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Inside

Commercial and Federal Litigation Section

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A Message from the Chair

Jury Duty—Or How I Spent My Summer Vacation

In the 23 years that I've been practicing, I've received my fair share of jury notices. Typically they have been uneventful—daily calls to the phone number on the jury summons, only to hear a message that my number had not been called and that I should call back the next day.

One time—when I was a junior associate—it seemed that things would be different. I was actually called to court, and then was selected as part of a jury pool being questioned in voir dire. After I answered some questions, counsel for one of the parties looked me over and asked, "You actually want to serve on this jury, don't you?" "Absolutely," I said in all of my youthful enthusiasm, "it would be a great experience for a litigator." Moments later, I was sent home.

So, when I was called for jury duty to the Daniel Patrick Moynihan United States Courthouse in Manhattan in mid-July, I fully expected my "service" to be brief. Perhaps some questioning, perhaps just a day of trying to do work outside the office. After all, if I had been struck off a panel as a junior associate, I certainly would not be kept on a jury as a full-time litigation partner (or as the Chair of the NYSBA's Commercial and Federal Litigation Section).

I was called in the first group of potential jurors and sent upstairs. United States District Judge John G. Koeltl, who had recently spoken to the Section's Executive Committee about the proposed changes to the Federal Rules of Civil Procedure, conducted voir dire. I filled out a questionnaire and I noted that I had recently met Judge Koeltl through Bar activities and that I knew the Corporation Counsel. (The case involved the City of New York.) Judge Koeltl asked if I could be impartial, and I answered truthfully that I could, but expected that one of the parties would strike me. The seat numbers of the jurors who were being excused were called, and to my amazement, mine was not among them. In fact, as luck would have it, I sat in the first seat and wound up as Jury Foreperson in a civil trial—a § 1983 case involving a claim of police brutality.

It was a great experience. The trial lasted for only three days (including deliberations), with good lawyering for plaintiff and defendants. The questioning was crisp, and there were very few objections. As a practicing litigator, I found the time spent to be as valuable as any CLE course I have taken. Sitting as a juror helped crystalize what really matters to the finder of fact. In the heat of battle, litigators too often focus on minor victories, concerned about how tactical advantage gained on a certain point can shape the outcome of a case. In a jury trial, however, the effect of those skirmishes often pales in comparison to the big issues that ultimately help determine what a juror will decide—which witnesses are most credible and why, which documents carry the most weight, and how the presentation and order of evidence and use of themes can have maximum persuasive impact. For example, litigators often labor over minor inconsistencies in witness testimony or variations between a witness's recollection and a document. But when you sit as a juror and listen to a witness testify, inconsistencies and errors in memory do not seem to have as much dramatic effect if the witness generally seems to be truthful, or trying her hardest to be accurate and forthcoming.

I was impressed by the respect that juries were shown—not just by Judge Koeltl (who treated us as honored colleagues in the judicial process), but by the entire court system. And I was inspired by the commitment that jurors showed—their commitment to be on time, their commitment to keep an open mind, their respect for the judge, the lawyers, the witnesses and each other.

The collective memory and impressions of a jury are remarkable. Each person brings to the decision-making process her own perspective, skills and knowledge. In addition to a litigator, our jury included a doctor, a stay-at-home mother, an aesthetician, a dentist, an elementary school teacher, a secretary, and a biochemical researcher. When it was time to deliberate, we found that many of us identified the same pieces of evidence, but our own experiences led us to remember or weigh differently the testimony and documents presented. It is not just theory; it actually happens.

I found that my fellow jurors often looked to me for guidance, not about how to decide the case, but as to how the court works. When would breaks be taken? What would happen after the witnesses were examined? I was serving not only as a fellow juror, but as an ambassador to our profession and the justice system.

Sure, serving on a jury is disruptive to practice. (Lunch time was filled with e-mails and calls to keep my own cases moving forward, and I often had to return to the office after testimony.) But jury service allows us as busy lawyers to see beyond the routines that fill our daily schedules—discovery battles, negotiations, time sheets, letters and e-mails—and recognize the critical role lawyers play in the functioning of our society. We invite citizens into the dispute resolution process and help craft resolutions that bring justice.

Someday soon you will receive your next jury summons, and I know many of you will view it as a potential disruption to your practice—to the important work that you do for your clients and your firms. I hope that my experience will give you another perspective—that you may, in fact, actually serve on a jury…and that the call to service will provide you professional value, personal satisfaction and a strong sense of civic accomplishment.

* * *

One last thought: My involvement and our Section's involvement in the jury process did not end with the verdict (or the follow-up call that I received from one of the lawyers who wanted my feedback on her advocacy). A few days later I went to a meeting of the Section's Executive Committee and learned that two of the projects our Section will be handling this year are designed to improve the effectiveness of juries in commercial cases.

First, our Section is continuing to work with the Office of Court Administration's Pattern Jury Instruction Committee on publishing jury charges for commercial cases. In the past two years, our Section has been involved in proposing instructions relating to (a) veil piercing, (b) breaches of fiduciary duty involving limited liability companies, (c) distinctions between direct and derivative claims, and (d) sales of goods to good-faith and *bona-fide* purchasers. More such proposed instructions are on the way, and we welcome the input of all Section members to help us identify (1) new Pattern Jury Instructions (and commentary) for commercial causes of action that would provide a useful resource for practitioners, and (2) actual or proposed jury instructions that have been used in commercial jury trials—whether in state or federal court.

Second, our Social Media Committee plans to help craft jury instructions relating to social media use by jurors. Most potential jurors Tweet or post on Facebook, LinkedIn, Instagram or Snapchat. When a question arises in the course of their everyday lives, they turn to Google for the answer. However, once they enter the jury box, jurors are supposed to rely only upon the evidence presented at trial to decide the issues in the case—not their independent investigation. Through a survey of our membership and a review of instructions drafted in other jurisdictions, our Section hopes to develop social media jury charges that can be used by both the federal and state courts in New York to give jurors the clear guidance they need—so they can honor their obligations to the courts while still continuing to engage in their normal digital lives.

If you would like to participate in either of these projects or any of our other Section activities, please let me know at Sarkozi@thsh.com.

Paul D. Sarkozi

Former Chair's Column

More than 20 years ago, when I was privileged to serve as Section Chair, I penned this column—a reflection on events that then went back yet another 20 years. Today, these sentiments are as vivid for me as they were decades ago. I take the liberty of again sharing these thoughts with you.

* * * *

In a Heartbeat

I have read with sadness and some alarm the reports of "burnout" within our profession and among others who are part of the "baby boom" generation.

We read in the popular press of relatively young Wall Streeters who take their life savings and try to make a go of it as country innkeepers in Vermont; of doctors bored with the repetitiveness of their practice or frustrated with dealing with HMOs who give up life in New York for greener pastures elsewhere; of lawyers who leave forever the world of private practice because of an aversion to the pressures, hours or firm culture. And we have seen the emergence of a new professional in our midst: the counselor who ministers to lawyers who are burned out.

Why is it that, while so many suffer, others thrive? Surely, there can be no single reason. Differences in objective circumstances—money, position, status—can account for differences in perceived satisfaction. The degree of autonomy in one's professional life can be critical. And the intensity of competing demands in one's personal life (and whether one has a partner to share them) can make a significant difference.

For reasons I do not fully understand, I am happy with the practice of law. I have no intention of retiring, and I see more of a role model in the greats in our profession who have practiced at age 90 and beyond (Fuld, Rifkind, Handler, Gould) than in my colleagues who retired to Florida at 50.

Perhaps the clue to a litigator's happiness (it is mostly litigators whom I know) can be found in some secret life that every litigator has lived. Allow me to provide a glimpse into mine.

Like many other college students at age 18, I was fascinated with the magic of radio. For two years, I toiled every night at my college radio station, perfecting the patter of my "top 40" disc jockey persona. So did a number of my colleagues.

Unlike my cohorts, however, I had a rendezvous with serendipity. A local 24-hour radio station—a 50,000-watt powerhouse—abruptly fired an all-night disc jockey and urgently needed a replacement. The program director contacted someone at my college who had worked professionally. He was unable to fill in but gave my name.

In a heartbeat, I dashed over to the radio station for a quick audition and, before I knew it, I was scheduled for a six-hour show beginning at midnight.

Suddenly, at 20 years of age, I was confronted with the biggest challenge of my life. Up to that time, I had only broadcast within the college community, where an amateur's mistakes were tolerated and expected. Now, I was about to go on the air in an unfamiliar format, where no mistakes would be forgiven, to be heard by people in half a dozen states and Canada.

As the station staff briefed me on such things as the required "play list" and the timing of live commercials that I had to read, I was sure they were thinking that the program director had lost his mind.

I managed to hold my own. My emergency fill-in work lasted for some 12 consecutive nights (I got practically no sleep and dragged myself to most of my classes). With my foot in the door, I then did summer fill-in work and afterwards was sent down to the radio world's equivalent of a farm club—a smaller local radio station—for seasoning, where I had a four-hour afternoon "drive time" show five days a week.

The following fall (my senior year in college), I returned to a major radio station, and in the course of two more years, I worked for no fewer than five stations and attracted at least one loyal fan club. The premier "rock" station in New York City beckoned but, alas, the demands of law school forced me to choose a different path.

What seemed like the death of civilization followed. A series of tragedies—Kennedy, King, Kent State, Cambodia—affected my generation like no other events had in our lifetime. Somehow we emerged, like the Renaissance that followed the Dark Ages. I found myself as a law clerk to a federal judge and then a young associate at a large law firm.

Some years later, I joined with four other talented lawyers to form a litigation law firm. We had no clients and no assurances, but lots of optimism.

Each of us had an assigned task for launching the new venture. Besides holding the door as the rented furniture was delivered, mine was to get financial backing. I showed up for an appointment with the "private

banking" division of a major New York City bank and was ushered into a back room (I had never before been anywhere but at the teller's window), where I was seated on an antique settee near a coffee table with flowers. I was offered my choice of tea, served in china cups with saucers, by a silent, white gloved, waistcoated figure who entered and left as if walking on air.

"What line of credit did you have in mind?" asked the banker. I made a point of looking her straight in the eye as I uttered a number greater than my aggregate compensation in all my years as a lawyer.

"That will be no problem," she said. "But we will need a budget."

"What's that?" I asked.

"You know, expenses on the one hand and income on the other."

I reminded the banker that there was no certainty about our anticipated venture.

"That's all right," she said. "Just do the best you can."

Figuring our likely expenses was something I could do. But how to project revenue? I hadn't a clue. Then it struck me. There were five of us. I knew that each of us planned to work pretty hard. And we planned to establish an hourly rate equal to our billing rate as associates. I multiplied the number of people by the number of hours we planned to work by our billing rate. And there it was. We had turned a profit!

Opening our law offices brought me back to the day, years before, when I had walked into the unfamiliar radio station for the first time, never realizing that I could fail badly. Over 25 years later, as I look around today, it strikes me that I never would have dreamed that I would be supported by so many talented people, that two of my partners would have gone off to become federal judges, and that I would be privileged to have not only cases to try, but exciting and interesting ones at that.

So today, I cannot imagine a profession more fulfilling than that of a litigator. Each week brings something new: a new case, a new client, a trial in a new city, a new situation entirely different from those I have faced before.

Judges no longer are feared headmasters but colleagues and friends. Bar association work, advisory committees, continuing legal education activities, legal commentary, and college and law school involvement all present a range of opportunities open to me as a litigation lawyer, which makes every day different.

To be entrusted with the problems of clients (particularly lawyers, who make excellent clients), to deal with complicated legal and personal situations that have no easy solutions, and to bring to the task all the knowledge and experience one can muster—all are the ingredients of professional satisfaction, indeed, the antidote to burnout.

So I am a litigator. If there is a difficult situation—even an intractable one—that needs attention, I welcome the opportunity to tackle it. And I'll be there…in a heartbeat.

Mark C. Zauderer

Presentation of the Robert L. Haig Award for Distinguished Public Service

Presenter:
Honorable Lewis A. Kaplan

Award Recipient:
Honorable Robert S. Smith

JUDGE KAPLAN: It is wonderful to be here with the Commercial and Federal Litigation Section, which has done so much to improve the quality of justice in commercial and federal cases throughout New York. I always feel that I am among friends and colleagues when I am with you. And it is a privilege to be here to honor a great judge, Robert S. Smith, a man whom I have counted as a treasured friend for over four decades. The fact that the honor being conferred upon Bob bears the name of Robert L. Haig, who has contributed so greatly to the litigation bar in New York, adds icing to a very rich cake.

Bob Smith, as you know, is a New Yorker, through and through. He was born and raised here, though truth be told he was seduced by California to the extent of having gone to college at a little place called Stanford, a place that probably never saw weather anything like what we New Yorkers have experienced in the past year. But all that California sunshine apparently did not sit well with Bob. And I suspect that perhaps he didn't feel all that comfortable with some of the other Stanford students, whom he reportedly described as being much tanner and much taller than he was. So when the time for law school came, he came home to go to Columbia, a place with perhaps a shorter student body and certainly with one that is far less sun-kissed. Bob came to Columbia, like a lot of other people, with possibly left-leaning political inclinations and a determination to enter politics. But Bob, as those who know him well understand, is nothing if not a contrarian. So it should not have been any surprise that he emerged from Columbia as quite conservative and began the practice of law. Despite his post-Columbia conservatism, but entirely in line with his contrarian instincts, he went to Paul Weiss, which was commonly thought of as a bastion of liberalism. And that is where I first encountered Bob.

Jay already has told you a thing or two about Bob at Paul Weiss. But let me add a bit to the picture. For one thing, Bob was—for want of a better term—a trial scrounge. He just wanted every bit of courtroom experience he could get. And, though regular clients in those days were not any more eager to have young associates try their cases than they are now, Bob found ways to get courtroom experience. I think his courtroom baptism came in a case brought on behalf of a plaintiff named Kerry Kleid, who wanted to race motorcycles professionally. Kerry got a professional motor cross license from the American Motorcycle Association. But when Kerry showed up to race for the first time, the Motorcycle Association made an unexpected discovery. You see, Kerry Kleid was a woman. The fact that Kerry is an androgynous name never had dawned on the Motorcycle Association, so it had issued her a professional license without having any idea of her gender. When it saw that Kerry Kleid in fact was a woman, it revoked her license and would not let her race.

Well, Bob took on Kerry Kleid's case along with Max Gitter, who is here tonight. Max contributed the idea to sue under the antitrust laws. Bob moved for a preliminary injunction and tried the hearing. He cross-examined the president of the Motorcycle Association. And right after that cross, the defendants gave up and issued a new license to Kerry Kleid. And that is how Bob Smith got his first trial experience and how Kerry Kleid became the holder of both the first and the second professional motor cross licenses ever issued to women.

But Kerry Kleid was only one instance of Bob's taking on anything that offered a chance of examining a witness in a courtroom. Bob scooped up anything that would go to trial or a hearing, anything he could find, and it never mattered how little notice he was given. We all knew that if you suddenly found yourself with an appellate brief due and a hearing or trial somewhere at the same time, Bob would do the hearing or trial and let you do your brief.

Nor was Bob all work and no play. He was more or less a regular in a friendly poker game—played for matchsticks, of course. He umpired softball games. He raised a convivial glass once or twice with more than a couple of us. And as time went by, his ability, his wit, and his avuncular way made him a valued mentor to scores of Paul Weiss associates. More than a few very good lawyers owe a fair amount of what they know to having worked with Bob Smith.

Of course, we all now owe Bob quite a bit more than a helping hand, mentoring, and warm and generous friendship. We all are fortunate that former Governor Pataki had

the good judgment to appoint Bob to the Court of Appeals ten years ago. In my opinion, that appointment is a legacy of which the Governor should be very proud. And I would like to say a few words about the overriding reason we all are here tonight, which is Bob Smith's service as a judge.

In my opinion, the word that best describes Bob's jurisprudence is "principled." Principled, though, is not to be confused with partisan, or ideological, or obstinate. He is anything but that. His principles are based upon a judicial philosophy that focuses on what he views as a faithful, narrow interpretation of the law as set out by the legislature, even where he may not applaud the outcome of such an application. He has described himself along these lines, as a "Hayekian" Judge, one who is duty-bound to interpret and apply the rule of law as it stands, no matter his personal preferences.

This judicial philosophy is illustrated perhaps most clearly through his work over the years relating to the death penalty. When Bob was in private practice, he represented several inmates in death row appeals, two of them before the Supreme Court. He put heart and soul into those cases, trying to help his clients avoid execution. One of the two defendants he represented in the Supreme Court was executed. At least as of a few years ago, the other still was living.

I do not know whether Bob personally believes in or opposes the death penalty. As he wrote on one occasion, at the time he was appointed, he "was undoubtedly less friendly to capital punishment than most conservative Republicans, and friendlier to capital punishment than most capital punishment defense lawyers." But whatever Bob's personal views may be, no condemned prisoner ever had a more zealous advocate. And then Bob was appointed to the court.

Only six months into his tenure on the bench, the case of *People v. LaValle* came before him. That case, which I am sure many of you know well, raised questions about the constitutionality of a mandatory instruction to the sentencing jury in death penalty cases. A majority of the court held that New York's death penalty statute was unconstitutional as drafted.

Bob dissented, as he has been known to do with some frequency. He described the majority opinion as "elevat[ing] judicial distaste for the death penalty over the legislative will." His dissent was not based in the least upon a preference for the death penalty—to the contrary, he acknowledged that the dissenters may have shared the majority's apparent discomfort with the death penalty. He further acknowledged that the statute centrally at issue in the case was highly unusual. But these were not his concerns. His own mixed feelings about the punishment or his view on the soundness of the jury instruction played no part in his opinion. Instead, finding no constitutional infirmity, he expressed deference to the legislature's decision to pass a death penalty statute and related provisions.

Lest there have been any suspicion that Bob's dissent was driven by ideology, his concurrence three years later in *People v. Taylor* surely would have quashed it. *Taylor* invited the Court of Appeals to revisit *LaValle*. Due to a change in the membership on the court, Bob suddenly found himself the swing vote. An ideologue might well have used the opportunity to retreat from the court's position in *LaValle*. But not Bob. He voted to leave *LaValle* undisturbed. Adhering to his view that the judiciary should not interfere with the legislature's decisions, particularly in controversial policy areas, he concluded that the doctrine of *stare decisis* and the posture of the case in *Taylor* demanded the result he reached.

Bob's principles come through not only in his reasoning, but also in his willingness to disagree. Those who know him surely would say that he doesn't have a disagreeable bone in his body, but this certainly hasn't stopped him from filing scores of dissents during his time on the bench. There have been so many of them that articles have been written analyzing his dissents, one by Bob himself. He apparently felt compelled to explain in an essay in the *Albany Law Review* why it is that he dissents with such frequency. The answers shed light on the way that Bob views his responsibilities as a jurist. Of course, Bob is no different than any other dissenting judge in that he thinks his analysis is correct. But he writes so many dissenting opinions, I think, not merely because he is convinced that he is right. He views it as a duty. A duty to expose the weaknesses of the majority opinion, thereby giving the majority a chance to improve, or perhaps even to rethink, their approach. A duty to help readers better understand the case and all of its angles, twists, and turns. And a simple, straightforward duty to be honest and express, as he sees it, the right result.

After he retires at the end of this year, Bob 's legacy will carry forward, not only through his majority opinions, but also through these dissents—dissents that, in Chief Justice Hughes' words, are "an appeal to the brooding spirit of the law, to the intelligence of a future day."

Bob Smith has made vast contributions to the jurisprudence of the State of New York. He has been a judge's judge. He has been a lawyer's lawyer. He has performed a great service for the people of New York.

It is my privilege and pleasure to present to Robert Sherlock Smith the Robert L. Haig Award for Distinguished Public Service.

JUDGE SMITH: What the hell does "avuncular" mean? Seriously, I want to thank, first, Jay and Lew for bringing me back to a very happy time a very long time ago, and to thank my old friend Lew, he does not know what a valued old friend he is, for very undeserved, very, very touching remarks.

When I met Lew, Richard Nixon was president of the United States. Frank Hogan was District Attorney of New York County. And I was a liberal Democrat. It was a long time ago.

And now I'm going to see if I am high tech enough to find my notes. Yes, how about that. I am used to reading speeches from handwritten notes which are utterly illegible. Not even I have the slightest idea what they say. So being able to type on one of these little things is a major improvement, except every now and then you let it go too long and you glance down and see a picture of your youngest grandchild. But I am getting used to it.

I am going to be serious for a minute. I do want to thank Lew for being such a great friend and much admired model forever. I have admired his analytic power, his energy, his clarity of vision. He is a great judge, as he was a great lawyer, for many reasons; but I think none more important than that he has an ability very, very few people have just to see what is in front of him and call it what it is, something I have always aspired to do, and I hope I can do it as well as he can someday.

And I also want to express my gratitude to the Section for giving me the Bob Haig award. It is, of course, a great honor to receive an award named after Bob Haig, whom I have also known for a few years. His tirelessness—tirelessness is a big word tonight, everybody is tireless. I hope you are tireless because this speech has a way to go. But Bob Haig has a tirelessness and a calm, unflamboyant commitment to public service that is simply amazing and a model for quite a few of us.

Okay. Now I will get to the speech.

I asked myself: What can a judge tell litigators that will be useful to them? And the answer is pretty much nothing. You laugh but it is true; in fact, it is not only true but it is obvious when you think about it. There is no shortage of judges and ex-judges who are willing to give useful advice to lawyers. Anything useful I could say has been said a long time ago. The secrets are all out. There is nothing I am going to tell you that is going to do you any good.

So I begin with a question to which the answer is nothing. And I have to give a speech. Can I do it? Yes, I can.

Here is what I am going to do, folks. I am going to tell you a few things that surprised me, a few things that I did not know before I became a judge, and then I will explain in each case why my revelations are absolutely useless to you, and that should consume the time allotted for this speech.

My first revelation. Get prepared for a real shock. All briefs are too long. Okay, I really did sort of know that before I became a judge. If I did not know it, I learned it from Jack Auspitz, who I remember many years ago doing a little skit on what a brief is:

Point 1: I am going to show you my hand. [Pause] This is my hand. [Pause] Now I am going to take it away. [Pause]

Point 2: You may remember that in Point 1 I showed you my hand.

And that Auspitz version of what a brief is, is basically true. I guess I knew it when I was practicing, and I know it even better now. You really get a sense of how true that is when you are on the bench.

All briefs are too long. Every brief I ever wrote when I was in practice was too long. When I go back to practice next year, every brief I write will be too long. And why can't we make them shorter? You can't. You cannot afford to take the chance that the judge who reads your brief is not that swift and does not get the point unless you say it three times.

No one is going to take that risk. So you are going to keep writing briefs that are too long. I am going to write briefs that are too long. And the news that they are too long is not going to do you or me the slightest bit of good. Okay. That is the first useless revelation.

Second useless revelation, but this is a serious revelation. I mean, I do not want you—you are not supposed to laugh at this next part. This is true. Courts are better than you think.

I used to be very cynical about the way courts, including the one I now sit on, work and especially cynical about all the low-profile things the judges cannot possibly be spending much time on. On my court those are motions for leave to appeal and appeals submitted without oral argument.

And I used to think they give those motions to some clerk who cannot read or write. No one is going to ever bother to have the slightest idea what you are saying. They are going to grant every tenth one. They throw them down the stairs. They pick the odd numbered ones. They have no idea what they are doing. They sit there with an affirmed-no-opinion stamp.

For me one of the most surprising things about being on the Court of Appeals, probably the thing that was least like what I expected and a very pleasant surprise, was that that really is not true. It is true that a lot of the work on low-profile stuff is done by central staff clerks, totally anonymous people who do not have the fanciest resumes in the world. But they are carefully chosen; they are well trained; they are well supervised; they work hard; they take pride in their work; and they do a pretty damn good job. They understand that they have to take every case, literally every case, seriously, including the crackpot cases.

The central staff of our court has no sense of humor about cases and that is a good thing. I sort of envision young, hotshot associates at big firms saying "here is another matrimonial between a couple that really deserve each other" or "here is another prisoner who does not like his dental work." The people who work on our court either are not saying that, or, if they are saying that to themselves or each other, it does not show through. The snide tone never shows through. On every case, literally every case, you get a careful, serious effort to figure out whether the case is worth taking or how it should come out.

I remember years ago we had a case involving some pro se prisoner who was claiming that they had taken his gold chain away, and on some theory I now no longer remember he thought his First Amendment rights had been infringed, and he was not necessarily wrong. The central staff lawyer who wrote the report said he had a serious case, and it was a careful analysis; the clerk analyzed it I am sure a lot better than the prisoner did in his pro se application.

There were also reasons not to take the case, and I have forgotten what they were, but good reasons, and the report eventually recommended that we not take it, and we did not take it. And I am sure that prisoner—prisoners are not famous for their faith in the system—thought exactly what I thought about one of my applications; they never read it, I am wasting my time.

I almost felt like I ought to call that guy up and tell him, you know, you really got—he will never know it, but he got his money's worth out of the system, and I think that every applicant for relief from our court does that, does get his or her money's worth, and I think that the utterly anonymous people who do the less glamorous work should get a lot of credit for that.

Okay, so that is my second revelation. Now, what good does it do you? None, of course. Maybe it raises your morale because you know someone is paying attention. Maybe it lowers your morale because when you lose, you cannot just say those idiots never looked at the papers. But it is not going to change what you do. You are going to go right on writing the best papers you can, and cursing out the court when you get denied. What else are you going to do?

Okay, third revelation. Oral argument makes more difference than you might think. And that is something else I used to be very skeptical about. Even though I loved oral argument, and I did many of them, they are my favorite things; but if you asked me, I would have said that virtually every case would come out the same way if there was no oral argument; or if only the losing party argued, it would still come out the same way.

I now think that is really not true. Okay, in most cases of course it is true. If the judge is prepared at all before the argument he or she is going to have some preconceptions and more often than not they are not going to be overcome. But it is not as rare as you would think.

A few years ago someone asked me to guess what percentage of time I changed my mind after argument. I guessed 5 to 10 percent, which was higher than I would have put it when I was practicing. And then just out of curiosity I kept track for a while. It was higher than that. For about the next 20 cases I think I changed my mind 3 or 4 times, 15 to 20 percent, a pretty high percentage when you think about it. And I hear my colleagues saying, with some frequency, I was going to affirm until I heard that argument, so on and so on.

Okay. Now you have another piece of utterly useless information. What are you going to do with it? You are going to do your best in oral argument like you did before, right? If there is a difference, it is psychic. You feel better because you think what you do matters. You feel worse if you lose because it was your fault. On the other hand, if you win, you know it is entirely due to your genius, but you already knew that.

Last of my revelations. It does you absolutely no good to kiss the judge's ass. I remember when I was practicing, how I and everybody I worked with was obsessed with how the judge would react to the tiniest little thing. Going over a brief: "Well, we have got to use a capital C for the judge's court. We do not want him to think that we do not respect his court, you know."

I remember when I was a young associate I was working on a cert. petition. Someone had written in it, "the time has come for the court to take up this issue."

Someone else said "You do not want to say that. That makes it sound like we are impatient with them and that they should have done it before." It is impossible for me to express how little that sort of thing really matters.

Of course I say that, you may not believe it, because how do I know what subconsciously influences me? But I can tell you, this I do know, I have decided some tough cases in favor of some really loathsome, obnoxious lawyers and some tough cases against some really lovely people I like, and I have never been conscious of a twinge of hesitation in doing that. Okay, maybe that is my natural tendency to think that I have no faults. But I do not have any tendency to think that my colleagues are without faults. As Lew has told you, I have been known to dissent once in a while from what my colleagues do. And one fault I have never for an instant observed in any of my colleagues is any tendency to lean this way or that because the judge hates or loves the lawyer. It does not happen.

I am not saying judges are not human. I am not saying they are never swayed by their feelings. But the fact is—I know this is a non-revelation, something you can already figure out—they are a lot more likely to be swayed by their feelings about the client than about the lawyer.

