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NYLitigator

A Journal of the Commercial & Federal Litigation Section
of the New York State Bar Association

Commercial and Federal Litigation Section Annual Meeting

- Presentation of Stanley H. Fuld Award
- Remarks
- Presentation: Bridging the E-Discovery Gap
- Presentation: Reducing Costs for Corporate Clients—Fee Arrangements, Budgeting, and Billing
- Presentation: Reducing Costs for Corporate Clients—Case Management and Staffing

Also Inside

- The Art of Enforcing a Money Judgment
- Distinction Between Direct and Foreseeable Harm
- The (Non)-Interpretation of 28 U.S.C. 1367(d)
- Spouse's Credit Card Debt and the Marital Home

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A Message from the Outgoing Chair

My mind is just spinning. I cannot believe that my year at the helm of the Commercial and Federal Litigation Section has drawn to a close. And what a year it has been!

After giving much thought to this, my last "Chair's Message," I have decided against recapping all that we have accomplished over the last year. To be sure, from our Mentoring Initiative to our soon-to-be released compendium of "Best Practices for Electronic Discovery in the Federal and State Courts," we have been extremely busy. But to use this final column like an Egyptian obelisk, recording our successes for posterity, would be antithetical to what our Section stands for.

If I had to define the Commercial and Federal Litigation Section in a single word, that word would be "service." As expressed by that great poet, Bob Dylan:

> You may be an ambassador to England or France
> You may like to gamble, you might like to dance
> You may be the heavyweight champion of the world
> You may be a socialite with a long string of pearls
>
> But you're gonna have to serve somebody, yes indeed
> You're gonna have to serve somebody.[1]

What makes our Section so special is the willingness of its members, be they partners at premier law firms, in-house counsel at world renowned institutions, solo practitioners or members of the state and federal judiciary, to give freely of their time and formidable talent to better the legal profession. It would be easy enough for our Section members to rest on their proverbial laurels. Instead, though, our members recognize the importance of and satisfaction derived from having "to serve."

Leading the Commercial and Federal Litigation Section has been the most rewarding undertaking of my professional career to date. I have enjoyed the rich camaraderie of like-minded colleagues and have derived untold satisfaction from witnessing a large number of important projects come to fruition.

I owe an enormous debt of gratitude to several individuals, without whom this year would not have been the success that it was. Thank you to our Section's Executive Committee, and in particular, to my Officers, David Tennant, Tracee Davis, Paul Sarkozi and Erica Fabrikant. You all worked tirelessly for this Section and provided me with immeasurable support and good counsel. Thank you to Lesley Friedman Rosenthal and Matt Maron, two visionary leaders who were instrumental in the launch of our Section's Mentoring Initiative. Thank you to all of our Section's former chairs for blazing the trail and leading the way for our Section to evolve into what it is today. Thank you to my partners at Flemming Zulack Williamson Zauderer LLP for supporting my efforts this past year and for permitting me to hold this second "full time" job. Finally, a special thank you to Michelle Lupkin, my beloved wife of twenty one years, and to Shira, Arielle, Leora and Ilana Lupkin, my four remarkable daughters; without your unwavering love, support, understanding and patience, I could not have served effectively.

The time has now come to pass the baton to Incoming Chair, David Tennant, and his slate of officers: Chair-Elect Tracee Davis, Vice Chair Gregory Arenson and Treasurer Paul Sarkozi. David and his all-star team know what it means "to serve." I am confident that they will lead our Section with distinction, integrity and class in the year to come. Team David—the Section is now in your capable hands.

Jonathan D. Lupkin

Endnote

1. Excerpt from lyrics to "Gotta Serve Somebody," by Bob Dylan.

A Message from the Incoming Chair

Taking over the helm of the Section may be a particularly appropriate image given our Spring Meeting in Newport and the hard fought (but not close) race between "The Federals" and "The Commercials" in 12-meter America's Cup yacht racing. If so, I have inherited a beautiful, sleek, ocean-going vessel, handed down from exceptionally gifted (back-to-back) "skippers," Captains Vince Syracuse and Jonathan Lupkin. OK; enough of that. The ship has sailed on all nautical analogies. Working closely with Jonathan this year has been exceptionally rewarding both personally and professionally. I am inspired by his vision for the profession, legal ability, humanity, and devotion to a remarkable family. Mazel Tov! Thank you, Jonathan, for an outstanding year of leadership.

Standing at the helm, for what will be the blink of another year, is both daunting and invigorating: there is so much to do! If you did not attend the Spring Meeting, you may not have heard the ideas of the real David Tennant (not the actor who played Doctor Who) for 2011-2012. While we all know that various issues and challenges will be thrust upon our Section over the next 12 months—and we will react to them as best we can—I would like to outline my priorities for the next year, organized under the headings, "People," "Places" and "Things."

People

Our Section leads the bar in creative and pragmatic diversity programs, having established the Smooth Moves program in 2007, established the Hon. George Bundy Smith Pioneer Award, and started funding minority fellowships for the Commercial Division in the same year—which happens to be the same year Lesley Friedman Rosenthal chaired the Section. (Just a coincidence?) I think our Section can and must do more. In doing so, we answer State Bar President Vincent Doyle's Section Diversity Challenge. I hope to see the Section develop mentoring opportunities for attorneys of color, building upon our Association-leading mentoring program established last year. Lesley Friedman Rosenthal is not only a former Section chair and initiator of the Smooth Moves program, which has been ably co-chaired by Hon. Barry Cozier, recent chair of the Section's Diversity Committee, Carla M. Miller and Tracee Davis, she also is the current co-chair of the Section's mentoring initiative. Together with our Diversity Committee, chaired by the Hon. Sylvia O. Hinds-Radix and Carla M. Miller, the mentoring program leadership will work in the program's second year to further ensure that the Section attracts and serves the professional interests of all commercial litigation attorneys.

I also wish to see our Section address the "pipeline" issue—the fact that too few minority college students are attending law school. To address that issue, which I think is essential to increase the numbers of attorneys of color, I hope to expand a moot court program at Cornell Law School that targets minority college students. The William E. McKnight Moot Court competition is an oral exercise only, and uses the moot court problem studied by first year law students in the prior year. The Black Law Students Association chapter at Cornell organizes and runs the competition. BLSA reaches out to the minority pre-law society (and other undergraduate groups) at Cornell University to recruit undergraduate students of color to participate in the moot court program. The goal of the McKnight Moot Court competition is to encourage minority students to attend law school. The program is low cost and runs on volunteer effort by law school students, faculty, alums and practicing lawyers at Nixon Peabody.[1] We think the McKnight Moot Court program can be replicated easily at each of the fifteen accredited law schools in New York State, pairing each law school with one or more undergraduate colleges.

Places

Upstate New York is a lovely place to raise a family; it also contains vibrant legal communities in which savvy commercial litigators ply their trade. As the first "upstate" chair in a decade (and only the third ever), I think our Section can do better in expanding its footprint "upstate," by making itself more relevant and visible. I have commissioned an "upstate" task force, chaired by former Section Chair Sharon Porcellio, and rounded out by Linda J. Clark in Albany, Mitchell J. Katz in Syracuse, Heath Szymczak in Buffalo, and me in Rochester. The task force will try to answer why this Section does not have the same kind of following upstate as, say, TICL. The task force will propose concrete, specific steps to increase enrollment in the State Bar and CFLS. We intend to bring certain events upstate, including at least one Executive Committee meeting which will be videoconferenced from an upstate location to our New York City office. We also expect to bring a CLE program to one or more upstate locations in the next 6-9 months. If you live and practice upstate, CFLS activities will be coming to a neighborhood near you.

Things

The Commercial Division is the crown jewel of this Section, and we must find ways to support the court amidst the current crisis in funding. As courts are being asked to do more with less, as are the corporate clients we represent, the need for more efficient dispute resolution

grows. The mantra "faster, cheaper, smarter" can and should be translated into efficient problem solving, where commercial and business disputes are rapidly evaluated and resolved through a creative truncation in traditional procedures. What that might look like is the job of a working group that is forming as I write. These future-minded lawyers and judges will survey corporate clients to see what alternatives are possible and tolerable, examine existing court-annexed ADR and summary procedures, and conceive of super-efficient methods of dispute resolution for commercial and business cases. A report will be issued by the Annual Meeting in January.

Conclusion

Assuming leadership of the Section is a great opportunity and tremendous responsibility. I am blessed to embark on this adventure with dedicated and talented fellow officers: Chair-Elect Tracee Davis, Vice-Chair Greg Arenson and Treasurer Paul Sarkozi,. We have a long tradition of exceptional teamwork in the Section, which I hope to continue.

Truly I stand on the shoulders of giants. The pantheon of former Section chairs is beyond remarkable, including such luminaries as Section founder Robert L. Haig, United States District Court Judges Shira A. Scheindlin and P. Kevin Castel, and three state bar presidents: Mark H. Alcott, Bernice K. Leber and Stephen P. Younger. I would be remiss not to mention my partner Harry P. Trueheart, III, who went on to serve as managing partner for Nixon Peabody and continues to serve as its Chairman. Of course, I also should mention the great leadership demonstrated by each former Section chair not already mentioned (Jack C. Auspitz, Cathi Baglin, Peter Brown, Carrie H. Cohen, Michael A. Cooper, John M. Nonna, Gerald G. Paul, Jay G. Safer, Lewis M. Smoley, Lauren J. Wachtler and Mark C. Zauderer). We are blessed to have so many of these exceptional bar leaders involved in the Section's activities today, continuing to contribute to the lifeblood of the Section.

While atop the shoulders of such giants, my shoe size looks okay, but the minute I drop from that lofty perch, I have enormous shoes to fill. I am tempted to say, "Wish the Section luck!" But the Section needs more than your good wishes. We need all members to take ownership in the future of our Section, to roll up our sleeves and contribute to the Section's mission to better the profession. There are many ways to contribute. We look forward to your participation in our committees, CLE programs, Annual and Spring Meetings and other Section events and activities over the next year, and beyond. Opportunities abound everywhere.

Jump 'board!

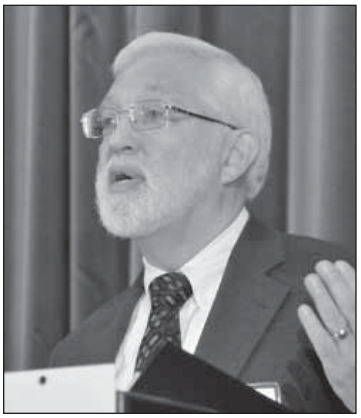
David H. Tennant

Endnote

1. The program at Cornell was established in honor of Bill McKnight, who received his law degree from Cornell University in 1972 and became the first African American partner at Nixon Hargrave Devans & Doyle (now Nixon Peabody) and was perhaps the first African American partner at any large firm in New York State outside New York City. Bill McKnight was an accomplished labor lawyer who was very active in the community. His path as a trailblazer was tragically cut short at age 36 in 1985. In his honor, the firm established (among other things) the McKnight Moot Court program at Cornell Law School, which has operated for more than 20 years.

Presentation of the Stanley H. Fuld Award for Outstanding Contributions to Commercial Law and Litigation to the Honorable Robert A. Katzmann

Presented by the Honorable Jed S. Rakoff, United States District Court for the Southern District of New York, to the Honorable Robert A. Katzmann, United States Court of Appeals for the Second Circuit, at the Hilton New York, New York, New York on January 26, 2011


Hon. Jed S. Rakoff

I consider it an immense privilege to have been asked to present the Stanley H. Fuld Award to Judge Robert A. Katzmann. Chief Judge Fuld was one of the greatest judges of his time, and I submit that Bob Katzmann is well on his way to becoming one of the greatest judges of our time.

Rightfully, this award should also be co-awarded to Judge Katzmann's wife, Jennifer Callahan. In everything he does, Bob's goal is to make Jennifer proud, and he usually succeeds. Indeed, if you combine a Callahan with a Katzmann, how can you possibly fail!

Robert A. Katzmann is one of those rare judges who combines a brilliance of intellect with a deep-seated compassion—a judge whose head and heart combine to make sure that real justice is done.

Bob is also one of those very rare judges utterly lacking in pretension. Though armed with a Ph.D. from Harvard and a J.D. from Yale, he is just as comfortable talking with everyday folk as hobnobbing with university presidents and cabinet officials.

Intellectually, Bob is a man for all seasons. At the time of his appointment to the bench in 1999, he held three separate professorships in three separate departments at Georgetown University, plus a fellowship at the Brookings institution, plus he was the president of the Governance Institute, an institution concerned with making government work. Hmm, making government work: I guess Bob is not only brilliant, but also imaginative.

Does any of this remind you of another public servant? It should, because Bob, before he went on the bench, was also a close associate of Daniel Patrick Moynihan, who was in many ways his mentor, and who instilled in Bob a desire to look beyond politics and ideology and to get things done. In my view, Bob is part of the living legacy of Pat Moynihan, to which we are all so indebted.

For example, like Moynihan's writings, Bob's judicial opinions are both well written and wise. The first time you read them you are struck by their clarity of expression, the second time you read them you are struck by their finely balanced judgment, and the third time you read them you are struck by their insight and depth. The only reason I haven't read them a fourth time is that it would just make me too darn jealous.

But Bob has not been content simply to sit up there on the Second Circuit and render decisions, important though that be. Again, like his mentor Pat Moynihan, Bob has looked beyond the immediate issues to more fundamental problems, and then has taken action. Over the past few years, the Second Circuit has had to confront a huge number of immigration appeals, and has struggled with some of the technical issues they present. But it is Bob who has recognized that these cases also illustrate, all too tragically, the difficulty a poor immigrant person faces in obtaining adequate legal representation.

For Bob Katzmann, the son of a refugee from Nazi Germany and the grandson of Russian immigrants, this was too much to bear. So, beginning about two years ago in a speech to the New York City Bar Association, he called upon the organized bar to take up the slack and provide the representation that was needed. To quote Nina Bernstein of the *New York Times*, "Almost alone among the nation's federal judges, he has used the prestige of his office to push for more and better legal representation of immigrants." And from this impetus, there has emerged a pro bono effort on the part of the


Section Chair Jonathan D. Lupkin and Hon. Jed S. Rakoff

immigrant poor that now involves literally hundreds of lawyers from dozens of firms.

I won't say more about this, because I am hopeful he will say some words about it himself. But let me put it this way: our society is sometimes obsessed with imaginary heroes, like Superman and Spiderman and Batman; but we have here before us today a real-life, flesh-and-blood hero, and his name is Katzmann. I am very proud to present this year's Stanley H. Fuld Award to Robert A. Katzmann, United States Circuit Judge.

Acceptance Remarks of Honorable Robert A. Katzmann, U.S. Court of Appeals for the Second Circuit, Upon Presentation of the Stanley H. Fuld Award

Hon. Robert A. Katzmann

It is an extraordinary honor to receive the Stanley H. Fuld Award, named for a giant in the law, whose contributions to the administration of justice continue to serve as a model for all of us in the legal profession. When I think of those who have been previous awardees, I am humbled all the more. I recognize with great admiration previous awardees who I believe are here today—Judge Weinstein, Judge Stein, Judge Kaplan, and Chief Judge Preska. I am deeply grateful to the Commercial and Federal Litigation Section and to its chair, Jonathan Lupkin, for thinking of me, as well as to vice-chair Tracee Davis for her efforts. Words cannot fully express my appreciation to Jed Rakoff, a truly distinguished jurist and a friend for all seasons, for his generous thoughts. Knowing how busy Judge Rakoff is, I am especially thankful for his taking the time. Jed is a human being of extraordinary range and depth. He is a brilliant judge in every way, a committed judicial mentor, a devoted teacher, a person of uncompromising integrity. And, with a sense of what in life is most important, Jed is a wonderful family man. I might also add that in another life he could very well make his mark as a witty, urbane lyricist.

I have long admired the work of the New York State Bar Association and its Section on Commercial and Federal Litigation. Some years ago, I had the pleasure of introducing a previous Fuld Award recipient, my colleague Joseph McLaughlin, when Stephen Younger was program chair. And I have participated in various meetings of the section, at the invitation of then chair Lesley Friedman Rosenthal. As a federal judge, I have been an appreciative consumer of the reports of the Section—for example, the report on certification of questions from the Second Circuit to the NY Court of Appeals, co-chaired by Preeta Bansal and David Tennant, and the recent report on the surge in immigration cases in the Second Circuit, produced by Michael Patrick, Clarence Smith, and Charlotte Smith. The New York State Bar Association and its Section on Commercial and Federal Litigation's concern for the federal courts is at all times palpable, furthering through your activities, the fair and effective administration of justice. All of us on the bench are much in your debt.


Hon. Robert A. Katzmann

And, I very much applaud the mentoring initiative of the Section, which will importantly preserve the highest traditions of the legal profession. As Stephen Younger put it, mentors can guide the "next generation of lawyers, to represent our profession well, and most important, to be stewards of our profession." And as Jonathan Lupkin commented, "As the legal profession continues to struggle in this difficult economy, we aim to provide newer attorneys with fundamental skills and a potent and meaningful avenue for professional development." This call for mentorship resonates with my own experience. Personally, I certainly wouldn't be here without the guiding hand of so many. Professionally, several years ago, in the 1990s, in my pre-bench days, I directed a project of the Governance Institute, *The Law Firm and the Public Good*, an effort to stimulate pro bono activity in the bar. Drawing together a team of lawyers, that effort sought to make the case for pro bono, not only from an ethical perspective, but also from the point of view of the law firm's self-interest in recruiting lawyers, developing lawyering skills, and maintaining morale. A key ingredient in furthering pro bono work is leadership and mentoring from the top. Whether the culture of pro bono exists in a law firm, whether it will thrive, depends very much on law firm partners as mentors, as encouraging agents who inculcate values passed on to the young cadres of lawyers.

It is in the spirit of that mentoring initiative that I, as a judge in the federal court, ask for your help in an effort to address the unmet legal needs of the immigrant poor—a vulnerable population of people who come to this country mostly not knowing the language, often in fear, in search of a better life. I wasn't looking for this subject, the subject found me.

As a judge on the U.S. Court of Appeals, I have seen a flood of immigration cases in the last several years. When

I joined the Second Circuit in 1999, only a minuscule percentage of our caseload consisted of immigration cases. But over the last several years, especially in the aftermath of 9-11 as the Executive Branch sought to dispose of its immigration backlog, as much as 40% of our cases have been immigration cases, mostly asylum cases. Put another way, since 2006, our Court has decided more than 14,000 immigration appeals.

Section Chair Jonathan D. Lupkin, Hon. Robert A. Katzmann, Hon. Jed S. Rakoff

My experience led me to conclude that to the detriment of non-citizens, the legal system is not functioning as it should. For non-citizens, the stakes are high—whether they can stay in this country, whether they will be separated from their families. In case after case, I was appalled by the poor quality of lawyering, with devastating impact for the non-citizens in question and their families. In many cases, I had the feeling that if only the non-citizen had been better represented, the chance of prevailing would have been greater. You see, as an appellate judge, immigration cases tend to come before me in a legally circumscribed context. A judge's role is to review the administrative record and decision; the Court is largely constrained to defer to the agency's ruling, absent legal error or lack of substantial evidence supporting the decision. What record is made by the immigrant, therefore, and what legal points are preserved for review in the record are critical to the outcome, especially where the alien has the burden of coming forward with evidence and the burden of proof of entitlement to status or relief. Even if a judge would have ruled differently in the first instance, he or she has no authority to do so. Thus, quality legal representation in gathering and presenting evidence in a hearing context and the skill in advocacy as to any legal issues and their preservation for appeal can make all the difference between the right to remain here and being deported. It also means that getting effective counseling before, not after, petitioning for relief or getting immersed in proceedings provides the best chance for fleshing out the merits of the case, avoiding false or prejudicial filings, and securing lawful status or appropriate relief.

So, when I was asked by Peter Eikenberry to deliver the Marden Lecture in 2007 of the NYC Bar, I chose as my subject the unmet legal needs of the immigrant poor because the gravity of the problem demanded attention. The problems of representation I identified are two-fold. One problem is the absence of counsel at the early stages of immigration proceedings. While studies show that those with counsel are six times more likely to prevail than those without, nationwide only 40% of non-citizens in the 300,000 immigration proceedings concluded in immigration courts each year have lawyers. Another dimension to the representation problem is that too often non-citizens with counsel fall prey to unscrupulous lawyers who fail their clients.

I took the occasion of the Marden Lecture of the NYC Bar to issue a challenge to the NY legal establishment and others interacting with that establishment—law firms, bar associations, nonprofits, corporate counsel, foundations, law schools, state and local government, the media, the immigration bar, senior lawyers and retirees, providers of continuing education and training, and think tanks—to step up activity to help address the large unmet needs of non-citizens.

I didn't know what to expect, but the response has been very gratifying. With the guidance of several of you in this room, I launched a working group, the Study Group on Immigrant Representation, consisting of some 50 lawyers from a full range of firms, non-profits, immigration groups, bar associations, law schools, federal, state and local governments, as well as Judge Chin. It has been inspiring for me to work with such dedicated lawyers. We have focused on three areas: (1) increasing pro bono activity of firms; (2) improving mechanisms of legal service delivery; and (3) rooting out inadequate counsel. Our study group has had three purposes: (1) to serve as a forum for discussion, bringing together a wide range of lawyers, in the private and public spheres, fostering a sense of community and heightened consciousness; (2) to spawn ideas for consideration and implementation; and (3) to develop means to implement realistic steps and action plans that flow from the Study Group's analysis. The full group meets periodically at the Courthouse, and the subcommittees meet additionally. A major conference at Fordham Law School, with coverage in the *The New York Times*, served to bring our work to the attention of the broader public, and to generate further interest and involvement. *See* Http://www.nytimes.com/2009103/l 3/nyregion/13immigration.html.

What concretely have been some of our activities in concert with decisionmakers?

Apart from increasing awareness and activity in support of better representation of non-citizens, our group has produced three major reports, with detailed recommendations, and we are in the process of implementing those recommendations. *See* http://www.law.com/jsp/nylj/PubArticleNY. jsp?id=1202437343741&hbxlogin= l; http://law. fordham. edu/fordham-law-review/l5905.htm.

Other activities include: (1) following meetings I had with Attorney General Holder, Senator Schumer and others, the Attorney General announced the creation of a Legal Orientation Program in NY, which enables non-profit providers to counsel immigrants, in group settings and individually; (2) as you may have read in last week's *New York Times*, we are working with the Bloomberg Administration, which, through the Mayor, made a $2 million commitment, to create an Immigration Fellows Program for young lawyers, who would serve for one or two years, mentored by experienced immigration lawyers; (3) we undertook training sessions for deferred law firm associates so that they could devote their deferred years to immigration and presumably enter law firm practice with a commitment to pro bono for non-citizens; (4) we have spurred the creation of law school clinics; (5) group members are working with local and federal government to explore ways that consumer law could be used to root out fraudulent attorneys; (6) with foundation support from the Leon Levy Foundation, and working with the Vera Institute and Governance Institute, we are undertaking a needs-assessment for indigent defense of non-citizens in New York and formulating recommendations as to resources and strategies to meet the need; and (7) we have worked together with bar organizations to recruit more pro bono lawyers. Our next public colloquium, bringing together all of the stakeholders, will be on May 3, 2011 at Cardozo Law School with the participation of Justice John Paul Stevens.

There is so much more to do. The legal needs of the immigrant poor are vast and largely unmet. I ask for your help, partners and associates alike. Those of you who are firm leaders, please encourage your firms to make pro bono immigrant representation a priority. Commitment from the top is essential if our work is to be expanded. As mentors, partners can advance immigrant representation by steering associates to immigration cases, by showing the way by undertaking immigration cases themselves. Those of you who are associates, please encourage your firms to support pro bono immigrant representation. Any lawyer who has successfully represented a non-citizen, whose efforts have kept families together, knows the intrinsic value of such representation.

I might add that apart from the personal satisfaction of doing good for those in need, indeed, of having a chance to make a substantial difference in the lives of their clients, young lawyers who undertake immigration cases will learn skills that will help them in other areas of practice—the opportunity to take the lead in developing a factual background and legal analysis with a client; preparing a client; gaining experience in sitting first or second chair at a hearing; arguing before an immigration judge or Article III appellate judge; writing briefs that can help break new ground or apply existing doctrine to new circumstances. As to the truth of this statement, ask, for example, Crystal Doyle of Fried Frank; or Jesenia Ruiz de la Torre of Willkie Farr; or Vanessa Bressler of Simpson

Thacher; or Kierea Lobreglio or Michael Almonte of Fragomen; or the Cleary Gottlieb team of Joon Kim, Sara Sanchez, Olivier de Moor, Adam Shajnfeld and Abena Mainoo; or Jonathan Rohr, Bill Hughes and Nuri Frame of Sullivan & Cromwell.

To those who say that they have no experience in immigration law, I respond that immigration law can be learned just as any other area of law can be learned—and there are organizations, bar associations, non-profits ready to help train you. In the next month alone, there is a training session at the N.Y. County Lawyers Association on February 9; there are two sessions being presented by the Public Services Committee of the Federal Bar Council on March 2 and March 9. As a start, I encourage you and your colleagues to attend these sessions. I hope to see you there. For more information generally about the work of our Study Group on Immigrant Representation, you can contact Lindsay Nash, lhash1@yu.edu.

As I have noted, local bar associations can play a key role. This is true throughout the state. In many areas upstate, there is a dearth of immigrant representation assistance available, even pro bono assistance. Upstate the situation is that, at least in some cases, immigration courts will give non-citizens a list with purported immigration providers only to find that those on the list are not providing such services. Local bar associations can lead the way in encouraging firms to promote pro bono assistance for immigrants. An example of such a program for training lawyers in removal proceedings is one noted in the NYS Bar Association pro bono newsletter, undertaken in October by the Erie County program bar association in conjunction with the 8th Judicial District pro bono N.Y. committee. More such programs are needed.

Each of us, as lawyers, must seek to ensure the fair and effective administration of justice. Our duty to serve those unable to pay is not an act of charity or benevolence, but rather one of professional responsibility, reinforced by the terms under which the state has granted to the profession effective control of the legal system. I look forward to working together in the years ahead.

Presentation: Bridging the E-Discovery Gap Between Bench and Bar

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MR. LUPKIN: Ladies and gentlemen, good morning. I'd like to ask everybody to take their seats. I think this is probably a world record for the New York State Bar Association. We are starting two minutes early, and that's a good thing.

I'm not going to spend a lot of time talking. I just want to introduce myself and welcome you. My name is Jonathan Lupkin, and I'm the Chair of the Section.

Tracee Davis, our current vice chair, has a couple of words to say. We owe her a debt of gratitude for planning this extraordinary event.

And I also wanted to thank Veritext, who is providing their services gratis, as they've done for the past three years.


Tracee Davis

So without further adieu, Tracee Davis.

MS. DAVIS: Good morning. Welcome to the Commercial and Federal Litigation Section's 2011 Annual Meeting.

Before I move on to my remarks, I just want also add that Veritext has been gracious enough to offer up a Kindle for raffle. There is a bowl outside on the desk table where the materials are located. So if you drop your card in, you have a chance to win a Kindle.

I'm the vice chair of the Commercial and Federal Litigation Section and program chair of today's event. I would like to thank you all, on behalf of the Section, for joining us. We have two very, very full panel discussions planned for you today, so my remarks will be very, very brief.

The first panel will focus on electronic discovery, and the second panel will focus on enhancing value and decreasing cost in providing legal services to our corporate clients.

Before I forget, I need to extend an enormous thanks and our debt of gratitude to the panel chairs, Adam Cohen, co-chair of the section's e-discovery committee, and Bob Haig, who you will hear from later on this morning, who is the founder of this Section and former chair, for attracting what I can only describe as some of the brightest legal minds in the profession.

So without further—without further remarks by me, I want to just turn the panel over to Adam.

We do have a few housekeeping matters to attend to before I give Adam the mike.

First, be sure to sign in outside at the registration desk so that you receive CLE credits for your attendance today. There is a verification form and evaluation form in your

materials in the front part of the program book. You do need to fill this out and hand them in in order to receive credit.

Secondly, and much more substantively, we have with us today Judge Driscoll, who—and Maura Grossman, who are co-chairs of the chief administrative—the New York State chief administrative judges working group on e-discovery. They along with Jeremy Feinberg would like to take a few moments to briefly update you on what's been happening with that working group.

MR. FEINBERG: Thank you, Tracee. It's certainly a pleasure to be able to set the table for this all-star lineup.

It's an easy sell in this room to tell you that New York State has a lot of work to do in advancing on e-discovery. We were a bit behind the curve, and that was not lost on chief Judge Lippman and Chief Administrative Judge Pfau.

So as you heard at last year's meeting we commissioned a report to look at how we can get better e-discovery and in what order we should be doing things.

And under the excellent leadership of Judge Driscoll and Maura Grossman, we have put together a working group of 26 dedicated individuals who have really been hard at work since their first meeting in October.

And I'm going to let my two co-presenters tell you exactly what it is they've been doing. I think you're going to be very impressed. We are very much on the road to some major progress.

MS. GROSSMAN: Thank you.

So it's been great to co-chair this committee with Judge Driscoll. We have three subcommittees at the present time. One is an education committee. We have a bench book that's already been drafted that will be coming out within the next couple of months that is guidelines not only for the state court judges but also quite a detailed appendix of all state cases on e-discovery.

We will be setting up a Web site also where you can actually do a search. It will be indexed. You'll be able to search for particular kinds of cases.

We also have a curriculum. We have ten luncheon learns that we have come up with that we'll be putting into place where there will be one-hour sessions, very detailed, not general education but specific things like how to—protocols for reviewing a hard drive or forensic collection, things like that. They're very detailed and specific.

And we have an operations subcommittee that is going to implement a number of pilot programs. We already have drafted a PC order that we're going to pilot in several courts that will require the parties to certify that they have met and conferred and to detail the outcome of that meet and confer process: what they have agreed on, what they haven't agreed on, what remains to be discussed.

And then finally we have a review and recommendations subcommittee that is reviewing pilot projects, rules, guidelines, all over the country and making recommendations back to the full committee. They've already looked at the Seventh Circuit protocol and have made some suggestions in the preservation area that we might consider.

And we are presently looking at the guidelines that were provided by the CPLR committee.

So those are our subcommittees.

JUDGE DRISCOLL: As Jeremy and Maura mentioned, the working group has some 26 members, and Jeremy and a couple members of his staff are also in the working group. And it's astounding in the breadth and depth of experience. We have commercial litigators, matrimonial litigators, plaintiff's side lawyers, defense side lawyers, judges, court attorneys.

But many of you in this room, this might be the first time you're hearing about the working group. I don't want it to be the last time you hear about the working group. I also don't want it to be the last time that I hear from you about the working group.

But just because all of you in the room may not be members of the working group doesn't mean that Maura, Jeremy, and I don't welcome your input.

So any thoughts that you have about areas that we should be looking at, about training programs that we should be conducting, if there's any studies out there, whether it's—we are familiar with Sedona; we're familiar with the Second Circuit. Anything else, we want to know about it.

We thank you for the opportunity to be here and look forward to updating you in the future. Thank you.

MR. COHEN: Thank you to the working group for everything you're doing. And because of the limited time that we have today, I think we're going to forgo the traditional self-congratulatory introductions. I think you'll all agree that everyone on the panel is qualified, if you go look at the bios that are included with the written materials.

I just wanted to mention another project that is happening that will hopefully be helpful to you that's being undertaken by the e-discovery committee, and that is to come up with some best practices guidelines for New York attorneys.

You know, we came out with some basic information for New York attorneys on metadata a few years ago, and

we're trying to cover the landscape now, specifically to New York practice and New York attorneys.

The first issue that we're going to talk about is preservation. It's a key issue, obviously, in e-discovery. It's the issue that shows that our educational efforts have not gone as far as we would like them to, as we read sanctions cases week after week. And it's only getting more complex as the sources of electronic information multiply and vary.

And to kick off that discussion, I'm going to ask Judge Scheindlin to talk about the idea of having a rule about preservation. Currently we don't have one. Rule 37 is not really doing the trick.

So without further adieu, I ask Judge Scheindlin to tell us about that.

JUDGE SCHEINDLIN: Preservation is the most expensive part of this, and it's what lawyers complain about the most, particularly in-house counsel. And so because there's not a federal rule that governs preservation, the rule makers have been wondering whether it's possible to pass one standard national rule that would govern the duty to preserve.

And there are many questions about our ability to do that. The first is it governs pre-suit conduct, and the Federal Rules of Civil Procedure obviously kick in once there's a lawsuit. So can you pass a rule that governs what people have to do before there's a lawsuit. That's the first question.

Another question that we ask ourselves is if there is such a rule should it apply to all cases or should it be a special rule for complex cases.

And the reason I say that is we do not want to price litigants out of our courthouses, and that's always a complaint we hear, that e-discovery is causing cost to rise so much that people don't want to go to court at all. So we're conscious of that and wondering if the detailed preservation rule should only apply to some kinds of cases and not others.

So about a year ago there was a conference to consider if there were a rule on preservation what would it look like.

I was on that panel. It had a lot of people that were in different fields. We came actually to some consensus about what such a rule would cover. We didn't draft a rule but said this is what it might cover. There are eight categories. You see them on the slide. I'll take them one by one.

We began with trigger. What triggers the duty to preserve? Well, there can be many triggers. First of all is the easiest one. That's the common-law duty to preserve on litigation is reasonably foreseeable. And that's what you see in all the cases. That's the common-law duty.

Another trigger would be if a party receives a written request by another party to preserve evidence. Obviously one would be receipt of a complaint, a notice of a claim, or a subpoena. If you receive one of those, I guess you better start holding on to the material.

Aside from all that, there might be a statute, there might be a regulation, there might be a duty in your contract that tells you you have to preserve.

So those are other possible triggers: contractual, statutory, regulatory.

And then the one that you're seeing more and more I think in the case law is if you as a party are taking steps in anticipation of a serving or defending a potential claim—for example, you're preparing an incident report, you're hiring an expert, you're drafting a regulatory complaint, you're drafting a pre-litigation notice, you're hiring a lawyer to consider suing, or you're conducting what could be destructive testing—all of that would trigger your duty to preserve.

