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Inside

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

In This Issue....

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JANUARY 27 – 31
NEW YORK CITY

2020

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Message from the Chair

In January, I was honored and privileged to become the Chair of the Corporate Counsel Section for 2019. I wish to thank my predecessor, Elizabeth Shampnoi, for her outstanding 18 months of service as Chair. Not only did she prove to be a strong and steady leader of the Section, along with concurrently being the editor of this publication, but she was thrown into this leadership position prematurely upon the untimely passing of Section Chair Jana Springer Behe. Trust me, the year spent as Chair-elect is one that ramps up as one gets closer to becoming Chair. Jumping in six months early, upon learning of the death of a dear friend, is a feat to be recognized. Thank you, Liz, for your passion, vision and work ethic. I also need to thank Jessica Thaler-Parker for her past work as Vice-Chair, and Naomi Hills, who was Secretary of the Section. Naomi will continue on as an officer in the position of Vice-Chair.

It has been my pleasure to serve on the Section's Executive Committee since 1999, and I was first Chair 14 years ago. Why have I volunteered my time to serve this Section for so many years? An easy answer: it's all about the people — the members of the Executive Committee, the members of the "Big Bar" that we work with, the law students we mentor and find internships for and the members we meet at the CLE programs and other activities.

Who are we? We are 1,500+ members strong, made up of 55% in-house counsel, 33% in private practice, with the remainder law students hoping to end up in an in-house position and others who have a general interest in the in-house corporate practice. Approximately 65% of us practice in New York, though many live or work in surrounding states, and there is a 14% international contingent. We have almost as many members who practice in large law departments or firms as those who practice as one of five or fewer attorneys and just as many who are solo practitioners. From an age breakdown, our members are equally spread among the different age bands. The majority of our members have been in practice for more than 20 years. By gender, men make up approximately 60% of our membership. If we are not you, we can be you.

What are the membership benefits? The subscription to Inside, interesting CLE programming for which you receive a discounted registration rate, free lunchtime webinar informational briefings and access to the Section's Committees.

In November the Section put on its semi-annual CLE Ethics for Corporate Counsel, which was well attended and received. In December we conducted a free luncheon webinar entitled "Block Chain and Smart Contracts 101." At the NYS Bar Association Annual Meeting in January, the Section partnered with the Dispute Resolution Section to produce an afternoon of CLE under the title "ADR in the Boardroom and the Headlines: Not Fake News." The following week, we partnered with the NY Women's County Bar Association in presenting "Breaking Through Bias to Achieve Rainmaking and Leadership Success." Looking ahead, our Eighth Corporate Counsel Institute will be held on October 17th, at the offices of Kelley, Drye & Warren in midtown Manhattan, with a reception to follow. Please look for the marketing collateral on p.33. We have hosted and will continue to host lunchtime webinar informational briefings and CLEs.

Mitchell F. Borger

Our committees are always looking for new members. Please reach out to me or our Section's liaison, Sally Bratten, at Sbratten@nysba.org, if you are interested in becoming involved.

I would be remiss if I didn't highlight one of our Section's gemstones, the Kenneth G. Standard Diversity Internship Program. The program, in its 14th year, is named in honor of the NYSBA Past President who has shown a lifetime commitment to initiatives aimed at increasing diversity in the legal profession. The Section works with various New York State law schools to select diverse law students to apply for summer internships in corporate law departments with New York State companies or organizations. Last year, 11 interns from eight law schools were placed in eight corporate organizations. For the first time the Section placed an intern through the New York State Bar Foundation, in memory of Past Chair Jana Springer Behe. Look for an update about this year's program in the fall edition of Inside.

If you have any questions/comments for me or want to volunteer to became active in a committee or other activity, please contact me at mitchell.borger@gmail.com. I look forward to hearing from you. In the meantime, enjoy this spring/summer edition of Inside.

Mitchell F. Borger

Message from the Editor

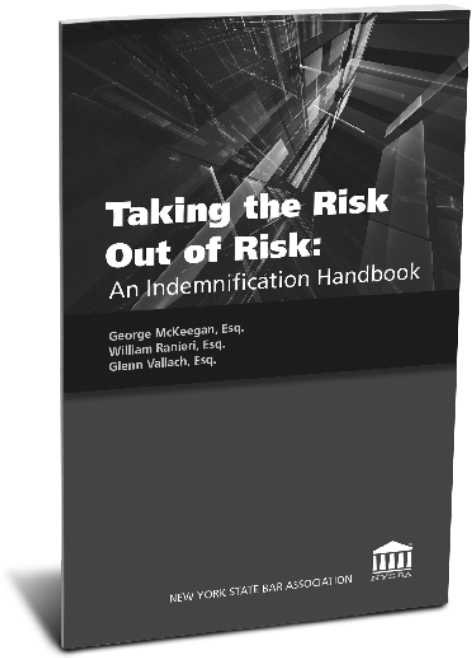
Greetings, valued readers, and welcome to the Spring/Summer 2019 issue of Inside! We strive to bring you practical articles of interest that cover a broad array of topics, substantive areas and industries. We are currently preparing the fall and winter issues of Inside. If you have a topic in mind, please contact me at elizabeth@shampnoiadr.com. We are also seeking law student volunteers to conduct interviews of in-house counsel and to attend and write about section events. This is a terrific opportunity for law students to become more active in the Corporate Counsel Section, network and be published.

As always, if you have any comments or suggestions, please do not hesitate to reach out.

Elizabeth Shampnoi

From the NYSBA Book Store

Taking the Risk Out of Risk: An Indemnification Handbook



AUTHORS

George McKeegan, Esq.
William Ranieri, Esq.
Glenn Vallach, Esq.

This book examines the concept of common law or implied indemnity, and indemnity arising from a contractual relationship. Indemnification generally involves the transfer of risk from one party to another.

The topics covered will be useful to a wide array of lawyers, legal scholars, and other practitioners or individuals dealing with indemnity issues. This is particularly true when determining, interpreting and/or clarifying the client's rights and obligations in this area, thereby potentially streamlining or eliminating litigation.

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Message from the President

Diversifying the Legal Profession: A Moral Imperative

By Hank Greenberg

No state in the nation is more diverse than New York. From our inception, we have welcomed immigrants from across the world. Hundreds of languages are spoken here, and over 30 percent of New York residents speak a second language.

Our clients reflect the gorgeous mosaic of diversity that is New York. They are women and men, straight and gay, of every race, color, ethnicity, national origin, and religion. Yet, the law is one of the least diverse professions in the nation.

Indeed, a diversity imbalance plagues law firms, the judiciary, and other spheres where lawyers work. As members of NYSBA's Corporate Counsel Section, you have surely seen this disparity over the course of your law practices.

Consider these facts:

- According to a recent survey, only 5 percent of active attorneys self-identified as black or African American and 5 percent identified as Hispanic or Latino, notwithstanding that 13.3 percent of the total U.S. population is black or African American and 17.8 percent Hispanic or Latino.
- Minority attorneys made up just 16 percent of law firms in 2017, with only 9 percent of the partners being people of color.
- Men comprise 47 percent of all law firm associates, yet only 20 percent of partners in law firms are women.
- Women make up only 25 percent of firm governance roles, 22 percent of firm-wide managing partners, 20 percent of office-level managing partners, and 22 percent of practice group leaders.
- Less than one-third of state judges in the country are women and only about 20 percent are people of color.

This state of affairs is unacceptable. It is a moral imperative that our profession better reflects the diversity of our clients and communities, and we can no longer accept empty rhetoric or half-measures to realize that goal. As Stanford Law Professor Deborah Rhode has aptly observed, "Leaders must not simply acknowledge the importance of diversity, but also hold individuals accountable for the results." It's the right thing to do, it's the smart thing to do, and clients are increasingly demanding it.

NYSBA Leads On Diversity

Hank Greenberg

On diversity, the New York State Bar Association is now leading by example.

This year, through the presidential appointment process, all 59 NYSBA standing committees will have a chair, co-chair or vice-chair who is a woman, person of color, or otherwise represents diversity. To illustrate the magnitude of this initiative, we have celebrated it on the cover of the June-July Journal. [www.nysba.org/diversitychairs]

Among the faces on the cover are the new co-chairs of our Leadership Development Committee: Albany City Court Judge Helena Heath and Richmond County Public Administrator Edwina Frances Martin. They are highly accomplished lawyers and distinguished NYSBA leaders, who also happen to be women of color.