Yeah, if a guy raped and strangled a young child, it is very hard to remember that that guy has constitutional rights like anyone else, and you have to let him walk because he did not have the right Miranda warnings. We do it when we have to, but I am not going to tell you that those cases are not hard.

But no lawyer is ever going to lose a case by failing to say "Your Honor" in the proper tone of obsequiousness. I assure you that will not happen. And that is another piece of information that I guarantee you, you are going to ignore completely. You are going to be just as servile to judges as you have always been, and starting next January I am going to be just as servile right next to you.

Why is that? Well, I admit, I have a skewed perspective as an appellate judge. In a trial court there may be a slightly different dynamic. It is one thing to say that you would never decide a case because of your reaction to the lawyer. I do not know whether you might get to the case sooner, decide it this week rather than next week, depending on whether you are mad at the lawyer. Who knows?

But there is a more basic reason why you are not—we are not—going to change our ways. Fish got to swim, birds got to fly. Lawyers do what they do. And I am actually looking forward to getting back to doing it again.

Thank you very much.

Spring Meeting

Zachary W. Carter, Dinner Speaker

MR. CARTER: I understand these remarks are being recorded so I am going to be uncommonly careful in my new role. Not. Too many of you know me too well.

So this is kind of a record for me because I think this is the latest I have ever started a speech. So this is a special responsibility. More often than not when you are speaking before dinner, you apologize for keeping people away from dinner. Tonight, knowing that many of you have driven for 2 hours and 45 minutes to get here, and it is already 9:10, I have to avoid the embarrassment of a loud bump as someone's forehead hits the table midway through my remarks. So I am going to try to keep it, hopefully, interesting but also blissfully short.

First of all, I want to thank Paul Sarkozi for inviting me. We have played golf occasionally at Bonnie Briar where we both belong in Larchmont, and it is a pleasure, as always, to see him. And I thank the Commercial and Federal Litigation Section for inviting me to share some observations about the profession and particularly my experience in the short time that I have served as corporation counsel.

In some respects, it gives me an opportunity to gain some efficiency in my life because many of you whom I know ask me individually, what is it like to be corporation counsel? All right.

Now I can kill a lot of birds with one stone because nobody asks me how my daughter is doing in college anymore. They do not ask about my golf handicap. They always ask me, what is it like to be corporation counsel? So I will get that out of the way right now.

For me, frankly, particularly given my advanced age, I regard this as my last chance to save the world. I never stopped being the 18-year-old semi-radical in college, and I miss the opportunity to be in public service and to try to have an impact. And I realize that I am not alone because I get so many resumés from folks at or near my age. And I will set aside time to interview any of you who sent resumés that I have overlooked.

The last time I spoke I delivered the disappointing news to some that I have had such uniformly positive experiences with the extraordinary lawyers that I have worked with in many, many difficult cases over the one hundred days I have been on the job, that I have not met a lawyer who I wanted to replace, so please stop sending the resumés.

One of the reasons why, though, I think so many people, particularly in private practice, have been attracted to work in the Law Department and kind of envy the opportunity that I have to return to public service is that there is just something different about the meaning and impact that you can have as a lawyer in public service.

I mean, the reality of private litigation, to be frank, is that our clients in private practice do not necessarily want fairness, they want advantage, right? Sometimes fairness and advantage are the same thing, but often they are not. And I think that in public service, at least the way I regard the responsibilities of a government attorney in civil practice, our responsibilities are somewhat different than those of an advocate in private practice for this reason.

The Law Department of the City of New York brings and defends cases in the name of the people of the City of New York. Ninety percent of the time the folks on the other side of the V are some subset of that client group; and because of that persistent reality of that gentle conflict, I think we have an obligation to never be indifferent to the fairness of the ultimate result. It does not mean that we do not zealously protect the interests of the City, but we have to always be mindful of the fact that in the long run the City's interests are best protected when there is a fair outcome that has credibility with the public.

Now, I have had an opportunity to have that principle tested because I believed that before I took this job, I believed it when I was United States Attorney for the Eastern District of New York and I had a third of my office devoted to civil practice, but it never has been tested as much as it has in the time that I have been corporation counsel.

I have been involved in the reversal of so many litigation positions since the new administration took over that I have come to call myself Captain U-turn. And I am very proud of the fact that the attorneys, many of whom have been in the office for decades and who have been invested in high-profile controversial cases, have accepted the fact

of our democracy, that elections do have consequences; that it is part of our democratic process; that policies reflect the will of voters; and that, to the extent that we can, consistent with the rule of law, we must support the policies of an elected chief executive. To the extent that that requires some modification of position, we are prepared to do that.

Now, I am very proud of the fact that the Law Department has a long history of independence from politics. That is something to be very proud of. But there is a difference between being independent from *politics* and being independent from *policy*. Being independent from politics is noble. Being independent from policy is arrogant.

No one elected the Law Department or the corporation counsel. They elected the Mayor of the City of New York, and to the extent that he reflects the aspirations of the majority of voters and reflects the policies that they had hoped that he would institute, then we have a responsibility in the Law Department to provide the legal architecture, whenever the law permits, to support those policies and that is what we attempt to do.

But one of the things that is a challenge in trying to achieve that justice, that I think we have a responsibility to squeeze out of the law whenever we can, is that the law forces us to use language in filing claims, particularly in the area of civil rights, that do not necessarily reflect what we really mean. And I will give you a couple of examples in cases that we have been confronted with in situations in which we have reversed legal positions in order to support new policy positions. And these are cases that are all a matter of public record and that are already resolved and so I feel free to talk about them.

So the case involving the fire department—the employment discrimination case, the class action, that was brought in the Eastern District of New York that was pending before Judge Garaufis. You know that the central allegation was that there was a willful under-representation of African-Americans and Latinos on the City Fire Department. We are talking about representation in the low single digits, and you know that, given the demographics of this City, it is kind of hard to fathom why that would be. And some might leap to the conclusion that, well, maybe that is just a factor of there not being sufficiently qualified African-Americans or Latinos to fulfill the responsibilities of that job. Maybe the test that the Vulcan Society, the fraternal group that represented African-American firefighters, protested as being discriminatory, maybe it is just weeding out those who are not qualified to do the job.

And I thought about that last year when I was not a part of the administration and just viewing this litigation from afar, I thought about it, and I said let us think about what it takes to be a first-rate firefighter. You have to be reasonably athletic. You have to be physically strong so that you can carry heavy equipment up flights of stairs. You have to be sufficiently strong to occasionally carry people out of a burning building. You have to have the quality of physical courage that will permit you to risk serious physical injury or even death. You have to be sufficiently intelligent to process complicated directions, sometimes on the fly because one day you may be putting out a simple house fire, the next day you might be in a multi-story skyscraper, and you have to have a team orientation and a capacity to work with others.

Now, did I not just describe an NFL football player? Any shortage of African-Americans in the NFL? All right. So you start with what I regard as an indefensible position when you find the kind of inadequate representation of African-Americans on the department. So you ask yourself how could the administration resist the claims of the claimants; how could they use the kind of rhetoric that was used sometimes to disparage the court in its supervision of that case? And what I would suggest is this, the civil rights laws sometimes force plaintiffs to use language that signals more than they really intend.

Now, I served as the Chairman of Mayor Bloomberg's Judicial Selection Committee for twelve years. If I believed that he was a racist, anyone who knows me knows that I would not have served in that capacity for one minute.

So why was there this resistance? Well, when the civil rights laws require you to accuse someone of intentional discrimination, it feels like an accusation of bigotry. It feels like an accusation that you are wearing a white robe and carrying a burning cross, and that just does not feel good. Anyone who has that kind of accusation leveled at them is going to react viscerally, and that reaction is human.

What I believe really happened with respect to the fire department is that there was a system of legacy that was perpetuated from generation to generation in which members of the tribe of the prevailing racial demographic felt entitled to pass those jobs on from father to son or uncle to nephew. Interestingly, the group that has been most in opposition to the Vulcans in their lawsuit call themselves "merit matters" in their zest to preserve their system of legacy.

Well, I think that system of legacy represents not necessarily bigotry but what I call discrimination by alternative preference. So there is one slot left in the fire department, and I am a white commander who has responsibility for recruitment. And I have got Leroy Jones, an African-American candidate, sitting in front of me, and he seems like a fine fellow, seems to measure up. I have nothing against him. But I prefer the guy who looks like me. I prefer the guy who may be related to me.

Now, does that make me a KKK card carrying bigot? No. It makes me someone who is engaged in exercising an alternative preference. But Leroy Jones is just as much out of a job as if I had been carrying a noose.

But in terms of getting to a resolution of that case, the language that we have to use in the civil rights context supercharges and overheats the discussion so much that you cannot get to a civil resolution. And sometimes what is required is that a judge, without overreaching, asserts his influence in a way that gets the combatants to the table to try to come to a civil and sensible resolution—in the way that Justice Garaufis did in this case. That is just the nature of the process.

In the case of stop and frisk, similarly, the prior administration's resistance to calls of members of the African-American and Latino communities that perhaps the use of stop and frisk was having a disproportionate impact on young African-American and Latino males. And what I remember reading in the press around stop and frisk was how so many, speaking for the City, were struck with wonder at how the African-American community, whose kids were over-represented in the victim class in shootings and assaults in neighborhoods that were beset by crime, how could they possibly be more concerned about stop and frisk than gun violence?

Well, what I would suggest, and again, a case in which the language of litigation does not help to advance civil discussion, but actually serves to divide. What I think was not understood was that the practice of stop and frisk did not occur on a blank slate.

I am 64 years old, and as a matter of habit and reflex, I still cling to my store receipts when I am in a CVS or in a corner store or even a department store out of concern, out of residual concern, some might suggest paranoia, but paranoia from habit that I might be challenged as a shoplifter. And there are people who do not look like me who will never be subjected to that.

So stop and frisk is a practice that rubbed salt in an open wound. The same people who were subjected to unreasonable suspicion that they might be up to no good, that criminality might be afoot, who might get passed up by a yellow cab on a rainy night. That aggravates the already open wound. So we are not talking about a population that is oversensitive. We are talking about people who are responding to the reality that we are not quite in post-racial America. Somebody should tell Justice Roberts.

What I hope to accomplish as corporation counsel, and I have been, frankly, pleasantly surprised at my success so far, is to get our lawyers comfortable when it is appropriate and when a litigation implicates important public policy, and when a resolution might be in sight that corrects practices that are in need of correction, that they take off their litigation hats, and encourage their adversaries to take off their litigation hats, in order to solve the underlying policy or operational problem. That is a difficult thing to do because we are all good lawyers here.

We all fall in love with our theories of defense or prosecution of our claims. And it is hard to let that go and to have the kind of discussion that advances public policy in a sensible way, because those of us who are in litigation, our tools are, comparatively speaking, meat cleavers and sledgehammers. And what you need to really fine-tune public policy is scalpels, and those tools are not available in litigation.

And so what I have tried to get the lawyers in my department and in the Law Department comfortable with is the notion that there is a purpose beyond winning the litigation contest. That winning gets redefined as accomplishing a broader policy purpose in the long-term best interest of the City.

And I hope that by doing that, that there are areas of litigation, that there are individual litigations, particularly with respect to those that have public policy implications, that get dealt with as matters that are ripe for policy resolution, rather than litigation combat. And I have been surprised at the extent to which that has been embraced by people who have been in mortal combat for a long time; very, very fine lawyers who realize that they can have the fulfillment that comes with not only winning the litigation, but delivering reform that may be needed within the agencies that we represent.

So that is the reason why I came back to public service. That is the reason why I get flooded with resumés and that is the reason why I am having the time of my life as corporation counsel for the City of New York.

So thank you for inviting me to share my experience, and I hope you enjoy the rest of the weekend.

Is a Complex Commercial Appeal Different from All Others? The View from the Bench

Moderator:
Mark C. Zauderer

Panel Members:
Honorable Victoria Graffeo
Honorable Helen Freedman
Honorable Karla Moskowitz
Honorable Karen Peters
Honorable Thomas Dickerson
Honorable Barbara Kapnick
Honorable Barry Cozier

MR. ZAUDERER: We are going to talk about appeals in commercial cases, but a lot of what we will talk about really will be broader than that, because we wanted to take advantage of this opportunity to get a little inside peek at some of the thinking of our panelists. So bear that in mind.

What I would like to do is reserve questions for the end so we can keep going through our topics. Feel free to make notes, if you have them, and we will try to mix it up at the end.

So let me begin.

Judge Cozier, you served for many years with distinction on the Second Department Appellate Division. Now that you are in private practice, folks are lining up at your door to have you handle appeals. And somebody comes to you with a complex commercial case and wants to take an appeal and you decide you are going to do it. You take a very suitable retainer and wait for the check to clear.

Give us a little insight, what goes through your mind as you begin to pull your thinking together and how you are going to handle this appeal? What do you look for? Give us some ideas about that.

JUSTICE COZIER: Good morning.

Firstly, I have adopted a two-step process. And my practice is to, initially when someone consults me on a case, to say that preliminarily I will review the underlying pleadings and, if necessary, the record to make a determination as to whether or not there really are appealable issues. So I do a preliminary evaluation.

And the issue becomes, number one, error is—obviously the purpose of the appeal is to correct the error. But all error, of course, is not really material to whether or not you can have a successful appeal because much error is harmless error, and it is not going to lead to any change in the disposition of the case. So my focus is always on the question of, are there dispositive issues for purposes of appeal and to try to prioritize those issues?

One of the most difficult things I think for appellate attorneys is you are faced either with a client, and even more importantly, you are faced with, many times, an attorney who has been involved in the case at the trial level, at the motion level. It really is almost impossible for those interested persons to take a dispassionate look at the record and be objective as to what is appealable.

And so, I mean, that is the job that you undertake when you are handling an appeal. You are looking at it for the first time, and you are trying to give a dispassionate look at it and say do we have error, and do we have dispositive issues? So that is the first thing.

MR. ZAUDERER: So when you go through that process, and you have a complex case and many potential issues, you prioritize them. How do you decide "how many issues do I present"? Is there a philosophy you employ, such as "less is more"?

JUSTICE COZIER: My philosophy is exactly that, and I try to explain that to the associates, and I try to explain it to consulting counsel; and that is, the philosophy is "less is more."

Being cognizant, having sat on the court and read thousands of pages of briefs and records, and, you know, it is the old "where's the beef" situation? You are reading

40 pages and five pages are particularly material to the case. So it is always a question of distilling this to the essential elements for purposes of the appeal.

And the idea is it is terrible when you have nine questions presented, and basically those questions follow the format, the court erred, the court erred, etc. I mean, you are not addressing any of the issues. You are just saying that the court made a mistake in making this particular ruling, but it is not providing the court with any guidance as to why. So you need a theme and that is what I focus on, is there some theme to the appeal; and that theme, of course, has to surround what is reversible error or a basis for a modification.

MR. ZAUDERER: Judge Moskowitz, when you read these briefs, do you sometimes have a problem finding the beef?

JUSTICE MOSKOWITZ: Yes. And that is really what the preliminary statement should be, not a treatise on law, you know, the trial court error, but really, what is the focus of your appeal, and do not start—well, we were talking about this before. Do not start in the middle of the story. You have got to start from the beginning because we are sitting there and we have not looked at anything yet, just as you have not looked at—the lawyer has not looked at anything yet, and you have got to grab us in that statement.

So you are not going to put your nine issues in that statement. You are going to make it very clear and simple, and then we get to the statement of facts. We get to the rest of the brief.

MR. ZAUDERER: Judge Freedman, you have been on the court quite a bit of time. You are sitting, and, as I imagine is the case, the materials are presented to you, and if you put the records and the briefs in a pile, it would be a New York City skyscraper, and you have many appeals to get through. And Judge Cozier has submitted a brief in his case, and even though he has whittled it down and has five major points and six sub-points, 11 points, of course you have an answer on every one of those points, and you have a reply on every one of those points. How do you get a handle on all of those issues?

JUSTICE FREEDMAN: Sometimes it is not easy, and as Justice Moskowitz said, you should, at least in the openings, tell the court what the case is about. Sometimes it takes us to somewhere in the middle of a brief to find out what the case is about. We do not usually start out on appeal by reading the complaint, which also may be 800 pages—or 800 paragraphs with 17 subparts under each one.

When I start getting bogged down, one of the first things I do is turn to the reply, because sometimes that might help me figure out what it is that they are talking about or what it is that they are really appealing about. That is the other thing. You want it to be clear what your case is about, why the court was wrong, the court below is wrong, and not emphasize every little error, because most of them are clearly harmless errors. You can go into them later on page 49 or 50 of your brief or maybe page 45, you must be clear about what is that really dispositive thing that you think was error in the lower court.

MR. ZAUDERER: Judge Moskowitz.

JUSTICE MOSKOWITZ: One of the things that I noticed in commercial cases is there is a contract. Hopefully there is a contract. A lot of the cases involve contracts. Do not quote the paragraph that is really what is in issue and use little dots, because do you not think the other side is going to find out what is in those documents?

And do not paraphrase it. I mean, if there really is a term, a little paragraph that really is what you are talking about, tell it. Give us the whole thing. We are not going—the other side is going to find it, and we are going to find it.

MR. ZAUDERER: Judge Peters.

JUSTICE PETERS: You know, when you pose that question, you talked about the fact that we would be hauling an appellant's brief, a respondent's brief, and a reply, and I want to focus on that for a second.

What I see is that replies are not necessary most of the time. Instead, what happens is the law firm says, ahh, respondent's brief came in, so we have to file a reply, and their reply says the same thing they said in their appellant's brief. And my frustration level increases if I read the same thing again that I already read. So my suggestion to you is that you should never file a reply unless you are replying to the respondent's argument. It is not the time to remake yours.

MR. ZAUDERER: Judge Peters, on that subject of your review of the briefs, you have an appeal of a case that involved a denial or a grant of summary judgment. You appreciate it, of course, when you see the opening brief and the first two pages tell you what the standards are for summary judgment?

JUSTICE PETERS: Sure.

You know, the statement of facts is so critical to me, and I must tell you that before I ever read your brief, the first thing I do in any appeal I handle is read the decision of the court that is being appealed.

And many of you judges know that, and you write knowing full well, that we will read your decision first. So I really do not need an attorney to lecture me on summary judgment being a drastic remedy. What I need you to do is give me a statement of facts that tells me only what I need to know to decide the appeal. I do not need any extraneous names. I do not need any extraneous dates. I do not need any extraneous geographic information.

All I want to know is what I need to know to decide your appeal and the more concise and clear you can be in the statement of facts, the more I will find you credible. And the key here is for me and the rest of the court to find you credible. The less credible you are in the beginning of that brief, the less likely you are to win.

MR. ZAUDERER: Judge Cozier.

JUSTICE COZIER: I was just going to point out that, on this question of the statement of facts, I think it is probably one of the most common violations in briefs; that is, that the statement of facts will be incorporated first into a long preliminary statement. It never tells the court what the case is about but just recites facts. It will be re-recited in the statement of facts section itself and re-recited in the argument.

And it is so annoying when you are reading it because you have already gotten it. You have gotten it three times, and then it will be repeated in a reply brief. So you have to be very, very careful. I mean, the statement of facts is very important. It should be concise. It should only be those salient facts that are relevant to the issues on appeal.

And this is particularly true because most of the appeals in commercial cases are appeals from intermediate orders, from non-final orders, interlocutory appeals; and therefore you are many times limited to the motion record here, to the record on a motion for summary judgment, to the record on a motion to dismiss, to the record on a motion to amend the pleading.

So the point of it is, you do not have to recite the entire procedural history of the case, and you do not have to recite all of the facts related to the case. You have to recite those facts that are relevant to that issue.

MR. ZAUDERER: Judge Dickerson, give us a little peek through the window, if you would, in the Second Department. When the judges get ready to hear oral argument, presumably read the briefs, discussed it, if necessary, with their staff, do you meet with your colleagues and discuss it in advance; and do we know who is going to be assigned to write the decision for the majority?

JUSTICE DICKERSON: Let me take this from a little bit different perspective.

In the Second Department, we are bound by *stare decisis*. If you are challenging a particular precedent, go ahead and do it. If you have a case that is outside of what is a precedent, well, tell us about it, and then start arguing why we ought to change the precedent.

MR. ZAUDERER: Before I get to Judge Peters, let me follow up with Judge Dickerson, if I may.

Obviously there are some cases, simpler cases, where the issue is just one of finding the clearly applicable precedent. There is an argument over the statute of limitations. Well, you look it up. It is clear you have a statute, you have a case, it is three years, it is six years, etc.

But in complicated appeals, many of them commercial cases, there are many precedents, and it is more the issue of, well, which precedent do I apply, because not any one of them clearly imposes a decision? How do you handle that?

JUSTICE DICKERSON: We analyze each and every issue on a stare decisis basis, and we go one by one, and that is what the lawyers have to do. So you still have to go one by one and put it all together.

MR. ZAUDERER: Judge Peters.

JUSTICE PETERS: I am happy to talk about how our court handles appeals, but I just wanted to get back to brief writing for a second before we lose that issue.

I suggest to you, that in complex cases when you have a limited amount of time in your brief to convince us of your position, to think a little bit outside of the box in the way you present information: think charts; think timelines. Sometimes it is easier for me to see the corporate structure and how it changed, or the investments and how they were made, in a timeline or a chart than for me to read 20 pages of history.

I know that is not the way you lawyers usually function, but I strongly suggest you take some young associate that has been doing that kind of thinking since he or she has been born, and ask them to help you create a chart or a timeline to teach us the information we need and allow us to go back to it as we read the brief and understand what is happening in your case.

MR. ZAUDERER: Did you want to comment on the other topic, about how you process your appeals?

JUSTICE PETERS: Just quickly. We can talk about this all day.

We handle almost 2,000 cases a year, and until just recently there were only seven judges on our court, as many of you know. So we triage the cases; and all the commercial cases, not all of them but most of them have just been sitting around waiting for us to be able to get to them.

But the way we manage our cases is that, while we know ahead of time which judge is assigned to write a decision, you do not.

But we prepare for an oral argument as if each case were our case so you will not know who is obligated to draft the decision.

JUSTICE DICKERSON: Can I go back to—

MR. ZAUDERER: Yes, Judge Dickerson.

JUSTICE DICKERSON: The lawyers that we really like and respect are the ones that come in and say, Your Honors, here is the precedent that we wish to challenge, here are the cases supporting it, here are some other cases that have questioned that particular precedent and here are the facts of the case. So if you just get right down to it, at least in terms of challenging the precedent, that is what we appreciate.

MR. ZAUDERER: Judge Kapnick, you have heard a brief description of how the pre-argument process works in the Second Department and Third Department. That is not exactly the way it is done in the First Department, is it?

JUSTICE KAPNICK: Well, it is a little bit different, and if I make any misstatements, Justices Moskowitz and Freedman can correct me since I am sort of new to the process.

But we have about 18 or 19 appeals every time we sit. We usually sit in benches of five unless something happens and there are only four, but we try to do it with five. And in terms of the reporting judge or the judge responsible, we do not know that in advance, so we all read all 19 cases not knowing which one is going to be assigned to us, and it does not get assigned to us until after the calendar is called the day of argument and all the cases are called.

Some, as you know, actually show up to argue, some are submitted, some that we think will probably be coming in to argue and have asked for time do not show up sometimes, and we wanted to ask some questions but they are not there.

And once that is figured out, the clerks go back and do some kind of process in the back, the wheel, and then they come back—then we get a list, as the first argument usually is in the process of going, and we find out who is assigned to which case. So I think we all take a minute and look to see which ones are our cases so we know that that is our case. Now, that does not mean—so everybody is prepared equally on every case, and our bench is also a hot bench, and I have now sat with everybody on the First Department at least once, and I can say everybody is always very prepared and everybody is always asking questions. Since the oral argument time is limited because there are so many appeals, obviously we want to know what we want to know.

We are not just interested that you can make a nice presentation for seven minutes, and nobody ever gets to speak for seven minutes without being asked way before that a lot of questions. So it is important. You can sort of figure out by the judge's questions what we really are interested in knowing, what is confusing us, or what we would like more information on, and that is important. So the cases that we are assigned to may be the ones that we write on, it depends on the situation, but we do not find out until then.

I would just, to pick up on one other point I think that you just made, Justice Peters, it is a little bit of a breath of fresh air for me, having come out of five-and-a-half years in the Commercial Division, reading a couple of trip and falls, some motor vehicle cases, the things I used to have, because they are generally less complex and more straightforward.

The commercial cases are obviously the really complex cases in our court, in all of our courts, and we get a few of them. I am not saying some of the others do not also have difficult issues, but generally the commercial ones are pretty complex, the briefs are pretty significant and the records are large.

I also like to look at the decisions below and I also like to read the oral argument transcripts. Because I always like to read the transcripts in my cases when I would go back and start writing my decisions, and I find that the discussions that the judge had with the lawyers are also very important and are sometimes incorporated into the written decision that was produced. So, I like to read both of those to see what the discussions were there.

I do agree that a lot of the time, when I am reading those cases, I make charts because there are so many different parties, and as you know, so many of them have the same name or almost the same name, holding company, whatever, LLC, the corporation, the company. It becomes very confusing. I have to keep flipping back. So I draw a chart, but having a chart somewhere in the papers is a good thing.

I think sometimes people get bogged down in all the details rather than just getting to the issues, and that is important because there is so much volume in all of the departments, I am sure, and the commercial cases really involve a lot of different things, and of course there is not always precedent or that much precedent on some of these issues.

A lot of us out in the Commercial Division, since I was there so recently, are struggling with some of these issues because there are new issues coming up all the time in a lot of different cases. All of a sudden—the RMBS cases, ten years ago nobody knew what those were. Now that has been infiltrating our courts and people go in different ways and CDO cases and whatever, and the precedents sometimes are not as clear-cut as the judges would like.

So sometimes it is a little confusing, and sometimes you have to really focus on what you would like us to decide and what you should want us to look at, but of course you need to address the major cases that you know are out there that we are familiar with that may go a different way, and try to distinguish them because that is certainly what we are going to be doing.

MR. ZAUDERER: Before I get to Judge Cozier, let me just follow up with you, Judge Kapnick, on question—clarification.

You mentioned that when you read the briefs in preparation for the argument, the judges do not know who is going to be the reporting judge.

Am I correct that one of the reasons or the reason you cannot know is that the assignments go in order and you may show up in the court and someone who is planning to orally argue will submit, which will change the whole order. Is that not something—

JUSTICE FREEDMAN: That is the system, but even that is not clear to most of us.

MR. ZAUDERER: Judge Moskowitz.

JUSTICE MOSKOWITZ: There are two wheels. One is for submitted cases and one is for argued cases. So that is why we do not know until we get there, and because we do not know who is going to show up to argue, what wheel you are on and that is the reason it is not set before oral argument.

JUSTICE FREEDMAN: Can I just add a little bit about our process? Unlike the Second Department, the court attorneys get assigned to write up cases, and it is not that we wait for them. We calendar our cases before they must get their reports to us.

Now, Judge Kapnick does not remember this, but up until last year our calendars were between 20 and 22 cases.

JUSTICE KAPNICK: I was not there.

JUSTICE FREEDMAN: The reason they are down to 18 or 19 or 20 now is that we have lost so many attorneys in the law department so that they cannot generate the reports as quickly as they did before. There are just fewer of them, and so we have not been able to schedule quite as many cases, but traditionally we do over 3,000 appeals a year.

And for the first time, just so people know, for the first time we are actually holding over a hundred appeals from June over to the September-October terms that ordinarily would have been argued in this calendar year up to June because of the shortage of personnel in the law department.

But our system is a little different. You heard about some of the other differences. We do not get our reports two weeks before. We get them one week before because the court attorneys are working so hard and scrambling so hard to get them out.

But we do have access to the lower court decisions, which I think all of us read before we even read the reports or the appeals. Sometimes it is a little deceptive because you find out once you get the appellate briefs that—we start reading the briefs, they are not appealing all the issues that are in the lower court's opinion. So you may have wasted a little bit of time, but it gets better background, and sometimes the court—unfortunately because of the way things go, the clearest description of what the case is about is in the lower court's opinion.

