NYSBA WINTER 2015 | Vol. 33 | No. 3

Inside

A publication of the Corporate Counsel Section
of the New York State Bar Association

Message from the Chair

Thank you for reading the Winter Edition of the Corporate Counsel Section's *Inside* Newsletter. I hope that you had a wonderful holiday season! As you read this, I will be the outgoing Chair of the Section. It has been my distinct honor and pleasure to lead the Section this year and I am very proud of what we have accomplished. I would like to take a few minutes to share some of the highlights.

My goal as Chair was to focus on NYSBA's Pathway to the Profession initiative. A question lawyers with all levels of experience often ask is "How do I go in-house?" There is not one path for all so it is a difficult question to answer. Each person has his or her own story and I was proud to share mine, along with other Section members, in a video produced by the Section and maintained on the Section's page. I hope you will take the time to check it out.

In addition, the Section co-hosted the first ever Young Lawyers Section Pathway to the Profession Event titled "Managing Your Legal Career: How to Get Started as Corporate Counsel and Stay Connected." During the program, seasoned lawyers discussed their respective career paths. Some of those paths were "traditional" while others were not. Notwithstanding, every story is inspiring and provides valuable information to those just starting out. For this reason, it is so important for each of us to keep this in mind and spend time helping younger lawyers. We hope, going forward, to host this program and others like it yearly. I would like to es-

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pecially thank Naomi Hills, the Section's Young Lawyers Liaison, who developed and coordinated the program.

The Section also successfully hosted its bi-annual Corporate Counsel Institute in October. If you are not familiar with this event, it consists of a two-day CLE program organized by the Section's CLE and Meetings Committee. It is a great way to stay abreast of current legal trends and substantive changes in the law; network with your peers; and fulfill your CLE requirements. The Institute was sold out and received extremely positive feedback from the attendees. We were honored that Benjamin Lawsky, the former New York State First Superintendent of Financial Services, and New York State Bar Association President, David Miranda, provided keynote addresses.

Panels included topics about arbitration, human trafficking, cybersecurity, not-for-profit law, valuing intellectual property, and ethics. The ethics portion was particularly riveting because the panel members included in-house counsel from some of the largest and well-known organizations discussing ethical issues we all face every day and how to handle them. I urge you to look for our stand-alone panel on ethics in the coming year as we anticipate it will be just as riveting.

As I leave you, I look forward to returning to service as a member of the Section's Executive Committee and resuming my duties as co-chair of the Technology and New Media Subcommittee. Jeffrey Laner will be taking over as Chair. I leave you in good hands. Jeffrey is a long-standing and dedicated member of the Section's Executive Committee, most recently serving as Treasurer. He has both in-house and law firm experience, making for a well-rounded perspective. I look forward to seeing what he has in store for the Section.

We are always looking for new initiatives and ideas that you, the member, will benefit from and encourage you to get involved. Please do not hesitate to contact me or Jeffrey about any ideas or contributions you would like to make to the Section.

Finally, thanks to the wonderful work of our editors, Elizabeth Shampnoi and Jessica Thaler, you are about to embark on an issue all about Litigation and Dispute Resolution. Enjoy!

Natalie Sulimani

Disputes pose a myriad of risks to business. These risks impact the bottom line along with daily operations. Worse, they have the potential to damage a company's reputation and may ultimately impact the viability of the business. To control and mitigate such risk, in-house counsel are increasingly being asked to reduce litigation spending by handling what they can in-house, closely managing outside counsel and seeking alternatives to traditional litigation. For these reasons, this issue of *Inside* is focused on Litigation and Dispute Resolution.

Whether you are an experienced litigator working in a large in-house litigation department, a corporate generalist or the sole lawyer for a company, you will find something of interest to help you avoid, prepare for or mitigate the risks associated with disputes. Topics include advice for counsel concerning enterprise risk management; engagement letters; avoiding litigation through effective use of social media policies; an update on the Federal Rules of Civil Procedure; forum selection; in-house counsel's responsibility when it comes to e-discovery; the use of litigation consultants and investigators; in-house counsel's role in mediation and arbitration; arbitrator selection; confidentiality in arbitration; and the argument for always considering mediation.

In addition to the substantive articles, we have included an interview of Lura Hess Bechtel, Assistant General Counsel, First Vice President at First Niagara Financial Group, Inc. in Buffalo, New York, and a book review. Ms. Bechtel's interview highlights her career path and advice for both experienced and newer lawyers. The book review, submitted by Janice Handler, highlights *The Road to Character* authored by David Brooks and explores the differences between résumé virtues and eulogy virtues. Since lawyers are almost always overachievers focused on building a résumé, you may find that you want to add this book to your reading list.

In addition to our authors, we would like to especially thank the law students who helped in the editing process of this edition. We had the pleasure of working with four[1] second-year law students from Pace University School of Law who were efficient and enthusiastic—Sheryl McCabe, Nicole A. Maguire, Monica Calderon and Vito J. Marzano. Given that some of the great benefits and joys of participation in the Corporate Counsel Section are networking and professional development, especially with respect to younger lawyers, we would like to highlight each law student here. Sheryl McCabe is interested in corporate law, compliance and regulation. Currently, she interns at the Law Office of David Lacher in New Rochelle, New York. Nicole A. Maguire is pursuing a concentration in Land Use and Real Estate. Monica Calderon is an Associate for the *Pace International Law Review*. She is currently interning for in-house counsel at Thomson Reuters in the Finance & Risk Division and is interested in litigation, arbitration and compliance. Vito J. Marzano is a Junior Associate on the *Pace International Law Review*, Dean's Scholar, Research Assistant, and participant in the Pace's Federal Judicial Honors Program. He will be representing Pace at the National Appellate Advocacy Competition in 2016 and hopes to establish a career in International Law, Personal Injury, or Business Law.

We hope that you find value in this issue of *Inside* as it relates to your litigation and dispute resolution management. As always, we are looking for authors and articles for topics of interest to in-house practitioners. If you or your colleagues are willing to write, please contact us so we can discuss your next steps and topic ideas. We look forward to hearing from you!

Elizabeth J. Shampnoi and Jessica Thaler

Endnote

1. A fifth law student, Arthur Shalagin from Cardozo Law, also assisted in conducting and authoring the interview of Lura Hess Bechtel contained herein. His biography can be found on page 5.

Jessica Thaler is an attorney with Bliss Lawyers, currently working on secundment for Credit Suisse. Prior to engaging with Bliss, she spent a year acting as the Chief Legal Officer of My Sisters' Place, a not-for-profit organization working for the benefit of domestic violence and human trafficking victims throughout Westchester County. Jessica has rich experience as a corporate-transactional generalist, gained through her work at NYC law firms and her solo practice. She is an active member of NYSBA, acting as immediate past chair of the Committee on Lawyers in Transition, on the executive committees for the EASL and Corporate Counsel Sections, a long-standing member of the Membership Committee and the Committee on Law Practice Management and, now, as a co-editor of *Inside*.

Elizabeth J. Shampnoi is an Attorney and Director in the Dispute Advisory & Forensic Services Group of Stout Risius Ross, Inc. ("SRR"). She regularly provides litigators, in-house counsel and senior executives with a broad range of business and legal advice concerning cost-effective and timely alternative dispute resolution. Many times this involves identifying which cases are appropriate for mediation or arbitration, proper forum selection, drafting clauses pre-dispute and post-dispute, selecting the arbitrator or mediator, rule interpretation/enforcement and best practices in advocacy. Prior to joining SRR, Ms. Shampnoi was a Litigation Associate at the law firm of Storch, Amini & Munves, PC. Ms. Shampnoi is an active member of NYSBA and serves on the executive committees for the Dispute Resolution and Corporate Counsel Sections.

Inside Interview

Lura Hess Bechtel, Esq.

Assistant General Counsel, First Vice President
First Niagara Financial Group, Inc., Buffalo, New York
Conducted and written by Arthur Shalagin

Introduction

Lura H. Bechtel, Esq. is an Assistant General Counsel and First Vice President of First Niagara Financial Group, Inc. and First Niagara Bank, N.A.[1] In this role, she reports to the General Counsel and is responsible for management of First Niagara's litigated matters and regulatory investigations, in addition to advising on employment law matters. Ms. Bechtel has been with First Niagara since 2011.

Ms. Bechtel grew up in Amherst, New York. She received a Bachelor of Science degree in Industrial and Labor Relations at Cornell University. After graduation from Cornell, she worked in Los Angeles as a labor relations representative for the Alliance of Motion Picture and Television Producers alongside attorneys interpreting and negotiating collective bargaining agreements, and managed special projects. The careers of the attorneys she worked with there demonstrated to her that law school was the right means to further her career and to obtain career flexibility. Ms. Bechtel pursued her law degree at St. John's University School of Law, graduating with her J.D. in 2003.

Following law school, Ms. Bechtel worked briefly at Hughes Hubbard and Reed, LLP before clerking for Justice Rosalyn H. Richter, then of the New York State Supreme Court in Manhattan. She relocated to Buffalo and joined the labor, employment and education law practice group at Hodgson Russ LLP. She believes that large law firms provide excellent preparation for in-house counsel positions because of the variety of clients and legal issues encountered by associates, as well as the opportunity to observe the many different lawyering techniques of experienced attorneys. While at Hodgson Russ, Ms. Bechtel provided advice and counsel to First Niagara, which ultimately led her to her current role.

The Transition from Labor and Employment Practitioner to In-House Counsel

Asked to describe some of the challenges when transitioning from a law firm to an in-house position, she stated,

> [t]he challenge of that transition generally arises from fundamental differences in the role of lawyers to the organization. At law firms, lawyers are the revenue producers, and the rest of the roles support the lawyers in that function. In most corporations, the reverse is true—lawyers are "cost centers" and are a support or control function. The challenge of being in-house is to add demonstrable value to business, so that the revenue producers seek out your advice and collaboration. I enjoy this aspect of my role, which involves helping to identify, avoid or mitigate risk. But there can be times when, as a control function, lawyers must take positions or give advice that the business may not like. When that happens, it is important to have established trust with the business and explain clearly the rationale for the position.

The Role Technology Plays In-House

Technology plays a fairly significant role in Ms. Bechtel's day-to-day work, allowing for more transparency and control of outside counsel costs. E-billing systems, along with a matter management system, allow ease and accuracy in billing. The e-billing system analyzes data on past legal spending, and automatically flags invoice inconsistencies between time charges and the terms of the applicable engagement letter or billing guidelines. Taken together, this makes negotiating with outside counsel data-driven and can reduce the legal costs for the company. The metrics available to in-house attorneys from the e-billing systems can also assist with budgeting and forecasting. And, of course, electronic discovery is a very significant part of any litigation or investigation that proceeds past the initial stages.

The Key to Success

Ms. Bechtel finds that the key to being a successful in-house attorney is being responsive and practical when providing legal advice, which is most often given to non-lawyers. In-house lawyers must deliver advice and assistance in an accessible, understandable, and business-tailored manner. The best part of Ms. Bechtel's day is when she works with her internal business partners to arrive at creative, practical solutions to tough issues. For example,

finding a way to achieve a new business initiative while substantially mitigating or avoiding the inherent legal risks.

Advice for Law Students and Junior Attorneys Who Want to Go In-House

Ms. Bechtel offers the following advice to law students and junior attorneys about breaking into an in-house role:

> [t]o law students, working at a law firm with a diverse client base provides the best training and understanding of the practice of law. If you do want to go straight in-house, I would suggest targeting a particular industry or business-type and learning everything about it. In particular, understand how the business makes money, who the regulators are and what the pain points are. At interviews, be prepared to explain how you can contribute to the strategic goals or challenges facing that company; not everyone inherently understands the value that lawyers can provide. To junior attorneys, my advice is to serve your clients well. In my experience, many in-house counsel previously were their employer's outside lawyer, myself included.

Endnote

1. First Niagara Bank, N.A. is a multi-state community-oriented bank headquartered in Buffalo, New York which serves customers in New York, Pennsylvania, Connecticut and Massachusetts. First Niagara has approximately 390 branches, 5,400 employees and $39 billion in assets.

This interview was conducted by Arthur Shalagin, a 3L at Cardozo Law. He is interested in doing corporate work with startups and small to medium size businesses upon graduation. Last summer, Arthur interned at LawTrades (a legal tech startup), and at Jackson Ross PLLC, a boutique focusing on corporate work with startups and small businesses in NYC.

The Engagement Letter: Defining the Attorney-Client Relationship

By Amianna Stovall and Joel A. Chernov

While in-house counsel often focus on the rates and fees set forth in an engagement or retainer letter, a well-crafted agreement with outside counsel addresses far more than costs. Although clarity with respect to cost is obviously an essential element of a client's relationship with counsel, other aspects of the relationship are equally important. This is especially true for in-house counsel tasked with juggling a myriad of legal needs for any number of entities and individuals. In such environments, it is important to have a carefully drafted engagement letter that identifies the client with specificity; describes in some detail the services that counsel will be performing; and identifies who will be represented should a conflict arise. An engagement letter that addresses each of these issues will help avoid confusion and ill-will between in-house counsel and their outside lawyers. More importantly, an adequate engagement letter may prevent claims for malpractice and/or motions for disqualification.

I. Identifying the Client

Specifically identifying the client is the first step in defining the scope of the representation. In the context of transactions involving corporations, for example, an engagement letter should plainly state if the attorney is representing the corporate entity, affiliates of that entity, or individual directors, officers, and employees of the entity. Carefully identifying the specific client may have significant ramifications. In *Kurre v. Greenbaum Rowe Smith Ravin Davis & Himmel, LLP*, individual shareholders brought a legal malpractice action concerning a failed corporate transaction.[1] The court dismissed the lawsuit because the engagement letter specified that the law firm represented only the corporate entity and further advised the individual shareholders to obtain separate counsel due to their differing "interests and concerns."[2]

II. Multiple Clients and Conflicts

When a lawyer represents multiple clients, in-house counsel should ensure that the engagement letter addresses what will occur should a conflict of interest arise: will the firm withdraw? Or will the firm seek to represent one or more of the clients? An engagement letter that memorializes the representation of, for example, a corporation and each of its individual directors and officers, or states that the representation does not create an attorney-client relationship between the law firm and the individual directors and officers, will help avoid misunderstandings and, hopefully, disqualification. In the event that multiple clients are being represented, however, the engagement letter should advise the clients that confidential, attorney-client communications will be shared.

III. Advance Waivers

In-house counsel should also be mindful of "advance waivers" which many law firms now include in their standard form engagement letters. By virtue of such a waiver, a client gives its informed consent to waive any potential conflicts among multiple defendants, as well as any conflicts that may arise with prospective clients. While the enforceability of advance waivers is typically determined based upon the facts specific to each case, courts consider, among other things, the sophistication of the client; whether the waiver is sought to be enforced in a litigation, as opposed to a transactional matter; whether the client was represented by independent counsel when it agreed to the advance waiver; whether the advance waiver is a wholesale or limited waiver; and, ultimately, whether the conflict is waivable at all, notwithstanding the advance waiver. However, courts are becoming increasingly tolerant of advance waivers. Indeed, relatively open-ended advance waivers have been enforced against sophisticated clients with in-house counsel, where the client "routinely retain[ed] different, large law firms to advise the corporation on various matters across the country."[3] The court in *Galderma Labs., L.P. v. Actavis Mid Atl. LLC*, explained: "[w]hen a client has their own lawyer who reviews the waivers, the client does not need the same type of explanation from the lawyer seeking the waiver because the client's own lawyer can review what the language of the waiver plainly says and advise the client accordingly."[4] As a result, it is important for in-house counsel to appreciate the potentially broad consequences of advance waivers and to discuss them with their lawyers before signing form engagement letters.[5]

IV. The Scope of the Engagement

In addition to identifying the client and potential conflicts, in-house counsel should make certain that the engagement letter will define with some specificity the services that the attorney agreed to perform. When the charging fee is expected to be in excess of $3,000, New York *requires* that there be a written engagement letter and that the letter specify "the scope of the legal services to be provided."[6] Toward that end, an engagement letter involving any new matter should spell out the tasks involved in the representation, as well as any restriction or limitation on the representation and the potential consequences of those limitations and restrictions.

For example, if an engagement letter provides that the representation is limited to proceedings before certain tribunals, a legal malpractice action for the attorney's failure to take an appeal is likely to be dismissed.[7] Similarly, where an engagement letter limited the claims and counterclaims to be litigated, the New York Court of Appeals found that the attorney had no duty to pursue other causes of action that might have been viable.[8] In *AmBase Corp. v. Davis Polk & Wardwell*, a client sued Davis Polk for failing to properly advise it about whether certain tax liability could be allocated to another entity.[9] Relying on the language of the engagement letter, the Court concluded that the scope of Davis Polk's representation was limited to the resolution of tax issues before the IRS—which it did, successfully absolving the client of over $20 million in tax liability.[10] The Court found that Davis Polk had no duty to advise its client with respect to whether, in the first instance, the client was primarily or secondarily liable for that tax liability.[11] It is, however, incumbent upon the lawyer to advise a client that seeks to limit a representation as to the potential consequences of such a limitation, and that advice should be reflected in the engagement letter.[12]

V. Conclusion

In the end, an engagement letter should not be viewed as a mere formality to comply with the ethics rules. Rather, articulating the scope of the engagement is a benefit to both client and counsel to the extent it provides both transparency and guidance. While in-house counsel are obviously alert to issues involving the costs associated with the legal services that they are retaining, they should also be alert to the other details in the proposed engagement letters. The actual breadth of the services being rendered by outside lawyers—or their limitation as the case may be—and to whom those services are being rendered should be set down in writing in order to provide basic parameters for the attorney-client relationship. Clarity and precision at the beginning of the relationship will go a long way toward preventing uncertainty in the event a dispute arises later.

Endnotes

1. *Kurre v. Greenbaum Rowe Smith Ravin Davis & Himmel, LLP*, No. A-5323-07T1 2010 N.J. Super. LEXIS 832 at *1 (N.J. Super. Ct. App. Div. Apr. 16, 2010).
2. *Id.*
3. *Galderma Labs., L.P. v. Actavis Mid Atl. LLC*, 927 F. Supp. 2d 390, 402 (N. D. Tex. 2013).
4. *See id*. at 405.
5. *See, e.g.*, *GEM Holdco, LLC v. Changing World Techs., L.P.*, 46 Misc. 3d 1207(A), 7 N.Y.S.3d 242 (Sup. Ct., New York Co. 2015), *aff'd*, 127 A.D.3d 598, 8 N.Y.S.3d 119 (1st Dep't 2015) (law firm was permitted to continue to represent one set of codefendants against the other after they became adverse where the codefendants entered into an engagement letter that included an advance waiver specifically contemplating a future conflict of interest between them and notwithstanding law firm's receipt of information from former client that could be used to the advantage of law firm's current client).
6. N.Y. Comp. Codes R. & Regs. tit. 22, § 1215.1(b)(1) and (2) (N.Y.C.R.R.); *see also* 22 N.Y.C.R.R. § 1215.2(1). There are exceptions to this provision "when the lawyer will charge a regularly represented client on the same basis or rate and perform services that are of the same general kind as previously rendered to and paid for by the client." Rule 1.5(b), Rules of Professional Conduct, 22 N.Y.C.R.R. § 1200.0; *see also* 22 N.Y.C.R.R. § 1215.2(2) (the 22 N.Y.C.R.R. § 1215.1 requirement for a written engagement letter does not apply to a "representation where the attorney's services are of the same general kind as previously rendered to and paid for by the client").
7. *See, e.g.*, *Turner v. Irving Finklestein & Meirowtiz, LLP*, 61 A.D.3d 849, 879 N.Y.S.2d 145 (2d Dep't 2009).
8. *DeNatale v. Santangelo*, 65 A.D.3d 1006, 884 N.Y.S.2d 868 (2d Dep't 2009).
9. *AmBase Corp. v. Davis Polk & Wardwell*, 8 N.Y.3d 428, 834 N.Y.S.2d 705 (2007).
10. *Id.* at 709.
11. *Id*. *But see Superior Tech. Solutions, Inc. v. Rozenholc*, 2013 N.Y. Misc. LEXIS 1423, *15-17, 2013 N.Y. Slip Op. 30690(U) (Sup. Ct. New York Co. 2015) (engagement letter ambiguous as to whether scope of engagement was limited to litigation; thus, motion to dismiss legal malpractice action for negligence in connection with transactional work was denied).
12. *See* NYSBA Comm. on Professional Ethics, Formal Op. [No. 604 Nov. 14, 1989]; *see also Rupert v. Gates & Adams, P.C.*, 83 A.D.3d 1393, 919 N.Y.S.2d 706 (4th Dep't 2011) ("[a]n attorney has the responsibility to investigate and prepare every phase of his… client's case") (internal citations omitted); *Ellenoff, Grossman & Schole LLP v. APF Grp., Inc.*, 26 Misc.3d 1029(A), 907 N.Y.S.2d 100, at *2 (Sup. Ct. New York Co. 2009) (denying summary judgment where limitation on firm's engagement was unsupported by written evidence); *Unger v. Horowitz*, 8 A.D.3d 62, 777 N.Y.S.2d 648 (1st Dep't 2004) ("To the extent that the…defendants assert their role was limited to that of consultant or 'of counsel,' it was incumbent upon them to ensure that plaintiff understood the limits of their representation."); Restatement (Third) of the Law Governing Lawyers §19 (2000) (the client must be adequately informed and consent if the lawyer wants "to limit a duty that a lawyer would otherwise owe to the client").

Amianna Stovall is a partner in the law firm of Constantine Cannon LLP. Ms. Stovall has extensive experience in complex commercial litigation, with particular expertise in legal malpractice and securities law. She has litigated in several federal and state courts and arbitration forums.

Joel A. Chernov is of counsel to Constantine Cannon LLP. Mr. Chernov has handled a wide range of complex commercial and securities litigation matters, including matters involving partnership disputes and accountant and attorney liability.

