties, fairness, informed consent over any agreement reached, parties' freedom to withdraw.
- Confidentiality.⁵³

A European network of advice and assistance centres for consumers has also been created. In 2001, the Extra-Judicial Network (EEJ-Net) was launched⁵⁴ and a consumer claim form promulgated⁵⁵ to facilitate consumers' access to ADR providers.⁵⁶ Subsequently renamed the European Consumer Centres, the ECC-Net consists of national 'clearing houses' that assist

⁵⁰ Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters [2008] OJ L136/3.

⁵¹ Commission Recommendation 98/257/EC on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes, [1998] OJ L 155/31, online: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:115:0031:0034:EN:PDF>>.

⁵² Commission Recommendation 2001/310/EC on the Principles for Out-of-Court Bodies involved in the Consensual Resolution of Consumer Disputes, [2001] OJ L 109, 56-61, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:109:0056:0061:EN:PDF>

⁵³ Online: <http://europa.eu.int/comm/justice_home/ejn/adr_ec_code_conduct_en.pdf>.

⁵⁴ Council Resolution of 25 May 2000 on a Community-wide network of national bodies for the extra-judicial settlement of consumer disputes, OJ C 155/1, 6.6.2000.

⁵⁵ http://www.eejnet.org/filing_complaint.

⁵⁶ http://ec.europa.eu/consumers/publications/factsheet-ECC-Net_en.pdf (accessed 31 March 2011).

consumers to settle possible cross-border disputes with companies, by guiding them towards alternative dispute resolution mechanisms.⁵⁷ From 2006-2009, most complaints tackled by ECCs concerned products and services, and contract terms. The main sector concerned by far over those five years was air transport, and a large number of complaints also concerned on-line transactions (55%).⁵⁸ The total number of complaints handled by ECCs has been between 50,000 and 60,000 annually.

A separate network of national ADR bodies was established 2001 for financial services, called FIN-NET (Financial Services Complaints Network).⁵⁹ FIN-NET links 50 out-of-court schemes that deal with complaints in the area of financial services and covers the European Union, Norway, Iceland and Liechtenstein. In 2009, FIN-NET handled 1,523 cross-border cases, of which 884 were in the banking sector, 244 in the insurance sector, 410 in the investment services sector, and 4 that could not be attributed to one sector.⁶⁰

In 2002 SOLVIT⁶¹ was created as a free-of-charge on-line problem solving network in which EU Member States work together to solve without legal proceedings problems caused by the misapplication of Internal Market law by public authorities. There is a SOLVIT centre in every European Union Member State (as well as in Norway, Iceland and Liechtenstein). SOLVIT Centres can help with handling complaints from both citizens and businesses. They are part of the national administration and are committed to providing real solutions to problems within ten weeks. From 2002 to 2010 SOLVIT resolved more than 1300 problems encountered by citizens and businesses due to incorrect application of EU rules by national authorities. It accepts around 60 new cases per month, around 80% of which are resolved, most of them within the deadline of ten weeks.

In May 2010 a Recommendation introduced an EU-wide method for classifying and reporting consumer complaints to be used by complaint bodies on a voluntary basis.⁶² This Recommendation is part of the gradual planned establishment of an EU harmonized complaint classification system and a Union-wide database of consumer complaints. The harmonised methodology is to be used on a voluntary basis by complaints bodies.⁶³

It was realised around the end of the 2000s that CDR can deliver effective redress for consumers, and that CDR systems can deliver mass redress, which goes a long way to solving consumer collective redress problems. There is wide political support for extending Consumer ADR, but there remains strong opposition to extending collective actions, so the choice for political leaders is transparently clear.

A series of studies on CDR were made by the European Commission. A 2005 study published in 2007 mapped ADR in 28 Member States plus USA, Canada and Australia.⁶⁴ It found that a multitude of ADR methods are used, that every Member State had put in place an

⁵⁷ http://europa.eu/legislation_summaries/other/132043_en.htm.

⁵⁸ See the ECC Network website consulted in 2011 http://ec.europa.eu/consumers/ecc/key_facts_figures_en.htm

⁵⁹ See http://ec.europa.eu/internal_market/finances-retail/finnet/index_en.htm (accessed July 2008).

⁶⁰ This number is based on the reporting from 38 members of FIN-NET in 2009.

⁶¹ http://ec.europa.eu/solvit/site/index_en.htm

⁶² See the recommendation at http://ec.europa.eu/consumers/strategy/complaints_en.htm

⁶³ See the recommendation at http://ec.europa.eu/consumers/strategy/complaints_en.htm.

⁶⁴ http://ec.europa.eu/consumers/strategy/complaints_en.htm.

⁶⁴ J Stuyck and others, *Commission Study on alternative means of consumer redress other than redress through ordinary judicial proceedings* (Catholic University of Leuven, January 17, 2007, issued April 2007), available at: http://ec.europa.eu/consumers/redress/reports_studies/index_en.htm.

unique mix. From this divergence, it was far from self-evident how to come up with one ‘ideal’ ADR system. Gaps were identified in sectoral and geographical coverage,⁶⁵ leading to the conclusion that an ADR scheme with general competence and guaranteed geographical coverage was a necessary complement for sector specific mediation and arbitration schemes.

A 2009 study for the European Commission found that there are far more ADR systems than most people are aware of.⁶⁶

- 750 national ADR business-to-consumer (B2C) schemes were identified across the EU.⁶⁷ [Note: this is misleading, as the number of effective CDR bodies is far lower.] The most were: Germany 247 (many decentralised schemes), Italy 129 and UK 43, France 35. Civic say that ADR is clearly more relevant in Belgium, UK, Spain, Sweden, Austria, Ireland, Netherlands, Denmark and Malta than elsewhere. UK seems to have the highest number of cases for any individual scheme, with the Financial Ombudsman Service (FOS) often handling over 100,000 cases a year—most large schemes handle 5,000 to 20,000 pa. There seemed to be 530,000 cases in the EU in 2008, and this increased from 410,000 in 2006.
- Schemes had a high degree of diversity, as between public and private origins, and over the extent to which a decision or recommendation is binding on one or both parties. Several types of collective ADR procedures are in use, notably involving investigations, single representative procedures, and Scandinavian ombudsmen. Concerns over the functioning of collective cases include (a) the complexity of the procedure and related costs and (b) the non-binding nature of the decision.
- ADR schemes are low-cost and quick for consumer disputes. The vast majority are free or minimal cost to consumers (below €50) and are settled within a short period of time (an average of 90 days⁶⁸). ‘The analysis shows that many problems connected with court proceedings can be solved by effective ADR schemes, such as cost, duration of proceedings and formality.’

Over the past decade, ADR has been included as a dispute resolution mechanism in many sectoral pieces of legislation, so has grown largely unseen. These have firmed up over the past decade from *encouraging* ADR to *requiring* traders to belong to an ADR scheme. Measures that *encourage* Member States to establish ADR schemes apply in E-commerce,⁶⁹ postal services⁷⁰ and markets in financial instruments (MiFID).⁷¹ More recent EU legislation *requires* that adequate and effective ADR schemes are put in place, in the telecom sector,⁷² the energy sector,⁷³ consumer credit,⁷⁴ and payment services.⁷⁵ The Services Directive⁷⁶ also requires

⁶⁵ Examples include no coverage for air transport disputes, car rental, sports centres and computer stores in the Netherlands despite the existence of 30 sector specific arbitration schemes there. Ombudsman in UK are said to be quite popular but are mainly present in the services sector and not goods.

⁶⁶ Civic Consulting, *Study on the use of Alternative Dispute Resolution in the European Union*, 16 October 2009 http://ec.europa.eu/consumers/redress_cons/adr_study.pdf 2 December 2009

⁶⁷ The number 750 is almost certainly an over-estimate, mainly because Germany has wrongly counted its ADR bodies as *Consumer* ADR bodies, which they generally are not.

⁶⁸ Ibid, p. 33.

⁶⁹ Directive No 2000/31/EC; OJ L 178, 17.7.2000 p. 1.

⁷⁰ Directive No 2008/6/EC ; OJ L 52 27.02.2008 p.3.

⁷¹ Directive No 2004/39/EC; OJ L 145/1, 30.4.2004, p. 33.

⁷² Directives No 2009/136/EC and No 2009/140/EC; OJ L337, 18.12.2009 p.11 & 37.

⁷³ Directives No 2009/72/EC and No 2009/73/EC; OJ L 211, 14.8.2009 p. 55 & 94.

⁷⁴ Directive No 2008/48/EC; OJ L 133, 22.5.2008, p.66.

⁷⁵ Directive No 2007/64 /EC; OJ L319/1, 5.12.2007 p.32.

service providers to provide consumers with information if they are members of an ADR scheme.

The number of CDR schemes that already exist is surprisingly large. Such schemes operate primarily within individual sectors (such as financial services, holidays, energy, telecoms) and have, therefore, arisen largely unnoticed except outside their particular sector. But the result is startling. In the U.K., over 2 million requests for information on financial services annually are processed by the Financial Ombudsman Service, which turn into around 400,000 claims that are resolved by that Service – and do not go to court (or, mostly, through lawyers). Around 11,000 claims are processed annually by the 50 sectoral dispute Boards in the Netherlands. In Finland, Sweden, Norway and Denmark, virtually no consumer claims have gone to court for many years, since they go through the CDR system. In those states also, medical negligence or product liability litigation is processed through the no fault compensation schemes, and not the courts.⁷⁷ Spain and Portugal have consumer arbitration centres. Since the CDR approach will expand as a result of the 2013 EU legislation, this is looking like a major revolution in the architecture of European legal systems. It also raises the issue of what the residual function may be for the courts.

In January 2011 the Commission issued a consultation on ADR and on possible ways in which the use of ADR within the EU could be improved,⁷⁸ noting that ‘ADR has, however, not yet achieved its full potential. In 2009, 6.6% of the cross border complaints received by the European Consumer Centre network were transferred to an ADR scheme.’

A major study of national CDR schemes by the Centre for Socio-Legal Studies at Oxford University identified that two forms of mechanisms exist: older models based on arbitration (or mediation-then-arbitration) and more advanced models involving consumer ombudsmen.⁷⁹ Different national models exist, so it is difficult to try to combine all schemes or to state a best model.

Many CDR schemes are funded by business. This raises the question whether such schemes can be independent and unbiased. Many schemes have solved this problem by adopting a series of techniques. They rely first on applying the essential requirements through combinations of vertical scrutiny by regulators and customers, and horizontal scrutiny by competitors, the market and the media. Leading examples are the criteria and systems established in the United Kingdom for the telecommunications sector by Ofcom and general consumer sector by the Office of Fair Trading,⁸⁰ and established in the Netherlands by the Stichting Geschillencommissie.

Many of the ADR systems use one or more of the same basic dispute resolution *techniques* of mediation, conciliation and arbitration. Many systems are designed to integrate several techniques within a tiered sequence, so as to enable different forces to act together within a pyramid structure within which claims can be resolved first in the quickest and cheapest fashion, whilst allowing progression to more adjudicatory (and hence more costly and slower) techniques involving adjudication by arbitrator(s) or judge(s):

⁷⁶ Directive No 2006/123/EC; OJ L 376, 27.12.2006, p.36.

⁷⁷ C Hodges, 'Nordic Compensation Schemes for Drug Injuries' *J Consumer Policy* (2006) 29: 143-175.

⁷⁸ Consultation paper on the use of Alternative Dispute Resolution as a means to resolve disputes related to commercial transactions and practices in the European Union (European Commission, January 2011), available at http://ec.europa.eu/dgs/health_consumer/dgs_consultations/ca/docs/adr_consultation_paper_18012011_en.pdf

⁷⁹ C Hodges, I Benöhr and N Creutzfeldt-Banda, *Consumer ADR in Europe* (Hart Publishing, 2012).

⁸⁰ See *Mapping UK consumer redress. A summary guide to dispute resolution systems* (Office of Fair Trading, May 2010), http://www.offt.gov.uk/shared_offt/general_policy/OFT1267.pdf.

- (a) direct negotiation between the parties;
- (b) conciliation or mediation assistance from a trade association, ombudsman or independent party;
- (c) the option of referral to a binding decision by an independent third party through arbitration (by an arbitrator, dispute resolution board, or ombudsman), as an alternative to starting a judicial procedure.

Those involved in stages (b) and (c) have sector-specific expertise, and the ability to adopt proportionate procedures, thereby delivering expert, swift and low cost outcomes. Sectoral Boards, such as travel/holidays, financial services, telecommunications, motor vehicles, and so on, can be structured so as to satisfy requirements of independence and absence of capture.

A significant percentage of initial consumer complaints (varying from sector to sector) are requests for information about how to use products and services appropriately or better, rather than disputes. If such inquiries are not dealt with well, they can escalate into disputes. There is, therefore, a need for an early information service and support function, and this is usually best provided by business entities.