And this is a particularly important group of comments I just made because they apply so much to plaintiffs who are considering suing. So when is there a plaintiff's duty to preserve, a trigger?

Well, when it takes any or all of those steps.

Okay. That takes care of trigger, when does the duty to preserve attach.

Then the next huge question is what do you have to preserve, what is the scope of your preservation application. So we thought about the criteria of scope, and we said, well, obviously first of all we have to talk about the subject matter of the information to be preserved.

It can't be—it can't be everything. It has to be that information which is relevant to the claims or defenses in the action. You have to specify a relevant time frame. You don't want to preserve stuff that's unnecessary to the suit that arose ten years ago. You want to figure out the time frame of this suit.

We wrote that it's good and important to apply the concepts of proportionality or reasonableness to preservation efforts. We've always known those apply to production, but nobody has taken on the interaction between proportionality and preservation. We know preservation is terribly expensive, and so we're saying a rule should recognize that and has to take into account costs.

Okay. Another thing about scope is what data, what data are you going to preserve. So should the rule specify the types of data or tangible things to be preserved. Should a rule specify the sources on which the data are stored.

You know data are stored on lots of different electronic sources. Should we specify which ones. Should we specify the form in which information must be preserved.

Let me tell you, there are a lot of addles—I have one right now pending—about the form in which material should be preserved.

Should we impose presumptive limits on the types of data or sources that must be searched. And what I mean by that, should we simply say no more than ten, no more than five, or presumptively no more than five, as we do now with depositions, where we say presumptively ten per side. Should we say only so many sources need to be preserved.

Should we consider presumptive limits on the number of key custodians. You've all heard the word "key players" by now. So should we say in any case preserving the data created by ten key custodians is not presumptive? In some cases it won't be 50, but should there be a presumptive limit.

Finally, in terms of scope, what is the duty of a party versus a nonparty. So what is a nonparty? I mentioned earlier, in terms of trigger, getting a subpoena. That's a nonparty. Would they have the same burdens in terms of scope as a party does.

Okay. The third bullet point, so to speak, is duration, and that is simply how long you have to hold on to this stuff. The duty to preserve is triggered, but there's no lawsuit. Do you have to hold this stuff endlessly because it was triggered or is enough enough.

Third bullet point: ongoing duty. Once that duty kicks in, do you have to preserve information created going forward.

So after the duty to preserve has attached, do you keep preserving newly created information.

Next bullet point: litigation hold. I know there's a lot of controversy about written litigation. I caused the controversy. Okay. I confess. I confess. We've all heard *Pension Committee*.

But the question of litigation hold is—and this is what we thought as a group, and there are a lot of people on that group, not just me—that if in fact you distribute a litigation hold that should at least be evidence of due care.

So instead of saying you have to issue a written litigation hold, putting it another way, if you're smart enough to do it—and I don't know why you wouldn't; I don't back off at all from my view that a company should issue a written litigation hold—but if you do it, you show you have taken due care. Given if that is in a rule, why wouldn't you, for goodness sake, issue a written information hold.

Work product is the next bullet point. Is a litigation hold or the steps you take to preserve protected. Do you have to reveal that to the other side. So if one side says, I want to see your litigation hold, I want to know the steps you took to preserve, is that work product protected, is it attorney-client protected. I'm not going to give you the answer because I'm not sure there is the answer, but the rule might wish to address that.

Then a big, big bullet point and that is obviously the flip side of preservation, and that's called the consequences of failing to properly preserve. And of course we felt that the rule should specify what are the sanctions going to be for failure to comply so everybody knows up front this is the price you're going to pay if you don't do it.

We also said the rule should specify different sanctions depending on the spoliator's state of mind.

We realize sometimes things are lost unintentionally. It happens. But sometimes people act negligently, sometimes they act recklessly, sometimes they act with gross negligence, and sometimes they shred willfully.

So depending on the spoliator's state of mind, there would be different sanctions.

We also said maybe the rule should actually tell us that certain conduct equals a certain state of mind, and the example we picked was failure to issue a written litigation hold. If you fail to do that, is that negligence per se. We weren't saying it is, but we were saying the rule might want to address that.

We suggested that a rule should contain a model adverse inference instruction, because there's so many different instructions floating out there now that it's getting confusing, and maybe a model in the rule would be a good thing.

We also wrote that if you comply with the rule, if you do everything the rule tells you to do, that should preclude sanctions because you can't have acted with any culpable state of mind if there were a rule on preservation and you followed it.

We wrote that an innocent party, that is, the one who was prejudiced, the innocent party, has to promptly raise the issue of noncompliance or spoliation.

Nothing's more frustrating than a judge hearing this a year later. I would say, Where were you in September? What are you doing in February telling me that the evidence was destroyed. So you have to raise these problems, sort of raise your weight.

The innocent party has to do three things. It has to state what information was lost as best it can. It does have to tell us about relevance of the information.

We had a little debate here about relevance being important. But I always say relevance is the touchstone. So the innocent party has to say what was lost, why it was relevant, and what prejudice I suffered. So those are the three elements that the innocent party would have to prove, right? What was lost, how was it relevant, and how was I hurt.

Again, this would be a great contribution if the rule would specify burden of proof, because that's another confusing area. We don't know who carries the burden of proof on these spoliation issues.

The final bullet point, number eight, judicial determination. That's not very hard. We first recommend, of course, first access to a judicial officer. We say the officer, judicial officer, should apply the concept of proportionality to any sanctions motion.

The court should consider, not necessarily impose but should consider, cost shifting in any spoliation sanction and should consider the range of sanctions.

And you all know about that. It starts with fines, it can move to preclusion, it can move to adverse inference, it can finally move to dismissal. So there should be a range of sanctions that should be considered.

There was another proposal kicked around by a professor of law. You know, professors of law, they're a little removed from reality. But he's got an idea that's a little bit different from what the practitioners came up with.

His name is Benjamin Spencer at Washington and Lee Law School. And he had a five-part rule, which I said I will spend much less time on. First of all we can just put number one in his five points the general rule on sanctions.

That sort of summarizes what we already know. Sanctions are warranted for a party's failure to produce relevant material if the failure is accompanied by a culpable state of mind—that means any level of culpability—if the party reasonably anticipated litigation, had notice of litigation, or a statutory or regulatory duty to preserve.

So that first point should sound familiar because it really summarizes what I already said in the federal rules.

Then he wrote a trigger point two. He says triggers occurs if the parties received a court order to preserve—and I will explain that in a minute, because you might say, Court order, how does he get a court order? There's no litigation.

But if the party received a court order, if it received a written notice seeking preservation or threatening litigation—and you heard about those. Those are the letters that one party sends to another: I intend to sue; please preserve. He says those triggers.

Here are two more triggers. If you knew of occurrence—there's a train wreck, an airplane crash, if you knew of an occurrence that was likely to have litigation result—that's a trigger. Or if you took steps in anticipation of asserting or defending a claim. And I pretty much covered that in the federal one.

But then here was his real contribution. He suggested something called a pre-action preservation order. He said—he's just inventing this, because he's a professor and he can invent things.

He said a party should be able to come into court, file a petition in that court, saying I expect to file an action. I don't know when, but I expect to file an action. The subject matter of my action is going to be X. Here's the facts I intend to prove. Here are the materials that I will need to prove my fact. So they should be preserved. And then he should identify who the potential adverse parties are.

So based on this ex parte showing of this potential plaintiff, the court would then issue a preservation order. But in his proposal the adverse party could then come in and move to dissolve or modify the order. So originally it starts out ex parte, but the adverse party can come in and say, I don't like it.

But here is the good part. If an action was then not brought within 60 days, then there can be no sanction for failure to preserve. So it was kind of clever. It says go in and get that preservation order, but if you don't sue in 60 days, they don't have to preserve another minute and there can be no sanction.

And, he said, there should be cost shifting. Then this person who ran in and got a preservation order should have to pay the cost that you incurred during those 60 days to lock down all that information.

So the more I thought about this number three, I kind of thought it was not a bad idea.

Number four, Professor Spencer's idea was a range of sanctions and burden of proof. He gave an estate clause and said sanctions may be imposed until the spoliating party demonstrates that the loss was substantially justified or harmless. And that picks up on the federal language in Rule 37 where there's an escape clause from sanctions.

And finally he said he would continue the language of the current 37(e), which I hope you all have memorized, which it says—well, which it says, because it's so short—sanctions may not be imposed under these rules for ESI, which is losses as a result of a routine good faith operation of an electronic information system.

Thank you.

JUDGE PECK: The professor has no clients.

MR. COHEN: Let me ask Judge Peck and Judge Francis, in that order, assuming Judge Scheindlin is going to take all the pre-action filings—and Judge Peck, be mindful of who you're sitting next to—do you have any thoughts about the visibility of a rule like this.

JUDGE PECK: The prefiling aspect is not one that excites me in any way because while Judge Scheindlin usually does not refer matters to her magistrate judge colleagues, a lot of her colleagues do. And I suspect that it's going to be on Jay's desk and my desk much more. We have enough litigation discovery fights, et cetera. I'm not thrilled by that aspect.

The biggest concern, of course, is first of all what is the authority for a rule that would deal with pre-suit conduct. I've heard somebody say, Well, one can do it by saying you can do what you want pre-suit, but if you follow these points there will be no sanctions. So it becomes a postlitigation get-out-of-jail-free card sort of thing.

I think the idea in general is good. I'm not sure that it advances beyond what—where we are today, particularly because pre-suit there will be no judicial referee.

So, for example, the proportionality comment that there should be proportionality in preservation is obviously a good one. But as Judge Francis said in a recent *Orbit One* decision, part of the problem with that is you're not going to know what the court thinks is proportional approach until after the facts. So you're better off doing what you're doing now, which is preserving more broadly than necessary to cover yourself.

Similarly, presumptive limits on key custodians, if you don't preserve—okay, if the rule is presumptively ten is okay but this is a mega antitrust case and that presumption really isn't applicable, you're not going to have a judge to tell you that you should be preserving a hundred, not ten, until further down the road.

So I'm not exactly sure how all of this would work out and whether it's any more definite than the state of the law that we now have. But it is obviously important that we do something to deal with this issue.

JUDGE SCHEINDLIN: I'm going to take the right of rebuttal for one second.

The purpose of a national rule is because the circuits are in disarray. I forgot to mention that. There are different standards in all of the federal circuits.

So litigants say, Well, what do I do in the Fifth Circuit as opposed to the Second Circuit? What do I do in the Ninth Circuit? That's not a good thing. Litigants have said, particularly corporate America: We have to have one rule idea. We have to know our obligations.

One of the purposes of a national rule if it becomes federal, which I think will flow over to the states if we actually pass it, so litigants know what is expected of them.

JUDGE FRANCIS: Ignoring the precept of be careful of what you wish for, I think the pre-suit petition is a very good idea, and I think it's a good idea because it provides the kind of certainty to litigants that they're looking for in circumstances that are more tailored to each particular case than would be possible with a rule generally. So I think it's a particularly good idea even if it means more work for Peck.

I want to pick up on the last part that Shira made. I agree that it's important to have a national rule with respect to preservation in order to smooth out the circuit differences and to give more certainty to litigants.

I don't think that that necessarily lapses over into the sanctions piece of this. I think that they ought to be disentangled for purposes of thinking about rule making.

It's important to have a uniform rule of conduct, which is the preservation rule, but I think it's important to preserve for the courts a good deal of flexibility with respect to what the consequences of violating that rule of responsibility are.

I'm a little concerned about a national rule that's a bit of a race to the bottom and forgives violations of the rule where they are without intent to an extent that I think would be inappropriate.

So that's where I would draw the line. I would say leave to the courts the issue of what the sanctions are but let's have a uniform rule of preservation.

MR. COHEN: Okay. David, as somebody who regularly represents large multinational corporations as part of your practice, what do you find is the most difficult part of getting a client to comply with preservation obligation?

MR. LENDER: On the list Judge Scheindlin had up, the biggest issue by far is the scope of preservation, without question. My view is that the entire paradigm does have to change.

And the issue is when you have a case like *Zubulake* where you're talking about five custodians, it's pretty easy. You know who they are. You can reach them all, talk to them all on the phone. All the case they talk about, the employer's obligations to follow up, very simple.

But when you talk about an antitrust case—I have this conversation with lawyers in my firm all the time. There can be a thousand people at your company. There can be multiple thousands of people at your company that would have, quote, "relevant information to the dispute."

And how do you do it? You can't possibly follow up with 3,000 people. It makes no sense to preserve documents with 3,000 people, because, if you think about it, what litigation is going to involve the production of 3,000 custodians' documents? What trial is going to involve 3,000 witnesses?

Every case that I've ever been involved with, regardless of the complexity, you've never called more than 5 or 6 witnesses at trial and there have never been more than 25 depositions. What are we talking about?

So that's the paradigm that really needs to change, and that's the scope issue I deal with all the time. In my view the paradigm really has to shift to the most relevant as opposed to everyone who might potentially be relevant. And that's the problem. That is by far the biggest problem to deal with.

JUDGE SCHEINDLIN: Rebuttal again. Rebuttal again.

Let me tell you about this complex antitrust case. This is the straw man of all straw men. I have had one in 16 years on the federal bench. Okay? It's not what we do for a living. Most of our cases are the simpler variety. The vast majority, 95 percent, really have a limited number of custodians, and I'm sure the same is true in most of the state court cases.

We get carried away worrying about this outlier super complex case, and it hurts our ability to do a ruling. In most cases a presumption of limit of candidates is probably enough. It's the rare case. As I said, one antitrust in 16 years. They're not out there. And this is New York; this isn't the rest of the country. So we don't have those mega, mega cases all that much.

MR. COHEN: In terms of someone who used to practice in the same area as David, certainly there are a lot of intellectual property cases—

MR. LENDER: Absolutely.

MR. COHEN:—where the product, sometimes the only product a company manufactures, is at issue, huge stakes for the company, and they may have thousands of engineers who worked on that product: marketing people, salespeople, et cetera. Those cases are not that unusual, and those clients have a lot of questions about scope.

JUDGE WARSHAWSKY: Would you want a rule or not? You want no rule, and your client says to you: What the heck do we do, you're our lawyer, tell us what to do, on a regular, ongoing basis.

I mean, in the working group one conference in Sedona, that was one of the big questions. Maura was there, and I was there. I was on the panel. I think I was the token saint judge, with certain federal magistrates. And that was the big complaint for a very big audience of national attorneys representing national corporations: Give us something.

And I think they asked me: Would you want a rule? I would love a rule. That doesn't mean I might not spin off from it a bit. But at least it would be a starting point for counsel to tell its clients this is what the rule is, now let's see if we can work with it. We've got to have somewhere to start. And if there's nothing, then you're out there in the jungle of you never know what's going to hit you.

MR. COHEN: Judge Austin, what do you think about having a state rule on preservation?

JUDGE AUSTIN: I think the discussion of state rule versus national rule is really the same discussion. In our experience in having created the Commercial Division rules under which we all operate, we found that the views of some of the rules and how things are done in the Fourth Department were different than how they're done in the First and Second, and the Third had its own way of doing things.

You're going to find that same thing in a national context where in Kansas it's going to be different than New York. That's just the reality.

But the real key, I think, is to have a rule, to have some sort of jumping-off point for advising clients, for giving the court an ability to have an overview as to what is and is not appropriate.

Certainly in the commercial rules we've started to move in the direction of having a way of doing it in the commercial rules 202.7(d), Rule 8, deals with a meet and confer, deals with various things to be done. That's the sort of thing that I think is necessary.

And then how it is interpreted, well, we all know even from within departments you go to Judge A and you're going to get one ruling and Judge B, you're going to get a slightly different view and approach to things.

It's no different state or federal, but the bottom line is you need some jumping-off point, I think, to be able to get to where you've got to go.

MR. COHEN: Since I'm a glass-half-full kind of guy, I always see the placement of uniform language around a topic like this is helpful in itself even if the guidance is kind of vague because then you see case law develop, at least using common language, and you can draw some kind of guidelines from that.

Paul Weiner just walked in. His train was delayed from Philadelphia.

Since I want to get you warmed up quickly, what are some of the challenges that you find—for someone who specializes full time in e-discovery, what do you find are the biggest challenges in terms of preservation in your practice?

MR. WEINER: Absolutely. Good morning. My name is Paul Weiner. Sorry I'm a little late.

I would say there's three major things that I am seeing. And my position is not only discovery counsel. My firm has 800 lawyers in 49 offices, so we really do see this across the country.

The three major things are, one, believe it or not, we still have clients who don't view e-discovery obligations as a serious threat. I call it the "not me" syndrome. They say it's other cases that you have to deal with this.

They are very resistant to altering retention policies. They're resistant to things like putting third-party vendors on hold because they think it may interfere with business relationships. They are very resistant to day-to-day interruptions when we are making certain recommendations.

And even things like logistics, we always require acknowledgements of holds. And sometimes when you're putting in 5 people, it could be 500, I have some cases where we have thousands, things where people don't have e-mail and we really have to get down into the trenches.

So, one, people not recognizing how serious a threat this really is. Two, the cost.

I'm sure everyone is familiar with the cost. It is a big pill to swallow, in small cases but certainly in the larger cases. We also have some clients who are pushing back and saying that they're going to do a lot of this on their own in-house.

And as we know, the obligations apply to counsel, and the judges can talk about that. So it really puts an interesting tension between us and the client.

And then three, I am finding that people still do not get that e-discovery is a two-way street. It applies to plaintiffs as strongly as defendants.

Judge Scheindlin said it best in *Pension Committee* that plaintiff obligation to preserve may arise—usually arises first, because they control the litigation.

In a commercial case, I get this often where the lawyers will send out a phenomenal preservation letter, and their own house isn't in order. They're asking that the other side do certain things, and they haven't done those things for themselves.

And I'm also finding a lot on be careful about work product. If you are counseling a client, particularly a plaintiff, in doing an investigation, as we know, in order to claim work product you have to reasonably anticipate litigation. But what's the trigger for a litigation hold? You reasonably anticipate litigation.

So be very careful when you start claiming work product to make sure that you have your house in order and that you've counseled your client that the hold most likely has been triggered and have taken appropriate steps.

So those are the three high-level things I see.

MR. COHEN: Thank you, Paul.

I'm glad Paul mentioned the issue of cost in connection with litigation.

And Andrea is an in-house counsel concerned about cost.

One of the issues people are discussing today is whether it's okay to allow custodians or employees to preserve their own information, whether that's adequate preservation or whether you need to secure the information, take it away from them, put it somewhere safe.

Andrea, since your bio is not in the materials and you have such an interesting job, can you tell us a little bit about what you do, a little bit of background, and then tell us your thoughts about, you know, leaving preservation to individual employees.

MS. BERNER: Thanks, Adam, for setting me up for that one. Not to laugh too hard. I'm the general counsel at The Miss Universe Organization. So yes, I deal in beauty pageants every day.

But we're owned by NBC and Donald Trump, so we have some very high-profile owners. And that leaves us to be oftentimes threatened with litigation.

I very much welcome the idea of a rule because I'm very much on the front lines of all of this. I get threats of litigation almost on a daily basis. The decision that I have to make and the judgment calls that I have to make every day is which of these threats does trigger a document hold.

And that is very expensive, frankly, you know, despite what Paul says. Regardless of whether it is a small case or a large case, I have to decide which of my employees I have to start trying to retain their e-mails or tell them to.

And the minute I issue a litigation hold, which I'm very—I do a lot, but it does cause immediately a line outside my door as to what is this about, what does it mean for me.

And then the question becomes whether I have to employ an outside firm to actually start retaining these e-mails or do I rely on my employees to do this themselves. And that becomes, to Adam's point or question, a very big judgment call for me to make on a day-to-day basis.

So, you know, at the risk of saying this in front of this panel, I don't know how reliable my clients are when it

comes to retaining their e-mails. E-mails may be our one thing, because I can oversee that a little better.

Perhaps it's a discussion for a different day, but I will tell you the bane of my existence right now is text messages and BlackBerry messages and instant messages, social media messages. And I know that people are using these things all the time for business, whether or not they're supposed to be, because it's easy and it's convenient. And so I can tell them to retain them, and then the question is whether I have to—how much oversight I actually have to do to make sure they do it.

MR. COHEN: That was a good answer. It was kind of a trick question. I think the answer will be different in different situations. Certainly we've seen lots of cases where the custodians themselves are implicated by the allegations of the complaint, and you don't want to leave the evidence in their hands. Other cases may be different.

Let's switch gears a little bit and talk about cooperation among counsel and meet and confer. This is sort of a revolutionary idea. At least, you know, I left practice about five years ago, and I'm not sure what cooperation really means in the context of litigation.

And we've heard a lot about the need for cooperation in connection with electronic discovery. The Sedona conference issued a white paper imploring greater cooperation, and they're asking judges to support that.

You know, at the same time at prior New York State Bar Association conferences, you know, I've been challenged on the idea that anyone should cooperate in an adversarial proceeding.

The first opportunity for cooperation is very often the meet and confer under the federal rules. One of the things you have to talk about there is preservation.

I'll ask Judge Peck to just describe why cooperation is so important for electronic discovery and what kind of cooperation and transparency do you expect from the parties at a meet and confer.

JUDGE PECK: Part of the problem with the way—part of the problem with the meet and confer nowadays is too many people do what we've come to call in the literature a drive-by meet and confer.

You know, your adversary says, I'm going to want you, when I give you a document request, to produce all your e-mails, IMs, et cetera, et cetera; and the response is I'll get your request and we'll deal with it at that time. Okay, check, we've talked about e-discovery, let's move on. And that is just the wrong way to do it.

I would put it this way: Cooperation and transparency are your insurance policy. If somebody out there were offering e-discovery insurance as a result of *Pension Committee* or other decisions, all of you and your clients would go out and pay the premium. There is no such product. But cooperation and transparency are the way to ensure that you won't get sanctioned.

And what I mean by that is if you look at the sanction cases, virtually the universal is that there was a failure to cooperate with the other side. And the *Pension Committee* is another example of it: misrepresentations if not outright lies to the court and the adversary about what was done, and generally at a point of no return.

So at a point the problem is discovered and brought to the court at a time when it's too late. The material that should have been preserved wasn't and has disappeared or the failure to produce, even if the material was still there somewhere, is first brought to the court's attention the day before the close of discovery or, as in the Qualcomm case in California, in the middle of the trial.

There's not much that a court can do at that point except levy very serious sanctions. If the parties talk about the issues up front at the meet and confer, if not before, then any problem can be brought to the court's attention and can be quickly resolved, generally before it's too late.

It may be that if it was a preservation issue there's not as much as can be done about it. But even there there may be ways to go to backup tapes or other ways to fix the problem.

As Maura Grossman's track studies under the National Institute of Standards in Technology show, whether you use the old-fashioned lawyer eyes on every document or keywords or virtually anything else without much thought, you may think you're producing 95 percent of the responsive documents but you're actually producing about 25 percent.

So absent that transparency and discussion with the other side about the appropriate way to search, number of custodians, the keywords you're going to use if you go that approach, the more sophisticated search technology if you're going to go that approach, whatever it may be, it's that transparency that when the other side finds a document somewhere else that you didn't produce, they're not going to say, Oh, these people are hiding the ball, et cetera, et cetera, but you're going to be on common ground.

So I think every one of the judges on this panel has endorsed the Sedona cooperation proclamation in one way or another, and we are all firm believers in that.

Rebuttal?

JUDGE SCHEINDLIN: No, not on this point. On this point you will call it affirm.

I think the problem in these meet and confers is sometimes what we all the symmetric versus the asymmetric case. It's one thing when both sides have a lot of records.

When both sides have a lot of records, there's a true incentive to cooperate because it will reduce costs in the end. If you don't talk to your adversary, you're going to end up with a do over.

I can't tell you how many requests for do overs I see. The first pass didn't give me what it should have. There's a new list of search terms. We should have done it that way. The form is wrong. We should have done it that way.

It's very inefficient to not agree with your adversary on the scope of the search, the form of production, all of those things.

So when everybody has records, this notion that one time we were all trying to be adversarial, the word "cooperation" sounds like malpractice, my answer to that is get over it, because we judges expect you to cooperate and we won't really tolerate any longer your coming in and saying, They refuse to talk to us, and you, judge, have to tell us the search terms. I have plenty of things to do during day than work out your search terms.

So we really demand, expect, demand cooperation. I don't care if that gives you a pause because it used to be adversarial. You have to work together in this expensive endeavor.

The asymmetric case is a problem. When one side has no records, virtually, the other side has them all, we understand that's a problem. It's typical in an employment case. The employer has all the records. The employee have very few, though they have more now with Facebook and social networks. Even the employee has records. But there are certainly more records for the employer.

There, I would say to all of you who represent defendants, if you meet with these people in a real effort at cooperation and you're getting nowhere, then come to the court. We will straighten that out quickly.

Instead of putting up with it or waiting until it festers and becomes a sanction problem on the back end—Judge Peck couldn't be more right. This is a sanction avoidance issue.

If you talk up front about all these issues—scope of search, form, et cetera—there will be no sanctions on the back end. Every case I read, it was a failure to communicate up front. No question about it.

So this notion of cooperation and meet and confer is here. You're going to have to work that way. And it's a good thing in the end.

MR. COHEN: Judge?

JUDGE FRANCIS: I think one of the questions is how we as judges can impose some systemic incentive for cooperation. We can jawbone until we're blue in the face, but I'm not sure that always gets through to the attorneys.

There's one idea that's embodied in the Birmingham project in the U.K. where the judge sits down with counsel at the outset of the case and they set a discovery budget.

Now, it seems to me that a budget is going—if you have to work within a budget and your adversary has to work within a budget, there are incentives on both sides now to cooperate so that you come in under that budget. That's certainly I think a way that we can think about forcing cooperation in a way that we haven't yet.

MR. COHEN: I'm certainly not going to ask the outside counsel on the panel what they think about putting caps on fees like that.

JUDGE FRANCIS: Exactly.

MR. COHEN: Terrible idea. Let's stick to state practice for a few minutes. It seems like some of the most important state opinions on e-discovery came out of Nassau County, and some of our panelists here, Judge Austin, can you tell us about the state law efforts to promote greater cooperation?

JUDGE AUSTIN: Well, certainly our rules have now provided for it. Our chief administrative judge amended the uniform Rules 202.12(b) to require a meet and confer generally among the trial bench. But it's really come down to the Commercial Division where I think that happens more than anywhere else.

At RPCs we ask: What do you have in electronic discovery? And we had expected under the rules that there will have been a conversation prior to coming in. I can't tell you how many blank stares I got when I was asking the question when I would say, Okay, so what electronic discovery, what ESI, do we have to address? ESI? It's still a problem—

JUDGE WARSHAWSKY: That was a long time ago. I think most of them understand that has to do with a computer now.

JUDGE AUSTIN: That is true. However, they never really contemplated what would be involved in having to do it. And when they get there, they say, "Okay, we'll do everything," because there really is no forethought or planning with regard to getting it done.

And that has back-end problems not only in terms of sanctions but when there are failures in what's been promised but also from the perspective of an "oh, my God" when it comes down to the question of the cost. That's not considered as much as it might be.

So in state practice we do expect it. In Nassau there's a rule with regard to including in the preliminary conference order a specific statement with regard to

what's being produced and the manner in which it's being produced. Most will check off "I waive it."

MR. COHEN: Judge Warshawsky, your comments?

JUDGE WARSHAWSKY: It's something, Nassau County is not a foreign country, unless of course you are New York City-centric, and many people outside of the city believe if it didn't happen in New York City, it didn't happen. You can take it to Las Vegas if you wish.

The point being, though, that Rule 8(b) says you're supposed to meet and confer. This is not just Nassau County. And when the report came out to the chief judge, there were a number of higher projects that were mentioned in it. One of them was to put a page into the PC order that says they've met and conferred.

I figured I'll be a pilot project by myself, so I added that page to my PC order. I have actually had a few people fill it out, amazingly enough. One filled it out and had no idea what they were saying. Two other firms, though, met and conferred.

And when—it's a carbonized form, and you write down what you did. It was amazing. It's like someone was listening. It's there. This is the rules. It's not in someone's, you know, maybe in the future. No offense meant to Jeremy and Maura. But it's there in my PC.

And the national cavit PC which Judge Austin and I created—he did most of it; I ended it—we offered that around the state to the other commercial divisions, and basically they said thank you but did not adopt it.

We got two pages on that PC order Number 12, I believe, which gives you the complete way to go with electronic discovery. And we did it in cooperation with members of the state bar.

I think, Paul, you were shown that, you commented on it, you suggested revisions in it. So we revised it.

And also the electronic discovery guidelines that exist on the Web site, again done in cooperation of this committee and Paul Sarkozi. I think it's like a three e-discovery course. I don't know how many of you have looked at it, but it can't hurt. They're free. You just download them and read them. You can't be hurt with that.

So meet and confer is there. It's in the rules. It's not like you might let's think about it some day. It's there, Adam. I don't think we should look at it as a foreign country.

MR. COHEN: Mark, you have a regular column in the New York Law Journal on e-discovery practice in New York State, and you practice in the state courts a lot. What do you think of this?

MR. BERMAN: Well, it's in the rules. Yes, it **is.** But it's not followed. I practice in the five boroughs, sometime in Nassau County. While it's in the rules, it's rare, if ever, that someone has the appropriate meet and confer in advance of going into the PC conference.

JUDGE WARSHAWSKY: But do you request that of your adversary? The rules say this: Let's sit down.

MR. BERMAN: It depends if I'm a plaintiff or defendant, in real terms.

JUDGE WARSHAWSKY: Plaintiffs do have a duty to preserve. You do know that.

MR. BERMAN: Absolutely. We follow what the judge said. Absolutely. The fact of the matter is it depends if you're a plaintiff or defendant. Ninety-five percent of the cases in this state are in state court, and 5 percent are in federal court. New York State has 1,500 different Supreme Court justices, all coming from different approaches, going back to what we were saying before.

I think any sort of rules are good because it brings sort of the outliers closer together, and then you all have judicial interpretations on the rule. And that's a good idea.

But because my view is not different than many other people's view, I am on the chief judge's working group, and they are putting together a proposed PC order that will be piloted, to be determined how and where it will be piloted. It's a variation on the theme of what Justice Austin Warshawsky put together.

It will require attorneys to certify that they had meet and confers and put down the dates when they did so. It will require a short description of the case. That's important both for the issues and to show what the dollar amount in controversy is because that obviously relates to any consequential proportionality. So right up front you see is this a $100,000 case, a $25,000 case, or a $10 million case.

It will require, at least the proposed PC, checking off boxes: Did you agree on preservation, did you agree on forms of production, privilege, inadvertent production, costs, and allocations. If you agree, great. Still summarize a little bit what you agreed to. But if you didn't agree, lay it out there.

So this is something that would be done and have to be proposed and brought to the judge in advance. That's trying to force the issue up front. I know 202 was changed to seek to do that. I don't think it's been doing it as effectively as it should, and I think this proposed PC order will be forcing the issue.

JUDGE PECK: A practical point I would suggest, and I would be curious to hear what my in-house and outside colleagues here think about it, but I recommend that outside counsel bring either the in-house e-discovery counsel, if you've got someone like that at the client, or somebody from the client IT side to the meet and confer

and to the first conference or any conference with the court that is going to deal with issues of e-discovery and what is doable, because that way you're not going to do, as in the Fannie Mae case where the lawyer's trying to cooperate, promise to do something that 6 months later took 9 percent of the entire agency budget for the year and they still were not in compliance.

So you want educated cooperation. And you want the people who actually know how to get the material out of the computer and that it's not just pushing a Staples' easy button to be there and to talk to each other.

Ask your adversary to bring the same person from their side. And the person who comes to these conferences prepared in that way is going to do a much, much better job, even if, perhaps particularly if, the adversary is unprepared.

MR. BERMAN: Just from a state law perspective, Commercial Division Rule 1(b) in New York was amended to encourage that a client representative or an outside IT person come to the initial preliminary conference.

JUDGE AUSTIN: That's now part of the rule statewide for all parts, all civil cases.

MR. COHEN: David and then Paul, we all know that IT people make great witnesses. What do you think about bringing an IT person to the meet and confer?

MR. LENDER: Bringing an IT person to the meet and confer can be helpful, absolutely, especially if when you're—if you actually use the meet and confer to try to cavit in what you want to do and try to put some sanity into this, especially in terms of focusing on accessible data first, putting the inaccessible backup tapes in light to the second tier, having the IT people explain what the burdens are and what the effect of that would be. It can be very helpful, especially if the lawyer is not as versed in what is going on.

I would be a little bit more concerned about bringing that person to court, mostly because IT folks have a way of just, "Yeah, I can do that, yeah, I can do that." They always think they can do it. That's not always necessarily the place you want to be. I would be very nervous about bringing the person to court unless I was pretty confident that the person was very well prepared.

MR. WEINER: Let me just say from a practical standpoint—and I did about 50 meet and confers on Rule 16 conferences last year around the country.

Putting the rule aside, cooperation actually works. And I don't want you to think—and I have this discussion with my partners all the time. Cooperation doesn't mean you all get in a room, hold hands, and sing Kumbaya.

There's nothing further from the truth, and I was a commercial litigator for years. I know how to play the game. It means getting in the room and protecting yourself. So, for example, identifying your sources.

And by the way, most of my cases are the asymmetrical cases where you have one named plaintiff and the big bad company on the other side.

So I'll give you an example. Lots of my clients have videotapes, and they're at issue in the cases that we're dealing with nationwide wide wage and hour.

I will identify that. I will say, "We're not preserving it," and I will say, "Here's why." And if we're going to agree to disagree, I would rather get before the judge early in the case than three years down the line and a witness says, "By the way, we have videotapes and we haven't preserved that."

So it really is this insurance policy, and it's creating the paper trail. I have plenty of people on the other side who don't work with me, and we get before the court. I have heard judges around the country and judges here say Rule 16 is the most underutilized weapon in people's arsenal.