Another face on the cover is Hyun Suk Choi, who co-chaired NYSBA's International Section regional meeting in Seoul, Korea last year, the first time that annual event was held in Asia. He will now serve as co-chair of our Membership Committee, signaling NYSBA's commitment to reaching out to diverse communities around the world.

This coming year as well we will develop and implement an association-wide diversity and inclusion plan.

In short, NYSBA is walking the walk on diversity. For us, it is no mere aspiration, but rather, a living working reality. Let our example be one that the entire legal profession takes pride in and seeks to emulate.

Hank Greenberg can be reached at hgreenberg@nysba.org.

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Corpus Wellness: The Path to Attorney Health

Hear how one New York lawyer — who also happens to be a world champion powerlifter — deals with the stresses of practicing law. In this video, member Robert S. Herbst, Esq. shares some practical tips on:

- Using exercise to combat the negative health effects of stress
- Making yourself your own client in committing to wellness
- Healthful eating
- Setting realistic goals

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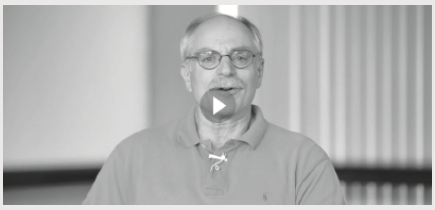

Stop ADR Diversity from Falling Through the Cracks: A General Counsel Checklist Manifesto

By Linda Gerstel

I thought the last quarter of 2018 was a newsworthy year for showcasing the lack of diversity in Alternative Dispute Resolution (ADR), between the mainstream media coverage of Jay-Z's motion spotlighting the lack of African Americans arbitrators and the passage of ABA Resolution 105 urging providers to expand their rosters and users of ADR to select and use diverse neutrals. But only a month into 2019, the front-page New York Times headline is "12 White Faces Reflect Blind Spot in Big Law." A post first appeared in early December on LinkedIn when Paul Weiss was "pleased to announce its new partner class" which displayed all white male images with the exception of one white female. The LinkedIn images were a stark illustration of what can happen when promotion decisions are relationship-driven and concentrated in the hands of white male rainmakers, even in workplaces with a commitment to diversity. Ditto with the selection of neutrals in ADR. Perhaps for many readers this news was not entirely shocking (recent studies show that gender parity in partner promotions will not be achieved until 2032), but the response from over 170 General Counsel was unprecedented and needs to expand to ADR diversity ("GC Letter"). The GC Letter hit all the right notes: underscoring the power of the purse, the millions of dollars spent annually on legal services, the expectation that law firms reflect the legal community's diversity and the companies served and the disappointment that partnership promotions do not reflect the demographic composition of the entering classes. Put simply, "it is not enough to commit your firm to diversity during the recruiting process or to hire a diversity and inclusion officer and expect that the person can effect change without the full commitment of each member of the firm." How does the GC Letter fall short? For one, the signatories are ethnically diverse, but only 17% of the signatures are men. (Many "Laurens" and "Kates," not enough "Andrews" or "Toms"). Second, few Fortune 500 companies are represented (despite the growing percentage of women general counsels at Fortune 500s). Third, it needs to be circulated more widely—more General Counsels need to sign the GC Letter, including more white males. Finally, the GC Letter desperately needs to be amended to include the selection of diverse neutrals, and above all, there needs to be follow-up with a practical checklist to effect meaningful change.

Linda Gerstel

> "The Jay-Z motion, much like the GC Letter, focuses on the role that clients play in determining whether diversity will increase or not. Meaningful change for ADR diversity depends on clients and their lawyers—the ultimate selectors, the purchasers of arbitration services."

The GC Letter also captures the reason why diversity in ADR has been falling through the cracks. There is not a responsible person, team or leader tasked with managing the issue. It is not on the radar or part of the job description for a diversity and inclusion officer. In many firms there may not be a central "Arbitration or Mediation Practice" so no one is really tracking data of litigators from various practice groups who may have matters in arbitration or mediation. For those firms that do have an official arbitration practice, often falling under the heading of "International Arbitration," the number of diverse neutrals selected is worse than the domestic statistics. The selection of diverse arbitrators will be harder to attack than the partnership promotions, even though the latter might eventually impact the former, because ADR is cloaked with a veil of confidentiality— one of its major selling points. Yet, in order for in-house counsel to have an impact, recordkeeping needs to improve in the selection of diverse neutrals. ADR providers have been tracking and publishing data and it is time for in-house counsel to work with their outside counsel and do the same. The Jay-Z motion, much like the GC Letter, focuses on the role that clients play in determining whether diversity will increase or not. Meaningful change for ADR diversity depends on clients

and their lawyers—the ultimate selectors, the purchasers of arbitration services.

Resolution 105 provides an important starting point and an action plan, essentially a checklist of the sort espoused by Atul Gawande in The Checklist Manifesto as a critical tool to improve outcomes. Gawande espouses that organizations need to take a critical look at how checklists can be used to dramatically reduce errors and increase discipline in an organization, whether in the operating room or in a business setting as he describes its application to other industries like construction, finance and aviation. The author, a surgeon, chronicles his successful introduction of a checklist to radically improve surgical outcomes globally through the World Health Organization. We need to use a checklist to increase partnership promotions of minorities and the selection of diverse ADR neutrals. Good checklists are explicit; offering the possibility of verification but also instilling discipline and high performance. Most important, implementing a checklist is an important tool to behavioral change. Checklists can be used to force key players to speak to each other as a strategy to foster teamwork. Key items for any checklist include (1) clearly defined objectives; (2) cannot be lengthy; (3) ideally fits on one page and wording needs to be simple; and (4) needs to be tested in the real world and measured. It is not simply an exercise in checking boxes but embracing a culture of teamwork and discipline. It may be the key to moving the needle for ADR diversity.

Keeping Gawande's principles in mind, apply an "Action"-based checklist: Account, Awareness, Access, Ask, and Appoint. These are five basic categories with specific suggestions for General Counsel to implement in coordination with outside counsel, ADR provider organizations and administrators of local court panels.

Account

Simply put, this is the most critical "A" on the checklist. First, create a committee which will be accountable for establishing goals, benchmarks and time periods to reach those goals. This committee should include an executive committee member, chief diversity and inclusion officer, and leaders of your Dispute Resolution Practice or Litigation practices and various affinity group leaders at your firm. Designate a member in the group to (1) act as a liaison to private ADR provider panels and to administrators of local court panels; (2) establish and lead a mentoring and shadowing program; (3) create and host CLE and social gatherings to meet diverse neutrals; and (4) collect resources on diverse neutrals. Second, staying on track often requires that we take measured steps: journaling, setting up spreadsheets and, yes, checklists! Also have quarterly meetings with outside counsel for checking in on progress. Third, designate a person on the committee to keep data, both to measure your firm's progress and to put on tap—and make sure outside counsel maintains —the institutional knowledge upon which recommendations to in-house counsel can be made. ADR provider organizations have increased panel diversity and, by far, the biggest change has been in recordkeeping and transparency by publishing the data. In his New York Times bestseller, Measure What Matters, John Doerr recounts his introduction of the concept of "Objectives and Key Results" (OKR), principles adopted by some of the most successful organizations, including Google and the Gates Foundation, as a proven approach to operating excellence. In the OKR model, "Objectives" define what we seek to achieve and "Key Results" are how the top priorities goals will be attained with specific measurable actions and within a set time frame.

Awareness

We cannot get jaded by the ubiquity of awareness campaigns because they are reminders to set goals and measure benchmarks whether that is diverse partnership promotions or selection of ADR neutrals. Members of the arbitration community circulated a pledge to take action in 2015 (www.arbitrationpledge.com) seeking to increase the number of women appointed as arbitrators with the ultimate goal of full parity. The ADR Inclusion Network expanded the pledge to extend to all diverse candidates (www.adrdiversity.org) and the Alliance for Equality in Dispute Resolution is a newly launched initiative that seeks to bring awareness and workshops to the international community (www.allianceequality.com). ABA Resolution 105 continues an awareness campaign but begins to address meaningful follow-through steps, including expanding the awareness programs. First, initiate discussions within your own firm and your outside counsel regarding the value of diversity. Second, take public diversity pledges available from various institutions and tell your friends and family to do so. Third, implement a multi-pronged awareness-raising campaign at internal meetings and in industry association meetings, with outside counsel and with ADR providers. Fourth, together with your outside counsel, host and attend programs such as FINRA's annual "Diversity Summit" (www.finra.org) that seek to educate lawyers about elimination of bias and provide tools to increase diversity either through the Arbitral Women (AW) Diversity Tool Kit or the ADR Inclusion Network's resources. For example, Women in Dispute Resolution (WIDR) has an online directory of members who speak on ADR panels nationally so that panel organizers can make sure that diversity is represented. Fifth, consider distributing the ADR Inclusion Network "Mindbug" sheet, a one-page slip sheet to hand out to counsel involved in the selection of neutrals to alert counsel to the benefits of diversity. Increasing diversity is not simply a matter of equity.