Importantly, the best CDR systems can also provide *regulatory* information and effects, if designed properly. The dispute resolution procedures can deliver valuable information on types of claims, trends and issues, and how well sectors and individual businesses are performing, both in relation to substantive issues such as breach of law, or commercial information on how to improve products and services, as well as whether there is a need to improve the dispute handling process itself. This can improve standards and provide a powerful mechanism for behaviour control. The requirement is that the dispute resolution system should capture the data, and make it transparent and available to the market, customers and regulators. Economies of scale can also be achieved in combining dispute resolution systems within quality control and regulatory systems. Hence, the dispute resolution system can operate also as a regulatory Quality Management System, reinforcing and improving virtuous behaviour.

The 2013 Consumer ADR Directive and ODR Regulation

In 2013 the EU took a bold move in creating a pan-EU framework to support CDR and ODR. The ADR Directive tackles the three main problem areas:⁸¹

- (a) *Gaps in the coverage* of ADR entities at both sector-specific and geographical level;
- (b) *Lack of awareness* and insufficient information preventing consumers and businesses from using ADR entities; and
- (c) *Variable quality of ADR*: a significant number of ADR entities are not in line with the core principles laid down by the two Commission Recommendations.

The Framework CDR Directive ensures full ADR coverage in all Member States, to inform consumers about ADR and to ensure that ADR entities respect specific quality principles. Full ADR coverage will create the required framework on the basis of which an EU-wide ODR system can effectively deal with disputes relating to cross-border e-commerce transactions.

The legislation applies to procedures for the out-of-court resolution of contractual disputes arising from the sale of goods or provision of services by a trader established in the Union to a consumer resident in the Union. Thus, it would cover accept both, domestic and

⁸¹ cf. Study on the use of Alternative Dispute Resolution in the European Union of 16 October 2009, http://ec.europa.eu/consumers/redress_cons/adr_study.pdf, pp. 56-63; 112-115; 120-121.

cross-border disputes. It does not apply to in-house dispute resolution services operated by traders, to direct negotiation, or to judicial attempts at settlement.

The main elements of the legislation are:

1. *Ensuring that ADR procedures exist for all consumer disputes.*
2. *Information on ADR and cooperation.* Consumers must be able to quickly identify which ADR entities are competent to deal with their dispute. Traders will have to inform consumers on whether or not they commit to use ADR in relation to complaints lodged against them by a consumer. This obligation will act as an incentive for traders to use ADR more frequently. Member States may delegate responsibility for this task to their ECC-net offices. ADR entities will be encouraged to become members of networks of ADR entities in sector-specific areas. The proposal encourages cooperation between ADR entities and national authorities entrusted with the enforcement of consumer protection legislation.
3. *Quality of ADR entities.* ADR entities must respect the quality principles of impartiality, transparency, effectiveness and fairness, which are laid down in the two Commission Recommendations, and are given binding effect. The proposal requires that disputes should be resolved within 90 days, and that ADR procedures should remain accessible to all consumers by being free of charge or of moderate costs for consumers.
4. *Monitoring.* In each Member State, a competent authority will be in charge of monitoring the functioning of ADR entities established on its territory. The competent authorities will publish regular reports on the development and functioning of ADR entities.

The Directive required the national CDR frameworks to be in place by July 2015.

The ODR Regulation

The main elements of the ODR Regulation are:

1. Establishment of the European online dispute resolution System

The Regulation establishes a European online dispute resolution platform ('ODR platform'). This ODR platform will take the form of an interactive website which offers a single point of entry to consumers and traders who seek to resolve out-of-court a dispute which has arisen from a cross-border e-commerce transaction. The platform will be accessed in all official languages of the EU and its use will be free of charge. ADR schemes established in the Member States which have been notified to the Commission in accordance with the Directive on consumer ADR will be registered electronically with the ODR platform.

Consumers and traders will be able to submit their complaints through an electronic complaint form which will be available on the platform's website in all official languages of the EU. The platform will check if a complaint can be processed and seek the agreement of the parties to transmit it to the ADR scheme which is competent to deal with the dispute. The competent ADR scheme will seek the resolution of the dispute in accordance with its own rules

of procedure within 30 days from the date of receipt of the complaint. The ADR scheme will have to notify to the platform some data in relation to the development of the dispute (date when the complaint was notified to the parties; date when the dispute was resolved; outcome of the dispute).

Under the proposal, a network of online dispute resolution facilitators ('ODR facilitators' network') will be established which will consist of one contact point for online dispute resolution in each Member State. The ODR facilitators' network will provide support to the resolution of disputes submitted via the ODR platform.

2. Information on the EU-wide ODR system

The Regulation requires traders established within the EU that engage in cross-border e-commerce to inform consumers about the ODR platform. This information shall be made easily, directly, prominently and permanently accessible on the traders' websites as well as when the consumer submit a complaint to the trader.

3. Monitoring

An annual activity report will be drawn up on the operation of the platform. The compliance by ADR schemes with the obligations set out in this Regulation will be monitored by the competent authorities to be established in the Member States in accordance with the Directive on consumer ADR. Every three years the Commission will report to the European Parliament and the Council on the application of the Regulation.

4. Data Protection rules

The data entered in the ODR platform by the parties and the ADR schemes will be stored in a database and will be subject to the relevant legislation on data protection.

Half the existing ADR schemes offer consumers the possibility of submitting their complaint online, very few offer consumers the possibility of conducting the entire procedure online (via online dispute resolution – ODR).⁸²

The measure is closely tied to the development of e-commerce. Objectives are stated of

- Increasing the number of consumers who are willing to buy online from another Member State by 20% in 2020
- Increase in the number of businesses that are willing to sell online in other Member States by 10% in 2020.

Issues Arising from the CDR/ODR Legislation

This new legislation is simple and bold. It establishes a vision of capturing issues between consumers and businesses, solving them, and using the information to improve practice and markets. If consumers can be taught to 'think ADR' whenever they encounter a problem, the problem can be sorted out. Many problems will simply revolve around communication of further

⁸² The 2010 report of the European Consumer Centre's Network indicates that more than half of complaints (56.3%) received by the ECC-Net were linked to e-commerce transactions. However, out of the 35.000 cross border complaints received by ECC network in 2010, 91% could not be referred to an ADR scheme in another Member State as no suitable ADR scheme existed (http://ec.europa.eu/consumers/ecc/docs/2010_annual_report_ecc_en.pdf).

information, and not be ‘disputes’. But disputes can also be resolved quickly and cheaply if consumers ‘think ADR’ or ‘think ombudsman’ instead of ‘courts’ or ‘lawyers’.

The discussion above has focussed on influencing the behaviour of the private sector. ADR is certainly spreading outside the consumer field. Many European States have extremely effective Ombudsmen for disputes between citizens and the public sector. Such Ombudsmen are generally effective because they operate directly under Parliamentary authority and mandate, thereby enabling them to behave with great discretion rather than in an authoritarian fashion, and they have built personal reputations of the highest integrity. They do not just resolve individual disputes but (as seen with the private sector total quality system (TQS) principle) can investigate systemic problems and behaviours. The Ombudsmen in the Nordic States, the Netherlands and the United Kingdom⁸³ have had considerable effect on building a respectful style of relationships between the state and citizens.

ADR and regulators may in certain circumstances challenge the traditional role of the courts. Some may be concerned at this.⁸⁴ But others will support the development of a new relationship and function between the courts and private sector ombudsmen. One model would be that courts decide issues of law, and ombudsmen apply settled law to the facts of individual disputes. Hence, there should be a rational transfer of cases between courts and ADR providers.

A topical issue is whether ADR can be mandatory, or whether this infringes the right of access to the courts under article 6, ECHR.⁸⁵ This problem does not arise if both parties agree to refer disputes to arbitration, since they will both be bound by the award. However, many CDR schemes are not binding arbitration. Many ombudsmen schemes provide that the award will be binding on the company if the consumer accepts it: this preserves the consumer’s article 6 rights to go to court until a case is settled.

Some countries require consumers to use ADR/CDR before being able to start court proceedings. An interesting case⁸⁶ was decided by the Court of Justice in relation to Italian implementation of the the Universal Services Directive (USD),⁸⁷ requiring that Member States shall ensure that transparent, simple and inexpensive procedures are drawn up for dealing with users’ complaints, and the general principle of effective judicial protection were compromised by the Italian law which made mandatory an initial out-of-court dispute resolution procedure before a dispute was admissible in the ordinary court process. The Court ruled that the USD does not set out the precise content or the specific nature of the out-of-court procedures that have to be introduced at the national level. The only criteria were those set out in article 34 of the USD: the principles of effectiveness, legality, liberty and representation. The Court held that none of these principles limited the power of the Member States to create mandatory out-of-court procedures for the settlement of telecoms disputes between consumers and providers.⁸⁸ The only requirements are the maintenance of the *right* to bring an action before the courts for the settlement of disputes and for ensuring that the Directive remains effective.

⁸³ Proposals to improve and extend the UK public ombudsman system for disputes between citizens and public bodies are: House of Commons, Public Administration Select Committee, *Time for a People’s Ombudsman Service*, Fourteenth Report of Session 2013-14, HC 655.

⁸⁴ See the critical stance of PH Lindblom, ‘ADR – The Opiate of the Legal System? Perspectives on Alternative Dispute Resolution Generally and in Sweden’ [2008] 1 *European Review of Private Law* 63-93.

⁸⁵ European Convention on Human Rights.

⁸⁶ See J Davies and E Szyszczak, ‘ADR: Effective Protection of Consumer Rights?’ (2010) 35 *E.L. Rev.* October 2010-11-19.

⁸⁷ Directive 2002/22 [2002] OJ L108/51.

⁸⁸ *Alassini* (C-317/08, C-317/08, C-319/08 and C-320/08) March 18, 2010 at [42].

It is likely that the development of CDR schemes will continue and that the 2013 Directive will be revised in about five years. Future revisions may include that all decisions are mandatory on both parties.

CDR relates to C2B contract disputes. Some countries have non-litigation arrangements for personal injury claims, based around an ombudsman-like inquisitorial stage and insurance-based pools of funds. In the Nordic countries, such arrangements exist for injuries caused by road traffic, medical and medicine accidents. France introduced a scheme in 2005, partially copied recently in Poland. There is considerable interest in some other countries. As with CDR schemes, the compensation schemes replace courts and lawyers with privately-funded, but independent, expert and authoritative decision-makers.

H. REQUIREMENTS FOR INSURANCE

These developments relate to the investigative and resolution processes for disputes. They do not replace the need for mechanisms to pool risk, and fund payment of valid claims. Hence, the need continues for insurance mechanisms, in which groups of businesses or entities that have similar risk profiles pool their risks and buy finance that will provide coverage for specified risks that materialise. The changes in the architecture of the legal system from courts towards ombudsmen and regulators may entail some consequential changes in how insurance is provided, but not in the essential need for this risk-pooling support mechanism. One obvious change is the need to examine policy wording in relation to triggering liability as a result of decisions achieved through settlements, ADR, ombudsmen or as a result of discussions with regulators.

I. CONCLUSIONS: DELIVERING EFFECTIVE REDRESS

In the 21st century, the civil justice system will change dramatically. Various new techniques are being developed to deliver redress and behaviour control. They are driven by pragmatic considerations of finding techniques that work well. A combination of regulatory powers to oversee redress and an ombudsman system can be particularly effective. Consumers can access ombudsmen quickly, and have their issues considered. Many contacts merely seek advice or triage on whether an issue is or is not a right to compensation, but the aggregated information gives a clear picture of issues in the marketplace, and can be recorded and fed back to traders, markets, consumers and regulators, all of whom can then react. Regulators, in particular, can intervene swiftly to stop infringing behaviour. They can also ensure that traders pay mass compensation without delay, failing which the ombudsmen come into play again. Making claims, individually or collectively, in slow court systems, with added bureaucracy and cost, no longer looks an attractive option.

Different countries will make their own political decisions over the choice between the types of individual techniques described here, and the prioritisation between them. For example, the U.S.A. places strong emphasis on litigation (private enforcement), on the basis that it is thought to have strong elements of deterrence over future behaviour, and that regulatory systems are weak and ‘captured’. In contrast, European systems place far greater emphasis on public regulation and enforcement, and do not particularly encourage litigation—deliberately adopting the ‘loser pays’ rule and rare punitive damages.

Structurally, what has occurred is shift in the traditional means of claiming and delivery redress from the ‘first pillar’, under which individuals pursue their claims through courts, often with the assistance of lawyers, to the ‘second and third pillars’ which form a combined mechanism, under which individuals take their claims to an independent ADR party, an ombudsman or other arbitrator, who will operate effective, fair but cheap and quick dispute resolution process, overseen by a competent state authority, and who works together with a consumer or range of sectoral regulatory authorities in delivering mass redress and enforcing standards of behaviour on traders. The result is that there is limited need for litigation and judges in traditional roles, but much wider access to justice.