This is your chance to get before the court and get these issues. And it may not be a ruling that you like, but at least you know what the ground rules are going in.

MR. LENDER: I agree with that a hundred percent. I really believe the Rule 26 conference is a prime opportunity to negotiate where everything should be on the table: what metadata you're going to preserve or not preserve, how many custodians, key word searches, whether you're going to go to backup tapes, what you're going to preserve, what you're not going to preserve.

I've had this conversation many, many times because it's the setup before you go to court. It's the way I've always been able to cavit in what we've had to do. I may have a disproportionate number of complex cases, but the ones that I have, we usually have a lot of potential custodians.

And I say to the adversary: Look, we've done some searching, we've looked around, done some preparation. We're willing to preserve 30 people, produce the documents, run these 30 search terms, and that's going to give you a million pages of production.

I've had them say, That's outrageous.

I will say, That's fine, let's go to the court and have you explain why a million documents isn't enough in a case like this, that the most important document is in that millionth and one page. And no one ever wants to go to court and say that because it looks ridiculous. Then you start actually having a conversation and negotiating.

The other thing I'd say is keyword searching should be iterative. A lot of lawyers think you agree on some keywords and you go back and you do it. But I've had a lots of cases where you have key words, you run it, and you get two million hits.

Plaintiff doesn't really want two million garbage documents. You go back and say, Well, that doesn't make any sense. Let's try to work it out.

But you get even more credibility on the flip side when you agree on a search term and you get no hits. If you go to the other side and say, Look, I ran that key word and got nothing, maybe we need to find something else, you can't imagine the credibility you get and trust—and it's all about building trust with your adversary—by being completely straight up about that.

MR. WEINER: Let me mention on bringing the IT person into the meet and confer under Rule 16. Sometimes, yes, if they're prepped properly. I actually especially in a larger cases bring an expert because I find the flip side of what Judge Peck said. If you just say you don't have the details, if you just come in and say, Judge, it's going to be very expensive, the judge is going to say that's not enough for me.

If you come in and say, I have put on hold 300 people, if I put on hold another 500, it's going to cost me X for me to collect their data, and literally I will have my people give an affidavit and give it to the other side.

Or I will bring them to the court, prepared to testify, and explain to the judge, to give them real ammunition to look over to the other side and say, This makes sense, sounds reasonable, why are you insisting on more.

So think about using an expert, because I found that judges really find that to be helpful.

And one of my greatest tricks is I insist on the other side getting an expert, and I have them talk off-line, let the experts talk off-line, because sometime I have an adversary that doesn't get it. And I'll say, Please get an expert, and I'll propose things and I'll say, Go talk to your expert. And they will actually talk to their expert and say that makes sense.

So I love putting experts in a room or putting them on the phone by themselves without prejudice to anyone's position. And they come up sometimes with the most creative ideas about how to spend money and how to not spend money and how to get things.

So think about using the experts and getting them together.

JUDGE WARSHAWSKY: Just one point on that. Really know what your IT person's going to say before you walk into that courtroom or into the before a federal magistrate. I will just speak for myself.

And when you claim you can't do discovery because it's going to cost $45,000, the other side says, "Judge, we checked into that and we can get it done for 7,500," you better be ready to back up your $45,000, because that's when we talk about cost shifting—we'll get to that some other time.

Don't just assume the judge is going to swallow your gigantic number and then say, Oh, okay, we're going have to divide that 25 each, something like that. Really be aware of that.

A case many years ago I had, Credit Risk Monitor, the IT person was deposed and said, Oh, six e-mails? We've got around at least a few hundred e-mails on that topic. The guy just slid under the table who was representing the adversary, and that led to a gigantic cost shifting.

And one of the early days seven years ago, it cost them $50,000 to do that, and that was really big money seven years ago; not anymore, I admit. But know what that IT person is going to say.

MR. COHEN: Paul, you really hurt my feelings you didn't take me to one of those meet and confers.

Let's talk about cost shifting, because cost shifting and preservation are the biggest issues in electronic discovery. David is coauthor of the most excellent treatise on electronic discovery.

Could you bring us up-to-date on what's the current law on cost shifting in the federal courts?

MR. LENDER: So in the federal courts, the cost shifting discussion really focuses around 26(b)(2)(b) which is one of the new rules that went into effect in December of 2006.

Just quickly what the rule says is that you don't need to provide discovery, at least in the first instance, of information that's identified as not reasonably accessible because of undue burden or cost.

And then if you meet that burden, the other side can then still try to move to compel that production. And if they meet the burden of showing good cause, the question then is still were the production of the documents not reasonably accessible information and then can decide on cost shifting.

Here's the problem and the reason why I think there have not been as many cost-shifting decisions as you might otherwise expect. There is a split in the case law about whether not reasonably accessible because of undue burden or cost, does that mean just inaccessible data or can it be accessible data? Let me explain what I mean.

There are some cases where courts have held that that rule applies only to inaccessible data, essentially things

like backup tapes or old servers or deleted information, things like that, things that are difficult to get at.

There are some courts that have held that even accessible data, that means the stuff that is in your inbox, you can still claim that that's not reasonably accessible because it would be really expensive to get at, review it, and produce it.

That actually is the minority view. I actually am in that case, because I read the rule, I have read it many, many times. It doesn't say inaccessible; it says not reasonably accessible because of undue burden or expense.

But that is the rub. There are some courts that have literally just said accessible data, no cost shifting, not going to happen. There are other courts that have actually looked at it and discussed it.

I look at cost shifting as a vehicle—and the way I always think about cost shifting is it's really a setup to try to narrow the scope of production, because the best cost shifting is not having to do discovery at all.

Oftentimes, where this comes down is somebody will say to you, Look, I want you to produce"—there's a great case on this, a recent case, the *Barara* case, out of the District of Connecticut. This came down in December. This is actually one of the cases that agreed with me that even accessible data you can still deal with this rule.

In that case what essentially happened is somebody wanted the other side to produce 40 custodians, 80 search terms, 7 years of data. And they said that's going to cost $60,000 to do all that stuff.

The court said, Okay, that's not reasonably acceptable; that's too much money. Here's what we're going to do: We're going to narrow the scope. The scope was narrowed to three custodians, five years, same search terms. That saves a ton of money.

To me that's what cost shifting really is. It's a vehicle to try and reduce the costs. If you deal with backup tapes, of course that's where courts are willing to consider—many, many courts are willing to consider cost shifting if it comes up.

The key is the evidentiary basis. You can't just go in and say it's expensive, as Paul said. You've got to have some evidentiary basis to support the cost.

MR. COHEN: Judge Scheindlin, stick with the federal side. What is your view on cost shifting?

JUDGE SCHEINDLIN: The problem is I know the answer, because I wrote the rule. So if you really want to know the answer, I'm going to tell it to you. Not reasonably accessible means what it says. It means not reasonably accessible.

However, with respect to the accessible information, there was always a way to get cost shifting anyhow. It's just in the wrong rule. The proportionality Rule 26(b) (2) (c) has always recognized the possibility of cost shifting.

So don't try to shoehorn accessible data into what we meant by not reasonably accessible. That rule is a special rule. It says presumptively that's not even discoverable.

It had nothing to do initially with cost shifting. It was trying to reduce the burden of preservation and production. So it tried to say if you don't have to get to Tier 2 or Tier 3 data, don't go there. Start with your accessible information first, particularly on these meet and confers. Then if you need to dig deeper and dig deeper, we'll talk about who should bear the cost.

But with respect to accessible information, what you called your in-box, if people's demand is overly burdensome, if they want 300 custodians when 30 is enough, you have Rule 26(b)(2)(c). And that's the most underutilized rule, not Rule 16.

But nobody deals with the proportionality rule. Come to the court and say it's accessible. We're not going to try to tell you it's not accessible. But it's unduly burdensome. But if they really want it, I have to admit it's relevant, but they should pay for it. They're drilling down to a point where there should be caution.

So my view is you always had it and don't try to call it unreasonable.

MR. LENDER: Unfortunately, Judge, there are many courts out there, at least a dozen decisions I can identify, where courts have essentially said—they're getting it wrong, and it's unfortunate. I agree with you.

JUDGE SCHEINDLIN: Right. I know where that confusion started, and I know what the judges then wrote. But the point is that's because you're trying to shoehorn accessible data into Rule 26(b)(2)(c) and not being successful. We've always had the potential for cost shifting on accessible data.

MR. LENDER: But it has been somewhat surprising as to how few decisions have been made. We update our book every year, chapter 5, the small book that Adam mentioned, on cost shifting, and literally there have been few decisions.

JUDGE FRANCIS: I think part of that, unfortunately, is because I see parties agreeing to share costs. So it doesn't get to the court for purposes of a decision because they recognize that a possibility is out there and they would rather deal with it themselves. I think that reflects a good deal of cooperation.

MR. COHEN: Mark, the state practice or the state law on this, it seems to be—there seems to be a lot of confusion about what the rule is in New York State. Where do we stand today?

MR. BERMAN: Well, with David and the judge debating accessible or inaccessible—

JUDGE SCHEINDLIN: Not reasonable.

MR. BERMAN: I'm just using that particular word, that jargon—

JUDGE SCHEINDLIN: We don't use "inaccessible."

MR. BERMAN: But that jargon is not even used. The most recent cases coming out of the First Department is readily available. And there really are no recent cases.

What is readily available? I don't know what's readily available. Some of the decisions say deleted documents are not readily viable. Archived documents are not readily available. What's deleted? What's archived?

JUDGE WARSHAWSKY: Where is the statute that quotes "readily available"? Where is "readily available" in the statute?

MR. BERMAN: It's not in the statute, because there is no statute. That's the problem.

JUDGE WARSHAWSKY: Glad I asked that.

MR. BERMAN: It came out of one of the First Department decisions. So you have different jargon in the state court and in the federal court. Generally speaking the state court decisions don't rely upon the federal court decisions. Over time they may well have to, and things may meld together. But in fact they may never meld together.

So right now when—I think there are few cost-shifting decisions in state court. People do agree, because if there's any lack of clarity in the federal court, there's even more lack of clarity in the state court.

So you have right now in New York if you—the presumption for years has always been that the requesting party pays. There's relatively recent precedent that says each side bears their own cost.

So now you go in, the trial judges are having to deal with both. It's very difficult. And it is somewhat of a black hole in state court. And if you're going to make your motion for cost shifting, you really don't know where it's going to come out.

And you really, really have to have a good record. You have to have the IT person say how much it's going to spend. I think you have to lay out the federal standards and not call in the federal standards. I think you have to use—you have to deal with the issue of undue burden and inconsequential costs, which are some of the terminology used by the first department. And just really do a very, very fulsome motion in an attempt to achieve what you want to achieve.

MR. COHEN: Judge Austin, we don't have a lot of time left, but is it okay for a judge to use cost shifting as a way to give a party discovery that they wouldn't otherwise get?

JUDGE AUSTIN: I think cost shifting is an end of the discussion type of thing, not a beginning. There are certain burdens that both the federal courts and the state courts have with regard to producing parties or demanding parties.

Cost shifting comes up at a point when you've got in state practice a 3103 application in terms of protective order. I don't know that it's really the beginning of the discussion. Unless somebody raises it.

And I don't see it raised all that often. I shouldn't say "see"—"saw." And when it happened, the question was, well, we've started to do it but, not at the initial stage but later on, again kind of the "oh, my God" factor. And that's when it really seems to come up in state practice.

MR. COHEN: Okay. Just for fun, Andrea, what kind of cases do you see that involve electronic discovery? You would think that all cases now are electronic discovery cases. Is that true?

MS. BERNER: I think every case is an electronic discovery case at this point. More to the point we were just saying, I have to make this decision well before we get to the point of cost shifting or even having a meet and confer. I have to decide at the first letter how many custodians' documents I'm going to start retaining.

So my costs come up right away, regardless of whether I want them to or not, and it's hard for me to explain to my CFO that maybe sometime down the line it will be shifted but right now it's our problem.

Some of our cases are I think also very asymmetrical. We have a lot of employment cases with one plaintiff and we're the ones, presumably, with all the documents.

And my prior employer, a publisher, we have, you know, a junk fax case, and they wanted to know in my 17 offices and thousands of employees, how many faxes were sent and to whom, over how many years. It became, you know, unwieldy.

So every case in my opinion is an e-discovery case because that's how the world operates now and that's how we all communicate.

MR. COHEN: Okay. I think we're out of time, so let's thank our panelists.

Presentation: How Inside and Outside Litigation Counsel Can Add Value and Reduce Costs for Corporate Clients—Fee Arrangements, Budgeting, and Billing

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Robert L. Haig

MR. HAIG: As I mentioned earlier, our second panel today is on alternative fee arrangements, budgeting, and billing. And I would like to—same format, question and answer, and I'd like to introduce the panelists and then we'll get right into it.

Our panelists are, from left to right, Gary Brown, senior vice president and chief counsel for litigation of CA Technologies; Alex Dimitrief, vice president and senior counsel, litigation and legal policy, General Electric Company; Steve Haber, managing director and head of litigation for the Americas at Deutsche Bank; Susan Hackett, senior vice president and general counsel, Association of Corporate Counsel.

Thank you so much, Susan, for coming on this lousy day from Washington, D.C.

MS. HACKETT: Hey, you guys handle snow so much better than we do, it's a pleasure. I'm from Michigan. This is great. The streets are getting cleared.

MR. HAIG: And Alex, thank you so much from fighting your way down from Fairfield. I do appreciate it.

MR. DIMITRIEF: It was an adventure.

MR. HAIG: Margaret Madden, vice president and assistant general counsel of Pfizer; Mark Morril, senior vice president and deputy general counsel of Viacom; and Jay Safer, partner, Locke Lord Bissell & Liddell.

Let me get right into it. Susan Hackett, it is only because I have cherished our friendship—

MS. HACKETT: I can feel it coming.

MR. HAIG: It is only because I have cherished our friendship for more than 20 years that I feel comfortable in asking you this question. This is my question: How could you and the Association of Corporate Counsel concoct the ACC value challenge and thereby try to take advantage of the worst economic recession in 70 years to gouge the poor law firms on their pricing? How could you do such a thing?

MS. HACKETT: I'm so sorry, Bob. Bob, would that I were so powerful, although I do feel we were a bit prescient.

I think the answer to that question is twofold. First of all, this project was started long before the economic downturn. So while a lot of people have felt the love of the leverage in the last couple of years as a result of the economy going south and folks having to look at different ways of doing business in order to prosper, from both the in-house side and the outside side, this project is

actually the result of decades of discontent, disconnect, and concern that the inside / outside counsel relationship wasn't working as well as it should.

So the second prong of why it is that it is important to introduce this panel, if you will, on this issue, is to say that the ACC value challenge isn't here to make people feel pain; it's here to help people who are in pain figure out how to do it better and prosper.

Our entire project has been focused on the fact that what's been lost in the relationship between inside and outside counsel, is the alignment, the sense of collaboration, and is the frustration that so many in-house counsel and frankly so many law firms have felt, and certainly individual practitioners within both of those groups, but all that frustration that they have felt that that kind of relationship that they had hoped for when they first ventured into the law had been lost to what was almost a zero-sum game, that if the law firm won in the relationship it was at the expense of the client and that if the client won in the relationship, it was at the expense of the law firm.

What we're trying to figure out is how to help in-house and outside counsel figure out how all those rise when they work more collaboratively and efficiently together.

It is possible for in-house counsel to create the predictability and certainty in budget and guarantee the results they desire at the same time that law firms become more efficient, more profitable, and more satisfied with the trusting relationship they have with their clients.

And that's what I hope we'll focus on, not this sense of people have of you're attacking me. We're not. We're here to help. Because I'm from Washington.

MR. HAIG: Upon cross-examination, we'll drill into some of those claims. So this won't become an adversarial proceeding, Mark, what do you think about the kind of thing Susan has been talking about? We've had a couple of really difficult years financially. Do you think things are going to go back to where they were in 2006 and 2007 or do you really think that there's been a paradigm shift? Do you think that the kind of thing that the ACC value challenge is designed to achieve is going to be the new reality?

MR. MORRIL: So do I think there's been a paradigm shift? Are we going back to the old way as when we come out of a recession? I think the answer is yes and no but mostly no, we're not going back to the old way, a lot for the reasons that Susan identifies.

I think it's very productive to start with one of the points Susan makes, which is we believe we all need collaboration. We place a very high value with our relationships with our law firms and feel fortunate to be represented by the best lawyers in the world, the best law firms in the world. We cherish those relationships. There's a lot of trust. We nurture them. We have relationship meetings with our law firms, and that's very important. Semicolon.

However, looking at the price structure, I'm reminded of the gubernatorial candidate who just kept saying the rent is too damn high. We are looking at rates. We have a constellation of strategies to look at the cost structure. We were very, very interested in the corporate executive board CT TyMetrix study that came out, I guess it was mid last year, the real great study. And I commend that to all of you if you haven't seen it.

What it showed is that law firm rates continued to rise through the whole recession during a period where CPI for urban areas from 2008 through 2010 actually declined by about 3 percent. Law firm rates continued to rise, and they actually rose at more than double the rate of white collar wages during that period.

So that's objective data that we think is important.

What we have done at Viacom is kind of a constellation of approaches, but we are still paying primarily hourly rates. Right now we have frozen rates at the 2008 rate structure, and we are paying discounts off of that.

So, yes, collaboration and trust in relationship is the centerpiece, but we have a lot of management around the financial aspects of relationships too, and we think that's here to stay.

MR. HAIG: Alex, Mark was just talking about the billable hour, which is something I know you've had great interest in. With apologies to Mark Twain, have the reports of the death of the billable hour been greatly exaggerated?

MR. DIMITRIEF: Absolutely. I have taken a hard look at this over the last two years, and I think the Fulbright & Jaworski data says that even with companies that use alternative fee arrangements like we do, 70 to 75 percent of companies are still using hourly rates for 90 percent of their matters.

And, you know, I think that when you ask why it's because when lawyers—what lawyers are selling is their time. So there's a natural logic to billing by the hour and how much time is required for a lawyer to get a task done. So there's a logic to it.

I think there's also been some resistance to getting away from the hourly rate because that's always the bogey against which any alternative fee arrangement is measured.

So at the end of a matter a law firm sits down and the partner who is in charge of the matter, she has to go to her managing committee and say, "If we've been going

by the hour, I would have made this much money. Under this fee arrangement, we made this much money." So depending on how you get versus the hourly rate, you either took a premium or you took loss.

Conversely, on our side we sit down and we say, "How would we have done if we had been billing by the hour, how does that compare." So we either came out ahead or came out behind.

So there's still this concept, I think, of a zero-sum game mentality to alternative fee arrangements that leads to a default to hourly rates in order to avoid hard feelings and relationship-damaging outcomes.

That said, I do think there are a couple changes where the hourly rate is under pressure. One is I think that billing—that law firms have got to decompress their billing rates.

I think that what's been fascinating over the last 15 years is you see the stealth creep within the middle of the bracket. So there are lawyers who are fabulous lawyers that I wouldn't blink an eye at to pay $1,100 an hour for their time.

What I'm not going to do is pay $950 an hour for someone who's got ten years less experience than that lawyer. And I do think that law firms are under the illusion that as long as you hold that top rate down to under $1,000 an hour, you can have your fifth-, sixth-, seventh-, eighth-year lawyers creep up and get $800 an hour. Law firms are going to have to decompress.

And then the second thing is the days of unlimited hour billing are over, and we I think will probably talk about billing budgets and cost controls later. But the days of simply sending in a bill and saying for services rendered this took us 800 hours, hope you can pay us by next week, that's done.

And I think that the short answer, Bob, to your question, is if law firms bill responsibly and sensibly and take the time to make sure that their bills make sense, the hourly rate is okay.

MR. HAIG: Susan, in light of what Alex said, let me come back to you again, and this also relates to some of the remarks that Mark made, and that is do you think that all of these new ideas and this emphasis on value and the new paradigm, is this really going to stick or are things going to be back where they were, which is basically the question that I asked Mark. I'm interested in your—ACC is driving this and driving it very effectively, though I think you're getting a little help from economic conditions.

MS. HACKETT: Absolutely. Well, you know, I don't disagree with anything that's been said here. And the point of our project has never been to kill the billable hour or suggest it's not the best mechanism by which to value some kinds of work.


Susan J. Hackett

What we want most in this project is for law firms and clients to become knowledgeable enough and effective enough in understanding the underlying costs of the legal matters that they are working on that they have the ability to calculate the price of a matter on the variety of different kinds of value mechanisms that are out there so that if the billable hour is the one that the client and the firm feel most comfortable using, they should use it.

But if they wish to create some kind of a fixed-fee arrangement or a successor incentive fee or if they wish to use a portfolio retainer or if they wish to work some other way that firms will have the capacity to deal with the situation that Alex just described for the partner who has to go back and explain whether or not her work for this client was actually profitable for the firm.

Right now the firm's business model is so heavily geared to selling an inventory of hours that they have no other effective tools to figure out what the work is worth. But trust me, in-house counsel who are spending time on this have lots of other ways to look at what the work is worth rather than simply how many hours will lawyers spend working on it.

So for those clients who wish to deploy those kinds of services and fee structures, this project is all about that. So in terms of going back, no, the reset button has been hit. But that doesn't mean that billable structures and fee structures that were deployed at some point previous to the economic downturn and the start of this project won't still be valid for clients and firms, that want to use them. You will simply see that the conversation will become much more rich and hopefully will include much more discussion at the front end of the matter rather than simply arguing over the bill after the matter is complete or stages are complete, the bill comes, and the client is suddenly somehow surprised that it's running into this kind of expenses or that these kind of teams were deployed or that kind of hourly structure or billing rate was brought to bear for the matter.

MR. HAIG: Let's see if we can get into some more specifics and particularly a couple of major things that other panelists have done.

Steve, I understand that Deutsche Bank has been bidding out most or maybe all of its litigation work for some period of time. How exactly does that process work?

MR. HABER: We have been doing that since the middle of last year. Obviously there's a large number of cases that are going to be coming in that are related to prior matters where you won't be bidding. But anything that comes in that's essentially a new matter we've been bidding out.

Steven M. Haber

And the process is essentially sending out to three or four of our relationship firms a spreadsheet. It varies depending on the type of matter; but it essentially goes category by category, and it's scalable.

So we have an entry for motions to dismiss, which is obviously the easiest thing to predict, but it gets down into the details on discovery. We'll have review of documents, although largely it's secondary review of documents because we do first review offshore.

But it's first thousand documents, what's the price, every set of 500 documents thereafter. Same for depositions, same for expert witnesses, all the way through trial, where we have, you know, one-week jury trial or nonjury trial and then every additional trial date thereafter.

Obviously nobody expects those predictions are going to come true to the penny, but it does give us a way of comparing one firm to another, gives us some sense of what these tasks actually cost us, because we're now getting bills that are tied to those categories.

So whereas in the past it's been very difficult for us, at least, to look at a bill and figure out, okay, what did it cost over the run of a year to do, you know, handle those depositions, because you have to tease out that information from, you know, pages and hundreds of pages of bills, now we have a way of hopefully, as we go forward, seeing what that actually costs us in any particular case.

And so we're, again, at the very beginning of this process. We think it gives us some advantages and the law firms some advantages in terms of really both sides getting a knowledge base as to what these tasks actually cost us over the course of the litigation and what—you know, what kind of predictability we can get up front depending on the type of matter. Obviously we're going to have issues as we go forward because we're not yet at the point where, as with any type of fact or flat fee arrangement, you have to see, okay, how did reality comport with the budget, and it's obviously going to be a cooperative venture between us and our relationship firms when the number's either much lower or much higher. There's going to have to be some level of accommodation made.

But the one thing this really does give us, absent some truing up at the end, is some certainty as to what we're going to be paying out to outside counsel for a particular matter. And our businesses are certainly looking for certainty.

MR. HAIG: Maggie, speaking of major alternatives that major companies that undertaken for the last few years, Pfizer has been involved in a selection of national counsel program. I wonder if you could share any thoughts, observations, any particular surprises that that process has produced from your perspective.

MS. MADDEN: Yeah, let me just, for those who aren't aware, just briefly, how we coordinate our legal services.

Pfizer has created a Pfizer legal alliance, and there are 20 firms that are part of that alliance. And those alliances firms by the end of 2010 do 75 percent of our work around the world.

Those firms are all—all operate on a flat fee. They are told in January what they will be paid for the year, and that's it. And there's a discussion about what that work is, either specific matters or general categories, and that is how they are paid, a twelfth every month.

The Pfizer legal alliance is about—we're starting our second full year. 2010 was the first full year. We started probably midway through 2009.

I will say the biggest surprise that I have seen that I would not have expected but I am absolutely glad and I think everybody else on the panel has mentioned the collaborative spirit that you want with your outside counsel.

But what I see is not just our collaborative spirit with each firm individually but the collaborative spirit amongst the firms. The walls have broken down. Their goal is to give Pfizer the best legal service that they can.

And if an issue comes up and Firm A thinks that they've got some expertise but Firm B, because they've just had a conversation with that person, should be brought in, that's the way we are now working.

And that has been apparent fairly quickly that camaraderie on a professional basis has been created.

The other thing you sometimes don't think about as in-house counsel when you do these major alternatives is what happens to the firms that fall out. Say you have had a 20-year relationship with a firm where, big or small, you are one of their biggest clients and whether it's because of dollar amounts or because you're the biggest pharmaceutical company in the world, that adds something to their client list.

I think when we think about things like that, you need to look at that.

All in all for us it's been an incredibly positive experience for the past two years.

MR. HAIG: Gary, let me ask you a general question about CA Technologies and its use of alternative fees. Later in the program I want to drill into some of the specifics of the experience you've had, but can you just take a minute and tell us—you've been the head of litigation for CA since 2005, I think, around then; it's been a number of years.

What kind of experience have you had with alternative fees and what impact has that had on the firm?


Gary R. Brown

MR. BROWN: This is from one of these necessity being the mother of something, right? So I have the misfortune or misfortune of working for a company that had economic troubles or challenges before the economic meltdown.

So we were one of the first ones out there sort of proposing alternative fees, which at the time was, frankly, heresy. You call up and say, Look, can we do something, a cap, some kind of—are you kidding? And firms uniform—largely rejected the notion.

We kept working at it, and we had a number of firms come forward who were willing to work with us. And we have done every kind of alternative fee arrangement. Again, we'll talk about it later. The firms willing to work with us at that time got our business, kept our business, and we have been better served because of it.

MR. HAIG: Jay Safer, can you give us a very brief overview of the kinds of alternative fees that the law firms are using these days?

MR. SAFER: Let me just say initially when I was studying the subject for the panel I came across some reading material and was actually surprised. I came across an article in the New Hampshire Bar Journal by Katherine Brown and Kristin Mendoza, who quoted from an attorney, Niki Kuckes in the Legal Times, and this is what I learned, that in the past normally voluntary schedules were enforced by the threat of disciplinary action against a lawyer whose fees were regarded as too low.


Jay G. Safer

And the Virginia State Bar warned that attorneys who charged less than suggested fees would be presumed guilty of misconduct. They followed the ABA's model ethical code which was in effect until 1969 that said it was unethical for an attorney to undervalue its legal services.

It wasn't until '75 when the U.S. Supreme Court in Goldfarb against Virginia State Bar held that minimum state and local fee schedules were unconstitutional under the antitrust laws.

So I think we have come a long way from the days when the lawyers could say, "Hey, it's unethical for me to charge less."

I think one of the things that firms have been looking at for any number of reasons to try to work with their clients to make them feel comfortable, I'm just going to give you a list, because we could spend a lot of time on each one.

Volume discounts, blended hourly billing rates, a targeted billing goal, fixed fees, which is, for example, what Maggie mentioned.

We don't do a lot of that in commercial litigation, but there are some contingent fees or modified contingent fees that you can do with a client in a commercial case based on risk.

There are ways to take the flat fee, and what you do is you get a total and if you go under that total it's a benefit to one side. If you go over that total, it's a benefit to the other using regular hourly rate.

You can have a success bonus with a deep discount, it's called. Some ideas of alternative fee arrangements are based on task billing. That's what should be agreed upon for that task. There are retainers. We've worked with both the deal costs where a deal goes sour in a transaction area.

Early credits. These sound alike, but they're a little bit different, where if you do enough volume, there's a credit the client earns against further work.

Of course there's the fee cap. There are outcomes which are dependent on the whole back payment to the law firm based on success or based on goals.

There are clauses you can put in arrangements. For example, you can have a flat fee arrangement with a client. Sometimes it will include litigation, which I

understand Pfizer has. Sometimes it doesn't. Or it can have a savings clause where you do an adjustment.

The key is to try to have something that's fair based on experience and trust. So at the end of the day if you're not using the hourly billing rate, you at least have worked with your client so both of you can feel comfortable and also provide the basis for future work with that client.

MR. HAIG: Susan, Jay has just come up with a good kind of laundry list of these, but let me ask you the big question here, and it's prompted by something that I think you have said.

You have referred to what you call value nirvana, and that is developing and structuring a value relationship which increases the profitability of a law firm but at the same time as it increases predictability of the cost and reduces the cost for the client.

How do you accomplish all those at the same time?

MS. HACKETT: Well, there are a variety of ways that you can do it. The first thing that I think has to happen in that process—and we use this term "value based billing" instead of "alternative billing structure" simply because the terminology "alternative" is in and of itself pejorative. It sounds like the crazy aunt you keep locked in the attic because you only want to pull her out for holidays when it's appropriate to bring her downstairs.

I should put it a different way. Everything is an alternative in billing structures in a value-based situation.

So how do you create a relationship where the firm profits and the client gets what it values out of the relationship? And it goes back to that conversation that we were having a little bit earlier about this idea of the business model of the firm being based on selling an inventory of hours.

If a firm's cost, if you will, in terms of its business model for a lawyer's hour is, for simplicity purposes, $100 an hour, then a client who needs to have work done that will take approximately ten hours is billed $1,000.

If you can find a way for the firm to more efficiently perform that service than spending ten hours on it would require, say doing it in six hours because now you have a team of paralegals that can take care of the document process and a lawyer doesn't have to do it, or you have knowledge-management systems that allow you to pull more resources or you have more effective assigned who is assigned to the matter so that people are being supervised but none of the expense are doing the work, the firm can now accomplish that work in what it would value as $500 worth of time but still potentially bill more than that time to the client for whom the matter may not be worth $1,000 but $800.

That's a 20 percent discount to the client from the $1,000 cost that they would have had at 10 hours at $100 if they get it for $800, and it's an increasingly profitable matter for the firm that can turn it over in 5 hours worth of time and spend the remainder of time now billing other clients for other work or maybe just going home for dinner or doing some other kinds of things that also have value to the lawyers in the firm beyond constantly having to create more hours of bills in order to create a profitable environment for their firm.

So the nirvana comes from the focus on efficiency. It's a focus where the firm figures out how to do the work better, having first had a conversation with the client about what it believes the work is worth.

And if the client is able, through its own value techniques, to say it's worth $800 and the firm figures out that what formerly they used to charge a thousand bucks for could actually be delivered for $500, nirvana.

MR. HAIG: Alex, before we get into the specifics of particular kinds of fee arrangements, let me ask another fairly broad and general question, and that is do you look at the special fee arrangements as cost-saving opportunities or do you have a different perspective on that?


Alexander Dimitrief

MR. DIMITRIEF: I usually find myself not invited to join my colleagues on panels when I answer that question in the way I'm about to, which is I don't view them primarily as cost-saving vehicles.

MS. HACKETT: Yeah.

MR. DIMITRIEF: I view them primarily as a way to get more efficient results. If cost savings is a consequence of the alternative fee arrangement, that's all the better.

I really think a mistake—let me back up a second.

I continue to firmly believe that companies like GE get what we pay for and that the best lawyers are going to command the best rates and the best fees. That's just the competitive nature of our economy. That's the way the profession ought to work.

Within that construct, however, though, there are all sorts of ways to structure fees to allow both a client and a law firm to sit back and look at efficient ways to do things and sensible ways to do things that an hourly biller who is always rewarded for doing more work rather than less just might not do.

So if by putting some skin in the game on a performance-based fee arrangement or some other alternatives leads to lawyers and their inside counsel collaborating to take harder looks at whether certain types of risks are necessary, whether it's really necessary to depose every single person whose name shows up in a file of documents, then I think that's good for everybody.

But I don't view that as cost savings, you know. I don't view—to me if a company like GE approaches us and says, "Wow, we think we can get $15,000 worth of work on a deal where we can dupe the law firm into a $10,000 cap," that's not going to be constructive for anybody. And I think that if you go into it just to save money at the expense of law firms, it's not a real productive enterprise.

MR. HAIG: Mark, what about you? Have you had success using alternative fee arrangements and are there particular models that you've found effective?

MR. MORRIL: Yeah, I would say that our work is still predominantly on the hourly rate structure, but we have experimented with different kinds of arrangements. And I like Susan's formulation that everything is an alternative.


Mark C. Morril

Let me start by just echoing something that Alex talked about at the beginning, which is we see that the law firms continue to think in terms of hourly rates. So they measure all of the other structures against their hourly rate structure. That almost from the beginning frustrates the process.

We have, for example, one alternative arrangement that we've made is to outsource an entire area of our practice. And after a year in which everybody thought it was working very well, I think the law firm thought it was working well, they were being compensated fairly, we thought we were paying a fair price and getting very good, in fact, enhanced collaborative service, the law firm partner says to me, "You know, this has been great, but I am getting killed by your fees." I said, "Well, what do you mean, 'getting killed?'" Of course he is comparing it to what he would have earned on an hourly basis.

Law firms are businesses, and I think the right way to look at these arrangements is through the prism of their cost structure on a project and can you make a reasonable return on your investment on a particular project.

So we have done outsourcing.

Our favorite alternative arrangement is a discount—I said earlier that we drive pretty aggressive discounts against pretty aggressive rate schedules. We do pay success fees. Our preference is to pay them in our discretion, but we're very good about paying them for good results.

We've also done a number of litigations where we take a very deep discount, say a 40 or more percent discount, against a sliding scale of success fees. I think that has worked well and aligned our incentives with our firms.