I do not want to add anything to the other things, but I just wanted you to know how we work a little differently.

MR. ZAUDERER: Judge Cozier.

JUSTICE COZIER: I just wanted to react to my friend Justice Dickerson's statement. I want to give you some hope.

It is the case that the appellate division applies stare decisis, and to a lesser extent law of the case sometimes applies with respect to prior appeals. But the fact of the matter is there are many instances, of course, where there is no precedent from the Court of Appeals and no direct precedent in that particular department. And those are really the basis for stare decisis. Because, while precedent in another department is persuasive and federal deci-

sions are persuasive, it is certainly not binding on the department.

But in the context of commercial cases, you should keep in mind that the court's scope of appeal is very broad. The court has jurisdiction over the facts as well as the law. The court can exercise interest of justice jurisdiction where appropriate. The court also decides whether or not there has been an abuse of discretion.

So in terms of commercial cases, particularly appeals from motions for summary judgment, the call that really is being made many times is a question of whether or not there is an issue of fact, a triable issue of fact. So it is sometimes gray in that respect. It does dovetail on something that Justice Peters indicated, and that is that they like to affirm, and that is why you need to be familiar with the judge who the case is being appealed from many times.

And the first thing I do when I do evaluate cases, I ask for all of the decisions, all of the decisions; and that is, I want to see all the decisions that the trial judge or motion judge made because it gives me a sense, well, does it sound right in the first instance? Because, if it sounds right, then it is probably going to be an uphill battle.

Now, sometimes I have an advantage, to some extent, in the First and Second Department; and that is, I know so many of the judges either personally or by reputation. It is sometimes easier for me to evaluate because I know that certain judges are held in high regard before the court; and therefore, if they make a minor mistake, they are going to be affirmed.

And so I know that there are certain things that are not going to work with respect to those judges because they are fairly consistent. They are consistently right when they decide most issues. And it is helpful to me just in terms of evaluation.

But I think that there is always room—again, there are cases where it turns on the facts. You have to remember, the Appellate Division can re-find facts where necessary, unlike the Court of Appeals. So there is wiggle room certainly there, and even though they may prefer to affirm, they also want to make sure that the motion court or trial court got it right.

MR. ZAUDERER: So before we turn to the Court of Appeals—and go to the Court of Appeals, which is no mean feat to get there—for the moment, Judge Cozier, let me follow up. And if you were talking from the perspective of an appellate judge, you know, we who do work as practitioners have no control over who decided the decision below. So if we are appealing it, it might be a little disconcerting to us to think that we have only a record.

We are arguing on the facts, as they appear, and to think that the appellate judge's decision on that case would be influenced by the judge's view of the judge below, as a judge who generally gets things right or may get things wrong, because all we have before us is the record on this appeal. Would that not be something we should be concerned about?

JUSTICE COZIER: No, because I do not think it is in that context. I think it is in the context that there are close cases. There are cases that are very close, and there are cases where it is really a discretionary call. And that is what the Appellate Court is sometimes examining, how close is it?

And it is true, I think, that sometimes a judge will get the benefit of the doubt on certain issues. Again, it depends on the issue. It depends on what the scope of the appeal may be. But I think that practitioners, particularly commercial practitioners, have as good a sense since there are a limited number of judges that are handling commercial cases.

And, I mean, I certainly follow the decisions of the judges, and I certainly like to follow the decisions on the appeals to get some sense. So I think that it is helpful to have some sense as to how those issues have played before the court in previous cases.

MR. ZAUDERER: Judge Dickerson.

JUSTICE DICKERSON: Barry is correct in everything he says, but I can tell you that, of those 20 appeals that I will hear next week and the week after and the week after that, there might be one or two where there is an issue of first impression.

If there is, then whoever is the reporting judge will be encouraged to write an opinion, because we like to do that. We like to stay on the cutting edge of the law.

MR. ZAUDERER: Judge Freedman, then Judge Peters and Judge Moskowitz, and we will be taking numbers in a moment.

JUSTICE FREEDMAN: I think that we have a somewhat different experience in the First Department, partly because we do get so many of the complex commercial cases that you all are responsible for, and because the law is not so clear and the facts may be different and may be different enough.

As Judge Kapnick said before, the whole concept of the RMBS and the CDOs that have come in are fertile fields for litigation and yet the law is not that established because most of those cases have not yet gone to the

Court of Appeals, and when they do, I think we will have a better idea.

But one of my colleagues has said, and I have no reason to doubt him, that the First Department has more dissents than the other three departments combined. We do not, within our group, always agree. In fact, we often do not. And I think that my favorite line was one of my colleagues who said that, I do not want to give a gender, he or she spent all weekend saying novenas that he or she would not get that case when it came up because it was so complicated and so difficult.

So that you are right to expect, at least in some of the complex commercial cases that you handle, that the law is not as established, that the judges within our court have different approaches, and that you may even be looking to get to the Court of Appeals on your case in a complex commercial one.

MR. ZAUDERER: We are struggling to get to the Court of Appeals.

Judge Peters.

JUSTICE GRAFFEO: That is why I am way at the end here.

JUSTICE PETERS: I will speak quickly.

I just wanted to comment upon the other judges' comments concerning your brief writing.

We do hear so many cases in one day. What you want to be able to do is write a brief that persuades us that your case is the most important case that day. So that when we walk into the robing room to put our robes on, to get up on the bench, the topic of conversation among the five judges in that room is, "Wow, can you believe this case. It is going to be a fascinating argument." You want your case to be that topic.

MR. ZAUDERER: Judge Moskowitz.

JUSTICE MOSKOWITZ: This is just on oral argument.

MR. ZAUDERER: We will come to that in a moment.

JUSTICE MOSKOWITZ: Would you like Court of Appeals first?

MR. ZAUDERER: I am trying very hard.

JUSTICE GRAFFEO: Shows you how hard it is to get to me.

MR. ZAUDERER: Judge Graffeo, I apologize for the delay.

We are often told that if we want to maximize our chance of getting heard in the Court of Appeals, having our case taken, what we have to think about is whether there is a split in authority among the different departments of the Appellate Division and, of course, as we know, the second feature, why is this issue not only important in our case but is an issue of general importance?

Which of those two factors, if either, weighs more heavily in your mind; a split in the Appellate Division or the importance of the question?

JUSTICE GRAFFEO: Let me do a bit of preface before I answer that question. And first let me say good morning. It is always a real pleasure to meet with your Section. The bar generally does a fantastic job when they come into the Court of Appeals.

But from my view, the most important document to deal with in our court is your motion for leave, because that is really what it is all about in our court. Let me give you a statistical foundation to work from.

Last year we had over a thousand civil leave applications and over 2,000 criminal leave applications. We issued 259 written opinions. That shows you an enormous sifting process, especially since more than 50 percent of those opinions were in criminal cases. It is like a pyramid coming up to the top from what my colleagues have talked about here in terms of their numbers versus what our court can handle. So that motion for leave is such a critical document.

And first you have got to deal with looking at the jurisdictional barriers that our court has. We are very different from the Appellate Divisions. I often try to impress upon attorneys that you just cannot take your Appellate Division brief and spiff it up and expect that it is going to do the job in our court because we have got timeliness, finality, preservation. We have all these jurisdictional barriers, and the materials I have attached so you have a hard copy of what is on our website.

We have very particular requirements, and I think that the most crucial thing is for lawyers to go over that and to make sure that they can fit those categories, because the worst thing is to spend all of your time and effort and find out that your motion is going to be dismissed because it is a non-final order.

We are looking for significant cases, novel interests, something that affects an industry practice. Of course the amount of damages, the size of the case sometimes makes a critical difference. We are very, very interested in keeping New York on the forefront of international commercial and financial matters. So if the case involves foreign nationals and it is a very significant case, we are going to take that. And, of course, as Mark mentioned, if

we have a split in the departments.

But remember, we are a court of law. And, despite what the dispositional statement may be in an Appellate Division decision, we will examine whether it is actually a factual dispute or legal issue.

In your motion for leave, you need to tell us what the legal issue is and why it is a legal issue, because frequently there can be a two-judge dissent, but it may be a factual issue even though the Appellate Division said its decision was based on the facts and the law. So we look beyond their label, and we examine the case.

MR. ZAUDERER: Well, Judge Graffeo, the current chief judge, like the former chief judge, has brought a lot of attention to the effort being made by many parties to enhance New York's reputation as a commercial center, for reasons not only of pride and reputation, but the practical reasons of drawing jobs and businesses to the State.

Is that something you are aware of in deciding what case to take, whether this is an issue, perhaps, a legal issue that is not only important in New York, but would be important to establish a precedent for New Yorkers as well as other courts?

JUSTICE GRAFFEO: Absolutely. If they are banking, securities cases, we want to keep these industries in New York. So there is no question, we will talk about that.

Let me give you a summary of our process, because it is dissimilar from the Appellate Division's. When a motion for leave arrives in a civil case, the first person to read it is a staff attorney, and that lawyer will write a report and make a recommendation whether to deny or grant. Staff is primarily looking at jurisdictional prerequisites; that is how they are trained to deal with the case.

They will write a report and then that report is assigned to one of the seven of us. The assigned judge will go through the motion for leave, and if we agree with the staff report, we will approve its circulation. If we disagree with the staff report, we will either have the report rewritten or we will put a cover sheet on it and explain what we think the court should do with the motion.

Then when we are in session, every morning at conference, we consider civil motions. The cases are called and two votes out of seven are needed to grant a civil case. That sounds fairly easy, but when you look at the statistics, obviously, we do not grant all the commercial cases that come in.

As you are putting your motion for leave together, try to explain the ramifications and the significance of the case—this is extremely important. And I would also suggest, particularly if it involves an industry practice, it is an insurance case with a clause that is commonly used, if there are any trade associations or outside organizations that can submit an amicus brief, or even just a letter that is supporting the issue, that is helpful to us. That helps to alert us to the significance of the case. There is an audience out there interested in this case.

And I think oftentimes people wait until we accept leave and then they start to look for amicus submissions, and I think that is a little bit too late because the fact is you want to do it early on as you are thinking about the case, trying to get groups to make submissions, and that is helpful because we are concerned with what is going on, especially if there are recent decisions from other States' highest courts or a Circuit Court.

It does not necessarily have to be a split between the departments. It could be that the majority of other states are going this way on this UCC provision, and New York is adhering to a minority view. We will probably take that case so that we take another look at it.

MR. ZAUDERER: Judge Graffeo, if I am correct, when an application for leave is made to you, the party on the other side does not necessarily have to respond to that; is that not correct?

JUSTICE GRAFFEO: Right.

MR. ZAUDERER: What would your advice be? Should we respond in all instances just on the chance that a point will not be perceived or picked up on?

JUSTICE GRAFFEO: I think it depends on the nature of the case. I think if there is a reason. Sometimes the respondent will send a letter and say there is not a split in the departments, the cases are being misinterpreted, that type of thing. If there is something valuable to say, yes, say it. If it is just to tell us the case is not significant, then I do not think it is probably worth a submission.

MR. ZAUDERER: Judge Freedman, one of the avenues for getting to the Court of Appeals, of course, is that motion for reargument by the losing party or the alternative leave to appeal to the Court of Appeals. What goes on behind the curtains when that motion is made?

JUSTICE FREEDMAN: Well, it always goes back to the reporting judge; and, again, the reporting judge did not know he or she was the reporting judge until the oral arguments began or the parties were sitting. But what happens is, it goes back to that judge and that judge writes a memo I would say usually saying this is just rehashing the arguments made before. There is nothing new here and recommends to deny.

However, when there is a three-to-two or even sometimes a four-to-one split, and, as I said, in New York County or in the First Department that is not as uncommon as it might be elsewhere, we, out of courtesy to our colleagues, even if we are the judge who is the reporting judge and who wrote the majority opinion, will recommend granting leave to appeal. Occasionally, it is also because of a particularly interesting issue.

I can think of one, a commercial issue on consequential damages in which I was the reporting judge. We found a certain way, but I had been very troubled by that decision, even when I went along with it or I wrote it, more or less. When it came to me, I recommended granting leave to appeal. I needed to get one colleague; I think Judge Moskowitz went along with me. So when two of us agree to grant leave, we do, and not surprisingly, the Court of Appeals reversed us. So that is what happens. That is the civil cases.

Just quickly in criminal cases, all you need is just one judge to disagree and one judge can grant leave to appeal; and it can be any judge, and instead of going to the reporting judge, the appellants or prospective appellants go to the judge who dissented, because that judge is likely to grant leave to appeal.

MR. ZAUDERER: So if I understand you correctly, let us assume there is a five to zero decision, so no one is dissenting, but your rule of senatorial courtesy is that, if two judges feel, for whatever reason, even though they have voted with the majority, then you will certify that to the Court of Appeals?

JUSTICE FREEDMAN: That has been our practice.

MR. ZAUDERER: We talked a little about oral argument. One of the projects that is under way in the Advisory Council, the Commercial Division Advisory Council that Judge Lippman has created, is coordination between the Commercial Division and appellate courts to explore ways in which the appeals may be processed more expeditiously. And one of the things we found out is that, on oral argument, there are very different practices in the different Departments. Let me talk about the First Department.

One of the scenarios that I hear lawyers talk about a lot is the following, and this is one lawyer advising another lawyer who has never argued an appeal: Well the judges will come out at 2:15, and the justice presiding will say, "Well, if we have oral arguments as everyone has put down for, we will be here until 7:00 tonight. Therefore we are going the call the calendar, and you tell us how much time you really need." And a lawyer is nominally posted for 15 minutes, and not wanting to be offensive but knowing they have a lot to say, will respond, "Well, I will take twelve minutes," and the presiding judge may say, "You have seven."

Now, these commercial cases are very complicated. Oh, and the other thing that the justice presiding will say is, "You can rest assured we have all read the briefs and we know the issues."

Now, is there any concern among those on the court that, if circumstances permit, greater time for oral argument would be useful to the court, if not to the parties?

JUSTICE KAPNICK: I have seen that when there are issues that the judges really want to know about, the fact that the red light goes on does not stop the judges from asking additional questions, or if the attorney feels that there is some point that is very important, they will ask if they could have just a moment or so. But when the court feels that really there is something we need to hear about, we continue to ask questions.

I have not felt, in the short time I have been there, that people—maybe once, but I do not even know if it is that—that people leave feeling they really have not been able or allowed to get out their important issues. A lot of times

people say, if there are no more questions, then I will rest on my brief.

There are a lot of questions that come up. It is complicated, but I think we try to ask and get them to answer, and the red light is not, okay, I have to stop in the middle of a sentence. I will let some of my colleagues who have been there longer expand on that.

JUSTICE MOSKOWITZ: Well, that is true of other cases, other than commercial cases, where there is something complicated about it. We might want more time and you might want more time, and I think it comes down to your really having to focus on the key one issue or two issues because the case is going to be decided that way.

And could I just go back to appearing for oral argument?

MR. ZAUDERER: Sure.

JUSTICE MOSKOWITZ: Well, the first thing is, please, come in and orally argue. You have no idea how frustrating it is for us if we are—even commercial cases—where we have expected you to come in, where you have asked for that time and you do not show up. So it is really important that you do come in. That is the first thing.

The second thing is it is very—it is equally important that you take one issue or two issues, and you do not think you are going to take five issues, because obviously you had to take maybe an issue that somebody in the firm thought had to be put in or the client or something, but that is not going to be the issue that we are going to decide on.

The other thing is, if you are talking about one issue and one of us says, Mr. Arenson, could you please address X? It does not do your client any good to say, well, I will get to that later. Let me finish my thought. When we are asking that, it is a question that is troubling that judge, maybe another judge, and we really want to hear you address that question. So you do not say, "Well, later, Judge."

MR. ZAUDERER: So I should not say "I'm happy to submit a letter tomorrow"?

JUSTICE MOSKOWITZ: Can I just get back on something else?

I was talking about how useful it would be to have flow charts or some other way or timelines. Do not think that if you are going to bring that in for the oral argument, that we are going to let you put that in front of us.

JUSTICE FREEDMAN: Sometimes we do. Sometimes we do not.

JUSTICE MOSKOWITZ: No, we do not, really, not at all. Because that is something—

JUSTICE FREEDMAN: Occasionally, we have looked at charges provided by counsel at oral argument.

JUSTICE MOSKOWITZ: Well, no. If it is a blowup or something, it is a summary of the report, that is fine. If it is newly created for the oral argument to help us with a timeline, that is not fair to the other side, and we are not going to let that happen. Maybe on your panel.

MR. ZAUDERER: Judge Peters.

JUSTICE PETERS: There is only one Third Department Judge here so I will speak for all of us. We do not have a red light. The justice presiding is the red light, but we do put on our website the amount of time that you have been allotted for your oral argument, and we will give you what we have allotted you. We will not cut you off. We will, however, hardly ever give you any more time.

But the situation in which we will allow you to continue to speak is similar to that posed by the other members of the panel; and that is, if one of the judges of the court has a question to ask you and your time is up, we will allow you to answer that question.

I would like to stress what Mark said; the worst thing to ever do to us is to tell us you will get to that later. It should never be part of your lexicon because it is just rude. And, in addition, the idea of not showing up for oral argument is incredibly rude as well. We have clerks who keep track of the calendar and those persons present in court.

If you are scheduled to argue, particularly in our court because some of you are coming from the city, you are taking the train, you are driving, and you are going to be delayed, you can call and ask that your case be called later in the calendar, or you can call and say I am sorry there has been a snowstorm, and I cannot get there, I would like to submit. Do not fail to show up because we really will notice that.

And, on the subject of oral argument, one more thing; if you do find yourself, Mr. Zauderer, the night before you are scheduled to argue in my court, having some gentleman call you who is very, very wealthy and wants to pay you a great deal of money to meet with him the next day to discuss his case—

MR. ZAUDERER: This generally happens, yes.

JUSTICE PETERS: And you know full well that you would like to have that client, so you therefore cannot come to argue that case in front of me the next day. The worst thing to do is to give the brief to some junior associate in your firm and say, read this brief and record and get into the court tomorrow and argue the case. You are better off submitting, because there is nothing more offensive than for us to know more about the case than the advocate standing in front of us. Do not ever—do not do it to the poor associate and do not do it to the court.

MR. ZAUDERER: Judge Graffeo.

MR. SARKOZI: The yellow light is going off.

MR. ZAUDERER: Thank you. Do this by Third Department rules. Judge Graffeo.

JUSTICE GRAFFEO: I got your back, Mark. Oral argument is very important in our court because many of our cases are extremely close. Every month there are a number of cases that, frankly, I could write either way. So it is also extremely critical because we do not know who is going to draft that opinion before oral argument. So, anything that we want to know about that case, we are going to ask at oral argument.

All lawyers who come to our court should be prepared for two things. One is to answer a lot of hypotheticals, and no matter how ridiculous you may think some of those hypotheticals are, we are trying to expand the rule and test it to see if it breaks somewhere, how it is going to affect other types of cases. So if I had $5 for every time a lawyer said, "but these are not the facts of the case before you"—I cringe when attorneys say that.

Our whole purpose is to devise a rule of law that applies across the board that is not going to cause tremendous harm. We have to ask those kinds of hypotheticals. So if you confront those hypotheticals, have patience with us and try to answer them as best as you can.

The second tip for oral argument is to point out the significance of your client's position and why it is the better rule. Most of us are, at some point, going to ask, "what is the 'going forward' rule," because sometimes we tend to get caught in the details of the case. What we need to ask is, "What is the general rule that you want us to articulate?"

And, frequently, we will also ask about a remedy, because there may have been different issues that have percolated from the trial court to the Appellate Division to our court with the passage of time. Generally, years have gone by, by the time a case gets to our court. So always think about what you are requesting in terms of a remedy.

We are not wedded to the red light in our court, although I think sometimes lawyers wish we were. We can go 10, 15, 20 minutes overtime. We have that luxury because of the number of arguments we schedule in a day. And, generally, the Chief Judge will not cut attorneys off. As long as other judges want to ask a question, usually he will allow that. When Judge Lippman is recused and I am the judge presiding, I try and allow the other side to have an equivalent amount of time; but we will, frequently, go beyond the time allotted.

MR. ZAUDERER: So, we only have three or four minutes left. I promised there would be some time for questions. I am sorry if it is too short. The only thing I would respectfully ask is that, if you have a question, let us make it a question and let us make it brief.

Anybody have any questions?

THE FLOOR: Courts can be very flexible about time. When I argued the Levitown School Finance Case, a panel of the Second Department, it was a whole day, and then after they wrote their opinion with a very long fact session, they called counsel into chambers to review the fact session and update it.

I do not know if you have ever done that in other cases but it can be done if—

JUSTICE DICKERSON: When was that done?

THE FLOOR: In the late '70s, early '80s.

JUSTICE DICKERSON: On occasion, in a complex case, we will allow extended argument time.

MR. ZAUDERER: Judge Freedman.

JUSTICE FREEDMAN: If lawyers ask in advance for extra time, in very few cases we will make an exception. I do not advise asking unless it really is warranted. But if it is, let us know beforehand. Occasionally, the presiding judge that day will make the decision, usually in consultation with the other members of the panel, to hear arguments, say at 12:00 noon, from 12:00 to 1:00 instead of in the regular order, which is usu-

ally 2:00 in the afternoon afterwards. And we never start at 2:15. We always start at 2:00. Some people make that mistake too.

MR. ZAUDERER: I wondered why I am always late.

JUSTICE FREEDMAN: But you can get extra time in our court.

MR. ZAUDERER: Yes, I have been involved in two cases where there was an hour argument at 12:00 in the last couple of years.

L to R: Mark Zauderer, Hon. Karla Moskowitz, Hon. Barry Cozier, Hon. Victoria Graffeo, Hon. Karen Peters, Hon. Thomas A. Dickerson, Hon. Barbara R. Kapnick, and Hon. Helen E. Freedman

JUSTICE FREEDMAN: In two cases, I think that may be the total number of cases in the last—no, we have had a few more.

THE FLOOR: I do not know the rule in the Third Department. I know the rule in the Second Department is against rebuttal. But I was wondering if the judges could talk about utility of rebuttal and is it a good idea, is it a bad idea, good points, bad points.

JUSTICE PETERS: Well, in the Third Department the rule is that there is a certain amount of time, as I mentioned, allotted for argument, which is on our website and on the calendar. And we advise you at the beginning of the calendar that if you want time for rebuttal, you need to tell us what time you would like set aside for rebuttal. It comes out of your argument time, it is deducted, and then I hold it, and I give it to you for rebuttal.

I actually think it is very helpful to hold a couple minutes, because often there is some issue that is raised by the respondent that you really do want the opportunity to correct. Often it is a factual error that you want the opportunity to correct, or a place in the record that you want to bring to our attention. So I think it is a good idea.

MR. ZAUDERER: I think we have time for one more question.

THE FLOOR: Federal case law—I know, for example, Judge Scheindlin's decision in *Zubulake*—was considered by the First Department in making recent decisions on e-Discovery. We are also seeing some other cutting edge issues—in RMBS and a lot of the complex financial instrument cases—being addressed in both state and federal courts. What is the court's view of the persuasive authority, the value of Federal Court decisions in those contexts?

MR. ZAUDERER: Judge Moskowitz.

JUSTICE MOSKOWITZ: Particularly because we do not have decisions in certain areas in the state courts, we will look at the decisions in federal cases. They are not binding, but they can be persuasive, particularly if they are the same, how do we say it, same CDO, the same parties, and they would just assume be in a different court.

JUSTICE GRAFFEO: It is very important in our court to point this out. We are going to look at District Courts, Circuit Courts, of course, the U.S. Supreme Court, but we are even going to look at other states' high courts. It is extremely important.

And we have a very active certification process with the Second Circuit. And with—as a matter of fact, we are in the middle of our two-week term right now, and we have a certified question from the Delaware Supreme Court this session. We have probably six to eight certified questions in commercial cases from the Second Circuit each year.

MR. ZAUDERER: So before I thank the panel, since our time is up, let me, on a personal note, say it is a privilege to work with all the judges and present this to you and to share with you just a little of my own philosophy of life that has guided me.

My philosopher has always been Yogi Berra—that great wise philosopher—who said many, many interesting things. One that always stuck with me, that I have adhered to, is, in life, if you come to a fork in the road, be sure to take it. On that note, let us hear it for our panel.

Oil in the Joints or Monkey Wrench in the Gears: Deferred and Non-Prosecution Agreements in Antitrust Cases

I. Introduction

In February of 2013, the Department of Justice Antitrust Division, together with the Criminal Division (collectively, DOJ), announced its first-ever Deferred Prosecution Agreement ("DPA"), made with the Royal Bank of Scotland plc ("RBS") in connection with the bank's role in benchmark interest rate (LIBOR) manipulation.[1] Under the DPA, the bank agreed "to admit and accept responsibility for its misconduct[,]" to cooperate with the DOJ's ongoing investigation, and to pay a $100 million penalty.[2]

The Antitrust Division has traditionally avoided using DPAs and Non-Prosecution Agreements ("NPAs") in criminal antitrust cases, favoring instead its Corporate Leniency Program. However, in recent years the Antitrust Division has offered NPAs in a few cases. Thus, the DPA with RBS caused the antitrust bar and legal analysts to wonder whether this resolution might foreshadow a shift away from the Antitrust Division's predilection for its Corporate Leniency Program.

Here, we examine the potential effects of such a shift from both a government enforcer and defense perspective. Specifically, we discuss whether DPAs and NPAs can act as companions to the Corporate Leniency Program by enhancing corporate compliance and averting significant collateral consequences such as financial ruin, or whether the agreements undermine the very core of the Corporate Leniency Program and its success in furthering criminal antitrust enforcement. We also (1) note the potential effects that increased use of DPAs and NPAs could have on related civil antitrust litigation, (2) examine whether there are guiding principles found in those cases where the Antitrust Division has offered criminal defendants DPAs and NPAs in lieu of prosecution, and (3) discuss what all of this means for future antitrust enforcement.

II. Background

A. What Are DPAs and NPAs and Where Do They Come From?

DPAs and NPAs are flexible agreements that federal prosecutors and companies under criminal investigation can tailor to meet the circumstances. The agreements offer the DOJ a middle ground between pursuing a potentially harmful criminal process, and forgoing criminal prosecution outright. Under an NPA, the government agrees not to prosecute a company, so long as it satisfies its obligations under the agreement. [3] The agreement may never even become public. Under a DPA, the government files formal criminal charges, but refrains from prosecuting the case on the condition that the company performs its obligations under the agreement.[4] DPAs are typically public documents filed on the court's docket.[5]

Generally speaking, both DPAs and NPAs require the contracting company to:

- admit to its criminal conduct;
- cooperate fully with the government's investigation;
- implement (or strengthen) a corporate compliance program or other remedial measures;
- expand and strengthen existing internal controls;
- terminate employment of responsible individuals;
- refrain from making any public statements contradicting the terms of the agreement or the company's admissions;
- pay a criminal penalty; and
- face prosecution if the agreement is breached.[6]

These agreements with corporations have their roots in pretrial diversion programs for individual defendants, which DOJ has used where it has determined that the societal benefits of prosecution are outweighed by the costs to the defendant. Typically, such programs are limited to first-time offenders who have committed relatively minor offenses. Similarly, corporate DPAs and NPAs are designed to prevent or mitigate collateral harm that could result from a corporate conviction, while preserving the deterrent, punitive, and rehabilitative goals of criminal prosecution.

Although used intermittently over the years, corporate prosecution agreements became more common following the DOJ's prosecution and conviction of the auditing firm Arthur Andersen in 2002,[7] which led to the firm's demise and to 28,000 employees losing their jobs. Criticism that the conviction resulted in the "corporate death penalty" led the DOJ to revise its policy on the prosecution of corporations in 2003. In what is referred to as the "Thompson Memo," the DOJ stated that cooperation and voluntary disclosure could merit "granting a corporation immunity or amnesty or *pretrial diversion*[.]"[8] The memo also referred prosecutors to the section of the United States Attorneys' Manual that sets forth principles governing non-prosecution agreements for individuals.[9] This was the first time the DOJ suggested using corporate prosecution agreements in exchange for cooperation by companies involved in criminal activity.