The future European legal system will include new techniques, some of which have been described above. These techniques operate not just individually but also collectively. For example, sophisticated ombudsmen systems work together with regulators in solving problems, giving advice, identifying new issues that can then be addressed by regulators and others, including by regulatory redress powers. A further example is that the mass litigation technique, which may be needed to process some cases, should only be a last resort. In other words, priority is given to the faster, cheaper and more efficient CDR-plus-regulatory techniques, and access to the litigation technique is only available if the first options do not respond. By these means, the various individual pillars form a coherent holistic framework of techniques within the legal system.

A View from the Peak: The Journey from Trial Court to Supreme Court in a Use of Force Case

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Plumhoff v. Rickard, United States Supreme Court. Orally argued 3/4/14, Decided May 27, 2014.

FACTS

West Memphis Police Lieutenant Joseph Forthman stopped a white Honda Accord about midnight July 18, 2004 for having a headlight out. Forthman saw the vehicle on the east bound access road to I-40, activated his lights and siren and then pulled into and stopped in a parking lot of a gas station in West Memphis. Rickard was the driver of the car and Allen, a female, was his front seat passenger. As he approached the car, Forthman noticed a broken indentation in the windshield about the size of a human head or a basketball. Allen volunteered that the damage to the windshield resulted from the car hitting a curb. Forthman also noticed glass chips and dust still on the dashboard and became suspicious. Forthman questioned Rickard for a few moments, asking among other things for his identification, where he had come from and where he was going, and whether he had any beer to drink that night. Upon approaching the vehicle Forthman had immediately seen case of beer in the rear floorboard. Rickard claimed that the pair had come from their hotel, but could not give the name or location

¹ I want to acknowledge and thank Michael A. Mosley, League Staff Attorney, for his incredible work in defending this case over the nearly ten years of its existence. While I've been involved at every stage of the litigation, Mike has been the lawyer of record and handled the matter at the United States Supreme Court as well or better than those who routinely practice in that environment. Mike's intelligence and diligence made the difference for our clients in West Memphis. He also did the lion's share of the work on this paper and I'm most grateful for that as well.

of the hotel. He further claimed they were going to purchase a light to fix their inoperable headlight and that they had not been drinking. As the conversation continued Rickard thumbed through his wallet and Forthman noticed that Rickard repeatedly skipped over his driver's license and his hands were shaking. Forthman then asked Rickard to get out of the car.

Rickard did not exit the car or respond. Again, Rickard was ordered to get out of the car and again he disobeyed the command. Rickard then looked at Allen, words were exchanged between the two that Forthman couldn't fully understand, and Rickard fled the traffic stop. Forthman ran to his cruiser and the pursuit began. He activated his lights and siren, radioed that he was in a pursuit, gave a description of the vehicle and notified other officers of his location.²

Several West Memphis officers joined in the Rickard pursuit: Vance Plumhoff, Jimmy Evans, Lance Ellis, Troy Galtelli, and Bryan Gardner. Plumhoff soon became the lead police vehicle in the pursuit. Rickard entered I-40³ heading east towards Memphis, Tennessee. He crossed over the I-40 DeSoto Bridge⁴ from Arkansas into downtown Memphis. During the chase, Plumhoff radioed that "he just tried to ram me." Forthman said on his radio and recorded on the video, that "he is trying to ram another car," followed by "[w]e do [now] have aggravated assault charges on him." In deposition and affidavit testimony, the officers described what appeared to them to be Rickard

² Dash Cam videos were in use in Forthman's vehicle and two others and they captured the majority of the pursuit, the shooting and the final crash of the Rickard vehicle. All the videos were requested by, and provided to, the Supreme Court.

³ I-40 is a busy interstate highway that runs from Barstow, California to Wilmington North Carolina and covers over 2,400 miles. The stretch in West Memphis, Arkansas where I-40 (east and west) and I-55 (north and south) travel together for a little over two miles has long been the second busiest route for tractor trailer traffic in the United States. Noel E. Oman, *Agency touts I-40-to-I-55 link: Delta Regional Authority is adding its resources to project*, Ark. Dem.-Gaz. July 5, 2006, § Ark. at 1 (Internet version at 9).

⁴ The Desoto Bridge is quite lengthy and spans both the Mississippi River and bayous on the Arkansas side.

attempting to veer or ram his car into both Plumhoff's and Evans's police cars. As with Plumhoff, Evans makes it clear over the radio that Rickard had tried to run him off the road. Further, it is easily seen on video footage that during Rickard's trek over the bridge alone he recklessly weaved through heavy traffic and passed approximately 29 civilian motorists, some of whom were forced to the side of the road. Brake lights also repeatedly flash on as cars try to get out of Rickard's way. While all of that was occurring, dispatch returned information on the Honda's license plate, indicating the plate was actually for another car, a Green Saturn.

At the end of the bridge, Rickard abruptly veered off I-40 into downtown Memphis at the Danny Thomas Boulevard Exit. To exit so quickly, Rickard crossed at least one lane of traffic and directly in front of a pickup truck pulling a trailer. In turn that caused the driver of the pickup to brake so harshly that the trailer nearly jackknifed. During the chase on I-40 and across the bridge speeds exceeded 100 mph on several occasions.

The vehicles then proceeded onto Alabama Avenue briefly before Rickard turned right very quickly onto Danny Thomas Boulevard. At that point, Officer Evans is heard on the radio asking whether to terminate the pursuit. Plumhoff responded: "negative. See if you can get in front of him." As Rickard approached Jackson Avenue, he made another sharp right turn onto Jackson and was hit by a pursuing police vehicle.⁵ That caused Rickard's vehicle to spin around in a parking lot at the intersection of Danny Thomas and Jackson.

⁵ It was not a PIT maneuver. "PIT" stands for "precision intervention technique" and is a technique where officers make contact with the back of a vehicle they are pursuing in a manner that makes the suspect's vehicle spin to a stop. *Scott v. Harris*, 550 U.S. 372, 375 (2007).

Rickard then collided head-on with Plumhoff's cruiser. Plumhoff thought his car was disabled based on the impact and force of the collision but unfortunately that turned out not to be the case. Several officers exited their vehicles and ordered Rickard to stop trying to evade the police and to get out of the vehicle. Rickard continued to refuse to submit to the officers' commands. The officers formed a semicircle around his vehicle and believed the building in the parking lot and the placement of their cruisers had Rickard blocked in and would prevent him from fleeing further. This also turned out to be incorrect.

Evans and Plumhoff approached the Honda on foot and they, along with the other officers continuously ordered Rickard to shut off the engine and to exit with his hands up. Evans was on the passenger-side of the Honda and tried to break the front passenger window and windshield open by striking them with the butt of his firearm. While those attempts were being made, Rickard gunned the engine and the Honda struck Evans's right hand. Evans and the other officers testified via affidavit and deposition that they feared for their own safety and those of their fellow officers because of Rickard's continued defiance and dangerous behavior.

Other officers, including Lance Ellis, were on foot in close proximity to the Honda. Rickard accelerated and with tires spinning the Honda struck Gardner's occupied police cruiser. The officers believed that Rickard was trying to escape by pushing the police cruiser out of his way. Immediately thereafter, Plumhoff fired three rounds at the driver through the windshield from the right front fender of the Honda. Upon review of all the video, in proper sequence, Rickard could easily have run over Plumhoff, Gardner, Evans or all three when the initial shots were fired. Plumhoff testified he used deadly

force because he feared he or others would be seriously injured or killed given Rickard's use of the car as a weapon.

After Plumhoff shot, Rickard put the Honda in reverse, made a sharp a U-turn and escaped onto Jackson Avenue. As he reversed Ellis was forced to move out of the way or he would have been hit. Ellis testified via affidavit that he feared serious physical injury or death at that time. Gardner then fired ten shots at the driver and Galtelli fired twice. Gardner and Galtelli provided affidavit testimony that Rickard posed a risk to their safety, the safety of their fellow officers, and the safety of the general public.⁶

Rickard finally lost control of his car and crashed into a low retaining wall, briefly getting slightly airborne and then landed on the front porch of a home behind the retaining wall at the corner of Jackson Avenue and Manassas Street. Right before crashing, however, Rickard pulled in front of an oncoming vehicle on Jackson Avenue. Tragically, both Rickard and Allen died.

PROCEDURAL HISTORY

The Officers moved for summary judgment in the District Court⁷. As to the Rickard Estate's Fourth Amendment claims, the Officers argued that the existing case law in the Sixth Circuit and Eighth Circuit supported the reasonableness of the use of deadly force. Alternatively, they argued they were entitled to qualified immunity because the law was not clearly established in 2004 that their conduct violated Rickard's Fourth Amendment rights. The District Court denied that part of the motion on both grounds, i.e., an underlying constitutional violation and qualified immunity, ruling disputed issues of fact existed.

⁶ Three petitioners never used deadly force: Officers Forthman, Evans, and Ellis.

⁷ The case was filed in federal court in Memphis, Tennessee which is part of the Sixth Circuit Court of Appeals. Arkansas is within the jurisdiction of the Eighth Circuit Court of Appeals.

The Officers took an interlocutory appeal to the Sixth Circuit Court of Appeals, pressing the same arguments. The Sixth Circuit panel affirmed denial of summary judgment and qualified immunity, ruling from the video evidence it could not conclude as a matter of law that the Officers' actions were reasonable⁸. Following the denial of petitions for rehearing, the Officers petitioned the United States Supreme Court to take the case. This is the only portion of the case that we "out sourced." The Petition was drafted by a lawyer that had success several years before in a similar case before the high court. While we were heavily involved in the process we relied on that lawyer to help us steer the matter in this initial and very difficult phase.

THE WAIT FOR A DECISION ON THE PETITION

The Supreme Court relisted the case for successive conferences on five occasions in the fall of 2013. During that time, the Court requested a response from the Plaintiff, the record from the Sixth Circuit, and the record from the District Court including the Dash Cam video recordings of the events in the case. On November 15, 2013, the Court granted the Petition for Writ of Certiorari. The case was set for briefing and Oral Argument was set for March 4, 2014. The Court Clerk advised that the schedule would remain as it was set and no continuances or extensions would be granted.⁹

⁸ Both the District Court and the Sixth Circuit continued the trend of characterizing specific factual evidence rather than accepting the uncontested statements of the police officers. During the oral argument in front of the Sixth Circuit we continually argued that the few "facts" the plaintiff asserted as being in contention were acquiesced to by the defendants and as a result no facts were in contention. Despite the record being clear on that point the panel insisted that factual disputes existed and when viewed in the light most favorable to the plaintiff a Fourth Amendment violation existed. It was our belief that this "mischaracterization" of facts clearly not in dispute was the key in understanding why the Sixth Circuit's opinion was in error.

⁹ Not what seasoned trial lawyers are accustomed to!

MERITS BRIEFING

Once a case gets accepted by the United States Supreme Court, lots of help from many directions gets offered. LOTS! For instance, there is an informal group that's been dubbed the "Supreme Court Counsel." It is made up of attorneys who have regularly argued before the Court and often get hired to brief and/or orally argue cases exclusively at the Supreme Court. The group includes former Solicitor Generals, Assistant Solicitor Generals, and former Law Clerks to members of the Court. We didn't hire any of them to assist us but knowing there is a group of life guards readily available did provide a level of comfort.

While there is such a thing as accepting too much help, for the most part we found it extremely beneficial to accept several such offers. This was particularly true during the drafting of the merits brief. We took input from several sources including one national organization that filed a terrific amicus brief as well as a several practitioners that had considerable time before the high court. In the end however, we did the final two edits (they were very significant due to the abundance of earlier input) ourselves and felt very good about the product.

As might be imagined, the Merits Brief is very stylized and specific as to what it must contain. The printing requirements alone are astonishing. Thankfully there are printers throughout the nation that specialize in the end product and the one we chose out of Nebraska was very easy to work with. With that said, the printing costs alone were quite hefty, approaching nearly fifteen thousand dollars. Further, like all briefs learning the rules of the particular court in which it will be filed is of paramount importance. In that regard, the Rules of Supreme Court are much different than those in any of the

federal circuits. The most notable provisions, which take the most time and attention, are the Statement of the Case which contains the “facts,” the Summary of the Argument and the Argument. Fourth Amendment cases are by definition factually intensive thus getting the facts right is essential for a myriad of reasons, but when facing the possibility of embarrassment at the hands of nine of the smartest people on the face of the earth extra attention to this key aspect of the brief was the order of the day. Because of the ruling by the Sixth Circuit, and the potential for egg on the face as noted above, we were very careful to fully cite the Joint Appendix for every factual statement we made. We also took great care that (a) the record supported the wording we used and (b) where possible we cited our opponent’s materials from the nearly decade long litigation to support our position both factually and legally. The latter effort led Justice Scalia to say to opposing counsel during oral argument, after asking if he wanted to withdraw a particular assertion and the attorney declined, “You ought to take it back.”¹⁰

AMICUS CURIAE

Likely in even relatively unremarkable cases multiple requests for the filing of amicus briefs on both sides of the case will occur. Given the enormity of this case it got a lot of attention. It is common practice for both sides to consent to the filing of such briefs even if they are being filed against your client’s best interest. In *Plumhoff*, the State and Local Legal Center assembled numerous entities to join in an amicus brief in support of the Petitioners including the National Conference of State Legislatures and International Municipal Lawyers Association. Additionally, 22 States’ Attorneys General filed a separate brief in support of Petitioners. On the Respondent’s side briefs were filed by the

¹⁰ http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-1117_f2ag.pdf

National Association of Criminal Defense Attorneys and the Police Accountability Project.