We've also been involved, particularly in the patent area, in fixed fees, fixed fees by stage of the matter, so everybody up to the Markman hearing is one fee. And we do a lot of budgeting and various points of relief that Jay talked about if the budget is not met, sharing the pain or sharing the benefit.

So we've done that whole tool kit of things.

MR. HAIG: Steve, what about Deutsche Bank? What kinds of alternative fees have you used, and your reaction?

MR. HABER: We've done a number—tried a number of the arrangements that Mark just mentioned. We've had success fees, we've had preferred rates with law firms, we've had budgets, and I think part of the problem we've had in the past has been twofold.

One part of it is what I mentioned before, which is cost certainty. So you can—you can have a law firm that gives you 20 percent discount off its fees, but it really doesn't give you that much control over—any control, really—over what the end number is going to be.

And it also leads to some anomalies in terms of cost savings where when you have a law firm that's giving you a discount from $700 to $600, first a law firm that's giving you a discount from $550 to $500, arguably, depending on how you measure cost savings, I'm better hiring the firm at $600 an hour because I can show a hundred dollars cost savings.

The other problem with it we found was really from our perspective it was very difficult to gauge what a task should cost. And frankly I think, looking at it from the perspective now of having done the bidding process for eight months or so, we've seen that law firms have not been used to thinking about tasks in terms of how much they would cost.

Certainly when we bid out we bid out to firms with largely similar hourly rate structures. And at the beginning we were seeing just hugely divergent estimates on a motions to dismiss, where really you would expect that a given firm with a given price structure should give you roughly a given price or range of prices for something like the motion to dismiss, which is fairly predictable.

Our hope is, as we go through the process in terms of bidding, the feedback will work to the advantage of the law firms and give the law firms some better sense of sort of how a price tasks and what tasks should cost and give us a sense as well of what these tasks cost, because if you came to us and said how much should discovery cost in a Section 11 case, I frankly couldn't give you an answer to that because we just haven't been getting bills in a way that would allow us to tease out that information.

MS. HACKETT: Bob, one of the things that this really brings up is the importance and the growing importance of data, within both departments and firms. And while most have billing mechanisms, they really haven't collected the right kind of data or allowed people to deploy it.

But firms that are really getting ahead in this area and clients who are really finding new ways to deliver value, whether it's cost or predictability or better outcomes, are doing it on a solid foundation of better data.

If you're a law firm that's done 450 motions to dismiss in the last two years, there really isn't any reason why you shouldn't know, in general, what 90 percent of them will cost, and couldn't, therefore, within a budget process—which is really all a fixed fee discussion is, is a budget—figure out what the cost is.

Because it's not about rates; it's about costs. Once you figure out what your costs are, then you can determine what the price is, regardless whether you do that through a rate structure or some other kind of conversation about that.

MR. HAIG: Maggie, speaking of moving away from the hourly billing and Pfizer's flat fee approach, can you share with us some more of the thoughts about that approach, you know, its nonmonetary benefits and any other thoughts that you want to raise? Because I think it's fair to say it's a very unusual arrangement.

MS. MADDEN: It certainly is. Yeah, I think there are many benefits that are not monetary, and they are, I think number one, we're getting better lawyering. People are more creative. You're talking about trying to get a result as opposed to billing hours.

Margaret M. Madden

Anecdotally, we hear associates love to work on our cases because there isn't that pressure of, you know, how much time you're spending. What we want are results.

I think the other big nonmonetary advantage that we have is with 20 firms—think of a company the size of Pfizer. I forget how many we had before we went to the PLA. It was arguably over a thousand. We have 20 firms who do our work.

Tomorrow the relationship managers of all of those firms are coming to New York, I guess weather permitting, and we're having a full-day meeting to talk about some of the issues with the PLA. But in addition to that, the CEO, who has now been CEO for six-eight weeks, is going to present at that meeting.

Most law firms don't have that exposure. I lead Pfizer's employment law group, and we have a yearly meeting with the one law firm that does all of our employment work.

And when we had the meeting in December, the general counsel spoke, the CFO spoke, someone from media relations spoke, we had somebody come and talk about health care reform. We did some more mundane things like employer relations and various things. And that meeting had virtually all the partners at that firm who do our work.

So most of those—most law firms don't get the exposure like that.

We've also started something called the associates roundtable, because we think it's important to develop the next generation of lawyers at law firms. So the PLA firms have all just nominated a senior person, just kind of prepartner level, who will all form this associates roundtable.

We hope they will develop the relationships at that level that we see develop with the senior folks of the firm. Each of those people will be paired with a Pfizer in-house lawyer to understand a little bit better about Pfizer and how Pfizer works.

I think when you develop a relationship with a client that is much more holistic the law firm provides better work, we understand—they understand our issues better, they can connect the dots in a way that if somebody is just doing our products work and they don't know about our employment work or they don't understand what the CEO's vision is, they can make suggestions that those of us who are inside are happy to hear and happy to act on.

MR. HAIG: We're getting close to the end of our time.

Gary, I'm going to ask you a question in a minute about alternative things.

But Alex, I wonder if I could give you a task in about two minutes, and that is I'd be very interested in your

thoughts as to the most important takeaways that law firm partners and the audience of this program might take away from this program.

Let me give you at least 60 seconds, which is more than we give you a lot of the time, to think about it, and let me ask Gary first. You talk a little bit about alternative fee arrangements at CA. Is there anything that you would like to mention about what you've done with alternative fees that hasn't been covered so far?

MR. BROWN: Sure. I'll talk about the dark side of alternative fee arrangements, when they go bad, and they can go bad, if that's what you're talking about, Bob? Bob, is that where you want me to go?

MR. HAIG: Yes.

MR. BROWN: We've done literally every type of alternative fee arrangements: success fees, caps, fixed fees, you name it. And the reason for that is we put cases out to bid, early on, before the economic problems really arose, and said to the firms: Look, we'll hear any offer.

One of the things that is much more important to a company—and mine may be a little bit smaller than some of the others here today—is predictability. Right? You can't afford to say, Okay, we're going to put an X on legal fees. In the coming quarter, sorry, we spent 5X. I have a lot of explaining to do.

So we're willing to talk about anything that sort of gave us more control and predictability over the fee arrangements.

The key, I think, to doing this correctly that we ran into in the last five or six years is to keep an open mind, because everyone goes in with certain assumptions about a case. We all know cases can go bad, things can explode, and things can change. And you have to be willing to work within the arrangement that you made or change the arrangement you made if the facts change.

Alex mentioned earlier about some corporate in-house counsel would see, like, Oh, we can dupe the law firm. Obviously that can't be the outcome because things will happen.

We bid out one case at a firm that we have worked with for years who came in with a very, very, very low fixed fee. It was, in the words of Marlon Brando, an offer you could not refuse. Okay, you guys want to do it for that? It's yours.

They made some miscalculations. And instead of coming and talking to us about the miscalculations what they decided to do was just staff the case leanly, put some associate on it, some partner was sort of on the outside of the firm, and they were trying to handle a Fee Arrangements, Budgeting, and Billing case that was much too big for them.

And they got us into a great deal of trouble. The case started going bad. I had to hire two firms to clean up what that firm did. And that firm I had to send packing.

That's the sort of irresponsible behavior that—that's the worst thing; right? We worry about the bills, but you worry about being slaughtered in court much more than the bills. We've got to win, but win at the right price.

The open dialogue—I will give you a positive spin on that. We had an affirmative case that was kind of a dog, and we had a case that—a firm we worked with for a long time and they said, We'll take it on a contingency. They didn't have the budget right then to hire firms. It was a very complicated case.

And as it moved along, it turned out it wasn't such a bad case after all; it was kind of a good case. It needed a little more work. We hired a second firm to help out, and I agreed to take on that expense.

The contingency fee would have been so large that I would have had a lot of explaining to do. The firm came to me and said, Look, this is not what any of us anticipated. We will cut our fee to a third of what we're entitled to, but we just want your commitment you will give us more work in the future. That's in fact what happened. We reduced the fee, and we've given them quite a few cases; and it's worked out quite well.

The one thing with any of these situations is you have to keep talking because things change.

MR. HAIG: So, Alex, you've got a lot of law firm partners in the audience. What do you see as the most important takeaways from this program?

MR. DIMITRIEF: Don't lose the opportunity to use the budgeting and billing process to distinguish yourself favorably and use it as a very pronounced, competitive advantage. And by that I mean spend some time on this and devote some careful thought to this.

We can tell as soon as we get a case proposal or a budget how much time you've spent on it and whether you've really thought about what this particular case, what this particular matter, is going to require. I can tell after 30 seconds of looking at something if somebody's really spent some time thinking about it.

You are making a terrible mistake if you delegate your billing to a billing assistant who doesn't have a relationship with the client with whom you're working and you don't review it until the client calls you up and asks you what's going on with the bill.

Take the time to review your bills, make sure they're easy for us to read, make sure that we can look at your bills and quickly figure out how much we paid for what types of tasks you accomplished. It's all in your interest to make this a client-friendly process because it leads to good conversations.

Also, when you see issues coming up, raise them real time. Use your monthly submissions of bills or whatever your billing period is to check the status of the case and raise issues that you see with budget—budgets that probably were too high or too low or need to be changed ahead of the time of when it's going to become necessary to change them.

This can be an incredibly collaborative and client-friendly process, and it applies whether you're doing hourly rates, alternative rates, whatever they are.

And I guess, you know, my advice to you, having been in private practice for 20 years and been on this side now for 4, is I'm still to this day mystified at how many terrific lawyers who are out there who deliver really good results don't understand the degree to which they can undercut all of that by having been sloppy and inattentive to how they billed their clients for that work.

So if you spend the time, you come up with a good template, and you make it a friendly process where we feel that you're working with us and working through issues like how much risk to take, how much time to spend, how much time to do—the billing arrangement itself isn't going to really matter. It's about getting to the right result.

Don't lose this opportunity to distinguish yourself favorably. It really matters, and it is worth your time to get it right.

MR. BROWN: Bob, can I follow on with just one quick point?

MR. HAIG: Sure.

MR. BROWN: Early on in my career at CA, I got a budget from an outside firm, a huge national firm. They gave me a $2 million budget on a case that just wasn't a $2 million case. We were in the middle of a restructuring.

I said, Look, I can't give you any law people when you've got clearly assumptions in here that—it's just not right. Please look at it again and give me another budget.

The guy came back a couple days later with a new budget of $2.2 million. And I called him back and said, which one of "less" didn't I make clear?

So I will tell you that firm no longer represents us, and that firm is no longer in business. Think about it.

MR. HAIG: Susan, you came the longest distance, so I'll give you the last word if you'd like it.

MS. HACKETT: A couple of takeaways. First of all, let's debunk the myth that these kinds of practices are only appropriate or realistic in the large law firms and large clients. These kinds of practices are being deployed most visibly with groups like Pfizer and the leverage they have with some of the firms they work with and the size of their portfolio.

But one of the really interesting things that's coming out is some of the greatest variety and innovation is happening from firms in the mid-tier, firms that are boutiques, firms that are from outside of the normal pool of law to hundreds that folks are used to working with.

And some of the clients who are benefiting most from firms that have gotten comfortable with these practices are smaller clients. It's not just a big law thing.

The second thing, litigation is not a mystery. And that's particularly important for you all to hear. I am so tired of hearing people say litigation is not predictable. Nothing in business is predictable. Get over it. It's not that it's predictable. It is that this is business for your clients.

There are a lot more things that are predictable in litigation and repeated in litigation from matter to matter than there are things that are unique. So don't use that all we can't get our hands around it. Figure out how to get your hands around it.

And then finally I would say discounts are not—the discount mentality is not the way to go. It's not sustainable for either the client or the firm, and it avoids the question and the real need for firms to rethink their business model, not simply give 10 percent off. And for clients to figure out what the matter is worth, not simply ask for a 10 percent discount.

Every empirical evidence that we have coming out of this movement shows us that clients that are focusing solely on discounts and firms that are offering solely discounts are not from the client side saving money overall because cost is not affected at the end of the day. It simply gets more expensive some other way. And for the firms, it's not profitable.

So those would be my takeaways for you.

MR. HAIG: We're about out of time. Anyone else?

MR. DIMITRIEF: I just have to tell Susan I couldn't agree more. I have to tell you my greatest moment being in-house so far is a meeting at an aircraft engines business where a lawyer was telling an executive who is in charge of coming up with fixed bids for next-generation aircraft engines for the military on technology that hasn't even been developed yet that it was just too complicated for this lawyer to predict what an employment case was going to cost at trial in the next six months. And it was a beautiful moment, because, you know, I got a lot of get out of jail free cards for that one on both sides.

MS. HACKETT: There you go.

MR. HAIG: We are out of time. Thank you all very much. Terrific job.

Presentation: How Inside and Outside Litigation Counsel Can Add Value and Reduce Costs for Corporate Clients—Case Management and Staffing

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MR. LUPKIN: Ladies and gentlemen, it's 10 o'clock. We are going to start our next program.

With great fanfare, as he walks up the aisle, it is my great pleasure to introduce the founder of this Section, Bob Haig. We're grateful to him for all of the stuff he does for us. And I believe that everybody will greatly enjoy this panel and the distinguished group that he has put together. So as he walks up the aisle, Bob Haig.

MR. HAIG: Sorry for a brief delay. They have promised me a wireless microphone so I can walk around, and it is not here yet. Why don't we get started, though. Can y'all hear me? Good, good.

The title of this program, of this segment of the program, is how inside and outside litigation counsel can add value and reduce cost for corporate clients. And what we have done is we have a good number of panelists, and we've broken it down into two segments.

The first segment is case management and staffing, and that's this panel, which I'll introduce in a minute. And then after the end of the first hour, we have a second panel, and they're going to address alternative fee arrangements, budgeting, and billing.

And I have asked the panelists not to make formal presentations. We're going to do this all on a question-and-answer basis. As to some of the questions that I'm going to ask the panel, they have an idea of what the questions are going to be because we didn't want you to think that we were just shooting from the hip on some pretty complex issues that we're going to raise.

On others of the questions, they have no idea whatsoever that they're getting the questions in advance, and we will see how they do.

I understand there are some written materials here. They include a couple of chapters from a book called *Successful Partnering Between Inside and Outside Counsel*. One of the chapters is written by one of our panelists in the second panel this afternoon.

So without any further adieu, let's get started and get right into it. I do want to very quickly, just by name and by position and company, introduce the panel. And we asked them to sit in alphabetical order so you can keep track of them easy.

Mitchell Borger, group vice president, associate general counsel, Macy's; Wanda Goodloe, vice president and general counsel of BC Richard Ellis; Bruce Hector, associate general counsel and chief litigation counsel, Becton Dickinson & Company; Todd Kahn, senior vice president, general counsel and secretary, Coach, Inc.; Mike Leahy, deputy general counsel, AIG; Liz Sacksteder, deputy general counsel and head of litigation, Citigroup; and John Schulman, partner, Mitchell Silberberg but a long history as an in-house counsel before that.

Let me start. What I'm going to do at the very beginning is see if we can start at the beginning. This is case management. But some people think that the most effective way to manage cases is to try and avoid litigation from happening in the first place; and if it does happen, to create the rules for yourself.

Bruce, let me raise with you, what about dispute resolution clauses in contracts as a way of managing the litigation before it even starts? Thoughts?

MR. HECTOR: Well, certainly one thing we like to do is, if possible, in a particular agreement have a three-level dispute resolution clause. Fairly typical. You have probably seen them a lot where the first level is senior executives from each company need to get together to resolve it. If that's unsuccessful, then you have to go to nonbinding mediation.

And then and only then if you've gone through the first two steps do you get to go either to litigation or, depending on what you've negotiated, arbitrate. In the case of arbitration you have the additional ability to negotiate the terms under which you will arbitrate, including limiting discovery if you like or not.

One of the nice things about that kind of approach is all too often people are reluctant to mediate or suggest it because it appears weak or you haven't got discovery done. It takes that issue off the table. And very often the time when it's saved the most money is if you take a crack at it before litigation starts.

MR. HAIG: Todd, do you have any tips on how a company can avoid litigation?


Todd Kahn

MR. KAHN: Yeah. One thing we've done the last couple years is we have over 11,000 employees in the United States. We're in the retail industry, which has a lot of volatility and turnover.

One of the things we did is put in a pretermination process where before any employee is ever terminated, other than time and attendance, the terminating entity has to get preclearance from the legal department. And what it does is it allows us to have clarity and transparency to what potential issues might be.

And I can tell you pretty remarkable statistics. Since we've implemented it, our employment litigation, which in our industry is, you know, one of the big issues you can deal with, is virtually zero. We have—I looked this morning—six outstanding either EEOC complaints or lawsuits pending from a termination.

And I think we got there not because we, you know, overpaid or deal with it but because we have clarity of the issue ahead of time. People do their homework. And it's been quite beneficial.

So that's something that in-house or outside counsel can really help their clients with.

MR. HAIG: Before we leave the topic of avoiding litigation and move on to something else, Mitch, I know that Macy's has given some thought to what is called an economical litigation agreement. Could you tell us briefly about that and how it works?

MR. BORGER: Sure, Bob. I'd be happy to.

I recently came across this. This is something that's been rolled out by the International Institute of Conflict Prevention Resolution. They're known as CPR. They were big on alternative dispute resolution. And for any of you interested, the Web site is cpradr.org, and you will find it on there.

And what it is in essence is an agreement between the two parties. So you use this not in employment matters but contract matters. You place this contract provision in the agreement, and what it does, it sets forth a whole discovery map.

And it's really a hybrid, Bob. It's using arbitration for the discovery aspect of litigation. And what it does is you agree on this ELI arbitrator for discovery. So you're still in court for pleadings, for motions of summary judgment, for trial. But on this piece it sets out what the discovery is going to be. And it really helps deal with electronic discovery and all aspects of it.

So the other piece that's nice to this is that it lays out how much discovery the parties are entitled to based on how much is in controversy. The smaller the case, the less you get, both sides. The larger the case, the more you get. And the arbitrator, this discovery arbitrator, gets to decide if you make a motion to ask for more or to ask for less.

It also has fee-shifting arrangements in this. So if something's going to be very burdensome on the e-discovery side or discovery in general, the burden, the cost, can be shifted.

So it's something that's just come out. I'm waiting to see who else uses it. We at Macy's would be interested in using it in the right situation. And I hope others will look at this, and maybe down the road we'll have more to talk about.

MR. HAIG: Let's leave the avoidance of litigation and get into how to manage it. And just to give you a general sense of where I hope we're going, we're going to talk about some things having to do with staffing and then managing costs, the role of outside counsel, ADR, selecting and evaluating outside counsel, and the role of inside counsel.

But before we get into the specifics of staffing, Liz, let me ask you a general question—and I've got a general question for John also—because, Liz, you were a litigation partner at a law firm for a number of years, and now you manage Citigroup's litigation. John has kind of got the opposite of that and he was in-house for 25 years, but he's now—or something like that. It was 25 years, John. All right don't deny it. But now he's partner at a law firm.

But, Liz, if you had to pick the single most important conversation to have with your outside counsel in the middle of handling a litigation, what would that conversation be?

MS. SACKSTEDER: I would say the most important conversation is the very first one, because I think that's where you and your outside counsel calibrate together your expectations for how the case can be managed.


Elizabeth Sacksteder

I think the most unsatisfying experiences that inside counsel have with their outside counsel in the course of a matter is where there's just a real disconnect about the level of investment, the level of resources, the type of staffing, that the matter merits.

And if you can lay the groundwork for a common understanding with respect to that at the very beginning, I think you go a long way towards avoiding those sorts of disconnects.

Obviously matters can take on unexpected twists and terms and you may have to revisit your original plan. But if you don't have that meeting of the minds at the beginning, that's a recipe for trouble.

MR. HAIG: John, Liz mentioned common grounds and issues like that. What do you see as the long-term goals of the inside and outside counsel relationship?

MR. SCHULMAN: Strangely, I think they're the same. I think it's advantageous for general counsel to develop a relationship with outside counsel that is long-term where they both understand and work for the same things.

Liz's point about the initial Case Management and Staffing conversation is dead bang on. For instance, when we got sued by Warner Brothers and the name on the complaint in the defendants' box in addition to Warner Brothers was Steven Spielberg and Clint Eastwood, it took on a different complexion than when the name was new artist, new actor, new whatever.

Regardless of what the merits were, it had to be handled differently.

And if the outside counsel and the inside counsel are together on that from square one, you work much better that time and the next time and the next time.

MR. HAIG: Let's talk some more specifics, and I want to talk about staffing on a number of different levels.

Wanda, let me start with you and ask you the general question. And your company is different from many of the huge companies that are represented here on this podium.

Tell us what you see as the appropriate staffing for a litigation matter, taking into account where you're coming from and what your company—what kind of docket you have.

But then right after that I want to jump to Mike—and AIG's a little bit bigger than Wanda's company—and ask you some specific questions about how you use contract attorneys.

But Wanda, go ahead.

MS. GOODLOE: That's an excellent question for us because as a Fortune 500 company you would expect that we would have very large, complex litigations. It's just the opposite. We have very few litigations, and they're not usually very large at all. The discovery and the relevant documents are usually a few inches thick, not requiring the electronic discovery tools and that sort of thing.


Wanda N. Goodloe

But for us it starts with having someone in-house who's very capable of working with litigation counsel, outside litigation counsel, to understand how to manage that process. For us the ideal setting is to have one person handle the entire litigation because they're not very complex.

So what we try to do is have good lawyers that we work with regularly, that have reasonable rates, and we partner with them so that they begin to become intimate with the way we do business, what our underlying business is all about, and then they can guide someone junior to them handling the litigation from soup to nuts very well.

MR. HAIG: Mike, let me zero in on the staffing question or a couple of questions that I promised you, and that is AIG I'm sure uses contract attorneys. How do you use them? Do you engage them through the law firms? Do you engage them directly? How do you use them cost effectively?

MR. LEAHY: There are really two sort of competing considerations in my mind when I think about contract attorneys. On the one hand, you know, there's our desire to achieve cost savings, and obviously as everyone knows they're a lot cheaper than your typical first- or second- or third-year associates at a law firm.

Michael W. Leahy

But on the other hand the last thing I want to do is take responsibility and accountability away from the firm that we've selected to represent us on the matter. Usually if we're talking about using contract attorneys, it's a big matter with a lot at stake.

And so what we really try to do is offer up to the law firms a universe of contract attorney or outsourcing firms that we have a relationship with, we have prenegotiated rates with, we have a certain level of trust in, and really have them choose one of those and at the outset sort of acknowledge that they're comfortable using that firm and they will continue ultimately to be responsible for their work product.

And so I think the challenge is really to have the best of both of those worlds and, like some of my colleagues have said, iron that out and be clear about that out front and document it.

MR. HAIG: Bruce, let me ask you a different kind of staffing question. At Becton Dickinson how do you use local counsel? Do you use them just as a mail drop or do you have a broader role for them?

MR. HECTOR: One of the things we discovered, at least in larger matters, you know, the older model is you have your main player on a national basis and you just use local counsel as a mail drop.

But more recently we have taken the approach of working together with whoever our national counsel is and identifying a local counsel who has real resources. The reason we can do that is that that way, in order to address the cost issues, you know, if you're in a locality outside of the coast and you have very competent local counsel, you can ask them to address a lot of the more routine steps of administering a lawsuit, provided that that atmospheric trust has been built up between your national counsel and your local counsel. That way you're paying the overhead in Indianapolis and not in New York or Los Angeles.

MR. HAIG: Bruce, you mentioned cost. I know with this group of panelists that your attitude toward cost when it's raised by outside counsel is, gee, whatever it takes, don't worry about it. I'm joking. I'm joking. I'm really joking.

MR. SCHULMAN: Tell that to the people in the audience.

MR. HAIG: Let me ask you, Wanda, a general question, again, from your perspective about steps you take to deal with costs, and then see if we can bore into some specific other cost issues with other panelists.

But what kinds of steps do you take to try to contain litigation costs?

MS. GOODLOE: I think Liz, you know, started this—made this point. The first thing we do is make a real—we do a cost/benefit analysis of the importance of the matter. We have to. Because of the costs of litigation and it's hard to sometimes contain them, you have to make a business judgment right up front as to the value of that case to you.

There are times the dollars at stake are very low but yet the matter is very important for many other policy reasons. And you make certain decisions about what you're going to do or not do in a litigation very early on.

MR. HAIG: Todd, Coach has got an aggressive litigation program protecting its IP, basically. What kind of tools do you use to keep the costs—actually, why don't you take a second to tell us about the program and then how you keep the costs down.

MR. KAHN: Our most valuable asset at Coach is our trademark, the Coach brand. Coach is, as many of you know from walking the streets, probably the most counterfeited brand in our category of the world. It's a good news/bad news kind of problem. If they stop counterfeiting us, maybe we have a bigger issue.

So one of the things we did is we realized that we were working with government agencies, we were working with investigators, but we had a missing piece. And the missing piece was really a very aggressive litigation program. Especially in the U.S., the Lanham Act and other laws give us a lot of tools.

So what we did is we launched something called Operation Turn Lock, which I think is the most aggressive litigation program in our space. In the last two years, we've launched 300 lawsuits to protect the brand, all—that's in the U.S. alone. We've launched outside of the U.S. My goal is to launch 50 lawsuits a quarter.

And what we do—the way we can do that is a couple-fold. First, very innovative pricing strategy. We partner up with law firms. They are truly our partners. They have skin in the game; we have skin in the game. I think that's the only way that kind of program can work.

Also we create templates for them. So there are templates for every aspect of the litigation; not to say litigation is cookie cutter, but to a certain extent we can take some of the heavy lifting away and use regional law firms in their territories to go after this. And it's become really a wonderful relationship.

And my ultimate goal is to create a general deterrent, and it's been working.

MR. HAIG: Mitch, Macy's has got some experience with IP litigation as well. What kind of litigation is it and what do you do to control the costs of it?

MR. BORGER: Bob, the patent work is the most frustrating for us. It's also become the most expensive. When I look at where our fees have gone the last two or three years, by far it's intellectual property and it's patent. I wish I could come in here and give you some magical recipe for getting rid of that.

Mitchell Borger

We actually have more patent work the more we get into e-commerce. And the way this is going for us, e-commerce is becoming the largest segment of our business. So I don't see the IP part disappearing.

I think the one key thing for us is finding neutral parties who we can have a joint defense group with to share outside counsel costs. The costs are very high. It's not something we can do in-house. But if we can share the cost, that seems to help.

The other thing I want to mention—and it's something that's fairly new on this horizon—are the aggregators, also known as the white trolls. And these are entities that put together licenses on patents. And they go and affirmatively sell you into their group to protect you from some of these IP lawsuits.

And quite frankly, we're not sure yet whether the white trolls are as bad as the traditional patent trolls out there. It's a very interesting business model. We considered it on an individual case-by-case business situation.

But I can tell you that our other retailers in other companies who are kind of in this with us, whenever you do kind of get in with the aggregators, you are looked upon like you have now crossed to the dark side. So a very challenging subject, Bob.

MR. HAIG: Bruce, what about ED and managing litigation costs, any special things that haven't been mentioned? For example, what about the costs of your law firms, do you have a way of managing the kind of disbursements they submit to you.

MR. HECTOR: One of the things certainly we do at a major company is we have national contracts with shorthand reporters, with duplication of mailing services, with travel agents, with contract attorneys.

And when we work with our law firms, we ask them to use those vendors because—and by the way, you know, we have the vendors send the bills to us. So in that way we can help keep some of those overhead expenses down when we administer litigation.

MR. HAIG: Let's leave the topic of cost, but I do want to ask one additional question, and this is something that John raised with me. And it seemed counterintuitive, but he'll explain it. What about fee negotiation after a matter is done? You raised this issue. I thought you're supposed to negotiate your fee up front, but apparently you're still negotiating it after the matter is over. How do you do that?

MR. SCHULMAN: Quite easily because the matter is over and—

MR. HAIG: When you say "quite easily," are you speaking as inside counsel or outside counsel, John?

MR. SCHULMAN: Both. Each has an interest in going forward. This matter may be concluded. Judgment may have been rendered, appeal over. Both parties are interested in a relationship, if they're smart. And the game is not concluded, although the matter may be. I think it is a fine time for occasionally a reward, occasionally a discount. It's a long-term interest on both parties' behalf.

MR. HAIG: Let me come back to Liz and then back to you again, John, particularly because of your roles on both sides of the relationship. And, Liz, let me ask you, as I mentioned before, you were a litigation partner at a law firm for a while, and what do you think, now that you're in-house, that is—tell us the single thing that in-house litigators understand least well about the role of the outside litigators that they work with.

MS. SACKSTEDER: I think it's that outside counsel can only act pursuant to direction. They're an agent, and the client is the principal, obviously. I find a lot of disconnects in expectations arising because—not

necessarily the in-house litigators but other in-house lawyers or business people at the company sort of have the expectation that outside counsel is the same as in-house counsel and should always be acting in the best interests of the company as it sees it, regardless of the instructions that it's received from in-house counsel.

So I do find myself from time to time explaining to my colleagues at the company that if the outside counsel was instructed by a person with appropriate authority to do X and they did X, the—and you disagree with X—the appropriate place to lay blame is inside, not outside.

That's not to say that if X was really boneheaded that outside counsel didn't perhaps have a responsibility to escalate within the company and make sure it was really a reasoned decision. So in saying that I don't mean to let outside counsel off the hook entirely.

But it really is a different role, and outside counsel doesn't see everything that's going on inside and doesn't have the same opportunity to influence that, nor the same breadth of responsibility, frankly. They are, you know, basically to do what they're told by the client, broadly defined.

MR. HAIG: John, your thoughts on that, in particular can the role of outside counsel vary in handling litigation matters? Should it vary? Do you agree with Liz?

MR. SCHULMAN: Dramatically. I've used outside counsel for a 7 o'clock in the morning conversation: Look, you're not getting this matter, it's not going to your firm, you're not well suited for it for any number of reasons, but I want your advice on it, I want two hours with you over coffee this morning.

MR. HAIG: Are you paying for that time?

MR. SCHULMAN: I'm paying for that time, absolutely.

MR. HAIG: Good.

MR. SCHULMAN: That one I won on both sides of the fence.

There's one outside counsel I joke with my wife I've seen more movies with him than anyone other than her, because he has come over at 6 o'clock to see the allegedly infringed movie and then at 7:30 or 8 the allegedly infringing movie, and we would then have a discussion.

John A. Schulman

He used to be my inside IP lawyer and I thought about 15 percent more conservative than we were, but, we could discount that. But we would have discussions. His law firm didn't get it. They were much too expensive, and it was much too convoluted for them. But I appreciated very much his evaluation of the case.

The three of us would have that conversation. He would get paid to watch movies with me, drink bad Diet Coke from the vending machine, and have a discussion from 9 to 10, which I valued incredibly.

And that was one of the few times I didn't toggle a billable rate because I would weigh what that particular lawyer had. I didn't want the firm; I wanted him for that evaluation. But if you get him for that service, get him for what you want, he's very helpful with that. Then I can go on and use any one of these dispute-resolution systems we're talking about when I've got a good evaluation inside.

MR. HAIG: Let me move to another topic and ask some questions about your perspectives of ADR in general and mediation in particular. And one of the general things I think many of us are interested in is what you think of arbitration. There's a sense in some people these days that arbitration has kind of fallen out of favor with in-house counsel and mediation is on the ascendancy.

Mike, maybe I can go to you. What kinds of—first, have you found mediation effective at AIG and what kinds of formats seem to work the best for the things that you've dealt with?

MR. LEAHY: The short answer is I've found it incredibly effective, and it's a very important tool. Most of the stuff that winds up on my desk are not cases where we have contractual provisions containing arbitration or other ADR provisions, but they're huge, messy, nightmarish cases that can go on years and years and potentially involve billions of dollars in liability.

We have been very, very aggressive in reaching out to our adversaries when those kinds of cases first come in the door. Someone else on the panel referenced, you know, getting rid of this notion that that's somehow a kind of weakness. And we really try to engage very, very early.

It's difficult—with the use of a mediator, it's difficult to resolve those disputes in the first session. But usually you find at a minimum that you set up a process that stays in place for the remainder of the case where you almost have this alternative informal, you know, litigation stream going along with the one in court.

And as things happen in court on dispositive motions, on various other junctures, you can always revert back to the plead elaboration stream and touch

base. And you have—you have an existing dialogue and a process and a cast of characters that allow you to, I think, settle the case at the earliest possible juncture.

And I think people have seen the results of that in some of our recently announced settlements, most predominantly our big legacy securities fraud action with a $25 million settlement that was announced earlier this year.

That was largely in part to many years of mediation coming to fruition at the right time. And I think it was a very creative settlement that I think would have been very difficult to reach earlier had we not engaged in that process right away, even though it took several years to get to an actual settlement.

So we're a big, big believer in it, and obviously it has a lot to do with the mediator you choose. In that particular case we used Judge Phillips, Lane Phillips, who was very effective and aggressive in helping us get that done.

MR. HAIG: Todd, Coach is a big company too. It's a different kind of company than AIG. What are your views on mediation and ADR and how are they colored by the kind of company you work for?

MR. KAHN: We have very little defense litigation, fortunately. I think the biggest litigation I mentioned is our aggressive counterfeiting and going after those people. And I have found mediation, particularly in some jurisdictions which mandate mediation, very effective.

Again, I think it's—you know, I look at it a little bit as an inverted bell curve because I think on the really hard stuff, as John said, that can be very helpful. On the really relatively easy stuff, I think it can also be helpful, particularly on the IP side where you have the law sort of dead to rights. This is us, you knocked us off, Lanham Act says $2 million.

It really becomes, then, all about the money and future injunctive relief. That's a very easy, meaty thing a mediator can help the two sides get to much quicker than the normal litigation process.

So, again, I find where there's not a lot of emotion in litigation on either side of the extreme mediation can be very helpful. I haven't found it quite as helpful in some of the other areas, employment and things like that, but I do find it helpful, as I said, in pretty clear-cut issues, especially after they have been tenderized a little bit.