Access

The pipeline has been improving through conscious steps by ADR providers (1) to add more diverse candidates; (2) to commit, like the AAA, to provide arbitrator lists that are at least 20% diverse (the percentage should not stay static); and (3) to establish mentorship and training programs for minority candidates with the ultimate goal of bringing those individuals into the roster pipeline. The issue, in part, is a supply and demand problem. Arbitration panels reflect the demographics of the partnership ranks at a typical law firm. Most ADR panels have about 25% female neutrals, which is pretty consistent with the upper range of law firm partners. The statistics for other minorities mirror the abysmal pattern found in law firms. The lack of partnership promotions for minority candidates is inextricably tied to the lack of selection of diverse neutrals, but the pipeline has vastly improved for the former group. One of the ways that court administrators of mediation programs in New York are trying to tackle the pipeline issue is by establishing shadowing opportunities and most recently mediator incubation models. Private law firms should establish their own shadowing and mentorship programs and consider, subject to confidentiality agreements, having young diverse neutrals shadow the proceeding or act in the role as a secretary to the panel. None other than Sheryl Sandberg of Facebook underscored the importance of sponsors who did not fit her gender prototype.

Ask

First, ask ADR provider organizations about policies and practices regarding diversity and how they can be improved and ask them to stretch their benchmarks. Second, ask your corporate outside counsel to consider adding the JAMS diversity inclusion language in your dispute resolution clauses. Third, ask outside counsel to have a program offering young lawyers (age is another measure of diversity) opportunities to shadow neutrals and buddy systems. Fourth, ask your ADR provider organizations and your outside counsel to have programs to meet diverse neutrals. Fifth, ask and research information about diverse neutrals outside of your bubble. Do not stop at one email circulated within the firm. Sixth, ask your outside counsel what steps were taken to research diverse neutrals before settling on a name brand.

Appoint

Select diverse neutrals whenever practicable. This step is not simply a goal of being able to appoint any neutral simply because of diversity. Appointing needs to take place under a new and improved model that consists of doing better research into diverse neutrals, trying to meet diverse neutrals and ensuring that ADR provider organizations have diverse neutrals represented in all matters. Our natural tendency as humans is to make decisions often through a biased lens based upon what appears to be easier, and behavioral economic theories confirm that people often make decisions on that basis rather than what might be in their best interest. When choosing an arbitrator, we have to set a nudge to remind ourselves to consider diversity and do the necessary research to make an informed decision. We are programmed to go with what is familiar to us, what we consider safe, someone who is in our social and business network. Recent startups such as Humu have created a "nudge engine" to deliver personal suggestions for making better decisions in the workplace. The current process typically amounts to a firm-wide email asking lawyers "do you know or have any experience with any of these arbitrators?" (not terribly scientific). A handful of individuals have developed name recognition and it seems easiest and safest to go with a name brand. As litigators, would we ever stop after finding a few cases on point? Never. Operating within our own "bubbles," most law firm attorneys are unfamiliar with diverse neutrals. To seek them out, we need to take affirmative steps. Surveys from Arbitrator Intelligence indicate that 92% of arbitrator practitioners want more information about more diverse arbitrators. While many arbitral awards are confidential, other information on diverse arbitrators is increasingly available for those willing to do the research.

Conclusion

Ultimately, the marketplace— law firms and in-house counsel—decide which arbitrator a particular party selects. The GC Letter and Jay-Z's motion both highlight how critical the role is for the client to drive the process. Transformative change will only happen when clients and their General Counsel make clear that diversity matters and despite law firms' best intentions of hiring chief diversity officers and hiring a class of first years who are diverse, something is broken when it comes to partnership promotions and the selection of diverse neutrals in ADR. The GC Letter unmistakably delivers the message to align with us, get on board and achieve tangible results, and hints that each GC has the freedom to fashion business incentives, or switch to a competitor law firm if goals are not being achieved or a system for change with benchmarks is not implemented.

In-house counsel should customize a checklist manifesto in conjunction with outside counsel to set an action plan with accountability and business incentives. Let's get on the same page and work with a checklist to track OKR in partnership promotions and selection of diverse neutrals and it needs to start at the top—at every firm, the executive committee and include the all the right stakeholders.

For a one-page checklist, see page 13.

Endnotes

1. See Deb Sopan, Jay-Z Criticizes Lack of Black Arbitrators (Nov. 28, 2018), https://www.nytimes.com/2018/11/28/arts/music/jay-z-roc-nation-arbitrators.html; Rekha Rangachari, Can't Knock the Hustle …[To Broaden Diversity in Arbitration], Kluwer Arbitration Blog, Jan. 15, 2019, http://arbitrationblog.kluwerarbitration.com/2019/01/15/cant-knock-the-hustle-to-broaden-diversity-in-arbitration.
2. https://www.americanbar.org/content/dam/aba/images/abanews/2018-AM-Resolutions/105.pdf.
3. See Noam Scheiber & John Eligon, 12 White Faces Reflect Blind Spot in Big Law (January 27, 2019) (Note: Headline subsequently edited for online access: Elite Law Firm's All-White Partner Class Stirs Debate on Diversity) https://www.nytimes.com/2019/01/27/us/paul-weiss-partner-diversity-law-firm.html?module=inline.
4. See Aebra Coe, Firms Crawl to Gender Diversity Shows Long Road Ahead (Jan.22, 2019), Law360, https://www.law360.com/articles/1119398/firms-crawl-to-gender-diversity-shows-long-road-ahead.html.
5. See Christine Simmons, 170 GCs Pen Open Letter to Law Firms: Improve on Diversity or Lose Our Business (January 27, 2019), https://www.law.com/newyorklawjournal/2019/01/27/170-gcs-pen-open-letter-to-law-firms-improve-on-diversity-or-lose-our-business.
6.. Michelle Fang, Posts [LinkedIn page] retrieved Feb. 4, 2019 from https://www.linkedin.com/feed/update/urn:li:activity:6495355575147335680.
7. Although the percentage of women and minority General Counsel has seen a growing trend, women are still earning 30% less than their male counterparts. See Experience Preferred: The State of Today's Fortune 500 General Counsel (November 2018), https://www.spencerstuart.com/research-and-insight/the-state-of-todays-fortune-500-general-counsel; Melissa, Heelan-Stanzione, Women General Counsel Make $125K Less Than Male Colleagues (November 27, 2018), https: news.bloomberglaw.com/us-law-week/women-general-counsel-make-125k-less-than-male-colleagues.html.
8. Atul Gawande, The Checklist Manifesto: How to Get Things Right (Henry Holt & Co. 2009).
9. John Doerr, Measure What Matters (Penguin Random House 2017).
10. At the end of 2018, there were over 3,250 organization and individual signatories to the Pledge and the list grows.
11. www.arbitralwomen.org (In commemoration of its jubilee anniversary of bringing together global women in dispute resolution, AW created a toolkit and training module whereby trainers lead participants through various exercise to recognize moral, equal access, and business cases for diversity, problem solve in dialogue and brainstorm ideas for change).
12. Research from Northwestern's Kellogg School of Management indicates that homogeneity can "hamper the exchange of ideas" and stifle the intellectual ferment generated when people from different backgrounds interact, and that better decisions are reached through diversity. See Kellogg Insight, Better Decisions Through Diversity (Oct.1, 2010), http://insight.kellogg.northwestern.edu/article/better_decisions_through_diversity.
13. See Southern District of New York programs for mediators (http://nysd.uscourts.gov/mediation) and the Eastern District of New York mediator program (https://www.nyed.uscourts.gov/alternative-dispute-resolution).
14. www.jams.com.
15. See Catherine A. Rogers, The Key to Unlocking the Arbitrator Diversity Paradox?: Arbitrator Intelligence (December 27, 2017), Kluwer Arbitration Blog, http://arbitrationblog.kluwerarbitration.com/2017/12/27/on-arbitrators.