Fact-Finding in Litigation: Gain the Upper Hand and Boost the Bottom Line

By Anastasia Wincorn

An aggressive fact-finding strategy can help you efficiently and cost-effectively gather information without relying solely on the discovery process. Investigators and investigative attorneys have resources and techniques to help you uncover facts without waiting for your opponent to hand them over to you. In-house counsel and the litigation team will be able to approach litigation or settlement negotiations armed with crucial intelligence that gives your business the upper hand. This can lead to better outcomes, a faster resolution of your case, and, ultimately, a boost to the bottom line.

"An independent investigation prior to or at the beginning of discovery can help you zero in on your Goldilocks questions: not too broad, not too narrow."

When Is Independent Fact-Finding Useful in the Litigation Process?

Independent fact-finding is useful in any case in which you will need to otherwise rely on the opposing party to provide you with information. Even if you know all of the salient legal facts prior to litigation, information on the opposing side's motivations, financial situation, or business relationships may inform and strengthen your position in negotiating a settlement.

Preparing for Litigation

In many cases, complaints can be fairly broad, include a variety of claims, and need not recite the facts of the case in detail, so why engage in pre-complaint fact-finding? First, you can save time and money by understanding your opponent. If you are the plaintiff, know which defendants to include in the lawsuit. Does the defendant company have any subsidiaries or parent companies that should be named in the suit? Who has the deepest pockets? You can search for and often find these facts long before discovery. Second, a thorough vetting and verification of the facts as you understand them can also help avoid unpleasant surprises down the road, such as inconsistencies in your or your fact witnesses' stories or embarrassing incidents in your expert witnesses' pasts.

If you are the defendant, do not wait for discovery to get to know your plaintiffs. Independent fact gathering can help you answer key questions like whether the plaintiffs have a pattern of filing frivolous lawsuits and how soon in the process they usually settle. You also may be able to begin gathering statements from non-parties (no violating the "no contact" rule, please) and to see what kind of fact witnesses might be out there and to what extent they will support or undermine your opponent's case. All of this can be done at the first whiff of conflict, can save you a significant amount of time and money, and can help you develop a smarter, more well-informed litigation strategy.

Making Discovery More Efficient: The Goldilocks Principle

Endless battles are fought over discovery, and these battles are expensive and frustrating. There is often a constant back-and-forth between attorneys who have the same two goals in mind: 1) get the other side to give you everything you want; and 2) give the other side as little as possible. The barrage of motions to quash and motions to compel in commercial cases can drag on forever. Some conflict is unavoidable, but there are ways to find key facts to support your case without duking it out in the courtroom.

First, the right information can tell you what to ask for in interrogatories and document requests. If your interrogatories are too broad, your opponent can refuse to answer, but you also do not want to make them too specific and risk missing something important. An independent investigation prior to or at the beginning of discovery can help you zero in on your Goldilocks questions: not too broad, not too narrow.

For example, in one case, our client, outside counsel for a large corporation, issued a series of document requests without first conducting its own fact investigation. It asked broadly for records of all transactions that fell into a certain category, let us call them "premium" transactions (this is fictionalized to protect our client's identity). The opponent agreed to hand over records for premium transactions, but there seemed to be an unusually small number of records. Rather than resort to a motion to compel, the client asked us to look into this issue. After speaking to a number of the opponent's former employees, we discovered that there was a wide variety of premium transactions, only a small minority of which were called simply "premium." The others were called "premium plus," "ultra-premium," "sub-premium," etc. There was an entire universe of documents available once we uncovered the proper terminology for our client to include in its document requests. Our client had found its

Goldilocks questions, and the opponent could no longer evade the request as either too narrow or too broad. Motion practice averted.

Preparing for Settlement Negotiations

Collecting information that your opponent does not know you have can be a powerful tool in settlement negotiations. For example, in a recent case, the plaintiff, a large corporation, had us find and interview the defendant company's former employees prior to filing suit. Many of the employees told the same story, which strongly supported the plaintiff's position. In the complaint, the corporation was able to state facts in meticulous detail that would normally not be available until months of discovery had gone by simply using information provided by the former employees they had interviewed. Once the defendant company saw the complaint replete with damning statements from its former employees, it agreed to a settlement that was highly favorable to the plaintiff before discovery even began. This technique can be extremely effective for both plaintiffs and defendants.

Does the defendant company claim to be judgment-proof? That may not actually be the case. A thorough investigation may reveal that the defendant actually has a shell company into which it funnels its money for the express purpose of appearing judgment-proof. An interview with the defendant's former bookkeeper or administrative assistant may tell you that the defendant's president has a bad habit of mixing his own money with that of the company. Armed with facts to support a potential veil-piercing claim, you will be in a much stronger position to convince the defendant to meaningfully participate in settlement talks.

In one case we encountered, the defendant claimed to be judgment-proof, and refused to cooperate with the plaintiff company in any way. Information uncovered as part of an independent fact investigation strongly suggested that the judgment-proof defendant company was benefiting from its parent company's breach of a crucial vendor agreement. Should the arrangement between the subsidiary and the parent company have been exposed at trial, the parent company's vendor would have ended its relationship, and the parent company's business would have ground to a halt. The defendant was entirely unaware that the plaintiff knew about this arrangement, as none of this information had been provided in discovery. Needless to say, the plaintiff was in a position to catch its adversary completely off guard, gaining a tremendous advantage and forcing the defendant to negotiate in good faith.

Regardless of the stage of litigation during which settlement negotiations are taking place or which side of the table you are on, a thorough knowledge of your opponent's circumstances and position can provide an advantage. For example, knowing that your opponent has been encountering financial difficulties might influence the amount of your opening settlement offer. Similarly, you may want to uncover the plaintiff's true motivation for initiating the lawsuit. Intimidation? Harassment? Money? All of the above? The answer will inform your strategy and help you determine on what points you think your opponent is willing to negotiate or how hard a line you should take on certain issues.

What Kind of Facts Can You Find and How Do You Find Them?

While some private information is protected by law, such as bank accounts and phone records, a surprisingly large amount is readily available, but only if you have the right resources. Most investigations begin with a thorough search of what we call the public record. This is a very broad category, and includes any information that we can glean without speaking to individuals. As part of a public record search in the context of litigation, we can identify and locate potential witnesses, look at a person's affiliation with private or public companies, real property holdings and other assets, publicly disclosed securities holdings, liens, bankruptcies, litigation history, criminal record, media profile, and social media profile.

"Public record" is a bit of a misnomer, since nearly all of the information is not readily available to the public. For example, even the most thorough Google search will not reveal that an individual has a hidden connection to a private company in Nevada or $4 million in tax liens. Most of this information is found through a collection of sophisticated databases. Since online litigation records are incomplete in most jurisdictions, investigators also use a nationwide network of trusted individuals to retrieve litigation records, which can be especially helpful in uncovering information about past business dealings and company affiliations. Occasionally, your outside counsel may be able to find some of this information; however, while a handful of law firms have in-house investigative teams, most do not have the resources or the expertise needed to conduct a thorough investigation. An experienced investigative attorney can help you and your outside counsel find the facts you need when you need them, and will allow you to develop far more efficient litigation and negotiation strategies.

Anastasia Wincorn is an investigative attorney and the founder of The Law Office of Anastasia Wincorn, located in Manhattan. She has conducted investigations for numerous Fortune 500 companies and Am Law 100 law firms.

Amendments to the Federal Rules of Civil Procedure: Synopsis of What You Need to Know

By Yann Geron and Elizabeth Viele

A host of amendments to the Federal Rules of Civil Procedure (the "Rules") took effect on December 1, 2015. The new Rules make an effort to streamline and tighten the practice of litigation in federal courts, encourage cooperation and communication, and provide more defined penalties for parties who do not play by the rules.

Here is a summary of what you need to know about the major rule changes. A complete list is available at supremecourt.gov/orders/courtorders/frcv15(update)_1823.pdf.

I. Brief History of the Proposed Amendments

The Advisory Committee on the Rules of Civil Procedure first introduced the proposed amendments in August 2013. A six-month public commentary period followed, during which the plaintiffs' bar and defendants' bar actively advocated their respective opposition and support of the amendments. While plaintiffs' lawyers decried the amendments as restricting their clients' abilities to fairly litigate their claims, attorneys for corporate defendants supported the amendments' attempt to simplify civil procedure.

Following several more layers of review and approval by the Advisory Committee, the Committee on Rules of Practice and Procedure, and the Judicial Conference of the United States, the United States Supreme Court approved the amendments on April 29, 2015. The amendments became effective on December 1, 2015.

II. Synopsis of the Major Rule Changes

A. Streamlining the Initial Phase of Litigation

The new Rules trim some of the fat off the existing time periods that can slow down litigation before it has even begun. Rule 4(m) reduces the time that plaintiffs can rest on their heels after the filing of a complaint, decreasing the time to serve process on the defendant from 120 to 90 days. Cutting the time allotted to plaintiffs to complete service may also increase the instances in which suits are thrown out for failure to timely serve.

Rule 16(b) further tightens the opening stages of litigation by dropping the time by which the judge must issue a scheduling order to 90 days after any defendant has been served with the complaint (previously 120 days) or 60 days after any defendant has appeared (down from 90 days). The new Rule 16(b) also expressly states that scheduling orders may include provisions on the preservation of electronically stored information ("ESI") and agreements reached under Federal Rule of Evidence 502 on the disclosure of privileged communications. Setting ground rules in these areas in the scheduling order will streamline discovery at the outset and ideally enable the parties to avoid disputes after discovery has gotten fully under way.

"The new Rules make an effort to streamline and tighten the practice of litigation in federal courts, encourage cooperation and communication, and provide more defined penalties for parties who do not play by the rules."

Changes to Rule 26(d) also reflect an aim to expedite discovery. Under the prior rule, parties could not seek any discovery prior to the Rule 26(f) conference. The proposed amendment allows parties to serve discovery 21 days after service of the summons and complaint, regardless of whether a Rule 26(f) conference has taken place. While the request is deemed to have been served at the first Rule 26(f) conference for the purposes of calculating response time, the intent of this amendment is to jumpstart the discovery process and to guide the parties to engaging in more productive discussions at the inception of the case.

B. Balancing the Scales: Focus on "Proportionality" in Discovery

Perhaps the most significant change is that the new Rule 26 changes the ever-widening universe of what is considered discoverable in a litigation by re-writing the standard from what could "lead" to discoverable information to what is "proportional to the needs of the case."

The previous version of Rule 26(b) allowed litigants virtually unlimited latitude in defining the scope of discovery by allowing a party to seek anything "reasonably calculated to lead to the discovery of admissible evidence." As a result, parties looking to draw out discovery and increase their opponents' expenses have always been able to hide behind Rule 26(b)'s extremely broad scope.

The new Rule 26(b) is a game changer, eliminating the watered-down language of the old rule in exchange for a new "proportionality" standard composed of several factors. Under the new rule, "Parties may obtain discovery… proportional to the needs of the case, considering:

- the amount in controversy;
- the importance of the issues at stake in the action;
- the parties' resources, the importance of the discovery in resolving the issues; and
- whether the burden or expense of the proposed discovery outweighs its likely benefit."

The more finely tuned language of the new Rule 26(b) paves the way for a more expedited and, likely, less costly discovery process, in which parties are required to tailor their discovery requests to the specific issues of the case, rather than force their opponents to undertake a massive fishing expedition on account of even the smallest of claims. This should be particularly advantageous to defendants' attorneys, including in-house or general counsel, who will find greater protection in the Rules with which to shield their clients from abuse of the discovery process by plaintiffs looking to use the discovery process itself as additional leverage.

C. Allocating Expenses in Protective Orders

Changes to Rule 26(c)(1) may also give parties an incentive to engage in more reasonable discovery practices. The language of the new Rule allows the court to enter an order not only specifying the time and place for discovery, but also for the "allocation of expenses." This cost-shifting provision should dissuade parties from unreasonably refusing to produce relevant discovery or seeking information well beyond the scope of the case.

D. Defining More Specific Penalties for Failing to Preserve ESI

The last significant amendment is Rule 37(e) on the preservation of ESI, which fleshes out the penalty a party may face for failure to meet its ESI obligations under the rules.

The previous Rule 37(e) provides that "absent exceptional circumstances," a court may not sanction a party for failing to provide ESI lost in "routine, good faith" operation of an electronic information system. Under the new Rule, parties are held to a more specific standard of conduct and face concrete penalties for failure to do so.

Key changes include shifting the burden onto the preserving party, who may be sanctioned if it fails to preserve ESI that "should have been preserved in the anticipation or conduct of litigation." The new Rule also allows the court to order measures to cure the loss of information to a degree no greater than necessary, including permitting additional discovery, requiring the producing party to produce information that would otherwise not be reasonably accessible, and ordering the party to pay reasonable expenses caused by the loss, including attorney's fees.

Notably, the new Rule permits the Court, upon a finding that the non-preserving party acted with the "intent to deprive," to presume that the lost information was unfavorable to the party, instruct the jury to make the same presumption, and even dismiss the action or enter a default.

III. What This Means for Corporate Counsel

Corporate counsel will receive the new rules as a step in the right direction. The amendments attempt to address many of lawyers' complaints about how expensive, slow and, at times, unworkable discovery has become. The new Rules provide efficiencies in the initial phases of litigation (shortening the complaint service period, the scheduling of the initial conference, and expanding the scope of the scheduling order) that should put pressure on meritless litigation and help speed up the process once your client has been served.

The move away from the permissive and overly broad discovery standard in Rule 26 and toward case-specific proportionality should, in theory at least, cut down on the significant time and expense many defendants lay out during the discovery phase. In practice, the possibility of expenses being ordered by the court against the losing party in a protective order may provide the teeth necessary to enforce the new proportionality standard.

It must be remembered that the new Rules codify stricter penalties against those parties who fail to preserve ESI. Litigants who do not take these additional proactive steps—or worse, who are found to have destroyed certain ESI information intentionally—face harsh penalties under the new Federal Rules of Civil Procedure. At the very least, however, the Rules provide a more definitive category of ESI information to preservethat which is maintained in the anticipation or conduct of litigation—which should help give counsel more guidance as to what steps need to be taken internally to avoid sanctions.

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Lawyers and Enterprise Risk Management: Balancing Business and Independence

By Richard Alleyne and Pete Maloney

In the United States, the in-house legal profession dates back at least to the Reconstruction era. The General Counsel of railroad and other emergent industries wielded heavy authority in the industrialization of America and commanded equally hefty salaries.[1] Over the next 150 years, corporations and their stakeholders generally recognized other benefits in the in-house lawyer, as General Counsel took on the role not only of business facilitators but corporate defenders.[2] Contemporary American lawyers perform both an attack and a defense function in facilitating business, and whether in-house or in private practice they "overwhelmingly…manage business affairs."[3] The jumbo economy of the United States "floats on a sea of lawyers."[4] We have been happily going with the flow for decades.

This last decade, however, has seen a new style of thinking and a new wave of "consultspeak" come into the corporate vernacular: the language of enterprise risk management (ERM). Principles of risk management have long been part of the insurance profession (and insurance has long been part of the risk management profession), but a new emphasis came into play with the public accounting crisis that led to Sarbanes-Oxley, its systemization of internal controls verification, and the standing up of the roles of the Chief Risk Officer and Chief Compliance Officer. In the banking and insurance sectors, ERM became the next governance initiative after the pain of SOX implementation. Importantly, while ERM is being driven through the financial services industry, there is no question that it is permeating other corporate entities, including even state government.[5] The legal profession, however, has not been a very vocal participant in the ERM build-out process, for a variety of reasons.

First, SOX and ERM have largely been seen as a public accounting issue, so the legal profession to some degree eschewed intrusion. This has meant, however, that in many instances the profession has left the definition of legal roles and legal responsibilities to the accounting profession, which is globally consolidated in the Big Four and competing with the legal profession for perimeter work in governance, regulation, and compliance. Secondly, as noted above, ERM is a global phenomenon. Lawyers are not on equal footing around the globe. The independence, and the associated attorney-client privilege, of continental lawyers is questioned.[6] On the other hand, in the United States and other common law jurisdictions, the independence of in-house counsel is recognized and in fact coerced.[7] Because continental regulators and audit firms have a strong hand in driving ERM, there is good question whether in-house counsel adequately participate in the global program. Lastly, lawyers are famously slow to change and subsist in a largely fractured—some say devolving—profession.[8] Sometimes we are late to court and here we have been late to the debate.

The OCC and the Three Lines of Defense

An illustrative fact pattern is the Office of the Comptroller of the Currency's ("OCC's") development of the "Three Lines of Defense" framework ("3LD") for large banks, which was finalized last year and will be effective in 2016.[9]

By way of background, 3LD is a conceptual framework developed to explain the role of risk management (second line) and internal audit (third line) in monitoring the business (first line). The business is defined as having ownership of various risks to the business (e.g., credit risk, fraud risk, reputational risk) and is required to establish controls and processes to manage risk. The second line of defense monitors that process, and provides an independent challenge if it sees risk going awry. Internal audit provides a third line of independent *assurance* that the system is working.

A good 3LD workflow example is new vendor management: the business does the due diligence on the vendor, including around cyber-security, and negotiates a contract; risk management reviews the business' risks and controls over the new vendor and assesses the impact on other business segments; and internal audit examines a cohort of vendor relationships to assure that the process is working appropriately. As lawyers, we know that we may have helped draft the standard vendor contract; may have helped negotiate, settle, or litigate one or more disputes with vendors and may have suggested better ways of conducting due diligence and contracting with vendors in light of said experiences; could have advised whether there were regulatory compliance or even criminal issues with the way we were doing business with the vendors; and may have ultimately ran an investigation into one or more vendors to determine whether they were fleecing the company. Or, we may have delightfully concluded that new vendor intake was performing swimmingly.

At each step, lawyers wear a different 3LD hat. It is that kind of nimbleness and experience that makes in-house counseling rewarding and, at the same time, makes the in-house lawyer invaluable to the organization.[10] The problem, however, is that when these ERM frameworks are built, counsel is omitted or designated in the wrong place.

The OCC's draft framework did the latter, placing Legal as a first line department, meaning that it was not deemed "independent," would be subject to risk management review and challenge by the second line, and audited by the third line. Apart from well-founded worries about non-lawyers giving legal advice, privilege could have been seriously compromised in that framework.[11] Happily, the OCC took comments, including a set from the Clearing House Association LLC, which argued, among other things that Legal, while often heavily involved with the business, still acted as an independent risk function and was thus a second line function.[12] The OCC's final regulation defined Legal as "not ordinarily include[d]" in the first line, but noted in its accompanying commentary that some functions that report to a General Counsel could be deemed first line, just as some aspects of HR, Finance or IT could be as well.[13] In short, the guidelines recognized lawyer independence and allowed lawyers to continue to have the necessary flexibility across the 3LD of affected banks. Privilege was protected too. The General Counsel of the Federal Reserve, Thomas Baxter, gave a speech this summer regarding the OCC framework in which he remarked that in-house counsel are "extremely important" to ERM. His guidance was, "don't try to force-fit attorneys into a specific line of defense. There is no single, right place for the lawyers and the compliance folks in an enterprise risk management framework."[14] Rather, he remarked that the key to effective risk management is risk professionals working collaboratively.

So We Are Important: Now What?

Other regulators have recognized the very important role of the law in risk management. Last year, the Financial Stability Board ("FSB") issued guidance on how to assess the "risk culture" of systemically important financial institutions ("SIFI's"). Good risk culture is supposed to be the ultimate outcome of ERM. The FSB stated:

> A *sound* risk culture consistently supports appropriate risk awareness, behaviours and judgements about risk-taking within a strong risk governance framework. A sound risk culture bolsters effective risk management, promotes sound risk-taking, and ensures that emerging risks or risk-taking activities beyond the institution's risk appetite are recognised, assessed, escalated and addressed in a timely manner.
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> **First and foremost, it should be expected that employees in all parts of the institution conduct business in a legal and ethical manner.** An environment that promotes integrity should be created across the institution as a whole, including focusing on fair outcomes for customers.[15]

The average lawyer reading this might say, "all right, now we are getting somewhere with all this risk stuff," but the guidelines do not directly mention the law again, let alone lawyers.[16] We are left to develop our own theories and guidelines.

Unfortunately, the science of legal risk management has only lately begun to develop.[17] One stumbling block is the definition of "legal risk"—there is no standard definition and it may be that one is impossible.[18] In a structure where lawyers are force-fit into an ERM structure, this lack of definition can leave counsel blind and hamstrung. The kind of enterprise risks that in-house counsel worry about and which can have massive downside—regulatory, compliance, ethical, reputational—wind up in a political dog pile or, worse, never make it to the dog pile. Moreover, there is a seductive risk in ERM itself, in that it believes it can capture, classify and manage the law like it is a risk onto itself. One author notes that:

> to the extent the law is treated as simply a source of "risk" that may for this purpose be homogenized with risks stemming from other sources, it is incorporated within a risk management framework as another constraint on conduct, "not norms that express views of right conduct or desirable states of the world."[19]

The author goes on to note that where lawyers are reduced to a pure second line function, they can lose the ability to actually affect the business' decision whether or not to comply with the law.[20] Ironically, that is a "risky" structure, because it continues to prefer an ambulance at the bottom, rather than a fence at the top, of the cliff.[21]

Given the risk of one's business going over a cliffside, it is considerably important that lawyers help create the ERM frameworks that non-lawyers intend to apply to lawyers. This means translating legal practice sufficiently into ERM so that non-lawyers can make sense of it and we as a profession do not suffer death by nomenclature. That is not to say we abandon what works. One author notes that while "engineers, IT security experts and enterprise risk managers are increasingly using standardized assessment methods, we lawyers seem to use experience-based heuristics to manage complexity and risk. This established approach has worked well in the past, and we should be very cautious about replacing it."[22] Legal's original inclusion in the OCC's first line of defense was something of a backhanded compliment because it acknowledged that most businesspersons are very receptive of lawyers and their war stories about, and common sense developed from, cradle-to-grave business experiences

Assuming that 3LD continues to be the framework within which ERM is generally understood, we also need to begin illustrating how lawyers operate in each trench line while maintaining their independence of each. This is the invitation to elaborate what was made in the *OCC Guidelines*, Mr. Baxter's speech, and by the FSB. We are challenged to underscore our essential benefit as business facilitators as well as our independence and risk management capabilities.