The DOJ further revised the U.S. Attorneys' Manual in 2008, expressly endorsing the use of prosecution agreements for corporations:

> [W]here the collateral consequences of a corporate conviction for innocent third parties would be significant, it may be appropriate to consider a non-prosecution or deferred prosecution agreement with conditions designed, among other things, to promote compliance with applicable law and to prevent recidivism. Such agreements are a third option, besides a criminal indictment, on the one hand, and a declination, on the other.… Under appropriate circumstances, a deferred prosecution or non-prosecution agreement can help restore the integrity of a company's operations and preserve the financial viability of a corporation that has engaged in criminal conduct, while preserving the government's ability to prosecute a recalcitrant corporation that materially breaches the agreement. Such agreements achieve other important objectives as well, like prompt restitution for victims.[10]

The U.S. Attorneys' Manual also sets forth factors relevant to the government's consideration whether to offer a prosecution agreement to a corporation "due to the nature of the corporate 'person.'"[11] For example, "prosecutors should consider…the pervasiveness of wrongdoing within the corporation" and the "existence and effectiveness of the corporation's pre-existing compliance program[.]"[12] Other factors to consider are the "collateral consequences" of prosecution, such as "disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as the… adequacy of remedies such as civil or regulatory enforcement actions."[13]

In the years that followed, several branches of the DOJ, which, unlike the Antitrust Division, do not have leniency programs, used DPAs and NPAs as powerful enforcement tools. For example, the DOJ has used DPAs and NPAs in cases relating to accounting fraud, environmental pollution, money laundering, health care fraud, and the Foreign Corrupt Practices Act. Indeed, the Criminal Division now enters into more prosecution agreements than plea agreements. In 2012, the Department entered into at least 35 DPAs and NPAs, securing $9 billion in fines.[14] Similarly, in 2013, the Department entered into 27 DPAs and NPAs, making 2013 "the fifth consecutive year in which at least 20 agreements have been executed."[15]

Although the Antitrust Division entered into a few NPAs prior to 2011, in recent years the Division has used these agreements more frequently, particularly in cases involving financial institutions accused of price fixing or bid rigging. In 2011, for example, the Antitrust Division entered into NPAs with four financial institutions that were accused of bid rigging relating to municipal bonds.[16] Most recently, the Antitrust Division entered into its first DPAs with Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A. ("Rabobank") [17] and RBS,[18] after filing a criminal information against each company charging them with manipulation of LIBOR rates. Historically, however, the Antitrust Division has relied on its Corporate Leniency Program to enforce criminal antitrust violations.

B. The Antitrust Division's Corporate Leniency Program

The Antitrust Division's Corporate Leniency Program (the "Program") is the cornerstone of antitrust criminal enforcement in the United States. Announced in 1978, the Program was significantly revised in 1993 and again in 2008 to further encourage cartel members to self-report their illegal activity.[19] The Program, which affords criminal leniency to self-reporting companies, has successfully assisted the Division to uncover and prosecute antitrust cartels (and other criminal antitrust violations).

Under the Program, the first cartel member to report illegal activity and turn in the other members can, by cooperating with the Division in investigating and prosecuting the antitrust violation, avoid all criminal convictions, fines and prison terms for the company and its cooperating individual officers and employees. [20] This immunity, however, is available to only *one* company in any particular matter.[21] Accordingly, the Program incentivizes cartel members to avoid criminal exposure by getting to the government first, and thereby instigates a race among co-conspirators to be the "first-in."

The Antitrust Division offers two types of leniency: Type A, granted before an investigation has begun, and Type B, granted after the Division has received information about illegal cartel activity, regardless of whether it has opened a formal investigation.[22] For Type A leniency, the company—referred to as the "leniency applicant"—must meet six conditions:

(1) At the time the corporation comes forward, the Division has not received information about the activity from any other source.

(2) Upon the corporation's discovery of the activity, the corporation took prompt and effective action to terminate its participation in the activity.

(3) The corporation reports the wrongdoing with candor and completeness and provides full, continuing, and complete cooperation to the Division throughout the investigation.

(4) The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials.

(5) Where possible, the corporation makes restitution to injured parties.

(6) The corporation did not coerce another party to participate in the activity and clearly was not the leader in, or the originator of, the activity. [23]

An applicant that cannot meet these six conditions may nevertheless receive Type B leniency where the applicant is (1) "the first to come forward and qualify for leniency with respect to the activity[,]" and (2) at the time, the Division does not have evidence against the applicant that is likely to result in a conviction.[24] For Type B leniency, the applicant also must satisfy Type A conditions 2 through 5.[25] In addition, the Division must be able to determine that leniency "would not be unfair to others, considering the nature of the activity, the confessing corporation's role in the activity, and when the corporation comes forward."[26]

Where the applicant satisfies the necessary conditions, the Division then issues what is called a "conditional leniency letter."[27] The leniency is conditional until the applicant provides full and complete cooperation to the Division's investigation and prosecution, including document production and witness interviews and testimony.[28] Once the leniency applicant satisfies the conditions of the letter—something that often means a multi-year commitment—leniency becomes final.[29]

While the "top prize" is reserved for the leniency applicant, a "second-in" company that provides timely and valuable cooperation may also receive substantial benefits, such as reduced fines and more favorable treatment of its culpable executives.[30] Additionally, a company that loses the race, but offers DOJ evidence of a criminal antitrust violation involving another product or geographic area can qualify for leniency concerning the newly uncovered conspiracy, and also receive more favorable treatment where it lost the race.[31] This is called "amnesty plus," and is another way that DOJ seeks to mitigate the "winner take all" approach to criminal immunity.[32]

While there are benefits available to a "second-in" company, the Division seeks to calibrate them to the timing and value of the cooperation offered. However, a second-in company, as well as any of its culpable employees, always remains subject to full prosecution and almost always pleads guilty to criminal antitrust violations.

By publicly announcing and regularly discussing its Corporate Leniency Program, the Antitrust Division intends that its terms be transparent to cartel members.[33] Thus, the Program is designed not only to sow the seeds of mistrust among cartel members, thus destabilizing the cartel, but also to assure those seeking to enter the Program predictable treatment by the Antitrust Division.[34] Central to the Program, however, is the notion that the first-in company will be treated fundamentally better than any other cartel member.

To illustrate, take the case of Chien Chung Chen aka Andrew Chen, former executive vice president of a U.S. company that participated in an international conspiracy to fix the prices of aftermarket auto lights sold in the U.S. In 2008, Chen's company sued the other cartel members for trying to drive the company out of business, thereby effectively "blowing the whistle" on the cartel.[35] However, neither Chen nor his company sought amnesty under the Corporate Leniency Program because of erroneous legal advice. Meanwhile, another cartel member—one of those whom Chen's company had sued—did, and the DOJ granted that cartel member conditional leniency.[36]

Aided by its leniency applicant, the DOJ launched a criminal investigation and indicted Chen and his company, among others.[37] Eventually, Chen and the company agreed to plead guilty for participating in the conspiracy.[38]

At Chen's sentencing hearing, the DOJ argued adamantly that Chen should serve a six-month prison term even though he was responsible for exposing the conspiracy.[39] Indeed, the DOJ distinguished Chen's situation from that in another case specifically on the ground that Mr. Chen was not the first in the door.[40] In the DOJ's view, because Chen was not the "first-in," he was not entitled to the same benefits enjoyed by the leniency applicant, even though Chen also cooperated with the government, and might have secured immunity for himself and his company but for erroneous legal advice. The court disagreed with the DOJ's position on sentencing, and credited Chen's cooperation while imposing one year of probation, six months of house arrest, and a fine of $25,000.[41] Chen's company, which also pleaded guilty, received a fine of $200,000.[42]

Notwithstanding that result, the DOJ's position in Chen's case illustrates an important principle of the DOJ's criminal antitrust enforcement approach: *only* the "first-in" cartel member escapes criminal prosecution in antitrust cases under the Corporate Leniency Program.

Thus, the Corporate Leniency Program reflects a "one size fits all" approach. In contrast, DPAs and NPAs are, by their nature, fashioned to resolve criminal matters on an individual, circumstance-by-circumstance basis. Accordingly, the question becomes whether DPAs and NPAs can act as companions to the Corporate Leniency Program, or whether these sorts of prosecution agreements, if they should become prevalent and well-publicized, would undermine the Program's core purpose.

III. DPAs and NPAs: Friend or Foe?

A. *An Enforcer's Perspective*: DPAs and NPAs "Water Down" the Corporate Leniency Program

Proponents of NPAs and DPAs tout them as a middle-ground approach between criminal prosecution and outright declination. Indeed, as noted above, many branches of the DOJ have successfully used NPAs and DPAs as effective enforcement tools. However, as also noted, those

same branches do not have the alternative of a corporate leniency program, which tends to spare the Antitrust Division the dilemma of whether to indict or "walk away."

In the antitrust context, the so-called "middle-ground" already consists, historically, of cooperation benefits that the Antitrust Division can offer to companies that lose the race for criminal immunity. Generally, the "second-in" company and those that follow can obtain proportionate benefits measured by the value and timing of their cooperation. But, those companies almost always still face criminal prosecution. By denying criminal immunity to anyone but the first-in company, the Antitrust Division sends a clear message: the Corporate Leniency Program will reward the first-in company profoundly better than any later company that self-reports its crimes.

DPAs and NPAs, of course, offer prosecutors much of the same relief as a guilty plea, including an admission of guilt, large monetary penalties, cooperation, and promises of corporate compliance. Critics are concerned, however, that DPAs and NPAs will not only dilute the Corporate Leniency Program's core message, but also afford those companies who are not first-in benefits that are significantly better than those that would be available to those companies under the Corporate Leniency Program: non-prosecution and, correspondingly, relief from consequences that often flow from criminal conviction, plus an increased opportunity to negotiate benefits.

1. Could the "Second-in" Get a Better Deal Under a Prosecution Agreement Than Under the Corporate Leniency Program?

Today, a company that approaches the government after the leniency applicant simply cannot predict how it will fare. As noted above, second-in (or later) benefits tend to be proportional, depending on the timing and value of the cooperation received. For example, a second-in company can either significantly advance an investigation or find that its cooperation is duplicative and unnecessary. Thus, second-in benefits depend on a variety of unknowns—typically, the state of the investigation at the time of the cooperation and the nature and extent to which the cooperation advanced the investigation.[43] The Antitrust Division seeks to measure the value of the company's cooperation carefully to ensure proportional treatment of cooperating parties.

While second-in companies may receive some benefits, the Antitrust Division's traditional approach has been to prosecute these companies notwithstanding their cooperation. The purpose of this approach is to incentivize companies to "race" to be the first in the door. Some argue that if DPAs and NPAs become prevalent and highly publicized, companies might begin to believe that they can escape prosecution even without leniency, and thus, may be less interested in winning the race to the door. The availability of DPAs and NPAs could also diminish the interest of second-in (or later) companies to avail themselves of "amnesty plus" by disclosing new conspiracies. Indeed, a "second-in" company might attempt to secure a DPA or NPA on the known violation, instead of disclosing the new violation, if the company determines that the risks—particularly, inevitable civil liability—weigh against disclosure.

Consequently, by allowing second-in companies to escape prosecution, the use of DPAs or NPAs on a regular basis would not only depart from the Antitrust Division's historical practice; it also could undermine incentives created by DOJ's existing "winner-take-all" and "amnesty plus" practices.

2. What's the Rush?

In a speech before the International Workshop on Cartels in 2000, the Antitrust Division's former head of criminal enforcement Scott Hammond said,

> The first element common to both deterring cartel activity and creating a successful Leniency Program is the threat of severe sanctions.…
>
> ***
>
> [C]artel activity will not be deterred if the potential penalties are perceived by firms and their executives as outweighed by the potential rewards. If the potential sentences are not sufficiently punitive, then the potential sanctions will merely be seen as a cost of doing business.[44]

Essentially, if cartel members do not fear detection, they will not be inclined to self-report their wrongdoing to authorities in exchange for leniency.[45]

DPAs and NPAs create opportunities currently unavailable for cartel members who do not win the race for leniency, and therefore, could arguably cheapen the value of first-in benefits now offered, particularly if DPAs and NPAs are used on a frequent, predictable basis and are well-publicized. Under the current regime, the "winner-take-all" approach creates a race, which, in turn, breeds tension and mistrust among cartel members,[46] thus creating incentives to be the first in the door—not the second (or worse).

If DPAs and NPAs became prevalent in antitrust cases, the concern is that leniency would become less attractive because second-in cartel members could avoid criminal prosecution via these alternate routes. If cartel members have more options available, will there be such an intense race to the government? Perhaps not. Similarly, the race to beat the others just to be second or third or so forth—in order to increase the company's chances of receiving proportional benefits—could also be diminished if the proportionality aspect of the Corporate Leniency Program were to become diluted. If a cartel member is better able to predict its penance, what is the rush?

Accordingly, decelerating the race is not without consequences. The Corporate Leniency Program has been described as the single greatest investigative tool available to anti-cartel enforcement, having been "responsible for detecting and cracking more international cartels than all of our search warrants, secret audio or videotapes and FBI interrogations combined."[47] At the heart of the Program is the race. Getting to the government first, turning in co-conspirators, providing extensive cooperation, shining light on new conspiracies—these are all products of the race that assists the Antitrust Division to successfully detect and prosecute cartels. DPAs and NPAs turn the "winner-takes-all" approach on its head. If cartel members are no longer incentivized to participate in the race, DOJ investigations, and subsequently, cartel enforcement, will suffer.

B. *Defense Perspective*: Prosecution Agreements Complement the Antitrust Leniency Program and Fill the Gap Between Immunity and Prosecution

DPAs and NPAs offer the DOJ both a carrot and a stick. On the one hand, they complement the Corporate Leniency Program by enhancing second-in benefits, thereby increasing the incentive to cooperate, even where the subject company is ineligible for criminal immunity. On the other hand, these agreements also deter antitrust violations, because they typically impose hefty penalties and structural remedies on wrongdoers, without causing unwarranted collateral consequences.

1. Prosecution Agreements Incentivize Cooperation

According to DPA and NPA proponents, prosecution agreements do not "water down" the Corporate Leniency Program because they can incentivize cooperation from more cartel members than the Corporate Leniency Program can on its own. That is particularly true if prosecution agreements (1) become more widespread, (2) are offered in a predictable manner, and (3) are well-publicized. Under these circumstances, businesses that are ineligible for leniency are incentivized to come forward anyway.

The requirements for Type A leniency, noted above, are strict and may preclude leniency for some companies—for instance, a cartel member that coerced another party to participate in the activity is ineligible for Type A leniency. To obtain Type B leniency, the Division must "determine[] that granting leniency would not be unfair to others, considering the nature of the illegal activity, the confessing corporation's role in it, and when the corporation comes forward."[48] Because Type B leniency is discretionary, companies cannot be confident they will obtain it. Thus, if a company knows it cannot secure Type A leniency, and believes that circumstances are such that it is unlikely to obtain Type B leniency, the company has little incentive to come forward.

If the perceived inability to receive either Type A or Type B leniency is in fact currently deterring self-reporting by cartel members, then a policy that offers limited benefits to these companies in exchange for cooperation could strengthen the Antitrust Division's investigatory and enforcement efforts.

Equally important, from a policy perspective, a form of settlement—without the severe consequences of a guilty plea—can appropriately mitigate the arguable harshness that the Corporate Leniency Program's first-in principle can produce. As the DOJ has acknowledged, "[o]n a number of occasions, the second company to inquire about a leniency application has been beaten by a prior applicant by only a matter of hours."[49] The Antitrust Division has also stated that "there have been dramatic differences in the disposition of the criminal liability of corporations whose respective leniency applications to the Division were very close in time."[50] Such a rigid and formalistic distinction between the first-in and the second-in should not determine whether the company secures immunity or will be subjected to potentially crippling criminal prosecution.

By offering a prosecution agreement to RBS, the Division implicitly acknowledged that this formalistic approach is not always appropriate. Although RBS was not eligible for leniency, the DOJ "credit[ed] RBS' cooperation in disclosing LIBOR misconduct"[51] and acknowledged that RBS had "provided highly valuable information that expanded and advanced the criminal investigation."[52]

2. A Prosecution Agreement Is Not a Free Pass

Prosecution agreements serve as a "stick" because they allow the government to impose penalties and obtain remedies that might not otherwise result from the Corporate Leniency Program. For example, in its DPA with RBS, the DOJ required RBS to admit the misconduct charged in the information in an extensive and detailed statement of facts.[53] Further, if the government ever pursues criminal prosecution, RBS agreed not to "contest the admissibility of, nor contradict, the Statement of Facts."[54] RBS paid a $150 million penalty, including the $50 million penalty imposed by the Court upon RBS Securities Japan Limited in connection with its guilty plea.[55] Finally, RBS had to expand and strengthen its compliance program and internal controls in order to prevent future instances of LIBOR-related misconduct, fire the individuals who were responsible, agree to continued cooperation in the government's ongoing investigation,[56] and represent that it would not publicly contradict RBS's acceptance of responsibility.[57] Thus, the competing policy goals of rewarding cooperation and punishing wrongdoers intersected quite nicely in the RBS case, making it a prime candidate for a prosecution agreement.

When it comes to the individuals who actually engaged in criminal conduct, prosecution agreements continue to act as a "stick." As Judge Rakoff recently wrote, "Companies do not commit crimes; only their

agents do."[58] When a company has no pervasive culture of criminality, and a select few individuals have acted on behalf of the corporation in a criminal fashion, the Corporate Leniency Program's immunity, available to the first-in company, nevertheless allows culpable individuals to go free (so long as they cooperate).[59] A DPA or NPA, however, enables the government to prosecute the individuals who actually committed the crime (so long, of course, as the company is willing to enter the agreement on this basis).

For example, after the Antitrust Division entered into an NPA with UBS arising out of an investigation into municipal bond bid rigging, the government was able to prosecute various UBS executives, which might not have happened if UBS had received leniency. Again, here, prosecution agreements provide an intermediate position between letting a company and its wrongdoing employees avoid all criminal sanctions, and prosecuting the company while potentially harming the global or national economy in the process.

IV. Collateral Consequences and Other Considerations

Notably, prosecution agreements allow the wrongdoing company to avoid or mitigate unintended and harmful collateral consequences of a corporate conviction. These collateral consequences, though arguably rare, can be detrimental when they do occur—not only to the company itself, but also to its innocent shareholders, employees and pension beneficiaries, as well as to the victims of the crime, the company's upstream and downstream partners, the economy more broadly, and, ultimately, consumers themselves. These concerns can be particularly salient in the antitrust context, where, as the Assistant Chief of the Antitrust Division's San Francisco field office Peter Huston put it, "the last thing [antitrust enforcers] want to do is punish someone out of business if that is going to mean a reduction in competition[.]"[60] For example, if a felony conviction resulted in a company being barred from government contracts or required a company to surrender licenses (as in the case of Arthur Andersen), the felony conviction could act as the "corporate death penalty," leading the company to its demise. If several large financial institutions were to be charged with cartel conduct, multiple convictions could seriously destabilize the global economy.

Although the collateral consequences of a corporate conviction can be potentially disastrous, actual financial ruin has been rare in practice. Moreover, as some might argue, antitrust violations tend to be pervasive and systematic throughout companies, and it is not uncommon for one antitrust investigation to unearth another involving those very same defendants, or overlapping groups of companies.[61] These violations often go to the heart of a business and affect competition in entire industries. Further, antitrust conspiracies often involve multiple companies, and thus, it is hardly clear how the DOJ can decide who among cartel members gets a DPA or NPA, and who gets prosecuted. How can such a distinction be made? And, perhaps most importantly, what message does it send when very serious economic crimes are committed and not all members of the conspiracy are prosecuted accordingly?

Proponents of these agreements respond that DPAs and NPAs serve the three policy goals of criminal enforcement: they are punitive, rehabilitative and deterrent.[62] Prosecution agreements are punitive because they impose significant financial penalties and can require restitution to victims.[63] They facilitate rehabilitation by imposing structural remedies designed to prevent any similar violations from happening again.[64] Lastly, DPAs and NPAs serve as general deterrents for the obvious reason that they can impose severe penalties and obligations, as well as become admissible (in certain cases) as party-opponent admissions in follow-on civil litigation.[65] They also serve as specific deterrents because the government can resume or initiate prosecution if the company breaches the agreement.[66]

One might argue, however, that prosecution agreements do not act as a deterrent to other companies because they suggest a willingness on the government's part to entertain the "too big to jail" defense. In other words, to the extent prosecution agreements become more common in antitrust cases, individuals engaged in antitrust misconduct might believe they have a better chance of escaping prosecution than they currently have under the Corporate Leniency Program. Nonetheless, prosecution agreements are not guaranteed, can impose severe penalties, and generally require the company to terminate the employment of those involved. Furthermore, those individuals can still be prosecuted, even after the company enters into the agreement, if they are "carved out." (The carve-out feature, however, is also available and used today by the Antitrust Division with second-in cartel members.)

V. The Effects of DPAs and NPAs on Follow-on Civil Litigation

Major criminal antitrust investigations typically spark almost immediate civil treble damage litigation by private plaintiffs. When a company under investigation for criminal antitrust charges enters into a plea agreement with the Antitrust Division, that agreement can negatively affect the defendant's position in the related civil litigation and present important advantages for civil plaintiffs. While DPAs and NPAs can require an admission of guilt, courts vary in their treatment of such admissions in follow-on civil litigation.

For their part, guilty pleas are *prima facie* evidence of an antitrust violation in follow-on civil litigation under Section 5(a) of the Clayton Act, with some exceptions.[67] Thus, the guilty plea "create[s] a rebuttable presumption in favor of the plaintiff and against each defendant against

whom the government judgment was entered."[68] Further, Federal Rule of Evidence 803(22) allows plaintiffs to use a guilty plea to establish facts related to a claim. The rule provides that a final judgment entered after a guilty plea for sufficiently serious crimes is admissible over a hearsay objection to prove "any fact essential to the judgment."[69]

Additionally, information in one defendant's guilty plea can be used as evidence against other defendants to the extent that the others are specifically implicated in the conduct underlying the plea.[70] Thus, the factual and legal allegations in the plea, and statements made during the court hearing at which the plea is entered, present potential challenges for an antitrust defendant in follow-on civil litigation. At the same time, they afford opportunities for plaintiffs in civil litigation to benefit significantly, not only at trial, but also in opposing motions to dismiss, and even in seeking at least partial summary judgment.

On the one hand, plaintiffs might argue that admissions made in connection with a non- or deferred prosecution agreement are no different than admissions made in connection with a guilty plea. Accordingly, they reason, courts should treat admissions in prosecution agreements as admissible *prima facie* evidence of liability.[71] If courts do not give prosecution agreements as much weight as guilty pleas, DPAs and NPAs could arguably hinder the civil process by allowing antitrust offenders to escape the civil consequences they would have faced had they pleaded guilty.

On the other hand, defendants argue that, unlike guilty pleas, prosecution agreements do not reflect adjudications of facts, and are thus immaterial or irrelevant. Accordingly, they argue, allegations based on prosecution agreements should be struck pursuant to Rule 12(f) of the Federal Rules of Civil Procedure.[72] An example of unadjudicated facts being used in this manner is playing out in *In re LIBOR-Based Financial Instruments Antitrust Litigation*, where plaintiffs have used RBS's various agreements with the DOJ, which expressly cover the alleged manipulation of LIBOR as to certain currencies—not including the U.S. Dollar—as a factual basis for claims that are based on the U.S. Dollar and other currencies that were not covered by the prosecution agreement.[73] It is controversial whether "facts" like these, where the nature and extent of RBS's role in LIBOR misconduct cannot be gleaned from the agreement with the DOJ, should—as a policy matter—be allowed to support a civil claim against RBS.

Finally, defendants in other cases have also argued that prosecution agreements are inadmissible hearsay[74] or are inadmissible under Federal Rule of Evidence 410(a)(4), which prohibits the use of "statement[s] made during plea discussions…if the discussions did not result in a guilty plea."[75] Again, some fear that suppressing evidence of prosecution agreements could lead to some second-in companies—that would otherwise face civil consequences for a guilty plea—being able to avoid civil liability. On the other hand, defendants argue that civil plaintiffs should, and do, bear the burden of proving their claims without relying only on unadjudicated allegations.

VI. Looking Forward: In Which Cases Might the Division Negotiate a Prosecution Agreement?

The Antitrust Division apparently does not have immediate plans to increase its use of prosecution agreements over plea agreements in criminal cases. In fact, the former head of the Antitrust Division's criminal enforcement, Scott Hammond, distinguished the RBS case from other antitrust investigations, explaining that a DPA was appropriate there, at least in part because the banking industry is already heavily regulated and the Antitrust Division was working together with the Criminal Division.[76] Hammond went on to state that this "resolution is not an indication that we've changed our policy, [it's] an indication that just the facts of this particular case merited that result."[77] Yet, given the potential collateral consequences of prosecuting large financial institutions, it could be asserted that prosecution agreements are appropriate under similar circumstances.

Going forward, one could speculate that prosecution agreements may also be appropriate in unregulated industries with large-scale global impact, where compliance programs are critical, as well as situations where the Antitrust Division is working with another DOJ division. Indeed, the former head of the Antitrust Division's National Criminal Enforcement Section, Tony Nanni, commented that the Division had "wisely modified [the practice of avoiding DPAs and NPAs] when the alleged conduct at issue is properly seen as primarily a criminal fraud rather than an antitrust violation."[78]

VII. Conclusion

DPAs and NPAs are still infrequent in antitrust cases. However, the recent uptick of prosecution agreements for financial institutions involved in price fixing and bid rigging suggests that the Antitrust Division could be open to exploring these agreements in future similar cases. While prosecution agreements offer benefits to criminal enforcement beyond those available under the Corporate Leniency Program, it is not clear whether more frequent use of these agreements would "chill" the willingness of companies to come forward under the Leniency Program.