Linda Gerstel is Of Counsel at Anderson Kill, P.C., an arbitrator and mediator, an Adjunct Professor of ADR at Fordham University Law School and one of the founding members of the ADR Inclusion Network.

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ADR Diversity Checklist Agenda for General Counsel and Outside Lawyers

By Linda Gerstel

•Define "Objectives and Key Results" (OKR[1]) to be achieved with realistic timelines.

•LAMSTAIH[2] Work with Outside Counsel to set annual goals for some of the suggested measures (Awareness, Account, Ask and Appoint) to increase ADR Diversity

Awareness:

- •Track, sign and circulate ADR diversity pledges (www.arbitrationpledge.com);
- •ADR Diversity and Inclusion Pledge; (www.adrdiversity.org); and
- •Circulate ABA Resolution 105 (https://www.americanbar.org).
- •Raise the ADR Diversity Pledge at industry meetings and internal meetings;
- •Gather and update regularly data, lists and resources on diverse arbitration neutrals;

Account:

- •Establish ADR Diversity Committee composed of executive committee member; D&I leader, arbitration practice/ litigation practice group leaders; and diverse attorneys and General Counsel/clients with arbitration clauses in most contracts,
- •Establish liaison between Committee members and ADR providers, organizations promoting ADR Diversity, court mediation panels;
- •Establish/maintain database of diverse neutrals to form basis of future recommendations;
- •Ensure that ADR Diversity guidelines are incorporated in handbooks and procedures;
- •Require lawyers to attend at least two [2] elimination of bias/ADR events each year;
- •Track hosting/attendance of lawyers at elimination of bias/ADR events/meet and greets;
- •Track opportunities offered to diverse candidates to co-author ADR articles;
- •Track number of diverse attorneys afforded ADR shadowing opportunities;
- •Track cases (by type and damages) where neutrals are appointed and note the following:
  - –whether ADR provider list was diverse and if so, what percentage was diverse;
  - –whether after strike/rank procedures a diverse neutral was selected.

Ask:

- •ADR providers for lists of diverse neutrals and opportunities to meet diverse neutrals;
- •corporate/real estate departments to include the JAMS diversity rider in agreements;
- •neutrals that you are familiar with for recommendations of diverse neutrals;
- •City/State Bar Association to hire a Diversity and Inclusion Manager to help track progress and benchmarks of Pledge signatories for public reporting.

Appoint:

- •Introduce the use of diverse neutrals by first appointing them to cases with lower thresholds of dollars at stake
- •A mediator and suggest opportunities for a diverse neutral to co-mediate.

Endnotes

1. OKR, "Measure What Matters: How Google, Bono, and the Gates Foundation Rock the World with OKRs" Doerr, J.
2. LAMSTAIH - Look At More Stuff, Think About It Harder, "Look at More: A Proven Approach to Innovation, Growth, and Change". Stefanovich, A.

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NYSBA

Assessing Conflict: How General Counsels Manage Conflict at the Board Level

Vanessa Seidman and Marc Sokol

Vanessa Seidman

Marc Sokol

Imagine a General Counsel (GC) attempting to take minutes in a meeting at which board members only mimic the chair rather than voicing their own opinions. Instead, imagine a GC who cannot get any minutes recorded or resolutions achieved because directors refuse to stop contradicting and arguing with each other. Consider the example of a board that voted to sell its company's last remaining revenue-producing division, solely because there was so much internal conflict that the directors couldn't come to a healthy decision. In this last case, the company eventually folded, and shareholders, including directors, lost all of their value in the company.

Each of these examples is a failure of the respective boards that should have been avoided, especially if the GC had more actively addressed conflict at the board level. Conflict management is not only crucial to healthy company development and survival; it is a pivotal part of a GC's position to protect companies, their boards and their decision-making. Sooner or later, every GC encounters some level of conflict on a board. Seasoned GCs have likely seen variations over time and across companies. In the present article, we outline the different types of conflict the GC may encounter.

How Conflict Dynamics Can Undermine Protections of the Business Judgment Rule

The Business Judgment Rule generally protects informed decisions made by the board. That means that the substance of an informed business decision by a board of directors will not be second-guessed by courts after the fact. Duty of care means that directors must take reasonable steps to become informed, prior to making a decision; duty of loyalty means that directors must not act out of self-interest and must act in the best interests of the corporation and its shareholders. A shareholder, however, can rebut this presumption by showing by a preponderance of the evidence that the board of directors has failed to satisfy one of its fiduciary duties. We believe that unhealthy conflict can lead the board to make suboptimal decisions and in the process loosen protection of the Business Judgment Rule. Below we identify different types of conflict that can appear and impact board behavior.

Identifying Conflict

Just like there is good and bad cholesterol in the human body, a board can have good and bad conflict. And just as many people remain unaware of and unable to address the build-up of bad cholesterol, boards can be unable to recognize or act on the conflict around the board. Savvy GCs will have a mental model to identify the type of conflict, while also paying attention to the type of behavior displayed among board members.

The first step is to identify what type of conflict you are dealing with. Below are four types of conflict in the boardroom of which a GC should be mindful.

1. Healthy conflict
2. Conflict-avoidant directors and boards (the deferential board)

3. Conflict-energized directors and boards (the combative board)

4. Self–interest conflict (individual director conflict of interest).

Healthy conflict at the board level is best recognized by the way directors challenge but simultaneously listen to each other; they can debate forcefully but quickly shift to higher ground, whether that is acknowledging superordinate goals of the business or showing respect and appreciation for another director with whom they disagree. Healthy conflict is often punctuated by humor, even self-deprecating humor, as directors pause to reflect on their momentary behavior. In many cases the chair will allow conflict to be expressed to a point and then either the chair or GC will rein it in, aligning directors to focus on their work as a team.

Conflict avoidance at the board level is best recognized by the way directors fail to engage each other openly; they may look to the chair for clues as to what seems appropriate, and hence might be characterized as the deferential board; they may not look at materials before voting, so they have less or no ground to form and take a strong position, and more readily go with the chair's recommendation. Conflict-avoidant directors will be reluctant to share potential personal conflict or inquire if others have a potential conflict. They maintain an illusion of harmony but sacrifice diversity of thought and possibly compliance with their duty of care to make an informed individual decision. While this may seem a safe route, it is far from reality: the directors can still be sued for breach of fiduciary responsibility. They may be submissive to the chair, but they remain legally accountable for board decisions. Also, in the end, the decision reached, although pleasing to the chair may not be best for the overall company, thereby hurting the company and its shareholders.

> "The GC, by recognizing and managing conflict in the board room, will help directors comply with their fiduciary duties, which in turn can help protect the board after they have made decisions."

Sometimes a director who is conflict avoidant at board meetings will seek out the GC privately outside meetings, intending to get the GC to carry that conflict-avoidant director's message or manage conflict with another director on their behalf. This situation requires keen attention and a skillful response from the GC. Conflict cannot be avoided and must be listened to and addressed between the parties.

A conflict-energized board is impossible to ignore! Combative directors may form into factions, may argue for the sake of hearing themselves talk, and may pride themselves on winning any difference of opinion. This can become the norm as one or more directors filibuster or interrupt each other, even seeing that as the highlight of board meetings. At other times they may defer decision-making or settle for suboptimal, even poor, decisions just to get past the present conflict. A significant warning sign is when they ignore the GC's legal advice or inquiries as if it were just another opinion in the room. Furthermore, a conflict-energized board can quickly grow to a volcanic dangerous board, as violent tempers rise and dangerous actions appear. It is imperative that the GC engages the board members to reduce this type of conflict. A conflict-energized board can quickly shift to a submissive board when the chair or another member dominates discussion, and there is no compensating member or group process to move the group toward healthy conflict dynamics.

An individual conflict of interest is where a board member has a personal interest that influences his or her decision-making for the company. While we discussed above the three observable ways that conflict occurs among and within the board, there is an additional conflict of interest, if present, that must be identified by the GC. Sometimes, a director does not voice his or her potential conflict of interest. The director may be unaware of the conflict of interest, but also may not feel willing or able to readily voice such concerns in an open board meeting, perhaps due to the conflict avoidant or combative dynamics of the board.