MR. HAIG: Mitch, you mentioned to me something that sounded like a particularly innovative and unusual ADR arrangement. Can you share it with us?

MR. BORGER: Sure. It has to do with something called premediation. First of all, I'm a pretty big fan of arbitration in the right situations and mediation in almost all situations. But mediation really requires that you do it at a right time when the parties are ready to have a neutral come in and do it.

This premediation concept we use with very good success on our employment litigation. And employment litigation is about 40 to 45 percent of our portfolio, to give you a sense of it. And what we do is we set it up as an opportunity, confidential, not to be used for discovery purposes.

You bring in the plaintiff, the former employee with his or her counsel; you bring in our counsel with generally a fairly senior HR representative. And you let the former employee tell his or her story, let them vent.

So much about employment litigation is having that former employee have their time to tell the story, let the emotion come out; and then have somebody on our side, if there was a mistake made, just get right up there and say, I'm sorry that happened, I'm sorry we did this, let that emotional piece and that process work its way out.

Now, when we've done these things, my expectation is not to negotiate dollars at that premediation meeting. The idea is let the emotions play out, call the other side two, three weeks later, and then start negotiating.

And we've actually had success at about 50 to 60 percent where we're able to settle these claims within the next 90 days and avoid a lot of litigation expenses and everybody walks away as happy as they're ever going to be in this.

MR. HAIG: Let me raise another question with you, Todd, because we've talked about several aspects of the kind of litigation that Coach has and what you do. Does that result in—that kind of litigation docket for a company like yours—in you retaining just a few firms and concentrating your work on them or do you use a broader kind of mosaic approach where you look at specialization and costs and what kinds of issues does that present?

MR. KAHN: I think that's a great question. I grew up in the era where you sort of go to one firm and they—it was one-stop shopping. I think as many of us realize, those days are long gone, especially for the money-centric firms. The cost of litigation, the cost—the hourly rates are just too high. It just doesn't make sense.

One of the things we've done is really do use a broad mosaic. There are specialties. There are people in a firm you may go to, as mentioned by a panelist, but not necessarily the firm to handle the whole litigation. I think that is an excellent call out.

But I do think, look, there are a lot of really terrific lawyers out there, and they're all over the place, and they're across the country. And you find them, and you

work with them, and they start to understand you culturally. It becomes a very strong relationship at much more realistic, for the kind of litigation we do, hourly rates.

And I think that is the name of the game today. I think we all have bottom lines to be responsible for, and we have to keep a balance on that. And fortunately for us on this side of the fence, it is a buyer's market. And we can find some great lawyers all over the world, and we are.

So I think that it is a mosaic, and we've been developing the mosaic quite strongly.

MR. HAIG: Mike, Todd was just talking about how you would identify him and hire him. Let's go to the other end. AIG has used a lot of lawyers, particularly in the last couple of years.

MR. LEAHY: I don't know what you're talking about. Although I guess this is technically a shareholder meeting.

MR. HAIG: It's as funny as you think. How do you evaluate those lawyers? You know—and how often do you do it?

MR. LEAHY: That's something that we're getting a lot more organized and formal about. Actually someone sitting in the audience, Howard Hill, is the new chief operating officer for the legal department at AIG. That's how much business we have with law firms and other vendors, you know, worldwide.

We are really engaged now very aggressively in centralizing our law firm relationships and, as a part of that, being a lot more rigorous and periodic in our review and assessment of each law firm's performance, not just dealing with the individual in-house counsel at a particular partner—at a particular firm—may be dealing with, but really bringing in the firms on an annual basis and talking to them about their relationship across the company and what various people's reactions are, positive and negative, to the work that they've been doing and really forcing those, you know, more formal, more organized, more periodic discussions and assessments of their performance.

So I think that is sure to yield some very interesting results and conversations in the months ahead.

MR. HAIG: Let's move to a few questions, and then we'll see if the audience wants to ask any questions—about the role of inside counsel in hopes that that may produce some greater understanding.

Liz, I asked you a question before about the understanding on the part of the in-house people about the outside counsel's role. Turn it around. You know, any further thoughts on outside counsel's understanding or lack of understanding about what you now do?

MS. SACKSTEDER: I can probably go on on this subject for a long time, but I'll try not to.

MR. HAIG: You have 60 seconds. Take your best 60.

MS. SACKSTEDER: I think one thing that outside counsel are not always as sensitive to as they might be is that for public company clients things that happen in litigation have disclosure implications, they have reserving implications, and those two things have timing implications.

So it is tremendously important that in-house counsel be kept informed and have a clear line of sight to developments that may be on the horizon in order to be able to manage those issues appropriately.

Relatedly I think outside counsel sometimes lose sight of the fact that in-house counsel is, among other things, the early warning system for senior management. And so if something may develop adversely, we just learned a new fact that may change the picture; for example, we just learned something about the other side's expectations for settlement that we didn't know before, things like that, in-house counsel needs to know that right away so that whoever is the appropriate person in senior management or in other control functions is alerted to that in real time and the attendant consequences can be managed appropriately.

MR. HAIG: Mitch, Macy's, to a substantial extent, is using an in-house litigation model, is it not?

MR. BORGER: Yes, Bob. We're one of the few companies across the country that does that. It's interesting, we have ten lawyers in our midwestern office and three paralegals, and all they do are litigation.

And they don't supervise it, for the most part; they actually litigate. They go across the country to do that. They pro hac in the different jurisdictions.

We use local counsel. The idea, of course, is to have local counsel do about 5 percent of the work, you know, be the mail drop, let us know about local rules and things like that.

There are some things from practice area that they don't handle. They don't handle patent; they don't handle security and antitrust cases. But they do handle class actions, including wage and hour, out in California, where most of our class actions are, and it saves us a lot of money.

If there's some overflow, what we try to do is use some sort of hybrid partnership where we combine a couple of our in-house litigators with some outside law firms who have some expertise in the area.

We had one a couple years ago, Bob, actually, with your law firm in which our in-house litigators did about two-thirds of the billable hours; your folks did about one-third.

By the way, it was a class action that we got dismissed. It was a wonderful result. And we saved a chunk of money by having two-thirds of the billable hours done in-house.

So while I realize it's not for everybody, if you have a company with a certain size and a certain litigation portfolio, you can save a chunk of money.

And just to give you a sense of how much, I estimate that for this fiscal year we will save the company about $2.5 million. And that's real dollars. That's not just what outside counsel fees are. We deduct from that what our inside fees are and the local counsel fees. So it's a real $2.5 million.

MR. HAIG: You know, Wanda, Mitch has described an approach and a model which I think he has acknowledged is unusual. How involved are your in-house lawyers in managing litigation? Are you there every day or do you turn it over? What is your approach?

MS. GOODLOE: Our approach is very similar. We try to do as much of the work in-house as possible. Obviously, depending on how many cases you have at any given time or the significance of that matter to the firm, what we will do is strategize with outside counsel and then release the reins a little more. We do a lot in-house.

I wanted to point out one thing we tried recently and has been very successful. On a couple of pure contract—breach of contract claims, I have actually—where we've been the plaintiff—I have actually picked up the phone, called the general counsel of the other company that I was thinking of suing, and indicated what my problem was. And we've created a position paper that looks a lot like a brief and sent it to the person and asked for a response.

And so we've done a lot of things like that as well in order to create—to try to minimize the impact and cost of the litigation.

MR. HAIG: Liz, if you had to pick the single most important resource that a corporate litigation team could have, what would it be?

MS. SACKSTEDER: Well, for a large company in a litigation-intensive industry like financial services—so I think Mike would be with me on this one—I think the most important resource you can have to both save money and keep your company out of trouble is resources that the law department controls for the collection and managing the review process for electronic discovery.

It has always been the case that discovery is the most expensive part of litigation. In this day and age with the unending volumes of undifferentiated electronic materials that we have to collect and review in litigation, that cost has grown exponentially.

But if you can really manage that process internally so that it's robust, it's defensible, it's accurate, and it is controlled with respect to costs, you do yourself an enormous favor.

And I think it's incumbent on outside counsel to be able to work effectively with those in-house resources to partner together on controlling that cost and controlling that accuracy.

MR. HAIG: Let me ask one more question, and then we'll see if the audience wants to ask any questions.

Just to pick up on what Liz said, Mike, AIG has got a big litigation docket. How do you use technology to manage that docket?

MR. LEAHY: In a lot of ways, but the most important way I think is sort of our matter-management system.

When I first assumed my current position, it was towards the end of a reporting cycle, and I asked the paralegal to bring me the reports from around the business units on all the litigations.

And he came back with two or three other paralegals and about, you know, 15 or 20 binders of documents, all of which were in different formats. Almost every report, though well intentioned, was sort of overinclusive and underinclusive.

And it was very difficult for a single person to sift through it and figure out what was important and what the major trends were across the company.

So we immediately set about converting that manual system into a live database across the company where I can dictate, look, these are all the things that we here at the parent company need to know about, this is the format that it needs to be in.

With respect to every case, I need to know where is it, who are the lawyers, what are the claims, what, if any, accruals are there, what are the legal fees to date, all in the same live format, which then allows us to generate meaningful reports that allow us to do our job in terms of escalating things to senior management and having a better sense of our docket.

Then we have since built into that e-billing and also litigation hold issuance and tracking. And I think that to me technologically this is the single-most important thing that we use on a daily basis.

And in my view in a company of our size, it's the only possible way that you can get your arms around what's out there, and particularly given that it is

manipulatable in the sense that I'm just not stuck with some fixed spreadsheet or Word document that I have to kind of manually piece together.

I can go out into that system and say, you know, print out every case that's currently pending in California or print out every single class action or punitive class action case or any case where the spend has exceeded, you know, a million dollars. And it's just incredibly effective management tool that we use every day.

MR. HAIG: Questions for the panel?

I think you answered all the questions.

Do any of you—we are just about out of time, but any final contributions, thoughts?

MR. LEAHY: I just wanted—on the question, the unfair question that you got blindsided with on what's the most relevant resource—

MR. HAIG: Excuse me? Excuse me?

MR. LEAHY: I just want to say I agree with all of that, but I think also at the same time from my perspective the most valuable resource, despite all this technology and discussion about spend and rates and everything else, continues to be the competence and the creativity of the lawyers that you hire internally and externally, and that's an incredibly important thing to keep track of, because there no better way to save money on a case than if the lawyer is effective from the beginning.

You may be paying someone a lot more on an hourly basis at the beginning of the case, but that person, through effective and creative lawyering, gets rid of it early, as opposed to someone who may come in and say, Well, here's all the ways we can save you on contract attorneys and e-discovery vendors and five years later the case is still on your docket. I think that's just an important thing for in-house and external litigators to keep an eye on.

MR. HAIG: Tracee, I think we're past time, because we were supposed to end this at 10:50. We're going to—this panel is now finished, and we're going to start up again right at 11 o'clock with our second panel, which is going to talk about alternative fee arrangements, budgeting and billing.

I want to thank this panel for doing a terrific job.

Section Report

A Proposal for Enhanced Expert Disclosure in the New York State Commercial Division

Prepared by the Committee on the Commercial Division

The Commercial Division of the New York State Supreme Court was established to improve the efficiency with which commercial cases are resolved. Since then, in recognition that the resolution of commercial cases can be complicated, protracted, and expensive, courts and practitioners have continued to review the issue of efficiency (among other things) in the Commercial Division, and, over time, rules and practices have been amended and adjusted to ensure that commercial cases in the Commercial Division are resolved efficiently. In keeping with this continued review, various proposals have been made to enhance the existing expert disclosure rule (CPLR Section 3101(d)) for Commercial Division cases to address concerns that the rule does not promote efficiency, predictability, or reliability. For a variety of reasons, none of those proposals were adopted. This report proposes a procedural rule that would not amend the CPLR and that would be *for use only in Commercial Division cases*, which the Committee believes is sensitive to the concerns raised in connection with prior proposed amendments and, at the same time, addresses concerns about the inefficiencies under the existing current rule.

The developing hodge-podge of ad hoc fixes by practitioners and judges designed to address the current rule's limitations in commercial cases, as set forth herein, evidences the need to amend the current expert disclosure rule. At least two Commercial Division's justices (Justice Ramos of New York County and Justice Karalunas of Onondaga County) have implemented more expansive expert disclosure rules than those afforded by Section 3101(d). In addition, litigants have addressed the rule's limitations by entering into agreements or stipulations governing expert disclosure on a case-by-case basis. And relevant studies, including the 2006 Commercial Division Focus Group Report, suggest that some litigants simply choose to go somewhere else to resolve their commercial disputes. This state of play is inconsistent with the underlying purpose of the Commercial Division as well as with the articulated goal of ensuring that the Commercial Division is a venue of choice for complex commercial litigation. Chief Judge Lippman observed that the Commercial Division's "emphasis on specialization ha[s] led to more efficient dispositions, greater predictability and a reliable body of decisional law on which important business and corporate governance decisions can be made."[1] The Committee believes that the proposed rule will further the goals of efficiency, predictability and reliability.

This report recommends a rule that provides for more expanded expert disclosure, including depositions of testifying experts and timely disclosure of expert reports, subject to consultation with the court if a party does not consent. It is modeled after the approaches and practices already implemented by certain Justices of the Commercial Division in their Individual Practices. The report also proposes that the Chief Administrative Judge amend Title 22 of the Official Compilation of the Codes, Rules and Regulations of the State of New York (the "NYCRR") Section 202.70 Rules of the Commercial Division of the Supreme Court to expand and focus expert disclosure by adopting the proposed rule and, in the alternative, that the individual Commercial Division justices adopt the proposed rule.

Commercial Division cases frequently involve controversies where the legal fees for just the pre-trial phase approach or exceed $1 million. In light of these costs, parties seek full and timely disclosure to allow them to assess the risks of trial and the benefits of potential settlement. Unfortunately, the Commercial Division currently does not provide the type of expert disclosure necessary for parties to undertake this analysis—particularly where efforts to quantify valuation or damages will be based on the strength of the expert's testimony. Moreover, under the current rules this expert testimony frequently is not revealed until the eve of or at trial. Consequently, parties are often forced to continue to litigate even when the amount in controversy that may ultimately be proved is far less than the legal fees incurred simply because they are unable to adequately assess the true value of a case early enough in the process. This, in turn, forces parties to prepare to ensure that they can advocate for or against the highest conceivable amount at risk. For parties who can control forum selection—either by contract or through removal—it is often wiser to litigate in Delaware or the federal courts since both alternatives provide substantially more robust and timely expert disclosure.

We believe that the proposed rule for enhanced expert disclosure in Commercial Division cases can rectify this current impediment to the Commercial Division's evolution and efficiency. Moreover, we believe that, for the reasons set forth at the end of this report, the new proposed rule can be implemented in the limited arena of Commercial Division cases in a manner that is consistent with the dictates of the CPLR.

I. Introduction

The current expert disclosure rule (CPLR Section 3101(d) ("Section 3101(d)")), promulgated in 1985, "reflected the Legislature's view that expanded disclosure with respect to expert witnesses would, among other things, discourage parties 'from asserting unsupportable claims or defenses' and promote 'settlement by providing both parties an accurate measure of the strength of their adversaries' case.'"[2] Given the developments in modern complex commercial litigation and the increased role and importance of expert witnesses in a significant portion of that litigation, there is a clear need to supplement the rule in Commercial Division cases to ensure that the rule promotes the purpose for which it (and the Commercial Division itself) was designed, namely to promote the efficient resolution of commercial cases.

The need for a predictable set of expert discovery rules that provide for full and thorough disclosure and testing of expert opinion and testimony is particularly acute in complicated commercial cases because the financial stakes are so high. Without full and thorough expert disclosure, parties cannot adequately assess the possibility of settlement or prepare for motion practice and trial. As a result, the court has a much more difficult task in determining which issues should go to the fact finder. Furthermore, participants in the 2006 Commercial Division Focus Groups indicated that unpredictable and inadequate expert disclosure is a substantial reason for not taking advantage of the Commercial Division, especially when alternative fora provide the level of expert disclosure necessary to fully prepare, assess and litigate a case.[3]

In this report, this Committee (1) highlights the current state of play of expert disclosure in the Commercial Division; (2) identifies inefficiencies created by the absence of a supplemental rule providing for enhanced expert disclosure in the Commercial Division; (3) discusses various ways in which litigants and courts have tried to address those inefficiencies; and (4) proposes a procedural rule for Commercial Division cases to remedy the inefficiencies.

II. Current State of Play of Expert Disclosure in Commercial Division Cases

Section 3101(d) governs expert disclosure in New York State Court. Set forth below is a summary of the case law relevant to Section 3101(d) relating to (a) the required scope of disclosure, (2) the "special circumstances" under which additional disclosure is permitted, and (3) the timing of disclosure.[4] Notably, there are relatively few Commercial Division cases addressing these issues; most of the jurisprudence regarding expert disclosure that has been developed in appellate courts across the state does *not* involve commercial litigation.[5]

A. Section 3101(d)(1)(i): Scope of Disclosure

Section 3101(d)(1)(i) provides that a party is entitled to know the identity of any testifying expert and is entitled to a "reasonabl[y] detail[ed]"[6] disclosure of: (1) "the subject matter on which each expert is expected to testify," (2) "the substance of the facts and opinions on which each expert is expected to testify," (3) "the qualifications of each expert witness," and (4) "a summary of the grounds for each expert's opinion."[7]

For obvious reasons, the manner in which "reasonable detail" has been defined is of particular concern to this report, given the considered view that limited expert disclosure does not promote the goal of efficient resolution in Commercial Division cases. "Reasonable detail" is defined as information sufficient to give the opposing party a sense of the content of the expert's anticipated testimony without actually laying out the expert's opinions.[8] The rule does not require that the summary of the expert's testimony provide the fundamental factual information upon which the expert's opinions were made.[9] Although a disclosure "so general and nonspecific that the [other party] has not been enlightened to any appreciable degree about the content of this expert's anticipated testimony"[10] does not satisfy the requirement, disclosure with particularity is not required.[11] Disclosure "[n]ot so inadequate or inconsistent with the expert's testimony as to have been misleading," or not so lacking in "specifics or details" as to result in prejudice or surprise to the Defendant, does satisfy the requirement.[12]

An expert's testimony will rarely be precluded because of inadequate disclosure.[13] Generally, preclusion for failure to comply with Section 3101(d) is improper unless there is "evidence of intentional or willful failure to disclose and a showing of prejudice by the opposing party."[14] Furthermore, upon finding the summary of an expert's expected disclosure insufficient, courts permit the proponent of the testimony to supplement the disclosure rather than deciding to preclude the expert's testimony at trial, provided the other party is not prejudiced by the late disclosure.[15] For example, in an unpublished Commercial Division case, plaintiffs moved to preclude defendants from offering expert testimony due to the vague and conclusory nature of the disclosure. The court held that even though the defendant's expert disclosure did not explain in reasonable detail the method by which its expert proposed to value the company (it only referred to "standard valuation methods and procedures"), the remedy was an amended disclosure, not preclusion.[16] In *Beard v. Brunswick Hospital Center Inc.*, the Second Department found the following generic and conclusory disclosure sufficiently reasonable:

> Defendants' expert will testify that defendants acted in accordance with good and accepted medical

> practice with respect to the issues of malpractice and informed consent. The expert will further testify that the defendants were not negligent; and that plaintiff's condition was not related to, or proximately caused by, any act of negligence or malpractice of the defendants. The expert will dispute the theories put forward by the plaintiff in the pleadings.[17]

In *Oliver Chevrolet, Inc. v. Mobil Oil Corp.*, the Third Department found the defendant's disclosure sufficient even though the statements disclosed only that the expert would negate the plaintiff's causation theory and failed to disclose that the expert had discovered a separate cause for the incident.[18] In *Maldonado v. Cotter*, the Fourth Department found plaintiff's expert disclosure notice reasonably sufficient although it gave no more detail than positing a general theory of medical malpractice.[19]

As the above shows, courts in all four departments have interpreted "reasonable detail" narrowly and have been reluctant to preclude expert testimony where a party fails to satisfy the narrow requirement. In *Gallo v. Linkow*, the First Department declined to preclude expert testimony concerning plaintiffs' contributory negligence even though defendant's disclosure notice "referred to culpable conduct somewhat vaguely as 'factors outside of the control' of the defendant."[20] The court based its decision on the fact that the bill of particulars "gave plaintiffs full warning of the details to which this phrase referred."[21] In *Flores v. New York Hospital-Cornell Medical Center*, the Second Department noted that defendant's disclosure, "although not detailed," was adequate to satisfy Section 3101(d) as the defendant "apprised plaintiff that defendant's experts would dispute and rebut plaintiff's theory that his injury was caused by the failure of defendant, through its on-call anesthesiologist, to properly monitor and regulate plaintiff's body fluid levels."[22] Accordingly, the court held that plaintiff was sufficiently notified that defendant's expert would, "in his trial testimony, attribute plaintiff's injury to causes other than those urged by plaintiff," and therefore that it was improper to preclude the expert's testimony, which posited "a theory of causation not specifically disclosed in defendant's response."[23]

B. Section 3101(d)(1)(iii): Additional Disclosure Under "Special Circumstances"

Section 3101(d)(1)(i) does not require disclosure of an expert's report, the data used by the expert to reach his or her opinion or the opinion itself; nor does it provide for expert depositions all of which are essential in many complex commercial cases to efficiently resolve a commercial dispute. Absent an agreement by the parties or a court rule requiring disclosure of this information, a party can obtain this disclosure by court order upon a showing of "special circumstances."[24] Whether "special circumstances" exist is within the discretion of the court,[25] and most courts have construed the exception narrowly.[26]

Courts have recognized two circumstances under which there are "special circumstances" justifying additional expert disclosure and discovery. The first is where the evidence reviewed and relied upon by an expert and is lost, destroyed, or otherwise becomes unavailable.[27] (In other words, a situation where the material cannot be duplicated because of a change of conditions.) The second circumstance under which "special circumstances" exist is "where some other unique factual situation exists."[28] Instances where courts have found "unique factual" circumstances include where a plaintiff's principal was "unable to answer basic inquiries into the plaintiff's bookkeeping practices, or regarding specific entries in the corporation's financial records" and the accountant was the "sole person who could respond to those inquiries"[29] and where a plaintiff's claim was "based not on any facts personally known to defendant," but rather, on reports conducted by plaintiff's expert accountant and construction industry executive."[30] Even when the court finds "special circumstances" exist, courts have generally limited the additional disclosure to the materials and data on which the expert based his opinion and will not compel the expert to disclose his or her actual opinion.[31] Consequently, even where "special circumstances" exist, disclosure is generally limited to portions of the expert's report or narrowly tailored interrogatories.

C. Timing of Expert Disclosure

Section 3101(d) does not set forth a deadline by which expert disclosure must be provided,[32] nor does it set forth the consequences for failing to provide adequate expert disclosure, although Section 3101(d) explicitly states that a party will not be excluded from providing expert testimony if the failure to comply with Section 3101(d) is for a "good cause."[33] The case law and commentary vary greatly with respect to when disclosure is due and the appropriate penalty for failing to provide adequate disclosure.[34]

Appellate courts from all four departments have all, at some point, held that a party is not required to respond to a demand for expert witness information within a specified time. All have also held that a party may be precluded from proffering expert testimony where there is evidence of an intentional or willful failure to disclose and a showing of prejudice by the opposing party[35] (the burden of showing an intentional or willful failure is, of course, on the party seeking disclosure).[36] In fact, most courts are willing to avoid precluding expert disclosure by finding alternative means to avoid prejudice. For example, the Second Department has affirmed a trial

court's decision to adjourn a trial date to allow a party to submit expert disclosure two weeks before trial.[37]

Nonetheless, recent decisions in the Second Department suggest that courts in the Second Department are in fact willing to preclude expert discovery for noncompliance with Section 3101(d)(1). In a recent decision by the Second Department Appellate Division, the court held that a trial court had not abused its discretion in declining to consider the affidavits of experts offered to rebut summary judgment where the plaintiff had previously requested the affidavits and the note of issue and certificate of readiness had been filed.[38] Similarly, the Court found that a trial court erred in declining to preclude the plaintiff's expert's report, which was submitted in opposition to the defendant's motion for summary judgment, when there was no good cause for the expert not being disclosed prior to the filing of the note of issue and certificate of readiness.[39] The cases appear to support the proposition that, at least in the Second Department, if requested, expert disclosure must be provided prior to filing of the note of issue and certificate of readiness. The Second Department, however, has since upheld a trial court's refusal to preclude expert testimony offered in opposition to a motion for summary judgment, stating:

> CPLR 3101(d)(1)(i) does not require a party to respond to a demand for expert witness information at any specific time nor does it mandate that a party be precluded from offering expert testimony merely because of noncompliance with the statute, unless there is evidence of intentional or willful failure to disclose and a showing of prejudice by the opposing party.[40, 41]

III. Problems with the Current Expert Disclosure Rule in Commercial Cases

As the January 2010 Report of the Advisory Committee on Civil Practice recognizes, "[t]he issues addressed by experts in commercial cases are often complex, touching on nuanced economic, financial and corporate principles, such as how stock or other securities should be valued, how a business should be valued, or whether the financial analysis of a board of directors was sound under the circumstances."[42] Expert disclosure requirements that do not provide for the date by which disclosure must be provided, or for disclosure sufficient for parties to assess and analyze the strength of their cases, is simply out of step with the nature of most of the complex commercial cases in today's world. And litigants hoping to get an efficient resolution of their commercial disputes in New York cannot take much comfort from decisions relating to the application of Section 3101(d).[43]

A. Lack of Predictability

Lack of predictability with respect to expert disclosure, including what must be disclosed when, can result in over or early disclosure. The truth is that a litigant in the Commercial Division cannot predict when it will get the expert discovery it requests; nor can a litigant predict what discovery it will get. And it is anybody's guess as to what consequences, if any, there are for failing to comply with Section 3101(d)(1)(i). Not only can the current rule lead to prejudice, but it is ripe for inefficient gamesmanship.

Commercial Division litigants in the Fourth and Second Departments are currently operating with different disclosure dates, and even within the Second Department, it is difficult to ascertain when disclosure is due and what will happen if a disclosure is late.[44] Commentators are at odds on whether Section 3101(d)(1)(i) imposes a time limit.[45] One commentator has suggested that "the unwritten, but widely accepted deadline" for expert disclosure under Section 3101(d) is thirty days before trial commences,[46] while another suggests that a response within twenty days of the request is reasonable based on other approaches in the CPLR.[47]

B. Inadequate Disclosure

As commentators and practitioners have indicated, New York's expert disclosure rules "are very limited [] and do little to inform the adversary about the expert testimony that will be offered."[48] Indeed, as discussed above, courts are apparently more concerned with whether a party is sufficiently on notice of the fact that it should expect expert testimony than whether the party has been sufficiently apprised of what the expert will actually say. However, knowing the details of and the basis for what an expert will say is essential for the efficient resolution of a business dispute. Section 3101(d)(1)(i) does not, for example, require the expert to disclose his/her methodology, a written report, the data underlying his/her opinions or the exhibits upon which the expert will rely at trial. Section 3101(d)(1)(i) also does not provide for depositions of experts (though the special circumstances exception, as it has been interpreted, does provide commercial litigants with a way to get some additional discovery). This lack of meaningful expert disclosure has led to (1) ill-prepared *Frye* motions, (2) uninformed summary judgment motions, (3) misguided settlement analysis, and (4) inefficient trial preparation.

1. Ill-prepared *Frye* Motions

A motion to exclude expert witnesses on evidentiary grounds can result in a meaningful narrowing of issues for the trial court in business litigation. While such motions are common practice in federal courts, they are not often seen in New York state court practice.[49] One reason for this, as has been noted in commentary, is the fact that "the attack on the opponent's expert is made

much more difficult by the thinness of expert disclosure under the CPLR."[50] Without adequate disclosure, it is difficult to mount an appropriate challenge to an expert's opinion.

As one treatise stated, "[i]deally, one would like to know all the details about the expert's methodology so one can determine whether that methodology is reliable," however, a litigant "is unlikely to learn those details through the pretrial expert disclosure provided by CPLR 3101(d)(1)(i)."[51] The treatise suggests using other sources to mount the challenge, including researching other publications, papers and speeches to get a better understanding of the expert's methodology and opinion.[52] While it is certainly advisable to look to secondary sources when analyzing an opposing expert, not having a clear statement as to what methodology was actually used by the expert hampers the preparation of an effective *Frye* motion. Efficiency is not served by allowing decisions to be made in business disputes on the basis of unreliable expert testimony. Further, the risk that unreliable expert testimony will be admitted against them is undoubtedly among the factors causing litigants to go elsewhere to resolve their complex commercial disputes.

2. Uninformed Summary Judgment Motions

Pretrial motion practice, and in particular a dispositive motion for summary judgment, is an indispensable part of commercial litigations. Summary judgment motions provide litigants with an opportunity to seek full dismissal of a case or, at least, to focus the issues to be tried. Those summary judgment motions in commercial cases that are premised heavily on expert testimony are often, under the current rules, not useful because the summary judgment movant lacks sufficient information to launch a proper challenge. This, in turn, reduces the efficacy of the summary judgment procedure to eliminate and/or narrow issues for trial.

A movant who makes a summary judgment motion without the benefit of expert discovery runs the risk of making arguments that would not have otherwise been made if the litigant had the benefit of full expert disclosure. In addition to wasting time and resources on arguments that otherwise would not have been made, an attorney may forgo other arguments or prepare his expert's affidavit in a different manner. These inefficiencies explain in part why the Second Department has held on certain occasions that post-note of issue expert disclosure made in response to a summary judgment motion should be precluded.[53]

Judicial resources should be conserved for taking a hard look at the very best arguments for and against summary judgment. Timely and adequate expert disclosure in commercial cases would further that cause.

3. Settlement Inefficiencies

Prior to going to trial, parties generally entertain the idea of settlement. Among the reasons for expert disclosure is the fostering of early settlement. The decision to settle—whether from the vantage point of plaintiff or defendant—is best done with full and complete information. In business litigation, lawyers typically attempt to handicap the chances of success based on, among other things, the persuasiveness of competing narratives, the admissibility of documentary evidence, the credibility of fact witnesses, the burden of proof, and the strength of the expert testimony. In fact, many cases can come down to a "battle of the experts." The administration of justice is simply not served when parties settle based on inadequate information, particularly where, as is the case with expert disclosure, it would be easy to remedy the current situation.

4. Trial Inefficiencies

Trial preparation for complex commercial cases is a rigorous time-consuming affair. In New York, all of this pretrial work can be derailed because litigants are permitted to disclose experts and expert testimony on the eve of trial, or during trial (*e.g.*, when a party only learns during an expert's testimony that certain theories in interrogatory responses or in a bill of particulars are the subject of expert opinion).

There are no rules for when and under what circumstances parties can disclose new experts in Commercial Division cases. In fact, as things now stand, a "new expert" may be one who was retained late in the day or, alternatively, one retained and prepared long ago but only recently disclosed. Thus, a lawyer could be faced with finding a rebuttal expert and preparing to move against or cross examine the testimony to be offered by the surprise expert on short notice.[54] Furthermore, since an expert is not required to prepare a report and parties are not entitled to depose experts, it is difficult to meaningfully and efficiently cross examine experts at trial.

Trial by ambush—which Section 3101(d)(1) implicitly permits—does nothing to further the pursuit of fair and efficient resolution. Indeed, our rules of disclosure are designed, at least in part, to eliminate this inefficiency. Moreover, in Commercial Division cases, where parties will frequently spend hundreds of thousands (if not millions) of dollars on legal fees in the *pre-trial* phase of the case, this trial by ambush imposes risks and uncertainties so late in the process as to make resolution of commercial cases in the Commercial Division a gamble that many sophisticated business litigants cannot justify when adequate and timely disclosure is available in other fora (*e.g.*, federal court or Delaware state court).

IV. The Limitations of, and Lessons Learned from, Self-Help

While judges and parties will likely attempt to address the above-referenced inefficiencies of Section 3101(d)(1) as best they can, self-help is not a long-term solution.

A. Litigant Self-Help

1. Alternative Forums

We know from the July 2006 Report of the Office of Court Administration to the Chief Judge on the Commercial Division Focus Groups that inadequate expert disclosure rules have pushed litigants to different forums. This trend away from New York is not a new phenomenon. Prior to the establishment of the Commercial Division, commercial litigants were choosing alternative forums to litigate their disputes. Chief Judge Lippman, among others, observed this flight from New York state courts firsthand and noted that he witnessed "the steady decline in commercial filings as lawyers and litigants increasingly migrated to the federal courts, Delaware, or private dispute resolution fora."[55]

As Chief Judge Lippman has stated, the Commercial Division was established to reverse the trend of commercial litigants turning to federal courts or alternative forums.[56] While this Committee has not conducted a survey of why litigants have chosen not to litigate in the Commercial Division, the focus groups suggest that commercial litigants are again citing inadequacies in New York procedure as reason not to choose the Commercial Division.[57]

2. Stipulations

Sophisticated parties in complex commercial litigation generally want extensive expert disclosure, and consequently usually enter into some sort of agreement or stipulation governing expert discovery. For the most part, parties doing so agree to disclosure requirements similar to those under the federal rules.[58] Indeed, the fact that this is common practice is one of the reasons there is so little Commercial Division case law relating to expert disclosure.[59] It is worth noting that a leading treatise on Commercial Division practice even provides a form stipulation for additional expert disclosures that is consistent with the federal rules.[60]

Agreements and stipulations between parties, however, do not address the systemic inadequacies under the current system. While a stipulation may be the best solution in a given case, litigants cannot count on reaching an agreement on the issue of expert disclosure. Without the comfort of adequate expert disclosure rules that exist independently from intra-party agreements, the timing and scope of expert discovery may well depend on the judge before whom you find yourself. This does not further predictability or efficiency in Commercial Division cases.

3. Summary Judgment Motions

Some parties have attempted to get expert disclosure in Commercial Division cases by filing a summary judgment motion that leaves the party against whom the motion is filed no choice but to respond with expert testimony.[61] Obtaining disclosure this way may be better than nothing, but it is hardly adequate because it does not necessarily provide adequate disclosure of the expert's opinion(s). Furthermore, if the party filing the motion does not carry the burden of proof, it may be prejudiced by having to disclose its expert opinion first.