From management's perspective, the role of an effective in-house lawyer is that of a business person who wears a legal hat. The reason for this is that a lawyer working in-house has two primary responsibilities: to protect the company, and at the same time help to drive profitable growth by applying legal skills to business challenges and initiatives.[23] Because the in-house role includes defensive, offensive, and business-focused components, it is incumbent upon the lawyer to be both independent and infused throughout the end-to-end business processes from production through implementation to any necessary dispute resolution. Because ERM is also part of the end-to-end business process, companies must empower their lawyers to embrace their roles in executing an effective ERM program.

Once a company accepts the premise that the best practice is to construct an ERM framework that provides lawyers with visibility and effective access to the business lifecycle, the lawyer's challenge is to be independent, collaborative, practical and holistic while adding analytical discipline and rigor to a company's ERM regime. This important and delicate balancing act is a perpetual state for in-house counsel because they are responsible to the ongoing business and accountable to shareholders. By contrast, when a company hires outside counsel, that lawyer will typically handle a discrete issue, resolve the issue, and then fade away. An in-house lawyer must understand how everything fits together so that holistic solutions are developed that consider a host of risks and avoid unintended consequences (e.g., systems issues, regulatory embroilment, reputational injury, lawsuits) while establishing sustainable business practices that drive growth and profitability.

There is a saying in poker that "you can't lose what you don't put in the middle, but you can't win much either." Such is the case when evaluating the benefits of an appropriately calibrated ERM discipline that incorporates lawyers able to craft business-sensitive solutions that manage risk and drive desired outcomes. It is absolutely not a lawyer's job to squeeze all the risk out of any given opportunity. This is the difference between theoretical advice (i.e.. "we could get sued for millions") and practical advice that approaches risk from a qualitative and quantitative standpoint and generates a more useful cost-benefit analysis for the business.

Ultimately, having legal closely partnered with ERM and its attendant processes will produce better business outcomes with less volatility from unanticipated risks that should have been caught in a well-designed filter. Additionally, it is important to note that every business and function within a company is a client of the in-house lawyer (e.g., Compliance, Finance, Risk, HR, Internal Audit, etc). This is especially true in highly regulated industries like banking and insurance. Therefore, the goal should be to have a company's in-house legal function at the table and adding value throughout the 3LD process because to do otherwise may at any given time endanger the business or its stakeholders. The drafting history of the *OCC Guidelines* showed the balance and tension between these, at times, competing interests. Below we discuss examples in the insurance industry of how business lawyers function in the first and second lines of defense.[24]

Practicing in the Business

In the first line of defense, the objective of an in-house business lawyer is to provide strategic and tactical legal advice focused on market opportunities; regulatory compliance; product development; contracts with business partners and vendors; judicial developments and disputes; and various transactional matters including mergers and acquisitions. The legal support in the first line of defense is usually designed to align with the business units, which allows the lawyers to develop a deep understanding of their goals and objectives. An expected consequence of this alignment is that lawyers will often be called upon to identify and advise on all types of risks, not just legal risks, just like any other member of the business team. Unlike outside counsel who value depth in niche specialties, in-house lawyers must take a generalist approach to issue spotting and then decide where to delve more deeply.

In addition to legal risks, the run-of-the mill product development or underwriting initiatives must be considered in light of the business risk (profit and loss), potential for damage to partner relationships, consumer complaints, increased regulator activity/scrutiny, IT systems limitations/issues, and risk of damage to reputation and brand. Therefore, the first line of defense emphasizes alignment with the business and prudent assessments of a wide range of risks to support the desired business result.

Independent Risk Management

Once this process is complete, a lawyer's work is not done. A second line of defense has begun to co-exist for the business lawyer, with a re-focused alignment and responsibility for advising the functions charged with implementing and monitoring sound business policies and practices.

A business lawyer's role in the second line of defense is to assist and advise in the control and oversight function. An instructive example of this role is observed in the relationship between the legal and compliance functions, which are generally separate roles in larger companies with compliance professionals who may or may not have formal legal training.

The typical division of labor between legal and compliance is one where lawyers interpret laws and regulations to determine their meaning, their impact, and any obligation of the company to comply, while compliance is charged with taking the lead on developing plans to implement and monitor the agreed-upon policy or practice. Careful coordination between legal and compliance is crucial to the overall success of the control and oversight strategy. Both areas should work together to establish the "guardrails" for conducting business and the necessary risk management protocols. The process of facilitating the implementation of any changes necessary to comply with a new or revised statute or regulation requires legal to support compliance in both identifying potential risks and ensuring that the interpretation of the company's obligations creates a pathway to a sustainable solution that can be effectively monitored and measured. Further, while compliance may have the primary responsibility for managing the various operational and business processes related to matters such as complaint handling, regulatory exams, insurance policy rate and form reviews, and the development of corporate policies, identifying and assessing the myriad risks that permeate these processes will invariably fall to the in-house business lawyer. Once well-defined controls and compliance processes are established, executive management and corporate boards are charged with carrying out their oversight duties through mechanisms designed to assure that all relevant risks associated with the company and its businesses are properly identified and effectively managed.

Conclusion

The in-house legal profession spends the preponderance of its time running the traps with the business and has little time for self-advocacy. Nonetheless, we have probably gotten to the stage where professional responsibility dictates that we join in the ERM modeling exercise at the front end, not as an afterthought. We are good advocates by training, so we should be particularly suited to demonstrate how the law that we serve is very relevant to the models being developed by our colleagues in other professions. As discussed above, ERM has advanced far outside the financial services sector, so it is imperative that all lawyers speak its lingo and make sure they have a seat at the ERM table, wherever it may be.

Endnotes

1. Sarah Duggin, *The Pivotal Role of the General Counsel in Promoting Corporate Integrity and Professional Responsibility*, 51 St. Louis. U. L.J. 989, 995 (2007) (discussing historical roles).
2. Tania Rostain, *General Counsel in the Age of Compliance: Preliminary Findings and New Research Questions*, 21 Geo. J. Legal. Ethics 465 (2008) (discussing the transition of in-house counsel from "kept lawyers" to cops, counselors and entrepreneurs).
3. Lawrence M. Friedman, Law in America: A Short History 168 (2002).
4. *Id*.
5. *See* Steven J. Dreyer, *Standard & Poor's Looks Further Into How Nonfinancial Companies Manage Risk*, S&P Global Credit Portal: Ratings Direct (June 24, 2010) www.standardandpoors.com (google title of article); Martin Pergler, Enterprise Risk Management: What's Different in the Corporate World and Why (McKinsey & Co. 2012) (contrasting ERM in financial institutions with ERM incorporates); Andrew Cuomo, Governor, New York State, Cuomo Announces Administrative Appointments (June 3, 2015), www.governor.ny.gov/news/governor-cuomo-announces-administration-appointments-20.
6. Melissa Maleske, *4 Cases That Expanded In-House Privilege Overseas*, Law360 (Aug. 6, 2015) www.law360.com/articles/687665/4-cases-that-expanded-in-house-privilege-overseas (quoting source with the Association of Corporate Counsel and contrasting privilege protections in United States) ("[W]e're still seeing cases in Europe—particularly in France, which has not ever had a lot of respect for the role of in-house lawyers—where the competition authority is still demanding documents prepared by in-house lawyers").
7. *Organization as Client*, N.Y. Rules of Prof'l Conduct r. 1.13 (2009) (New York in-house counsel reporting obligations); David A. Delman & Paul A. Bruno, *Up the Ladder and Out the Door: How to Say "No" to the CEO*, ABA: Forum on the Construction Industry (Fall 2013 Meeting) (arguing same type of SOX job protections that extend to CFO should extend to GC); *see also* Nicola Laver, *Revealing the Truth*, IBA (Nov. 11, 2015 8:45 AM), http://www.ibanet.org/Article/Detail.aspx?ArticleUid=cea217a9-682c-4f6a-9465-5445603259d7 (surveying UK and U.S. whistleblower protections for in-house counsel). For Australian and New Zealand considerations, *see* Michael Legg, *The Hardie Judgment II: Lawyers as Gatekeepers*, Univ. of NSW: Centre for Law Markets and Regulation, http://clmr.unsw.edu.au/article//the-hardie-judgment-ii%3A-lawyers-as-gatekeepers, (last accessed Nov. 16 2015); *Ethical Conflicts and In House Counsel*, Without Prejudice 44, Feb. 2009(Feb. 2009); David Friar, *The James Hardie Decision: Liability for General Counsel and Company Secretaries* NBR (Aug 2012), http://www.nbr.co.nz/article/james-hardie-decision-liability-general-counsel-and-company-secretaries-ja-126180 (considering Australian developments and best practices under NZ law); *see also* Joan Loughrey, Corporate Lawyers and Corporate Governance (Cambridge Univ. Press 2011) (U.K. lawyers may have common law obligation to report up; also noting public expectations are trending towards regarding counsel as the "conscience of the corporation").
8. *See* Richard Susskind, The End of Lawyers? 4 (Oxford U. Press 2010) (drawing comparisons to allow chandlers, cordwainers, and wheelwrights) (Susskind I); Richard Susskind, Tomorrow's Lawyers: An Introduction to Your Future (Oxford U. Press 2013) (predicting radical industry transformation in the coming 20 years (Susskind II); James E. Moliterno, The American Legal Profession In Crisis (Oxford U. Press 2013) (a concentration of power and arch-conservatism hamstrings legal adaptation and progress).

9. Dep't of the Treasury, Office of the Comptroller of the Treasury, OCC Guidelines Establishing Heightened Standards for Certain Large Insured National Banks, Insured Federal Savings Associations, and Insured Federal Branches; Integration of Regulations,12 CFR Parts 30 and 170, (Sept. 2, 2014).
10. Deborah DeMott, *The Stages of Scandal and the Roles of General Counsel*, 2012 Wis. L. Rev. 463, 491.
11. ERM operates in significant part by establishing patterns and practices. Consider in litigation the discoverability of statistical data on legal, regulatory or compliance breaches and the geometric risk of non-lawyers opining on that data as it moves through the line of defense ranks.
12. *TCH Comment Letter to OCC on Proposed Heightened Standard Offers Support, Suggests Clarification of Certain Aspects of Proposed Guidelines*, The Clearing House, 11-13, (Mar. 28, 2014), https://www.theclearinghouse.org/%20issues/banking-regulations/dodd-frank/corporate-governance/tch-comments-on-occ-heightened-standards-proposal (download PDF).
13. OCC Guidelines, at 25-26.
14. Joanna Belbey, *Where Does Legal and Compliance Fit Into the OCC Framework of Enterprise Risk Management*, Forbes (Aug. 31, 2015) http://www.forbes.com/sites/joannabelbey/2015/08/31/where-does-legal-and-compliance-fit-into-the-occ-framework-of-enterprise-risk-management/.
15. Guidance on Supervisory Interaction with Financial Institutions on Risk Culture at 1 (Financial Stability Board Apr. 2014) (emphasis supplied).
16. Much of the FSB's subsequent subject matter is fundamentally "legal" in nature, however: boards of directors' responsibilities; the ensuing need for board access and open discussion; holding employees accountable to the organization; compensation structures; risk awareness, e.g., advice given and/or taken; learning from past experiences; and clear consequences.
17. Susskind II, *supra* note 8, at 117-18 (the legal risk manager is "most urgently needed and long overdue").
18. *See* Karen Anderson and Julia Black, *Legal Risks and Risks for Lawyers*, Herbert Smith Freehills & London School of Economics Regulatory Reform Forum (June 2013) (offering the definition of the International Bar Association: "Legal risk is defined as being a risk of loss to an institution that is primarily caused by: (1) a defective transaction; (2) a claim (including a defense to a claim or counterclaim) being made or some other event occurring that results in a liability for the institution or other loss (for example as a result of the termination of the contract); (3) failing to take appropriate measures to protect assets (for example, intellectual property) owned by the institution; and (4) a change in law") (Anderson and Black).
19. DeMott, *supra* at 468.
20. *Id.*
21. Susskind II, *supra* note 8, at 118.
22. Tobias Mahler, *Tool-Supported Legal Risk Management: A Roadmap*, 2010 Eur. J. Legal Stud 2, 3. (Heuristics are best simply described as common sense or "rules of thumb." At law, the most self-contained heuristic is "res ipsa loquitur.").
23. In ERM verbiage, this means finding the "upside" of risk. *See* Edward Teach, *The Upside of ERM*, CFO Magazine (Nov. 26, 2013), http://ww2.cfo.com/risk-management/2013/11/upside-erm/; *A Structured Approach To Enterprise Risk Management (ERM) and the Requirements of ISO31000* at 2, Institute of Risk Management, (2010) ("a comprehensive approach will result in an organization benefiting from the 'upside of risk'").
24. We hope to discuss in a subsequent article how lawyers function in the third line by, for example, advising on legal matters identified by Internal Audit and conducting investigations in partnership with Internal Audit.

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Courts Increasingly Hold Companies Accountable When Their Outside Counsel Lacks E-Discovery Expertise

By Daniel Meyers

I. Introduction

Courts from New York to California have held that when litigation counsel lacks E-Discovery expertise, it is the client that is accountable. Perhaps the most striking—though by no means the only—example of this is a decision from the United States District Court for the Southern District of Ohio in *Brown v. Tellermate Holdings*.[1]

In *Tellermate*, the court imposed severe sanctions against a litigant for failing to properly preserve and produce electronically stored information (ESI). The *Tellermate* decision went out of its way to emphasize that the preservation shortcomings were not solely of the client's making, but more the result of retaining counsel that had a "basic inability to appreciate" the nature of its client's electronic data or how to fulfill the client's E-Discovery obligations.[2]

The notion that counsel has an obligation to be familiar with developments in the law—and specifically, developments in the E-Discovery arena—is not novel. That obligation is founded upon the core ethical and professional requirement that lawyers continue their legal education and represent clients only on those subject matters with respect to which they are well-informed.[3] Judges, however, frequently take that ethical rule governing attorney conduct one step further, holding the client directly responsible for *its counsel's* E-Discovery shortcomings. The resulting lesson for corporate litigants, who face particularly complex and burdensome E-Discovery obligations, is clear: either hire outside counsel with E-Discovery expertise or find some other means to ensure that such obligations are fully understood and satisfied (such as by retaining an outside E-Discovery expert to buttress and advise outside counsel). Heed this advice or suffer the consequences, which can have a crippling impact on both litigation budgets and the ultimate disposition of the merits.

II. Counsel's Obligation to Ensure Its Client Is Preserving ESI Is Well-Established

Since *Zubulake v. UBS Warburg LLC*,[4] the basic obligation to preserve ESI has been well-established. The parties to a litigation are required to implement a litigation hold and to preserve potentially relevant ESI as soon as litigation is reasonably anticipated. Counsel, in turn, has the obligation not only to direct the client to take measures to preserve potentially relevant ESI, but also to monitor the client's compliance. It is not enough for counsel simply to delegate ESI preservation tasks to the client and take the client at its word. The attorney must perform a reasonable inquiry to ensure compliance.

In *Vladeck v. Paramount Leasehold*, for example, Justice Bransten of the Commercial Division of the Supreme Court, New York County, issued sanctions after faulting defense counsel for, *inter alia*, "fail[ing] to direct its clients to implement a litigation hold."[5] And in *Ober v. County of L.A.*, the court expressly recognized that Rule 26(g) of the Federal Rules of Civil Procedure "mandate[es]" that "counsel make a reasonable investigation and effort to certify that the client has provided all information and documents available to it which are responsive to a discovery request."[6]

Likewise, in *Tellermate*, the court faulted counsel for falling "far short of their obligation to *examine critically* the information which Tellermate gave them [about ESI]."[7] The court continued, "Counsel had an obligation to do more than issue a general directive to their client to preserve documents.… [They] had an affirmative obligation to speak to the key players at Tellermate so that counsel and client *together* could identify, preserve, and search the sources of discoverable information."[8]

Similarly, in *PIC Group, Inc. v. LandCoast Insulation, Inc*, the court ordered defendant to pay a $50,000 monetary sanction as a result of "e-discovery compliance [that] was wholly devoid of competence."[9] The court criticized defense counsel's hiring of a purported expert who "accepted Defendant's representation [about the availability of ESI] without attempting to verify its truthfulness or recover any of the allegedly erased data."[10] Had defense counsel or its expert investigated the issue, they would have discovered earlier that the data defendants claimed to have been erased was stored on a portable hard drive marked "Backups."[11]

III. Where Counsel Fails to Guide Its Client Adequately, It Is the Client That Is Exposed to Sanctions

Courts routinely go beyond merely chastising counsel for failing to satisfy its duty to understand and advise the client concerning E-Discovery obligations. In *Tellermate*, as part of their employment discrimination case, the plaintiffs requested that defendant Tellermate produce reports from salesforce.com, a website Tellermate used to track employee sales performance. Tellermate's counsel did not produce these reports, claiming—inaccurately—that Tellermate could "only access the salesforce.com database in real time."[12] The court admonished Tellermate's counsel, noting that there was "no evidence that counsel made any effort to speak to…employees to find out if they could retrieve information from their salesforce.com accounts," nor was there any evidence "that counsel ever visited the

salesforce.com website."[13] Counsel's "failure to appreciate" the nature of Tellermate's ESI led to a "corresponding failure to take steps to preserve that information" beyond the three-to-six-month period it was automatically stored by salesforce.com.[14] As a result, the court sanctioned the client, Tellermate, by precluding it from using any evidence that would tend to show that the plaintiffs were terminated for performance-related reasons, effectively eviscerating Tellermate's core defense.

"Clients often assume that because their counsel is sophisticated with respect to the subject matter of the underlying litigation, they will be savvy on E-Discovery. As is now clear from Tellermate *and similar cases, that assumption is both mistaken and potentially perilous."*

Additional cases abound holding a party accountable for its counsel's E-Discovery mistakes. In *In re A&M Florida Properties II, LLC*, for example, where the plaintiff failed to produce certain emails due to counsel's failure to understand the distinction between an employee's "live" and "archived" email folders, the court ordered plaintiff to pay monetary sanctions.[15] Specifically, plaintiff had to reimburse defendant for half of the cost of forensic searches that were run as a result of plaintiff's failure to produce documents and for the costs of the sanctions motion.[16] Despite noting counsel's lack of bad faith, the court nonetheless imposed sanctions because counsel "simply did not understand the technical depths to which electronic discovery could go."[17]

IV. Conclusion

Clients often assume that because their counsel is sophisticated with respect to the subject matter of the underlying litigation, they will be savvy on E-Discovery. As is now clear from *Tellermate* and similar cases, that assumption is both mistaken and potentially perilous. Staying informed of developments in the ever-evolving world of E-Discovery requires special expertise and dedication. Corporate litigants should take care to examine their choice of outside counsel to ensure that they are adept at E-Discovery. Alternatively, corporate litigants should identify and retain an outside E-Discovery expert to buttress its choice of outside counsel. The consequences of inattentiveness to these issues include burdensome motion practice and sanctions, which can range from monetary penalties to the outright dismissal of claims or defenses.

Endnotes

1. No. 2:11-cv-1122, 2014 WL 2987051 (S.D. Oh. July 1, 2014).
2. *Id.* at *20.
3. *See* Model Code of Prof'l Conduct R. 1.1 cmt. 8 ("To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology…."); Elizabeth E. McGinn & Kristopher Knabe, Am. Bar Ass'n, *Ethical Issues in the Digital Age: Navigating E-Discovery Challenges* (Nov. 1, 2012), available at http://apps.americanbar.org/litigation/committees/consumer/email/fall2012/fall2012-1112-ethical-issues-digital-age-navigating-e-discovery-challenges.html (Rule 1.1's directive makes it "imperative that attorneys overseeing the e-discovery process have a solid understanding of the capabilities and functions of the various e-discovery tools employed during the review and production of ESI.").
4. 220 F.R.D. 212 (S.D.N.Y. 2003).
5. 2015 N.Y. Misc. LEXIS 663 (Sup. Ct. N.Y. Co. Mar. 4, 2015).
6. 2014 U.S. Dist. LEXIS 78027, at *20-21 (C.D.Cal. Mar. 27, 2014).
7. 2014 WL 2987051, at *1 (emphasis added).
8. *Id.* at *20 (emphasis added).
9. No. 1:09-CV-662-KS-MTP, 2011 WL 2669144, at *1 (S.D. Miss. July 7, 2011).
10. *Id*.
11. *Id.*; *see Procaps S.A. v. Patheon Inc.*, No. 12-24356-CIV, 2014 WL 800468, at *6 (S.D. Fla. Feb. 28, 2014) (ordering plaintiff and its counsel to split a monetary sanction for attorneys' fees where they failed to implement a litigation hold and where they used "inadequate, insufficiently supervised methodology…to locate and collect ESI and other documents"); *Clay v. Consol. Pennsylvania Coal Co., LLC*, No. 5:12CV92, 2013 WL 4854746, at *6, *8 (N.D.W.V. Sept. 11, 2013) (imposing sanctions after rejecting defendants' explanation that a failure to search for any relevant ESI until ten months after the action was filed was the result of a "minor miscommunication between counsel and a human resource (HR) manager, who they allege was responsible for collecting materials responsive to Plaintiff's discovery requests").
12. 2014 WL 2987051, at *1, *5, *20 (In reality, "any Tellermate employee with a login name and password could access… historical information [on salesforce.com] at any time.").
13. *Id.* at *8.
14. *Id.* at *9.
15. No. 09 15173, 2010 WL 1418861, at *6-7 (Bankr. S.D.N.Y. Apr. 7, 2010).
16. *Id.*
17. *Id.*

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Feedback Please! Working Effectively and Ethically with Litigation Consultants

By Jennifer Scullion and Johanna Carrane

The days are long gone when litigation consultants focus solely on jury selection and mock trials. Nowadays, litigation consultants have many potential roles at various stages of a case, from venue selection (or challenges), to discovery planning and assessment, and preparation of witnesses for deposition or pre-trial hearings. At each of these stages, a proven, reputable consultant can bring valuable expertise and experience in social research to complement and enhance your legal team's analysis, evaluation, and preparation of the case. That being said, with litigation budgets increasingly squeezed and scrutinized, it is more important today than ever to secure maximum value and impact from your litigation consulting dollars.