Dated June 4, 2014

New York State Bar Association
Antitrust Committee

Jay L. Himes
Meegan Hollywood
Laura E. Sedlak
Aidan Synnott

Endnotes

1. *See* Press Release, U.S. Dep't of Justice, RBS Securities Japan Limited Agrees to Plead Guilty in Connection with Long-Running Manipulation of Libor Benchmark Interest Rates, Feb. 6, 2013, *available at* http://www.justice.gov/opa/pr/2013/February/13-crm-161.html (last visited Aug. 1, 2014) [hereinafter RBS Press Release]; *see also* Deferred Prosecution Agreement, *United States of America v. The Royal Bank of Scotland PLC*, No. 3:13CR73 (MPS) (D.C. Conn. Feb. 5, 2013), *available at* http://www.justice.gov/atr/cases/f292500/292555.pdf (last visited Aug. 1, 2014) [hereinafter RBS Deferred Prosecution Agreement]; Plea Agreement, *United States of America v. The Royal Bank of Scotland PLC*, No. 3:13CR73 (MPS) (D.C. Conn. Feb. 5, 2013), *available at* http://www.justice.gov/iso/opa/resources/217201326133540747939.pdf (last visited Aug. 1, 2014).
2. *See id*.
3. *See Accountability, Transparency, and Uniformity in Corporate Deferred and Non-Prosecution Agreements Before the House Comm. on the Judiciary*, 4 (June 25, 2009) (statement of Gary G. Grindler, Deputy Assistant Attorney General, Criminal Division, U.S. Dep't of Justice), *available at* http://www.justice.gov/criminal/pr/speeches-testimony/documents/06-25-2009grindler.pdf (last visited Aug. 1, 2014) [hereinafter Grindler Statement]; *see also, e.g.*, Non-Prosecution Agreement, *United States of America v. UBS AG* (Dec. 18, 2012), *available at* http://www.justice.gov/iso/opa/resources/139201212191174584 5757.pdf (last visited Aug. 1, 2014).
4. *See* Grindler Statement, *supra* note 3, at 3-4.
5. *See* Eugene Illovsky, *Corporate Deferred Prosecution Agreements, The Brewing Debate*, 2006 A.B.A. Sec. Crim. Just. 36, at 36, *available at* http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_cjmag_21_2_corporatedeferred.authcheckdam.pdf (last visited Aug.1, 2014).
6. *See id.*
7. *See id.* at 36.
8. Memorandum from Larry D. Thompson, Deputy Attorney General, to Heads of Department Components, United States Attorneys 6 (Jan. 20, 2003), *available at* http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf (last visited July 31, 2014) [hereinafter Thompson Memorandum] (emphasis added).
9. *See id.* at 3.
10. 9 U.S.A.M. § 28.1000(B) (Aug. 2008), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm (last visited July 31, 2014) [hereinafter U.S. Attorneys' Manual, Title 9]; *see also* U.S. Attorneys' Manual, Title 9, at §§ 28.000–28.1300.
11. U.S. Attorneys' Manual, Title 9, *supra* note 10, at § 28.300(A).
12. *Id.* at (A)(2), (A)(5) (citations omitted).
13. *Id.* at (A)(7), (A)(8) (citations omitted).
14. *2012 Year-End Update on Corporate Deferred Prosecution Agreements (DPAs) and Non-Prosecutoin Agreements (NPAs)*, Gibson Dunn & Crutcher LLP, Jan. 3, 2013, at 2, *available at* http://www.gibsondunn.com/publications/Documents/2012YearEndUpdate-CorporateDeferredProsecution-NonProsecutionAgreements.pdf (last visited July 31, 2014).
15. *2013 Year-End Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs)*, Gibson, Dunn & Crutcher LLP, Jan. 7, 2014, at 2, *available at* http://www.gibsondunn.com/publications/Documents/2013-Year-End-Update-Corporate-Non-Prosecution-Agreements-and-Deferred-Prosecution-Agreements.pdf (last visited July 31, 2014).
16. *2011 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements*, Gibson Dunn & Crutcher LLP, Jan. 4, 2012, at 4, *available at* http://www.gibsondunn.com/publications/Documents/2011YearEndUpdate-CorporateDeferredProsecution-NonProsecutionAgreements.pdf (last visited Aug. 1, 2014).
17. Deferred Prosecution Agreement, *United States of America v. Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A.*, No. 3:13CR200 (AWT) (D.C. Conn. Oct. 29, 2013), *available at* http://www.justice.gov/iso/opa/resources/976201310298727797926.pdf (last visited Aug. 1, 2014); Information, *United States of America v. Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A.*, 3:13CR200(AWT) (D.C. Conn. Oct. 29, 2013), *available at* http://www.justice.gov/atr/cases/f304500/304581.pdf (last visited Aug. 1, 2014).
18. RBS Deferred Prosecution Agreement, *supra* note 1; Information, *United States of America v. The Royal Bank of Scotland PLC*, No. 3:13CR73 (D.C. Conn. Apr. 12, 2013), *available at* http://www.justice.gov/atr/cases/f296500/296519.pdf (last visited Aug. 1, 2014).
19. *See* U.S. Dep't of Justice, Antitrust Division, *Corporate Leniency Policy* (1993), *available at* http://www.justice.gov/atr/public/guidelines/0091.pdf (last visited July 31, 2014) [hereinafter *Leniency Policy*]; *see generally* Scott D. Hammond, *The Twenty-fourth Annual National Institute on White Collar Crime: The Evolution of Criminal Antitrust Enforcement over the Last Two Decades*, U.S. Dep't of Justice, Feb. 25, 2010, *available at* http://www.justice.gov/atr/public/speeches/255515.pdf (last visited July 31, 2014).
20. *See* Scott D. Hammond et al., *Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters*, U.S. Dep't of Justice, Nov. 9, 2008, at 1, *available at* http://www.justice.gov/atr/public/criminal/239583.pdf (last visited July 31, 2014) [hereinafter *FAQs*].
21. *See id*.
22. *Id.* at 4.
23. *Id*.
24. *Id.* at 5.
25. *Id.*
26. *Id.*
27. *Id*.
28. *See id*. at 23-24.
29. *See id.* at 24.
30. *See* Scott D. Hammond, *Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations*, U.S. Dep't of Justice, The 54th Annual Am. Bar Ass'n Sec. of Antitrust Law Spring Meeting, Mar. 29, 2006, at 1, *available at* http://www.justice.gov/atr/public/speeches/215514.pdf (last visited July 31, 2014) [hereinafter *Second-In Cooperation*].
31. *See FAQs*, *supra* note 20, at 8–9.
32. *See id*.
33. *Second-In Cooperation*, *supra* note 30, at 1.
34. *Id.*
35. *See In re Aftermarket Auto. Lighting Prods. Antitrust Litig.*, No. 09 MDL 2007-GW(PJWx), 2013 U.S. Dist. LEXIS 126308, at *8-9 n.5 (C.D. Cal. Aug. 26, 2013).
36. *See id.*
37. *See* Information, *United States v. Sabry Lee (U.S.A.) Inc.*, No. CR 11-0599 WHA (N.D. Cal. Aug. 30, 2011), *available at* http://www.justice.gov/atr/cases/f274700/274769.htm (last visited Aug. 1, 2014); Information, *United States v. Chen*, No. CR 11-0166 RS (N.D. Cal. Mar. 22, 2011), *available at* http://www.justice.gov/atr/cases/f274700/274769.htm (last visited Aug. 1, 2014).
38. *See* Plea Agreement, *United States v. Sabry Lee (U.S.A.), Inc.*, No. CR 11-0599 RS, at *2-3 (N.D. Cal. Oct. 5, 2011), *available at* http://www.justice.gov/atr/cases/f277400/277483.pdf (last visited Aug. 1, 2014); Plea Agreement, *United States v. Chen*, No. CR 11-0166 RS, at *2-3 (N.D. Cal. May 25, 2011), *available at* http://www.justice.gov/atr/cases/f272100/272188.pdf (last visited Aug. 1, 2014).
39. *See* Tr. of Proceedings, Sentencing Hr'g at 6-12, *United States v. Chen*, No. 11-cr-166 (N.D. Cal. Feb. 5. 2013).
40. *Id.* at 8-9.

41. *Id.* at 26-28.

42. Amended Judgment at 2, *United States v. Sabry Lee (U.S.A.), Inc.*, No. 11-cr-599 (N.D. Cal. Oct. 6, 2011).

43. *See Second-In Cooperation*, *supra* note 30, at 2.

44. Scott D. Hammond, *Detecting and Deterring Cartel Activity through an Effective Leniency Program*, U.S. Dep't of Justice, Int'l Workshop on Cartels, Nov. 21-22, 2000, at 2, 3, *available at* http://www.justice.gov/atr/public/speeches/9928.pdf (last visited Aug. 1, 2014).

45. *See id.* at 4.

46. *Id.* at 5.

47. *Id.* at 1.

48. *Leniency Policy*, *supra* note 19, at 3; *FAQs*, *supra* note 20, at 15.

49. *FAQs*, *supra* note 20, at 2.

50. *Id.* at 5-6.

51. RBS Press Release, *supra* note 1.

52. RBS Deferred Prosecution Agreement, *supra* note 1, at 5.

53. *Id.* at 2-3, att. A.

54. *Id.* at 2-3.

55. *Id.* at 8-9, 10-11.

56. *Id.* at 4-5.

57. *Id.* at 16-17.

58. Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. Review of Books, Jan. 9, 2014, *available at* http://www.nybooks.com/articles/archives/2014/jan/09/financial-crisis-why-no-executive-prosecutions/ (last visited Aug. 1, 2014).

59. *Leniency Policy*, *supra* note 19, at 4 (providing that individuals who admit to their involvement in the misconduct will receive leniency "if they admit their wrongdoing with candor and completeness and continue to assist the Division throughout the investigation").

60. *2013 Mid-Year Update on Corporate Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs)*, Gibson, Dunn & Crutcher LLP, July 9, 2013, at 8, *available at* http://www.gibsondunn.com/publications/Documents/2013-Mid-Year-Update-Corporate-Deferred-Prosecution-Agreements-and-Non-Prosecution-Agreements.pdf (last visited Aug.1, 2014) (citing Ron Knox, *DOJ Official: In Some Industries, NPAs Needed to Protect Competition*, Global Competition Review, Feb. 25, 2013).

61. As the Antitrust Division recently reported regarding its massive criminal auto parts investigation,

> To date, the investigation has resulted in charges against 26 companies and 29 individuals and more than $2 billion in criminal fines for participation in conspiracies to fix prices of and rig bids on automobile parts, including safety systems such as seat belts, air bags, steering wheels, and antilock brake systems, and critical parts such as antivibration rubber, instrument panel clusters, starter motors, and wire harnesses.

Division Update Spring 2014, Criminal Program, U.S. Dep't of Justice, http://www.justice.gov/atr/public/division-update/2014/criminal-program.html (last visited Aug. 1, 2014).

62. *See* Assistant Att'y Gen. Lanny Breuer, Address to the New York City Bar Ass'n, The Role of Deferred Prosecution Agreements in White Collar Criminal Law Enforcement (Sept. 13, 2012), *available at* http://stopforeclosurefraud.com/2012/09/22/the-role-of-deferred-prosecution-agreements-in-white-collar-criminal-law-enforcement/ (last visited Aug. 1, 2014).

63. *See id.*

64. *See id.*

65. *See id.*

66. *See id.*

67. *See* 15 U.S.C. § 16(a); *see also* Jonathan I. Gleklen, *Antitrust Law Developments*, 2012 A.B.A. Sec. Antitrust Law 933.

68. *Id.* at 934 (citation omitted).

69. Fed. R. Evid. 803(22); *see also Criminal Antitrust Litigation Handbook*, 2006 A.B.A. Sec. Antitrust Law 56. Note also, that the Antitrust Division has a long-standing policy against accepting a nolo contendere plea, which would not be admissible in a civil litigation. *See* Scott D. Hammond, *The U.S. Model of Negotiated Plea Agreements: A Good Deal with Benefits for All*, U.S. Dep't of Justice, 23 n.18, Oct. 17, 2006, *available at* http://www.justice.gov/atr/public/speeches/219332.pdf (last visited Aug. 1, 2014); *see generally* U.S. Attorneys' Manual, Title 9, *supra* note 10, at § 16.010; *See* U.S. Dep't of Justice, *Grand Jury Manual*, at IX-71 (1st ed. 1991), *available at* http://federalevidence.com/pdf/LitPro/GrandJury/Grand_Jury_Manual.pdf (last visited Aug. 1, 2013).

70. *United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc.*, 608 F.3d 871, 891-92 (D.C. Cir. 2010) (admitting proof of one defendant's prior guilty plea to a Sherman Act violation as "relevant pieces of evidence that are admissible against all defendants").

71. Some courts have cited prosecution agreements as a factor in denying motions to dismiss, acknowledging that they are not final adjudications of the facts, but allowing plaintiffs to rely on them in order to get over the pleading hurdles of *Twombly* and *Iqbal*. *See, e.g.*, *Thompson's Gas & Elec. Serv., Inc. v. BP Am. Inc.*, 691 F. Supp. 2d 860 (N.D. Ill. 2010) (denying, in part, motion to dismiss market manipulation claims that were the subject of a DPA with the CFTC, and noting that the DPA was an "alternative to adjudication"); *Davis v. Beazer Homes, U.S.A. Inc.*, No. 1:08CV247, 2009 U.S. Dist. LEXIS 107253, at *23-25 (M.D.N.C. Nov. 17, 2009) (considering a prosecution agreement as a "significant factor in assessing the 'plausibility'" of one of the plaintiff's claims, and recommending denial of a motion to dismiss that claim, but noting that the DPA was not a "final adjudication of the matters addressed therein").

72. *See Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 893-94 (2d Cir. 1976) (holding that a consent decree "can have no possible bearing" on the dispute before the court because it was not a "true adjudication[] of the underlying issues," and that it could "only be introduced in a later trial for collateral estoppel purposes if the issues sought to be precluded were actually adjudicated in the prior trial"); *Footbridge Ltd. Trust v. Countrywide Home Loans, Inc.*, No. 09 Civ. 4050 (PKC), 2010 U.S. Dist. LEXIS 102134, at *14-15 (S.D.N.Y. Sept. 28, 2010) (striking allegations in a complaint that were "based on pleadings, settlements, and government investigations in other cases").

73. [Corrected] Second Amended Consolidated Class Action Complaint ¶ 224, *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, Nos. 1:11-md-2262, 11-cv-2613 (S.D.N.Y. Sept. 30, 2013), ECF No. 438.

74. *In re Oil Spill by the Oil Rig "Deepwater Horizon,"* MDL No. 2179 Section: J(1), 2012 U.S. Dist. LEXIS 15902, at *13 (E.D. La. Feb. 9, 2012) (granting motion *in limine* to exclude DPA as inadmissible hearsay).

75. Fed. R. Evid. 410(a)(4); *see Escue v. Sequent, Inc.*, No. 2:09-cv-765, 2012 U.S. Dist. LEXIS 9949, at *25-31 (S.D. Ohio Jan. 25, 2012) (denying motion *in limine* to exclude plea discussions and DPA on the grounds that defendants had provided no information demonstrating their expectation that they were negotiating a plea agreement and that that expectation was reasonable).

76. Melissa Lipman, *DOJ Not Wavering on Antitrust Guilty Pleas, Official Says*, Law360, Apr. 10, 2013, *available at* http://www.law360.com/articles/431781/doj-not-wavering-on-antitrust-guilty-pleas-official-says (last visited Aug. 1, 2014).

77. *Id.*

78. Charles F. (Rick) Rule et al., *Antitrust Division Enters into First Deferred Prosecution Agreement,* Lexology, Feb. 14, 2013, *available at* http://www.lexology.com/library/detail.aspx?g=347e5b04-f9c9-49a6-b8b6-d3d1608e7e1d (last visited Aug. 1, 2014).

Arbitration Dos and Don'ts for the Trial Lawyer

By Richard L. Mattiaccio

A client has just asked you to represent it in the arbitration of a contract dispute. The case looks pretty much like others you have taken to bench or jury trial victories. You think you are all set.

Think again. You would not try a jury trial as if it were a bench trial, or vice versa. Why assume that you should try a case in arbitration as if it were in court?

Arbitration rules, handbooks and training programs can provide valuable insight into the steps leading to the evidentiary hearing. The literature and training programs will take the practitioner in detail through the filing of claims; the initial administrative conference in administered cases; the arbitrator selection process; the first conference with the arbitrator(s) leading to the crucial first procedural order; the pre-hearing exchange of documents; limitations on discovery, motions, subpoenas on nonparties, and evidentiary objections; the filing of witness lists, pre-marked exhibits, witness statements, expert reports, and pre-hearing memos; and post-hearing confirmation or vacatur of awards. Relatively little can be found in the literature, however, about the evidentiary hearing itself.

In the real world, much depends on the arbitrator's background, so the common wisdom is that cases are frequently won or lost at the arbitrator selection phase. A second commonplace that should resonate with every trial lawyer is the need to learn as much as possible about the arbitrator and adapt attorney style to what works with an arbitrator assigned to the case. For example, some arbitrators like the hearing to feel like a bench trial. Others like every step in the process to function more like a business meeting. An attorney representing a party needs to know this in advance or take cues from the arbitrator during the preliminary conference.

Unlike jury selection, which often follows motions and discovery practice, an attorney in arbitration needs to determine at the beginning of the case what sort of arbitrator would be receptive to the case on the merits and to his or her style. Arbitrator selection is a subject worthy of dedicated study.[1] The mechanics of arbitrator selection can vary depending on the nature of the case, the governing rules, and the terms of the arbitration clause. Still, some characteristics do appear across the commercial arbitrator spectrum.

Commercial arbitrators generally like to think of themselves as problem solvers and look to counsel to provide the tools arbitrators need to solve those problems. Arbitrators like to see the attorneys (a) focusing on the merits, (b) finding common ground on preliminary matters, and (c) using the time allotted efficiently and cost-effectively. They do not appreciate extensive attorney wrangling over procedure either before or at the hearing.

Arbitrators pride themselves on getting the point the first time it is made. They do not appreciate duplicative argument, briefing or testimony. They rarely see the point of having multiple witnesses testify to the same facts. They appreciate effective cross-examination, but they expect the cross-examiner to remain courteous and stay within pre-agreed time limits.

A good deal of planning, preparation and compromise with opposing counsel goes into effectively representing a client at a low-key, business-like, problem-solving evidentiary hearing. The following "dos and don'ts" are some practical tips offered to help a lawyer get started thinking about how to work with, not against, arbitration custom and practice in order to achieve good results for clients.

Dos	Don'ts
A. Study the Rules and Guidelines	
Read the arbitration rules and guidelines from cover to cover. • Think about how they differ from what you are used to in court; • Assume the arbitrator(s) will enforce the rules and follow the guidelines; and • Review the literature on commercial arbitration, especially when it is addressed to counsel's obligations.[2]	Don't read only the published rules applicable to the case. Also review the most relevant guidelines and protocols that tend to shape the conduct of the arbitrator(s) in specific categories or phases of arbitration.[3]
B. Advise the Client About Arbitration	
Provide your early case assessment with the arbitration process in mind. • Positions can be stronger or weaker in arbitration; figure it out *before* you advise the client. • Provide the client with realistic projections of arbitration cost and time in your early case assessment, and update your assessments.[4]	Don't overlook the strategic and tactical advantages or potential disadvantages of arbitration when you provide the client with your case assessment. Don't assume your client knows what to expect in arbitration; determine its experience level and adjust your advice accordingly.
Introduce the concept of mediation as a related step in the arbitration process.[5] • Make clear that arbitrators are generally not expected or supposed to get involved in settlement discussions but appreciate it when the parties give it a try. • Point to the provider organization's policies or procedures that favor mediation and that may treat mediation as a normal step within the arbitration process.[6]	Don't be deterred by a client's concern that suggesting mediation may send a signal of weakness. Explain that, if the arbitrator(s) find out that your side wants to pursue mediation or some other settlement device, the only risk is that your side will come across as sane.
Send the client a few articles if it is skeptical. • Providers and bar groups offer guides for the lawyer and non-lawyer alike;[7] read them, send the best-suited one to your client, and have a discussion with the client about the pros and cons of the process.	Don't unnecessarily place stress on your credibility with a client that is highly resistant to the advice. You can point to provider institution user handbooks and to neutrals on record providing the same advice.
C. Map Case Strategy Before the First Conference with the Arbitrator(s)	
Have an early game plan, ideally, before arbitrator selection. • Before the first conference with the arbitrator(s), know what you need in terms of exchanges of documents and other information. The first procedural order is your road map for the case.	Don't improvise. Your game plan may have to be adjusted, but, without one, you will not make good use of those crucial early encounters with the arbitrator(s), and the first procedural order will feel like a straightjacket as the case evolves in unexpected ways.

Dos	Don'ts
D. Assume Very Little Discovery	
Develop your core case and defenses on the assumption of little or no discovery. • Search your client's records to dig out all the essential documents. • Line up, interview and lock in the availability of all of your key witnesses. • Use the Internet. • Consider a private investigator, if needed, to fill in the blanks. • Look to some limited discovery for the gravy and, whenever possible, not for the meat and potatoes. Prepare your basic discovery plan before arbitrator selection. • If discovery is essential to your case, select arbitrator(s) with an active case load in court, or with experience as counsel in litigation, or as a judge in a court that allows broad discovery.	Don't think that you can build a case out of the other side's files or deposition testimony of its witnesses. Broad discovery is rarely allowed in domestic arbitration, and is just not available in international commercial cases. Arbitrators are trained to limit discovery, related expense, and the time needed to get to an award.[8] Don't assume that all arbitrators appreciate the challenges you face as counsel. Look for clues in the arbitrator candidate's professional experience. Has the arbitrator ever tried a case in court or in arbitration? How important will arbitrator empathy for the trial lawyer be as you prepare and present your case?
E. Gear Up for Arbitrator Selection	
Network to find the right arbitrator(s). • Ask experienced arbitration counsel and other neutrals about potential arbitrators. • Select arbitrator(s), especially the chair or sole arbitrator, with a proven ability to manage the process.[9]	Don't rely entirely on an official arbitrator biography if you can reach out to lawyers who have had experience with that arbitrator. There are online resources to help in some circumstances.[10]
Know the rules governing arbitrator selection in your case before starting the selection process. • The process of arbitrator selection can vary depending on the arbitration clause and the governing rules and procedures. • To some degree, an arbitration clause can vary the procedures that are generally incorporated by reference.	Don't expect busy case managers to focus right away on any special provisions on arbitrator selection or qualifications in your arbitration clause; point out those provisions before the case manager gets too far along in the arbitrator selection process.
F. Ask for an Early Administrative Conference and Work Collaboratively with the Case Manager at All Times	
Ask for an administrative meeting with the case manager prior to arbitrator selection. • Make clear what your preferred criteria are for arbitrator selection. • Engage in *ex parte* communications with the case manager to the extent allowed by the rules. • Propose an administrative conference with all counsel present.	Don't miss any opportunity to show the case manager that you are trying your best to be practical and that you are a straight shooter. Counsel cannot have ex parte communications with arbitrators, but case managers can and do talk with the arbitrator(s), and vice versa, whenever they think it serves a purpose.

Dos	Don'ts
Treat case managers like the important people they are. • Be practical and helpful; it's a joint problem-solving exercise. • Case managers can help counsel avoid costly missteps.	Don't condescend. Case managers may or may not have law practice experience or law degrees, but they are hard-working professionals and they understand some aspects of the arbitral process better than counsel ever will.
G. Address Confidentiality Up Front	
Assess the confidentiality of the process before exchanging sensitive information. • Not all arbitration rules provide the same level of confidentiality.[11] • Determine whether express confidentiality protections should be negotiated with the other side or, failing agreement, whether a procedural order regarding confidentiality should be sought from the arbitrator(s).[12] • Ask the arbitrator(s) to embody any agreement in a procedural order.	Don't assume that the parties are bound to confidentiality without checking the rules. Don't rely on customary practice in litigation. Don't rely on informal agreements, especially if the confidentiality stakes are high.
H. Confer With Opposing Counsel to Work Out as Much as Possible	
Reach out to counsel for the other side to try to agree on the basics, including: • Selection criteria for panel-selected arbitrator(s); • The extent and timing of the exchange of documents and other information; and • When, during the arbitration, mediation is most likely to be fruitful. Develop an agenda for the administrative conference. • Try to develop, collaboratively with opposing counsel, a list of at least some points to be addressed at the first conference.	Don't just spot an issue, pick a fight, and run to the arbitrator(s) to resolve it. The case manager or arbitrator(s) may conclude that there are no other adults in the room besides themselves. That will not help you when you need to ask for some leeway on any number of issues. Don't expect case managers to be mind-readers. If you need something out-of-the-ordinary to be addressed, make sure it makes it onto the agenda.
I. File an Early Witness List	
File as comprehensive a list of witnesses as possible, as early in the case as possible. • Include in the witness list the current affiliations of witnesses.	Don't hold back on identifying your witnesses in the hopes of springing a surprise witness at the hearing. Generally, surprise is not allowed or is mitigated by allowing opposing counsel time to regroup. If you do hold back, you run the risk of arbitrator disclosures later in the case, resulting in (a) a disruptive replacement of an arbitrator mid-stream, or (b) continued service of an arbitrator who might not have been selected in the first place if the disclosure had been made earlier.

Dos	Don'ts
J. Propose Rather Than Impose	
Present joint proposals as just that: proposals for consideration by the arbitrator(s). • Arbitration is a creature of contract, but joint proposals that go too far in transforming arbitration into litigation can undermine the nature and integrity of the arbitral process.	Don't send the arbitrators edicts. Arbitrator(s) need to be persuaded that whatever you jointly propose is a reasonable approach because they are trained by the provider organizations to achieve efficiency and to maintain the distinctiveness of the arbitration process.
Prepare to present to the arbitrator(s) some of your own reasonable proposals to resolve open issues.	Don't just expect the arbitrator(s) to figure it out; you may not like how it goes, especially if opposing counsel offers solutions.
K. Remember the Golden Rule	
Be courteous and cooperative in dealing with arbitrators, case managers, opposing counsel and staff, and witnesses. • And, if you want to convey the impression to the arbitrator(s) that you think you have a good case, show good humor at all times.	Don't grandstand for clients or, if things seem to be going badly, shift into high (make-the-record-for-appeal) gear. There is no effective right of appeal. Don't go on the offensive, unless it is a charm offensive.
L. Be the Problem-Solver in the Room	
Anticipate practical needs and likely disputes. • Try to resolve disputes with opposing counsel. • Try to present unresolved disputes at scheduled conferences.	Don't pepper the arbitrator(s) with many disjointed requests that could have been presented at one time.
Keep your presentation interesting but low-key.	Don't waste time on theatrics. There is no jury to wake up or to impress. Would you bring a megaphone to a poker game?
M. Limit Discovery Requests to What Is Absolutely Essential	
Whatever discovery you might ask for in court, cut it back. • You may get more from opposing counsel than from the arbitrator(s). • Consider the legal limits on arbitrator power to compel discovery from non-parties.[13]	Don't assume Federal Rules-style discovery is inscribed in the Bill of Rights. Even if broad discovery is written into your arbitration clause, arbitrators have discretion to streamline the process, and they feel pressure from provider associations to do just that.
Consider tools to cut discovery time and costs. • Computer-assisted electronic document review a/k/a "predictive coding" is one example. • Arbitrators appreciate a creative and practical approach.	Don't underestimate arbitrator receptiveness to creative solutions or the ability of technology to solve or mitigate problems created by technology.

Dos	Don'ts
If the arbitration is international (i.e., between commercial parties of different nations): • Do not expect to be able to take *any* discovery depositions at all.[14] • Exchange of written fact witness statements in lieu of live direct is the norm.[15] – Fact witness statements are often the only way to avoid surprise under international procedures. • Document exchange is limited.[16] – Prepare extremely specific requests for documents you don't already have but really need.	Don't try to look for the needle in the other side's haystack. The world detests American-style discovery. International arbitration practice and procedure reflect that consensus. If the case is governed by international arbitration rules, the fact that arbitration is taking place in the U.S. does not make discovery any more available.
If the case is domestic in nature: • Expect to be told you can take, at most, a very limited number of depositions of limited duration.[17] –The smaller the case, the fewer and shorter the depositions, so figure out what you *really* need, and go for that.	Don't assume that proportionality is a term first coined in response to discovery excesses in Federal Rules practice. Providers have been training commercial arbitrators for years to limit discovery to what is needed *and* proportional.
Expect push-back in response to a litigation-like discovery plan: • Even if you work out a joint proposal and present it on a silver platter. • Advise your client realistically and up front about the limits of discovery in arbitration. There are guidelines and articles explaining the limits of discovery in arbitration. Send one or two to your client if it does not believe you when you explain the limitations on discovery in arbitration.	Don't panic if you are used to broad discovery before trial. In arbitration, the hearing-by-installment approach usually affords ample opportunity to regroup. Arbitrators have the flexibility to remedy genuine surprise and are sensitive to the need for procedural fairness.
N. Present Disputes Informally	
Provide the arbitrator(s) with a brief, written, jointly submitted or at least even-handed preview of the dispute.	Don't expect the arbitrator(s) to rule on complex and important discovery disputes at a conference without having had time to think about it and confer with one another.
O. Propose Dispositive Motions When They Meet Arbitration Standards	
Propose a dispositive motion only if it is likely to succeed *and* to streamline the case.[18] • Prepare a one or two-page letter outlining the grounds, likelihood of success, and likely economies to be achieved from the dispositive motion.	Don't ask to make dispositive motions just to condition arbitrator thinking in your favor. It is not efficient, and busy arbitrators might conclude that you are trying to make extra work for yourself.