This is a particularly risky situation for several reasons: the conflict of interest can be later regarded as a breach of fiduciary responsibility with associated liability risk. First of all, the final board act may later be invalidated (and therefore action without the appropriate board approval), since certain directors had undisclosed personal conflicts of interest and therefore possibly their vote should be disqualified. Additionally, news of conflict of interest can tarnish the reputation of a company for being poorly led by board members making decisions in their own self-interest, rather than on behalf of the company and its shareholders.

A director may not be fully aware of personal benefit conflict and not see how it can give rise to issues between directors, or between firm operations and the director. The GC needs to raise their observations and address it in the board room in the best interest of the board and the company. A personal conflict of interest is neither illegal nor immoral, and does not need to invalidate a board

act, but it must be acknowledged and addressed, lest the company be harmed.

Such situations call for the GC to view this as a moment of truth, to pause discussion and press directors to explore the potential for conflict of interest. In some cases, the GC will need to address issues more quietly outside formal meetings.

The GC's Role in Calling Attention to Conflict

The GC, by recognizing and managing conflict in the board room, will help directors comply with their fiduciary duties, which in turn can help protect the board after they have made decisions. The key is not to try to avoid all possible conflict situations, which would be impossible anyway. Rather, the GC should identify dysfunctional conflict behaviors and then follow a process for handling them effectively. It's a matter of being able to recognize conflict dynamics, being willing to intervene, and choosing the right course of action that will move the board toward more healthy conflict behavior.

In our view, GCs should frame conflict analysis and management as a legitimate part of their board role. This provides an opportunity for them to observe director behavior, give voice to their observations when appropriate, and call on the directors to act toward more healthy conflict and better decision-making in the best interest of the company and its shareholders.

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Sanctions: Foreign Policy, Economic Warfare, or Both?

By Alex Haines and Oliver Powell

Oliver Powell

The law of sanctions and its cross-jurisdictional nature is complex, not least because its sources are both national and international; the measures it covers are both multilateral and unilateral; and the relevant case law has developed at a different pace and in different directions depending on the legal system at play. If the interaction between the four major actors in sanctions—the United Nations (U.N.), the European Union (E.U.), the United States and the United Kingdom (U.K.) —was not complicated and convoluted enough, three 2018 political developments have made a clear grasp of this area even more difficult, by injecting another level of uncertainty:

(i) On 18 May 2018, President Trump announced the U.S.'s withdrawal from the Joint Comprehensive Plan of Action (JCPOA) or Iran nuclear deal;

(ii) On 26 June 2018, the European Union (Withdrawal) Act of 2018 received royal assent following the 23 June 2016 referendum on the U.K.'s membership of the E.U., which provides for the repeal of the European Communities Act of 1972; and

(iii) On 7 August 2018, the E.U. announced that it would reactivate Regulation (EC) 2271/96–—known as the 'blocking statute'—by updating the list of U.S. sanctions on Iran falling within its scope.

An End to the Increased Reliance by the U.S. on Multilateral Sanctions?

Alex Haines

Traditionally, the U.S. has adopted sanctions unilaterally. When the Office of Foreign Assets Control (OFAC) was established in 1950, multilateral sanctions at the U.N. level had yet to be imposed. The U.S. sanctions system was, therefore, set up with a focus on unilateral—as opposed to multilateral—sanctions. The last couple of decades, however, have seen an increase in multilateral sanctions imposed at the U.N. level and many of these were, perhaps unsurprisingly, instigated by the U.S. in the first place. This increased reliance by the U.S. on multilateral sanctions was hampered when President Trump announced the U.S.'s withdrawal from the JCPOA, consistent with an increased use of extra-territorial measures by U.S. authorities.

The Blocking Statute: The E.U.'s Answer to the U.S. JCPOA Withdrawal?

Generally speaking, a blocking statute shields companies in its jurisdiction against sanctions by prohibiting them from respecting the sanctions and not recognizing foreign court rulings enforcing them. In early 1996, Congress enacted a law that strengthened the U.S. embargo against Cuba. The act extended the territorial application of the initial embargo (in place since 1958) to apply to foreign companies trading with Cuba.

The E.U. first introduced the blocking statute on 22 November 1996 in response to the U.S.'s extra-territorial sanctions legislations concerning Cuba—as well as Iran and Libya—in order to protect E.U. business "against the effects of the extraterritorial application of legislation adopted by a third country." The E.U.'s argument was that the sanctions benefited U.S. foreign policy interests at the expense of the sovereignty of E.U. Member States. On 7 August 2018, the E.U. announced it would reactivate the blocking statute by updating the list of U.S. sanctions on Iran falling within its scope.

The blocking statute provides for four mechanisms: (a) nullification of foreign court rulings (Article 4); (b) obligation of non-compliance (Article 5, paragraph 1); (c) the "clawback" provision (Article 6); and (d) the obligation to inform (Article 2).

(a) Nullification of foreign court rulings

Nullification means that no decision (administrative, judicial, and arbitral) taken by any foreign body that is based on the provisions listed in the annex to the blocking statute will be recognized in the E.U. (the primary blocking measure). Nullification also means that no decision requiring enforcement of economic penalty, or seizure against an E.U. operator, will be executed in the E.U.

(b) Obligation of non-compliance

The blocking statute makes it illegal for E.U. companies or banks to comply with the relevant U.S. sanctions. Any natural or legal E.U. person that violates this prohibition can be sanctioned by the domestic authorities of the Member States that have jurisdiction over the person in question. To enforce this provision, the European Commission has to establish that the company in question is no longer conducting business with Iran because of U.S. legislation, and not due to commercial business considerations.

E.U. businesses may be authorized to pull out of Iran and comply to the extent that non-compliance would seriously damage their interest. The European Commission assesses each application on its own merit. E.U. operators alleging serious damage can apply to the European Commission through a template form.

(c) The "clawback" provision

European companies hit by new U.S. sanctions on Iran can sue the American government for compensation. The provision allows them to recover damages in E.U. courts as a result of the sanctions.

(d) Obligation to Inform

E.U. companies must notify the European Commission within 30 days whenever the renewed U.S. extraterritorial sanctions affect the financial interests of the company. The blocking statute applies in all E.U. Member States, and despite the fact that it is an E.U. regulation, the responsibility for enforcement lies with each Member State.

The Blocking Statute's Practical Impact—a Largely de Facto Effect

First, the blocking statute does not compel E.U. businesses to continue dealing with Iran. What it does is to seek to prevent them from complying with U.S. sanctions. The distinction rests on whether an E.U. entity, when it decides not to engage in certain activities, does so because of commercial business considerations, or because of the U.S. sanctions. The reality is, however, that many E.U. companies will feel that they risk falling fowl of the blocking statute if they comply with U.S. sanctions, and they risk falling foul of the U.S. regulator if they don't. Although smaller companies with little or no U.S. exposure might continue to conduct business in Iran in non-dollar currencies, multinationals with important economic interests in the U.S. may well chose to pull out of Iran.

The unescapable and brutal reality for many businesses is that the nature of the banking system, namely its international dimension, means that banks are exposed to the U.S. financial system and U.S. dollar transaction. While the blocking statute might shield a company from fines as a result of U.S. sanction (through compensation for the costs companies incur as a result of U.S. sanctions), it cannot shield companies from the practical effects of sanctions imposed on them, for example: seizure of assets; criminal charges in the U.S.; prohibition on credit payments; and/or company officers or controlling shareholders of sanctioned firms being excluded entry from the U.S.

The aim of the blocking statute is not, therefore, purely legal. Obviously, it seeks to protect the interests of E.U. companies investing in Iran, but it also serves to demonstrate the E.U.'s commitment to the JCPOA. It can, therefore, accurately be described as a political statement.

The key question is whether E.U. businesses will rely on the blocking statute to guarantee their ability to keep doing business in the U.S. and Iran. After the blocking statute was introduced in 1996, both the U.S. and the E.U. reached a political solution in 1998 under which U.S .authorities did not actively enforce extraterritorial sanctions on E.U. companies still doing business with Cuba. The reactivated blocking statue could, therefore, be used as a bargaining chip in the case of Iran, albeit the U.S .sanctions regime imposed on Cuba is very different from the one imposed on Iran. There is, perhaps, a hope that history may repeat itself and that exemptions from U.S .secondary sanctions for E.U. companies may be forthcoming.