"A true litigation consultant is far more than someone with good 'instincts' or an ability to 'read people.' A good litigation consultant does what a lawyer is not trained to do and adds information to the mix that the legal team cannot get."

Consider Potential Consultant Roles Throughout Your Case Evaluation

Social research is the key phrase when it comes to litigation consultants. A true litigation consultant is far more than someone with good "instincts" or an ability to "read people." A good litigation consultant does what a lawyer is not trained to do and adds information to the mix that the legal team cannot get. For example, the consultant knows how to conduct effective and reliable focus groups, and can also advise on the most meaningful and useful issues and evidence to test in such groups.[1] A high-quality consultant also knows how to evaluate the focus group results to separate "noise" from real information and to help your company and legal team understand what the participants said about an issue, what was driving their reactions, and what different approach or facts might change their reactions. Likewise, a worthwhile consultant has access to and knows how to use reliable demographic data, surveys, and similar information to help assess the potential jury pool in a venue and, more broadly, identify potentially useful or dangerous beliefs, concerns, or trends in thinking that may affect views of the case. Finally, a consultant's analysis and advice on all of the above should be informed by the most current research—i.e., real data—on how jurors actually think and act.[2]

As a practical matter, only a select breed of the highest-stake cases will warrant involving a consultant at every stage. But most high-stakes, complex, or difficult cases do warrant real consideration of potential roles for litigation consultants beyond mock trials. Discussion of those potential roles is an invaluable part of your strategic litigation planning with your outside counsel.

Potential roles for litigation consultants you and outside counsel should consider include:

- **Assessing and comparing jury profiles in potential venues, including when deciding where to file a case or when there is the potential to transfer venue or consolidate cases in a single venue**. In addition to demographics, a consultant can draw on existing public opinion polls, social media, and other sources to help your legal team assess the pros and cons of potentially trying a case in one venue over another. A litigation consulting firm will also be able to gather information on how jurors in the relevant venues have dealt with similar cases or issues.
- **Early focus group work to test major case themes and guide discovery**. These can be much less involved and less costly than a mock trial, but help the legal team and company executives to get real feedback early in the case and recalibrate if necessary. Early focus groups also help identify the important facts and issues potential jurors will want to hear about, allowing the legal team to ensure that those facts and issues are brought out and/or disclosed through discovery from the parties, non-parties, or experts—and not, for example, cut off through uninformed objections or insufficient discovery responses.
- **Preparation of witnesses for deposition or pre-trial hearings**. This is not about the witness giving "perfect," rehearsed or scripted answers or otherwise putting on a performance. Such efforts not only raise ethical concerns, but, as a practical matter, often backfire when a nervous witness blurts out "I know I'm not supposed to use this word, but ____." Good witness preparation is about helping the witness be seen and heard as a clear, credible, and competent individual. The exceptionally nervous or insecure witness can benefit from having a separate person (the consultant) supporting and helping them specifically with their presentation (demeanor, clarity and completeness of

answers, etc.), while the legal team focuses on the substance. Where the witness is also high-ranking or a particularly difficult client witness, it can be useful to have an "outsider" (the consultant) be the one to give frank presentation feedback so that the critical, underlying relationship of trust and loyalty with the legal team or in-house working relationships are not undermined.

- **Mock Trials**: The format, scope, and cost of a "mock trial" can vary considerably—from a single-day exercise with a focus group assessment of "clopenings"[3] based on each side's key facts and arguments to something more akin to a real, multi-day trial with openings, key witnesses (by deposition video), and closings. A key consideration is timing. If time permits, a party may want to try to conduct some form of mock trial or focus group after "core" discovery and depositions have been completed, but before discovery closes so that additional party or non-party discovery might be taken if the mock exercise reveals a substantial "hole" in the case. A post-discovery mock trial is most useful not only for preparing for actual trial—which evidence, themes, witnesses, demonstratives, etc. work, what real-world concerns do the jurors have, what legal issues are confusing or troubling, etc.?—but for you and your trial team to engage in a realistic assessment (or, more typically, reassessment) of potential settlement value. (New York-based companies should be aware that some courts outside New York (e.g., certain federal courts in Colorado and Texas) require disclosure of the fact of a mock jury or focus group exercise and of the names of participants if the exercise draws from the court's jury pool or otherwise restrict exercises within the venue).
- **Jury Panel Research and Jury Selection**: Jury panel research and jury selection assistance are the bread and butter of litigation consultation. Even if this is the only role for which your outside counsel retains a consultant on a case, it pays to bring the consultant in early so that he or she can best tailor their research to the particular issues and circumstances of your case and so that you can work with the legal team and clearly discuss what options exist (i.e., will research go beyond public records,[4] will the team want live research during voir dire, etc.), how compliance with ethical and legal restraints (including local rules) will be ensured,[5] what the key issues are likely to be in juror selection, and the logistics of voir dire (who will participate, etc.).
- **Trial Witness Preparation**: The role of consultant for trial witness preparation is similar to deposition preparation, although the specific advice is tailored to suit a presentation to a jury and the different skills needed for effective direct and cross-examination testimony. Again, you can assure your executives and other key company witnesses that good, ethical preparation is not a concern. Research suggests that where witness preparation is disclosed, jurors are neither surprised to learn such preparation takes place, nor are they typically cynical about its purpose.
- **In-Trial Assessment/Shadow Jury**: When the case warrants the cost, a litigation consultant may run a "shadow jury" to provide real-time feedback on how the evidence and themes are coming across, allowing for adjustments, rehabilitation, and useful insights for closing arguments. Less costly, but also effective, is for the litigation consultant to provide real-time feedback, informed by pre-trial focus groups, mock trial, and/or voir dire.
- **Post-Verdict Juror Interviews**: If court rules permit, the litigation consultant may conduct post-verdict interviews with the jurors. This allows for a more neutral party to probe what guided the verdict, providing useful insight for the legal team and the clients on what worked, what did not, and potentially informing decisions about further, related, or similar proceedings. This can be particularly helpful where a company might be facing similar litigation by other potential plaintiffs or considering bringing suit against other defendants.

Ask for What You Need and Get What You Pay For

Having decided to instruct your outside counsel to hire a litigation consultant, you and your company should get the most from them. Though that seems like an obvious proposition, some common scenarios can get in the way.

As discussed above, one obstacle to working most effectively with a litigation consultant is engaging him or her later rather than earlier in the case. The most useful insights have no value if it is too late to get the necessary evidence in or positions and statements have thoroughly boxed a party in on an issue. If cost is the factor driving the timing to engage a consultant, ask the consultant (or 2-3 candidates) for a proposed solution that will get him or her involved early in the case on the key issues that will have the biggest impact on the shape and success of the case, whether its early testing of major themes, simplifying a complex core issue, or getting a candid, real-world assessment of a key witness and her story.

Relatedly, be demanding in budgeting. Get clear budget proposals for various potential projects, each broken down into professional fees and out-of-pocket expenses (which, in some cases, may far exceed professional fees). This allows a full and frank discussion about what proj-

ects make sense, which can be scaled back, and which can be tabled for later consideration. For example, you may decide to invest more upfront on early focus group research or witness preparation and scale back potential expenses in a later mock trial (by forgoing handheld electrocronic feedback devices, moving the exercise to a market-research facility, testing with fewer focus groups, etc.). Also, ask how much mark-up is added to out-of-pocket costs and whether any can be avoided by directly contracting (with a hotel, for example) or by paying invoices quickly (less than 30 days). Finally, to avoid crossed-wires, be sure to get clarification on what fees and expenses can and cannot be avoided if the case is dismissed or settles.

Issues within the legal team or at the company level can also dilute the value provided by litigation consultants. For example, it is important to set expectations realistically with those interested executives and employees about what the purpose and use of a focus group or mock trial is: it is much less about who "wins" or "loses" than about how and why the jury looks at key issues and evidence. While some of the feedback and results may be clear-cut, the bulk of the most useful information will be about tendencies and trends in thinking, as well as areas of surprising (to the lawyers) confusion and even "irrational" thinking. Most difficult of all can be really listening to candid data and comments that point to a major "disconnect" between how the case has been thought about for months (or longer) and how the jurors are seeing it. It is a mistake to allow such findings to be dismissed as "mumbo jumbo" or to fall into the trap of thinking "we'll just be more persuasive next time." If you truly believe you are getting unreliable or unhelpful analysis, you have hired the wrong consultant. But if you have done your homework and hired a proven professional, it is incumbent on you not to let your trial team (or executive or board members) play ostrich.

Protect Privilege and Confidentiality

A trusted litigation consultant can and should be an integral part of case assessment and trial preparation and facilitate trial counsel's ability to competently advise the client by effectively "translating" social research and data much as an accounting expert helps "translate" arcane accounting issues. As such, there are strong arguments that communications with and in the presence of consultants, and consultants' work product, fall within the scope of the attorney-client privilege and/or constitute core opinion work product shielded from discovery in all but the most compelling circumstances.[6] The case law both within New York and across the country, however, is sparse. What exists is mixed.[7] Thus, careful consideration should always be given to what information and opinions are shared with a litigation consultant and in what form, as well as who has access to the litigation consultant's work product, focus groups, etc. For example, while few would doubt that a mock trial presentation deserves the highest level of protection as core opinion work product, allowing expert or non-party witnesses to view or participate in the exercise could result in waiver of some or all of that protection.[8] This can be a difficult, but important, conversation to have with colleagues and company personnel who may be interested, but whose attendance is not vital to the mock jury exercise.

Best practices to maximally preserve confidentiality should at least include: (1) having outside counsel retain the litigation consultant expressly as their agents and non-testifying, consultants; (2) clearly discussing what work product the consultants will generate for any project and whether videotapes/written reports can be minimized or forgone; (3) limiting the audience and form for distribution of consultant work product—e.g., present detailed focus group results through PowerPoint presentation to core trial team, no potential witnesses in the room, and no hard copies; (4) have outside counsel present the core learnings from mock trials to the need-to-know internal company group; and (5) consistently maintain the structure of the consultant working as the lawyer's agent—e.g., the communication chain should be consultant to outside counsel to in-house personnel and vice versa (do not rely on cc: to counsel to preserve privilege) and the consultant should not be meeting with clients or witnesses other than in sessions set up and led by outside counsel.

Endnotes

1. For example, a trial team or those executives less familiar with the purposes of a focus group may sometimes want to use a focus group to predict a verdict or a damages award. While a focus group can be helpful to understand juror leanings and levels of anger and concern, they are best used to hone in on a select set of facts or themes to be tested. What to test varies based on the case but it is vital the consultant works with the trial team to identify and narrow the list of variables for an exercise.
2. For example, data collected by JuryScope research has shown that jurors are fairly evenly split on whether juries should be "sending a message" to corporations to improve their behavior, with about one-third each agreeing with, disagreeing with, or having no view on the proposition—and only a relatively small percentage strongly agreeing with the proposition.
3. A "clopening" is an opening statement that is supplemented for purposes of a mock exercise with additional documents and a persuasive tone, resulting in a combined "opening" and "closing" statement.
4. Social media searches can raise particularly thorny issues. The Formal Opinion 466 issued in 2014 by the ABA's Standing Committee on Ethics and Professional Responsibility permits "passive" searches of social media—i.e., viewing information available without "friending" or taking other affirmative action to request access from the panel member. By contrast, the New York City Bar Association issued an opinion in 2012 that reasoned that social media research may be improper if the particular platform (such as LinkedIn) alerts the panel member to the fact that their information has been reviewed. New York City Bar Ass'n Committee on Professional Ethics, Formal Op. 2012-2. Unlike the ABA, the NYC Bar Association was concerned that such notices may intimidate the panel member. Even when social

media or other research is permitted, care should be taken to avoid jurors feeling they (or their families and friends) are under "surveillance." Legal team members should avoid using printouts from or live access to social media, Google, etc. in ways that would be apparent to potential jurors.

5. For example, if research beyond public records is anticipated—private investigators, social media searches, and the like—care must be taken not to engage in any deception to gain access to information and not to cross the line into ex parte communications. Knowing the local court's written and unwritten rules on jury research is a must.

6. *See*, *e.g.*, *U.S. v. Kovel*, 296 F.2d 918 (2d Cir. 1981) (communications involving accounting expert are privileged to the extent the expert was "at least highly useful" to provision of effective legal advice by helping with the "foreign language" of accounting concepts); *Hickman v. Taylor*, 329 U.S. 495 (1947) ("opinion" work product reflecting mental impressions and thought processes of counsel is subject to highest level of protection from discovery); *U.S. v. Nobles*, 422 U.S. 225 (1975) (work product protection extends to "investigators and other agents" assisting counsel in preparation for trial).

7. *See*, *e.g.*, *In re Cendant Corp. Sec. Litig.*, 343 F.3d 658 (3d Cir. 2003) (advice provided to witness by litigation consultant during deposition preparation with counsel is protected opinion work product; limited questions permitted on whether testimony was practiced or rehearsed); *Hynix Semiconductor Inc. v. Rambus Inc.*, 2008 WL 397350 (N.D. Cal. 2008) (permitting "circumscribed inquiry" at jury trial on witness' preparation with litigation consultant). *Compare Southern Pac. Transp. Co. v. Banales*, 773 S.W.2d 693 (Tex. App. 1989) (allowing opposing counsel to view portions of practice deposition video showing advice "intended to mold the witness' testimony" as opposed to conveying case strategy).

8. *E.g.*, *In re Air Crash at Dubrovnik, Croatia on April 3, 1996*, 2001 WL 777433 (D. Conn. 2001) (notes taken by expert witness during mock trial were discoverable as information "considered" by expert in forming opinions).

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When Posts Speak Louder Than Words: Considerations for Avoiding Litigation Through Effective Employee Social Media Policies

By Asari A. Aniagolu

It is Monday morning and the company president rushes to the general counsel's office in a panic. Some employees are furious about the latest company policy and are harshly criticizing the company and its board of directors on a public social media platform. Worried about the unfavorable publicity, the president wants to: (a) terminate the employees and (b) implement a social media policy that forbids employees from engaging in such behavior in the future. What should the general counsel do?

1. Step One: Consider Legal Precedent Regarding Employee Social Media Use

There has been a marked uptake in corporate social media incidents in the last few years. Since 2012, the National Labor Relations Board (NLRB) has issued several decisions in cases concerning the limits employers can or cannot place on employees' use of social media platforms to express their opinions regarding workplace issues.[1]

The NLRB's earliest decision was in *Costco Wholesale Corporation and United Food and Commercial Workers Union, Local 371*.[2] In *Costco*, the local union was campaigning to organize the meat department in one of the company's facilities. Weeks before the union petition was filed, two employees were suspended and ultimately terminated after vandalizing the meat room. The NLRB found that the terminations were in violation of National Labor Relations Act (NLRA), as was the company's "Electronic Communications and Technology Policy" that prohibited employees from electronically posting statements that "damage the Company, defame any individual or damage any person's reputation." The Board determined that the policy broadly prohibited employees from expressing "concerted communications protesting the [Costco's] treatment of its employees" in violation of the employees' NLRA Section 7 rights.

The NLRB's strong pro-employee stance continued in *Karl Knauz Motors, Inc. and Robert Becker*.[3] Even though the NLRB upheld the salesman's termination because the posts did not concern the terms and conditions of his employment, the dealership's Courtesy Policy came under fire because it "expected [employees] to be courteous, polite and friendly" to coworkers and third parties, and not "be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership." The NLRB found this all-encompassing language would have a chilling effect on employees' exercise of their NLRA rights. A few months later, the NLRB ruled in *Hispanics United of Buffalo, Inc. and Carlos Ortiz*,[4] where five employees from a victims assistance non-profit organization were fired for "bullying and harassing" after swapping multiple messages on Facebook about a coworker who intended to report their poor work performance to management. The NLRB ruled that the Facebook conversation was protected activity under the NLRA and the terminations were unlawful.

The NLRB and various administrative law judges have ruled in favor of employees' protected activities in *Lily Transp. Corp.*,[5] *Durham School Servs., L.P.*,[6] *Professional Elec. Contrs. of Connecticut, Inc.*,[7] and *Laurus Technical Institute*,[8] as all of these cases included company social media policies that broadly prohibited employees' protected activities rather than including narrowing language that sufficiently stated what is and is not permissible under the company policies. In *Three D, LLC d/b/a Triple Play Sports Bar and Grille*,[9] employees who complained about management's tax accounting mistakes on Facebook were discharged. The NLRB ruled that a portion of the company's Internet/Blogging policy that threatened termination for "engaging in inappropriate discussions about the company, management, and/or co-workers" was unlawful as employees could reasonably construe this policy to have a chilling effect on their rights to participate in protected activities. The Board's most resounding display of support for employees' rights came recently on March 31, 2015 in *Pier Sixty, LLC and Hernan Perez and Evelyn Gonzalez*.[10] Here, employees at a catering business were considering joining a local union. After the assistant director reprimanded employees during a catering event, one employee posted a comment on Facebook using expletives to express frustration about the assistant director's managerial style and urge others to support the union. Although the employee's post was laden with profanity, the NLRB found that the language was not "so egregious as to exceed the Act's protection."

2. Step Two: Draft a Well-Rounded Social Media Policy and Educate Company Personnel

With these cases in mind, the savvy general counsel must appreciate the need for a well-crafted employee social media policy. Fortunately, one does not have to start from scratch. On August 18, 2011, the NLRB General Counsel's Office released the first of three reports discussing NLRB investigations in social media cases.[11] The second report was issued Jan 24, 2012.[12] This second report underscored two main themes: (1) "Employer policies should not be so sweeping that they prohibit the

kinds of activity protected by federal labor law, such as the discussion of wages or working conditions among employees" and (2) "An employee's comments on social media are generally not protected if they are mere gripes not made in relation to group activity among employees." The third, most recent report was issued on May 30, 2012.[13] Besides analyzing cases in which the NLRB had ruled, the third report also included a sample of a lawful social media policy. The main sections of this sample policy asked employees to (a) know and follow the rules, (b) be respectful, (c) be honest and accurate, (d) post only appropriate and respectful content, (e) refrain from using social media at work and (f) a prohibition against retaliation for reporting any deviation from the policy. Most importantly, each section of the sample policy included narrow, explanatory language in order to avoid broad prohibitions on employees' protected activities.

Another helpful example of effective social media policy came earlier this year when the NLRB upheld a company's social media policy in *Landry's Inc. and Sophia Flores*.[14] This national restaurant and hospitality operation terminated an employee after the employee made unfavorable comments about her employment on a social media website. The NLRB found Landry's policy at the time of the employee's termination was lawful. Some of the noteworthy aspects of the Landry's policy were that:

- it required employees to acquire prior approval from the Vice President of Marketing "[i]n order to post on external social media sites for work purposes" and
- also "urg[ed] all employees not to post information regarding the Company, their jobs, or other employees which could lead to morale issues in the workplace or detrimentally affect the Company's business" and repeatedly asked employees to "be mindful" about their posts.

The policy was written in such a manner that it informed employees about which social media postings to avoid but it also did not forbid employees from engaging in protected activities.

This is a delicate but useful balance to strike. Once company management and the general counsel are satisfied that their social media policy has been drafted in a way that equally protects employees' rights, company reputation and morale, the general counsel should work with management to adequately educate employees about the policy.

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Against this backdrop of the NLRB's repeated decisions in favor of employees and their rights to post opinions about workplace issues absent fear of termination, it would be prudent for the general counsel to proceed with caution before firing employees for unfavorable comments about the company on social media or creating a social media policy that would create a chilling effect on employees' protected rights under NLRA, Section 7. Consulting outside counsel well-versed in labor and employment law would also be helpful so the company can develop a social media action plan that complies with the NLRB precedent and preserves the company's reputational objectives.

Endnotes

1. Please note that this article solely discusses the NLRB's treatment of corporate social media policies and does not address implications under state-specific laws. According to the National Conference for State Legislatures, legislation has been introduced or considered in at least twenty-three states in 2015 and nine states have enacted legislation in 2015 to prevent employers from requesting passwords to personal Internet accounts as a requirement for employees to gain or maintain employment. *See* National Conference of State Legislatures, *Access to Social Media Usernames and Passwords* (Sept. 14, 2015), available at http://www.ncsl.org/research/telecommunications-and-information-technology/employer-access-to-social-media-passwords-2013.aspx. Please consult outside counsel to better understand if and how state-specific laws may impact your company's social media policy.
2. *Costco Wholesale Corporation and United Food and Commercial Workers Union, Local 371*, 358 NLRB No. 106 (Sept. 7, 2012).
3. *Karl Knauz Motors, Inc. and Robert Becker,* 358 NLRB No. 164 (Sept. 28, 2012).
4. *Hispanics United of Buffalo, Inc. and Carlos Ortiz*, 359 NLRB No. 37 (Dec. 14, 2012).
5. *Lily Transp. Corp.*, Case No. 01-CA-108618; JD (NY)-18-14) Cheshire, CT (Apr. 22, 2014).
6. *Durham School Servs., L.P.*, 360 NLRB No. 85 (Apr. 25, 2014).
7. *Professional Elec. Contrs. of Connecticut, Inc.*, Case No. 34-CA-071532; JD(NY)-25-14, Plainville, CT (June 4, 2014).
8. *Laurus Technical Institute*, 360 NLRB No. 133 (June 13, 2014).
9. *Three D, LLC d/b/a Triple Play Sports Bar and Grille*, 361 NLRB No. 31 (Aug. 22, 2014).
10. *Pier Sixty, LLC and Hernan Perez and Evelyn Gonzalez*, 362 NLRB No. 59 (Mar. 31, 2015).
11. NLRB, Office of the General Counsel, Division of Operations-Management Memorandum OM 11-74 (Aug. 18, 2011).
12. NLRB, Office of the General Counsel, Division of Operations-Management Memorandum OM 12-31 (Jan. 24, 2012).
13. NLRB, Office of the General Counsel, Division of Operations-Management Memorandum OM 12-59 (May 30, 2012).
14. *Landry's Inc. and Sophia Flores*, 362 NLRB No. 69 (Apr. 16, 2015).