Dos	Don'ts
P. Use Witness Statements and Exchange Experts' Reports	
Consider agreeing to the use of witness statements as part of direct testimony even if not required to do so. • Fact witnesses rarely crack on direct examination. • Exchange experts' reports. Parties rarely have an opportunity to take the deposition of opposing experts in arbitration. You may as well take some credit for adopting an approach that otherwise will be imposed. • Incorporate your expert report as an integral part of the expert's sworn testimony.	Don't fight tooth-and-nail against the witness statement procedure just because it is unfamiliar or can sometimes be abused; you can negotiate the ground rules to limit abuse. Don't assume that witness statements and experts' reports prevent the witness from telling her story. Arbitrators can be persuaded to let witnesses give brief overviews of direct testimony and to update or correct statements or reports just before cross-examination at the hearing.
Prepare fact witness statements with the witness and in the witness' own voice.	Don't submit a witness statement that reads like a memo of law. It will not be effective and your witness may deserve better.
Q. Design Helpful Hearing Submissions	
Organize hearing exhibits so that they are arbitrator-friendly. • Arbitrators pick up bundles of hearing exhibits and read them.	Don't submit exhibit volumes that resemble shuffled decks of playing cards.
Submit a separate volume of joint exhibits that are the key, undisputedly authentic documents in the case. • Parties may disagree as to the meaning of undisputedly authentic and relevant documents, but that does not mean the documents are not authentic or are not key to the dispute.	Don't create logistical challenges for the arbitrator(s) by burying the basic documents in larger document groupings. Many arbitrators work without any office support.
Provide documents in whatever form(s) the arbitrator(s) request. • Arbitrators on the same panel may have very different working styles. • Offer to have a courtesy paper set in the hearing room for each arbitrator.	Don't assume that all arbitrators have the same technological savvy. Some may consider the courtesy set to be essential; others may see it as unnecessary and wasteful. The key is to find out each arbitrator's preference.
Keep the record organized and make it easy for the arbitrator(s) to focus on what's important. • Consider with an open mind an arbitrator's request for authorization to work with a colleague on some aspects of a complex, large-record case. Arbitrators do not have access to law clerks and they cannot ask for help from law firm colleagues unless the parties expressly authorize it.	Don't automatically react negatively if an arbitrator, particularly in a complex, big-document commercial matter, asks for authorization to draw on a colleague for support for specific tasks. Depending on how the arrangement is structured, it could result in time and cost savings, and a better structured or reasoned award.
Keep Pre-Hearing Memos Concise. • Say things once.	Don't engage in repetition. Repetition tends to annoy arbitrators. Don't engage in repetition. Don't.

Dos	Don'ts
R. Decide on a Form of Award Well Before the Hearing	
Inform the arbitrator(s) before the evidentiary hearing as to what form of award is required. • Depending on the applicable rules, arbitrator(s) may decide on the form of award much sooner in the case, but the eve of the evidentiary hearing should be the absolute minimum notice so the arbitrator(s) can identify the tools they need to receive from the parties.	Don't ask for a reasoned award without agreeing to provide the arbitrator(s) with a hearing transcript or, if no transcript is made, to provide the arbitrator(s) with proposed findings of fact or some less formal version thereof.
S. Discuss the House Rules in Advance of the Hearing	
Clarify any restrictions on communicating with witnesses during their testimony, or on the witness' attendance during the testimony of other witnesses. • Ask the arbitrator(s) to set forth any restrictions in a procedural order.	Don't assume that you, the arbitrator(s) and opposing counsel all have the same practice experience background with respect to the handling of witnesses and other hearing-room conduct.
T. Propose Hearing Procedures That Maximize Time for Witness Testimony and That Help Keep the Arbitrator(s) Organized	
Keep housekeeping at the hearing to a minimum. • Try to limit discussion of administrative details to the beginning or end of the hearing day. • Try to work out problems off the record and then confirm agreements on the record.	Don't burden the transcript with lengthy discussions unrelated to the merits. The transcript (even in paper form) should be user-friendly for the arbitrator(s) in preparing the award.
Submit an order of presentation of witnesses in advance of the hearing. • Update the line-up at the end of each day for the next day.	Don't try to surprise the arbitrators with your next witness. Arbitrators like to prepare for witnesses too.
Have your next witness in the batter's box.	Don't waste expensive hearing time waiting for a witness who is stuck in traffic. Some arbitrators, and some clients who hear an arbitrator grousing about it, might hold it against you.
Make evidentiary objections briefly, in writing, and focused on significant matters; time the objections so as not to disrupt hearing flow. • Limit evidentiary objections during the hearing to important questions of time management, relevance, weight and confidentiality.	Don't use evidentiary objections to break a witness' rhythm or to run the clock. Arbitrators recognize the tactic, and may deduct points from your credibility score and/or help the witness get back on track. Don't fuss over prejudice unless the evidence is irrelevant and borders on the outrageous. Arbitrators think they are too sophisticated to have to worry about becoming prejudiced, but might draw the line at attempts to delve into clearly non-probative personal matters.

Dos	Don'ts
Ask the arbitrator(s) whether closing arguments or post-hearing briefs would be more helpful. • Ask the arbitrator(s) what points they would most like to be addressed in closing arguments and/or briefs, and adjust accordingly. • This is not just about being courteous. You want to know what might be troubling the arbitrator(s) and you want to deal with it as best you can. • Make use of arbitrator flexibility. For example, in some cases it might make sense to have a closing argument as to some issues plus a short brief on a point or two that are better addressed in writing, with a chart that the arbitrators might find helpful but requires a bit more time to prepare, etc.	Don't just repeat in closing the themes you have been developing all through the case; address what's on the mind(s) of the arbitrator(s) at that point in the hearing. It is your last chance to put the arbitrator(s) at ease with respect to what may be bothering them about your case or defenses. Don't repeat arguments that are not essential to your case and that have not gotten any traction with the arbitrator(s) just because your client likes to hear them. You are not there to entertain or soothe the client but to get the client the best possible result.
Provide the arbitrator(s) with hearing transcripts at the same time you receive them. • If you are getting daily copy, offer it. • Ask each arbitrator what form (paper, electronic, software) is preferred, and include any court reporter index.	Don't just do the minimum or the usual; go out of your way to make it as easy as possible for the arbitrator(s), particularly when doing so has no material impact on cost.
Supply a joint, definitive, final list of all the documents in evidence. • This is especially important in the larger-document cases or when exhibits have been moved into evidence without testimony. • Arbitrators like to have a reliable checklist to make sure they have reviewed and considered all the evidence in the record.	Don't rely on the court reporter to provide the exhibit list if there are exhibits in evidence that were not used with witnesses or not formally moved in evidence on the record.
U. Be Courteous to the End	
Thank the arbitrator(s) and case manager, each by name, for their service and attention. Acknowledge the members of your team at all levels. Thank the opposing attorney(s). If counsel was generally obstructive but cooperated in some small way, thank counsel specifically for that small detail even though (or perhaps because) it might seem like faint praise. Acknowledge the hard-working junior members of the other side's team, including non-lawyers, for their contribution and cooperation, even if you cannot utter a word of thanks to lead counsel.	Don't just say thank you; when you say it, say it like you mean it.

Endnotes

1. For a practical overview of some key considerations in arbitrator selection, *see* Charles J. Moxley, Jr., *Selecting the Ideal Arbitrator*, 2005 Disp. Resol. J., 1, *available at* https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_003897 (last visited Sept. 9, 2014).

2. *See* Stipanowich, et al., Protocols for Expeditious, Cost-Effective Commercial Arbitration 61-67 (2010), *available at* http://www.thecca.net/sites/default/files/CCA_Protocols.pdf (last visited Sept. 9, 2014) [hereinafter CCA Protocols].

3. *See generally*, Newman, et al, Guidelines for Arbitrators Conducting Complex Arbitrations (2012), *available at* http://www.c-pradr.org/Portals/0/Resources/ADR%20Tools/Tools/Arbitration%20Award%20Slimjim%20for%20download.pdf (last visited Sept. 9, 2014); Newman, et al., Guidelines on Early Disposition of Issues in Arbitration (2009), *available at* http://www.cpradr.org/RulesCaseServices/CPRRules/GuidelinesonEarlyDispositionofIssuesinArbitration.aspx (last visited Sept. 9, 2014) [hereinafter CPR Early Disposition Guidelines]; Newman, et al., Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration (2009), *available at* http://www.cpradr.org/RulesCaseServices/CPRRules/ProtocolonDisclosureofDocumentsPresentationofWitnessesinCommercialArbitration.aspx (last visited Sept. 9, 2014); N.Y. State Bar Ass'n, Section on Disp. Resol., *Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of Domestic Commercial Arbitrations* [hereinafter NYSBA Domestic Guidelines] and N.Y. State Bar Ass'n, Section on Disp. Resol., *Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of International Arbitration* [hereinafter NYSBA International Guidelines], both *available at* http://old.nysba.org/Content/NavigationMenu/Publications/GuidelinesforArbitration/DR_guidelines_booklet_proof_10-24-11.pdf (last visited Sept. 9, 2014); *Protocol for E-Disclosure in Arbitration*, Chartered Inst. Of Arb., Oct. 2008, *available at* http://www.ciarb.org/information-and-resources/E-Discolusure%20in%20Arbitration.pdf (last visited Sept. 9, 2014) [hereinafter CIArb E-Disclosure Protocol]; *Efficiency Guidelines for the Pre-Hearing Phase of International Arbitrations,* JAMS, Feb. 1, 2011, *available at* http://www.jamsinternational.com/wp-content/uploads/JAMS-International-Efficiency-Guidelines.pdf (last visited Sept. 9, 2014) [hereinafter JAMS Efficiency Guidelines]; Int'l Bar Ass'n, *IBA Rules on the Taking of Evidence in International Arbitration* (2010), *available at* file:///C:/Users/tmb/Downloads/IBA%20Rules%20on%20the%20Taking%20of%20Evidence%20in%20Int%20Arbitration%20201011%20FULL.pdf (last visited Sept. 9, 2014); The Code of Ethics for Arb. in Com. Disp., *available at* http://www.americanbar.org/content/dam/aba/migrated/dispute/commercial_disputes.authcheckdam.pdf (last visited Sept. 9, 2014).

4. *See* CCA Protocols, *supra* note 2, at 61-63.

5. The AAA Commercial Arbitration Rules now provide for mediation in the course of arbitration unless the parties opt out. *See* Am. Arb. Ass'n, *Commercial Arb. Rules and Mediation Procedures R-9,* at 14 *(*2013), *available at* https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103&revision=latestreleased (last visited Sept. 9, 2014) [hereinafter AAA Commercial Arb. Rules].

6. *Id.; see also* Luis M. Martinez and Thomas Ventrone, *The International Centre for Dispute Resolution Mediation Practice,* 494-95, *available at* https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_002567 (last visited Sept. 9, 2014); Int'l Chamber of Com., Mediation Guidance Notes, ¶¶ 28-35, *available at* http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Mediation/Rules/Mediation-Guidance-Notes (last visited Sept. 9, 2014).

7. *See, e.g.,* Am. Arb. *Ass'n, A Guide to Commercial Mediation and Arbitration fo*r Business People (2013), *available at* https://www.adr.org/aaa/ShowP*DF?doc=ADR*STAGE2019455 (last visited Sept. 9, 2014); Am. Bar Ass'n, *Benefits of Arbitration for Commercial Disputes, available at* http://www.americanbar.org/content/dam/aba/events/dispute_resolution/committees/arbitration/arbitrationguide.authcheckdam.pdf (last visited Sept. 9, 2014); Int'l Chamber of Com., *Introduction to ICC Arbitration, available at* http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/ (last visited Sept. 9, 2014).

8. *See, e.g.,* James M. Gaitis, et al., The College of Commercial Arbitrators Guide to Best Practices 137-76 (3d ed. 2013) [hereinafter CCA Best Practices Guide]; CCA Protocols, *supra* note 2, at 72-73; CIArb E-Disclosure Protocol, *supra* note 3, at 6*;* Int'l Dispute Resolution Procedures, Int'l Centre for Dispute Resol., art. 21.1, June, 2014, *available at* https://www.icdr.org/icdr/ShowProperty?nodeId=/UCM/ADRSTAGE2020868&revision=latestreleased (last visited Sept. 9, 2014) [hereinafter ICDR Dispute Resol. Procedures] ("The arbitral tribunal shall manage the exchange of information among the parties with a view to maintaining efficiency and economy."); Mitchell Marinello & Robert Matlin, *Muscular Arb. and Arbitrators Self-Mgmt. Can Make Arb. Faster and More Econ.,* 67 Disp. Resol. J. 69, 73-75, *available at* http://www.novackmacey.com/wp-content/uploads/2013/06/Muscular-Arbitration-and-Arbitrators-Self-Management-Can-Make-Arbitration-Faster-and-More-Economical-Dispute-Resolution-Journal-Vol.-67-No.-4-2013-PDF.pdf (last visited Sept. 9, 2014).

9. *See* CCA Protocols, *supra* note 2, at 32-34.

10. *See, e.g., Due Diligence Eval. Tool for Selecting Arbitrators and Mediators,* Int'l Inst. for Conflict Prevention & Resol. (2010), *available at* http://www.cpradr.org/Portals/0/File%20a%20Case/Engagement%20Guidelines%20final.pdf (last visited Sept. 9, 2014); Energy Arbitrator's List, Int'l Centre for Disp. Resol., *available at* http://www.energyarbitratorslist.com/ealsearch/faces/eal?_adf.ctrl-state=1bae1uglv_4 (last visited Sept. 9, 2014).

11. *Compar*e AAA Commercial Arb. Rules, *supra* note 5, M-10 (for mediation only), and ICDR Dispute Resol. Procedures, *supra* note 8, art. 37, and *Comprehensive Arb. Rules & Procedures,* JAMS, R-26, Oct. 1, 2010, *available at* http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_comprehensive_arbitration_rules-2010.pdf (last visited Sept. 9, 2014) [hereinafter JAMS Comprehensive Arb. Rules], *with* Rules, Int'l Inst. For Conflict Prevention & Resol., Inc., R-20, July 1, 2013, *available at* http://www.cpradr.org/RulesCaseServices/Arbitration/AdministeredArbitration/Rules.aspx (last visited Sept. 9, 2014) [hereinafter CPR Rules], *and* ICC Rules of Arb., Int'l Chamber of Com., art. 22, Jan. 1, 2012, *available at* http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/#article_b1 (last visited Sept. 9, 2014) [hereinafter ICC Rules of Arb.]; see also CCA Best Practices Guide, *supra* note 8, at 439-40, Table 17.3.

12. *See* AAA Commercial Arb. Rules, *supra* note 5, art. R-23; CPR Rules, *supra* note 11, art. R-11; JAMS Comprehensive Arb. Rules, *supra* note 11, art. R-26(b).

13. If the arbitration is governed by the Federal Arbitration Act (FAA), the courts are split as to whether FAA Section 7 authorizes the arbitrators to issue subpoenas for discovery document production or deposition testimony, or whether Section 7 only extends to subpoenas for attendance at the evidentiary hearing. *See generally,* CCA Best Practices Guide, *supra* note 8, at 149-52. If the arbitration is governed by state arbitration law, the power of the arbitrator(s) to issue subpoenas to nonparties may vary from state to state.

14. ICDR Dispute Resol. Procedures, *supra* note 8, art. 21.10 ("10. Depositions…generally are not appropriate procedures for obtaining information in an arbitration under these Rules."); JAMS Efficiency Guidelines, *supra* note 3, at 3 ("In JAMS international arbitrations, the prevailing practice is that depositions are not

permitted."). *Compare* NYSBA Domestic Guidelines, *supra* note 3, at 13-14, *with* NYSBA International Guidelines, *supra* note 3, at 28.

15. *See*, *e.g.*, ICDR Dispute Resol. Procedures, *supra* note 8, art. 21.10 ("Unless otherwise agreed by the parties or directed by the tribunal, evidence of witnesses may be presented in the form of written statements signed by them."); JAMS Efficiency Guidelines, *supra* note 3, at 3 ("In international arbitrations, the use of written witness statements in lieu of direct testimony…is a common, broadly accepted practice.").

16. *See* NYSBA International Guidelines, *supra* note 3, at 27-28.

17. *See* NYSBA Domestic Guidelines, *supra* note 3, at 14.

18. *See* AAA Commercial Arb. Rules, *supra* note 5, R-33 ("The arbitrator may allow the filing of and make rulings upon a dispositive motion only if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case."); CPR Early Disposition Guidelines, *supra* note 3, Guideline 2.4 ("It is important to bear in mind that even if early disposition of an issue may be accomplished quickly and fairly, it nevertheless may not be appropriate if it is not likely, if granted, to result in a material reduction of the total time and cost in reaching final resolution of the case.").

Richard L. Mattiaccio is a partner in the New York office of Squire Patton Boggs (US) LLP. He has over 30 years of experience as counsel in commercial and international arbitration and in litigation in the federal and state courts of New York, and over 25 years of service as chair, panel and sole arbitrator in international and commercial cases. He serves on the American Arbitration Association (AAA), International Centre for Dispute Resolution (ICDR), International Institute for Conflict Prevention & Resolution, Inc. (CPR) and International Chamber of Commerce (ICC) arbitrator panels and is a Fellow of the College of Commercial Arbitrators (CCA). He is a member of the Executive Committee of the NYSBA Dispute Resolution Section, where he co-chairs its International Dispute Resolution (IDR) Committee and is a presenter at arbitration training programs. He is a member of the New York City Bar's International Commercial Disputes Committee (ICDC), and of the Executive Committee of the New York International Arbitration Center (NYIAC).

Models for Use of Mediation in E-Discovery

By Steven C. Bennett

Many commentators and courts suggest that cooperative approaches to e-discovery planning hold the key to lower-cost, higher-quality e-discovery processes.[1] Yet, admonitions to cooperate hardly suffice to motivate self-interested parties.[2] Some system to foster cooperation, beyond the parties themselves, appears essential.[3] One system proposed as a means to promote e-discovery cooperation involves use of mediation.[4] This article outlines an array of mediation techniques that could be used for that purpose.

I. Mediation Alternatives

The term "mediation" encompasses a broad array of processes,[5] and a broad array of techniques.[6] In general, mediation is meant to facilitate communication, promote party-created solutions, and help clarify issues—all with the assistance of a neutral third party.[7] Mediation, as a set of tools, may serve a variety of goals, and adapt to a variety of circumstances.[8] What follows is a sampling of mediation-related techniques, generally arrayed from least intrusive (and least expensive), to more formal (and thus more resource and time intensive).[9] These techniques may also be arrayed on a continuum from "facilitative" to "evaluative" in nature.[10]

A. Education

Despite the long period in which the internet, email and other technologies have become integrated into daily life, ignorance of best practices in e-discovery remains a problem for the legal profession.[11] Technology savvy mediators can provide an education function for counsel and parties, even without becoming deeply involved in a matter.[12] A court, for example, might establish a "hotline" system, with trained court staff or volunteer mediators (with e-discovery experience), available to answer basic questions about the court's rules and expectations, about available e-discovery technology, or about essential forms (such as "clawback" agreements and confidentiality orders).[13] The system might also provide information regarding court-connected mediation services.[14] A court website might also offer information.[15] A courthouse "ombudsman" might provide similar services.[16]

B. Needs Assessment

Cases vary, and so do e-discovery problems (and the capacity of parties and counsel to resolve such problems). A system of assessment (not of the merits of the dispute, or even of the relative positions of the parties regarding e-discovery matters), aimed at determining whether the parties are well-prepared to cooperate in the case,[17] and what kinds of resources would best serve the needs of the parties, might be offered as a form of "triage."[18] A mediator, for example, could help identify gaps in knowledge that, if corrected, could lead to enhanced cooperation,[19] and creative solutions.[20] Such a system might require interviews, or could (conceivably) be conducted through a written questionnaire (perhaps even an on-line system).[21] The system might also focus on helping parties identify reasonable timetables for the conduct of discovery,[22] and help identify cases with specific forms of e-discovery related case management problems.[23] The neutral might determine that no form of mediation would assist the parties in the case, and direct the parties to normal court processes.[24] As in all mediation, moreover, the needs assessment recommendation would be non-binding.[25]

C. Facilitating Discussion

A mediator who concentrates on facilitating discussion between parties,[26] as opposed to evaluating a matter, or helping parties structure a resolution, can serve an important purpose.[27] In the discovery context, merely ensuring that parties communicate about essential issues, and do so in a courteous manner, can aid the process.[28] Thus, for example, a mediator whose role in a conference of parties and counsel consists of helping schedule the conference, and ensuring a professional tone to the discussion, might require very little preparation regarding the substance of the dispute. [29] A mediator might also encourage parties to bring together their technical personnel, to address creative solutions to e-discovery problems in a case.[30]

D. Structuring Negotiation

A mediator may aid parties by bringing an agenda for discussion to the process.[31] In the e-discovery context, at the outset of a case, many basic issues (preservation of evidence, search techniques, and privilege protection, to name a few) constitute essential elements for negotiation.[32] Yet, one common phenomenon is the "drive by" Rule 26(f) conference, where counsel "meet and confer" in name only.[33] A mediator might insist on discussion of all essential topics,[34] with the aim of creating (if possible) a comprehensive e-discovery plan for the case.[35] Where the parties are otherwise agreed on the e-discovery schedule and plan, the mediator might focus on more difficult issues, such as creating a search term protocol.[36] Parties might also agree on a process for resolving future e-discovery disputes.[37]

E. Screening Motions

Litigants are generally required to certify, before bringing discovery related motions, that they have "met and conferred" in good faith regarding the motion.[38] The "meet and confer" obligation, however, may be as subject to abuse as any other element of the e-discovery process.[39] Thus, a mediator might help confirm that parties truly

have met their obligations to confer in good faith, before seeking court assistance.[40] On more complicated, longer-lasting matters, a more permanent system of referral to mediation (akin to dispute resolution boards in construction matters)[41] might be appropriate.[42] Discussions with a mediator may help sharpen the focus of the parties for presentation to the court of any unresolved issues.[43]

F. Neutral Evaluation

Traditionally, the concept of "mediation" has not involved evaluation of disputes, but rather facilitation of discussion to resolve disputes.[44] Increasingly, however, the notion of non-binding evaluations as a part of mediation[45] has taken hold.[46] The neutral evaluation process generally involves each side in litigation presenting a summary of its position, with the neutral offering an evaluation of the strengths and weaknesses of each party's case.[47] Such an evaluation may lead to resolution of the conflict, or may simply assist with case planning[48] (helping the parties understand the nature of the issues, for example).[49]

G. Mediator Facilitated Search

In some instances,[50] parties and counsel might agree to permit a mediator with substantial technology skills to conduct (or supervise) a search for responsive records.[51] The mediator's recommendations regarding production of materials to opposing parties, however, would not bind the producing party.[52] In essence, the mediator would simply come to learn more about the circumstances of the parties' data systems and records, which could improve the mediator's ability to make competent recommendations.[53] Whether this (relatively intrusive) process truly constitutes "mediation" is debatable.[54] Certainly a specific protocol for the endeavor, agreed between the parties, would be essential.[55]

II. Conclusion

Mediation constitutes a generally accepted mechanism for dispute resolution.[56] Mediation processes are regularly incorporated into court-annexed ADR systems,[57] and often chosen by parties as a means for resolving their disputes.[58] The mediation process is flexible, meant to adapt to the needs of the parties and the circumstances of the case.[59]

Courts continue to experiment with mediation forms,[60] however, and evidence on the relative effectiveness of various systems remains difficult to assess.[61] Cutting-edge systems of dispute resolution, such as online mediation,[62] offer interesting possibilities, but have not yet received attention from court administrators.[63] The systems outlined in this article, although grounded in well-recognized mediation techniques, certainly cannot be considered "tried and tested" in the e-discovery sphere.[64] The mediation process, moreover, can be abused in some instances.[65]

But judicial administrators and dispute resolution system designers must start somewhere.[66] The notion of multiple "doors" to dispute resolution is firmly embedded in our legal culture.[67] Courts can and should consider ways to open doors to expand the use of mediation-related techniques into the e-discovery process. Court-connected pilot projects and study programs, already under way in many jurisdictions,[68] should be encouraged in this area.[69]

Endnotes

1. *See* Jay E. Grenig & Jeffrey S. Kinsler, *Handbook Of Federal Civil Disclosure: E-Discovery And Records*, § 4.19 (2013) (noting that cooperative approaches represent a "significant attempt to do something about the rapidly escalating costs of civil litigation"); Carole Basri & Mary Mack, *eDiscovery For Corporate Counsel*, Foreword (2013) (noting a "paradigm shift" in e-discovery process, toward cooperation); Daniel B. Garrie & Edwin A. Machuca, *E-Discovery Mediation & The Art Of Keyword Search*, 13 Cardozo J. Conflict Resol. 467, 472 (2012) (effective e-discovery requires that "attorneys share their understanding of the case and the technology with opposing counsel"); *The Sedona Conference Commentary on Achieving Quality in the E-Discovery Process*, 10 Sedona Conf. J. 299 (2009); *The Sedona Conference, The Case For Cooperation*, 10 Sedona Conf. J. 339, 361 (Supp. 2009), *available at* https://thesedonaconference.org/node/921 (last visited Aug. 28, 2014) (prisoner's dilemma may break down where "actors involved must repeatedly face the same or similar decisions" and each side "must evaluate the risk of the other side responding with similar conduct during a subsequent 'round'").
2. *See* Hon. David J. Waxse, *Cooperation—What Is It And Why Do It?*, 18 Richmond J. L. & Tech. 8, P15 (2012) (despite Sedona Cooperation Proclamation and "numerous [judicial] opinions," it appears that "cooperation is not being used enough"); Hon. Nora Barry Fischer & Richard N. Lettieri, *Creating The Criteria And The Process For Selection Of E-Discovery Special Masters In Federal Court*, 58:2 The Fed. Law. 36, 37 (2011), *available at* http://www.fedbar.org/Federal-Lawyer-Magazine/2011/February/Features/featurearticle2-feb11.aspx?FT=.pdf (last visited Aug. 28, 2014) (where not addressed early, ESI issues "often come up later in the proceedings, causing unnecessary delays and expensive e-discovery motions"); Kathleen P. Browe, *A Critique Of The Civility Movement: Why Rambo Will Not Go Away*, 77 Marq. L. Rev. 751, 756 (1994) (lack of cooperation "backs up already overloaded trial dockets," affecting the "efficiency of the entire judicial process," and leading to "a decline in public respect for the legal profession").
3. *See generally*, Hon. Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. Rev. 635, 638 (1989) (judges can do little about discovery abuse when parties control the discovery process themselves); John K. Setear, *The Barrister And The Bomb: The Dynamics Of Cooperation, Nuclear Deterrence, And Discovery Abuse*, 69 B.U. L. Rev. 569 (1989).
4. *See generally*, Steven C. Bennett, *Mediation As A Means To Improve Cooperation in E-Discovery*, 24 Alb. L.J. of Sci. & Tech. 233 (2014).
5. *See* Kyle Beardsley, *Using The Right Tool For The Job: Mediator Leverage And Conflict Resolution*, 2 Penn St. J. of L. & Int'l Aff. 57, 57-58 (2013) (noting that mediation may include functions such as "mere hosting of talks, substantive participation in the negotiation process, shuttle diplomacy, or heavy-handed involvement"; mediators must "tailor the level of leverage" applied to the "needs of the situation"); *see also* Thomas Stipanowich & J. Ryan Lamare, *Living With 'ADR': Evolving Perceptions and Use Of Mediation, Arbitration and Conflict Management In Fortune 1,000 Corporations*, Harv. Negot. L. Rev. (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2221471 (last visited Aug.

28, 2014) (noting "diverse array" of dispute resolution options, including mediation, mini-trial, fact-finding, court-annexed non-binding arbitration, and early neutral evaluation); Peter Salem, *The Emergence Of Triage In Family Court Services: The Beginning Of The End For Mandatory Mediation?*, 47 FAM. CT. REV. 371, 371 (2009) (noting "dozens" of dispute resolution processes, including psycho-educational programs, collaborative law, mediation, judicially moderated settlement conferences, and high conflict interventions); Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123, 128 (2009) (suggesting use of multiple processes for dispute resolution, with ability of parties to "loop" back or forward, as necessary, to different systems).