4. Trial Subpoenas

A trial subpoena pursuant to N.Y. C.P.L.R. Section 2305 is another method by which a commercial litigant can seek expert disclosure,[62] but a litigant is likely to get a response and/or material on the eve of trial, by which time it may be too late. Moreover, as a general rule courts do not allow parties to use trial subpoenas as broad discovery devices.[63] Thus, trial subpoenas must usually be narrowly tailored, which may result in some, but not necessarily adequate, disclosure.

B. Judicial Self-Help

There have been a number of instances of judges both in and out of the Commercial Division who have attempted to address the limitations of the current system in cases where greater disclosure is necessary to the just and efficient administration of justice. Additionally, the Chief Administrative Judge has promulgated a set of expert disclosure rules specific to matrimonial actions.

1. Commercial Division Self-Help

Justice Ramos of the New York County Commercial Division has issued a Part 53 Practice Rule that provides that "no later than thirty days prior to the completion of fact discovery, the parties shall confer on a schedule for expert disclosure, including the identification of experts, exchange of reports, and depositions."[64] Unless otherwise stipulated or ordered, the experts must prepare and sign a report that must comport with the same requirements as found in Federal Rule of Procedure 26(a)(2)(B), namely:

> (A) a complete statement of all opinions the witness will express and the basis and the reasons for them;
>
> (B) the data or other information considered by the witness in forming them;
>
> (C) any exhibits that will be used to summarize or support them;

(D) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(E) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and

(F) a statement of the compensation to be paid for the study and testimony in the case.[65]

A number of other Commercial Division justices have addressed expert disclosure in their preliminary conference forms. The forms in Nassau County Commercial Division and in one Commercial Part in Kings County ask the parties to identify the date by which they will provide expert disclosure.[66] The form used by Justice Karalunas of Onondaga County asks the parties to identify when expert disclosure will be made but provides that, in any event, the plaintiff and the defendant shall serve disclosure no later than 30 and 60 days, respectively, after the filing of the trial note of issue.[67] Justice Karalunas's Preliminary Conference Stipulation and Order states that "[e]xpert disclosure provided after these dates without good cause will be precluded from use at trial."[68] Justice Pines of the Suffolk County Commercial Division asks parties to identify the date by which they will provide expert disclosure,[69] and Justice Scheinkman of Westchester County provides five blank lines for the parties to fill in whatever they choose regarding expert disclosure.[70]

2. Examples of Other New York State Court Self-Help

The Commercial Division is not alone in recognizing the need to provide procedural rules to govern predictable and efficient expert disclosure. The Committee has not undertaken a complete survey of practice in New York, but we have identified a few examples. Justice Wood in the Supreme Court, Dutchess County requires the parties to exchange "any report by an expert whom counsel expects to call at trial."[71] In the New York County Supreme Court, Civil Branch[72] the party having the burden of proof shall respond to a Section 3101(d) request no later than 30 days prior to the trial date with a response due 15 days later.[73] The Third Judicial District mandates that plaintiff's expert disclosure is made on or before the filing of the note of issue.[74]

3. Expert Disclosure Rules in Matrimonial Actions

The Chief Administrative Judge has promulgated procedural rules in matrimonial actions that provide for efficient, predictable, and timely expert disclosure. A matrimonial action in the Supreme Court of New York[75] is governed by particular provisions in the NYCRR.[76] Expert disclosure responses are due twenty days following the request and the expert report for an expert to be called at trial and any responsive report are required to be exchanged no later than 60 and 30 days before the trial date, respectively.[77] The rule requires that any expert witness whom a party expects to call at trial submit an expert report that, barring a showing of good cause, will be the only report admissible at trial.[78] Failure to comply with the rule results in preclusion unless good cause, as authorized by Section 3101(d)(1)(i), is shown.[79] In certain instances, the court can bind the expert's testimony to the contents of the report.[80]

V. Expert Disclosure Rules in Federal and Delaware Courts

We know from various surveys that litigants often choose to litigate complex commercial cases in federal court or in Delaware state court.

The Federal Rules of Civil Procedure provide for expansive expert discovery.[81] Parties are required to identify trial experts, and provide either a report prepared and signed by experts retained or employed specifically to provide expert testimony or a summary disclosure for all trial experts not required to provide a report.[82] The expert report must contain certain elements, including, among others, "a complete statement of all opinions the witness will express and the basis and reasons for them" and "the facts or data considered by the witness in forming them."[83] For expert witnesses "whose careers are devoted to causes other than giving expert testimony"[84] a party is required to disclose the subject matter on which the witness is expected to present evidence, and a summary disclosure of (i) the opinions to be presented by those experts and (ii) the facts supporting those opinions. The default timing for expert disclosure is 90 days before the case is set for trial or, if expert opinion is used to contradict or rebut another party's evidence, expert disclosure is due 30 days after the other party's disclosure.[85] The federal rules also allow for a party to depose an expert whose opinions may be presented at trial.[86]

In the Delaware Court of Chancery, another popular forum for the resolution of commercial disputes, the rules governing expert disclosure provide that, if requested by interrogatory, a party shall identify the expert witnesses it expects to call and "state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion."[87] Further discovery can be requested upon motion.[88] There are two principal differences with the New York rule. First, there is no need to show "special circumstances" in order to get additional discovery[89] (a showing of "exceptional circumstances" is required for discovery of the facts and opinions of non-testifying experts).[90] Second, the Delaware rules explicitly state that an interrogatory

requesting expert disclosure must be responded to within 30 days of service.[91]

Effective May 1, 2010, a new division in New Castle County, Delaware known as the Complex Commercial Litigation Division was established with jurisdiction over commercial controversies exceeding $1 million.[92] The Complex Commercial Litigation Division of Delaware has issued a standard protocol for expert discovery that provides for depositions of expert witnesses as well as disclosure beyond that which is required by Chancery Court Rule 26(b).[93] Under this protocol, prior to the expert's deposition, a party must identify the documents reviewed by the expert and produce certain documents relied upon by the expert, including third-party documents not produced, documents with no common Bates numbering, documents prepared by a non-testifying expert relied upon by testifying expert, all publications relied upon by testifying expert, the expert's C.V., and a list of cases, administrative matters or other proceedings in which the expert has given trial or other testimony in public within last four years.[94]

VI. Recommendation

The measures taken by litigants and courts to address current limitations of expert disclosure in commercial cases will not result in the predictability and efficiency that the Commercial Division was established to create. There are numerous examples where inadequacies in our procedural rules have been addressed in order to maintain predictability and efficiency in the Commercial Division. The recent progressive steps to improve electronic discovery ("e-discovery") in New York is but one example. In response to the July 2006 Report on the Commercial Division Focus Groups there was a concerted effort to improve e-discovery in commercial litigation.[95] After an extensive review of the issue, various recommendations were implemented to improve the management and resolution of e-discovery issues in all state courts.[96]

Treatises, articles, and practitioners have acknowledged there is a problem with applying the current expert disclosure rule to commercial cases. In the same Focus Group Report where e-discovery was addressed, practitioners "cited the lack of expert discovery as a reason to use other forums," and "that it was of interest to their clients to be able to conduct meaningful and appropriate expert discovery."[97] Furthermore, the Advisory Committee on Civil Practice has consistently advocated for a change to Section 3101(d)(1)(i) for commercial actions in which the amount in controversy is $250,000 or more.[98]

A. Proposed Rule

To address the concerns set forth above,[99] we recommend that new language be added to the Commercial Division Uniform Rules or that Individual Commercial Division judges adopt the rule as part of their local rules. We believe that this new rule should reflect some of the steps already implemented in Individual Practices and Preliminary Conference forms in the Commercial Division.[100] Specifically, we recommend modifying Uniform Rule 8 to require parties to discuss the scope and timing of expert disclosure in preparation for and at the Preliminary Conference. We also recommend adoption of a new rule *for Commercial Division cases only* that states:

> If any party intends to introduce expert testimony at trial, no later than thirty days prior to the completion of fact discovery, the parties shall confer on a schedule for expert disclosure, including the identification of experts, exchange of reports, and depositions of testifying experts—all of which shall be completed no later than four months after the completion of fact discovery. In the event that a party does not consent to this procedure, the parties shall raise the objection as to enhanced expert disclosure and shall request a conference to discuss the objection with the court.
>
> Unless otherwise stipulated or ordered by the court, expert disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:
>
> (A) a complete statement of all opinions the witness will express and the basis and the reasons for them;
>
> (B) the data or other information considered by the witness in forming them;
>
> (C) any exhibits that will be used to summarize or support them;
>
> (D) the witness's qualifications, including a list of all publications authored in the previous 10 years;
>
> (E) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and
>
> (F) a statement of the compensation to be paid for the study and testimony in the case.

> The note of issue and certificate of readiness may not be filed until the completion of expert disclosure and expert disclosure provided after these dates without good cause will be precluded from use at trial.

While we advise that the rule be adopted across the Commercial Division, we recognize that certain caveats may be desirable. Like the monetary thresholds of the Commercial Division,[101] this rule could be limited to actions in which the amount in controversy exceeds a certain threshold—such as $250,000.

B. Two Proposed Implementations

1. Commercial Division Uniform Rule

We recommend that the Chief Administrative Judge promulgate the proposed rule and believe that a Commercial Division Uniform Rule would provide the consistency and predictability that would be beneficial to commercial practice. The Chief Administrative Judge has the authority to promulgate rules for the Commercial Division.[102] The rules may impose additional or specific procedural requirements when the CPLR is silent on a certain issue,[103] but any such rule must be construed consistently with the CPLR.[104] Similar to the rules promulgated regarding expert disclosure in matrimonial actions,[105] the Chief Administrative Judge should promulgate the proposed rule for the Commercial Division. Commercial actions, similar to matrimonial actions, encompass a limited category of actions requiring specialized procedures to address their unique nature.

2. Individual Practices or Local Court Rule

In the alternative, we propose that the individual Commercial Division justices exercise their authority and promulgate the proposed rule. As described above, individual courts have already begun to provide rules for expert disclosure.[106] The New York Constitution expressly states that it does not prohibit individual courts from adopting rules that are "consistent with the general practice and procedure as provided by statute or general rules."[107] The NYCRR also authorizes the practice, stating that "local court rules, not inconsistent with law [including the CPLR[108]] or with the rules contained in Part 202," can be adopted so long as they comply with part 9 of the Rules of the Chief Judge.[109] In addition to the judiciary's delegated power to enact formal procedural rules, it is well accepted that courts also possess inherent authority "to do that which is necessary to ensure the integrity of the proceedings over which they preside."[110] Courts are authorized to promulgate rules on a certain issues pursuant to inherent authority when applicable constitutions, existing statutes, and binding precedent are silent on the issue.[111]

VII. The Proposal Is Consistent With the CPLR

The CPLR governs the procedure "…in civil judicial proceedings in all courts of the state and before all judges, except where the procedure is regulated by inconsistent statute."[112] Courts of general jurisdiction cannot supersede the CPLR.[113] However, rules that supplement the CPLR are permissible.

Courts have not yet squarely dealt with how expert disclosure in commercial cases is limited by Section 3101(d)(1). Given the important policy considerations set forth in this report, we believe that a supplemental rule tailored specifically to the needs of the Commercial Division can be reconciled with Section 3101(d)(1). As noted in Section IV.B., both court rules and practitioners have fashioned extensive expert disclosure rules in line with the needs of commercial cases and the appellate Division has provided the trial courts with a great deal of discretion when it comes to crafting appropriate expert disclosure rules and remedies.[114] Section 3101(d)(1)(i) and the appellate case law are silent as to what the appropriate "reasonabl[y] detail[ed]" expert disclosure would be in commercial cases, and the Chief Administrator or a local court may propose the standard reasonable detail for commercial cases. "CPLR § 3101(d)(1)(iii) provides the court general discretion to order further disclosure regarding expert testimony in any case"[115] and the appellate case law on "special circumstances" does not foreclose recognizing the unique set of cases arising in the Commercial Division as a "special circumstance."[116] Just as matrimonial actions are governed by expert disclosure rules particular to matrimonial practice, Commercial Division cases may tailor expert disclosure rules to their unique and specific needs. To that end, the proposed rule expressly provides that any party may object to enhanced expert disclosure and request a conference with the court if it believes that enhanced disclosure may not be warranted under the circumstances of an individual case.

Conclusion

The New York Commercial Division is a leader in reform and innovation. Unfortunately, the general expert disclosure rule set forth in Section 3101(d) was not designed with the Commercial Division in mind; in fact, it was drafted before New York even had created a Commercial Division. Moreover, Section 3101(d) was crafted at a time when experts were not such meaningful participants in commercial litigation. We respectfully submit that the enhanced expert disclosure rules are critical to ensure that the Commercial Division continues to promote efficiency, predictability, and reliability, and ameliorate the current situation in which practitioners in the Commercial Division face expert disclosure limitations that make litigating in New York substantially less desirable than bringing the same case to federal court

or Delaware. Accordingly, we believe that the proposed rule should be adopted as soon as practicable.

Endnotes

1. Robert L. Haig, Commercial Litigation in New York State Courts §1.8 (4b West's New York Practice Series, 2010).
2. *Jasopersaud v. Rho*, 572 N.Y.S.2d 700 (2nd Dep't 1991) (quoting Mem. of State Exec. Dept. in support of L. 1985, ch. 294, 1985 McKinney's Session Laws of N.Y., at 3019, 3025).
3. Report of the Office of Court Administration to the Chief Judge on the Commercial Division Focus Groups (July 2006), http://www.courts.state.ny.us/reports/comdirfocusgroupreport.pdf.
4. This is by no means an exhaustive review of cases addressing Section 3101(d). For those interested in a more expansive review of Section 3101(d), Robert L. Haig's *Commercial Litigation in New York State Courts* (West N.Y.Prac. Series, 2010) is an excellent resource.
5. Our research found four Commercial Division cases discussing these areas. *A&B Furniture, Inc. v. Pitrock Realty Corp*., 847 N.Y.S.2d 900 (Sup. Ct. Kings Co. 2007); *Maniscalco v. Hay*, Index No: 115646/09 (Sup. Ct. New York Co. 2010); *Mendelovitz v. Cohen*, 20 Misc. 3d 1146(A); 873 N.Y.S.2d 235 (Sup. Ct. Kings Co. 2008); *Sieger v Zak*, No. 19978/05, 2010 WL 4383416 (Sup. Ct. Nassau Co. 2010).
6. Although not expressly stated in CPLR 3101(d), the "reasonable detail" standard has also been applied to the substance prong. *See Parsons v. City of N.Y.*, 573 N.Y.S.2d 677 (1st Dep't 1993).
7. N.Y. CPLR § 3101(d)(1)(i). Once a request has been made under Section 3101(d)(1)(i), it is treated as a continuing request that requires supplemental updates.
8. *See Richards v. Herrick*, 738 N.Y.S.2d 470, 471 (4th Dep't 2002) (disclosing that a meteorologist would testify that weather conditions at "the time and location of the accident" is statutorily deficient).
9. *See id.*
10. *See Chapman v. State*, 593 N.Y.S.2d 104, 105 (3d Dep't 2002).
11. *Foley v. Am. Indep. Paper Mills Supply Co.*, 635 N.Y.S.2d 515, 515 (2d Dep't 1995).
12. See *Gagliardotto v. Huntington Hosp.*, 808 N.Y.S.2d 430, 431 (2d Dep't 2006); *Hageman v. Jacobson*, 608 N.Y.S.2d 180, 181 (1st Dep't 1994).
13. But see *Desert Storm Constr. Corp. v. SSSS Limited Corp.*, 18 A.D.3d 421, 422 (2d Dep't 2005) (holding that "trial court providently exercised its discretion in precluding the defendants' expert witness from testifying regarding a subject that was not included in the defendants' pretrial expert disclosure").
14. *See Shopsin v. Siben*, 773 N.Y.S.2d 697, 698 (2d Dep't 1991); *see also Ryan v. City of N.Y.*, 703 N.Y.S.2d 90, 91 (1st Dep't 2000); *see also Hansel v. Lamb*, 796, 684 N.Y.S.2d 20, 21 (3d Dep't 1999); *see also Peck v. Tired Iron Transp., Inc*., 620 N.Y.S.2d 199, 200 (4th Dep't 1994).
15. *See*, *e.g.*, *Gallo v. Linkow*, 679 N.Y.S.2d 377 (1st Dep't 1998); *Chapman*, 642 N.Y.S.2d at 976.
16. *Sieger v. Zak*, No. 19978/05, 2010 WL 4383416 (Sup. Ct. Nassau Co. 2010) (Bucaria, J.).
17. 220 A.D.2d 550, 632 N.Y.S.2d 805 (2d Dep't 1995) (a medical malpractice case).
18. 274 A.D.2d 782, 783, 711 N.Y.S.2d 225, 226–27 (3d Dep't 2000) (a negligence case involving a gas leak of an underground gas tank where at trial the expert disclosed a second leak and when challenged the court said this new information "merely constituted an explanation in support of the ultimate opinion that the contamination source was not defendant's fuel tank").
19. 256 A.D.2d 1073, 1074, 685 N.Y.S.2d 339, 341 (4th Dep't 1998).
20. 255 A.D.2d 113, 117, 679 N.Y.S.2d 377, 381 (1st Dep't 1998) (also inadvertent); *see also Law v. Moskowitz*, 279 A.D.2d 844, 846, 719 N.Y.S.2d 357, 359 (3d Dep't 2001).
21. *Gallo*, 255 A.D.2d at 117, 679 N.Y.S.2d at 381.
22. 294 A.D.2d 263, 264, 743 N.Y.S.2d 267, 268 (2d Dep't 2002).
23. *Id*; *see also Maldonado*, 256 A.D.2d at 1074, 685 N.Y.S.2d at 341 (expert disclosure was reasonably sufficient when it stated that the expert would testify that staff deviated from acceptable standards of care by failing "to monitor the [plaintiff] after removing him from the operating room," "failing to appreciate changes in [his] respiratory rate," and "failing to properly access, monitor, and respond to changes").
24. Further discovery from a trial expert pursuant to CPLR 3101(d)(1)(iii) may be obtained only upon a court order, after a party files a formal motion accompanied by affidavits showing "special circumstances," which affords the adversary an opportunity to oppose the relief or request restriction or protection concerning fees and expenses. *See* N.Y. CPLR § 3101(d)(1)(i), (iii).
25. *Dioguardi v. St. John's Riverside Hosp.*, 533 N.Y.S.2d 915, 916 (2nd Dep't 1988) *citing to Brady v. Ottaway Newspapers, Inc.*, 473 N.E.2d 1172, 1172-73 (NY. 1984).
26. *See Brooklyn Floor Maint. Co. v. Providence Wash. Ins. Co.*, 745 N.Y.S.2d 208, 210 (N.Y. App. Div. 2d Dep't 2002) (the requirement of "special circumstances" is "more than a nominal barrier to discovery"); *232 Broadway Corp. v. N.Y. Prop. Ins. Underwriting Ass'n*, 567 N.Y.S.2d 790, 790 (N.Y. App. Div. 2d Dep't 1991) ("A conclusory allegation that such discovery is necessary to fully prepare for litigation is insufficient.").
27. *Hallahan v. Ashland Chem.*, 654 N.Y.S.2d 443, 445 (N.Y. App. Div. 3d Dep't 1997); *232 Broadway Corp. v. N.Y. Prop. Ins. Underwiring Assn.*, 567 N.Y.S.2d 790, 790 (N.Y. App. Div. 2d Dep't 1991).
28. *See*, *e.g.*, *Hallahan*, 654 N.Y.S.2d at 445.
29. *Brooklyn Floor Maintenance*, 745 N.Y.S.2d at 210.
30. *Taft Partners Development Group v. Drizin*, 717 N.Y.S.2d 53, 54 (N.Y. App. Div. 1st Dep't 2000).
31. *Tedesco v. Dry-Vac Sales Inc.*, 611 N.Y.S.2d 321, 322 (3d Dep't 1994); *see also Hartford v. Black & Decker (U.S.) Inc.*, 634 N.Y.S.2d 294, 295 (4th Dep't 1995) (scope of expert depositions "limited strictly to the factual circumstances of the observations of the experts and the procedures performed by them. Inquiry into the experts' opinion is prohibited").
32. *See* N.Y. CPLR 3101(d)(1)(i).
33. *Id.*
34. Patrick M. Connors, *Case Law on CPLR 3101(d)(1)(I), Expert Disclosure Is in Shambles*, N.Y.L.J., Jan. 20, 2009, at 3.; *and compare What About the CPLR?* David Horowitz, NYSBA Journal, p. 20-23 (Jan. 2009), *with* Letter to the Editor in response from David Hamm (citing *CPLR 3101(d): Myth of the 'Missing' Time Limit*, N.Y.L.J., p.5 (Nov. 29, 2007)).
35. *See St. Hilaire v. White*, 759 N.Y.S.2d 74, 75 (1st Dep't 2003); *Rowan v. Cross Co. Ski & Skate Inc.*, 840 N.Y.S.2d 414, 415 (2d Dep't 2007); *Silverberg v. Cmty. General Hosp.*, 736 N.Y.S.2d 758, 760 (3d Dep't 2002); *C.P. Ward, Inc. v. Deloitte & Touche LLP*, 904 N.Y.S.2d 842, 844, (4th Dep't 2010); *Sieger v. Zak*, No: 33045U, 2010 WL 4383416 (Sup. Ct. Nassau Co. Oct. 19, 2010) (Bucaria, J.) (slip opinion); *A&B Furniture, Inc. v. Pitrock Realty Corp.*, 847 N.Y.S.2d 900 (Sup. Ct. Kings Co. 2007) (Demarest, J.) (court denied plaintiff's motion to preclude because plaintiff suffered no prejudice from late disclosure); *Mendelovitz v. Cohen*, 873 N.Y.S.2d 235 (Sup. Ct. Kings Co. 2008) (Demarest, J.) (court denied motion to strike note of issue and motion for summary judgment and granted leave to defendants to serve expert opinion to rebut plaintiff's claims).
36. See Patrick M. Connors, *Case Law on CPLR 3101(d)(1)(i), Expert Disclosure Is in Shambles*, N.Y.L.J., Jan. 20, 2009, at 3.

37. *See, e.g.*, 840 N.Y.S.2d at 415 (preclusion denied because "any potential prejudice to the plaintiffs could have been eliminated by an adjournment of the trial").

38. *Construction by Singletree Inc. v. Lowe*, 866 N.Y.S.2d 702, 704 (2d Dep't 2008).

39. *King v. Gregruss Management Corp.*, 870 N.Y.S.2d 103, 104 (2d Dep't 2008); *Gerardi v. Verizon N.Y.*, 888 N.Y.S.2d 136, 137 (2d Dep't 2009); *see also Wartski v. C.W. Post Campus of L.I. Univ.*, 882 N.Y.S.2d 192, 192 (2d Dep't 2009).

40. *Browne v. Smith*, 886 N.Y.S.2d 696, 697 (2d Dep't 2009); *Howard v. Kennedy*, 875 N.Y.S.2d 271, 272 (2d Dep't 2009); *see also Connors*, Patrick M., 7B McKinneys Civil Practice Law and Rules § 3101, C:3101:29A (2010 Supplemental Practice Commentaries).

41. Some trial courts within the Second Department, in an apparent attempt to reconcile the expert disclosure case law in the department, have set forth two different rules for expert when an expert will be precluded—one governing an expert opinion offered for the first time in response to a summary judgment motion and another where an expert opinion is identified for the first time at trial. See Lukasik v. Lukasik, 2009 N.Y. Misc. LEXIS 2371, 241 N.Y.L.J. 44 (Sup. Ct. Queens Co. 2009).

42. Report of the Advisory Committee on Civil Practice to the Chief Administrative Judge of the Courts of the State of New York, p. 61 (Jan. 2010).

43. See Patrick M. Connors, *Case Law on CPLR 3101(d)(1)(i), Expert Disclosure Is in Shambles*, N.Y.L.J., Jan. 20, 2009, at 3.

44. *See* Jonathan A. Judd & Andrew L. Weitz, *The Timing and the Traps of CPLR 3101(d) Expert Disclosure*, N.Y.L.J., Nov. 1, 2010, *see also* Connors, Patrick M., 7B *McKinneys Civil Practice Law and Rules § 3101*, C:3101:29A (2010 Supplemental Practice Commentaries).

45. *Compare What About the CPLR*, David Horowitz, NYSBA Journal, p. 20-23 (Jan. 2009), *with* Letter to the Editor in response from David Hamm (citing *CPLR 3101(d): Myth of the 'Missing' Time Limit*, N.Y.L.J., p. 5 (Nov. 29, 2007)).

46. *See* Jonathan A. Judd & Andrew L. Weitz, *The Timing and the Traps of CPLR 3101(d) Expert Disclosure*, 244 N.Y.L.J., Nov. 1 (2010).

47. Connors, Patrick M., 7B *McKinneys Civil Practice Law and Rules § 3101*, C:3101:29A (2009 Supplemental Practice Commentaries).

48. Robert Haig, 3 N.Y. Prac. Comm. Litif. In New York State Courts § 2.:5 (3rd ed. 2010) (henceforth "Haig"); *see also* Report of the Office of Court Administration to the Chief Judge on the Commercial Division Focus Groups (July 2006).

49. Haig at §§ 28.8-10.

50. *Id.* at § 28.11.

51. *Id.* at § 28.10.

52. *Id.* at § 28.10.

53. *See Constr. by Singletree Inc. v. Lowe*, 866 N.Y.S.2d 702, 704 (2d Dep't 2008); *King v. Gregruss Mgmt. Corp.*, 870 N.Y.S.2d 103, 104 (2d Dep't 2008); *Gerardi v. Verizon N.Y.*, 888 N.Y.S.2d 136, 136 (2d Dep't 2009); *Wartski v. C.W. Post Campus of L.I. Univ.*, 882 N.Y.S.2d 192, 192 (2d Dep't 2009).

54. While the *Singletree* decision indicates that an expert may be precluded if it is disclosed for the first time in response to a post-note of issue summary judgment motion, the current practice requires a showing of willfulness and prejudice for an eve of trial disclosure.

55. Haig § 1.5.

56. *Id.* at § 1.1.

57. *See* Report of the Office of Court Administration to the Chief Judge on the Commercial Division Focus Groups (July 2006).

58. Haig § 28.6 ("It is not uncommon, particularly in the Commercial Division of the New York County Supreme Court, for the parties to agree to conducting expert discovery in a fashion more akin to the federal model than to CPLR 3101(d)(1)(i)").

59. *Maniscalco v. Hay*, Index No: 115646/08 (Sup. Ct. New York Co. 2010) (Bransten, J.) (Commercial Division case in which the expert disclosure stipulation for expert depositions was enforced by the court).

60. Haig § 28.20.

61. This practice may or may not be applicable in the Second Department, as the Second Department has recently held that previously requested disclosure that is first revealed in a post-note of issue response to summary judgment may be precluded and that a trial court did not abuse its discretion by not precluding an expert affidavit not disclosed until the response to summary judgment. *Compare Singletree Inc.*, 866 N.Y.S.2d at 704 (2008) *with Browne*, 886 N.Y.S.2d at 697 (2009).

62. Haig § 28.6 ("By using a well-crafted trial subpoena [pursuant to N.Y. CPLR 2305], one may be able to obtain on the eve of trial the production of material and information that exceed the limitations of N.Y. CPLR 3101(d)(1), such as expert reports, on the grounds that the material is necessary for cross examination.").

63. Haig § 28.6, n. 12 (*citing Genevit Creations, Inc. v. Gueits Adams & Co.*, 760 N.Y.S.2d 323 (1st Dep't 2003) (subpoena properly quashed which was overly broad in its demands and which was served to obtain further discovery after certification of the completion of discovery)).

64. Commercial Division Justice Ramos Part 53 Practice Rule 21. *Available at* www.nycourts.gov/courts/comdiv/PDFs/Practices_in_Part 53.pdf.

65. *Id.*

66. County of Nassau Commercial Division Preliminary Conference Form; Part 202 Preliminary Conference Form. *Available at* www.nycourts.gov/COURTS/.../onondaga/supremecounty/Karalunas_PC_Stipulation_and_Order.pdf.

67. *Id.*

68. *Id.*

69. County of Suffolk Commercial Division: IAS Part 46 Preliminary Conference Form. *Available at* www.nycourts.gov/courts/comdiv/.../PreliminaryConferenceCommercial.pdf.

70. County of Westchester Preliminary Conference Order—Commercial Case. *Available at* www.nycourts.gov/courts/comdiv/PDFs/Scheinkman_order.pdf.

71. Individual Rules of the Honorable Charles D. Wood. *Available at* www.nycourts.gov/courts/9jd/.../JudgePartRules/Wood_PartRules_2_10.pdf.

72. The rules are not applicable to the Commercial Division. *See* New York County Supreme Court, Civil Branch, Rules of the Justices, page 21. *Available at* www.ny**court**s.gov/supctmanh/UNIFRLrev-2011-Mar%204.pdf.

73. *Id.*

74. Third Jud. Dist. Expert disclosure Rules (2011), *available at* http://www.nycourts.gov/courts/3jd/supreme/rules.shtml#expertdisclosure (the Third District's rules do not apply to the Commercial Division and trial courts are not obligated to abide by the timeline); *e.g.*, *Silverberg v. Cmty. Gen. Hosp.*, 736 N.Y.S.2d 758,759 (3d Dep't 2002); see C.P.L.R § 3101(d) (2009).

75. See New York Family Court Act § 115(b) (2006) (the Supreme Court has exclusive original jurisdiction over matrimonial actions that affect the status of a marriage).

76. 22 N.Y.C.R.R. § 202.16.

77. *Id.* at §§ 202.16(g)(1)-(2).

78. *Id.* at §§ 202.16(g)(2).

79. *Id.*; *see also* Westchester Supreme Court Matrimonial Part Operational Rules (2010), *available at* http://www.nycourts.gov/

courts/9jd/Matrimonial/matrimonialprotocolfinal.pdf ("In the event that the expert does not complete the assignment within the time set by the assigned Matrimonial Part Justice, the assigned Matrimonial Part Justice may disqualify the expert, may order a refund or return of any monies paid to the expert, may take the expert's failure to complete the assignment timely in deciding whether to appoint such expert to another matter.").

80. 22 N.Y.C.R.R. § 202.16(g)(2).

81. See Fed. R. Civ. P. 26(a)(2) (providing for work-product protection for all draft expert reports (and summary disclosures), including supplemental reports, "regardless of the form in which the draft is recorded," i.e., "whether written, electronic or otherwise"); *see also* Fed. R. Civ. P. Rule 26(b)(4)(C) (the rule provides work-product protection for communications between retaining counsel and the testifying experts required to provide Rule 26(a)(2)(B) reports, regardless of the form of the communications, "whether oral, written, electronic, or otherwise").

82. Fed. R. Civ. P. 26(a)(2).

83. *Id.*

84. Report of the Civil Rules Advisory Committee (June 15, 2009 revision) at 2.

85. Fed. R. Civ. P. 26(a)(2).

86. Fed. R. Civ. P. 26(b)(4)(A).

87. Del. Ch. R. 26(b)(4)(A).

88. Del. Ch. R. 26(b)(4)(A).

89. Del. Ch. R 26(b)(4)(A).

90. Del. Ch. R. 26(b)(4)(B).

91. Del. Ch. R. 33(b)(3).

92. Vaughn, James, T, Administrative Directive of the President Judge of the Superior Court of the State of Delaware, No. 2010-3, Complex Commercial Litigation Division (May 1, 2010). *Available at* www.lexisnexis.com/documents/237-20100428022711.pdf.

93. Vaughn, James, T, Administrative Directive of the President Judge of the Superior Court of the State of Delaware, No. 2010-3, Complex Commercial Litigation Division, Sample Case Management Order, Exhibit A.2 Protocol for Expert Discovery (May 1, 2010). *Available at* www.lexisnexis.com/documents/237-20100428022711.pdf.

94. Vaughn, James, T, Administrative Directive of the President Judge of the Superior Court of the State of Delaware, No. 2010-3, Complex Commercial Litigation Division, Sample Case Management Order, Exhibit A.2 Protocol for Expert Discovery (May 1, 2010). *Available at* www.lexisnexis.com/documents/237-20100428022711.pdf.

95. Haig § 1.7; *see* A Report to Chief Judge and Chief Administrative Judge, Electronic Discovery in the New York State Courts (Feb. 2010).

96. *Id.*

97. Report of the Office of Court Administration to the Chief Judge on the Commercial Division Focus Groups, p 18 (July 2006). *Available at* www.courts.state.ny.us/reports/ComDivFocusGroupReport.pdf.

98. Proposal in Reports of the Advisory Committee on Civil Practice to the Chief Administrative Judge of the Courts of the State of New York, (2010). *Available at* www.courts.state.ny.us/ip/.../2010-CivilPractice-ADV-Report.pdf.

99. The most significant arguments against this proposal will likely concern the time and expense added to the litigation process by expanding expert disclosure. There are unlikely to be many new costs since, for example, commercial litigants typically retain an expert early in the litigation and prepare expert reports regardless of whether they are to be disclosed. Any additional time spent preparing the disclosure will be outweighed by the increase in efficiency. *See supra* Section VI.

100. *See supra*, Section IV B.

101. 22 N.Y.C.R.R. § 202.70(a)(2010).

102. The authority of the Chief Administrative Judge to promulgate rules regulating practice is derived from Article VI, §§ 28, 30 of the New York Constitution and Judiciary Law §§ 211, 212(2)(d). *See* N.Y. CONST. art. VI, §§ 28, 30. *See also* N.Y. Jud. Law §§ 211, 212(2)(d) (McKinney 2011); 22 N.Y.C.R.R. § 202.70 (2011).

103. *See* WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE: CPLR, Intro.01(6)(a) (2nd Ed. 2005) ("The Uniform Rules for the New York State Trial Courts and the other court-specific rules provide a level of detail about practice in the courts that would be inappropriate in the CPLR and impracticable to frequent legislative action").