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Shareholder Litigation and Forum Selection Provisions

By Jennifer L. Permesly and Stephanie Sado

In recent years, an increasing number of corporate boards have sought to avoid the risk of multi-forum shareholder litigation by adopting exclusive forum selection clauses in their corporate bylaws.[1] These provisions have been upheld by courts in Delaware, where over 50% of U.S. publicly traded companies are incorporated, and the Delaware legislature recently amended the state's General Corporations Law to expressly permit corporations to select Delaware as the exclusive forum for litigation of breach of fiduciary duty and other internal corporate claims.[2] Other recent case law developments suggest that provisions providing for arbitration as the exclusive forum for resolution of shareholder claims may be the next frontier for corporations. We review the state of the law regarding the enforceability of both types of forum selection provisions below.

I. Delaware Law Permits Corporate Boards to Adopt Exclusive Forum Selection Clauses in Their Bylaws

A. Delaware Courts Uphold a Corporation's Right to Impose an Exclusive Forum Selection Clause on Shareholders

In 2013, in *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, the Delaware Chancery Court considered challenges brought by the shareholders of Delaware corporations FedEx and Chevron to forum selection clauses in those companies' bylaws choosing Delaware as the exclusive forum for litigation of internal corporate claims.[3] The court first established that the forum clauses were permitted under § 109(b) of the Delaware General Corporation Law (DGCL), which sets forth the permissible content of a corporation's bylaws,[4] because they address the "rights" of shareholders by regulating where shareholders can exercise their right to bring internal corporate claims.[5] The court went on to reject the shareholders' argument that their lack of consent to the bylaws rendered the forum provisions invalid as a matter of contract law.[6] Rather, the court held that the shareholders' purchase of shares in a Delaware corporation constituted their consent to the statutory framework of the DGCL as well as to the FedEx and Chevron public certificates of incorporation, which in turn provided that shareholders are bound by bylaws unilaterally adopted by the board.[7]

Another Delaware Chancery Court decision took *Chevron* one step further, by suggesting that Delaware corporations could also select an exclusive forum in a state other than Delaware.[8] In *City of Providence v. First Citizens Bancshares, Inc.*,[9] the court upheld a board-adopted forum selection bylaw exclusively selecting courts in North Carolina, where the corporation was headquartered but not incorporated.[10]

Courts in other states, including New York, have readily applied *Chevron* to uphold forum selection provisions in the bylaws of Delaware corporations.[11]

B. Delaware Legislature Codifies Existing Case Law but Limits a Corporation's Ability to Select a Forum Outside of Delaware

In August 2015, the Delaware legislature adopted several amendments to the DGCL, including DGCL § 115, which provides:

> The certificate of incorporation or the bylaws may require, consistent with applicable jurisdictional requirements, that any or all internal corporate claims shall be brought solely and exclusively in any or all of the courts in this State, and no provision of the certificate of incorporation or the bylaws may prohibit bringing such claims in the courts of this State. "Internal corporate claims" means claims, including claims in the right of the corporation, (i) that are based upon a violation of a duty by a current or former director or officer or stockholder in such capacity, or (ii) as to which this title confers jurisdiction upon the Court of Chancery.[12]

In line with *Chevron*, DGCL § 115 gives Delaware corporate boards the authority to unilaterally adopt a forum selection provision in the company's certificate of incorporation or bylaws, thereby requiring shareholders to litigate "internal corporate claims" exclusively in Delaware.

The statute leaves certain important questions unanswered. Importantly, under DGCL § 115, it appears that Delaware corporate boards cannot exclude Delaware as a potential forum. A Delaware board can apparently adopt a forum selection provision that directs litigation to a state other than Delaware, but only if it also includes Delaware courts as an option.[13] This is in contrast to the Delaware Chancery Court's Decision in *City of Providence*, and raises questions as to how Delaware courts will rule on forum selection provisions enacted prior to the statute's adoption but selecting fora other than Delaware.

Second, DGCL § 115 does not eliminate the possibility that corporations will face "as-applied" challenges based on the facts and circumstances of the board's adoption of the forum selection bylaws. Following *Chevron*, most courts have enforced forum selection bylaws even in circumstances where the shareholder claimed that the board adopted the bylaw only to avoid litigation in the face of corporate wrongdoing.[14] At least one state court, however,

has refused to uphold a forum selection clause adopted unilaterally by a board in anticipation of the very lawsuit in question. It therefore remains possible that shareholders will attempt to bring such as-applied challenges.[15]

Finally, corporations may still be forced to appear in a forum other than Delaware in order to move to dismiss or transfer a shareholder action filed in violation of the exclusive forum clause.[16] In *Edgen Group Inc. v. Genoud*, the Delaware Chancery Court recognized the validity of a forum selection clause but refused to issue an anti-suit injunction against shareholder litigation filed in Louisiana, deferring to the courts of that state to consider the enforceability of the forum selection clause in deciding the motion to dismiss made by the corporation in that court.[17] The court refused to issue the anti-suit injunction despite the fact that the timing of the Louisiana litigation might impede the corporation's pending merger.

II. Courts May Uphold Arbitration Agreements in Corporate Bylaws

While Delaware law on forum selection clauses appears relatively settled, a question remains as to whether corporate boards may adopt mandatory arbitration clauses in their bylaws as an alternative to litigation. DGCL §115's direction that corporations cannot exclude Delaware as a forum for corporate claims suggests that corporations might be precluded from adopting an arbitration provision that would deny shareholders the right to sue in Delaware court. This would arguably contradict, however, the strong federal policy in favor of arbitration and could lead to a dispute regarding whether the Delaware statute is "preempted" by federal arbitration law. It would also undermine *Chevron*'s findings regarding a board's broad discretion to adopt and enforce bylaws.

The conflict between the imperatives of the Delaware statute and the binding nature of arbitration provisions could soon come to a head. Recent decisions suggest a trend towards the recognition of non-negotiated arbitration clauses, including those found in corporate bylaws. For example, in *AT&T Mobility LLC v. Concepcion*, the U.S. Supreme Court held that the Federal Arbitration Act (FAA) preempted California common law rendering unenforceable the inclusion of class action waivers in arbitration clauses in consumer contracts.[18] Similarly, in *Am. Express Co. v. Italian Colors Rest.*, the Supreme Court reasserted the extensive reach of the FAA, declining to invalidate a class arbitration waiver even where pursuing claims on an individual basis was cost-prohibitive.[19] State and federal courts have applied *AT&T* and *Am. Express. Co.* to uphold arbitration agreements in non-negotiated contracts, even where those agreements would strip claimants of protections such as the class action mechanism.[20]

In the shareholder dispute context, the case law remains limited, but a state court in Maryland recently enforced an arbitration clause in corporate bylaws, relying in part on *Chevron*'s general principle that the shareholders cannot invalidate a corporate bylaw based on their lack of consent.[21] The same court also pointed to *AT&T*'s recognition of the federal policy favoring arbitration to suggest that mandatory arbitration of shareholder disputes should be permitted.[22]

Similarly, the Southern District of New York recently enforced a mandatory arbitration clause adopted by the Brazilian state-owned oil company Petróleo Brasileiro S.A. ("Petrobras").[23] The court recognized that Brazilian law permits companies to adopt mandatory arbitration bylaws for claims arising from shares purchased on the Bovespa, the Brazilian Stock Exchange, and held that under Brazilian law, shareholders had constructively assented to the arbitration clause in Petrobras's bylaws when purchasing shares on the Bovespa.[24] The court dismissed the shareholders' Brazilian law claims on this basis.

These decisions suggest a growing tendency on the part of courts to look favorably upon mandatory arbitration provisions for shareholder disputes. The Securities and Exchange Commission has, however, taken a less favorable view. In 2012, the Carlyle Group, a private equity firm, sought to include a clause in its initial public offering documents prohibiting its shareholders from initiating class action lawsuits, instead directing all state law and federal law securities claims to individual arbitrations. Faced with vocal shareholder opposition, the Carlyle group ultimately dropped the provision when the SEC threatened to stall the IPO by refusing to accelerate the registration statement.[25]

III. Conclusion

The Delaware legislature has made clear that Delaware corporations can direct shareholder litigation to Delaware courts by including forum selection clauses in their corporate bylaws. Yet questions remain about whether Delaware corporations may direct their litigation outside of the exclusive forum of Delaware—whether it be to arbitration or to courts other than Delaware. Counsel for public companies and institutional shareholders alike should remain cognizant of this evolving legal landscape in considering the enforceability of an exclusive forum for shareholder litigation.

Endnotes

1. *See* Olga Koumrian, *Shareholder Litigation Involving Acquisitions of Public Companies*: *Review of 2014 M&A Litigation*, Cornerstone Research (2015), https://www.cornerstone.com/GetAttachment/897c61ef-bfde-46e6-a2b8-5f94906c6ee2/Shareholder-Litigation-Involving-Acquisitions-2014-Review.pdf (more than 300 publicly traded companies adopted forum selection bylaws in 2013 and 2014) (recent statistics suggest that multi-jurisdiction litigation was significantly reduced between 2013, when 60 percent of claims involving challenges to mergers and/or acquisitions were filed in more than one jurisdiction, and 2014, when approximately 40 percent of such litigation was filed in more than one jurisdiction.

2. *See* Delaware Dep't of State, About Agency, http://corp.delaware.gov/aboutagency.shtml (last visited Oct. 5, 2015); Del. Code Ann. tit. 8 § 115.
3. *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013) (the court found it expeditious to resolve this issue for both cases in the same opinion because the same attorneys represented both groups of shareholders and filed nearly identical complaints addressing nearly identical bylaw provisions).
4. Del. Code Ann. tit. 8 § 109(b) (providing that the corporation may issue bylaws which "relat[e] to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees").
5. *Chevron*, 73 A.3d at 950-51.
6. *Id.* at 954-55.
7. *See id.* at 956 (under Delaware statutory law, a corporation may, in its certificate of incorporation, give the board the power to unilaterally amend the corporate bylaws); *see* Del. Code Ann. tit. 8 § 109(a) ("Notwithstanding the foregoing, any corporation may, in its certificate of incorporation, confer the power to adopt, amend or repeal bylaws upon the directors or, in the case of a nonstock corporation, upon its governing body. The fact that such power has been so conferred upon the directors or governing body, as the case may be, shall not divest the stockholders or members of the power, nor limit their power to adopt, amend or repeal bylaws.").
8. *See City of Providence v. First Citizens BancShares, Inc.*, 99 A.3d 229 (Del. Ch. 2014) (addressing an issue of first impression: whether the board of a Delaware corporation may adopt a bylaw that designates an exclusive forum other than Delaware for intra-corporate disputes, and finding in the affirmative).
9. *Id.*
10. *See id.*
11. *See, e.g.*, *Groen v. Safeway, Inc.*, No. RG14716641, 2014 WL 3405752, at *1 (Cal. Super. Ct. May 14, 2014); *Miller v. Beam, Inc.*, No. 2014 CH 00932, 2014 WL 2727089, at *1 (Ill. Cir. Ct. Mar. 5, 2014); *Hemg Inc. et al. v. Aspen University*, No. 650457, 2013 WL 5958388, at *1 (Sup. Ct. N.Y. Cnty. Nov. 4, 2013).
12. Del. Code Ann. tit. 8 § 115.
13. At least one commentator has suggested that this provision may prevent corporations from circumventing the Delaware statutory prohibition on fee-shifting, which went into effect at the same time as DGCL § 115. *See* Neil J. Cohen, *Does Pending Delaware Legislation Cover Fee Shifting in Securities Cases?*, Bank and Corporate Governance Law Reporter (June 15, 2015), http://corpgov.law.harvard.edu/2015/06/15/does-pending-delaware-legislation-cover-fee-shifting-in-securities-cases/.
14. *See, e.g.*, *City of Providence*, 99 A.3d 229 (enforcing forum selection bylaw unilaterally adopted on the same day as the board announced a merger to which the shareholders objected); *Miller v. Beam, Inc.*, No. 2014 CH 00932, 2014 WL 2727089, at *1 (enforcing forum selection provision and finding no evidence that the board adopted the bylaw for a sinister purpose); *see also Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972) (applied in *City of Providence* and *Miller*) (under which a forum selection clause is presumed valid absent a showing that its enforcement "would be unreasonable or unjust, or that the clause was invalid for such reasons as fraud or overreaching").
15. *See Roberts v. Triquint Semiconductor Inc.*, No. 1402-02441, 2014 WL4147465, at *5 (Or. Cir. Ct. Aug. 14, 2014), *appeal docketed*, No. S062642 (Or. Dec. 17, 2014) ("Ultimately, the closeness of the timing of the bylaw amendment to the board's alleged wrongdoing, coupled with the fact that the board enacted the bylaw in anticipation of this exact lawsuit, and keeping in mind that its enforcement will have the effect—and Defendants knew it would have the effect—of forcing the shareholders to accept the bylaw, this court finds that enforcing the unilaterally enacted bylaw by dismissing this case would be unfair and unjust.").
16. *See City of Providence*, *supra* note 8 (noting that courts outside of Delaware are likely to grant a motion to dismiss, recognizing the exclusivity of the Delaware forum).
17. *Edgen Group Inc. v. Genoud*, C.A. No. 9055-VCL (Del. Ch. Nov. 5, 2013) (Tr.) (noting the Court's general reluctance to issue anti-suit injunctions to a foreign court for reasons of comity, and also pointed to the fact that the Delaware Supreme Court had only recently approved the use of anti-suit injunctions to enforce forum selection clauses between private parties. The court was hesitant to extend that approval to the shareholder forum selection clause context.).
18. *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (overruling *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005)).
19. *Am. Express Co. v. Italian Colors Rest*, 133 S. Ct. 2304 (2013), (reversing *In re Am. Express Merchants' Litig.*, 554 F.3d 300 (2d Cir. 2009)) (reversing the Second Circuit's finding that *AT&T* was inapplicable and the class arbitration waiver was unenforceable).
20. *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013) (the Second Circuit enforced an arbitration agreement with a class-action waiver, acknowledging that its prior holding in *Am. Express Co.* had been reversed by the U.S. Supreme Court. Earlier this year, a lower appellate court in New York, citing *AT&T*, held that New York's statutory prohibition against mandatory arbitration clauses in consumer contracts was displaced by the FAA); *see Schiffer v. Slomin's Inc.*, 48 Misc. 3d 15 (N.Y. Sup. Ct. App. Term, 2d Dep't 2015).
21. *See Katz v. CommonWealth REIT*, Case No. 24-C-13-001299 (Md. Cir. Ct. Balt. Cty. Feb. 19, 2014).
22. *See id.*; *see also Corvex Mgmt. LP v. CommonWealth REIT*, Case No. 24-C-13-001111, 2013 WL 1915769 (Md. Cir. Ct. Balt. Cty. May 8, 2013).
23. *See In re Petrobras Sec. Litig.*, No. 14-cv-9662, 2015 WL 4557364, at *1 (S.D.N.Y. Jul. 30, 2015).
24. *See id.* at *18 (finding that shareholders who purchased Petrobras shares on both the Brazilian and the U.S. market could not be required to arbitrate their *U.S. securities law claims* in arbitration in Brazil, holding that the consent to arbitration did not extend this far).
25. *See, e.g.*, Letter from Interested Organizations to The Honorable Mary L. Shapiro, Chairman, U.S. Securities and Exchange Commission (Feb. 3, 2012); Kevin Roose, *Carlyle Drops Arbitration Clause From I.P.O. Plans*, N.Y. Times, Feb. 3, 2012. Similarly, there is considerable pushback from consumer organizations and the plaintiffs' bar as to the use of arbitration clauses to strip class action rights from plaintiffs who typically have unequal bargaining power, such as consumer groups or employees of large corporations. These considerations also apply in the shareholder context, and it remains to be seen whether the ongoing legislative efforts to curb the use of arbitration clauses that do not permit class actions will influence corporations considering adopting such clauses.

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Why You Should Always Mediate

By John R. Goldman and Anna M. Hershenberg

If we had a nickel for every time a client instinctively refused to consider mediation to resolve a dispute, neither of us would have to work anymore. We have heard every excuse in the book:

We do not want to come in from out of town.

It is going to be a waste of time.

We are going to outspend them in litigation so they will give up.

We want to crush them in litigation.

And our all-time favorite:

Suggesting—or even agreeing to—mediation makes us look weak.

The notion that mediation makes a client look "weak" is an unfortunate gut reaction, typically fueled by the misconception that pounding the table and fighting your adversary on every issue is the only way to show strength in litigation. Sure, there are circumstances where litigation is necessary and a mediated resolution is impossible, but those situations are few and far between. Let us explore why it is almost always prudent to mediate—especially for budget-conscious corporate counsel trying to resolve disputes most efficiently (i.e., cost-effectively) so they and their company can focus on accretive business.

"The notion that mediation makes a client look 'weak' is an unfortunate gut reaction, typically fueled by the misconception that pounding the table and fighting your adversary on every issue is the only way to show strength in litigation."

1. You Might Actually Resolve the Dispute. First (and foremost), you might actually settle the case and save lots of dough in unnecessary and unproductive litigation expense. That would be good, right? Look, we all know that litigation is often time-consuming, distracting, expensive and unpredictable. Even if you are convinced you have a "slam dunk" case, elephants sometimes fly in courtrooms (and when they do, it can vastly alter—and increase the cost of —that case you thought was definitely a winner). Mediation gives you a chance to resolve the dispute in a much more controlled environment with a smart mediator you have a hand in selecting. A savvy mediator typically redirects the parties away from unproductive competitions over litigation issues and strategy and towards consideration of a mutually beneficial business solution. Indeed, if mediation happens quickly enough (i.e., before the parties become entrenched in litigation posturing), it is possible—even likely perhaps—that the settlement will include the parties doing productive and mutually profitable business together going forward.

2. You Always Learn Things (and That Is Really Good). Even if mediation does not result in settlement right away, you never leave a mediation empty-handed. Going through the mediation process educates you (hopefully early on) about the strengths and weaknesses of your position, as well as those of your adversary. A good mediator is an expert at helping both sides to most sincerely and realistically evaluate the case—both from a legal perspective and from a practical perspective. That analysis provides critical information as to what a fair settlement might be.This information is *always* valuable to corporate counsel in setting strategy and managing expectations going forward. The very process of mediation lends itself to this. In trying to push each side toward settlement, the mediator—as a neutral third-party (often a former Judge)—will flag the legal and practical obstacles each side will face should the case continue and will provide valuable insight into how those weaknesses may play out in front of a Judge and/or jury. A neutral assessment of the viability of the claims and defenses in the early stages of the case provides corporate counsel with the opportunity to most effectively manage the case (and the expectations of his or her business people) and be in a much better position to determine strategy—for example, whether to recommend settlement or to recalibrate litigation tactics going forward.

3. In the Immortal Words of the Late, Great Philosopher Yogi Berra, "It Ain't Over 'til It's Over." Even if the case does not settle right away, a good mediator is persistent and stays on the matter. He or she often (indeed, almost always) remains an independent and trustworthy sounding board for both sides. Many times after "unsuccessful" initial mediations sessions, we have reached out to the mediator and so have our adversaries. This means there is always the possibility that the matter will settle at a later point in the litigation. In our experience, we have found that parties who have already had at least one mediation session—even if "unsuccessful"—are often more likely to return to mediation at the mediator's invitation (or after tiring of throwing more money at the litigation) because they trust the mediator and the process, have a sharper awareness of the strengths, weaknesses and settlement value of their case and, in many instances, because opposing counsel have had an opportunity to establish a productive working relationship.

4. Suggesting or Agreeing to Mediation Is *Not* Weakness. It Is Strength. This one really is our favorite. It is the one where we scratch our heads, furrow our brows and remind ourselves that when really smart people get really angry, they become their own worst enemy. (Typically, the clients who tell us mediation is a sign of weakness are the same ones who will not attend a settlement meeting unless it is at their office and are the same ones who write us emails thanking us for convincing them to give mediation a try). The goal of litigation should not be to win an award for being the best posturer. It should be to reach the most efficient resolution. Mediation is often the best route to that result. In this context, it is confounding why anyone would think it demonstrates weakness when it is actually just the opposite. In fact, suggesting or agreeing to mediation sends a clear signal that you are ready to persuade an intelligent and experienced neutral that your case is better than your adversary's. Who would not want to seize that opportunity? And remember, mediators (unlike Judges) have manageable dockets and can spend the time to understand the nuanced arguments that might cause elephant lift-off in a courtroom.

"The goal of litigation should not be to win an award for being the best posturer. It should be to reach the most efficient resolution. Mediation is often the best route to that result."

In the end, budget conscious corporate counsel are, and should always be, looking for ways to save—and make—money. Given the reality that almost every case settles before trial anyway, it is in everyone's best interest to reach that settlement as early in the process as possible. This is especially true for in-house corporate counsel, who have the unenviable task of having to explain to management how the company could possibly have spent so much money on a litigation for the privilege of ultimately settling a case on terms equal to or worse than those that could have been obtained early on (and at a much reduced cost). Mediation is an excellent way to try to avoid that nightmare.

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Did You Select the Right Arbitrator?

By Jeffrey T. Zaino

Introduction

Every arbitrator selection involves the strategic circumstances of the parties. Each side, regardless of the dispute, has to consider how it wants to pursue the case tactically. At the outset, both sides expect to win. Yet, the side that does not prevail often embraces the expectation of doing so gracefully within an arbitral award. To this end, arbitrator selection is of primary concern to achieve expected outcomes.