United States Solicitor General

We wrote the Solicitor General imploring that he intervene in the case and file a brief in support of Petitioners' position.¹¹ And, he did. One challenge we faced in getting the Solicitor General, and the other amicus groups, to fully understand the matter was the dissemination of the Dash Cam videos. We created private YouTube links that required a password.¹² We firmly believe that those videos played an integral part in the Solicitor General's decision to intervene and in the end, helped persuade the Court that our arguments had merit. It is customary that if the Solicitor General files a brief in support of your clients' position, you also permit the Solicitor General (or in our case one of his assistants) to participate in Oral Argument. We consented and permitted the Assistant Solicitor General 10 of the 30 minutes we were allocated to argue the case. This was invaluable. Having the United States of America on your side, and allowing its lawyer to say why you're right is a very good thing.

ORAL ARGUMENT PRACTICE: MOOT COURTS

We participated in two moot courts: one at the National Association of Attorneys General and one at Georgetown Law School, where they have a beautifully constructed practice courtroom. Although, the identity of the practice judges is confidential based on an agreement made between arguing counsel and both entities, it can be revealed that

¹¹ Oddly, that's how the Solicitor General gets involved. We initially thought they would contact us if they were interested, but when we looked into it we discovered that a written request was the way to go.

¹² <http://youtu.be/fKiERwIqbuA>; <http://youtu.be/LSZRDrmoQFY>; <http://youtu.be/ZxkFmCU7UHk> Once you click on a link, it will ask you to log in. User Name: westmemphisvideos@gmail.com Password: westmemphispd

some of the most well-respected practitioners and educators participated, including former Assistant Solicitor Generals.

Generally, the practice arguments are 45 minutes to an hour long, followed by an hour of critique and advice. The moot courts are essential preparation. However, in order to get the privilege, one must contact Georgetown Law School as soon as possible following the grant of cert. If both parties contact the Law School at that time, our understanding is that a drawing is held and the winner is the side the Law School takes for the moot court.

ARGUMENTS¹³

1. Whether the Sixth Circuit wrongly denied qualified immunity to Petitioners by analyzing whether the force used in 2004 was distinguishable from factually similar force ruled permissible three years later in *Scott v. Harris*, 550 U.S. 372 (2007). Stated otherwise, the question presented is whether, for qualified immunity purposes, the Sixth Circuit erred in analyzing whether the force was *supported* by subsequent case decisions as opposed to *prohibited* by clearly established law at the time the force was used.

“Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was ‘clearly established’ at the time of the challenged conduct.” *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011) (quoting *Harlow v. Fitzgerald*, 475 U.S. 800, 818 (1982)). Courts have discretion which of the two prongs to analyze first. *al-Kidd*, 131 S.Ct. at 2080; *Pearson*, 555 U.S. at 236-38.

¹³ This section of the paper comes directly from our merits brief.

In this case, it was not clear to “every reasonable official” that Petitioners conduct violated the Fourth Amendment. The constitutional issue underlying the Petitioners’ use of force was not “beyond debate” as of July 2004. *Reichle v. Howards*, 132 S.Ct. 2088, 2093 (2012). If it is at least arguable, for qualified immunity purposes, that the officers’ actions were within the law, then the officers are entitled to qualified immunity. *Id.*, 132 S.Ct. at 2096.

The Sixth Circuit either improperly conflated the two distinct questions¹⁴ under the *Saucier* qualified immunity analysis or simply failed to answer both of those questions as it was required by precedent to do. *Pearson*, 555 U.S. at 232 (“if the plaintiff has satisfied [the] first step, the court must decide whether the right at issue was ‘clearly established’ at the time of the defendant’s alleged misconduct.”). The result is the same: the Sixth Circuit never discussed whether the use of force by Petitioners violated clearly established law at the time the force was employed in July of 2004.

The very nature of the “clearly established” inquiry requires courts to consider only that law that was known or could be known to the officers at the time of their conduct. *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam).

“To be clearly established, a right must be sufficiently clear ‘that every reasonable official would [have understood] that what he is doing violates that right.’” *Reichle*, 132 S.Ct. at 2093. Existing precedent must have made the question presented so clear that it was “beyond debate” at the time the officials acted. *Id.* “Clearly established” means a reasonable officer understands whether their actions violate a suspect’s rights because the contours of the right are clearly defined. *al-Kidd*, 131 S.Ct. at 2083. And, this Court has

¹⁴ *al-Kidd*, 131 S.Ct. at 2084 (“The general proposition ... that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established.”).

often admonished lower courts “not to define clearly established law at a high level of generality.” *Id.* at 2084 (citing *Wilson v. Layne*, 526 U.S. 603, 615 (1999); *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987)).

The Court held in *Stanton v. Sims*, that an officer [Stanton] who entered the plaintiff’s yard in pursuit of another person had qualified immunity because the officer “was not ‘plainly incompetent’” based on the state of the law *at the time* he entered Sims’ yard. 134 S.Ct. at 7. In *Stanton*, the Court reviewed its own cases, district and circuit court cases from the district where the action occurred as well as state decisions and concluded the constitutional question was not “beyond debate” *at the time* Stanton entered Sims’ yard. *Id.* Consequently, the Court reversed and granted the officer qualified immunity. *Id.*

The Sixth Circuit affirmed the denial of qualified immunity because it could not conclude “that the officers’ conduct was reasonable as a matter of law.” Pet. App. 10. That resolved (incorrectly, we submit) only the first prong of the qualified immunity analysis. At that point, one would have expected the court to turn to the second prong: Whether the unlawfulness of Petitioners’ actions was clearly established at the time they engaged in it. But the court did no such thing. That is manifest error. As explained above, an officer is entitled to qualified immunity unless his conduct, at the time he engaged in it, was clearly unlawful.

To the extent the Sixth Circuit concluded that the qualified immunity doctrine seeks to distinguish between officers who acted reasonably from those who acted unreasonably—and by finding that it could not conclude Petitioners’ conduct was reasonable as a matter of law, it resolved both prongs of the doctrine at once, it

committed reversible error. In *Saucier v. Katz*, 533 U.S. 194 (2001), this Court expressly rejected that approach. That case, like this one, involved a claim of excessive force in violation of the Fourth Amendment. And, claims of excessive force are analyzed under the Fourth Amendment’s objective reasonableness standard. *Graham v. Connor*, 490 U.S. 386, 388 (1989).

In *Saucier*, the “Court of Appeals concluded that qualified immunity is merely duplicative in an excessive force case, eliminating the need for the second step where a constitutional violation could be found based on the allegations.” 533 U.S. at 203. That is because, the court thought, both steps “concern the objective reasonableness of the officer’s conduct in light of the circumstances the officer faced on the scene.” *Id.* at 200. But just as the Court rejected that reasoning in Fourth Amendment search cases in *Anderson v. Creighton*, 483 U.S. 635 (1987), it rejected it in excessive force cases in *Saucier*.

The reasoning of the Ninth Circuit in *Saucier*—and the Sixth Circuit here—misperceived the nature of the qualified immunity inquiry, which “has a further dimension than the excessive-force reasonableness inquiry established in *Graham*.” *Saucier*, 523 U.S. at 205.

The concern of the qualified immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal restraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. . . . If the officer’s mistake as to what the law requires is reasonable, . . . the officer is entitled to the immunity defense.

Put another way, “*Graham* does not always give a clear answer as to whether a particular application of force will be deemed excessive by the courts.” *Id.* The qualified immunity doctrine therefore “protect[s] officers from the sometimes hazy border between excessive and acceptable force, and to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.” *Id.* at 206 (citations and quotation marks omitted).

The Sixth Circuit wrongly denied Petitioners that protection. It should have, but did not, look at its precedents (and those of the Eighth Circuit) in similar cases to determine whether they clearly established the unlawfulness of Petitioners’ conduct.

Petitioners also submit the court of appeals improperly applied the law of qualified immunity as it pertains to claims of excessive force in direct contradiction of this Court’s precedent. It was not sufficiently clear, so as to place the constitutional question “beyond debate” in July 2004, whether it was objectively reasonable to shoot a dangerous suspect to end the threat he posed with a vehicle in a high-speed chase. Moreover, to the extent that it *was* clear, case law strongly suggested that Petitioners’ actions did not violate Rickard’s constitutional rights. The court of appeals also improperly denied qualified immunity by relying on cases decided *after* the encounter between Petitioners and Rickard, rather than cases before and up to the time that the events in this case occurred in 2004.

The court of appeals was obligated to consider only law that was available to the officers *at the time of the incident*, not later, in answering the second prong of the qualified immunity analysis. *See Brosseau*, 543 U.S. at 198 & 200 n.4 (“These [post-conduct] decisions, of course, could not have given fair notice to Brosseau and are of no

use in the clearly established inquiry.”) It could not seriously be suggested that, by reference to subsequent case law, Petitioners had fair notice of what was and was not prohibited by our Constitution.

The court of appeals relied on this Court’s 2007 decision of *Scott v. Harris* to decide the immunity question posed in Petitioners’ appeal.¹⁵ This is unfair to Petitioners, indeed, any public servant, requiring them to look into the future to determine whether their actions are potentially unreasonable. The only qualified immunity cases cited by the court of appeals that were decided before the incident in question were from the Eleventh Circuit. But, Petitioners live and work in the Eighth Circuit, and the incident occurred in the Sixth Circuit.¹⁶ Petitioners could not have known that their actions would be held to violate the law in either the Sixth or the Eighth Circuit based on Eleventh Circuit precedent.

Under *Brosseau* and *Saucier*, then, the appropriate issue here is whether it was clearly established in July 2004 that the use of deadly force to end the threats posed by Rickard in a high-speed chase violated the Fourth Amendment. Here, Rickard took Petitioners on a dangerous, fast-paced chase for miles on city streets and interstate highways. He sped and weaved in and out of traffic, cut off vehicles in flight, collided

¹⁵ As discussed below, the court of appeals was also incorrect in distinguishing the facts of *Scott* from the facts of this case. Indeed, the decision in *Scott* applies to this case and is controlling, and it was reasonable as a matter of law for Petitioners to use deadly force given the dangers posed by Rickard. Rickard’s unrestrained flight that endangered the officers and the public, and his manner of driving depicted in the three Dash Cam videos was, without doubt, the commission of dangerous and ongoing felonies. Ark. Code Ann. § 5-54-125(d)(2) (fleeing in a vehicle if operated in a manner that creates a substantial danger of death or serious physical injury to others is a felony); Tenn. Code Ann. §§ 39-13-103(b)(2) (reckless endangerment with a deadly weapon is a felony) & 39-16-603 (evading arrest that endangers others is a felony); Ark. Code Ann. § 5-13-204(a)(1) (aggravated assault). Indeed, anyone who reviews the video evidence in this case can see the dangers posed by Rickard during the pursuit and until it finally ended after officers used deadly force.

¹⁶ The Sixth and Eighth Circuit law is in accord on the substantive questions posed in this case.

with police vehicles, nearly backed over an officer, and continued to pose a threat of serious physical injury or death to officers, the public, himself, and his passenger. Only then did three of the Petitioners utilize deadly force to try and end the threats posed by Rickard.

In December 2004, just five months after the events in this case, this Court held in *Brosseau* that there was no clear answer to the question whether it is acceptable “to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight.” 543 U.S. at 200. *Brosseau* involved a police officer who shot a dangerous fleeing suspect in the back. This Court did not rule on the first prong of *Saucier*, but rather reviewed only the “clearly established” issue of the second prong of the qualified immunity analysis. *Id.* at 198. The Court recognized that as of February 21, 1999 (the date of the shooting in *Brosseau*) no other court had found a Fourth Amendment violation when a police officer “shot a fleeing suspect who presented a risk to others.”¹⁷ *Id.* at 200

Comparing the facts in *Brosseau* and those in this case, it is clear the Officers did not violate any clearly established constitutional right. In that case, an officer responded to a report of a fight at a residence. *Id.* at 195. Upon arrival, the officer searched for the suspect until the officer saw the suspect running in a neighbor’s driveway. *Id.* at 195-96. The officer chased the suspect, who was able to enter a Jeep. *Id.* The officer with her gun drawn ordered the suspect to exit the vehicle. *Id.* The officer attempted to prevent the suspect from starting the Jeep, but she was unsuccessful. *Id.* When the suspect started the Jeep, it caused the officer to step back. *Id.* As the vehicle began to move, the officer

¹⁷ The Supreme Court only reviewed cases issued before February 21, 1999. *Brosseau*, 543 U.S. at 200 n.4.