Brexit's Impact on the U.K.'s Sanctions System—A Largely de Jure Effect

Most sanctions currently in force in the U.K. are decided at the U.N. or E.U. level. Moreover, U.N. sanctions policy is generally implemented in the U.K. through E.U. legislation, meaning that most of the sanctions measures in force in the U.K. are governed by E.U. law. When the U.K. leaves the E.U., however, absent new legislation in the U.K., it would be in breach of its obligations to implement U.N. resolutions. The Sanctions and Anti-Money Laundering Act of 2018 (SAMLA 2018), which received royal assent on 23 May 2018, and will come into force

once the U.K. leaves the E.U., is the new mechanism sought to ensure that post-Brexit U.N. sanctions are implemented directly in the U.K. SAMLA 2018 is one of the first pieces of legislation passed directly as a result of the U.K.'s imminent departure from the E.U., and its effect is such that it creates the U.K.'s own sanctions system.

Although SAMLA 2018 represents a dramatic change in the U.K.'s ability to impose its own sanctions independently from the E.U., and it could pave the way for the U.K. to align itself more with the U.S., the U.K. is unlikely to change its sanctions policy as a whole. Moreover, it is the legal implementation of sanctions measures that will change in the U.K., but Brexit itself is unlikely to change the manner in which sanctions measures are monitored or enforced in the U.K., not least because the U.K. has been at the forefront of sanctions proposals at the E.U. level.

Endnotes

1. Regulation (EC) 2271/96: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31996R2271.
2. Commission Delegated Regulation (EU) 2018/1100 amending Regulation (EC) 2271/96: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.LI.2018.199.01.0001.01.ENG&toc=OJ:L:2018:199I:TOC.
3. https://ec.europa.eu/fpi/sites/fpi/files/fpi-2018-00035-03-00_en_0.docx.
4. http://www.legislation.gov.uk/ukpga/2018/13/contents/enacted.

Alex Haines and Oliver Powell are both members of Outer Temple Chambers in London.

Alex Haines specializes in international law, particularly in the extensive field of international organizations law. He has advised on the sanctions regimes of the UN, EU, US and UK, as well as those of Multilateral Development Banks (MDBs) such as the World Bank Group. In 2018, Alex sat and passed the New York Bar examination and was recently admitted. He is a member of both the Bar Council International Committee and the New York State Bar Association, and he is a rapporteur for Oxford University Press' Oxford International Organisations (OXIO).

Oliver Powell's practice encompasses asset forfeiture and civil recovery; business crime; commercial fraud; financial services; and sanctions. He is currently retained in a number of major financial cases, both civil and criminal, as well as substantial cross-border corruption investigations. In 2017, led by Michael Bowes QC, he defended Terence Watson, the former Senior Vice President for Europe and Central Asia, of Alstom Transport UK. Oliver is a Barrister of the Eastern Caribbean Supreme Court (BVI), a member of the New York State Bar Association, and in recent years has undertaken work in inter alia: USA, UAE, Greece, Falkland Islands and U.K. offshore jurisdictions such as the Isle of Man.

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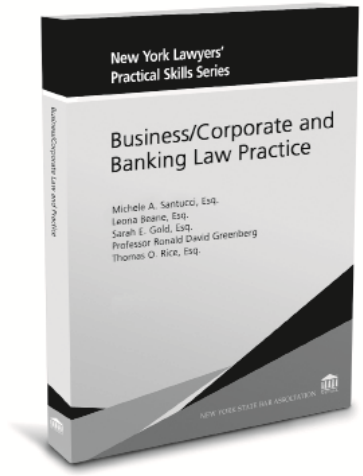

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Implications of CCPA on Business

By Gerard M. Stegmaier, Erika Kweon and Jillian Petrera

The California Consumer Privacy Act (CCPA),[1] which goes into effect on January 1, 2020, is akin to the European Union's General Data Protection Regulation (GDPR) and imposes a resource-intensive array of obligations and requirements on entities that collect personal information. However, as described below, the CCPA is different enough from the GDPR in scope and substance that compliance with the GDPR would not mean compliance with the CCPA. Businesses will need to carefully consider the significant issues and concerns raised specifically by the CCPA and how they will operationalize compliance with the law.

Gerard M. Stegmaier

While the CCPA becomes effective in 2020, businesses that fall within the scope of the law will need to start assessing and updating its collection practices and procedures well in advance. The CCPA essentially requires accountability from businesses for the collection of personal information during the 12 months preceding the effective date (January 1, 2019–December 31, 2019).

I. Scope of the CCPA Application

An entity doing business in the State of California that collects the personal information of California residents (or on behalf of which such information is collected), determines the purposes and means of processing personal information, and meets at least one of the following thresholds, falls within the scope of the CCPA[2]: (a) has annual gross revenues in excess of $25 million; (b) annually buys, receives, sells, or shares for commercial purposes, alone or in combination, the personal information of 50,000 or more consumers, households, or devices; or (c) derives 50% or more of its annual revenue from selling consumers' personal information. In addition, if an entity controls or is controlled by a business regulated by the CCPA and shares common branding with such a business, it also falls within the scope of the law.[3]

As defined in the current version of the statute, both "consumer" and "personal information" are broad in scope.[4] Under the CCPA, a "consumer" is an individual who is a resident of California,[5] meaning that it is not limited exclusively to consumers of businesses. It may also include individuals such as employees, as long as they are residents of California. "Personal information" is defined as "information that identifies, relates to, describes, is capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household."[6] The definition expressly includes identifiers such as Internet Protocol (IP) addresses,[7] commercial information such as purchasing or consuming history or tendencies,[8] Internet or other electronic network activation information, such as browsing history,[9] and inferences drawn from any of the information identified in the CCPA to create a consumer profile of preferences, characteristics and the like.[10]

Under this broad framework, most entities will not escape the need for a careful consideration of CCPA obligations and requirements.

II. CCPA Obligations and Requirements

At a high level, the CCPA is meant to provide certain rights to consumers with respect to their personal information. Among others, consumers have the right to:

- Request an entity disclose the categories and specific pieces of personal information it has collected or sold through a verifiable consumer request;[11]
- Request a business delete personal information that has been collected;[12] and
- Direct a business that sells personal information to third parties not to sell his/her personal information (right to opt-out).[13]

Further, the CCPA grants individuals the right to statutory damages between $100 and $750 per consumer per incident or actual damages (whichever is greater), in connection with their right to bring a civil action for the "unauthorized access and exfiltration, theft, or disclosure [of personal information] as a result of the business's failure to implement and maintain reasonable security procedures and practices…."[14]

The CCPA also imposes obligations on the entities collecting personal information. Such obligations include:

- Informing consumers at or before the point of collection as to the categories of personal information

Erika Kweon

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to be collected and the purposes for which such information will be used;[15]

- Disclosing a consumer's right to request deletion of personal information;[16]
- Providing notice of a consumer's right to opt out of the sale of his/her personal information;[17]
- Disclosing and delivering a consumer's personal information collected during the 12-month period preceding the receipt of the verifiable consumer request;[18] and
- Deleting a consumer's personal information upon receipt of a verifiable consumer request and directing any service providers to do same.[19]

To comply with these obligations, among others required by the CCPA, businesses covered under the law would need to evaluate and appropriately update not only their own policies, practices, and procedures regarding data collection, storage, and subsequent use, but they also would need to recognize risks associated with the practices of third-party service providers regarding the same.

It is also worth noting that the CCPA obligates the Attorney General to conduct a rulemaking proceeding for regulations to further the law's purposes. The substance of the regulations remains uncertain at this time. Between the anticipated regulations and the statute itself—similar to the GDPR—significant confusion is expected for the foreseeable future about the actual requirements of the CCPA.

III. Practical Considerations

When it goes into effect in less than a year, the CCPA will have significant implications on businesses that collect personal information of California consumers and are covered by the CCPA. While compliance with the CCPA may seem daunting, there are steps that you can take today to facilitate the process:

1. Determine if your business falls within the scope of the CCPA. If so, identify key stakeholders within your business and form a CCPA task force.
2. Review your current privacy policy as well as your data collection, storage and usage practices and procedures.
3. Know the whereabouts of the data you collect and how it is protected, including when third parties are storing and processing consumer personal information on your behalf.
4. Create a data inventory by identifying and categorizing any personal information obtained from residents of California, and tracking the corresponding purpose for which such information is being collected.
5. Develop a plan to comply with your obligations under CCPA, which may include executing CCPA-compliant agreements with third-party service providers that process personal information on your behalf. This may potentially require a restructuring or reassessment of existing business relationships with such third-party service providers.
6. Consult external counsel, as needed.