Parties prefer arbitration over court proceedings namely because they are able to select the decision maker. They also avoid protracted pre-hearing, intra-hearing, and post-hearing proceedings, which often includes extensive discovery. In exchange for an expeditious process, it is important the decision-maker have a more rigorous, exacting background or additional formal training in dispute resolution. In particular, it is becoming increasingly important for an arbitrator to deal both efficiently and seamlessly with issues arising within e-discovery.

Wisdom aside, clearly not all arbitrators are alike. How arbitrators manage the process, decide cases, and bill for their time varies significantly. These factors, along with their background and training, should influence selection.

Number of Arbitrators and Method of Selection

Initial determinations about the number of arbitrators and method of selection are dictated by the general needs and requirements of the case. A starting point should be the arbitration contract. Some arbitration clauses call for a panel of three arbitrators rather than a sole arbitrator. Unless there are cogent reasons relating to the need for the alternative skill sets of a three-person panel, a single arbitrator is typically the better option. Remember, parties can also mutually agree to override a contract provision to request a single arbitrator.

The American Arbitration Association (AAA) recently conducted an internal review comparing commercial arbitration cases with three arbitrators to those with a single arbitrator (approximately 100 cases). The single arbitrator cases cost five times less and on average concluded six months earlier when compared to cases involving three arbitrators.

While contracts may vary on the method of arbitrator selection, the parties may not have had sufficient prior knowledge and/or opportunity to plan for this. Regardless, your contract may contain very specific arbitrator background requirements and steps regarding the selection process. Absent specific requirements or steps, the governing rules will often outline the method of arbitrator selection. The parties are also free to agree to a different process. For example, the AAA offers the Enhanced Neutral Selection Process and Arbitrator Search Platform. The Enhanced Neutral Selection Process involves interviews of the potential arbitrators and the Arbitrator Search Platform allows for the parties to review the complete AAA database of arbitrators.

"Parties prefer arbitration over court proceedings namely because they are able to select the decision maker."

Determining Arbitrator Criteria

The type of case along with the facts should be considered when selecting an arbitrator. Will you need an arbitrator who has specific industry background or a legal generalist? Will there be issues presented (e.g., discovery and motion practice) better suited for an attorney arbitrator or a former judge?

Notwithstanding, an arbitrator's legal background may not be essential. Would a non-attorney arbitrator look at the case differently and bring a different approach to the process? Would expertise in another profession (e.g., architect, engineer, accountant, business broker, pension expert, etc.) relate better to the type of dispute at hand?

Arbitrator rates, comprised primarily of study time, hearing time, cancellation fees, and travel expenses, vary significantly. Hourly rates for arbitrators range from $250 to $1,200 per hour nationally, presenting a significant cost differential. Thus, arbitrator hourly rates should be carefully considered during selection. If there is a possibility that your case will settle, arbitrator cancellation fees and policies are worth due consideration.

Identifying the Best Arbitrator

After determining the type of arbitrator required for a particular matter, you can begin your research. First, carefully review the arbitrator's resume. Most arbitrators provide detailed resumes including education, work history, industry experience and arbitration experience. All fees associated with their service are also listed. Second, if possible, speak with colleagues who have appeared before specific arbitrators in the past. Information via word of mouth can be very helpful.

Veteran arbitrators often believe there is no substitute for experience. However, depending on your case,

there may be a good reason to select a "newer" arbitrator whose specific industry experience matches the issues presented. These "newer" arbitrators are generally not new to the legal community and offer diversity in both experience and exposure.

If pressed about the role experience plays, there is no "magic" formula. Applying years of accumulated knowledge by participating in hundreds of hearings for a broad spectrum of arbitration and litigation matters is what counts. Familiarity with the rules for proper and efficient case management are paramount and ultimately gained by managing a variety of cases.

Most so called "newer" arbitrators have twenty to thirty years' experience in their field as advocates *and* have been carefully screened to serve on an institutional panel. For example, the AAA requires a minimum of ten years of experience and mandatory training to serve on its commercial panel.

Finally, it is important for the arbitration process in general to develop the next generation of arbitrators. Never forget that the seasoned arbitrator, which you prefer to use regularly, was once a "newer" arbitrator and will eventually retire.

Conclusion

Arbitrator selection is a decision that should never be taken lightly. Be cognizant of your strategy, conduct research, scrutinize resumes and experience, and do not overlook the "newer" arbitrator.

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Arbitration—A Case for Judges to Be Heard

By Judge Billie Colombaro

Increasingly, parties are choosing arbitration as an alternative to court to avoid its inherent ceremonial, structured proceedings and because arbitration is perceived to be more expeditious and less costly, while still providing an authoritative dispute resolution mechanism. Furthermore, the flexibility associated with arbitration permits the parties to design a process that will best serve their individual needs and desires. Selecting the right arbitrator is critical to fulfilling this objective.

In making the decision of which arbitrator to choose many factors must be assessed and balanced, not the least of which is deciding whether to consider a former judge. Former judges are progressively moving into arbitration as arbiters, but some attorneys fear that choosing one as an arbitrator, essentially, puts the parties into a quasi-court.

How many times have we heard that former judges do not make good arbitrators because they are generalists; do not bring real world experiences; are more tied to rules of evidence and the letter of the law than senior level business executives or practicing attorneys are; are more formal; are set in their ways and do not have an open mind; do not have knowledge or experience in business or of the realities of practicing law; and will be in arbitration the way they are on the bench? These beliefs commonly comprise a "rule of thumb" used to exclude former judges from being chosen as an arbitrator. If true, they could provide a good gauge for excluding judges. But if false, they could deprive the parties of a valuable experience. This article explores the merits of these claims.

Unfortunately, there is little to no data we can review to assess the validity of these theories. The negative experience of a party with a particular judge often becomes associated with an undeserving judge, which leads to a misconception that this experience is the rule and not the exception. Examining the validity of the above views, starting with, "they are generalists," we consider a predominant area of law for which arbitrators are needed—commercial disputes.

Initially, we note that the implication of the belief—judges are generalists; therefore, they are not qualified to handle these specialized areas of law—seems to emanate from the fact that judges typically handle a wide variety of case types. Some think that this comprehensive experience dilutes or even negates the specialized knowledge judges acquire from adjudicating the complex litigation claims they handle.

The New York State Unified Court System Annual Report 2013 provides some insight on the issue. It outlines statistics on the number and types of cases that judges decided, and it reports on commercial claims as a particular category. *(See chart below).* In so doing, it qualifies the Commercial Division's scope and notes that it is devoted exclusively to complex business litigation. Presumably, these statistics are for that Division only, and do not include other commercial matters which are not in the "complex" classification.

We see that judges handled close to 8,000 complex business claims in New York City in 2013. Some claim that a judge's broad-spectrum knowledge and experience dilutes their expertise in complex business litigation. However, the data clearly supports the notion that judges are exceptionally qualified to handle specialized claims and that they are penalized for having the additional knowledge they attained from adjudicating a variety of other types of cases. The proficiency gained from their well-rounded experiences translates to and augments the handling of cases and provides judges with enhanced skills to handle these complex business claims, as opposed to those whose experience is limited to dealing only with commercial matters.

	CIVIL ACTIONS		HOUSING		SMALL CLAIMS		COMMERCIAL CLAIMS	
	Filings[a]	Dispositions[b]	Filings[a]	Dispositions[b]	Filings	Dispositions	Filings	Dispositions
New York City	**271,329**	**171,681**	**274,447**	**248,755**	**22,914**	**26,073**	**5,657**	**7,949**
New York	41,096	34,166	59,173	46,489	5,733	6,068	1,073	2,086
Bronx	44,805	30,939	89,653	89,572	3,525	3,637	813	856
Kings	103,038	48,008	77,546	67,779	6,532	6,873	1,268	1,699
Queens	66,023	44,894	42,405	39,673	5,721	7,818	1,608	2,338
Richmond	16,367	13,674	5,670	5,242	1,403	1,677	895	970

The large difference between the number of filings and dispositions is due to the number of cases filed but never pursued by the filing party.

[a]Includes both answered and unanswered cases.

[b]Includes courtroom dispositions and default judgments.

New York State Unified Court System Annual Report (2013), http://www.nycourts.gov/reports/annual/pdfs/UCS_AnnualReport_2013.pdf (More recent statistics were unavailable).

Next, consider the claim that judges do not bring real world experience to the case. If this means that judges' experiences are relegated simply to the courtroom, this is not reality and there is no data to support it. Even though the formalities of the courtroom, the robe, and the bench may give the impression of estrangement from the real world, anecdotes support that judges' lives, outside of their job, are as varied and extensive as those of senior level business executives or practicing attorneys. They have family and community interactions and enjoy all the activities and privileges of life, as anyone else does, and they are not shielded from the difficulties, disappointments, and tragedies of life.

If what is meant is that judges do not bring real world business experience or the understanding of the realities of practicing law to arbitration, this may be true for some but not all. Furthermore, if either is thought to be central to a fair outcome, the judge's business and/or litigation background can be determined easily and incorporated into the vetting process. In deciding on an arbitrator, it would be wise to balance these considerations against other factors that are desirable and which only judges can bring to the table, as opposed to using them as a sole disqualifier for an entire category of candidates.

"Judges are more tied to the rules of evidence and the letter of the law than senior level business executives or practicing attorneys are; they are more formal." It is true that this is what is expected of judges in the courtroom, but there is no empirical data to support that judges cannot or do not relax these standards when they are in a setting with different expectations, rules, and guidelines, such as arbitration. A judgeship is simply a job; jobs change. People's behavior and attitudes change to fit new positions. There is no objective support for the conclusion that judges adapt less than anyone else. Likewise, there is no evidence for the proposition that judges cannot be good arbitrators because they are "set in their ways" and "do not have an open mind," compared to senior level business executives or practicing attorneys who have been doing the same job for a significant period of time.

Judges have significant experience in adapting to new rules and procedures. For instance, they had to adapt to new procedures, environment, culture, and expectations when they transitioned from attorneys to judges. One could argue that this change was far more arduous than for a judge moving into the arbitration arena where the differences are a matter of pace, different rules, and relaxing formalities and the rules of evidence. This process of and the necessity to change is no different for senior level business executives or practicing attorneys who become arbitrators, especially for attorneys who are used to practicing within the parameters required of court. They must learn and adjust to the differences in the two environments, as well as change their demeanor and actions from the courtroom to arbitration. Some parties might actually prefer a more formal process; in which case, judges, as opposed to senior level business executives or practicing attorneys, already have the ability to accommodate them.

The marketplace of supply and demand dictates that judges and senior level business executives or practicing attorneys alike must acclimate to the arbitration paradigm regardless of the candidate's past or predilections. Thus, if a judge desires to transition into arbitration, obtain cases, and sustain a practice, she or he must conform to the norms expected of an arbitrator, as opposed to those expected of a judge.

On the bench and in life, judges have dealt with a comprehensive variety of experiences, problems, and people. They not only bring this life and professional experience to arbitration, they also bring a crucial and unique set of skills they had to learn and acclimatize to as a judge when they moved from being a practicing attorney or whatever position they previously held. Of necessity, judges are practiced at being aware of predispositions they have, putting them aside, listening neutrally and carefully, being an effective manager, and being decisive. Characteristically, they want to cut through the clutter to get to the actual issue(s) at hand. They do not want to get entangled in or sidetracked by technicalities; they want matters to be resolved on the merits to reach a just result. Most judges have no problem relaxing formalities and the rules of evidence, and they have transferable skills, due to the similarities in adjudication in court and in arbitration, which enhance the arbitration process. On the other hand, arbitrators who are senior level business executives or practicing attorneys have to develop these skills.

All of the above developed abilities and experience, which judges can deliver, seem to be perfect attributes for an arbitrator. While there are exceptions, the vast majority of judges transitioning to arbitration will adapt to the new position, accompanied by a new way of thinking and operating. At the same time, they will bring skills, exclusive to the job of judge to the arbitration process, and strengthen it by conducting a fair and efficient proceeding that will benefit everyone. There are plenty of reasons to conclude that judges can be excellent arbitrators.

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The Role of In-House Counsel in the Mediation Process

By Leslie A. Berkoff

I. General Overview

In-house counsel has a unique but very effective role to play throughout the mediation process including evaluating the benefits of, or preparing for, a mediation. Unlike outside counsel, no one knows the client better than the in-house counsel. In-house counsel is most familiar with the key personnel involved, the history of the deal or dispute and even the impact the current dispute may have on the specific business concerns. Moreover, unlike the client's business people, in-house counsel has the advantage of being able to step back and evaluate the pending dispute and related facts through a "legal lens." In-house counsel can be more objective to the key legal concerns and most likely will be more in tune with the heart of the business concerns than outside counsel. If focused properly on the role to be played, in-house counsel can efficiently prepare the facts and the business people for the mediation process, work to select the proper outside counsel and then the mediator; facilitate the filtering and gathering of the relevant information; and serve as a conduit for outside counsel and, at the appropriate time, the mediator. However, knowing the place or role to be played during each part of this process is critical. At times, in-house counsel can lose sight of his or her unique position and status which can minimize his or her effectiveness in the process.

"In-house counsel can be more objective to the key legal concerns and most likely will be more in tune with the heart of the business concerns than outside counsel."

II. Gathering Information

Initially, once a problem or dispute is identified, in-house counsel can, and should, take steps to advise the business people at the outset that they need to gather and preserve all relevant business records and information. This is true regardless of whether the dispute will be addressed through litigation or mediation. However, as the information is preserved and gathered the next critical step for in-house counsel will be assisting the company in evaluating and deciding whether addressing the current dispute through mediation is a viable option. In-house counsel should focus the business people on calculating the business and economic risks and rewards associated with utilizing the mediation process versus a more public and potentially more costly litigation. The ability to objectively provide guidance on this point is the first effective step in problem-solving for the client. The next step would, of course, be selecting the right counsel and the mediator if mediation is determined to be the first course of action.

III. The Selection Process

In the selection process, in-house counsel can and should be proactive. In-house counsel should evaluate whether the lawyers they are using are equally versed in litigation and mediation. The ability to be a good litigator does not always transition instinctively or practically into being a good mediation advocate (although plenty of lawyers can do both). However, failing to appreciate the differences in these skill sets and simply going on auto pilot in selecting regular counsel is a misstep in the process. Further, while business people often leave the selection of a mediator to their outside counsel, a hands-on in-house counsel will usually work with outside counsel to select the right mediator for the matter. In-house counsel will be best able to consider the personalities of the business people and the parties to the dispute and provide insight and guidance in guiding this process. Consideration should be given to what type of mediator the parties will best respond to or work with effectively. A full and open discussion with outside counsel should be sought and pursued for this and all aspects of the mediation. Among the many questions to consider, what type of mediation style is necessary, facilitative or evaluative? Does the mediator need to have in-depth experience in a certain substantive area or court? While outside counsel can do the leg work, in-house counsel should be sure the process is focused properly on what kind of mediator will facilitate the best result for the client.

IV. Preparing for the Mediation

The next step is preparing for the mediation itself. Too often in-house counsel allow outside counsel to take the lead on all aspects of the preparation process. However, to ensure an effective result for its client it is important to be sure that outside counsel has all of the information that it needs to prepare the case. In-house counsel should not presume that outside counsel is fully familiar with the nuances of the business issues, or the personnel's competing concerns. In-house counsel should guide outside counsel to ensure the client makes proper decisions in preparing for the mediation to resolve the matter. This may include being direct to assert what specifically you believe the company needs to make decisions.

Keep in mind that outside counsel will usually not be as familiar with the specific facts or even be aware of business specific matters. While you should be able to rely on outside counsel to identify the legal issues in dispute and guide the process, in-house counsel may be in the best position to help develop supporting facts, identify

key documents and determine which parties should be at the mediation. Further, pay close attention to the papers being prepared and do not be shy about asking questions or making comments. Of course, ensure that information summarized by outside counsel is fully accurate and represents the key facts in dispute.

Before the mediation, in-house counsel should be sure that they are fully familiar with the mediation process. Do not be afraid to let outside counsel know that you may separately need time to efficiently prepare for the mediation, or to assist you in focusing your internal inquiry to process information for the mediation. Be sure you work with outside counsel, as well as separately, to prepare your business people for the mediation. To the extent that there may be people who have key information who may not be attending the mediation, be sure that they are available by phone.

"Having the wrong people in attendance at the mediation can chill or derail the process."

Also, before the mediation begins you should meet with the business people to outline the parameters for negotiating and understand what terms or points can be compromised or where your lines in the sand may be. Consider what issues the opposing side faces and contemplate both real and potential business risks in the matter. You should use your own familiarity with the business to fully assess and evaluate any advice or information provided by outside counsel. It is important to evaluate whether an adverse result in one case will impact other facets of the business or other pending matters. You may need to consider providing notice to insurers or determine if they need to be in attendance or available by phone.

Prior to the start of the mediation you must decide with outside counsel who will play what role during the mediation—you do not want to undermine outside counsel in the process but need to establish your role differently from that of the business people at the table. Work with outside counsel to be sure you have selected people with knowledge of the facts and the right level of decision-making authority to be at the mediation. Having the wrong people in attendance at the mediation can chill or derail the process. Depending on the nature of claims, other department heads or divisions may need to have a representative available by phone during the mediation. Further, if this is a high profile dispute, consulting with the company's public relations department before, during or after to ensure image is properly maintained and any external messages are controlled is important.

V. During the Mediation

During the mediation, always keep in mind that you have a dual role as in-house counsel; while you are part of the legal team you are also the client. You may need to decide just how far you should go in being the "deciding business vote." Your knowledge of the business can facilitate creative solutions to the problem. Do not be afraid to point out that, at times, putting dollars into a settlement versus a litigation fund may be a practical means to solve disputes early on and prevent lengthy resource draining litigation. Moreover, be sure to recognize your own internal pressures throughout the process. As an employee of the company, you obviously have the pressure of your own job stability and security. At times, having to be the one to point out or recognize the mistakes of the business people who hired you may be a dicey proposition; so too can be recognizing and accepting potential losses or losing positions or advocating for concessions. Of course, whitewashing facts or legal risks does no one a service and may have disastrous consequences. It may be necessary to discuss with outside counsel some of these issues or concerns, and outside counsel may need to be the party to push these points given the internal conflict or pressure. Certain concerns may need to be addressed to secure "buy in" from the parties or departments. In-house counsel should be direct and upfront to obtain what it needs. Finally, if there are key points or provisions that must be in an agreement to satisfy various concerns, or if specific language must be inserted, then be sure to work with outside counsel to draft and prepare in advance so if there is a restriction, it can be readily included as a deal point.

In sum, the more proactive you can be the more useful you will be in the process and, most importantly, the most effective result you can facilitate achieving.

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In-House Counsel's Key Role in Arbitration: Ensuring the Process Meets Company Expectations

By Richard L. Mattiaccio

In-house attorneys tend to confront questions about arbitration at two discrete junctures: during the contracting process and at the onset of a dispute. A company is best served when its in-house counsel plays a proactive role at these and at every other stage of the process.

During the contracting process, the in-house attorney often needs to address so many mixed business and legal questions that the dispute resolution clause sometimes gets very little attention. When it does, there is a decent chance that the suggestion of arbitration may prompt a "never again" reaction from someone on the team who once had experience with an arbitration that took longer, cost more than expected or that did not produce the hoped-for result. The logical follow-up question, "Has that never happened to you in litigation" is rarely asked. That, and much more, should be asked.

In an ideal world, in order to bring adequate resources to bear on the question, a company should consider dispute resolution as a matter of corporate policy and strategy with a sharp focus on contracts that it signs on a regular basis. The focus of this article is on the more typical, real-world situations of a contract dispute that triggers the operation of an arbitration clause adopted without the luxury of much time or attention at the time of contract formation.

The most important asset any attorney can bring to bear in dealing with these questions is an understanding of the company's values, objectives and priorities. Outside counsel can provide some support, for example by outlining the various options made available by the major arbitration providers, analyzing the pros and cons of each option and how each option compares to litigation in court.[1] In the final analysis, however, in-house counsel's insight into the company's objectives and priorities will make the most important contribution to the process of choosing the dispute resolution mechanism that is best suited to a company. In-house counsel plays an equally important role in shaping and managing the arbitration process once the contracting parties find themselves in a dispute. This is true even if sophisticated arbitration counsel has been engaged and even if in-house counsel's training has been purely transactional.

The following suggestions are offered as guideposts for the in-house attorney who has limited resources available to devote to these questions but who nonetheless wants to make sure that her company chooses the right dispute resolution mechanism and maintains a reasonable level of control over the arbitration process.

At the Time of Contract Negotiations, In-House Counsel's Reality Check for the Business People

Business people rarely want to focus on the dark side when they are entering into a new relationship. In-house counsel has the unenviable but important duty to provide a reality check by diplomatically and clearly focusing the team on plausible scenarios in which the relationship might not go well in some material way. Once that conversation is under way, it is a small next step to the discussion of a dispute resolution process that would make sense in terms of an exit strategy or possibly even getting the business relationship back on track.

At the time of this always too-brief discussion, in-house counsel needs to have a good sense of the ever-more-customized procedures being offered by the major arbitration providers. A quick consultation beforehand with outside counsel who is experienced in these procedures could save time and produce one or more acceptable options. In addition, major providers offer online guides that can provide a good overview for attorneys or business people.[2]

In-house counsel also needs to become immersed in arbitration law or, more plausibly, have a conversation with an outside attorney who has taken that plunge, to determine the best "seat" for arbitration. Contracting parties can designate a seat of arbitration that is different from the actual place where the hearings will be conducted and that differs as well from the choice of substantive law governing the contract. The seat of arbitration can be the same as the place of hearing, but should be chosen based on the arbitration law of the seat and, specifically, on how much judicial supervision of (or "intrusion into") the arbitral process is considered ideal. There can be significant variation in judicial supervision, certainly from country to country in the international arena, but also from state to state in the domestic context. Judicial supervision may provide comfort to some companies—to others, it may undermine the very reason to agree to arbitration. A brief discussion with outside counsel is often the best way to work through these issues to get to an approach that best fits a company's priorities and expectations.