104. *See* N.Y. CPLR § 101; 22 N.Y.C.R.R. § 202.1(d).

105. *See* 22 N.Y.C.R.R. § 202.16(g).

106. CONNORS, PATRICK M., MCKINNEYS CIVIL PRACTICE LAW AND RULES § 3101, C:3101:29A (2010 Supplemental Practice Commentaries).

107. N.Y. CONST. art. VI, § 30.

108. Local rules must be construed consistently with the CPLR. *See* N.Y. CPLR 101.

109. 22 N.Y.C.R.R. § 202.1(c). Part 9 of the Rules of the Chief Judge simply address the ministerial filing and publication of local rules and regulations. *See* 22 N.Y.C.R.R. § 9.1.

110. *See Alvarez v. Snyder*, 702 N.Y.S.2d 5, 12–13 (1st Dep't 2000).

111. *Id.*

112. N.Y. CPLR § 101.

113. *See Ling Ling Yung v. Co. of Nassau*, 77 N.Y.2d 568, 571, 569 N.Y.S.2d 361, 362 (1991); *see also Sharratt v. Hickey*, 748 N.Y.S.2d 112, 113 (4th Dep't 2002).

114. *Compare Construction by Singletree Inc. v. Lowe*, 866 N.Y.S.2d 702, 704 (2d Dep't 2008); *Browne v. Smith*, 997, 886 N.Y.S.2d 696, 697 (2d Dep't 2009).

115. WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE: CPLR, 31-158 (2nd Ed. 2005); *see also Kavanagh v. Ogden Allied Maintenance Corp.*, 92 N.Y.2d 952 (4th Dep't 1998).

116. We have not found a case that has held that the complexity or nature of the case is insufficient to constitute a "special circumstance" that warrants further disclosure.

This report was prepared by the Committee on the Commercial Division which is co-chaired by Paul D. Sarkozi and Mitchell J. Katz.

Dealing with the Dodgy Debtor: The Art of Enforcing A Money Judgment Under Article 52 of the CPLR

By Rebecca Adams Hollis

So, you've won the case. What to do next? Notoriously, enforcing a money judgment can be as arduous, if not more so, than prosecuting an action and obtaining the judgment in the first place. In all too many instances the chance of voluntary payment by the defendant/judgment debtor after a judgment is obtained is slim to none.

The difficulty in collecting on a judgment may be the result of a stubborn defendant who hopes that, faced with continued stonewalling, the plaintiff will conclude that the prospect of enforcement is too daunting or expensive to pursue. Increasingly, in the context of the recent financial climate, the difficulty inherent in enforcing a money judgment may simply be symptomatic of an overleveraged debtor. In many such cases, the defendant's inability to repay a debt owed was what led to litigation in the first place.

Whatever the case may be, there are options available to the New York practitioner who, having obtained a money judgment, now faces the often discouraging task of actually collecting from the defendant. While some investigation may be required to determine the most appropriate strategy in this regard, some forethought and careful analysis of the facts and circumstances surrounding the particular case may make enforcing a money judgment through a New York court less cumbersome than it first appears to be.

This article explores recent case law which has expanded the reach of CPLR Article 52's judgment enforcement proceedings as well as that of pre-judgment mechanisms, and the alternative avenues and more creative options available to a judgment creditor taking steps to enforce a money judgment in New York.

The Expanding Reach of Article 52

In New York State, Article 52 of the New York Civil Practice Law and Rules (CPLR) governs the enforcement of money judgments and orders which direct the payment of money. Pursuant to this Article, a judgment creditor may file a post-judgment motion against the judgment debtor, or where the property sought is in the possession of a third party, commence a special proceeding against any garnishee (a third party in possession of the subject property), in order to compel turnover.[1] Because the Federal Rules of Civil Procedure provide for the application of state law with regard to post-judgment remedies, this procedural device is available in both New York State and Federal Courts. [2]

By commencing a special proceeding under Article 52, the judgment creditor can obtain a delivery order or turnover order from the court. A delivery order directs either the debtor or garnishee to deliver property in which the judgment debtor has an interest to the judgment creditor, or to convert it to money for payment of the debt.[3] A party's failure to comply with a turnover order is punishable as contempt of court.[4]

From the CPLR's inception in 1963, it largely was assumed that the enforcement of a money judgment pursuant to the operative provisions of the CPLR required the Court's jurisdiction over either the judgment debtor (*in personam* jurisdiction) or his or her property (*in rem* jurisdiction).[5] Two recent decisions handed down by the New York Court of Appeals have abrogated this assumption, interpreting the operative provisions of the CPLR much more broadly, and without an *in rem* requirement. As discussed below, more avenues are now available to judgment creditors enforcing a money judgment in New York State.

Koehler v. Bank of Bermuda Ltd: Broadening the Scope of Article 52

Prior to 2009, it was undisputed that a New York Court could order a judgment debtor over which it had jurisdiction to turn over any of his or her assets, whether or not they were located in New York State.[6] A Court also had the power to order a garnishee holding assets in which the debtor had an interest to turn them over, regardless of the Court's jurisdiction over the judgment debtor, provided the property itself was located within the state.[7]

Less clear, however, was whether a New York Court could properly order a person *other than* the *debtor* to turn over assets located *outside of the state*, if the Court did not have jurisdiction over the debtor himself. In last year's landmark decision of *Koehler v. Bank of Bermuda Ltd.*,[8] the New York Court of Appeals answered this dispositive jurisdictional question in the affirmative.

A. Background

The plaintiff in this seminal case was a Pennsylvania resident who in 1993 had obtained a Maryland judgment for $2 million against his former business partner, a citizen of Bermuda. Having been apprised of the fact that his former partner owned stock certificates which were held by the Bank of Bermuda, Koehler sought to enforce the Maryland judgment by registering that judgment with

the United States District Court for the Southern District of New York, where the Bank of Bermuda has a branch office, and thereafter commencing a turnover proceeding there.

The Southern District found in Koehler's favor, ordering the Bank of Bermuda to turn over the judgment debtor's stock certificates or money, located in Bermuda, to satisfy the money judgment.[9] The Bank appealed to the Second Circuit, arguing that because the Court lacked jurisdiction over the debtor himself, and because the debtor's property was held outside of New York State, the Court could not properly compel the turnover of these assets pursuant to Article 52. The Second Circuit, recognizing that the state's highest Court had not yet had an opportunity to address this particular issue, certified this question of New York State law to the New York Court of Appeals.[10]

B. The Court's Decision

In a decision which spurred great interest among the New York legal community, particularly in the context of advising clients on the protection of their assets, the Court of Appeals held that even where a New York Court lacks personal jurisdiction over the debtor and *in rem* jurisdiction as to his or her assets, a money judgment may be enforced in New York so long as the court has jurisdiction over the garnishee.[11] In essence, the Court determined that CPLR § 5225 does not have an *in rem* requirement, even where the Court lacks jurisdiction over the judgment debtor. The Court instead interpreted the statute broadly, authorizing a court to require a defendant to turn over out-of-state assets regardless of whether the defendant is the judgment debtor, or merely a garnishee.[12]

In effect, judgment creditors may now seek the recovery of out-of-state assets through a New York Court pursuant to CPLR 5225, by commencing a post-judgment proceeding against a garnishee or custodian of those assets, so long as there is any basis for personal jurisdiction over the garnishee in New York. In practical terms, this allows a New York court to order a bank over which it has personal jurisdiction to turn over money or other assets of a debtor, even if those assets are held by a subsidiary, branch or affiliate of the bank located outside of the state or country.[13]

Faced with a stubborn or elusive judgment debtor, it may prove far easier for a judgment creditor to enforce a judgment against a bank with ties to New York than to enforce the judgment against the debtor itself. If the creditor is aware that the debtor has an account or safe deposit box with an entity that has a New York presence, the creditor need only seek a turnover order against the bank in New York. This order will charge the bank with the responsibility of locating the debtor's assets and turning them over, no matter where the assets are physically located.

While the potential for negative consequences as to banks with branch offices in New York and their customers has been recognized by New York practitioners, it cannot be disputed that from the perspective of judgment creditors and their attorneys, this outcome is a boon.[14]

Hotel 71 Mezz Lender LLC:[15] Further Extending the Creditor's Reach

At the time that *Koehler* was decided, it was still generally assumed that to obtain a pre-judgment attachment order against a debtor's property pursuant to Article 62 of the CPLR, a mechanism by which a creditor can obtain a security interest in the debtor's property leading up to a final judgment, *in rem* jurisdiction by the issuing court was required.[16] In February of this year, the New York Court of Appeals, citing to *Koehler*, abrogated that assumption as well.

In *Hotel 71 Mezz Lender LLC*, the Court clarified that just as attachment of a debtor's property located inside New York may be used to confer *quasi in rem* jurisdiction over a nondomiciliary, personal jurisdiction over a defendant confers upon the court jurisdiction over the individual's tangible or intangible property for the purposes of an Article 62 attachment, "even if the situs of the property is outside New York."[17] Based on this reasoning, the Court held that the lower court had authority to order pre-judgment attachment of property controlled by the defendant, even though the property consisted of ownership interests in out-of-state business entities, based on the fact that the court had personal jurisdiction over the defendant.[18] The Court clarified that in contrast to a situation where attachment of in-state property was used to acquire *in rem* jurisdiction over the defendant, here the attachment mechanism served a security function.

In the wake of *Koehler* and its progeny, creditors now have the option of reaching and attaching the out-of-state assets of a debtor as security, even prior to obtaining a final money judgment, so long as the court has a basis for personal jurisdiction over the debtor. This mechanism is a good option for any creditor concerned that a debtor will assign or transfer his or her tangible or intangible property, in an attempt to place it out of reach of the creditor when the final judgment is obtained. Especially in light of this broader interpretation of Article 62, obtaining pre-judgment attachment may well pre-empt later problems with enforcing the final judgment.

UCC Article 9: The Prospect of Successor Liability

Another scenario which all too often arises in non-payment cases involving corporate debtors is the prospect

of enforcing a money judgment against a now-insolvent corporation or limited liability company. In many such cases, before a final judgment can be obtained or enforced, the defendant business has been sold off in an Article 9 foreclosure sale.

Through this procedure, the debtor submits to voluntary repossession of the debtor's assets by the secured lender, followed by an oftentimes contemporaneous resale of the assets to a newly formed corporation under the auspices of Article 9 of the Uniform Commercial Code (UCC). Increasingly, this device is being used to stabilize financially precarious corporations while avoiding the interruption of business operations, because in most states it can be accomplished without the involvement of the court. Depending on the facts surrounding the sale and the extent to which the old officers or owners are involved in the newly formed corporation, such a scenario may altogether preclude collection of the amounts owed. Courts throughout the country increasingly have held, however, that Article 9 transactions do not, as a matter of law, preclude successor liability.[19] Although discussions of successor liability are more often within the context of words of advice and warning to potential purchaser of assets, the doctrine nevertheless provides an interesting avenue for the judgment creditor, where the original defendant has become insolvent. While a claim of successor liability must still be proven, commencing an action against the successor corporation of the original defendant has become an increasingly viable option for judgment creditors with an otherwise "paper" judgment.

While New York courts agree that a successor corporation or limited liability company normally will not be liable for the debts and liabilities of its predecessor, marked exceptions to this rule apply for the purpose of preventing inequity. The exceptions recognized by New York courts include when: (1) the acquiring corporation expressly or impliedly assumed the predecessor's tort liability, (2) there was a consolidation or merger of seller and purchaser (*de facto* merger), (3) the purchasing corporation is a mere continuation of the selling corporation, or (4) the transaction was entered into fraudulently to escape debt obligations.[20]

A. Express or Implied Assumption of Debts and Obligations

Successor corporations may be held liable for the debts of their predecessors where they expressly, or impliedly, agree to take on these obligations. Oftentimes, mere examination of the asset-transfer agreement, obtained through the discovery mechanisms described later in this Article, will be enough to determine whether this exception applies.[21] If in the agreement, the purchasing corporation expressly agrees to assume the debts and obligations of its predecessor, it will be held liable for a money judgment obtained against the corporation which it purchased.

Less clear is a situation where the assumption of debts and obligations by the purchaser was not express, but where the purchasing corporation voluntarily pays some of the debts of its predecessor. Generally, to determine whether an implied assumption of liabilities has occurred, an analysis of the surrounding facts is necessary to determine whether the acquiring corporation has manifested its intent to pay the debts of the seller. It should be noted that the fact that a buying corporation has paid certain debts of the selling corporation on a voluntary basis is not, standing alone, grounds to find an implied assumption of liability. Such determinations are made on a case-by-case basis.

B. The De Facto Merger Doctrine[22]

Successor corporations also may be held liable for the debts and liabilities of their predecessor where a court finds that a *de facto* merger of the two corporations has taken place. A *de facto* merger exists where a transaction, although not a formal merger, is in substance "a consolidation or merger of seller and purchaser."[23] New York courts consider the following factors when determining whether a purchase of assets was in fact a *de facto* merger: (1) continuity of ownership; (2) cessation of ordinary business operations and the dissolution of the selling corporation as soon as possible after the transaction; (3) the buyer's assumption of liability necessary for the uninterrupted continuation of the seller's business; and (4) continuity of management, personnel, physical location, assets and general business operations.[24]

New York courts have consistently held that the continuity of ownership factor, as evidenced by a stock for assets transfer, must be present for this exception to apply.[25] As to the other three factors, New York courts have performed more of a balancing test. In short, the finding of a *de facto* merger in New York does not necessarily require the presence of all four factors, so long as continuity of ownership is present.

C. The Mere Continuation Exception

New York courts have applied a "mere continuation" exception to successor liability within the context of an assets purchase, where the owners and directors of one corporation essentially dissolve it and form another in order to continue its business operations while alleviating the need to sell the former corporation's debts and liabilities. "Mere continuation" is so similar to the *de facto* merger exception that some courts consider them to be a single exception.[26]

In determining whether the purchasing corporation is a mere continuation of the selling corporation, courts look to several factors, including: (1) continuity of ownership,

(2) cessation of ordinary business by the predecessor, (3) the successor's assumption of liabilities ordinarily necessary for the continuation of the predecessor's business, and (4) the continuity of management, personnel, physical location, assets, and general business operations.[27] Similar to the *de facto* merger doctrine, New York courts have consistently held that continuity of ownership is indispensable to the application of this exception, but apply a balancing test as to all other factors.

In other states, such as Connecticut and Michigan, continuity of ownership is not dispositive of successor liability, so long as some of the other relevant factors are proven.[28] If continuity of ownership is lacking in a particular instance, it may be worth researching how the successor liability doctrine applies in other states with a connection to the corporation or transaction at issue. In many instances, enforcing the judgment in another state may also be a viable option.

D. Fraudulent Transfer

A fraudulent transfer of assets will be deemed to exist for the purposes of successor liability where the consideration paid for the assets transferred to a newly formed corporation did not constitute the fair value of those assets. Simply put, this exception seeks to prevent corporations from transferring assets for the express purpose of avoiding debts and evading creditors. Although New York courts have held successors liable in the context of fraudulent conveyances designed to evade tort liability,[29] there is scant New York case law applying this exception in isolation, in the context of the evasion of debts. Courts have considered a fraudulent transfer, however, as an additional factor which supports the determination that the mere continuation or *de facto* merger exceptions should apply.[30]

Post-Judgment Discovery

While the imposition of successor liability would first require the judgment creditor to commence a separate proceeding against the newly formed corporation to prove the above-described elements of his or her claim, this process may be assisted by first undertaking the broad disclosure allowed pursuant to CPLR 5223. This Section provides that at any time before a judgment is satisfied, "the judgment creditor may compel disclosure of all matter relevant to the satisfaction of the judgment, by serving upon any person a subpoena…."[31] First acquiring pertinent information from the debtor may provide the judgment creditor with the facts necessary to establish his or her claims in a summary proceeding against the purchasing corporation. And in a simple enforcement proceeding, such a device will allow the creditor to determine how best to pursue the debtor's assets.

Conclusion

Recovering on a money judgment may require some determination, investigation and creativity on the part of the judgment creditor's attorney. In New York, several options and devices are available when the time comes to enforce. Who to enforce against, or how, certainly involves some amount of strategy, and forethought in this regard may make the difference between a more expedient recovery on the judgment and a good deal of frustration. Happily, courts, including those in New York, have become increasingly sympathetic to the plight of the judgment creditor.

Endnotes

1. *See* CPLR 5225 (1997).
2. *See* Fed. R. Civ. P. 69(a)(1).
3. CPLR 5225(b)(1997). Specifically, the provision states that as to money or other personal property in which the judgment debtor has an interest, "the court shall require such person to pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor" and if that amount is insufficient, "to deliver any other personal property…to a designated sheriff."
4. *See* CPLR 5210 (1997) ("Every court in which a special proceeding to enforce a money judgment may be commenced, shall **have** power to punish a contempt of court committed with respect to an enforcement procedure.").
5. *See, e.g., Kohler v. Bank of Bermuda, Ltd.*, 2005 WL 551115, at *7 (S.D.N.Y. 2005) (stating "[C]laims against BBL would nevertheless fail for the reason that this Court has no in rem juridiction….").
6. *See, e.g., Miller v. Doniger*, 814 N.Y.S.2d 141, 141 (2006).
7. *See Gryphon Domestic VI, LLC v. APP Intern Finance Co. B.V.*, 836 N.Y.S.2d 4, 5 (2007).
8. *Koehler v. Bank of Bermuda Ltd.*, 12 N.Y.3d 533, N.Y.S.2d 763 (2009).
9. No. M18-302 (CSH), 2005 U.S. Dist. LEXIS 3760, at *21 (S.D.N.Y. 2005).
10. *Koehler v. Bank of Bermuda*, 544 F.3d 78, 85-86 (2d Cir. 2008).
11. *See id.*
12. *See id.* at 86.
13. *See id.*
14. For discussions regarding the potential repercussions of *Kohler, see* George Hritz, Nowhere to hide, THE BRIEF, November 2009, at 12 ("New York Courts may now be able to access judgment debtors' assets anywhere in the world as long as they are held in a bank that also has a branch in New York."); Daniel L. Brown & Elizabeth M. Rotenberg-Schwartz, Judgment Secured—Now What?, 242 NEW YORK LAW JOURNAL 1 (July 20, 2009).
15. *Hotel 71 v. Mezz Lender LLC*, 14 N.Y.3d 303, 312, 900 N.Y.S.2d 698 (2010) (holding that a New York court with personal jurisdiction over a nondomiciliary present in New York has jurisdiction over that individual's tangible or intangible property for purposes of attachment, even when the situs of the property is outside of New York).
16. *Hotel 71 Mezz Lender LLC v. Falor*, 58 A.D.3d 270, 273, 869 N.Y.S.2d 61, 63 (1st Dep't 2008), *citing National Broadway v. Sampson*, 179 N.Y. 213, 222, 71 N.E. 766. 768 (1904).
17. *Hotel 71 v. Mezz Lender LLC*, 14 N.Y.3d 303, 312, 900 N.Y.S.2d 698 (2010).
18. *Id.* at 307.

19. *Ed Peters Jewelry Co. Inc. v. C & J Jewelry Co. Inc.*, 124 F.3d 252, 267 (1st Cir. 1997) ("[E]xisting case law overwhelmingly confirms that an intervening foreclosure sale affords an acquiring corporation no automatic exemption from successor liability."); *EEOC v. SWP, Inc.*, 153 F. Supp. 2d 911, 924 (N.D. Ind. 2001) ("The mere fact that the transfer of assets involved foreclosure on a security interest will not insulate a successor corporation from liability where other facts point to continuation."); *Glynwed, Inc. v. Plastimatic, Inc.*, 869 F. Supp. 265, 275 (D.N.J. 1994) (holding that purchase of assets at a secured party sale does not preclude a finding of successor liability); *Cont'l Ins. Co. v. Schneider Inc.*, 810 A.2d 127, 133 (Pa. Super. Ct. 2002) ("[W]e hold that a sale pursuant to Section 9-504 of the UCC does not, as a matter of law, preclude a creditor's claim against the purchaser based upon successor liability.").

20. *Fitzgerald v. Fahnestock & Co.*, 286 A.D.2d 573, 575, 730 N.Y.S.2d 70 (2001).

21. *See Desclafani v. Pave-Mark Corp.*, No. 07 Civ. 4639(HBP), 2008 U.S. Dist. Lexis 64672, at *15 (S.D.N.Y. 2008).

22. As noted by the Second Circuit in *Cargo Partner*, "[s]ome courts have observed that the mere-continuation and de-facto-merger doctrines are so similar that they may be considered a single exception." *Cargo Partner AG v. Albatrans, Inc.*, 352 F.3d 45 n.3 (2nd Cir. 2003).

23. *Schumacher v. Richards Shear Co.*, 59 N.Y.2d 239, 245, 464 N.Y.S.2d 437, 440 (1983).

24. *See Fitzgerald*, 286 A.D.2d 573, 574, *citing Sweatland v. Park Corp.*, 181 A.D.2d 243, 245-246, 587 N.Y.S.2d 54, 56 (1st Dep't 1992).

25. *Cargo Partner AG v. Albatrans Inc.*, 352 F.3d 41 (2d Cir. 2004) (applying New York law).

26. *E.g., Nat'l Gypsum Co. v. Cont'l Brands Corp.*, 895 F.Supp. 328, 336 (D.Mass. 1995); *Glynwed, Inc. v. Plastimatic, Inc.*, 869 F.Supp. 265, 275 (D.N.J. 1994); *see also Lumbard v. Maglia, Inc.*, 621 F.Supp. 1529, 1535 (S.D.N.Y. 1985).

27. *See Miller v. Forge Mench P'ship, Ltd.*, No. 4314, 2005 WL 267551, at *7-14 (S.D.N.Y. 2005).

28. *See Mavel v. Scan-Optics, Inc.*, 509 F.Supp.2d 183, 188 (D. Conn. 2007) (quoting *Bowen Eng'g v. Estate of Reeve*, 799 F.Supp. 467, 487-88(D.N.J 1992); *Turner v. Bituminous Cas. Co.*, 244 N.W.2d 873, 883 (Mich. 1976).

29. *See, e.g., American Standard Inc. v. Oakfabco Inc.*, 14 N.Y.3d 399, 901 N.Y.S.2d 572 (2010) (holding that the language of the parties' agreement shows that the buyer of a business assumed the seller's liabilities for tort claims based on items sold before the business was acquired, where the tort claimants were not injured until after the acquisition).

30. *See* George W. Kuney, *Successor Liability in New York*, 79-SEP N.Y. St. B.J. 22, 22–27 (2007).

31. CPLR 5223 (1997).

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The Supreme Court's Proximate Cause Analysis Under RICO: A Distinction Between Direct and Foreseeable Harm

By Michael C. Rakower

Proximate cause is rarely something that can be decided at the motion to dismiss stage. However, in the context of civil claims under the Racketeering Influenced Corrupt Organizations Act ("RICO"), the Supreme Court has issued rulings over the last several years that alter the traditional proximate cause inquiry, thereby limiting the scope of actionable conduct. The Court's decision in *Hemi Group, LLC v. City of New York*[1] ("*Hemi Group*"), reflects the evolution of its analysis as well as dissension among the Justices over the extent to which the scope of proximate cause in a civil RICO action should be constricted. In *Hemi Group*, a plurality formed by Chief Justice Roberts and Justices Scalia, Thomas and Alito drew stark contrast between two concepts of tort law that are ordinarily considered to be interrelated: directness and foreseeability of harm.[2] Dissenting, Justices Breyer, Stevens and Kennedy opposed the Court's treatment of foreseeability as it relates to RICO claims.[3] Justice Ginsburg wrote a concurring opinion in which she distanced herself from the Court's proximate cause analysis,[4] and Justice Sotomayor recused herself after having sat on a panel at the Second Circuit whose judgment led to the High Court's review and reversal.[5]

The following article reviews Supreme Court precedent to provide the reader with an understanding of the basis for the Justices' opposing analyses of RICO's proximate cause requirement. The article further examines two opinions from district courts applying *Hemi Group* in contradictory ways and shows why the dissent's view may live to see another day.

I. The Plurality's Reliance on Precedent to Enforce Hemi Group's Direct Harm Requirement

In *Hemi Group*, an online purveyor of cigarettes from New Mexico sold cigarettes to New York City (the "City") smokers without charging any use taxes on the sale, notwithstanding the fact that the City charged a per pack tax of $1.50 and New York State (the "State") charged a tax of $2.75 per pack.[6] Although New York required in-state sellers to charge, collect, and remit both the City's and State's cigarette taxes, the Commerce Clause barred any measure designed to compel an out-of-state seller to collect cigarette taxes.[7] Despite this, the Jenkins Act, a federal law, facilitated state tax collection efforts by requiring foreign vendors to provide each state with customer information related to cigarettes they sold to residents.[8] Armed with such information, local officials could attempt to collect taxes due by demanding payment from resident cigarette buyers.[9] The City possessed an information-sharing agreement with the State designed to maximize recovery of cigarette taxes.[10] When Hemi Group, LLC and Kai Gachupin (collectively, "Hemi") failed to provide New York State with purchaser information required by the Jenkins Act, the City seized upon this omission by bringing a RICO claim against Hemi.[11] The City alleged that Hemi's Jenkins Act violations constituted violations of mail and wire fraud, which led to the City's loss of tens, if not hundreds, of millions of dollars in tax revenue.[12] When the case was before the Second Circuit, Judge Straub was joined by then-Circuit Judge Sotomayor in holding that the City had stated a valid RICO claim.[13] Judge Winter, in a prescient dissent, concluded that the City had not met RICO's proximate cause requirement because the pleaded mail and wire fraud violations could not have been the proximate cause of the City's claimed injury.[14]

RICO provides a private cause of action for an injury in business or property "by reason of" a RICO violation.[15] The Supreme Court's review in *Hemi Group* turned on the meaning of the phrase "by reason of" as it relates to proximate cause. Chief Justice Roberts, who wrote the opinion for a plurality of the Court, framed the Court's analysis by instructing that proximate cause under RICO must be evaluated in light of its "common-law foundations."[16] The opinion looked to *Holmes v. Securities Investor Protection Corporation*[17] ("*Holmes*"), and *Anza v. Ideal Steel Supply Corp*[18] ("*Anza*"), for guidance.

Holmes concerned a RICO action brought by the Securities Investor Protection Corporation ("SIPC") against alleged stock manipulators.[19] When the defendants' stock manipulation scheme was discovered, SIPC alleged, stock prices collapsed and two broker-dealers were unable to meet their obligations to customers.[20] SIPC, as an insurer of customer accounts, was obliged to pay those customers approximately $13 million in reimbursement for lost funds.[21] As a consequence, SIPC sought to hold the defendants, alleged stock manipulators, liable under RICO for its reimbursement payments to customers.[22] Unfortunately for SIPC, the Court declared that a RICO claim requires "'some direct relation between the injury asserted and the injurious conduct alleged.'"[23] Consequently, the Court held, the conspiracy alleged by SIPC directly harmed broker-dealers, not SIPC, and SIPC's injury therefore was a contingent result of that harm for which RICO did not provide a remedy.[24]

Comparing the facts alleged in *Hemi Group* to those alleged in *Holmes*, the Court concluded that the damages

theory pleaded in *Hemi* Group was "far more attenuated" than the one rejected in *Holmes*.[25] It summarized the City's theory as follows:

> According to the City, Hemi committed fraud by selling cigarettes to city residents and failing to submit the required customer information to the State. Without the reports from Hemi, the State could not pass on the information to the City, even if it had been so inclined. Some of the customers legally obligated to pay the cigarette tax to the City failed to do so. Because the City did not receive the customer information, the City could not determine which customers had failed to pay the tax. The City thus could not pursue those customers for payment. The City thereby was injured in the amount of the portion of back taxes that were never collected.[26]

As depicted in this excerpt, the Court viewed the City's harm as being more than one step removed from the conduct.[27]

Having set the analytical stage with its review of *Holmes'* direct harm framework, the Court then turned to *Anza* to discuss its application of the direct harm requirement in that case.[28] In *Anza*, the plaintiff, a New York State hardware store, alleged that its competitor neglected to charge sales tax, enabling the competitor to charge lower prices and gain market share.[29] Backed by *Holmes*, the Court held that New York was the direct victim because the immediate consequence of the defendant's alleged scheme was to deny the State its tax revenue.[30] The Court perceived the cause of the plaintiff's alleged injury to be "'a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State).'"[31]

As in *Anza*, the plurality's opinion in *Hemi Group* found a disconnect between the conduct alleged and the pleaded harm. In *Hemi Group*, Justice Roberts wrote that "the conduct directly responsible for the City's harm was the customers' failure to pay their taxes. And the conduct constituting the alleged fraud was Hemi's failure to file Jenkins Act requests." *Id.* The following excerpt highlights the plurality's perception of a gulf between the harm pled and the conduct alleged:

> It bears remembering what this case is about. It is about the RICO liability of a company for lost taxes it had no obligation to collect, remit, or pay, which harmed a party to whom it owed no duty. It is about imposing such liability to substitute for or complement a governing body's uncertain ability or desire to collect taxes directly from those who owe them. And it is about the fact that the liability comes with treble damages and attorney's fees attached. This Court has interpreted RICO broadly, consistent with its terms, but we have also held that its reach is limited by the "requirement of a direct causal connection" between the predicate wrong and the harm.[32] The City's injuries here were not caused directly by the alleged fraud, and thus were not caused "by reason of" it. The City, therefore, has no RICO claim.[33]

II. The Dissent's Attempt to Revive a Foreseeability Standard

In contrast to the majority's "directness of relationship" test, the dissent in *Hemi Group* argued that RICO's proximate cause determination ought to be guided by a foreseeability standard. Relying on its legal conclusion that Hemi's intentional concealment of purchaser information constituted a misrepresentation that Hemi did not have customers in New York City,[34] the dissent concluded that Hemi intentionally enriched itself by harming the City.[35] Hence, the dissent concluded that Hemi proximately caused the City's alleged harm.[36] The dissent reasoned as follows:

> Hemi misrepresented the relevant facts *in order to* bring about New York City's relevant loss. It knew the loss would occur; it *intended the* loss to occur; one might even say it *desired* the loss to occur. It is difficult to find common-law cases denying liability for a wrongdoer's intended consequences, particularly where the consequences are also foreseeable.[37]

The dissent's analysis was powered by its opposition to the plurality's excision of foreseeability as a factor in the proximate cause inquiry. According to the dissent, a directness of harm standard has traditionally been used in tort law to *expand* the scope of liability beyond the sphere of foreseeability to reach those whose conduct directly caused unforeseeable harm.[38] In the dissent's view, the plurality misapplied a legal concept designed to expand proximate cause by utilizing it to limit liability.[39]

The dissent cited the Supreme Court's decision in *Bridge v. Phoenix Bond & Indem. Co.*,[40] ("*Bridge*"), in support of its position that foreseeability has an important place in RICO's proximate cause analysis. In *Bridge*, the High Court unanimously held that proximate cause was present notwithstanding the fact that the alleged RICO scheme involved two distinct parts. In that case, the Court

observed that the harm pled was a "foreseeable and natural consequence of [the defendants'] scheme."[41]

III. The Court's Prior Use of a Foreseeability Standard

Bridge concerned multiple bidders for municipal property who routinely submitted the lowest permissible bid, causing the municipality to establish a system whereby winners were selected on a rotational basis.[42] To preserve the integrity of the rotational system, the municipality required each bidder to provide a sworn statement certifying that it would submit only one bid, inclusive of any submissions by agents, employees and related entities.[43] One frequent bidder brought a RICO action against its competitor, claiming that the competitor provided false certifications when it made use of related entities to win more bids than its permissible share under the rotational system.[44] In furtherance of this purported scheme, the defendant bidder allegedly used the mails to send numerous notices required by state law to nonparties about the properties it had won at auction.[45] The plaintiff alleged that each of these notices, incident to the overall scheme, constituted mail fraud, and, collectively, showed a pattern of racketeering activity under RICO.[46]

Because the municipality allegedly received fraudulent sworn statements and harm was pled by a competing bidder, the Court considered whether a RICO claim predicated on mail fraud required "first-party" reliance (*i.e.*, reliance by the aggrieved party).[47] To the surprise of many practitioners, a unanimous court held that the plaintiff had pled a valid RICO claim based on the harm rendered to it (lost auctions) notwithstanding the fact that the predicate acts concerned the submission of false certifications to the municipality presiding over the auction.[48] Essentially, the Court perceived the two parts of the alleged scheme to be inextricably bound. This struck many as a divergence from *Holmes* and *Anza*, where the Court perceived the alleged schemes to involve two unrelated parts. Justice Thomas summarized the Court's view as follows:

> Nor is first-party reliance necessary to ensure that there is a sufficiently direct relationship between the defendant's wrongful conduct and the plaintiff's injury to satisfy the proximate-cause principles articulated in *Holmes* and *Anza*. Again, this is a case in point. Respondents' alleged injury—the loss of valuable liens—is the direct result of petitioners' fraud. It was a foreseeable and natural consequence of petitioners' scheme to obtain more liens for themselves that other bidders would obtain fewer liens. And here, unlike in *Holmes* and *Anza*, there are no independent factors that account for respondents' injury, there is no risk of duplicative recoveries by plaintiffs removed at different levels of injury from the violation, and no more immediate victim is better situated to sue. Indeed, both the District Court and the Court of Appeals concluded that respondents and other losing bidders were the *only* parties injured by petitioners' misrepresentations.[49]

A careful reading of this excerpt shows that the Court made use of the fact that the harm pled was foreseeable to support its conclusion that the harm was direct. Thus, just as the dissent in *Hemi Group* had described, the Court used foreseeability in *Bridge* to expand RICO liability to include within its scope the perpetrator of a two-part scheme whose conduct toward one entity led to harm against another.

IV. Proximate Cause Analysis After *Hemi Group*

In *Hope For Families & Community Service, Inc. v. Warren*[50] ("*Hope for Families*"), a district court in Alabama considered the viability of RICO claims arising from a dispute concerning the provision of licenses to operate charitable bingo establishments in Macon County, Georgia.