“fired one shot through the rear driver’s side window at a forward angle, hitting Haugen [the suspect] in the back.” *Id.* at 196-97. The officer explained that she fired her weapon because she feared for the safety of other officers in the area, as well as the safety of citizens in the area. *Id.* at 197.

The Court analyzed cases from the Sixth and Eighth Circuits, in which the courts of appeals “found no Fourth Amendment violation when an officer shot a fleeing suspect who presented a risk to others.” *Id.* at 200-01. (discussing *Smith v. Freland*, 954 F.2d 343 (6th Cir. 1992); *Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993)). The Court also considered a case from the Seventh Circuit in which that court reached the opposite conclusion. *Brosseau*, 543 U.S. at 201. After observing that “this area is one in which the result depends very much on the facts of each case,” the Court concluded that the “cases by no means ‘clearly establish’ that Brosseau’s conduct violated the Fourth Amendment.” *Id.*

Because the threat to the officers and the public posed by Rickard was even greater than the threat posed by the fleeing felon in *Brosseau*, its holding controls here: the law was not clearly established on July 18, 2004 that Petitioners violated Rickard’s constitutional rights.

Rickard dangerously passed 29 vehicles, crossed state lines, rammed his car into two separate police cars prior to Petitioners’ first use of deadly force, and then nearly backed over Officer Ellis. Rickard posed a threat of serious bodily harm or death to himself, his passenger, the public and the Petitioners before, during, and after the use of deadly force in this case. Unlike the perhaps speculative risk posed by Haugen in *Brosseau* to officers and the public, Rickard was a demonstrable threat and continued to be such a threat even after deadly force was employed.

Furthermore, it was not clearly established in July of 2004 (and it is still not clearly established) that, where deadly force is authorized, officers may not continue to use such force until a threat is eliminated. Rather, the circuit courts have held that where deadly force is constitutionally permissible, it remains permissible until the threat is eliminated; that is, officers can continue using such force during the pendency of a threat.¹⁸ The number of shots fired by three of six Petitioners is constitutionally irrelevant because Rickard indisputably remained a threat even after deadly force was employed in this case. In the very least, the firing of fifteen shots at a motorist, over a matter of approximately ten seconds, to end the threat posed by the motorist did not violate any clearly established law under the Fourth Amendment in July of 2004. Therefore, Petitioners are entitled to qualified immunity.

In April 2004, three months before Petitioners' encounter with Rickard, the Sixth Circuit held that officers were reasonable in firing on a suspect who was actively using his vehicle as a weapon against police and dangerously attempting to escape and evade apprehension. *Vanvorous v. Burmeister*, 96 Fed. Appx. 312, 314 (6th Cir. 2004).

¹⁸ See, e.g., *Elliott v. Leavitt*, 99 F.3d 640, 643 (4th Cir. 1996), concurring opinion on denial of rehearing, 105 F.3d 174 (4th Cir. 1997) ("The number of bullets fired is likewise irrelevant; if it was objectively reasonable for the officers to use deadly force, it was also objectively reasonable for the officers to continue firing until they were sure the threat to their lives had ceased."); *Estate of Rogers v. Smith*, 188 Fed. Appx. 175, 182-83 (4th Cir. 2006) (repeatedly shooting suspect who pulled gun after a traffic chase ended); *Berube v. Conley*, 506 F.3d 79, 85 (1st Cir. 2007) ("It may well be true that Conley continued to fire as Berube fell to or lay on the ground. But it is clear from the very brief time that elapsed that she made a split-second judgment in responding to an imminent threat and fired a fusillade in an emergency situation. Conley's actions cannot be found unreasonable because she may have failed to perfectly calibrate the amount of force required to protect herself."); *Wilkinson v. Torres*, 610 F.3d 546, 551 (9th Cir. 2010) (not unreasonable to shoot the driver of a minivan sliding around in wet grass and mud who's driving created a serious risk of danger to an officer in the way); *Jean-Baptist v. Gutierrez*, 627 F.3d 816 (11th Cir. 2010) (first high-speed chase then chase on foot, and officer confronted armed robbery suspect; 14 shots were not unreasonable).

The foundation of the court of appeals opinion in this case is its finding that Rickard was “essentially stopped” at the time force was used. However, that characterization of the events in this case is, we respectfully submit, blatantly contradicted by the undisputed video evidence. Rickard was never stopped in the constitutional sense and the video recordings show Rickard was never actually stopped in any sense until he crashed down the road from where the shooting took place. This is the same error committed by the Eleventh Circuit in *Scott v. Harris*, prior to this Court’s reversal. 550 U.S. at 378-79. While at the time of the first three shots in this case, Rickard was not covering much ground in the Honda, he was using it to ram Officer Gardner’s car.

Based on *Vanvorous* alone, and given the undisputed facts as shown by the Dash Cam videos and the testimony of the Petitioners, the holding of the court of appeals was incorrect because the clearly established law in the Sixth Circuit *did*, in fact, permit officers to use deadly force in a situation very similar to the one Petitioners faced. Consequently, the Sixth Circuit committed error in failing to grant the officers qualified immunity in this case because its own precedent established Petitioners did not violate clearly established law.

Additionally, Petitioners were certified law enforcement officers in the Eighth Circuit, and they were informed by their own Circuit’s decisions in ascertaining the clearly established law as of the date of the incident in this case. Those decisions did not clearly establish that Petitioners acted unconstitutionally; if anything, they support the lawfulness of their conduct.

In *Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993), the Eighth Circuit found the decision by a police officer to shoot a suspect upon probable cause that the vehicle driven by the suspect posed an imminent threat of serious physical harm was not objectively unreasonable. Like the case here, the Court noted the reasonableness of the officer's conduct because "Rice had seen the truck force several motorists off the road and threaten the safety of many others." *Id.* Additionally, the court also found that the officers who did not "seize" the suspect and were not sued as supervisors were summarily entitled to summary judgment, *id.*, which is the case here as it pertains to Petitioners Forthman, Ellis, and Evans.

Similarly, in *Hernandez v. Jarman*, 340 F.3d 617, 623 (8th Cir. 2003), decided 11 months before this incident, the Eighth Circuit held the use of deadly force permissible if an officer has probable cause to believe that a suspect posed serious physical injury or a threat of death to the officer or others. *Id.* at 623. The court summarized the events as follows:

The undisputed facts in this case demonstrate that Six Feathers [the suspect] continually eluded the officers and took them on a lengthy and highly dangerous chase. Near the end of the pursuit, Six Feathers intentionally drove his car directly into Tarrell's [a sheriff deputy] vehicle. Jarman [a sheriff deputy] testified that it was his belief that Six Feathers was an "immediate threat." Jarman further testified that, after the collision, he believed Six Feathers, as he was backing up and turning his car in Jarman's direction, intended to run him over.

Id. (bracketed material added). “[W]e hold that Jarman’s use of deadly force was objectively reasonable under the circumstances as Jarman knew them to be at that time.”

Id. Indeed, in this case, there are multiple instances of such conduct against the officers and each officer has testified to the threat of serious harm they perceived. Ignoring such testimony would impermissibly be engaging in 20/20 hindsight. Most importantly, *Hernandez* demonstrates that Petitioners’ conduct did not violate clearly established law in July of 2004.

2. Whether the Sixth Circuit erred in denying qualified immunity by finding the use of force was not reasonable as a matter of law when, under Respondent’s own facts, the suspect led police officers on a high-speed pursuit that began in Arkansas and ended in Tennessee, the suspect weaved through traffic on an interstate at a high rate of speed and made contact with the police vehicles twice, and the suspect used his vehicle in a final attempt to escape after he was surrounded by police officers, nearly hitting at least one police officer in the process.

The videos demonstrate how dangerous this police chase was, and the Officers provided testimony describing the dangers Rickard posed from their perspectives on the scene of the event. The question remains: Was Rickard’s offense sufficiently dangerous to warrant the use of deadly force to stop this high-speed chase as a matter of law?

In *Tennessee v. Garner*, 471 U.S. 1, 7-8 (1985), this Court balanced the interests of the individual to live against the public and law enforcement interests in preventing escape of a fleeing felon, there a nonviolent felon. *Id.* at 9-10.

Rickard’s dangerous high-speed flight from his traffic stop in West Memphis, Arkansas, weaving in and out of traffic on busy I-40 constituted a dangerous felony in

risking the lives of everyone he passed on the road, as well as himself, and the officers pursuing him.¹⁹ He then rammed police cars and nearly backed his car over an officer on foot. Then, undeterred, he continued his dangerous flight. Thus, *Garner* applies, *id.* at 11–12:

Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

And *Garner* was decided in 1985, 19 years before this incident.

The use of deadly force in this case was objectively reasonable under *Tennessee v. Garner* and *Graham v. Connor*. Rickard was a fleeing felon, wielding his Honda as a deadly weapon, intent on never being captured. He had employed force against officers, and he posed a continuing threat to them and to innocent bystanders. *Garner* at 11–12.

Under the circumstances here, considering the rule in *Garner* from 1985, reinforced by the dicta in *Sykes* from 2011 (discussed below), the use of deadly force to stop Rickard was objectively reasonable.

In *Scott*, this Court considered an argument that the police should simply allow suspects to escape when the vehicular flight is high-speed and therefore dangerous. 550 U.S. at 385. The Court rejected that argument because there was no guarantee that ceasing pursuit would eliminate the danger. *Id.* First, the officers would have no way to communicate to the driver that they were really giving up the chase. *Id.* Second, the Court

¹⁹ “Headlong flight – wherever it occurs – is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such.” *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000).

was reluctant to lay down a rule requiring officers to allow fleeing felons to get away by driving recklessly—this could encourage suspects to try to get away. *Id.* The Court laid down “a more sensible rule: A police officer’s attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.” *Id.* at 386.

In *Sykes v. United States*, 131 S. Ct. 2267, 2273-74 (2011) this Court held that felony flight in a vehicle is a “dangerous felony” for a U.S. Sentencing Guidelines enhancement. The Court elaborated, in language fully applicable to this case:

“Because an accepted way to restrain a driver who poses dangers to others is through seizure, officers pursuing fleeing drivers may deem themselves duty bound to escalate their response to ensure the felon is apprehended. *Scott v. Harris*, 550 U.S. 372, 385 (2007), rejected the possibility that police could eliminate the danger from a vehicle flight by giving up the chase because the perpetrator “might have been just as likely to respond by continuing to drive recklessly as by slowing down and wiping his brow.”

As the Court further acknowledged: “once the pursued vehicle is stopped, it is sometimes necessary for officers to approach with guns drawn to effect arrest. Confrontation with police is the expected result of vehicle flight. It places property and persons at serious risk of injury.” *Id.* at 2274. The Court referred to statistics of police reports involving vehicular flight and said: “Although statistics are not dispositive, here they confirm the commonsense conclusion that Indiana’s vehicular flight crime is a violent felony.” *Id.*

Therefore, vehicular flight involves a dangerous felony as a matter of law and “... the intervening pursuit creates high risks of crashes.” *Id.* In this case, the undisputed facts demonstrate the dangers recognized in *Sykes*. And, had Petitioners simply let the

decedent drive away, how would they have communicated to him that the pursuit had ended other than just slowing down? *See Scott*, 550 U.S. at 385. The decedent may have continued to drive recklessly, endangering more lives, simply because he thought the police were still trying to catch him. *See id.* Even if the Petitioners could have told the decedent that they would no longer chase him, he might not have believed them. *See id.* With so much uncertainty as to whether the pursuit would continue, he “might have been just as likely to respond by continuing to drive recklessly as by slowing down and wiping his brow.” *Id.* Considering *Sykes*, and the undisputed video evidence in this case demonstrating the dangers associated with high-speed police chases, police cannot permit a suspect to continue to dangerously flee and endanger the officers and the public.

ORAL ARGUMENT

At the two moot courts, it was advised that the Petitioners focus primarily on the second prong of qualified immunity.²⁰ A clear majority of the practice judges felt that a possible constitutional violation existed and that facts were in dispute. At Oral Argument the Court seemed to unanimously agree that the law was not clearly established in 2004 that the Petitioners violated the Constitution. Additionally, a number of the Justices desired discussion of the underlying constitutional issue. In that regard, it was argued that because of the dangers associated with the flight, the fact that Rickard never indicated

²⁰ We felt strongly from the outset of the litigation that on the merits of the fourth amendment force claim, the officers had acted reasonably. While we understood the advice to soft peddle that part of the argument the Justice’s questions allowed ample opportunity to discuss Mr. Rickard’s incredibly dangerous behavior and the reasonableness of the responses by the officers.

surrender in any manner, and the fact that it appeared clear Rickard would do anything to get away; the Petitioners did not act unreasonably in violation of the Fourth Amendment.