At the Time of a Dispute, Building an Arbitration-Specific Team with a Leading Role for the In-House Lawyer

When a dispute does arise, an in-house attorney who has a purely or predominantly transactional background may tend to take a back seat to outside counsel—"the

litigators"—for the actual handling of the dispute. That would be a mistake, and a missed opportunity.

Arbitration is, by its nature, a less formal and technical process than litigation in court, and that alone should encourage in-house attorneys of all backgrounds to take a proactive role.

Moreover, providers and arbitrators are interested in what in-house attorneys have to say about the process and whether it is working for their company. Even more important, arbitration and litigation are very different processes that call for very different strategies. Some arbitrators tend to roll their eyes—figuratively, if they can contain themselves—when attorneys engage in stereotypically aggressive litigators' tactics.

Leaving the handling of a case in arbitration entirely to litigators who are used to the courtroom can run counter to a company's interests if those litigators have trouble modulating their tone and adjusting their tactics to fit their new audience. A company's in-house counsel can add value by selecting outside counsel and by guiding the planning of the case with the differences between litigation and arbitration clearly in mind.[3] An in-house attorney with a good sense of effective presentation technique in a boardroom-type setting also can add much to an arbitration team's style of presentation in the hearing.

Another way in-house counsel can add value to the arbitration process is to take a close look at the dispute resolution mechanism provided in the contract and consider whether to negotiate different or additional ground rules tailored to the actual dispute as it has arisen. This may be helpful not so much to gain a strategic advantage—it is too late for that—but to contain costs, especially if that seems to be a priority for both sides in view of the stakes in the dispute.

Notice pleading is allowed, of course, but it is a trap, because a party needs to understand its case fully by the time arbitrators are being selected. In-house counsel can make sure that the team takes the time and steps necessary to (a) analyze the case, (b) identify the important witnesses and document sources, (c) preserve those documents and sources and interview those witnesses, (d) anticipate the other side's claims or defenses in pleadings and case strategy, and (e) prepare a detailed statement of claim to be filed with a demand, statement of claim or counterclaim. If that means the other side files first, so be it. If the arbitrators are selected wisely, it will not matter on which side of the "*v.*" a party appears.

During the Arbitration, In-House Counsel's Involvement in Every Phase

In-house counsel is welcome to join the early planning meetings with the arbitration provider. Decisions made during these conference calls can have a major impact on the most outcome-determinative decision in the case—identifying the attributes and backgrounds of arbitrators the provider will propose—as well as on the cost and duration of the arbitral process.

Arbitrator selection is generally considered the most important step in the arbitration process. In-house counsel should thoroughly discuss the process with outside counsel and make sure that outside counsel has fully thought through and discussed with the company the characteristics that are most important to the company's interests, and that every effort is made, within the limits of the selection process, to pick arbitrators with those characteristics. In commercial arbitration, where most awards are unpublished, arbitrator reputations generally are known by word of mouth. This suggests the value of using outside counsel or consultants with deep experience in arbitration.

A hands-on approach by in-house counsel can help to challenge outside counsel to be practical and creative in discovery. Arbitrators are sensitive to criticism that arbitration has become "too much like litigation," particularly in discovery. As a result, they are increasingly open to suggestions to reduce the related expense. At the same time, outside counsel with litigation backgrounds continue to tend to push for discovery along the lines available in U.S. litigation, unless their in-house counsel encourage them to think and work outside the box.

The preliminary conference often results in a detailed procedural order and schedule that takes the case through the evidentiary hearing. Before the conference, in-house and outside counsel should agree, at least, on a schedule their side can propose, including alternative dates to be held in reserve for use during the conference. It is usually a good idea to let outside counsel take the lead in telephone conferences with the arbitrators, and to have a separate line of communication open so that in-house and outside counsel can confer as matters arise during the conference. If that is not practicable or sufficient, there is nothing wrong with asking that a particular decision be deferred to allow time to consult. The order is the road map for the case, so it is more important to get it right than to get it done on the first call.

In-house counsel also can inject a dose of cost-saving discipline in motion practice. Arbitrators remain generally skeptical of dispositive motions and tend to grant dispositive motions only if they are convinced it will reduce net time and expense. In-house counsel should be confident that the company can make such a showing before authorizing outside counsel to make or seek permission to make the motion.

In-House Counsel's Role as an Open Channel for Settlement Discussions

It may be that not every case can or should be settled. Then again, not every case that gets as far as the evi-

dentiary hearing should go to a decision on the merits simply because the blood is boiling on both sides. Outside attorneys have their hands full presenting the case or defenses, cross-examining witnesses, and responding to the arbitrators' questions. Even if one side suddenly wants peace, it might not find anyone with whom to negotiate terms.

The in-house attorneys are sometimes the only people at the hearing table who can remain cordial with their counterparts. Arbitrators notice and approve of cordiality in all contexts, so it is always good to have at least one person on each side who maintains a smile and a cool head. Of course, there should be ground rules regarding direct communications between parties in the absence of outside counsel—they can be informal, but they need to be clear from the start.

It has been famously suggested, in the litigation context, that a lawyer defending a deposition witness should speak no more than would a potted plant in the room.[4] That is as it may be, but there is no potted plant rule for in-house counsel in arbitration. A company can only benefit from the active involvement of the attorney who has the deepest insight into its values and priorities. In-house counsel's involvement at all stages, in coordination with the company's outside counsel, also benefits the process by making providers and arbitrators more aware of and responsive to the needs and expectations of the parties to arbitration.

Endnotes

1. It is beyond the scope of this article to survey the broad spectrum of arbitration clause choices available to counsel drafting a dispute resolution clause. Leading arbitration providers offer online drafting guides and tools. See, e.g., the American Arbitration Association (AAA) ClauseBuilder tool, available at https://www.clausebuilder.org/cb/faces/index?_afrLoop=44744150967521&_afrWindowMode=0&_adf.ctrl-state=4u8zhfew7_4; AAA Drafting Dispute Resolution Clauses, A Practical Guide (2013), available at https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_002540; CPR Model Clauses, available at http://www.cpradr.org/RulesCaseServices/CPRModelClauses.aspx; ICC Standard Arbitration Clauses, available at http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/standard-icc-arbitration-clauses/; JAMS International Clause Workbook (2014), available at http://www.jamsadr.com/rulesclauses/xpqGC.aspx?xpST=RulesClausesGeneral&key=a1e1913c-e29c-4f04-a7c3-70c0a9bf4a38&activeEntry=ec165cc9-2c58-4b04-8c98-b1712dd4f05f. The CPR Arbitration Committee is in the process of developing a desktop guide for drafting arbitration clauses.
2. See, e.g., A Guide to Commercial Mediation and Arbitration for Business People, American Arbitration Association (2013), available at https://www.adr.org/aaa/ShowPDF?doc=ADRSTAGE2019455; ICC Commission on Arbitration and ADR, Effective Management of Arbitration—A Guide for In-House Counsel and Other Party Representatives, available at http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2014/Effective-Management-of-Arbitration-A-Guide-for-In-House-Counsel-and-Other-Party-Representatives/; CPR Rules & Case Services, available at http://www.cpradr.org/RulesCaseServices.aspx; IBA Arbitration Country Guides, available at http://www.ibanet.org/Article/Detail.aspx?ArticleUid=a646cf32-0ad8-4666-876b-c3d045028e64.
3. See, Stipanowich, Et Al, Protocols For Expeditious, Cost-Effective Commercial Arbitration 24-42 (2010), available at http://www.thecca.net/sites/default/files/CCA_Protocols.pdf; David E. Evans and India Johnson, The Top 10 Ways to Make Arbitration Faster and More Cost Effective, available at https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_025844. See also Richard L. Mattiaccio, Arbitration Tips and Traps for Corporate Counsel, Corporate Counsel (2014), available at http://www.thecca.net/sites/default/files/Arbitration%20Tips%20and%20Traps%20for%20Corporate%20Counsel.pdf. Arbitration Do's and Don'ts for the Trial Lawyer, NYLitigator, Fall 2014, Vol. 19, No. 2 (NYSBA), available at http://www.thecca.net/sites/default/files/NYSBA%20NY%20Litigator%20Fall%202014%20-%20Arbitration%20Dos%20and%20Donts%20for%20the%20Trial%20Lawyer.PDF.
4. The seminal opinion on attorney conduct in depositions, Hall v. Clifton Precision, 150 F.R.D.525 (E.D. Pa. 1993) (Gawthrop, U.S.D.J.) (unreported but repeatedly cited) did not, in fact, set such a standard, but did serve to focus discussion regarding aggressive attorney behavior. The suggestion that a lawyer is not a "potted plant" is properly attributable to Brendan V. Sullivan, Jr. Esq., during his defense of Oliver North before a Joint Committee of the House and Senate investigating the Iran-Contra scandal. See http://www.nytimes.com/1987/07/10/world/iran-contra-hearings-note-of-braggadocio-resounds-at-hearing.html.

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Interim, Provisional and Conservatory Measures in U.S. Arbitration

By Steven Skulnik

I. U.S. Legal Framework for Arbitration

Arbitration in the U.S. is governed by both federal and state law. The main source of U.S. arbitration law is the Federal Arbitration Act ("FAA"),[1] which applies in the state and federal courts of all U.S. jurisdictions. The FAA applies to all arbitrations arising from maritime transactions or to any other contract "involving commerce," which is defined broadly. This effectively means that the FAA applies to all international arbitrations and most domestic arbitrations seated in the U.S.

II. Seeking Interim Relief Before Courts and Arbitrators

Arbitration governed by institutional rules such as the American Arbitration Association ("AAA") Commercial Arbitration Rules (as amended on September 9, 2013, for arbitrations that commence on or after October 1, 2013) ("AAA Rules") and the International Centre for Dispute Resolution ("ICDR") International Arbitration Rules as amended and effective June 1, 2014 ("ICDR Rules") specify that the arbitrators have the power to grant interim, provisional and conservatory measures and specify procedures for obtaining relief even before the tribunal is constituted.[2]

Provisional relief is often necessary before arbitration when:

- A party has evidence that is relevant to the dispute but this evidence is likely to be destroyed, damaged or lost absent an interim order protecting it.
- A dispute is concerned with the ownership of perishable goods that may deteriorate before the dispute can be determined. An interim order requiring the sale of the goods (with the sale proceeds to be held pending the final award), or requiring the goods to be sampled, tested or photographed before the sale, is often granted in this case.

III. Who May Provide Relief

Interim, provisional and conservatory relief in aid of arbitration may be provided by:

- The arbitral tribunal.
- An "emergency arbitrator" appointed by an administering body.
- A federal or state court.

The precise scope of the powers of each of these to act depends on:

- The arbitration agreement.
- Applicable arbitration rules.
- Applicable federal and state law.

IV. Court-Imposed Limits

Under the FAA, a court may grant interim relief pending arbitration.[3] The question of whether a federal court should grant preliminary injunction is generally one of federal law even in diversity actions, but state law issues are sometimes considered.[4]

Court-issued interim orders generally last only until the arbitrators have the opportunity to consider the request for emergency or injunctive relief.[5] In effect, restraints issued by courts often serve the same function as temporary restraining orders.

While some U.S. courts have held that they lack power to grant interim relief where the underlying dispute is subject to an arbitration agreement governed by the New York Convention,[6] other courts have rejected this approach.[7] In *Sojitz Corp. v. Prithvi Info. Solutions Ltd*., 921 N.Y.S.2d 14, 17 (1st Dep't 2011), for example, the court held that a creditor can attach assets, for security purposes, in anticipation of an award that will be rendered in an arbitration seated in a foreign country, even where there is no connection between the arbitral dispute and the state, as long as there is a debt owed by a person or entity in the state to the party against whom the arbitral award is sought.

Where admiralty jurisdiction is invoked, federal law governs attachments of ships and other assets.[8] In proceedings begun by libel and seizure of vessels or other properties in admiralty proceedings, Section 8 of the FAA provides the federal courts with jurisdiction to direct the parties to proceed with arbitration and to enter a decree on the award.

V. Procedure Under State Law

Outside of admiralty, state law governs the availability of the provisional remedy of attachment in federal court.[9] Most state laws authorize provisional remedies in aid of arbitration.[10] Some state statutes that have adopted the UNCITRAL Model Law expressly allow for applications for interim measures of protection in aid of an arbitration.[11]

VI. Whether to Apply to the Arbitral Tribunal or the Court

Parties generally can apply either to a court or to arbitrators for interim relief. Parties should consider applying to the court when:

- The arbitral tribunal has not yet been constituted and therefore cannot yet act. In these cases, unless the ap-

plicable arbitral rules contain emergency arbitrator provisions, an application to the court is necessary.

- The party seeking interim relief needs judicial compulsion. Although arbitrators can impose negative consequences on parties (for example, drawing adverse inferences if a party does not produce evidence), they have no ability to make a party carry out their orders and no power that can be applied to non-parties.
- The party needs *ex parte* relief. Under most institutional rules, a party seeking emergency measures of protection must notify the other parties.[12] Notice of the application gives the party an opportunity to dissipate the evidence or assets that are the subject of the application. By the time the tribunal makes an order, it can be too late. By contrast, federal courts and most state courts (*e.g.*, California and New York) permit an applicant to proceed without notice in urgent cases.
- The matter is urgent and the arbitrator does not act timely or does not provide an adequate remedy.[13] Absent a showing of urgency, under the RUAA parties may seek relief only from the arbitrator after the arbitrator is appointed and is authorized and able to act.
- The arbitrator may not have the power to grant the relief sought. For example, arbitrators may not have the authority to appoint a receiver.[14]

Parties should consider applying to the arbitral tribunal for interim relief when:

- The tribunal has been constituted and is available on short notice.
- The applicant is satisfied that the other party will respect orders issued by the tribunal.
- The federal or state courts at the place of arbitration are reluctant to grant provisional remedies in aid of arbitration.
- The parties' agreement or the applicable institutional rules empower the arbitral tribunal to grant broader interim relief than would be available in court.[15]

VII. Interim Relief from the Arbitral Tribunal

A. Institutional Rules

Interim relief is available under, *inter alia*, the:

- AAA Rules.
- ICDR Rules.
- JAMS Arbitration Rules (effective July 1, 2014).
- The International Institute for Conflict Prevention & Resolution (CPR) Administered Arbitration Rules (effective July 1, 2013).

This section summarizes the interim relief available under the AAA and ICDR Rules. A review of the other institutions is included in the online version of this practice note at http://us.practicallaw.com/0-587-9225.

B. AAA Rules

Under the AAA Rules:

- The tribunal may take whatever interim measures it deems necessary, including injunctive relief and measures for the protection or conservation of property.
- Interim measures may take the form of an interim award and the tribunal may require security for the costs of the interim measures.[16]

AAA Rule 38 provides that where a party requires emergency relief before the tribunal has been formed, the AAA appoints an "emergency arbitrator." The emergency arbitrator has the power to order interim measures for the protection or conservation of property and may grant interim measures in the form of an award or an order, giving reasons in either case.[17] The authority of the emergency arbitrator ceases once the panel has been constituted.[18]

The rules also provide for parties to seek temporary relief in court, stating that:

> A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with this rule, the agreement to arbitrate or a waiver of the right to arbitrate.[19]

C. ICDR Rules

Under the ICDR Rules:

- At the request of any party, the tribunal may take whatever interim measures it deems necessary, including injunctive relief and measures for the protection or conservation of property.
- Interim measures may take the form of an interim award and the tribunal may require security for the costs of the interim measures.[20]

Furthermore, the rules expressly permit the tribunal to apportion the costs of the application in any interim award or in the final award.[21] In many cases it is preferable for costs to be dealt with globally at the end of the arbitration, rather than at the application itself.

The rules further provide that where a party requires emergency relief before the tribunal has been formed, the ICDR appoints an "emergency arbitrator."[22] The emergency arbitrator has the power to order interim measures for the protection or conservation of property and may grant interim measures in the form of an award or an order, giving reasons in either case.[23] The authority of the emergency arbitrator ceases once the tribunal has been constituted.[24]

The rules also provide for parties to seek temporary relief in court, stating that:

> A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.[25]

VIII. When to Apply

As a general principle, applications for interim and conservatory relief should be made as early as possible. This is because:

- Failure to apply early may prejudice the application for practical reasons. Evidence or assets may be disposed of or property may deteriorate.
- Delay in applying may be taken into account by the tribunal. If the matter is not urgent enough to cause a party to seek relief promptly, a tribunal may decide that the relief is not necessary.

IX. How to Apply

The procedure for applying to the tribunal depends in the first instance on the arbitration agreement or any applicable rules. However, the following points are generally applicable to arbitration under any institution's rules:

- **Apply in writing.** In the absence of any particular procedural requirements, most applications to the tribunal for interim measures should be made in writing.
- **Submit evidence.** The applicant should provide evidence in support of its position. For example, if a party is seeking conservatory orders in relation to property, it should identify the property and its whereabouts, and provide evidence that establishes why the relief sought is necessary. If the applicant is seeking to enforce an employee non-compete agreement, provide affidavits establishing the employer's business interest in enforcing the non-compete agreement and the potential harm to the employer if the tribunal does not issue an order preserving the *status quo*. The applicant should also brief the applicable law regarding its entitlement to the relief sought.
- **Specify relief sought.** State the precise order sought clearly in the application. Do not apply for an order that is too broad in scope. Provide a carefully formulated draft order so that the tribunal can easily see what is being requested and why.

X. *Ex Parte* Applications to Arbitrators

The rules of the major arbitral institutions prohibit applications for interim relief being made without notice. In any event, proceeding before an arbitrator on an *ex parte* basis would be ill-advised because:

- Most arbitral tribunals are extremely reticent about proceeding without giving both parties an opportunity to address them.
- Any steps taken without notice may affect the enforceability of the ultimate award. *Ex parte* evidence submitted to an arbitration panel that disadvantages any of the parties in their rights to submit and rebut evidence violates the parties' rights and is grounds for vacatur of an arbitration award.[26]

XI. No Power to Bind Fully Constituted Arbitral Tribunal

Under the institutional rules considered here, the emergency arbitrator does not have the power to bind the full arbitral tribunal. The fully constituted tribunal has the power to vacate, amend or modify any order, award or decision by the emergency arbitrator.

The usual default position is that the emergency arbitrator cannot become a member of the full arbitral tribunal unless the parties agree otherwise.

XII. Enforcing Preliminary Relief Awarded by Arbitrators in Court

Courts have held that they do not have the power to review an interlocutory ruling by an arbitration panel[27] but have relaxed this rule when parties seek confirmation of provisional remedies awarded by arbitrators.[28]

In *Yahoo! Inc. v. Microsoft Corp.*, the court confirmed an award issued by an emergency arbitrator appointed under the AAA rules to grant emergency relief "until the matter can be fully and fairly decided by a three arbitrator panel of industry experts following discovery."[29] The *Yahoo!* case shows how quickly interim relief can be obtained in arbitration. The emergency arbitrator held two days of evidentiary hearings starting 11 days after Microsoft commenced arbitration and issued a decision six days after conclusion of those hearings. The next day, Yahoo! moved in court to vacate the award and Microsoft cross-moved to confirm. The court ruled for Microsoft less than a week later. In going from commencement to judicial confirmation in merely 25 days, the *Yahoo!* case demonstrates that even where the tribunal is not constituted, the use of emergency procedures provided by arbitral institutions can provide expeditious and effective relief. Moreover, the court respected the parties' agreement to keep proceedings confidential. The motion papers were filed under seal and the only part of the proceeding that was made public was the judge's decision.

More recently, in *Companion Property & Casualty Insurance Co. v. Allied Provident Insurance, Inc.*, the arbitrators issued an interim award requiring the respondent to post security.[30] When the respondent ignored the interim award, the claimant made a motion in court to confirm it. The court reviewed the case law that supports the court's power to confirm interim awards of security and noted that "[w]ithout the ability to confirm such interim awards, parties would be free to disregard them, thus frustrating the effective and efficient resolution of disputes that is the hallmark of arbitration." Having concluded that it had the

power to confirm the interim award, the court noted that it should confirm as long as there is a "barely colorable justification." On that standard, the court confirmed the award because the agreement between the parties required that the respondent provide collateral for its obligations.[31]

Where, on the other hand, a court is asked to vacate an interim award issued by arbitrators, the same considerations may not apply. In *Chinmax Med. Sys. Inc. v. Alere San Diego, Inc.*, the court refused a request to vacate an emergency arbitrator's interim order for certain conservatory measures under the ICDR Rules.[32] In *Chinmax*, the court in addressing a challenge to the interim order found that it did not have jurisdiction to vacate the order because it was not final and binding for the purposes of the New York Convention. The order itself stated that it would be subject to the consideration of the full arbitration tribunal, and on this basis the court refused to grant the motion to vacate.

Courts will only enforce that part of the interim relief that requires judicial intervention at that stage of proceedings. To determine whether to grant relief, a court must consider:

- The likelihood that the harm alleged by the party will ever come to pass;
- The hardship to the parties if judicial relief is denied at this stage in the proceedings; and
- Whether the factual record is sufficiently developed to produce a fair adjudication of the merits.[33]

XIII. Resisting Interim Relief

In response to a request for interim relief, a party should marshal its legal arguments and supporting evidence to convince the tribunal or a court not to grant the requested relief. The opposition should address whether the tribunal or court has the power to grant the request and should give reasons why the application should be denied as a matter of discretion.

In addition to its main argument, the respondent should consider arguing in the alternative that if the relief sought by the applicant is granted, it should be conditioned on the applicant providing adequate security. Most institutional rules provide for security as a condition of interim relief granted by arbitrators.

XIV. Before an Emergency Arbitrator

The respondent should check how long it has under the rules to object to the appointment of the arbitrator and make the relevant objections in the permitted time frame. There may be grounds to resist the granting of emergency relief if the respondent has not been given proper notice of the application, or if the application fails to establish that the award to which the applicant may be entitled may be rendered ineffectual without interim relief.