Endnotes

1. CCPA, Cal Civ. Code § 1798.100 et seq. In September 2018, the Governor of California signed into law SB 1121, which amends the CCPA.
2. Id. § 1798.140(c)(1).
3. Id. § 1798.140(c)(2). ("'Control' or 'controlled' means ownership of, or the power to vote, more than 50% of the outstanding shares of any class of voting security of a business; control in any manner over the election of a majority of the directors, or of individuals exercising similar functions; or the power to exercise a controlling influence over the management of a company. 'Common branding' means a shared name, service mark, or trademark.").
4. There are certain kinds of information considered to be exempt from the CCPA. For example, medical information governed by the Confidentiality of Medical Information Act or protected health information collected by a covered entity governed by rules pursuant to the Health Insurance Portability and Accountability Act does not fall within the scope of the CCPA. Id. § 1798.145(c)(A). Other exemptions can be found in § 1798.145(d) (CCPA does not apply to sale of personal information to or from a consumer reporting agency as limited by Fair Credit Reporting Act), § 1798.145(e) (CCPA does not apply to personal information collected, processed, sold, or disclosed pursuant to Gramm-Leach-Bliley Act), and § 1798.145(f) (CCPA does not apply to personal information collected, processed, sold, or disclosed pursuant to the Driver's Privacy Protection Act).
5. Id. § 1798.140(g).
6. Id. § 1798.140(o)(1). The "household" language poses an additional challenge, as there may be situations where a California resident is temporarily living out-of-state.
7. Id. § 1798.140(o)(1)(A).
8. Id. § 1798.140(o)(1)(D).
9. Id. § 1798.140(o)(1)(F).
10. Id. § 1798.140(o)(1)(K).
11. Id. § 1798.100(a), (c). See also id. § 1798.110(a); § 1798.115(a). A "verifiable consumer request" is a "request that is made by a consumer, by a consumer on behalf of the consumer's minor child, or by a natural person or a person registered with the Secretary of State, authorized by the consumer to act on the consumer's behalf, and that the business can reasonably verify … to be the consumer about whom the business has collected personal information." Id. § 1798.140(y).
12. Id. § 1798.105(a).
13. Id. § 1798.120(a)(1).
14. Id. § 1798.150(a).
15. Id. § 1798.100(b).
16. Id. § 1798.105(b).
17. Id. § 1798.120(b). Further if a business has actual knowledge the consumer is less than 16 years of age, for the sale of the consumer's personal information (right to opt-in): (a) in the case of a consumer between 13 and 16 years old, there needs to be affirmative authorization from the consumer; and (b) in the case of a consumer less than 13 years old, there needs to be affirmative authorization from the consumer's parent or guardian.
18. Id. § 1798.100(d). See also id. § 1798.110(b), (c); § 1798.115(b); § 1798.130(a)(2).
19. Id. § 1798.105(c). Pursuant to § 1798.105(d), there are some situations where a business does not need to comply with a verifiable consumer request to delete personal information, if that personal information is needed for specifically identified purposes (e.g., to detect a security incident, to provide a good or service, to comply with a legal obligation, etc.).

Gerard M. Stegmaier, partner at Reed Smith LLP, is in the firm's IP, Tech & Data Group. He focuses on corporate governance, intellectual property, and internet issues, especially as they relate to privacy, information security, and consumer protection. An experienced and pragmatic litigator, Gerry focuses a significant part of his practice on pre-litigation and advisory services relating to business strategy for privacy by design, data protection, intellectual property, and emerging technologies and markets, often acting as outside product counsel to leading innovators and disruptive technology companies.

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Choice of Law and Forum Selection Clauses: Do They Really Matter?

By Erik S. Groothuis

When contracts are signed, parties often pay little attention to the provisions governing future disputes. At that point, the parties are probably on good terms: one side may be happy to make a sale and the other desirous of obtaining the good or service being offered. The prospect of litigation is usually remote, and if it ever arises it will likely be someone else's problem.

But when relationships sour, as they often do, these provisions can have a great impact on the parties' respective leverage in litigation. That's why it's a good idea to put some thought into dispute resolution provisions before you lock yourself into a disadvantageous forum or set of laws.

Erik S. Groothuis

What's the Difference Between Choice of Law and Forum Selection Clauses?

First, it's important to understand the difference between a choice of law and a forum selection clause. A choice of law provision selects the jurisdiction whose substantive laws (e.g., New York, New Jersey, Brazil) will govern a dispute, in whatever forum it gets litigated. A forum selection clause determines both where (a particular state or federal court, or the courts of a city or a nation) and how (in court, in an arbitration, or a mediation) the dispute will be resolved.

Why Do Choice of Law Provisions Matter?

Before a dispute exists, it would be natural to assume that it shouldn't matter what laws will govern a potential dispute. In a vacuum, how could you possibly know which law would be more favorable when you don't even know what the dispute will be about? But putting thought into this topic can be worthwhile because the stakes are high; the question of which substantive laws apply will frequently determine the outcome of a litigation. In other words, choosing one set of laws over another can mean the difference between winning and losing.

Even at the outset, it is often possible to project who is likely to be the plaintiff and who the defendant in a future dispute. Knowing only that much may steer you to a jurisdiction that is more defendant-friendly (say, Delaware) over a jurisdiction that is more plaintiff-friendly (say, California). Or you might choose the laws of a state that are more protective of a particular industry or group (think oil companies in Texas, financial institutions in New York, or public company boards of directors in Delaware). Moreover, the issues that were contentious during the negotiations can be predictive of the types of disputes that will surface down the road.

Keep in mind that when you choose the laws of a given jurisdiction to govern a dispute, the substantive laws of that jurisdiction will apply, but the procedural rules of the forum are likely to apply—and the forum may well be different from the substantive law chosen. So for example, you can agree to have Delaware law apply to a contract while mandating that any disputes be resolved in New York courts. In that scenario, New York's procedural rules—the Civil Practice Law & Rules in state court, or the Federal Rules of Civil Procedure in federal court—will govern.

An important, often-overlooked consideration is the statute of limitations. If you provide that your contract is governed by New York law, do you automatically get New York's statute of limitations? Not necessarily. That's because New York, like many states, has a "borrowing" statute.[1] Borrowing statutes are designed to prevent forum shopping by making applicable the shorter limitations period between that of New York and that of the jurisdiction where the cause of action arose. By way of example, if two citizens of country X agreed to have their dispute governed by New York law, and the limitations period for the claim in county X is one year while the limitations period for the claim in New York is three years, country X's limitations period will apply even though the parties chose New York law. The reason for this is that when the parties chose New York law, they presumably took all of it, including New York's borrowing statute. Parties who choose New York law for their contracts are often surprised that they are bound by a foreign limitations period when disputes arise.

Why Do Forum Selection Clauses Matter?

It is easier to imagine why forum selection clauses could be important, even if they too are often overlooked. In the first instance, parties usually try to bargain for a forum that is closer to home. All else being equal, it is easier to find counsel and attend court proceedings if the jurisdiction where the action is litigated is physically nearby. And the other side may not have the means or desire to travel across the country, or internationally, to deal with a dispute in an inconvenient forum. That is why the party with greater bargaining power often gets its preferred geographic forum.

Another common issue addressed in forum selection clauses is a jury trial waiver. It is well known that parties who expect to be defendants down the road are more likely to ask for such a waiver on the theory that juries can be unpredictable. But a subtler issue that often arises is whether a party who claims it was defrauded into entering into a contract is bound by a jury waiver provision. In New York, courts have held that for a party to evade a jury waiver to which it agreed in the context of a fraudulent inducement claim, it must assert that it was specifically defrauded into waiving the right to a jury.[2] In other words, just claiming that you were defrauded into entering the agreement is not enough to set aside the jury waiver clause.