While the practice arguments were excellent preparation, and in fact invaluable, the Justices were almost friendly to Petitioners position while pressing the Respondent's attorney very hard on several occasions. Several Justices noted that it appeared Rickard would do almost anything to avoid capture and engaged Respondent's attorney in spirited, and sometimes uncomfortable, debate.

DECISION²¹

In a 9-0 decision, authored by Justice Alito, the Court reversed the Sixth Circuit Court of Appeals.²² The Court first ruled that the use of force was objectively reasonable, i.e., deadly force in this case was not excessive and not in violation of the Fourth Amendment. Rickard's "outrageously reckless driving posed a grave public safety risk." And, at the time all the shots were fired, over a 10 second span, Rickard had not given up and continued to maneuver his car in a manner that reasonable officers could conclude he would remain a serious threat of harm if not stopped.

Next, the Court ruled that where officers are justified in using deadly force to stop a threat, they are constitutionally permitted to continue to use deadly force until the threat is eliminated.

²¹ http://www.supremecourt.gov/opinions/13pdf/12-1117_1bn5.pdf; *Plumhoff v Rickard*, 572 U.S. ---, --- S.Ct.--- (2014) WL 2178335

²² Regarding the "merits" portion of the opinion, i.e. whether the fourth amendment was violated, both Justice's Ginsburg and Breyer did not join various sections. Neither filed a dissent and both supported the remainder of the opinion.

Finally, the Court ruled that even had the officers violated the Fourth Amendment, the law as of 2004 did not put them on fair notice that their conduct violated Rickard's constitutionally rights and, thus, they would be entitled to qualified immunity.

SUMMARY

My office has been engaged in this matter since the morning after the incident. While I was on vacation in the summer of 2004 the city attorney for West Memphis called me as I was sipping coffee and enjoying the view of the beach and the beautiful blue/green water of the Gulf of Mexico.²³ He related the facts as he understood them and at some point in the conversation we both acknowledged that there would be litigation and it would not be the sort that either of us had ever seen. We certainly had no idea that the case would go to this nation's highest court, but there was something about the incident that caused us to believe the matter would not go quietly into the night.

Effectively the Supreme Court agreed with our position completely. That is more gratifying that I could ever fully communicate, but it is not the most gratifying part of the case for me. Rather, it's been representing six fine public servants that brings me the most pride and joy. Our office has watched these officers go through a hellish ten years. They have been ridiculed and maligned by many people. The most horrible of which is that the three shooters were the object of an overzealous prosecutor in Memphis for the better part of three years. While ultimately the criminal charges were dismissed the officers were nearly bankrupted in the process. Getting a well-deserved vindication for the six officers, even though it meant litigating at levels we never had before, is the real

²³ I was in Perdido Key, Florida to be precise enjoying the sugar white sand that stretches for hundreds of miles along the Florida panhandle. We lovers of the area affectionately refer to it as the "Redneck Riviera."

gratification for me and I believe for Mike as well. After all, they did nothing wrong...just ask the United States Supreme Court.

Shocking Revelations: Recent Developments in the Battle over “Deadly” Taser Applications

FDCC Annual Convention
The Greenbrier
White Sulfur Springs, WV
July 27 – August 2, 2014

Presented by:

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Ted Buck is the president of Frey Buck P.S. A graduate of the University of Puget Sound (Physics, 1987, Mortar Board Society, Order of Omega) and the University of Washington (J.D., 1992), his practice has long focused trying cases. He practices in the areas of catastrophic loss, complex and commercial litigation, real estate and title, product liability, class action litigation, the defense of governmental organizations and their employees primarily in the area of police misconduct and civil rights allegations and most anything else that sounds like it might be interesting.

Mr. Buck has substantial experience in state and federal courts, as well as with appeals before state appellate courts and the Ninth Circuit Court of Appeals. His cases have helped establish current precedent in the Ninth Circuit and nationally in the areas of police use-of-force, qualified immunity and police action in circumstances of civil unrest.

He is a past president of the Washington Defense Trial Lawyers and a member of the Federation of Defense and Corporate Counsel. He has been recognized as a “Super Lawyer” by Washington Law and Politics magazine since 2002 as well as repeatedly recognized in America’s Best Lawyers. Buck is a frequent lecturer on trial tactics, litigation management strategies, the use of expert witnesses, police civil liability and inquest proceedings.

Mr. Buck is also the Chairman of The Sweetwater Company, dba EARTH₂O, an Oregon-based home and office delivery and individual serving bottled water company with product distribution throughout the United States.

Shocking Revelations: Recent Developments in the Battle over “Deadly” Taser Applications

Ted Buck
Jason Anderson
FREY BUCK P.S.

I. INTRODUCTION

The use of “stun guns” by law enforcement agencies has proven to be a valuable tool in assisting in the detention of uncooperative suspects both by overcoming resistance and by minimizing the need for hands-on contact with suspects. While no longer a novel technology, such devices nevertheless continue to elicit strong reaction from traditional law enforcement watchdog organizations and motivated plaintiffs and plaintiff attorneys. Controversy spurred by the use of the devices both fosters and sustains claimants’ efforts to secure financial awards from law enforcement officers and agencies in the aftermath of applications.

Like other discretionary tools, stun guns provide myriad potential applications, pitfalls and outcomes both anticipated and unanticipated. One common claim of critics, however, is that such devices are known to interfere with the heart’s electrical system and can lead to cardiac arrest and death. This discussion addresses the foundations of such claims.

II. BACKGROUND

Thorough research on conducted electrical weapons (“CEW”), also known as electronic control devices or conducted electrical devices (“ECD” or “CED”), shows that CEW use itself has minimal deleterious effect on the human body. Statistical analyses have also consistently demonstrated that the use of CEWs creates a substantial decrease in overall injuries by minimizing the use of alternative force.¹ Although some animal research has shown some adverse impact to the heart through CEW use, those studies have been undertaken in unrealistic application scenarios that are considerably different than common CEW use by law enforcement. Serious injuries associated with incidents in which a CEW has been used have been reported, however, including deaths, though

¹ See Bruce Taylor, Ph.D. et al. (2009). Comparing Safety Outcomes in Police Use Of Force Cases for Law Enforcement Agencies That Have Deployed Conducted Energy Devices and A Matched Comparison Group That Have Not: A Quasi-Experimental Evaluation. Available at <https://www.ncjrs.gov/pdffiles1/nij/grants/237965.pdf>.

these injuries generally occur in the presence of other factors (primarily ingestion of illicit substances and/or the condition of excited delirium).²

Early studies – primarily of police records alone – evidenced a very low occurrence of serious injury in CEW application situations. Most of those studies, however, were limited to a small number of applications and/or a single department. The studies lacked the scope and detail necessary to thoroughly address the questions raised by critics of the devices. As a result, even smaller-scale reviews of incidents involving suspect death after confrontations including CEW use and anecdotal descriptions of CEW-related fatalities continued to grab the attention of the media and fuel criticism of the devices.

A preliminary, detailed effort to determine the actual role of CEWs among the many variables involved in suspect detentions by law enforcement was reported in the *Journal of Trauma* in May, 2010.³ There researchers analyzed five years of Taser application data from the Seattle Police Department from the departments initial adoption of the devices. In addition to department records on the incidents (use of force reports, incident reports, etc.) the researchers also evaluated emergency medical service response records related to the incidents and the subjects' medical records both pre-existing and after the application.

The Trauma study had many interesting conclusions, but most significantly found that incidences of serious injury associated with CEW use are exceedingly rare; no deaths were associated with the use over the entire study period, a time that encompassed more than 1000 applications. Regarding applications potentially associated with cardiac interference, moreover, the study reported that 68% of the applications were to the chest or upper back area of the suspect – precisely the application areas that critics suggest raise the greatest risk of serious cardiac injury in a CEW application. Approximately 27% of the subjects were evaluated in an emergency department after application, of those approximately a quarter (or about 6% of the total number of subjects) were admitted for treatment or evaluation of some condition. However, only eight of the subjects were admitted for trauma actually associated with law enforcement restraint, or less than 1% of the total number of individuals subject to CEW application. The remaining majority of subjects were admitted for medical or

² See National Institute of Justice (2011). Study of Deaths Following Electro Muscular Disruption. Available at <https://www.ncjrs.gov/pdffiles1/nij/233432.pdf>.

³ Strote, MD, Walsh, PhD, Angelidis, MD, Basta and Hutson, MD. Conducted Electrical Weapon Use by Law Enforcement: An Evaluation of Safety and Injury. The *Journal of Trauma Injury, Infection, and Critical Care*, May 5, 2010, Vol. 68, Number 5, 1239-1246.

psychological needs unrelated to CEW-induced trauma. Of those subjects, the overwhelming majority had psychiatric or substance-abuse issues; psychiatric issues formed the greatest single basis for admission accounting for 59.7% of all admitted subjects. 22.2% were admitted for unrelated trauma and 6.9% for unrelated medical diagnoses.

While the study not only found no evidence of a substantial risk of serious injury, it also described a remarkably uniform set of characteristics in the application population. Prior medical records of nearly 900 of the subjects were collected by the researchers and of those subjects 46.8% had a psychiatric history and 72.9% had a substance abused history. Nearly all those subject to CEW application were male – 92.6%.

In 2011, a National Institute of Justice (“NIJ”) review reaffirmed earlier findings on the lack of substantial evidence of significant or lasting harm stemming from CEW use; the NIJ noted that “there is no conclusive medical evidence” of a “high risk of serious injury or death from the direct effects of CED exposure.”⁴ The NIJ concluded that based upon the available evidence, law enforcement “need not refrain from using CEDs.” The NIJ findings have not placated critics, however, who point out that the NIJ’s findings are limited to healthy, sober people where CEW activations were less than 15 seconds.

Despite these studies critics continue to point to highly publicized instances of cardiac arrest and sudden death associated with CEW use to further the argument that the devices are potentially lethal under many of the common circumstances that can prompt their use.

III. TASERS, LIABILITY, AND PLAINTIFFS

Challenges to CEW use generally stem from claims that while CEWs are marketed as safe and predictably effective, law enforcement agencies know or should know that Tasers are extremely dangerous weapons. This perspective often finds its way into the media and popular culture where the sensational tends to flower and the routine wither. Examples of this phenomenon can be found, for example, in the introductory segment of the Wikipedia entry for “Taser.”⁵ The section is written in a skeptical tone and concludes with reference to the

⁴ *Id.* at vii.

⁵ Taser International’s ECDs are by far the most ubiquitous stun guns on the market to the point of becoming synonymous with the genre. There are several competing manufacturers, however.

“controversy” surrounding the devices’ use. Also, in February 2012, an Amnesty International report cited the “500th” Taser death and issued a “call for tighter limits on police use of the weapons.”⁶ The article noted that “Among the cases reviewed, 90 percent of those who died were unarmed. Many of the victims were subjected to multiple shocks.” The article lacked any showing of a direct connection between the CEW device specifically and the deaths, however, and failed to address the complex physical, mental health and substance abuse conditions that intersect in the typical CEW application. The report also failed to offer any suggestions as to what the “tighter limits” should be on Taser use.

In addition to such broadly set and ambiguous arguments, plaintiffs seeking compensation for injuries related to CEW application incidents also have a selection of studies to pick from that suggests an insidious danger in CEW use. For example, an often-cited study by Dr. Douglas Zipes showed that CEWs can cause cardiac arrest. While the study is subject to criticism due to its limited source base (it is based upon only eight specific cases where incident records alone were analyzed), it nevertheless concludes that Tasers “can” lead to cardiac arrest.⁷ Not surprisingly, Dr. Zipes is often a paid expert witness for plaintiffs.

In what is an understandable reaction, CEW manufacturers working to counter such criticism tend to underplay the nature of their devices, painting them as unrealistically benign. Taser International’s website, for example, describes its product as an “elegant approach to incapacitating violent persons” and emphasizes its CEW’s precision – “like static on the telephone lines within the body.”⁸ The website includes a prominent section on “research and safety,” including citation to over 250 research papers – largely industry-funded.⁹ The website also lists four favorable court decisions as justifying Taser use.¹⁰ In short, Taser positions itself as a highly responsible manufacturer of an elegant tool that momentarily mimics the body’s own electrical signals.

⁶ <http://www.amnestyusa.org/news/press-releases/amnesty-international-urges-stricter-limits-on-police-taser-use-as-us-death-toll-reaches-500>.

⁷ Douglas P. Zipes, M.D. (2012). Sudden Cardiac Arrest and Death Associated with Application of Shocks from a TASER Electronic Control Device. American Heart Association, Circulation. See <http://circ.ahajournals.org/content/125/20/2417>.

⁸ See <http://www.taser.com/pepper-spray>; <http://www.taser.com/research-and-safety/how-a-taser-works>.

⁹ <http://www.taser.com/research-and-safety/science-and-medical/medical>.

¹⁰ <http://www.taser.com/research-and-safety/science-and-medical/law-enforcement-and-legal/case-law-ecds-in-probe-mode>.