In 2003, the Alabama legislature authorized a constitutional amendment permitting charitable bingo in Macon County, and vested the county sheriff with responsibility for writing and enforcing regulations associated with the provision of bingo services.[51] The sheriff understood "charitable bingo" to refer to "electronic bingo," and the regulations he drafted concerned the provision of electronic bingo licenses to charities and operator's licenses to electronic bingo establishments. [52] He took to his task with verve, producing regulations within 31 days and granting an operator's license to "VictoryLand" within 13 days thereafter.[53] Electronic bingo proved profitable from the start, and VictoryLand's profits grew at a voracious pace.[54] VictoryLand's gross profits soared from approximately $408,481 in 2003 to approximately $125,860,684 in 2008. In 2004, envious of VictoryLand's profits, Lucky Palace, Inc. ("Lucky Palace") sought to obtain an operator's license from Macon County's sheriff so that it could compete with VictoryLand.[55] The sheriff subsequently entered rule changes that appeared to be designed to frustrate Lucky Palace's efforts, and, indeed, Lucky Palace could not persuade the sheriff to grant it an operator's license.[56] Similarly, charities that supported Lucky Palace could not succeed in securing bingo licenses for themselves.[57]

The sheriff, it turned out, did not draft and redraft the bingo licensing regulations himself.[58] Rather, he left such

work to his lawyer, who happened to be the son and law partner of VictoryLand's lawyer, and VictoryLand's lawyer happened to be a minority shareholder in VictoryLand.[59] Further, when faced with the daunting task of drafting the county's bingo regulations alone, the sheriff's lawyer accepted an offer by VictoryLand to make use of its lawyers to assist him in drafting the regulations.[60] In light of the seeming conflict arising from VictoryLand's involvement in drafting a regulatory scheme that effectively barred competition, Lucky Palace and certain unlicensed charities brought suit, seeking damages for, among other things, RICO violations premised upon allegations that VictoryLand corruptly influenced the enactment of Macon County's bingo licensing regulations.[61]

Examining the issue through the prism of *Holmes*, *Anza* and *Hemi Group*, the district court characterized the plaintiffs' complaint as having alleged two separate two-part schemes, each with the effect of improperly precluding the plaintiffs from participating in Macon County's lucrative charitable bingo trade.[62] In one scheme, VictoryLand and its owner purportedly defrauded the citizens of Macon County and the sheriff of their intangible right to receive honest services by ghostwriting bingo regulations favorable to VictoryLand and bribing the sheriff's lawyer to advise the sheriff to adopt those regulations.[63] The court held that, in connection with that alleged scheme, the citizens of Macon County and the sheriff were the direct victims of the alleged fraud.[64] In another scheme, the sheriff allegedly defrauded the citizens of Macon County of their intangible right to receive honest services by remaining willfully blind to the conflicts of interest arising from his lawyer's involvement and the involvement of VictoryLand's owner in the regulations-drafting process.[65] The court concluded that the victims of this alleged scheme were the citizens, who incurred damages in the form of lower quality products and services, fewer jobs and a less developed infrastructure.[66] Concerning the second alleged scheme, the court held that the sheriff was the direct victim of honest services fraud by his lawyer.[67]

The district court considered the implications of *Bridge*, which it characterized as standing for the proposition that a RICO claim predicated on mail fraud does not require a showing that the plaintiff relied on the misrepresentation giving rise to the fraud.[68] Nonetheless, the court held that "the conduct directly responsible for Plaintiffs' harm was the promulgation of Rules that had the effect of precluding Plaintiffs' entry into the Macon County electronic bingo market[, whereas [t]he] conduct constituting the alleged fraud was Defendants' failure to provide honest services to Macon County citizens and Sheriff Warren."[69] Hence, similar to *Holmes, Anza* and *Hemi Group*, the court held that proximate cause was lacking because the conduct causing the alleged harm was distinct from the conduct giving rise to the alleged fraud.[70] Accordingly, the Court ruled that Lucky Palace and its cohort charities lacked standing to pursue RICO claims against the alleged defrauders because the claimed injuries were collateral to the honest services schemes alleged.[71]

Taking a contrary position in a case of comparable facts, a district court in Pennsylvania held in *Clark v. Conahan*[72] that the distinctness between the conduct causing harm in an alleged two-part scheme and the conduct causing fraud was not so great as to prevent a finding of proximate cause under RICO. *Clark* concerned an alleged scheme, widely reported in the media, between certain juvenile court judges, a private attorney, juvenile probation staff, and the owner of a construction company, among others, to divert juvenile offenders to a privately owned detention facility in exchange for kickbacks.[73] The case included RICO claims brought by parents of a juvenile for damages arising from their payment of incarceration and probation fees to Luzerne County, Pennsylvania for their son.[74] Echoing *Hope for Families*, the *Clark* defendants argued that, because they were alleged to have committed honest services fraud, the direct victims of such fraud were not the plaintiffs but instead were the Commonwealth of Pennsylvania and the citizens of Luzerne County.[75]

After acknowledging RICO's direct harm requirement, the *Clark* court sidestepped a strict application of the directness of harm test by seizing upon the Supreme Court's statement in *Bridge*, itself an affirmation of prior statements by the Court, that proximate cause is a "'flexible concept that does not lend itself to a black-letter rule that will dictate the result in every case.'"[76] Given this flexibility, the *Clark* court discussed three underlying principles affecting a directness of harm analysis:

(1) difficulty in calculating the amount of a plaintiff's damages attributable to remote violations;

(2) avoiding the need to apportion damages amongst different "levels" of plaintiffs and to avoid multiple recoveries; and

(3) the general interest in deterrence is already served where other plaintiffs with more direct injuries may assert claims.[77]

Summarizing *Anza*, *Bridge* and *Hemi Group* with these factors in mind, the court compared the facts of those cases with the facts before it. The court held that "the underlying justifications for the proximate cause requirement do not compel a finding that [plaintiffs'] injuries were not proximately caused by Defendants' alleged RICO violations."[78] Distinguishing the facts in *Clark* from those in *Anza* and *Hemi Group*, the court noted that the injuries alleged in *Clark* were easily determinable, as the parents had pled a precise amount in

damages.[79] Because no other group had suffered the same economic harm as the plaintiff parents, the court saw no complication that could arise from a need to apportion damages.[80] Indeed, the public was not alleged to have been harmed economically; instead it was alleged to have lost its intangible right of honest services and therefore was not in a position to sue.[81] Accordingly, the court held that RICO's deterrent value would be furthered only if the parents' alleged injury was recognized as having been proximately caused by defendants' scheme.[82] Specifically, the court wrote, "In order to serve the deterrence goals articulated in the Supreme Court's proximate cause jurisprudence, it would be imprudent to hold that the only group whose injuries were proximately caused by honest services fraud is a group that suffered no tangible injury and is not in a position to bring suit."[83]

Conclusion

The plurality's opinion in *Hemi Group* seeks to close the door on RICO's proximate cause debate by purporting to serve as a cap on a string of cases that bar RICO liability for schemes other than those that directly harm a plaintiff, irrespective of whether the harm alleged was foreseeable. The dissent's opinion, however, highlights the fact that this debate continues to simmer amidst the Justices of our highest court.

Undoubtedly, some courts will interpret *Hemi Group* consistent with Alabama's district court in *Hope for Families* and apply a rigorous proximate cause analysis that will bar nearly all claims arising from a two-part scheme. But if the reasoning utilized in *Clark* gains traction, then the factors permitting exceptions to a rigid application of the direct harm approach could lead courts toward decisions that will swallow the rule that *Hemi Group*'s plurality sought to strengthen. This is not merely a theoretical possibility, given that the Court's jurisprudence includes language that invites debate. Indeed, *Clark* relied upon language in *Bridge* for permission to apply a more liberal proximate cause analysis.

Moreover, it is not yet absolutely certain that the *Hemi Group* dissenters—Justices Breyer, Stevens and Kennedy—have forever lost their argument that foreseeability should be used as a factor in the proximate cause analysis. Contrary to the plurality's interpretation of *Anza*, the dissenters in *Hemi Group* argue that *Anza* did not foreclose using foreseeability as a factor in the proximate cause analysis. The dissent's interpretation ought to be given a level of deference because Justice Kennedy wrote the *Anza* opinion. Indeed, the Court's unanimous decision in *Bridge*, which highlighted the foreseeability of the injury alleged to have been caused by the defendant, suggests that a majority of the Justices may not actually believe that a foreseeability test is without value. Justice Ginsburg, after all, joined the three *Hemi Group* dissenters in refusing to adopt the plurality's restrictive view of proximate cause.[84]

Thus, the spotlight may ultimately turn to Justice Sotomayor, who recused herself from *Hemi Group* after having joined Judge Straub in *Smokes-Spirits*, the progenitor of *Hemi Group*, at a time when she sat on the Second Circuit. Of course, it is possible that the reasoning laid out by the plurality in *Hemi Group* has altered Justice Sotomayor's perception of the proper boundaries of RICO's proximate cause analysis. Yet, in light of the fact that she was not persuaded by Judge Winter's dissent, it appears likely that Justice Sotomayor will continue to press a more expansive view of proximate cause than that which was adopted by the *Hemi Group*'s plurality unless and until a consensus on the Court soundly rejects her view.

Time will tell whether the Supreme Court will reinforce *Hemi Group* in a subsequent decision or whether *Anza* will be reinterpreted in a manner consistent with the dissent's view in that case. In the meantime, as evidenced by *Hope for Families* and *Clark*, the Court's prevailing view of RICO's proximate cause provides lower courts with latitude either to apply proximate cause doctrine rigidly or to utilize factors that would ameliorate this approach.

Endnotes

1. 130 S. Ct. 983 (2010).
2. *See id.*
3. *See id.* at 995-1002 (Breyer, J., dissenting).
4. *Id.* at 994-995 (Ginsburg, J., concurring).
5. *See City of New York v. Smokes-Spirits.com, Inc.*, 541 F.3d 425 (2d Cir. 2008).
6. *See Hemi Group*, 130 S. Ct. at 987, 990.
7. *Id.* at 987 (citing *Smokes-Spirits.com*, 541 F.3d at 432-33).
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* The RICO Act renders it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c) (2006). Hemi did not challenge the assertion that Jenkins Act violations constitute predicate offenses under RICO; the Supreme Court therefore assumed, without deciding, that they did. *Hemi Group*, 130 S. Ct. at 989.
13. *See generally City of New York v. Smokes-Spirits.com, Inc.*, 541 F.3d 425 (2d Cir. 2008).
14. *Id.* at 458-61 (Winter, J., dissenting).
15. 18 U.S.C. § 1964(c) (2006). Although the Second Circuit held in *Smokes-Spirits* that lost tax revenue constituted a type of injury recognized by RICO, the Supreme Court declined to rule on this issue when it held that proximate cause was lacking in the City's claim. *See Hemi Group*, 130 S. Ct. at 988.

16. *Hemi Group*, 130 S. Ct. at 989.
17. 503 U.S. 258 (1992).
18. 547 U.S. 451 (2006).
19. *Hemi Group*, 130 S. Ct. at 988 (citing *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992)).
20. *Id.* at 989.
21. *Id.*
22. *Id.*
23. *Id.* (quoting *Holmes*, 503 U.S. at 268).
24. *Id.* (citing *Holmes*, 503 U.S. at 271).
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* at 989-90.
29. *Id.*
30. *Id.* at 990 (citing *Anza*, 547 U.S. at 458).
31. *Id.* (quoting *Anza*, 547 U.S. at 458).
32. *Anza v. Ideal Supply Corp.*, 547 U.S. 5451, 460 (2006).
33. *Hemi Group, LLC v. City of New York*, 130 S. Ct. 983, 994 (2010).
34. *Id.*
35. *Id.* at 996-97 (Stevens, J., dissenting).
36. *Id.* at 995.
37. *Id.* at 997 (emphasis in original).
38. *Id.* at 998.
39. *Id.*
40. 553 U.S. 639 (2008).
41. *Hemi Group, LLC v. City of New York*, 130 S. Ct. 983, 1000 (2010) (dissenting opinion) (quoting in *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 638, 658 (2008)) (brackets inserted in Hemi Group).
42. *Bridge*, 553 U.S. at 643.
43. *Id.*
44. *Id.* at 644.
45. *Id.*
46. *Id.* at 647-648 (citing *Schmuck v. United States*, 489 U.S. 705, 712 (1989); 18 U.S.C. § 1962(c) (2006)).
47. *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 638, 646 (2008).
48. *Id.* at 648-650.
49. *Bridge*, 553 U.S. at 657-58 (emphasis in original).
50. 721 F. Supp 2d 1079 (M.D. Ala. 2010).
51. *Id.* at 1087.
52. *Id.*
53. *Id.* at 1086.
54. *Id.* at 1087.
55. *Id.* at 1086.
56. *Id.* at 1087.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.* at 1128-29.
63. *Id.* at 1129.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 1130.
69. *Id.* at 1131.
70. *Id.* (citing *Hemi Group*, 130 S. Ct. at 990).
71. *See generally id.* at 1122-34.
72. 737 F. Supp. 2d 239 (M.D.Pa. 2010).
73. *Id.* at 249-50.
74. *Id.* at 251.
75. *Id.* at 268.
76. *Id.* at 265 (quoting *Bridge*, 553 U.S. at 639).
77. *Id.* at 265 (citing *Holmes*, 503 U.S. at 269-70).
78. *Id.* at 267.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* at 267-68.
83. *Id.* at 268.
84. *Id.* at 995 ("Without subscribing to the broader range of the Court's proximate cause analysis, I join the Court's opinion to the extent it is consistent with the above-stated view, and I concur in the Court's judgment.") (Ginsburg, J., concurring).

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Is Your Clock Ticking? The (Non-)Interpretation of 28 U.S.C. 1367(d) by New York Courts

By David E. Miller

I. Introduction

It is axiomatic that the federal district courts are courts of limited original subject matter jurisdiction.[1] If you attended law school after 1990, you probably learned in Civil Procedure that a federal court with original subject matter jurisdiction over a civil matter also has supplemental jurisdiction over state law claims that are "so related to claims in the action within such original jurisdiction that they form part of the same controversy under Article III of the United States Constitution."[2] You may also recall that, having dismissed all claims over which it has original jurisdiction, the federal court may decline to exercise supplemental jurisdiction over such state law claims by dismissing those claims as well.[3] What you don't know—and what New York State's courts have not determined—is *how much time* you have pursuant to 28 U.S.C. § 1367(d) ("Section 1367(d)") to bring a state action after a federal court dismisses a client's state law claims on that basis. More specifically, it is unclear whether the statute of limitations is tolled for a six-month period following dismissal of the federal action or whether the statute is tolled during the pendency of the action *and* for an additional six months following its dismissal. Assuming the statute of limitations on a state claim runs during the pendency of a federal action, and you fail to file a new complaint in state court within six months, your state law claims will be time-barred and you may well find yourself confronted with a claim for malpractice. This article examines the two prevailing—and competing—interpretations of Section 1367(d) that have gained traction in other states' courts.

Section 1367(d) provides as follows:

> The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.[4]

As a preliminary matter, it should be noted that the word "pending" in Section 1367(d) means the period of time from initial filing of a complaint through appeal to the court of appeals, but does not include the filing or consideration of a petition for writ of certiorari.[5]

II. New York Law Is Effectively Silent on the Interpretation of Section 1367(d)

Under New York law, "dismissal of…pendent State law claims in [a] Federal action because the Federal claims were unsubstantial *trigger*[s] the protection of CPLR [§] 205(a), thereby affording the petitioner six months within which to bring another action in State court."[6] Thus, on its face, Section 1367(d) appears to state that the total amount of time during which the statute of limitations "shall" be tolled in a New York court consists of the entire period during which the claim was pending in federal court *plus* this additional six-month period.[7]

Notwithstanding that language, the concurrence in *Goldstein v. New York State Urban Dev. Corp.* ("*Goldstein*") suggests that state law claims are time-barred if they are not brought in state court within the thirty-day time period *set* forth in 28 U.S.C. § 1367(d).[8] The *Goldstein* concurrence found that the six-month toll provided for in CPLR § 205(a) was unavailable to petitioners because a 30-day time limit in Eminent Domain Procedure Law § 207(a) constituted a condition precedent to suit, rendering CPLR § 205(a) inapplicable.[9] Specifically, Judge Read wrote:

> if 28 USC § 1367(d) tolls an Eminent Domain Procedure Law § 207(C)(1) claim asserted against [defendant], these petitioners would not be helped… because they did not commence this lawsuit *within 30 days* after the federal District Court dismissed their section 207(C)(1) claim.[10]

However, that interpretation of Section 1367(d) appears in a two-judge concurrence in a decision in which there is also a dissent.[11] As a *result*, that opinion has no precedential value.[12] *Goldstein* is the *only* reported case from a New York State court that discusses Section 1367(d) at any length. Thus, one must look to other state courts for guidance as to the proper interpretation of Section 1367(d).

III. Other State Courts' Conflicting Interpretations of Section 1367(d)

While some state courts have found that Section 1367(d) *suspends* any applicable state statute of limitations while a claim is "pending," others have held that it merely *extends* any expired statute of limitations by thirty days. Those in the "suspension" camp have stressed the following italicized language in Section 1367(d): "The period of limitations…*shall be* tolled while the claim is pending *and* for a period of 30 *days* after it is dismissed unless State law provides for a longer tolling period."[13] Their opponents argue that, notwithstanding this language, public policy is violated if plaintiffs are allowed to add the entire period of time during which their state law claims were pending before a federal

court onto the thirty-day (or, in the case of New York, six month) extension of any time remaining in which to file in state court. The split between the two interpretations is clearest in California, where two intermediate appellate courts of concurrent jurisdiction have reached opposing results.

A. The "Extension" Interpretation of Section 1367(d)

The courts which have endorsed the "extension" interpretation of Section 1367(d) include the highest court of Alabama and *intermediate* courts of appeal in California, New Jersey, Ohio and North Carolina.[14]

In *Kolani v. Gluska* ("*Kolani*"), The Office Place ("TOP"), a wholesale supplier of office products, sued Amitai Gluska ("Gluska"), a former employee, for violating the "covenant not to compete" found in a "Sales Representative Agreement" executed by both TOP and Gluska.[15] The complaint, which was filed in federal court on September 27, 1994, asserted eleven claims, including, among other things, violation of the Racketeering Influenced and Corrupt Organizations Act, breach of contract and fraud.[16] On June 20, 1996, the federal district court granted Gluska's motion for summary judgment on eight of the counts, and, declining to exercise supplemental jurisdiction over the remaining state law claims, dismissed those claims.[17] Seventy-eight days later, on September 6, 1996, TOP filed a state action reasserting verbatim three of those state law claims.[18] The trial court dismissed certain of those claims on the ground that they were untimely, and plaintiffs appealed.[19]

The California Court of Appeal for the Second District began its discussion by noting that the application of Section 1367(d) was a *matter* of first impression in California.[20] Nonetheless, that court made short work of appellants' argument that Section 1367(d) should be read to suspend an applicable statute of limitations throughout the pendency of a federal action:

> Appellants urge us to interpret [Section 1367(d)] to *exclude from the limitations computation the entire interval that their federal claims were pending*. Appellants filed their federal suit about nine months after the claims accrued, and thus, if their argument is accepted, were allowed *more than a year following dismissal of the federal claims to refile in state court*.
>
> This construction is unreasonable. Such a construction is not needed to avoid forfeitures, because 30 days is ample time for a diligent plaintiff to refile his claims and keep them alive. Further, such a construction does significant harm to the statute of limitations policy.
>
> * * * *
>
> [Section 1367[d]] does not allow plaintiff to "tack" onto the limitations period the full time during which his federal action was pending.[21]

In short, *Kolani* and its sister cases effectively nullify the phrase "while the claim is pending and" from Section 1367(d) on public *policy* grounds.

B. The "Suspension" Interpretation of Section 1367(d)

The courts which have embraced the "suspension" interpretation of Section 1367(d) include the highest courts of Maryland and *Minnesota* and intermediate appellate courts of California, Florida and Pennsylvania.[22] Those courts have stressed the following italicized language of Section 1367(d): "The period of limitations for any [state law] claim…shall be tolled *while* the claim is pending *and* for a period of thirty days after it is dismissed unless State law provides for a longer tolling period."[23]

A good example is *Bonifield v. County of Nevada.* ("*Bonifield*").[24] *Bonifield* concerned the disappearance and death of Kimberly Anne Saunders ("Saunders"), who became missing while traveling in Nevada County and whose body was found twenty-one days later.[25] On June 28, 1997, Saunders' mother, who was the executor of Saunders' estate, and Saunders' minor daughter filed a suit against Nevada County and others in United States District Court for the Eastern District of California, alleging federal claims for violations of Saunders' civil rights and state law claims for negligence and wrongful death.[26] On February 17, 2000, plaintiffs and defendants executed and filed a stipulation dismissing the federal action that contained an order of dismissal.[27] A clerk of the court entered the dismissal on February 17, 2000.[28] On July 12, 2000, Plaintiffs filed a state action against Nevada County and others, alleging the same state claims that they had alleged in the prior, federal action.[29] Nevada County demurred, arguing that, based on Section 1367(d), the state action was untimely because it had been filed more than thirty days after dismissal of the federal action.[30] The trial court sustained the demurrer, and plaintiffs appealed.[31]

Relying on the "plain meaning of the *statutory* language," the California Court of Appeal for the Third District expressly rejected *Kolani*, holding instead that

> To toll the statute of limitations period means to suspend the period, such that the days remaining begin to be counted after the tolling ceases. Therefore, by tolling the statute of limitations "while the claim is pending [in federal court] *and* for a period of 30 days after it is dismissed unless State law provides for a longer tolling period" (italics added), [S]ection 1367(d) operates at a minimum

> as follows: The days left in the statute of limitations period at the time the federal claim was filed begin to run after the tolling ceases, *i.e.*, on the 31st day after the federal claim is dismissed.
>
> The contrary holding in *Kolani* is unpersuasive, and we decline to follow it. In rejecting the reasoning of *Kolani* we make the following observation: The additional 30 days of tolling provided by [S]ection 1357(d) apparently are intended to address the need for a grace period following the dismissal of a federal action that was filed on or near the last day of the statute of limitations. The fact that the additional 30 days may not be necessary in cases where the federal action was filed early in the statute of limitations period does not, in the words of *Kolani* do "significant harm to the statute of limitations policy." By no stretch of the imagination can it be said that an additional 30 days unduly compromises the policy in favor of the prompt prosecution of legal claims.

In other words, *Bonifield* and its *brethren* read the words "while the claim is pending and" as inviolable on public policy or any other grounds.

IV. Conclusion

As explained above, there is no binding precedent in New York concerning the proper interpretation of Section 1367(d). If the "extension" interpretation discussed above applies in New York, then state law claims may *well* be time-barred unless they are filed within six months following any civil court appeal. If the "suspension" interpretation applies, then those same state law claims are likely to be timely. Unless and until someone is willing to risk litigating the issue, it will not be resolved for New York litigants. In sum, it is highly advisable to assume that the "extension" interpretation applies in New York state courts. Avoid risking a malpractice claim—get your state law claims filed within six months.

Endnotes

1. *See, e.g.*, 28 U.S.C. §§ 1331, 1332.
2. 28 U.S.C. § 1367(a).
3. 28 U.S.C. § 1367(c)(3).
4. Section 1367(d).
5. *Okoro v. City of Oakland*, 142 Cal. App. 4th 306, 311-12, 48 Cal. Rptr. 3d 260, 264 (Cal. Ct. App. 2006) (citing *Kendrick v. City of Eureka*, 82 Cal. App. 4th 364, 370, 98 Cal. Rptr. 4th 153, 157 (Cal. Ct. App. 2000)); *Lucas v. Muro Pharm., Inc.*, No. 944052, 1994 WL 878820, at *2 (Mass. Super. Dec. 2, 1994).
6. *Manshul Constr. Corp. v. New York City Sch. Constr. Auth.*, 192 A.D.2d 659, 660, 596 N.Y.S.2d 475, 477 (2d Dep't 1993). *See also Mulford v. Fitzpatrick*, 68 A.D.3d 634, 634-35, 892 N.Y.S.2d 81, 82 (1st Dep't 2009) (same).
7. *Cf. Cave v. E. Meadow Union Free Sch. Dist.*, 514 F.3d 240, 250 (2d Cir. 2008) (stating in dicta that dismissal of state law claims would not have any impact on the statute of limitations because, pursuant to Section 1367(d), "the limitations period is tolled *while the claims are pending* and for 30 days after they are dismissed.") (emphasis added).
8. *Goldstein*, 13 N.Y.3d 511, 543, 921 N.E.2d 164, 183, 893 N.Y.S.2d 472, 491 (2009) (Read, J., concurring).
9. *Id.*, 13 N.Y.3d at 540-41, 921 N.E.2d at 181-82, 893 N.Y.S.2d at 489-90 (Read, J., concurring).
10. *Id.*, 13 N.Y.3d at 542, 921 N.E.2d at 183, 893 N.Y.S.2d at 491 (2009) (Read, J., concurring) (emphasis added) (footnote omitted).
11. *Id.*, 13 N.Y.3d at 553, 921 N.E.2d at 190, 893 N.Y.S.2d at 498.
12. *Cf. Greenhall v. Davis*, 190 A.D. 632, 636, 180 N.Y.S.2d 525, 528 (1st Dep't 1920) (authority of prior opinion in which two judges of Court of Appeals concurred in result only and one judge wrote a strong dissent "should be limited to the facts under consideration therein").
13. Section 1367(d) (emphasis added).
14. *Weinrib v. Duncan*, 962 So.2d 167, 170 (Ala. 2007); *Harris v. O'Brien*, No. 86218, 86323, 2006 WL 73452, at *2 (Ohio Ct. App. 2006); *Berke v. Buckley Broad. Corp.*, 359 N.J. Super. 587, 594-95, 821 A.2d 118, 123-24 (N.J. Sup. Ct. App. Div. 2003); *Kolani v. Gluska*, 64 Cal. App. 4th 402, 410-11, 75 Cal. Rptr. 2d 257, 261-62 (Cal. Ct. App. 1998), *but see Bonifield v. County of Nevada*, 94 Cal. App. 4th 298, 303-04, 114 Cal. Rptr. 2d 207, 210-11 (Cal. Ct. App. 2002) (discussed below); *Huang v. Ziko*, 132 N.C. App. 358, 361-62, 511 S.E.2d 305, 307-08 (N.C. Ct. App. 1999).
15. *Kolani*, 64 Cal. App. 4th at 405-06; 75 Cal. Rptr. 2d at 258-59.
16. *Id.*, 64 Cal. App. 4th at 406; 75 Cal. Rptr. 2d at 259.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*, 64 Cal. App. 4th at 409; 75 Cal. Rptr. 2d at 261.
21. *Id.*, 64 Cal. App. 4th at 410-11; 75 Cal. Rptr. 2d at 261-62 (emphasis in original).
22. *Goodman v. Best Buy, Inc.*, 777 N.W.2d 755, 760 (Minn. 2010); *Turner v. Kight*, 406 Md. 167, 180-81, 957 A.2d 984, 991-92 (Md. 2008); *Oleski v. Dep't of Pub. Welfare*, 822 A.2d 120, 126 (Pa. Commonw. Ct. 2003); *Scarfo v. Ginsberg*, 817 So.2d 919, 921 (Fla. Dist. Ct. App. 2002); *Bonifield v. County of Nevada*, 94 Cal. App. 4th 298, 303-04, 114 Cal. Rptr. 2d 207, 210-11 (Cal. Ct. App. 2002), *but see Kolani*, 64 Cal. App. 4th at 410-11, 75 Cal. Rptr. 2d at 261-62 (Cal. Ct. App. 1998) (discussed above).
23. Section 1367(d) (emphasis added).
24. *Bonifield*, 94 Cal. App. 4th 298, 114 Cal. Rptr. 2d 207 (Cal. Ct. App. 2002).
25. *Id.*, 94 Cal. App. 4th at 301, 114 Cal. Rptr. 2d at 209.
26. *Id.*, 94 Cal. App. 4th at 300-01; 114 Cal. Rptr. 2d at 209.
27. *Id.*, 94 Cal. App. 4th at 301; 114 Cal. Rptr. 2d at 209.
28. *Id.*
29. *Id.*
30. *Id.*, 94 Cal. App. 4th at 302; 114 Cal. Rptr. 2d at 210.
31. *Id.*

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Think a Spouse's Individual Credit Card Debt Cannot Result in the Foreclosure of the Marital Home? Think Again

By Andrew J. Scholz

These days when home foreclosures and sky high debt are rampant, a potentially very costly misconception of most married couples living in New York is that any debt accumulated by one's spouse individually instead of jointly, via a separate credit card, student loan or otherwise, cannot put their marital home at risk of foreclosure. The reality is that it absolutely can.

Under New York common law, a husband and wife who purchase a home together possess their property as tenants by the entirety. Generally, New York encourages and protects this unique property interest in that tenants by the entirety own an undivided one-half interest in their home, which means that neither spouse can sell or mortgage their half interest in the property without the other's consent. Tenants by the entirety also enjoy the right of survivorship, meaning that upon one spouse's death, the surviving spouse automatically inherits full title to the property.

A virtually unknown problem that spouses face is that a creditor, such as a husband's individual credit card company or student loan lender, can seek to collect on the debt by foreclosing on and forcing the sale of the debtor spouse's one-half interest in his home. In effect, the result is that an unknown third-party can purchase the property interest and possibly move in to the marital home.

To force the sale, the creditor first commences a lawsuit in the Supreme Court against the debtor spouse to recover the money that is owed. If the creditor wins the lawsuit, it then records the judgment with the county clerk's office in the county where the marital property is located. At that point, the creditor continues its lawsuit by filing motion papers against the debtor spouse pursuant to CPLR §5206 seeking judicial approval of a public sheriff's sale of the undivided property interest. Before the court will authorize the sale, however, the creditor has the burden of proof that: (i) it cannot locate any other assets of the debtor spouse that it can seize (e.g., a car, boat or bank account); and (ii) the result of the sale of the debtor spouse's one-half interest will not be unfair to the non-debtor spouse.

When determining whether the sale will be unfair, the court decides whether it would shock the conscience if the property were sold to a stranger at auction. A classic example of a sale that courts deem shocking and unfair occurred in *Hammond v. Econo-Car*.[1] In *Hammond*, the Court denied the creditor's motion seeking a forced sale of the undivided interest because the non-debtor spouse not only received public assistance but resided full-time in the home and was raising small children there.[2] In this type of situation, courts rightly conclude that a stranger should not have the right to buy an interest in a house at an auction and subsequently move in when small children are being raised within the home. As a result, courts will either enjoin the sale altogether or condition the sale so that the purchaser at the auction does not have the right to possess, use or occupy the residence while children are present.[3]

However, if the court determines that the sale is not unfair to the non-debtor spouse and that the creditor cannot seize any other assets, it will direct the county sheriff to sell the one-half property interest at a public auction on the courthouse steps.[4] At the auction, the sheriff sets the opening bid—the lowest amount one may bid on the property—to ensure that no matter what price the one-half property interest sells for, the debtor spouse will, in accordance with New York's homestead protection, receive at least the first $50,000 from the sale. If the bidding goes above $50,000, the sheriff pays the remainder of the sale's proceeds to the creditor, up to the amount that satisfies its money judgment. The sheriff then pays himself a fee for conducting the auction. Finally, any excess money above the amount of the creditor's judgment is given to the debtor spouse.

So, what happens to the buyer, debtor and non-debtor spouse once the one-half interest in the property has been sold? Legally speaking, the sale of the one-half interest extinguishes the tenancy by the entirety interest and the buyer consequently becomes a tenant in common with the non-debtor spouse, subject to the right of survivorship, which is not extinguished by the sale.

Practically speaking, this means that the buyer wins the right to use, rent and enjoy the entire home with the non-debtor spouse. That's right, as shocking as it may sound, a stranger can move right in to the couple's home, belly up to the couch with latte in hand and take control of the non-debtor spouse's remote control. Alternatively, the buyer may move in and partition the home (such as erecting walls) to establish which areas are for his use only. The buyer may also receive an unexpected windfall of attaining free rein of the property if the non-debtor spouse decides to vacate the home if the idea of sharing it with a total stranger is too unpalatable.

However, as all buyers must beware, so too must the buyer of the undivided one-half property interest since upon the sale the right of survivorship remains. Thus, the buyer obtains the debtor spouse's right of

survivorship, which means that if the buyer pre-deceases the non-debtor spouse, his heirs lose his one-half property interest because by law it reverts to the non-debtor spouse. Conversely, if the non-debtor spouse pre-deceases the buyer, the buyer obtains the non-debtor spouse's property interest and he consequently becomes the legal owner of the entire property. This latter results in a windfall for the buyer.

In short, a marital home is not absolutely protected against one's spouse's individual debts. Since one spouse's debt could result in the foreclosure of that spouse's property interest in the couple's home, couples need to be extra vigilant about regularly monitoring not only their collective debt, but their spouse's individual debts as well. No couple desires having the value of their home severely depreciated as the result of a sale by auction, much less having a complete stranger moving in and eventually inheriting full title.

Endnotes

1. 336 N.Y.S.2d 493 (Sup. Ct. Nassau Co. 1972).
2. *Id.*
3. *See Gilchrist v. Commercial Credit Corp.*, 322 N.Y.S.2d 200 (Sup. Ct. Nassau Co. 1971) (cancelling sale of debtor-spouse's interest where forced sale to third party would be unfair to children living in the home); *National Loan Investors LP v. Futursak*, 742 N.Y.S.2d 846 (2d Dep't 2002) (granting but conditioning the sale of undivided one-half tenancy by the entirety interest so that purchaser could not move into home where family resided).
4. *See Amev Capital Corp. v. Kirk*, 580 N.Y.S.2d 424, 425 (2d Dep't 1992); *see also Central Trust Co. v. Garvin*, 390 N.Y.S.2d 344, 345 (4th Dep't 1976).

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