A separate question is whether it is better to litigate in court, or use what are known as "Alternative Dispute Resolution" (ADR) procedures. The answer to that depends on how much time and money you want to spend on litigation. In broad terms, arbitration—which is a private and binding dispute resolution mechanism—is more streamlined and tends to move a bit quicker than traditional litigation. Arbitration awards are also more difficult to appeal, because the standards for overturning them are so high. But there are drawbacks, too: arbitration awards don't enforce themselves, which means you may have to go to court (albeit in a summary proceeding) to turn your arbitral award into a court judgment. And in arbitrations, the parties not only have to pay for their own counsel, they have to pay for the arbitrators' fees too (which may be allocated between parties by the arbitrator). In court, the judges are salaried government employees.

Another increasingly popular ADR mechanism is mediation. Unlike arbitration, mediation is not binding, which means at the end of the day no one can force a party to a resolution to which it does not agree. But a mediator's powers of persuasion can be surprisingly effective, notwithstanding the fact that they are not backed by any binding authority. That said, mediation tends to be more effective after the parties have been worn down by the grind of litigation (whether in court or in arbitration), and is not as successful at the beginning of a dispute, when each side is steeled with the belief that they are right.

The best way to avoid future litigation is through sharp contract draftsmanship. But it's impossible to anticipate every possible dispute, and concessions almost always have to be made when negotiating agreements. That's why when the inevitable disputes arise, it will have been well worth having spent time thinking through the ramifications of choice of forum and law provisions.

Endnotes

1. See New York Civil Practice Law and Rules § 202 (Cause of action accruing without the state).
2. See, e.g., Merrill Lynch & Co. v. Allegheny Energy, Inc., 500 F.3d 171, 188 (2d Cir. 2007); Weinrott v. Carp, 32 N.Y.2d 190, 197-98 (1973); Matter of Schachter, 52 A.D.2d 121, 123 (1st Dep't 1976), aff'd, 41 N.Y.2d 1067 (1977); Equilease Corp. v. Indemnity Ins. Co. of N. Am., 183 A.D.2d 645, 648 (1st Dep't 1992); British W. Indies Guar. Trust Co. v. Banque Internationale A Luxembourg, 172 A.D.2d 234, 234 (1st Dep't 1991).

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In late 2018, Mr. Groothuis launched Same-Day Justice, an innovative arbitration program designed to help parties resolve relatively small commercial disputes in just one day. Details can be found at www.same-dayjustice.com.

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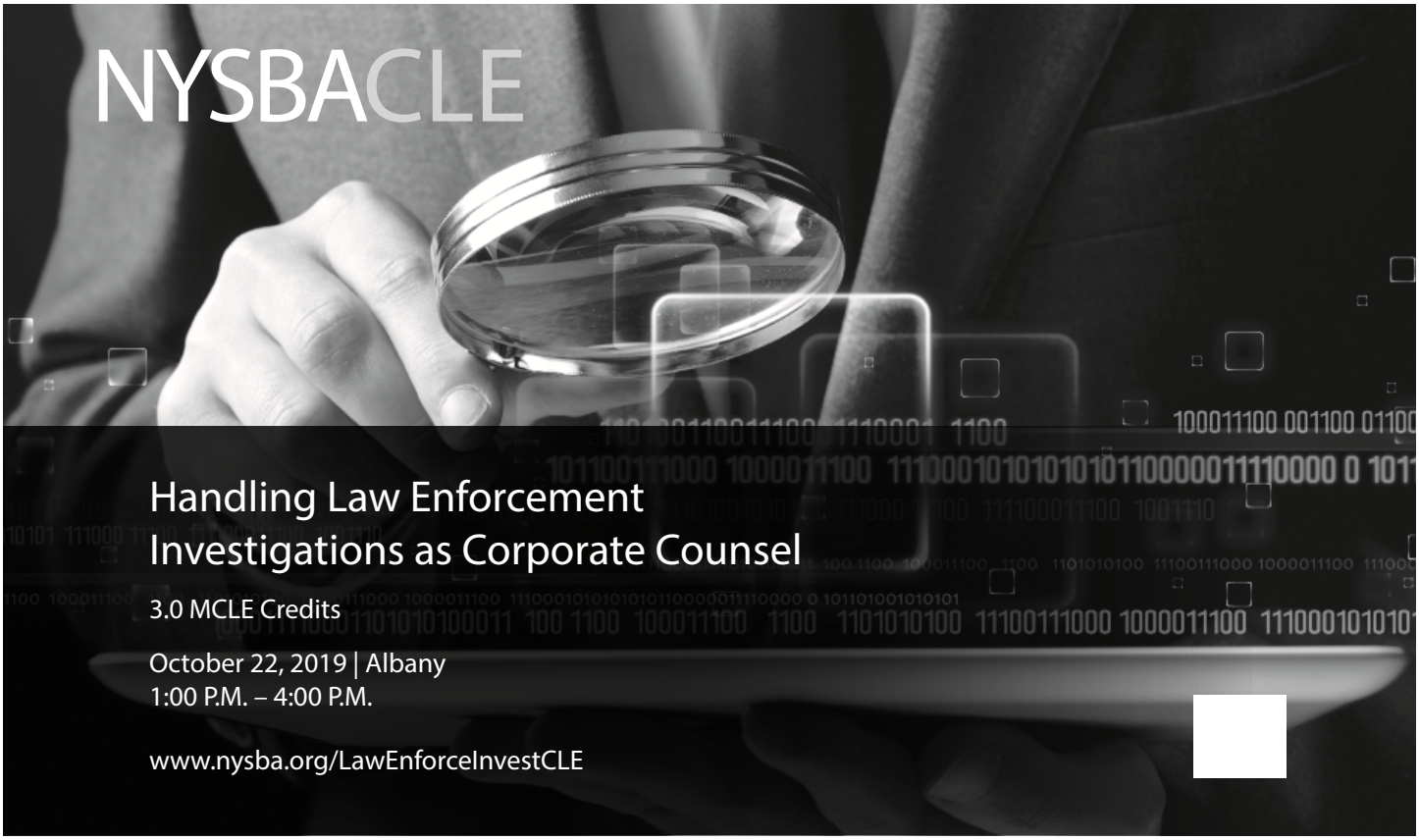
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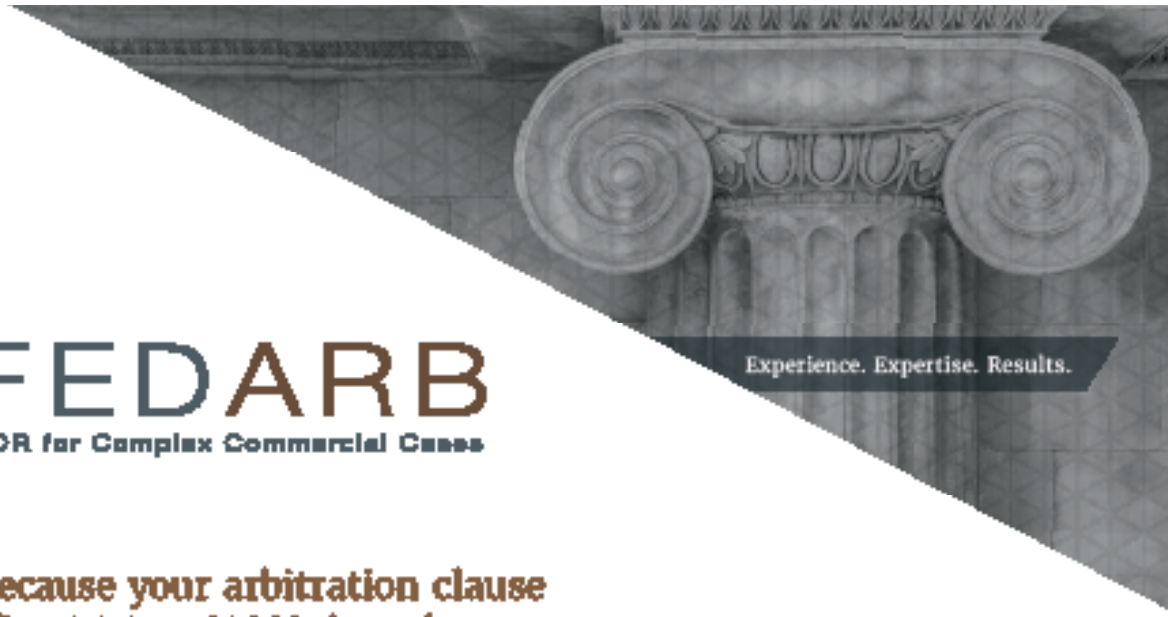

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