6. *See* Susan Nauss Exon, *The Effects that Mediator Styles Impose on Neutrality and Impartiality Requirements of Mediation*, 42 U.S.F. L. REV. 577, 578 (2008) (most agree that mediation involves "a neutral and impartial third party who assists others in resolving a dispute[,]" but mediation involves "varying styles, techniques, and orientations"); Kyle C. Beardsley et al., *Mediation Style and Crisis Outcomes*, 50 J. CONFLICT RESOL. 58 (2006) (noting facilitation, formulation and manipulation as among alternative "styles" of mediator activity).

7. *See* Am. Bar Ass'n, *Model Standards of Conduct for Mediators*, Preamble (2005), *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf (last visited Aug. 28, 2014) ("[m]ediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties"; "[m]ediation serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements").

8. *See* Smith, *supra* note 5, at 127-28 (design of system depends on "goals," which may include efficiency, fairness, satisfaction and other factors); Cathy A. Constantino & Christina Sickles-Merchant, *Designing Conflict Management Systems, A Guide to Creating Productive and Healthy Organizations* (1996) (system design requires consideration of whether ADR is appropriate, choice of process appropriate to particular problem, and making sure participants have necessary knowledge and skill to use ADR system).

9. This is not to suggest that the spectrum of processes necessarily must flow from "easiest" to "hardest" cases. Simple dispute resolution techniques often work well in some of the most complicated disputes, and the reverse is also true. *See* William L. Ury et al., *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* (1988) (ease of dispute resolution depends on focus on interests, or rights, or power—in ascending order—to determine degree of difficulty in resolving dispute).

10. *See* Dwight Golann, *Variations in Mediation: How—and Why—Legal Mediators Change Styles in the Course of a Case*, 2000 J. OF DISP. RESOL. 41, 44-45 (2000) (presenting "grid" of mediation practices, from facilitative to evaluative); *see also* Leonard L. Riskin, *Decisionmaking In Mediation: The New Old Grid And The New New Grid System*, 79 NOTRE DAME L. REV. 1 (2003) (noting various types of mediation, including evaluative, facilitative and transformative systems); Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996), *available at* http://www.mediate.com/pdf/riskinL2_Cfm.pdf (last visited Aug. 28, 2014).

11. *See* Mikki Tomlinson, *Attacking eDiscovery Ignorance In 2013* (Nov. 29, 2012), *available at* www.ediscoveryjournal.com (suggesting that poor cooperation efforts in e-discovery "oftentimes boils down to eDiscovery ignorance"); John M. Barkett, *The 7th Circuit E-Discovery Pilot Project: What We Might Learn and Why It Matters to Every Litigant in America*, 2011 A.B.A. SEC. OF LITIG. NEWS 23, *available at* http://apps.americanbar.org/litigation/litigationnews/civil_procedure/docs/barkett.december11.pdf (last visited Aug. 28, 2014) ("Without better education, e-discovery may not be managed fairly or frugally, and certainly not quickly.").

12. *See* Patricia Kutza, *New San Francisco Forum Promotes E-Discovery Mediation* (Oct. 23, 2013), *available at* http://autonomy.corporatecounsel.law.com/new-san-francisco-forum-promotes-e-discovery-mediation/ (last visited Aug. 28, 2014) (mediators can serve as "an antidote for the lack of e-discovery training in law schools"); Daniel B. Garrie & Salvatore Scibetta, *We Need Mediation In E-Discovery* (June 5, 2013), *available at* http://www.law360.com/articles/445869/we-need-mediation-in-e-discovery (last visited Aug. 28, 2014) (mediator serves as "*listener and translator*"; to "*translate the technical underpinnings of each party's systems into actionable discovery efforts that both parties can comprehend*"); Garrie, *supra* note 1, at 469 ("technically proficient" neutral may be required where parties and courts are unfamiliar with "latest methods" of searching for and processing electronic information); David Cohen & Claire Covington, *E-Discovery: Liaisons are key to discovery success* (Aug. 7, 2012), *available at* http://www.insidecounsel.com/2012/08/07/e-discovery-liaisons-are-key-to-discovery-success (last visited Aug. 28, 2014) (subject matter experts necessary "given that most lawyers and judges have little training in the technical issues surrounding ESI"); Fischer, *supra* note 2, at 36 (Rule 26(f) conferences have "generally remained ineffective" where counsel "lack the technical skill and experience necessary to facilitate effective resolution" of ESI issues); *see also* Richard N. Lettieri, *What is E-Mediation, and Why Might I Want To Recommend It to My Client?* (Sept. 2010), *available at* http://lettierilaw.com/documents/eMediationSeptember-2010-Newsletter.pdf (last visited Aug. 28, 2014) (counsel "unfamiliar with ESI" may benefit from use of mediator).

13. *See* Robert B. Yegge, *Divorce Litigants Without Lawyers*, 33 JUDGES' J. 8, 13 (1994) (telephone hotline system can be used on "as-needed" basis to provide information not available from workshops and other public education). Similar systems are often set up as ethics hotlines. *See* Bruce A. Green, *Bar Association Ethics Committees: Are They Broken?*, 30 HOFSTRA L. REV. 731, 737 (2002) (noting bar ethics committees that "field questions over the telephone, including, in some cases, via an ethics hotline" (internal quotation marks omitted)); *see also* Kimberlee K. Kovach, *New Wine Requires New Wineskins: Transforming Lawyer Ethics For Effective Representation In A Non-Adversarial Approach To Problem-Solving: Mediation*, 28 FORDHAM URB. L.J. 935, 950 (2001) (noting that "nearly every bar association has a committee or program focused on the civility of lawyers").

14. *See* Jacqueline M. Nolan-Haley, *Lawyers, Clients, And Mediation*, 73 NOTRE DAME L. REV. 1369, 1373 (1998) ("Many lawyers simply lack a basic understanding of the mediation process, the premises and values which drive it, and the creative outcomes which are possible.").

15. *See* Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is? "The Problem" In Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863 (2008) (noting system where review of ADR materials, together with certification of lawyer review with clients, is mandatory).

16. Traditionally in European systems, ombudsman programs have focused on government agencies, rather than courts. *See* Diana Douse, *Mediation and other alternatives to court* (June 6, 2013), *available at* www.parliament.uk/briefing-papers/SN04176.pdf (last visited Aug. 28, 2014) (noting use of ombudsman as "independent and impartial means of resolving certain disputes outside the courts"; the ombudsman may deal with "complaints" regarding "public bodies and private sector services"); Smith, *supra* note 5, at 169 (ombudsman system involves "[a] third party within an organization who deals with conflicts on a confidential basis and gives disputants information on how to resolve the problem at issue"). Courts in the U.S., however, have begun to experiment with such programs. *See* Michele Bertran, *Judiciary Ombudsman: Solving Problems In The Courts*, 29 FORDHAM URB. L.J. 2099, 2108 (2002) (New Jersey program offers public

information, including "educational literature, videos, and a website," and citizen assistance, including "investigation and resolution of complaints"); Yegge, *supra* note 13, at 10 (noting use of courthouse ombudsmen, who "distribute self-help form packets," and conduct workshops to give instruction to groups of litigants). The mediation functions described here generally fit the concept of an ombudsman. *See* Martin A. Frey, *Alternative Methods Of Dispute Resolution* 5, 12 (2003) ("third party" assistance in dispute resolution may include "ombuds" system; such a system can help parties take "corrective action" before problems become "much more difficult to address"); Karl A. Slaikeu & Ralph H. Hasson, *Controlling The Costs Of Conflict: How To Design A System For Your Organization* 94 (1998) (ombudsman provides a "neutral, confidential, readily available resource (usually available in person, by telephone, email, or some other direct means) to assist parties in self-help, troubleshooting (via coaching), informal shuttle diplomacy, and sometimes convening of the parties to help them select from options such as informal mediation or other higher resources"); Shirley A. Wiegand, *A Just and Lasting Peace: Supplanting Mediation with the Ombuds Model*, 12 Ohio St. J. on Disp. Resol. 95 (1996) (ombud system embodies mediation, with additional capabilities). As a neutral third party, moreover, an ombudsman could help reinforce a culture of civility within the e-discovery process. *Cf.* Bertran, *supra* note 16, at 2103 (ombudsman investigations may include questions of "discourteous behavior or incivility").

17. *See* John M. Lande, *The Movement Toward Early Case Handling in Courts and Private Dispute Resolution*, 24 Ohio St. J. on Disp. Resol. 81, 82 (2008) ("parties may not feel ready to settle, or even work together, right away"); Phillip M. Armstrong, *Why We Still Litigate*, 8 Pepp. Disp. Resol. L.J. 379, 380-81 (2008) (noting that culture, ego, emotion and other barriers may prevent parties from settling disputes outside court proceedings); Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 Ohio St. J. on Disp. Resol. 831, 838 (1998) (reviewing factors that may inhibit parties from using mediation early in litigation process); Robert A. Baruch Bush, *"What Do We Need a Mediator For?": Mediation's "Value-Added" for Negotiators*, 12 Ohio St. J. on Disp. Resol. 1, 6 (1996) (noting barriers to negotiation that mediation can help manage).

18. *See* Salem, *supra* note 5, at 372, 380 (suggesting use of "triage," where "most appropriate" form of ADR service can be identified "on the front end" of a case, to reduce burden, provide more effective services, and more efficiently use scarce court resources).

19. *See* Ralph C. Losey, *Lawyers Behaving Badly: Understanding Unprofessional Conduct in e-Discovery*, 60 Mercer L. Rev. 983, 1002 (2009) (discovery abuses often happen because "attorneys do not understand the complex technologies involved," and "acting out of ignorance and fear, they do not cooperate").

20. *See* Mike Hamilton, *E-Discovery Court Pilot Programs: E-Discovery Templates That Legal Teams Should Utilize* (Feb. 23, 2012), *available at* http://www.exterro.com/e-discovery-beat/2012/02/23/e-discovery-court-pilot-programs-e-discovery-templates-that-legal-teams-should-utilize/ (last visited Aug. 28, 2014) (neutral can "provide the necessary skill and expertise to help expedite the e-discovery process by quickly identifying practical and fair solutions"); Garrie, *supra* note 1, at 474 (neutral may assist where parties have failed to "secur[e] legal counsel with the requisite technological acumen").

21. *See* Salem, *supra* note 5, at 380 (triage system would involve initial screening or interviews by neutral who could help identify the service that will "best meet the needs" of the parties); Bruce L. Mann, *Smoothing Some Wrinkles in Online Dispute Resolution*, 17 Int'l J. of L. & Info. Tech. 83 (2008), *available at* http://www.researchgate.net/publication/31224908_Smoothing_Some_Wrinkles_in_Online_Dispute_Resolution (last visited Aug. 28, 2014) (introducing concept of "expert-peer online assessment" of disputes as means to resolve conflicts).

22. *See* Stephen F. Gates, *Ten Essential Elements of an Effective Dispute Resolution Program*, 8 Pepp. Disp. Resol. L.J. 397, 398 (2008) ("Much of the cost of litigation is a function of cycle time from case inception to final resolution, and all steps in the management process should be focused on reducing this cycle time.").

23. *See* Lande, *supra* note 17, at 91 (noting use of systems for "early screening of cases" to provide "early warning of potential case management problems, even before developing a scheduling order" (internal quotation marks omitted)). Such a system might also operate through a "differential" case management system, helping to designate cases as "expedited, standard, [or] complex," for example. *See id.* at 94; *see also* Frank E. A. Sander & Lukasz Rozdeiczer, *Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach*, 11 Harv. Negot. L. Rev. 1 (2006) (proposing framework for matching cases to ADR processes); Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 Negot. J. 49 (1994).

24. *See* William J. McLean, *Beware Masters In E-Discovery* (Aug. 21, 2008), *available at* http://www.law.com/jsp/article.jsp?id=1202423953864 (last visited Aug. 28, 2014) (noting potential circumstances where "no amount of cajoling could stop the tactical flood of discovery motions"); *see also FAQ: How do I know when to use e-Mediation versus a special master?* (2011), *available at* http://www.acesin.com/index.php?q=node/115 (last visited Aug. 7 2014) ("if there is such [a] breakdown in communication that the parties cannot even agree that the sky is blue, then more likely the parties need a special master to act as referee and 'make the calls'").

25. *See* Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 Harv. Negot. L. Rev. 1, 16 (2001) (noting importance of "self-determination" as central element of mediation).

26. *See* Susan Nauss Exon, *The Effects that Mediator Styles Impose on Neutrality and Impartiality Requirements of Mediation*, 42 U.S.F. L. Rev. 577, 591 (2008) (facilitator "encourages party attendance, facilitates communication, poses questions to uncover the parties' underlying needs and interests, helps educate the parties by assisting them to understand the other's needs and interests, and otherwise attempts to provide a comfortable forum in which the parties can develop their own creative solutions to a problem").

27. *See* Fischer, *supra* note 2, at 37 (suggesting use of "facilitator" to lead discussions on ESI issues, where attorneys are unable or unwilling to proceed with e-discovery conference).

28. *See* Daniel B. Garrie, *Redefining the Discovery Terrain: The Need For Mediation In E-Discovery, Part III* (Dec. 9, 2013), *available at* http://www.lawandforensics.com/redefining-discovery-terrain-need-mediation-e-discovery-3/ (last visited Aug. 28, 2014) (function of mediator to "facilitate cooperation and open dialogue"); Kutza, *supra* note 12 (mediators can "primarily work on getting the dialogue going," versus "shuttle diplomacy" of conventional settlement negotiations (quoting Michael Carbone)).

29. *See* Allison O. Skinner, *The Role of Mediation for ESI Disputes*, 70:6 The Ala. Law. at 425, 426 (Nov. 2009), *available at* http://smu-ecommerce.gardere.com/allison%20skinner%20role%20of%20mediation.pdf (last visited Aug. 28, 2014) ("Often, discovery battles can result in an exchange of potentially inflammatory correspondence that may be used as an exhibit to a motion to compel or motion for protective order…. Mediating the e-discovery dispute allows the litigants to make proposals confidentially."); Ron Kilgard, *Discovery Masters: When They Help—And When They Don't*, 40 AZ Att'y 30, 34 (2004) ("the mere fact of having to discuss these issues in person with the master present, and not in angry faxes and e-mails written late at night, has a taming effect on the lawyers"); *see also* Lande, *supra* note 17, at 92 (facilitator may help with "reduction of partisan psychology; prevention or reduction of conflict escalation; and creation of a mandatory event that overcomes logistical barriers to

negotiation"); Angela Garcia, *Dispute Resolution Without Disputing: How The Interactional Organization Of Mediation Hearings Minimizes Argument*, 56 Am. Soc. Rev. 818 (1991) (noting that mediation "constrains the presentation of accusations and denials" in negotiation).

30. *See* Bennett, *supra* note 4, at n.47 ("suggesting that, 'if you can get the IT people from both parties together in a room, they will often solve problems that the lawyers thought were insurmountable'" (quoting Kenneth J. Withers, *E-Discovery In Commercial Litigation: Finding A Way Out Of Purgatory*, 2 J. of Ct. Innov. 13, 22 (2009)); Peter S. Vogel, *E-Neutrals, e-mediation and special masters: an introductory guide* (July 2, 2012), *available at* http://www.lexology.com/library/detail.aspx?g=e5fcfc29-86b6-40df-92c0-9ef088102ecc (last visited Aug. 28, 2014) (suggesting that the mediator require the parties to indicate who will attend mediation sessions to provide "technical support" concerning ESI issues). The mediator may also remind parties that all mediation discussions are confidential. *See* Allison Skinner & Peter Vogel, *E-Mediation Can Simplify E-Discovery Disputes* (Sept. 23, 2013), *available at* http://www.lawtechnologynews.com/id=1202620012101? (last visited Aug. 28, 2014) (mediators may work with IT personnel to educate them about their role in the e-discovery process, and use "confidential caucus" to communicate ideas, without an inquiry being "misinterpreted as a weakness"); Mary Mack, *Litigation Prenups, E-Discovery ADR And The Campaign For Proportionality* (May 3, 2010), *available at* http://www.metrocorpcounsel.com/articles/12510/mary-mack-litigation-prenups-e-discovery-adr-and-campaign-proportionality (last visited Aug. 28, 2014):

> There is a great advantage in having the "meet and confer" take place under the cloak of mediation. It keeps the discussion and the written offers to compromise confidential. Mediation also provides a cloak of confidentiality for the IT people. This makes it possible for the IT people to talk more openly because they are not on the record.

31. One very simple task for a mediator would consist of identifying immediate areas of agreement between the parties. *See* Allison O. Skinner, *How To Prepare An E-Mediation Statement For Resolving E-Discovery Disputes* (2011), *available at* http://smu-ecommerce.gardere.com/allison%20skinner%20preparing%20for%20e-mediation%20discovery.pdf (last visited Aug. 28, 2014) (using pre-mediation submissions, mediator can identify "areas of mutuality that can be readily disposed of[,]" so that parties may thereafter focus on solutions to "more challenging issues"). Indeed, online systems have been developed to facilitate these kinds of basic agreements. *See* Noam Ebner et al., *ODR In North America*, in Mohamed S. Abdel Wahab et al., Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution (2012), *available at* http://www.mediate.com/articles/ODRTheoryandPractice19.cfm (last visited Aug. 28, 2014) (describing online system where parties "inform the platform of their real preferences and priorities, beyond what they are willing to share with the opposite party," where software can "conduct an analysis of the agreement to see if it maximizes each party's gains"). One can imagine adaptation of such processes to the e-discovery field.

32. *See* Robert A. Cole, *E-Discovery increases possibility of mediated resolutions* (Oct. 3, 2012), *available at* http://www.uww-adr.com/zgraph-content/uploads/2012/10/Bob-Cole.pdf (last visited Aug. 28, 2014) (agenda for conducting e-discovery mediation may include crafting agreements on preservation and collection protocols, including sampling and search techniques).

33. *See* Craig Ball, *Musings on Meet and Confer, It's More Important for Lawyers to Ask the Right Questions than Know the Right Answers* (2007), *available at* http://www.craigball.com/Musings_on_Meet_and_Confer.pdf (last visited Aug. 28, 2014) (noting phenomenon of "drive-by event with no substantive exchange of information"); Michael Collyard, *E-discovery: Avoiding drive by "meet & confers"* (Sept. 13, 2011), *available at* http://www.insidecounsel.com/2011/09/13/e-discovery-avoiding-drive-by-meet-confers (last visited Aug. 28, 2014); *see also* Emery G. Lee III & Thomas E. Willging, *Federal Judicial Center National, Case-Based Civil Rules Survey: Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules* (Federal Judicial Center Oct. 2009) (FJC study indicates that only half of attorney respondents included discussion of ESI in Rule 26(f) conferences, and only one in five court-ordered discovery plans included provisions relating to ESI).

34. *See* Peter S. Vogel, *The Role of e-Mediation in Resolving ESI Disputes in Federal Court, Interview with Allison Skinner* (Oct. 29, 2012), *available at* http://www.disputingblog.com/guest-post-the-role-of-e-mediation-in-resolving-esi-disputes-in-federal-court-interview-with-allison-skinner/ (last visited Aug. 28, 2014) (noting that "most meet and confers are ineffective"; mediator, may act with "court sanctioned checklist" of issues to discuss); Ronald J. Hedges, *The Sedona Conference Points The Way Toward Control Of The Costs And Burden Of E-Discovery*, 59 The Fed. Law. 46, 47-48 (2012) (suggesting use of mediators and court-appointed experts to assist in "good faith" process of "meet and confer"); Zachary Parkins, *Electronic Discovery: Why The Appointment Of Special Masters In All Large Electronic Discovery Disputes Is Vital To The Process Of American Civil Justice* (2011), *available at* http://www.americanjournalofmediation.com/docs/Electronic%20Discover%20-%20The%20Appointment%20of%20Special%20Masters.pdf (last visited Aug. 28, 2014) (suggesting role for mediator where parties do not prepare for Rule 26(f) conference "in an effective way").

35. *See* Allison O. Skinner, *Alternative Dispute Resolution Expands Into Pre-Trial Practice: An Introduction To The Role Of E-Neutrals*, 13 Cardozo J. Conflict Resol. 113, 125 (2011) (goal of mediation is to create a mediated e-discovery plan); *see also* Skinner, *supra* note 30 (typically, litigants would agree to e-mediation at outset of case, to develop a discovery plan; with the mediator thereafter available to help "break any impasse that may arise"); Robert Hilson, *Neutrals may ease anxiety over Florida's new e-discovery rules, says mediator Lawrence Kolin* (Apr. 26, 2012), *available at* http://www.aceds.org/neutrals-may-ease-anxiety-over-floridas-new-e-discovery-rules-says-mediator-lawrence-kolin/ (last visited Aug. 28, 2014) (neutrals can help "shape discovery plans" (quoting Lawrence Kolin, mediator)); Peter S. Vogel, *Use E-Mediation And Special Masters In E-Discovery Matters*, 26 Tex. Law. 15 (2010), ("E-mediation is most effective when initiated at the beginning of litigation, at the outset of discovery.…[I]f the parties can agree to the initial [mediated e-discovery plan], this will reduce the number of disputes presented to the trial court.").

36. *See* Daniel B. Garrie & Siddartha Rao, *Using Technology Experts For Electronic Discovery*, 38 Litig. 13 (2012) (mediator can "expedite" agreement on search terms, and avoid potential that parties might later "complain" about terms used).

37. *See* Cole, *supra* note 32 (parties may "[c]reate a method for resolving any disputes that may arise over the mediated plan").

38. *See* Fed. R. Civ. P. 26(c)(1) (requiring party moving for protective order to certify "good faith" effort to confer "in an effort to resolve the dispute without court action"); Fed. R. Civ. P. 37(a) (requiring party moving to compel to certify "good faith" effort to confer "in an effort to obtain [disclosure] without court action").

39. *See* Nicola Faith Sharpe, *Corporate Cooperation Through Cost-Sharing*, 16 Mich. Telecomm. & Tech. L. Rev. 109, 134-35 (2009) (suggesting that "meet-and-confer requirement will simply play out as the rest of the game does[,]" unless "rules that support cooperation as a favorable strategy" include "penalties" that counter a "strategy of abuse").

40. *See* Skinner, *supra* note 35, at 128 ("[A]n e-mediation conducted in good faith demonstrates [that] the parties have met their Rule 26 obligations."); Vogel, *supra* note 34 (mediator could "certify to the court that the parties met and conferred in good faith on the enumerated ESI issues"); *see also* Mack, *supra* note 30 (suggesting that court could "direct all e-discovery disputes to e-mediation before involving the judge," which would permit a party to "explain in a setting without the judge why the issue arose in the first place and what was being done to rectify it").

41. A dispute review board (which could be a single individual) would aim to identify e-discovery problems as they arise, and resolve them before they escalate. *See* Peter Vogel, *Use eMediation To Save Time And Money*, 29 Tex. Law. 10 (2013), (suggesting that use of mediation "as early in the case as possible" permits mediator to "address eDiscovery matters when they first arise"). Construction-related dispute review boards serve similar purposes. *See* Ming-Lee Chong & Heap-Yih Chong, *Dispute Review Board: Concept and introduction to develeoping[sic] countries*, 2 Interscience Mgmt. Rev. 6, 6-7 (2010), *available at* http://www.interscience.in/IMR_Vo2_No1/Paper_2.pdf (last visited Aug. 28, 2014) (dispute resolution boards, first conceived in the 1950s, have been implemented in virtually all construction areas); *id.* at 7 (board typically created at outset of project, with periodic status meetings and site visits; if conflicts arise, the board can provide "informal" opinions to help resolve disputes); Smith, *supra* note 5, at 167 (2009) (dispute resolution board generally formed at start of construction project, and "meets regularly to follow work progress and to provide guidance to the parties on differences before they become disputes"). The purpose of a dispute review board is to "create an atmosphere of trust and cooperation," with the aim of preventing disputes from escalating. James Denning, *More Than An Underground Success*, 63 Civ. Eng'g 42 (1993); *see also* Colleen A. Libbey, *Working Together While "Waltzing in a Mine Field": Successful Government Construction Contract Dispute Resolution with Partnering and Dispute Review Boards*, 15 Ohio St. J. on Disp. Resol. 825 (2000); Kathleen M. J. Harmon, *Effectiveness of Dispute Review Boards*, 129 J. Constr. Eng'g & Mgmt. 674 (2003), *available at* http://www.daps.org.au/wp-content/uploads/2011/11/Harmon-Effectiveness-of-DRB.pdf (last visited Aug. 28, 2014) (statistics suggesting high levels of success with dispute review boards, resolving disputes before project completion).

42. *See* Skinner, *supra* note 35, at 127 (2011) (parties may use mediator on "issue-by-issue" basis, "as needed," where mediator is "familiar with pre-trial activities" in the case and able to address specific issues as they arise).

43. *See* Hon. W. Royal Furgeson, Jr. et al., *E-Discovery And The Use Of Special Masters* 13 (Jan. 20, 2011), *available at* http://www.karlbayer.com/pdf/publications/2011-01-20_KarlBayer_E-Discovery-and-the-Use-of-Special-Masters.pdf (last visited Aug. 28, 2014) (even if not all disputes are resolved, mediation process "provides parties with a better understanding of the key disputes which must be presented to the court"); Skinner, *supra* note 29 (even if not all conflicts are resolved, mediation permits parties to "illuminate the key disputes to be presented to the court," without "inflammatory" communications); Losey, *supra* note 19, at 997 (cooperation means "refinement of disputes and avoidance when possible"; some discovery disputes "may still arise," but "the issues presented for adjudication will be much more focused and refined").

44. *See* Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 Fla. St. U. L. Rev. 937 (1997) (analyzing why evaluations do not comport with mediator's essential role); Kimberlee K. Kovach & Lela P. Love, *Evaluative Mediation Is An Oxymoron*, 14 Alternatives to High Cost Litig. 31 (1996).

45. Some commentators suggest that some degree of evaluation is inherent in the mediation process. *See* Ellen A. Waldman, *The Evaluative-Facilitative Debate In Mediation: Applying The Lens Of Therapeutic Jurisprudence*, 82 Marq. L. Rev. 155, 157-58 (1998) ("[M]uch of what goes by the name of mediation today involves some evaluative activity by the mediator. To construct a definition of mediation that excludes most of what the practitioner and lay communities understand to be mediation would spawn needless confusion."); Jeffrey W. Stempel, *Identifying Real Dichotomies Underlying the False Dichotomy: Twenty-First Century Mediation in an Eclectic Regime*, 2000 J. Disp. Resol. 371, 376-77 (2000) (noting "continuum," from facilitative to evaluative, for forms of mediation, based on "key determinants" of needs of parties, based on their past and current relations, and other factors).

46. *See* Stipanowich, *supra* note 5 (noting that, in "lawyered" cases, mode of mediation where "sooner or later, there is some kind of evaluation by a mediator with [a] background as a legal advocate or judge—predominates"); Benjamin F. Tennille et al., *Getting to Yes in Specialized Courts: The Unique Role of ADR in Business Court Cases*, 11 Pepp. Disp. Resol. L.J. 35, 48 (2010) (mediation may combine "evaluative and facilitative practices to get the best results"); Robert B. Moberly, *Mediator Gag Rules: Is It Ethical for Mediators to Evaluate or Advise?*, 38 S. Tex. L. Rev. 669, 675 (1997) (suggesting that "mediator evaluation can assist the parties in their self-determination efforts").

47. *See* Garrie, *supra* note 28 (mediator may help "educate each party" about the "reality" of their demands); Smith, *supra* note 5, at 166 (neutral case evaluation involves lawyer who "provides an advisory opinion to the parties as to their respective case strengths, weaknesses, and value"); Brian Jarren, *The Future of Mediation: A Sociological Perspective*, 2009 J. Disp. Resol. 49, 50 (2009) (mediator can serve as "agent of reality" when parties reach impasse); Frey, *supra* note 16, at 12 (neutral evaluation "provides the parties and their attorneys with the opportunity to visualize the case from a third party's perspective"; by having "preview of what might happen," parties achieve a "clearer understanding" of settlement issues).