The truth of the matter, of course, lies somewhere in the middle. While CEW applications most certainly are what most people would describe as very painful, and while they can contribute to physical harm, the research shows an absence of evidence that the device standing alone presents a risk of cardiac interference.

IV. RECENT CEW RESEARCH

A. Wake Forest University.

A 2009 study at Wake Forest University examined Taser effects on healthy volunteers (all of whom were law enforcement officers) over 84 exposures. It concluded that CEW use caused no adverse cardiac effects.¹¹ The primary researcher, Dr. William Bozeman, has been conducting research into CEW use by law enforcement since 2004.¹²

In 2012, Dr. Bozeman released another comprehensive study of 1,201 Taser uses by law enforcement.¹³ The study concluded that Taser shots to the chest are not more dangerous than elsewhere. Of the 1,201 examined cases, 178 included shots to the chest, and overall there was not a single case that could be linked to cardiac complications as a result of Taser use. A possible criticism could be that none of the examined cases involved deaths, suggesting too small (or hand-selected) a sample size. The study did explicitly reject the existing animal studies, nearly all of which involve placing electrodes directly on heart muscle, which would not occur in a law enforcement CEW application.

B. The landmark 2013 Canadian study.

Canada has a history of detailed Taser research. A 2008 study, for example, found batons more dangerous than Tasers, and concluded that among similar force options, only pepper spray was a safer alternative than Tasers.¹⁴ The

¹¹ <http://www.medicalnewstoday.com/releases/163076.php>, funded by the Wake Forest University Department of Emergency Medicine.

¹² http://www.wakehealth.edu/News-Releases/2012/Wake_Forest_Baptist_Study_Suggests_Tasers_Dont_Cause_Cardiac_Complications.htm

¹³ William P. Bozeman, M.D. et al. (2012). Transcardiac Conducted Electrical Weapon (TASER) Probe Deployments: Incidence and Outcomes. *The Journal of Emergency Medicine*, Volume 43, Issue 6, pages 970-75. *See also* http://www.wakehealth.edu/News-Releases/2012/Wake_Forest_Baptist_Study_Suggests_Tasers_Dont_Cause_Cardiac_Complications.htm

¹⁴ <http://www.canada.com/saskatoonstarphoenix/story.html?id=7f62c7ad-26b1-4523-8654->

report concluded that “The commonly held belief . . .” that Tasers carry “a significant risk of injury or death . . . is not supported by the data . . .”

In October 2013, one of the most comprehensive studies ever on Tasers was released by the Council of Canadian Academies of Health Sciences. The study, funded by the Centre for Security Science at Defence Research and Development Canada, was entitled “The Health Effects of Conducted Energy Weapons.”¹⁵ To answer a direct question on the current state of scientific knowledge of the physical impacts of CEWs, as well as where there are gaps in knowledge, the Council enlisted a panel of experts: an appellate judge, professors of medicine from Canada, England, and the United States, a professor of criminology, and practicing cardiologists.

The report was “intended to provide an in-depth and authoritative assessment of the state of knowledge regarding the relationship between CEW use and a range of health effects.” The panel canvassed nearly all known literature on CEW exposure,¹⁶ and in addition to issuing medical conclusions, established a framework for evaluation and analysis of past Taser research as well as guidelines for future research.

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¹⁵ Council of Canadian Academies and Canadian Academy of Health Sciences, 2013. The Health Effects of Conducted Energy Weapons. Ottawa (ON): The Expert Panel on the Medical and Physiological Impacts of Conducted Energy Weapons. See <http://www.cahs-acss.ca/the-health-effects-of-conducted-energy-weapons-2/>

¹⁶ Including the plaintiff-friendly Zipes study, among approximately 250 others. *Id.* at 84.

a. Noteworthy findings.

- Although there have been cases where Taser exposure and fatal cardiac arrhythmias have occurred close in time, “available evidence does not allow for confirmation or exclusion of a causal link.”
- In-custody deaths are caused by a constellation of factors, such as preexisting conditions or drugs.
- The core principle behind CEWs is that the length of exposure required to overcome heart muscles is 10 to 100 times longer than in a nerve cell, so rapid-cycle discharges disable the nerves but not the heart.
- Given the multiple factors present during an arrest of a suspect, it is extremely difficult for any researcher to find definitive causal conclusions in CEW data.¹⁷

b. Gaps in knowledge/problems with existing research.

- The panel acknowledged that there is a risk of not using CEWs, that studies show a reduction in injuries compared to other uses of force, and that review of the comparative benefits of CEWs was beyond the scope of the panel’s purpose.¹⁸ For this reason, the panel chose not to focus on physical injury, such as injury due to falling after a Taser is used on a suspect.¹⁹
- The health effects on non-healthy volunteers are less known, due largely to ethical concerns associated with subjecting such individuals to CEW applications.
- Research lacks sufficient transparency; existing research appears to be largely affiliated with CEW manufacturers or paid experts, and even if the methodology is sound, the potential conflict of interest prevents the studies from being objectively acceptable.
- There is no central data source for CEW exposure, as most data is kept within local police departments. This presents a problem in aggregating data and, perhaps more importantly, in assuring uniformity of data.

¹⁷ *Id.* at 68.

¹⁸ *Id.* at 63-64.

¹⁹ *Id.* at 67.

- In a related principle, many existing “studies” come from only one police department’s data.
- Standardization of reporting and recordkeeping must precede any large-scale study.²⁰
- There is no research on long-term effects of CEW use.
- Where a suspect is being arrested, there are often too many other factors to meaningfully isolate the effect of a CEW, even including the high stress and physical exertion of the arrest scenario itself.
- Research is limited by the narrow focus on TASER devices alone; research on a range of CEWs would aid understanding of how different outputs in electricity (duration, waveform variation, and intensity) affect the human body.

c. Conclusion/takeaways.

The Canadian panel’s thorough and peer-reviewed examination of the health effects of Tasers disclosed no evidence that Tasers play a causative role in causing cardiac arrest. Where cardiac arrest did occur, other factors were present.²¹ The report also supports an argument that any study claiming that Tasers are categorically unsafe and/or cause cardiac arrest cannot be legitimate (whether due to sample size, lack of uniform data, or presence of other uncontrolled factors at the arrest scene).

The Canadian study also evidences a weakness in the research, however; it confirms a lack of uniformity in the evidence collected by interested parties and utilized in the underlying studies the team evaluated. Moreover, the effect of applications on intoxicated or otherwise unhealthy individuals remains primarily anecdotal in nature because the necessary, controlled research would be unethical.

The report is very helpful, however, in placing previous studies in perspective. If a new study is released claiming a causal link between Taser use and fatalities, the guidance and methodology recommended by the panel should be used to assess the true validity of the study.

²⁰ *Id.* at 69.

²¹ As Judge Warlaw observed in *Bryan v. MacPherson*, 630 F.3d 805, 825 n.7 (9th Cir. 2010), any non-lethal force can be used in a way that causes the victim’s death.

V. CEW USE CONTINUES TO SPAWN SIGNIFICANT LITIGATION

CEW based-lawsuits are certainly not rare. The following sampling of cases illustrates (1) the types of medical arguments advanced (whether successful or unsuccessful), and (2) the types of injuries allegedly caused by Taser/CEW use. As illustrated, CEW-related claims go well beyond the strict cardio interference effect of the applied electric current on the subject, evidencing the diversity of potential claims that can stem from CEW applications. For all the research and study that has been dedicated to CEW use, however, the devices remain enigmatic for the simple reason that, like all other force options, the devices may be used in myriad ways under an infinite variety of circumstances. The combination of elements and the risks posed to suspects are also, accordingly, essentially endless.

- *Glowczenski v. Taser Int'l, Inc.*, 2012 U.S. Dist. LEXIS 39438 (E.D.N.Y. Mar. 22, 2012)
 - Plaintiff's expert claimed that a Taser-involved death was caused by metabolic acidosis – basically that Tasers cause muscles to contract, increasing lactic acid, altering the body's pH balance and causing sudden death.
 - Plaintiff also argued several conspiracy theories, including Taser's collusion with the medical examiner, though the court excluded the testimony.
- *Snowden v. City of Phila.*, 2012 U.S. Dist. LEXIS 143615 (E.D. Pa. Oct. 4, 2012)
 - Officers saw the suspect put a plastic baggie in his mouth; after using a Taser to gain compliance, the bag was stuck in the suspect's throat, restricting respiration and causing permanent brain damage.
- *Fontenot v. Taser Int'l, Inc.*, 736 F.3d 318, 332 (4th Cir. 2013)
 - A landmark case upholding a \$5.5 million product liability verdict. A 17 year-old boy died after being shot with a Taser; the boy's estate claimed that Taser "failed to warn" the police officers that Tasers "could" cause cardiac arrest, especially when used near the heart.
 - Pivotal to the court's ruling was the officer's testimony that he had read the Taser manual, and the issue was whether the officer would have acted differently had the manual included a specific warning.
- *McCarthy v. City of Charlotte*, 2013 U.S. Dist. LEXIS 136657 (W.D.N.C. Sept. 24, 2013)

- Court ruled that a plaintiff's claim that the police department failed to train officers of the "danger" of pointing a Taser at the center mass of a person and that such application could cause the death of a suspect due to cardiac arrest could go forward.
- *Jacobs v. City of Fort Worth*, #4:09-cv-00513, U.S. Dist. Ct. (N.D. Tex. 2011)
 - Man shot by Taser, officer inadvertently held trigger down for 49 seconds.
 - Medical examiner listed cause of death as "sudden death during neuromuscular incapacitation due to application of a conducted energy device."
 - Settled confidentially.
- *Marquez v. City of Phoenix*, 2012 U.S. App. LEXIS 19048 (9th Cir. Ariz. Sept. 11, 2012)
 - A Taser appeared to have no effect on a dangerous, large male suspect.
 - Officers pulled the trigger 22 times, each discharge of the Taser between one and 11 seconds. Suspect died after the officers' physically struggled with the suspect to restrain him.
 - The Ninth Circuit held that a Taser is not deadly force under Arizona law, noting that the plaintiffs "have produced no evidence that an X26 is capable of creating a substantial risk of death or serious physical injury. At most there is evidence in the form of scientific journals that it carries a potential risk of injury in a very small group of people."²²
- *Rich v. Taser Int'l, Inc.*, 2012 U.S. Dist. LEXIS 44584 (D. Nev. Mar. 30, 2012)
 - Another product liability case in which the court allowed Dr. Zipes to testify in an expert capacity to the effect that Taser use on even a healthy person can cause cardiac arrest (the cause of the plaintiff's injury in the case).
 - There the suspect suffered a partial seizure during the initial confrontation – not known to the officer – that caused the suspect to disobey the officer's commands. The suspect was tased 13 times in three minutes.
- *Quyen Kim Dang v. City of Garden Grove*, 2011 U.S. Dist. LEXIS 85949 (C.D. Cal. Aug. 2, 2011)

²² The dissenting judge disagreed citing the Zipes study that Taser use to the chest can cause cardiac arrest.

- Plaintiff died after a single Taser application at the scene; plaintiff's expert autopsy posited that the cause of death was cardiac arrest caused by the Taser.
- The evidence suggested that it may have appeared to the officer that the plaintiff was on a stimulant. The court noted that a person apparently on stimulants has a "perceptible vulnerability" to the use of a Taser. The court denied summary judgment to the defendant city.
- The court also observed that Ninth Circuit law distinguishes between Tasers deployed in "dart" mode and Tasers deployed in "stun" mode, describing the former exercise of force as substantially more severe than the latter (citing *Brooks v. City of Seattle*, 599 F.3d 1018, 1027-28 (9th Cir. 2010) (vacated on other grounds by *Mattos v. Agarano*, 661 F.3d 433 (9th Cir. 2011))).

The above cases are merely a sampling of 2011-2014 decisions. In that time period alone there are hundreds of Taser/CEW cases and decisions. Most of the cases, of course, focused on whether the use of force was justified, not whether the CEW could cause death.²³

These cases show that CEWs are most often implicated in serious injury or death in circumstances of unusual use. Egregious examples, such as the 49-second continuous discharge or 13 Taser applications in 3 minutes, certainly expand the claimant's opportunity to blame the CEW for the injury. These cases also provide foundation for a plaintiff's effort to defeat summary judgment on qualified immunity grounds, given that the plaintiff can claim it is well-established that law enforcement is or should be aware that CEWs can cause or at least contribute to substantial bodily harm.

Not surprisingly, many cases focus on the duration of each Taser application. The "default" application time for many CEWs is 5 seconds, though the application can often be prolonged by continuing to depress the trigger. Plaintiffs often argue that death or serious injury would not have occurred if the officers used only 5-second discharges. As noted, however, research on the effects of prolonged CEW applications is at best inconclusive.