In its response to the application, the respondent may consider whether it can object to the:

- Jurisdiction of the emergency arbitrator.
- Application on these grounds, among others:
  - the emergency arbitrator provision of the relevant rules do not apply;
  - the applicant is unlikely to succeed on the merits;
  - there is no urgent need for the interim relief to be granted;
  - irreparable harm would be suffered by the respondent if the emergency relief were granted; or
  - greater harm would be suffered by the respondent if the interim measure is granted than would be suffered by the applicant if it were not.

XV. Before the Arbitral Tribunal

The respondent should check the applicable rules regarding the power of the tribunal and the procedures for interim relief. In its response to the application, the respondent may consider whether it can object to the application on these, among other grounds:

- The applicant is unlikely to succeed on the merits;
- There is no urgent need for the interim relief to be granted;
- Irreparable harm would be suffered by the respondent if the emergency relief were granted; and/or
- Greater harm would be suffered by the respondent if the interim measure is granted than would be suffered by the applicant if it were not.

XVI. Before a Court

The respondent should consider:

- Whether federal or state courts in the state where the arbitration is seated have held that they lack power to grant the relief requested.[34]
- The application can be opposed on the ground that courts should intervene only until the arbitrators have the opportunity to consider the request for emergency or injunctive relief.[35] Where the arbitral tribunal is authorized to grant the equivalent of preliminary injunctive relief, it has been inappropriate for the district court to do so.[36]
- The applicant is unlikely to succeed on the merits.
- There is no urgent need for the interim relief to be granted.
- Greater harm would be suffered by the respondent if the interim measure is granted than would be suffered by the applicant if it were not.

Endnotes

1. 9 U.S.C. §§ 1-16, 201-208, 301-307.
2. *See* American Arbitration Association Commercial Arbitration Rules 37 and 38 (AAA); *see* Articles 6 and 24, International Centre for Dispute Resolution Rules (ICDRR).
3. *See Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 376 (4th Cir. 2012); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Salvano*, 999 F.2d 211, 214-15 (7th Cir. 1993); *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049, 1051-54 (2d Cir. 1990).
4. *See AIM Int'l Trading LLC v. Valcucine SpA.*, 188 F. Supp. 2d 384, 387 (S.D.N.Y. 2002).
5. *See Fairfield Cnty. Med. Ass'n v. United Healthcare of New England, Inc.*, 557 F. App'x 53, 56 (2d Cir. 2014); *Next Step Med. Co. v. Johnson & Johnson Int'l*, 619 F.3d 67, 70 (1st Cir. 2010).
6. *See, e.g.*, *McCreary Tire & Rubber Co. v. CEAT S.p.A.*, 501 F.2d 1032, 1037-38 (3d Cir. 1974); *I.T.A.D. Assocs., Inc. v. Podar Bros.*, 636 F.2d 75 (4th Cir. 1981).
7. *See Aggarao*, 675 F.3d at 376; *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 365 (5th Cir. 2003); *Borden, Inc. v. Meiji Milk Prods. Co.*, 919 F.2d 822, 826 (2d Cir. 1990); *Rhone Mediterranee Compagnia Francese Di Assicurazioni E Riassicurazoni v. Lauro*, 712 F.2d 50, 54-55 (3d Cir. 1983).
8. *See Result Shipping Co. v. Ferruzzi Trading USA Inc.*, 56 F.3d 394, 399 (2d Cir. 1995).
9. Federal Rules of Civil Procedure 64 (Fed. R. Civ. P.) ("[a]t the commencement of and throughout an action [for attachment in federal district court], every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment.").
10. New York Civil Practice Law and Rules Section 7502(c) (CPLR) (provides that to obtain provisional relief, the movant must demonstrate that "the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief."); *see* CPLR 7502(c) (provides that a showing of an ineffectual award is the "sole ground for the granting of the remedy."); *compare JetBlue Airways v. Stephenson*, 932 N.Y.S.2d 761 (Sup. Ct. N.Y. Co. 2010), *aff'd*, 931 N.Y.S.2d 284 (1st Dep't 2011) (denying motion for injunctive relief under CPLR 7502(c), because although the movant presented arguments regarding the CPLR Article 63 criteria, it ignored the "ineffectual award" requirement), *with Winter v. Brown*, 853 N.Y.S.2d 361 (2d Dep't 2008) (lower court erred when it granted preliminary injunction in favor of seller in breach of contract action where seller failed to satisfy the traditional equitable criteria for preliminary injunctive relief); *see also* CPLR 7502(c) (provides that if an arbitration is not commenced within 30 days of the granting of provisional relief, the order granting relief expires and costs, including reasonable attorneys' fees, are awardable to the respondent).
11. *See, e.g.*, *Bahr Telecomm. Co. v. DiscoveryTel, Inc.*, 476 F. Supp. 2d 176, 184 (D. Conn. 2007) (federal court applying state law of attachment); *Scottish Re Life Corp. v. Transamerica Occidental Life Ins. Co.*, 647 S.E.2d 102, 105 (N.C. App. 2007) (granting preliminary injunction under the Revised Uniform Arbitration Act (RUAA); states that have adopted this rule include Colorado, Florida, Minnesota and Washington).
12. *See* AAA Rule 38(b); ICDR art. 6.
13. *See* Revised Uniform Arbitration Act §8.
14. *Compare Stone v. Theatrical Inv. Corp.*, No. 14 CIV. 6494 PAE, 2014 WL 6790262, at *12 (S.D.N.Y. Dec. 2, 2014), *reconsideration denied*, No. 14 CIV. 6494 PAE, 2015 WL 195848 (S.D.N.Y. Jan. 14, 2015) (arbitrator has the power to appoint receiver as part of a final award) *with Ravin, Sarasohn, Cook, Baumgarten, Fisch & Rosen, P.C. v. Lowenstein Sandler, P.C.*, 839 A.2d 52, 57-58 (N.J. Super. Ct. App. Div. 2003) *and Pursuit Capital Management, LLC v. Claridge Associates, LLC*, No. 654301/12 (Sup. Ct. N.Y. Co. Mar. 21, 2013) (unpublished) (arbitrators may not appoint a receiver as a provisional remedy).
15. *See, e.g., CE Int'l Res. Holdings LLC v. S.A. Minerals Ltd. Pship*, No. 12 CIV. 8087 CM, 2012 WL 6178236, at *3-*5 (S.D.N.Y. Dec. 10, 2012).
16. AAA Rule, *supra* note 2, 37.
17. *Id.* R.38(e).
18. *Id.* R.38(f).
19. *Id.* at R.38(h).
20. ICDR Rules, *supra* note 2, art. 24.
21. *Id.* art. 24.4.
22. *Id.* art. 6(2).
23. *Id.* art. 6(4).
24. *Id.* art. 6(5).
25. *Id.* art. 24(3).
26. *See Pac. Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp.*, 935 F.2d 1019, 1025 (9th Cir. 1991).
27. *See Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 414 (2d Cir. 1980).
28. *See Sperry Int'l Trade v. Gov't of Isr.*, 532 F. Supp. 901, 909 (S.D.N.Y. 1982), *aff'd*, 689 F.2d 301 (2d Cir. 1982) (confirming an arbitrator's order to place a disputed $15 million letter of credit in escrow pending a decision on the merits, finding that the award would be rendered a meaningless exercise of the arbitrator's power if the order were not enforced); *Island Creek Coal Sales Co. v. City of Gainesville*, 729 F.2d 1046, 1059 (6th Cir. 1984) (upheld the confirmation of the award that preserved the status quo, reasoning that the injunction issued by the arbitral tribunal would be meaningless absent judicial confirmation of it); *S. Seas Navigation Ltd. v. Petroleos Mexicanos*, 606 F. Supp. 692, 694 (S.D.N.Y. 1985) (holding that if "an arbitral award of equitable relief based upon a finding of irreparable harm is to have any meaning at all, the parties must be capable of enforcing or vacating it at the time it is made.").
29. 983 F. Supp. 2d 310 (S.D.N.Y. 2013).
30. No. 13-CV-7865, 2014 WL 4804466, at *3 (S.D.N.Y. Sept. 26, 2014).
31. *See also Ecopetrol S.A. v. Offshore Exploration & Prod. LLC*, 46 F. Supp. 3d 327, 337 (S.D.N.Y. 2014) (enforcing interim awards requiring seller to tender certain amounts to purchaser with funds not derived from amounts in escrow).
32. No. 10CV2467 WQH NLS, 2011 WL 2135350 (S.D. Cal. May 27, 2011).
33. *See Draeger Safety Diagnostics, Inc. v. New Horizon Interlock, Inc.*, No. MC 11-50160, 2011 WL 653651, at *4 (E.D. Mich. Feb. 14, 2011).
34. *See, e.g.*, *McCreary Tire*, 501 F.2d at 1037-38.
35. *See, e.g.*, *Next Step Med.*, 619 F.3d 67 at 70.
36. *See, e.g.*, *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 726 (9th Cir. 1999).

Steven Skulnik, a member of the NYSBA Dispute Resolution Section and a Senior Legal Editor with Practical Law, submitted this article. Mr. Skulnik is a member of the Panels of Arbitrators of the American Arbitration Association (AAA) and the International Institute for Conflict Prevention and Resolution Panel of Distinguished Neutrals (CPR).

A longer version of this Practice Note was first published by Practical Law Litigation web service at http://us.practicallaw.com/0-587-9225.

Hacking Arbitration

By Erin Gleason Alvarez and Alexandra Dosman

Commercial parties decide to arbitrate for a number of reasons. Arbitration is efficient and flexible—the result is final and enforceable. But of the many reasons to choose arbitration, increased confidentiality is often a primary concern. When a dispute concerns intellectual property, mergers and acquisitions, investment strategy, or other sensitive matters, parties frequently agree to arbitrate in order to protect this information.

What would happen if confidentiality, one of the greatest attractions of arbitration, begins to erode? What if parties lose their faith that the protected information shared with arbitrators and arbitral institutions will remain private?[1] In this article, we outline issues for arbitral institutions, arbitrators and parties to consider in seeking to ensure the confidentiality of electronic information during the arbitration process.

The PCA Breach

In July of this year, the Permanent Court of Arbitration in the Hague (PCA) was hacked. The *American Lawyer* reported the security incident after a cyberthreat research company, ThreatConnect, discovered the breach.[2] The attack on the PCA occurred on the third day of hearings in an arbitration between China and the Philippines involving water rights. A source close to the PCA confirmed that its website had been hacked.

"There's a lot of money and influence wrapped up in legal data but the legal industry has yet to awaken to the danger of cyberwarfare."[3] The potential exposure is significant: A leading arbitration institution, the International Court of Arbitration of the International Chamber of Commerce (ICC), reports that "the amount in dispute in 2014 filings averaged $63 million, while the aggregate value of all disputes pending before the Court at the end of the year rose to just over $200 billion."[4]

While there has been much press over the need for law firms to be more aggressive in protecting client data, little attention is paid to providers of alternative dispute resolution (ADR) services or independent neutrals who are the recipients of otherwise highly protected information. As with law firms, motivations for infiltrating the systems of arbitral institutions and individual arbitrators might include the furtherance of political activity, money laundering, prevention or transformation of ventures and identification of individuals to target for harassment.

Arbitral Institutions

The issue of security relating to electronic information is gaining increased attention by arbitral institutions, with a program on cybersecurity front and center at a symposium organized by the Hong Kong International Arbitration Center in October 2015. In addition, the broader ICC (not its arbitration division) this year issued a guide on cybersecurity for business, noting that, "[i]nformation security is a combination of people, processes and technology that is a business-wide issue, not just an Information Technology (IT) issue."[5] The ICC Guide sets out specific strategies to address cyberthreats, including risk assessment and evaluation, a focus on leadership and thorough preparation.

As arbitration users demand greater security for information shared with institutions in the course of the arbitral process, the strategies set out in the ICC Guide should prove useful. Institutions that administer arbitrations, or other industry groups, may wish to develop protocols or best practice guides for the transfer and storage of sensitive electronic information, including the use of secure encryption on USB drives and file sharing locations such as FTP websites.

Arbitrators

Arbitrators who are not affiliated with law firms face particular challenges with respect to electronic security. While arbitrators at law firms may rely on their infrastructure and firm policies, independent arbitrators generally do not have easy access to support. Independent arbitrators may therefore wish to raise with the parties, early in the process, what information security procedures will be followed. Getting parties to agree on security protocols in the first procedural order will reduce the potential for friction later in the proceedings. Practical items to consider include:

- How will correspondence, filings and evidence be transmitted? Will the same level of security be applied to all documents, or will a high level of protection apply only to the most sensitive information?
- Do the parties agree to electronic copies of correspondence, filings and evidence being stored on Google Drive, Dropbox or similar services often employed by independent arbitrators?
- If complex encryption is required, who will bear the cost and burden?

Parties

In-house counsel are certainly aware of the need to protect sensitive information.[6] The following points may be considered in interactions with arbitrators and arbitral institutions:

- Can you review the institution's or arbitrator's cybersecurity protocols? Are their requirements in line with yours and that which you require of your law firms?
- Does the institution/arbitrator have protocols in place to detect anomalies in internal network use, potentially revealing an internal data security breach?
- How often are risk assessments performed? Is this similar to your own practice?
- Does the arbitral institution provide education and training for case administrators, other support staff and arbitrators on how to recognize a potential attack?
- Information shared with institutions and arbitrators may originate with your law firms or other legal vendors—do the firms understand your requirements for arbitrated matters?

Special considerations apply to the use of online dispute resolution processes or video-conferenced meetings. Are these processes recorded? If so, where is the data stored and who has access to it? As parties seek to reduce costs, it is important that online dispute resolution develops to protect electronically transmitted information.

Once in-house counsel has determined its cybersecurity requirements, implementation requires careful planning and execution. The first step is review of existing arbitration disputes. Do any raise cybersecurity concerns? Can you work with the institution/arbitrator to ensure that the protections you require are met? Prudent counsel will keep in mind cybersecurity concerns in choosing arbitral institutions and arbitrators on a going forward basis.

There has been much positive advancement in the field of arbitration in recent years: Institutional rules updated to promote efficient processes, increases in transparency and cost-conscious initiatives on behalf of many institutions. But if the confidential nature of the process is not preserved, these enhancements will mean little. Safeguarding confidentiality in the digital age is a shared responsibility of parties, arbitral institutions and arbitrators.

Endnotes

1. While this article is focused on arbitration, the same precepts and concerns would apply in the context of mediation.
2. Michael Goldhaber, *China Denies Role in Hack Attack on Hague Peace Palace*, The Am. Law Daily (July 22, 2015).
3. *Id.*
4. 2014 ICC Dispute Resolution Statistics, ICC Publication No. @15BUL1-1, 2015 Edition.
5. ICC World Business Organization, "ICC Cyber Security Guide for Business," Publication No. 450/1081-5 (2015).
6. Jason Straight, *What In-House Counsel Want in Law Firm Cybersecurity*, Corporate Counsel Magazine (April 22, 2015).

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Evidentiary Privileges

(Grand Jury, Criminal and Civil Trials)

Sixth Edition

Author
Lawrence N. Gray, Esq.
Former Special Assistant Attorney General
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A valuable text of first reference for any attorney whose clients are called to testify before grand juries, or in criminal or civil trials, *Evidentiary Privileges,* 6th edition, covers the evidentiary, constitutional and purported privileges that may be asserted at the grand jury and at trial.

Recently updated with new case law and sections throughout, the author provides in-depth discussions on trial privileges and procedures including state and/or federal cases and relevant legislation. *Evidentiary Privileges* features the transcript of a mock grand jury session, providing cogent examples of how some of the mentioned privileges and objections have been invoked in real cases.

Lawrence N. Gray is the author of numerous publications on criminal law and trial. This latest edition of *Evidentiary Privileges* draws from the author's experience as a former special assistant attorney general and his many years of practice in the field of criminal justice.

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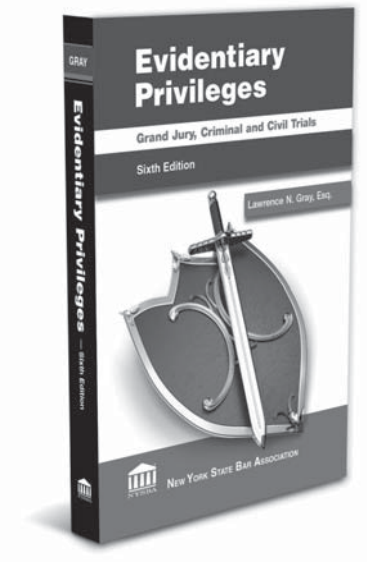

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Inside Books

The Road to Character

By David Brooks

Reviewed by Janice Handler

So why is a legal journal featuring a book on character? In fact, some would say that using the word "lawyer" and "character" in the same sentence is an oxymoron. I am reviewing this book because it discusses the differences between résumé values (those that contribute to worldly success) and eulogy values (those that get talked about at your funeral)—and who pursues résumé values more voraciously than lawyers?

David Brooks, the so called conservative (but maybe really liberal) op-ed columnist for *The New York Times*, has in recent years evolved from political opinion to social commentary to moral development and this book is the result of his evolution. *The Road to Character* explores differences between résumé virtues and eulogy virtues. Résumé virtues are those you list on your résumé: The skills you bring to the job market and that contribute to your external success. Eulogy values are those that get talked about at your funeral—the ones that exist at the core of your being—whether you are kind, brave, honest, faithful—what kind of relationships you formed.

The structure of the book is simple. Brooks discusses a "eulogy" character trait, such as self-conquest, struggle, love, self-mastery, dignity, then depicts portraits of a diverse set of people who were acutely aware of their own weaknesses, waged internal struggle against their sins and emerged with a sense of self-respect and a strong inner character. The profiles include: President Franklin Delano Roosevelt's Secretary of Labor Frances Perkins, Dorothy Day, General George Marshall, Bayard Rustin, George Eliot, St. Augustine and Michel de Montaigne

The chapter on Dwight D. Eisenhower illustrates Brooks' methodology. Inspired by his mother Ida, who had strong religious convictions and a strict code of conduct, teaching Ike that a disciplined work ethic was more important than a brilliant mind, Eisenhower struggled to control his intemperate nature and hot temper. He masked these with a false front of confident ease and garrulousness and became known for a sunny boyish temperament. He devised stratagems—such as writing enemy names on pieces of paper and dropping them in a wastebasket—for conquering anger and hatred. He was a passionate man who struggled to control his passions through a system of artificial restraints, and by the end of his presidency, according to Brooks, became a poster boy for moderation in practice.

Brooks concludes by discussing how the "crooked timber" school of humanity, which emphasized the correction of sin and human weakness, gave way in the post-1950s to the "Big Me" philosophy, emphasizing self-love, self-praise and self-acceptance as roads to happiness. Moral authority is no longer found in some external objective good but in authenticity, self-expression, self-liberation, the "Big Me." To improve yourself you must love yourself, be true to yourself, not doubt and struggle against yourself.

Brooks believes that the shift from Little Me to Big Me has gone too far, creating an imbalance, a culture in which people are defined by external abilities and achievements rather than character. A cult of busyness has developed emphasizing how to do things, not why, leading to a shriveling of the moral faculties necessary to point one's life in a meaningful direction.

Finally, Brooks concludes with some self-help, laying out a Humility Code, stating what to live for and how to live. His precepts include:

- We do not live for happiness; we live for holiness. All human beings seek to live lives not just by pleasure but purpose, righteousness and virtue.
- The long road to character begins with accurate understanding of our nature, that we are flawed creatures.
- We are splendidly endowed to recognize sin, be ashamed of sin and overcome sin. Humility is the greatest virtue in this process—pride is the central vice.
- The struggle against sin and for virtue is the central drama of life. Character is built as a result of this inner confrontation and character endures over time.
- No person achieves mastery on his own—he or she needs help from God, friends, family, rules, traditions, institutions. We must use the practical bank of wisdom our ancestors built up and have an acute sense of historical consciousness.
- No good life is possible unless organized around a vocation.

- The person who successfully struggles against weakness and sin may not become rich and famous, but will become mature.

David Brooks is a good writer, and his profiles are well done. While I commend him for going beyond the usual op-ed type subjects and digging deeper, this book does have flaws. His threshold assumption—that the eulogy values are superior to the résumé values—sounds intuitively true to the seekers amongst us—but is really unproven. Who says that loyalty, fidelity and bravery will make for more life satisfaction than a private plane and Birkin bag? Brooks just assumes this. But many of those he profiled seemed to have little joy to show for their struggle to overcome their character flaws. Also, his profiles can be a bit dull. Goodness and spirituality do not always make for lively reading, though this probably says more about my character than theirs.

Despite these flaws, the book is worth trying—especially for lawyers who, as a group, value résumé values quite intensely. To stop, take a breath and think about character in the company of an introspective and thoughtful writer can only be a good thing—especially for a profession considered by some to be character's antithesis.

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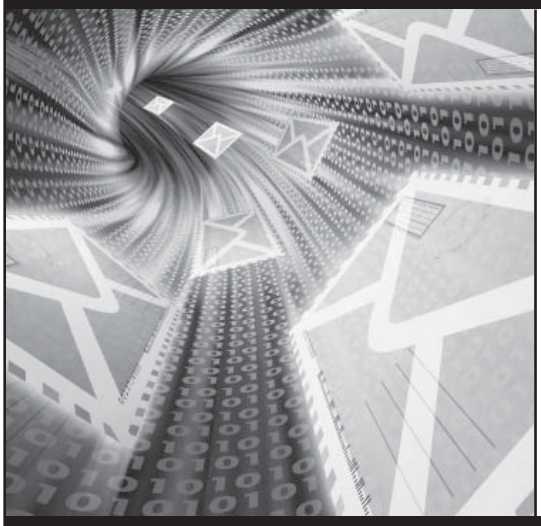

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ISSN 0736-0150 (print) 1933-8597 (online)

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