In conclusion, there is a dearth of evidence that a routinely employed CEW presents any serious risk of cardiac interference or arrest. The most that can be gleaned from the available scholarship is that an application, in combination

²³ See <http://www.aele.org/law/Digests/ECWcases.html>

with other aggravating factors, could lead to an overall physical state in the subject that might result in cardiac failure. In short, like other force options, it is the circumstance of the application that will control the analysis of potential liability. As noted by the authors of the Journal of Trauma report referenced above²⁴, the current CEW debate follows on the heels of another significant law enforcement use-of-force debate in the 1990s regarding the role of restraint (e.g. positional asphyxia) in suspect injury and death. Much litigation rode the controversy engrossed in that debate until the theory of positional harm was effectively rejected by thorough studies. It appears the CEW debate is simply the latest iteration of a long-standing question – why do suspects sometimes die in what are otherwise fairly routine detention efforts, both those involving CEWs and those that do not? It would appear the answer will never boil down to a single cause, such that it is the destiny of attorneys on both sides of the issue to slog through the specific facts of the cases forever – a disconcerting prospect from all perspectives save job security.

²⁴ See Note 3.



2014 ANNUAL FDCC MEETING - THE GREENBRIER

White Sulphur Springs, WV

July 26-August 2, 2014

THRIVE! DRIVING SUCCESS THROUGH PEOPLE, CULTURE, AND RELATIONSHIPS

Program Chair: W. Michael Scott, *CrownQuest Operating, LLC*

TUESDAY, JULY 29, 2014

7:30-8:50am

SECTION MEETINGS

DRUG, DEVICE, AND BIOTECH SECTION; HEALTHCARE PRACTICE SECTION; LIFE, HEALTH, AND DISABILITY SECTION; PREMISES AND SECURITY LIABILITY SECTION; REINSURANCE, EXCESS AND SURPLUS LINES SECTION

The Affordable Care Act: What's New, What's Happening, and What to Tell Your Clients; Part 1- a Two-Day Blockbuster Program in the TED Talk Format

Program Materials:

01. Shared Responsibility for Employers-Cori Cook

01. Stop Loss Presentation

01. Can the ACA be Used to Mitigate

01. Affordable Care Act Used to Mitigate

Alden Bianchi, *Mintz, Levin, Cohn, Ferris, Glovsky and Popeo PC*, San Francisco, CA

Marc Marion, Vice President- *Strategic Alliances, American Fidelity Assurance Company*, Oklahoma City, OK

Caryn Lilling, Principal, *Mauro Lilling Naparty LLP*, Woodbury, NY

PRODUCTS LIABILITY SECTION

Statistics in the Courtroom- Essentials for Trial Lawyers

Program Materials:

02. The Use of Statistics

Sawnie A. McEntire- *Beirne, Maynard & Parsons*, Dallas, TX

Michael A. Walsh-*Strasburger*, Dallas, TX

Nathan R. Soderborg, Ph.D., *CRE, CSSBB- Exponent*, Detroit, MI

PROFESSIONAL LIABILITY SECTION

Program Materials:

03. Starting Your Own Associate Training

Richard Caldwell, Jr.- *Rumberger, Kirk & Caldwell*, Tampa, FL

Sean W. Martin- *Carr Allison*, Chattanooga, TN

Arthur J. Reliford, Jr.- *Swanson, Martin & Bell*, Chicago, IL

Patrick E. Stockalper- *Reback, McAndrews, Kjar, Warford & Stockalper*, Manhattan Beach, CA

MANAGEMENT, ECONOMICS, E-COMMERCE, AND TECHNOLOGY OF PRACTICE SECTION

HIPAA for Law Firms-What You Need to Know to Prevent Your Law Firm from Paying Millions

Program Materials:

04. HIPAA for Law Firms

Jim Hoover- *Burr & Forman*, Birmingham, AL

Robert L. Coffield-*Flaherty, Sensabaugh & Bonasso*, Charleston, WV

10:00am-12:00pm

PLENARY SESSION

The 21st Century Practice of Law-The Future of the Law Firm

Program Materials:

05.21st Practice of Law

Debra T. Varner- *McNeer, Highland, McMunn, Varner*, Clarksburg, WV

Robert T. Adams- *Shook, Hardy & Bacon*, Kansas City, MO

Robert H. Shultz, Jr.- *State Farm Insurance*, Bloomington, IL

Clark R. Hudson- *Neil, Dymott, Frank, McFall & Trexler*, San Diego, CA

Wystan M. Ackerman-*Robinson & Cole*, Hartford, CT

Lauren S. Curtis-*Traub, Lieberman, Straus & Shrewsbury*, St. Petersburg, FL

Michael T. Lucey- *Gordon & Rees*, San Francisco, CA

WEDNESDAY, JULY 30, 2014

7:30-8:50am

SECTION MEETINGS

DRUG, DEVICE, AND BIOTECH SECTION; HEALTHCARE PRACTICE SECTION; LIFE, HEALTH AND DISABILITY SECTION; PREMISES AND SECURITY LIABILITY SECTION; REINSURANCE, EXCESS AND SURPLUS LINES SECTION

The Affordable Care Act: What's New, What's Happening, and What to Tell Your Clients; Part II

Program Materials:

06. Major Issues Shaping Affordable Care Act

06. Affordable Care Act on Medical Technology

Andrew Shin, Director of Health Care Policy and Life Sciences-*ML Strategies*, Washington, DC

Ellen J. Potter, CIC, Director-Health Policy, *Offices of the Insurance Commissioner*, State of West Virginia

TOXIC TORT AND ENVIRONMENTAL LAW SECTION

What Lies Beneath (and Ahead): Developing Trends in Shale Gas Litigation

Program Materials:

07. What Lies Beneath and Ahead

John R. Mitchell- *Thompson Hine*, Cleveland, OH

J. Christopher Davis-*Johnson & Jones*, Tulsa, OK
Steve Faurot-*Spectrum Tracer Services*, Tulsa, OK

TRIAL TACTICS, PRACTICE AND PROCEDURES SECTION; TRANSPORTATION SECTION

Defending Against Plaintiffs' Creative Use of Regulatory Evidence

Program Materials:

08. Negligence Per Se

Richard Caldwell, Jr.- *Rumberger, Kirk & Caldwell*, Tampa, FL
Kurt M. Rozelsky-*Smith Moore Leatherwood*, Greenville, SC

EXTRA-CONTRACTUAL LIABILITY SECTION; INSURANCE COVERAGE SECTION; PROPERTY INSURANCE SECTION

Recent Assaults on the Most Sacred Privilege of All: Does the Attorney- Client Privilege Still Exist?

Program Materials:

09. Recent Assaults on the Most Sacred Privilege

Phillip D. Priore- *McCormick & Priore*, Philadelphia, PA
Terrence M. Ridley- *Wheeler Trigg O'Donnell*, Denver, CO
Alan Bryan-*Wal-Mart Stores, Inc.*, Bentonville, AR
Diane L. Polsker- *Gordon & Polsker*, Portland, OR

9:00-10:00am

PLENARY SESSION

Cautionary Tales: Managing Law Firm Nightmares

Program Materials:

10. Cautionary Tales

10. Clients in Crisis

10. Law Firm Liability Terrain

10. The Four R's of Guarding

Edward J. Currie, Jr.- *Currie, Johnson, Griffin & Myers*, Jackson, MS
C. Howard Hunter- *Hill, Ward & Henderson*, Tampa, FL
James A. Dodrill- *The Progressive Group of Insurance Companies*, Charleston, WV
Douglas R. Richmond- *Aon Professional Services*, Chicago, IL

10:00-10:45am

Taking Action: Recognizing and Responding to Depression and Substance Abuse in the Legal Profession

Program Materials:

11. Taking Action

Stuart Mauney- *Gallivan, White & Boyd*, Greenville, SC

10:45am-12:00pm

Creating a Culture of Greatness

Program Materials:

Jon Gordon-*The Jon Gordon Companies*, Pointe Verde Beach, FL

THURSDAY, JULY 31, 2014

7:30-8:50am

SECTION MEETINGS

COMMERCIAL LITIGATION SECTION; INTELLECTUAL PROPERTY SECTION

Innovation Trumps Imitation: Outrunning the Bootleggers

Program Materials:

13. Innovation Trumps Imitation

Gerald B. Kline- *Cohen Pollock Merlin & Small*, Atlanta, G

Michael Q. Walshe, Jr.- *Stone Pigman Walther Wittmann*, New Orleans, LA

Brian D. Walters- *Matthews International Corporation*, Pittsburgh, PA

APPELLATE LAW SECTION

Supreme Court Practice- Strategies for Getting To and Litigating Your Case In The Highest Court of Our Land

Program Materials:

14. Supreme Court Practice

Meloney C. Perry-*Perry Law, P.C.*, Dallas, TX

Wystan M. Ackerman- *Robinson & Cole*, Hartford, CT

Joseph P.H. Babington-*Helmsing, Leach, Herlong, Newman & Rouse*, Mobile, AL

EMPLOYMENT PRACTICES AND WORKPLACE LIABILITY SECTION

Workplace Age Bias: Strategies for Preventing Lawsuits In-House and In Your Firm

Program Materials:

15. Age Bias in the Workplace

Kay H. Hodge- *Stoneman, Chandler & Miller*, Boston, MA

Eric A. Schneider- *Anderson, McPharlin & Connors*, Los Angeles, CA

Jeffrey Kelsey, *Federal Express Corporation*, Memphis, TN

ALTERNATIVE DISPUTE RESOLUTION SECTION

Prospective on an Effective Mediator

Program Materials:

16. Mediation and the Mediator

16. The Effective Mediator

Hon. Marina Corodemus- Iselin, NJ

Heather D. Maher-*Ralph Lauren Corporation*, Lyndhurst, NH

Christopher P. DePhillips-*Gibbons, P.C.*, Newark, NJ

Paul M. Finamore-*Niles, Barton & Wilmer*, Baltimore, MD

9:00-10:30am

PLENARY SESSION

Behind the Curtain- Things You May Not Know (But Probably Should) About What Drives Your Clients' Decisions

Program Materials:

17. Behind the Curtain

Heidi G. Goebel-*Christensen & Jensen*, Salt Lake City, UT

Alan Bryan- *Wal-Mart Stores, Inc.*, Bentonville, AR

Brian D. Walters-*Matthews International*, Pittsburgh, PA

Bryony B. Hodges-*SCANA Corporation*, Cayce, SC

Joe A. Garza-*Dex Media, Inc.*, Dallas, TX

David M. Nicholas-*Volvo Construction Equipment*, Shippensburg, PA

Marc Polk-*Covidien*, Mansfield, MA

10:30am-12:00pm

Psst...Secrets of Highly Successful Law Firms

Program Materials:

18. Psst Secrets of Highly Successful Law Firms

Brett J. Preston-Hill, *Ward & Henderson*, Tampa, FL

Michael A. Tanenbaum-*Sedgwick*, Newark, NJ

Deborah D. Kuchler-*Kuchler, Polk, Schell, Weiner & Richeson*, New Orleans, LA

Michele Ballard Miller-*Miller Law Group*, San Francisco, CA

Richard K. Traub-*Traub, Lieberman, Straus, & Shrewsberry*, Red Bank, NJ

Thomas Segalla-*Goldberg Segalla*, Buffalo, NY

FRIDAY, AUGUST 1, 2014

7:30-8:50am

SECTION MEETINGS

CORPORATE COUNSEL COMMITTEE AND INSURANCE INDUSTRY COMMITTEE JOINT MEETING

Best Practices for Working with Internal Clients and Outside Counsel

Program Materials:

19. Best Practices for Working with Internal Clients and Outside Counsel

Marc Polk- *Covidien*, Mansfield, MA

April A. Elkovitch- *Meadowbrook Insurance Group*, Westerville, OH

CLASS ACTION AND MULTIDISTRICT LITIGATION SECTION; INTERNATIONAL PRACTICE AND LAW SECTION

Travels Abroad in Class Action Litigation: A First Class Upgrade From Business As Usual

Program Materials:

20. Class Action: The French Action de Groupe

20. Class Action in East Asia

20. Status of Law Enforcement in EU

20. Product Liability Class Action EU

20. Recent Developments in Class Action Canada

Christopher Hodges, Professor-*Centre for Socio-Legal Studies*, University of Oxford, Oxford, UK

Scott Maidment- *McMillan LLP*, Toronto, Canada

Peter Lennon-*Maples and Calder*, Dublin, Ireland

Vincent Wang-*Tsar & Tsai Law Firm*, Taipei, Taiwan

CIVIL RIGHTS AND PUBLIC ENTITY LIABILITY SECTION

**Shocking Revelations: Recent Developments in the Battle over "Deadly" Taser Applications And A View from the Peak:
The Journey from Trial Court to Supreme Court in a Use of Force Case**

Program Materials:

21. Shocking Revelations

21. A View from the Peak

Ted A. Buck- *Frey Buck, P.S.*, Seattle, WA

Mark Hayes- *Arkansas Municipal League*, North Little Rock, AR