48. *See* Gates, *supra* note 22, at 400 (evaluator may be "very helpful in eliminating the 'emotional attachment' that a party may develop in its case and lead to serious negotiations"); Julie MacFarlane, *Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation*, 2002 J. Disp. Resol. 241, 265-66 (2002) (mediator may provide parties with "reality check," useful in negotiation); *see also* Lande, *supra* note 17, at 99; Wayne D. Brazil, *Early Neutral Evaluation or Mediation? When Might ENE Deliver More Value?*, 14 Disp. Resol. Mag. 10 (2007), *available at* http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1164&context=facpubs&sei-redir=1&referer=http%3A%2F%2Fwww.bing.com%2Fsearch%3Fq%3DEarly%2520Neutral%2520Evaluation%2520Or%2520Mediation%253F%2520When%2520Might%2520ENE%2520Deliver%2520More%2520Value%253F%26pc%3Dcosp%26ptag%3DA01EC74C9980D4C0F8BF%26form%3DCONBDF%26conlogo%3DCT3210127#search=%22Early%20Neutral%20Evaluation%20Or%20Mediation%3F%20When%20Might%20ENE%20Deliver%20More%20Value%3F%22 (last visited Aug. 28, 2014).

49. *See* Riskin, *supra* note 15, n.44 (noting that, in some forms of mediation, it is "common" to have a separate stage where the mediator conducts a "conflict analysis," and reports to the parties "what the conflict is" (internal quotation marks omitted)).

50. *See* Garrie, *supra* note 36 (suggesting that, in some cases, "[c]ooperative efforts and the expeditious selection of keywords are hampered" by "adversarial zeal" of attorneys).

51. *See id.* (mediator may conduct search, or may simply "ensure that appropriate documents are produced at a reasonable price respective to the underlying issue"); Marian Riedy et al., *Mediated Investigative E-Discovery*, 2010 Fed. Cts. L. Rev. 79, 91 (2010) (outlining process for neutral with skills of "trained digital investigator" to "search and retrieve relevant information," in a manner similar to an "in-house expert," but with both parties sharing the expense).

52. *See* Riedy, *supra* note 51, at 98-99 (system proposed would prevent mediator from producing information if party does not agree to produce).

53. *Id.* at 90 (suggesting that "standard" mediation process does not suffice, "because the mediator is only aware of the information the parties voluntarily disclose").

54. *See* Skinner, *supra* note 35, at 128 n.69 (rejecting notion that "mediated investigative e-discovery" is actual mediation, given that mediator may lack neutrality after conducting investigation).

55. *See* Nolan-Haley, *supra* note 14, at 1371 ("[Mediation] is an informal process based on principles of individual sovereignty and self-determination.").

56. *See* Stipanowich, *supra* note 5 (in survey, 87% of respondents report some use of mediation); Jennifer Reynolds, *The Lawyer With The ADR Tattoo*, 14 CARDOZO J. CONFLICT RESOL. 395, 397 (2013) ("even the most traditional lawyers use ADR techniques and processes all the time, from client counseling to negotiation to mediation to arbitration"); Richard S. Weil, *Mediation in a Litigation Culture: The Surprising Growth of Mediation in New York*, 17 DISP. RESOL. MAG. 8, 9 (2011), *available at* http://weilmediation.com/PDF/NewsABA.pdf (last visited Aug. 28, 2014) (in survey of litigators, 90% expressed a positive view of mediation).

57. *See* Roselle L. Wissler, *Court-Connected Settlement Procedures: Mediation and Judicial Settlement Conferences*, 26 OHIO ST. J. ON DISP. RESOL. 271, 272 (2011) (noting that judicial settlement conferences and court-connected mediation have become "commonplace" parts of court systems); Carrie Menkel-Meadow, *Ethics In ADR: The Many "Cs" Of Professional Responsibility And Dispute Resolution*, 28 FORDHAM URB. L.J. 979, 990 (2001) ("Virtually every state and federal court requires some form of ADR at least to be considered by the lawyers in a litigation matter, and, increasingly, transactions and contracts contain ADR clauses.").

58. *See* Stipanowich, *supra* note 5 (noting extensive use of mediation in commercial, employment and personal injury disputes); Thomas J. Stipanowich, *ADR And The "Vanishing Trial": The Growth And Impact Of "Alternative Dispute Resolution*," 1 J. EMPIRICAL LEGAL STUD. 843, 848-49 (2004) ("By far the predominant process choice [in ADR] is mediation, with its much-touted potential benefits of flexibility, party control, confidentiality, relatively low cost, and minor risk.").

59. *See* Simeon H. Baum, *Mediation and Discovery*, in DANIEL B. GARRIE & YOAV M. GRIVER, DISPUTE RESOLUTION AND E-DISCOVERY § 3.1 at 51 (2012) (unique features of mediation include "freedom and creativity that infuses" the process).

60. *See* Jarren, *supra* note 47, at 64 (courts still "experimenting" with mediation as an aspect of case management).

61. *See* Michael Heise, *Why ADR Programs Aren't More Appealing: An Empirical Perspective*, 7 J. EMPIRICAL LEGAL STUD. 64 (2010) (noting "mixed" evidence on effectiveness of ADR programs); *see also* Baum, *supra* note 59, at § 3.5 at 72 (2012) ("Mediation is no panacea.").

62. *See* Mann, *supra* note 21, at 89 (suggesting that online dispute resolution processes "can play various roles in consensus building"); Ethan Katsh, *Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace* (2006), *available at* http://www.lex-electronica.org/articles/v10-3/katsh.pdf (last visited Aug. 28, 2014) (describing online system that allows software to "clarify and highlight both the parties' disagreements and their desired solutions[,]" suggesting that system can help by "assisting the parties to identify common interests"); Joseph W. Goodman, *The Pros and Cons of Online Dispute Resolution: An Assessment Of Cyber-Mediation Websites*, 2003 DUKE L. & TECH. REV. 4 (2003) (noting potential for use of "traditional" dispute resolution mechanisms, supplemented by online technologies, which may include "fully automated" systems, or systems that include a human neutral).

63. *See* Ebner, *supra* note 31, at 454 (no court-annexed online dispute resolution systems currently); *see also* Julio Cesar Betancourt & Elina Zlatanska, *Online Dispute Resolution (ODR): What Is It, and Is It The Way Forward?*, 79 INT'L J. ARB., MEDIATION & DISP. RESOL. 256, 263 (Sept. 13, 2013) ("still too early to predict" future of online dispute resolution).

64. One of the earliest references to mediation of e-discovery disputes is less than five years old. *See* Skinner, *supra* note 29.

65. *See* John M. Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 71 (2002) (noting that "some lawyers use mediation to make misleading statements, 'smoke the other side out,' gain leverage for later negotiations, drag out litigation, increase opponents' costs, and generally wear down the opposition"); *see also* Kimberlee K. Kovach, *The Vanishing Trial: Land Mine On The Mediation Landscape Or Opportunity For Evolution: Ruminations On The Future Of Mediation Practice*, 7 CARDOZO J. CONFLICT RESOL. 27, 29 (2005) (noting that mediation can become a "curse" of "hoops to jump through" in litigation, rather than a "process expansion" leading to dispute resolution).

66. *See generally* Slaikeu, *supra* note 16.

67. *See* Thomas J. Stipanowich, *The Multi-Door Contract and Other Possibilities*, 13 OHIO ST. J. ON DISP. RESOL. 303 (1998); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution And Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211 (1995).

68. *See* Hamilton, *supra* note 20; *see also*, Press Release, Daniel Garrie Instructs 7th Circuit's Pilot e-Mediation Program, May 14, 2013, *available at* http://www.lawandforensics.com/daniel-garrie-instructs-7th-circuits/ (last visited Aug. 28, 2014) ("first of its kind" program to train mediators, who "agreed to volunteer their time for cases with heavy discovery loads, but comparatively small monetary returns"); 7th Circuit Electronic Discovery Committee, *Principles Relating To The Discovery Of Electronically Stored Information* (Aug. 1, 2010), *available at* http://www.discoverypilot.com/sites/default/files/Principles8_10.pdf (last visited Aug. 28, 2014).

69. *See* Wissler, *supra* note 57, at 274 (lawyers tend to view mediation with court staff mediators "more favorably than mediation with volunteer mediators").

Steven C. Bennett is a partner at Jones Day in New York, and Chair of the Firm's E-Discovery Committee. The views expressed are solely those of the author, and should not be attributed to the author's firm, or its clients.

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Piercing the Corporate Veil

By Barry A. Wadler

This article examines the issue of "Piercing the Corporate Veil," a phrase frequently used but not well understood by litigators. Specifically, under what circumstances can a plaintiff reach behind the corporate form and hold the owners of a corporation liable for a corporate liability, whether that liability is from a debt, contract or tort?

It is important for litigators to be familiar with the scope of this subject. As a plaintiff's lawyer in any litigation, it is one thing to win a judgment against some corporate defendant, but, at the end of the day, the bottom line is, what pocket is available to recover that judgment? Sometimes, the assets of a corporate debtor are insufficient and, in an appropriate case, the assets of the owners of the corporation, whether they are individuals or some parent corporation, may be on the line for a corporate liability. On the opposite side, counsel defending a corporation always wants to ensure that the owners of the corporate defendant are not frivolously named as defendants in a claim based on a corporate liability.

As a preliminary note, this topic applies both to corporations and limited liability companies because, for the most part, the same general principles which allow the shareholders of a corporation to be held liable for a corporate liability, can be applied to hold the members of an LLC personally liable for obligations of the LLC.[1]

Piercing the corporate veil is not an easy subject, not because it is complex like antitrust law or detailed like the tax code. It is difficult in the sense that it is hard to anticipate with certainty how the principles will be applied to a given case. There are broad principles that are easily stated and understandable, but these principles must be applied in specific circumstances to achieve equity. The many varied factual circumstances, the multitude of factors that can be relevant to a determination, plus that elusive goal of achieving equity, make it nearly impossible to anticipate how the trier of fact will apply the broad principles to a particular situation.

The New York courts often say, "[v]eil-piercing is a fact-laden claim that is not well suited for summary judgment resolution."[2] This makes it very hard, even impossible, for either side to be certain of the merits of a case. The Court of Appeals has even observed that New York cases determining whether it is appropriate to pierce the corporate veil may not be reduced to definite rules governing the various circumstances.[3] And one federal court, discussing New York law, said there were an "infinite variety of situations that might warrant disregarding the corporate form."[4]

I. General Rule

Piercing the corporate veil is not easily accomplished. It is the exception to the general rule of limited liability for corporate owners, and that general rule is very firmly set in American jurisprudence.

A corporation is an entity unto itself with its own existence that outlives the existence of its owners. The independent corporate body is a legal fiction that allowed for the growth of capitalism. Corporate entities began centuries ago with chartered corporations like the Dutch East India Company. Creditors could extend credit to the corporate entity and expect repayment from the entity and its assets even if one of the individual owners died or had his own financial reversal. Funds to do business could be raised from investor shareholders who were insulated from the business liabilities so they did not have to fear that the failure of the corporation would drag them down personally.

To uphold this important foundation of our business system, our jurisprudence vigilantly shields corporate shareholders from liability. This "corporate shield" is not to be lightly disregarded.

Accordingly, any discussion of the topic starts with the well-established general rule that "a corporation exists independently of its owners, who are not personally liable for its obligations[.]"[5]

Even where there is a single shareholder, that shareholder will not be held personally liable for corporate debts merely because there is only one shareholder. "A corporation, even when wholly owned by a single individual, has a separate legal existence from its shareholders," and courts say they "are loathe to disregard the corporate form for the benefit of those who have chosen that form to conduct business."[6]

The shareholders of a corporation will not be held personally liable for corporate debts merely because the corporation was formed for the express purpose of insulating the owners from personal liability.[7] The shareholders of a corporation also will not be held personally liable for corporate debts merely because the corporation does not have enough money to pay its debts.[8] The concept of piercing the corporate veil is the exception to the well-established general rule,[9] and it requires a strong showing.[10]

II. Piercing the Corporate Veil—General Principles

When can the corporate veil be pierced? There is no easy answer, no one general rule to apply. It is a mix of

factors that are applied, and the list of factors is not fixed or finite like the elements of a cause of action. Moreover, even the identifiable factors are not susceptible of easy application because it is not just the facts that are examined, but that vague, elusive notion of "equity" that comes into play.

The Court of Appeals, in *Matter of Morris v. New York State Dep't of Taxation and Fin.* said, "[b]ecause a decision whether to pierce the corporate veil in a given instance will necessarily depend on the attendant facts and equities, the New York cases may not be reduced to definitive rules governing the varying circumstances when the power may be exercised."[11] Similarly, in *Wm. Passalacqua Builders, Inc. v. Resnick Developers S., Inc.*, an often-quoted federal Second Circuit case surveying New York law, the court observed that there was an "infinite variety of situations that might warrant disregarding the corporate form" and that it "is not an easy task because disregarding corporate separateness is a remedy that 'differs with the circumstances of each case.'"[12]

The general, overarching principles that are often recited by the courts when asked to pierce the corporate veil are expressed in various ways. Courts generally look for: domination by the owners, failure to follow the corporate formalities, that *result* in a wrong committed against the plaintiff, and a measure of equity thrown in.

The Appellate Division, Second Department has said, "[a] party seeking to pierce the corporate veil must establish that (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in the plaintiff's injury."[13] In another opinion, the same court added that, "[t]he party seeking to pierce the corporate veil must further establish that the controlling corporation [the corporate parent] abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene."[14]

The rationale is easy to understand. If a corporation is formed but the owners do not respect the fact that there is a difference between the owners and the corporate entity, why should the courts let the owners hide behind the corporate shield? If the owners treat the corporate pocket as their own pocket, the court might well let a plaintiff reach into the owner's pocket.[15] "The rationale for piercing the corporate veil is that the corporation is something less than a bona fide independent entity."[16]

III. The Role of Equity

The underlying objective and a necessary component in any decision to pierce a corporate veil is "achieving equity." "Broadly speaking, the courts will…pierce the corporate veil whenever necessary to prevent fraud or to achieve equity."[17] "[P]recedent is clear that courts will pierce the corporate veil only to prevent fraud, illegality or to achieve equity,"[18] and "equity will intervene to pierce the corporate veil and permit the imposition of personal liability in order to avoid fraud or injustice."[19]

Achieving equity is in the eyes of the beholder. When the courts say they have the power to hold shareholders liable "whenever necessary to prevent fraud or achieve equity[,]"[20] they are allowing a lot of latitude for discretion. The bad news is that this makes it very hard for a litigator to know how a court will decide a case. The good news is that it gives the plaintiff's lawyer a major argument to stress if he or she can make the case that the plaintiff was an innocent victim and was cheated by the defendant.

IV. Linkage to the Injury

Another essential component in making out a claim to pierce the corporate veil is that a plaintiff must show a linkage between the corporate wrongdoing and the injury to the plaintiff. The Court of Appeals has cautioned, "[e]vidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance."[21]

The Second Department stressed the need for the linkage saying,

> A plaintiff seeking to pierce the corporate veil must demonstrate that a court in equity should intervene because the owners of the corporation exercised complete domination over it in the transaction at issue and, in doing so, abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that resulted in injury to the plaintiff.[22]

V. "Alter Ego" Theory Compared

Closely related to the doctrine of piercing the corporate veil is the distinct concept of holding a corporation's owner liable on what is commonly called the "alter ego" theory. The alter ego theory can be invoked even where there is no showing of fraud on the part of the defendants, but the domination of the corporate entity was so complete that the owner or owners effectively used the corporate entity as its agent.

> Apart from the legal concept of "piercing the corporate veil," separate corporations and business entities may be held to constitute a single unit in legal contemplation where each business is so related to, or organized or controlled by, the other as to be its mere agent, instrumentality, or *alter ego*.[23]

There is a difference in the proof required for an "alter ego" finding. Piercing the corporate veil requires showing some fraud or wrong that injured the plaintiff. But where an alter ego is found, plaintiff need not show that the shareholder domination was used to commit a wrong against plaintiff.[24]

> Under New York law, the corporate veil will be pierced to achieve equity, even absent fraud, when a corporation has been so dominated by an individual or another corporation and its separate entity so ignored that it primarily transacts the dominator's business instead of its own and can be called the other's alter ego.[25]

VI. Factors

As noted, there are many factors that have been identified by the courts in determining if it is an appropriate case to pierce a corporate veil.

> Indicia of a situation warranting veil-piercing include: "(1) the absence of the formalities and paraphernalia that are part and parcel of the corporate existence, *i.e.*, issuance of stock, election of directors, keeping of corporate records and the like, (2) inadequate capitalization, (3) whether funds are put in and taken out of the corporation for personal rather than corporate purposes, (4) overlap in ownership, officers, directors, and personnel, (5) common office space, address and telephone numbers of corporate entities, (6) the amount of business discretion displayed by the allegedly dominated corporation, (7) whether the related corporations deal with the dominated corporation at arms length, (8) whether the corporations are treated as independent profit centers, (9) the payment or guarantee of debts of the dominated corporation by other corporations in the group, and (10) whether the corporation in question had property that was used by other of the corporations as if it were its own."[26]

Other courts have highlighted just the most important of those factors, saying, "[f]actors to be considered by a court in determining whether to pierce the corporate veil include failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use."[27]

Note that "[n]o one factor is dispositive[,]"[28] that not all factors have to be shown to meet the burden, and that the above list of factors is not comprehensive. The courts look at the "totality of the evidence[.]"[29]

VII. Pleading

There is no independent cause of action for piercing the corporate veil.[30] Piercing the corporate veil is an "equitable remedy."[31] A "remedy" is part of the relief a plaintiff is seeking on the underlying cause of action. The litigator's job in prosecuting a claim against a corporate defendant and its shareholders is a two-step process. *First*, he must establish there was a contract that was breached or some tort committed, and that plaintiff has a right to damages from the corporate defendant. *Then,* in the same action, he must show that this is an appropriate case for the court to invoke the equitable remedy of imposing that liability on another party—the parent company or the individual shareholder(s)—to achieve equity.

In addition to adequately pleading the cause of action against the corporation, counsel must also plead the facts to show that the owners dominated or controlled the corporation, what they did in violation of the corporate form, and that they abused the privilege of doing business in the corporate form to perpetrate a wrong against plaintiff.[32]

Plaintiff need not plead actual fraud or fraudulent intent, only that defendant's control of the corporation was used to perpetrate a wrongful or unjust act toward plaintiff.[33] These allegations should be pled with facts, not in a merely conclusory form. There needs to be sufficient particularity to show there is an actual basis for invoking the remedy of piercing the corporate veil.[34]

While the complaint can name the shareholders as defendants and they can be sued in the same action, it is not necessary that a plaintiff must first obtain an unsatisfied judgment against the corporation in order to maintain an action against the owners based on piercing the corporate veil. The claim against the owners could be brought later in a separate action if a judgment against the corporation is not recoverable and there are grounds to pierce the corporate veil.[35]

VIII. Statute of Limitations

What is the statute of limitations for an action based on piercing the corporate veil? For the underlying action against the corporation, the statute is the regular statute. But if a party obtains a judgment against a corporation and then finds it is uncollectible, a separate action against a parent corporation or individual shareholders to collect on the judgment may be brought within twenty years, the time period for enforcing a judgment.[36] Remember that piercing the corporate veil is not its own cause of action. It is a remedy imposing liability of a corporation on another person or entity. If the liability of the corporation has been reduced to a judgment, plaintiff has twenty years to

enforce that judgment by piercing the corporate veil and going after the owners.

IX. Conclusion

Whenever plaintiff's counsel knows or fears that a corporate defendant will not have assets to satisfy a judgment, and where he or she is aware of facts that will establish that individual shareholders or a corporate parent can be held liable, those corporate owners should be named and the facts necessary to establish the right to pierce the corporate veil should be alleged. But counsel should not blithely assume that such a claim will withstand a motion to dismiss unless it is properly pleaded with factual support. Defendant's counsel, on the other hand, receiving a complaint that names his clients individually should scrutinize the complaint for adequate support and should seek to dismiss frivolous claims before the costly defense.

Endnotes

1. *See Grammas v. Lockwood Assocs., LLC*, 95 A.D.3d 1073, 1074-75, 944 N.Y.S.2d 623, 625-26 (2d Dep't 2012); *Matias ex rel. Palma v. Mondo Properties LLC*, 43 A.D.3d 367, 367-69, 841 N.Y.S.2d 279, 281-82 (1st Dep't 2007); *Retropolis, Inc. v. 14th Street Dev. LLC*, 17 A.D.3d 209, 210-11, 797 N.Y.S.2d 1, 2-3 (1st Dep't 2005); *Williams Oil Co., Inc. v. Randy Luce E-Z Mart One, LLC*, 302 A.D.2d 736, 739-40, 757 N.Y.S.2d 341, 345 (3d Dep't 2003).

   Note, however, the principles related to adherence to corporate formalities may be different when applied to LLCs. *See Mike Bldg & Contracting, Inc. v. Just Homes, LLC*, 27 Misc.3d 833, 848-49, 901 N.Y.S.2d 458, 472 (N.Y. Sup. Ct. 2010) (A limited liability company is not a corporation, and "the 'formalities' required for its management, defined in an operating agreement among the members, are far more flexible than the rules applicable to a corporation.").

2. *Damianos Realty Group, LLC v. Fracchia*, 35 A.D.3d 344, 344, 825 N.Y.S.2d 274, 276 (2d Dep't. 2006) (quoting *First Bank of Americas v. Motor Car Funding, Inc.*, 257 A.D.2d 287, 294, 690 N.Y.S.2d 17, 22 (1st Dep't 1999)); *accord Dromgoole v. T-Foots, Inc.*, 309 A.D.2d 1186, 1187, 764 N.Y.S.2d 900, 900 (4th Dep't. 2003) (citing *Matter of Morris v. New York State Dept. of Taxation & Fin.*, 82 N.Y.2d 135, 141, 603 N.Y.S.2d 807, 810 (1993); *Giarguaro S.p.A. v. Amko Int'l Trading, Inc.*, 300 A.D.2d 349, 350, 751 N.Y.S.2d 772, 773 (2d Dep't 2002); *Forum Ins. Co. v. Texarkoma Transp. Co.*, 229 A.D.2d 341, 342, 645 N.Y.S.2d 786, 787-88 (1st Dep't 1996) (internal quotation marks omitted)).

3. *Matter of Morris*, *supra* note 2, 82 N.Y.2d at 141 ("Because a decision whether to pierce the corporate veil in a given instance will necessarily depend on the attendant facts and equities, the New York cases may not be reduced to definitive rules governing the varying circumstances when the power may be exercised.").

4. *Wm. Passalacqua Builders, Inc. v. Resnick Developers S., Inc.*, 933 F.2d 131, 139 (2d Cir. 1991).

5. *Superior Transcribing Serv., LLC v. Paul*, 72 A.D.3d 675, 676, 898 N.Y.S.2d 234, 235 (2d Dep't 2010) (quoting *East Hampton Union Free Sch. Dist. v. Sandpebble Builders, Inc.*, 66 A.D.3d 122, 126, 884 N.Y.S.2d 94, 98 (2d Dep't 2009), *aff'd*, 16 N.Y.3d 775, 919 N.Y.S.2d 496 (2011)); *see also Bartle v. Home Owners Coop., Inc.*, 309 N.Y. 103, 106, 127 N.E.2d 832, 833 (1955).

6. *Harris v. Stony Clove Lake Acres Inc.*, 202 A.D.2d 745, 747, 608 N.Y.S.2d 584, 586 (3d Dep't 1994); *accord Matter of Estate of Gifford*, 144 A.D.2d 742, 744, 535 N.Y.S.2d 154, 156 (3d Dep't 1988) ("The mere fact that the corporation's management was controlled by an officer or controlling shareholder is, by itself, insufficient evidence to warrant piercing the corporate veil so as to impose personal liability on the shareholder."); *see also Superior Transcribing Service, LLC*, *supra* note 5, 72 A.D.3d at 676; *Island Seafood Co., Inc. v. Golub Corp.*, 303 A.D.2d 892, 759 N.Y.S.2d 768 (3d Dep't 2003); *Aetna Elec. Distrib. Co. v. Homestead Elec., Ltd.*, 279 A.D.2d 541, 541, 719 N.Y.S2d 668, 669 (2d Dep't 2001).

   If single shareholder control *were* grounds for piercing, virtually every sole shareholder managing his or her own business would be at risk. *East Hampton Union Free Sch. Dist.*, *supra* note 5, 66 A.D.3d at 126-27:

   > [I]f, standing alone, domination over corporate conduct in a particular transaction were sufficient to support the imposition of personal liability on the corporate owner, virtually every cause of action brought against a corporation either wholly or principally owned by an individual who conducts corporate affairs could also be asserted against that owner personally, rendering the principle of limited liability largely illusory.

7. *East Hampton Union Free Sch. Dist.*, *supra* note 5, 66 A.D.3d at 126 ("individuals may incorporate for the express purpose of limiting their liability"), *quoted in Superior Transcribing Serv., LLC*, *supra* note 5, 72 A.D.3d at 676; *accord Walkovszky v. Carlton*, 18 N.Y.2d 414, 417, 276 N.Y.S.2d 585, 587 (1966); *New York Ass'n for Retarded Children Inc., Montgomery County Chapter v. Keator*, 199 A.D.2d 921, 922, 606 N.Y.S.2d 784, 785 (3d Dep't 1993) ("[I]n view of the well established fact that a business lawfully can be incorporated for the very purpose of enabling its proprietor to escape personal liability, the corporate form is not lightly to be disregarded."); *Bartle*, *supra* note 5, 309 N.Y. at 106 ("The law permits the incorporation of a business for the very purpose of escaping personal liability.").

8. *Walkovszky*, *supra* note 7, 18 N.Y.2d at 419 ("The corporate form may not be disregarded merely because the assets of the corporation, together with the mandatory insurance coverage of the vehicle which struck the plaintiff, are insufficient to assure him the recovery sought."); *see also Bowles v. Errico*, 163 A.D.2d 771, 772-73, 558 N.Y.S.2d 734, 736 (3d Dep't 1990).

9. *East Hampton Union Free Sch. Dist.*, *supra* note 5, 66 A.D.3d at 126 ("The concept of piercing the corporate veil is an exception to this general rule, permitting, in certain circumstances, the imposition of personal liability on owners for the obligations of their corporation.").

10. *TNS Holdings, Inc. v. MKI Sec. Corp.*, 92 N.Y.2d 335, 339, 680 N.Y.S. 2d 891, 893 (1998) ("Those seeking to pierce a corporate veil of course bear a heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences.").

11. *Matter of Morris, supra* note 2, 82 N.Y.2d at 141.

12. *Wm. Passalacqua Builders, Inc., supra* note 4, 933 F.2d at 139 (quoting *Am. Protein Corp. v. AB Volvo*, 844 F.2d 56, 60 (2d Cir. 1987), *writ denied*, 488 U.S. 852 (1988)).

13. *Superior Transcribing Serv., LLC*, *supra* note 5, 72 A.D.3d at 676 (internal quotation marks omitted); *see also Nassau County v. Richard Dattner Architect, P.C.*, 57 A.D.3d 494, 495, 868 N.Y.S.2d 727, 729 (2d Dep't 2008); *Matter of Morris*, *supra* note 2, 82 N.Y.2d at 141.

14. *Gateway I Group, Inc. v. Park Ave. Physicians, P.C.*, 62 A.D.3d 141, 145-46, 877 N.Y.S.2d 95, 99 (2d Dep't 2009) (internal quotation marks omitted); *accord East Hampton Union Free Sch. Dist.*, *supra* note 5, 66 A.D.3d at 126; *Love v. Rebecca Dev., Inc*,. 56 A.D.3d 733, 733, 868 N.Y.S.2d 125, 125-26 (2d Dep't 2008).

15. *Wm. Passalacqua Builders, Inc.*, *supra* note 4, 933 F.2d at 138 (citing *Walkovszky*, *supra* note 7, 18 N.Y.2d at 420):

   > Where there is proof that defendants were doing business in their individual capacities to suit their own

ends—shuttling their own funds in and out without regard to the corporation's form—this sort of activity exceeds the limits of the privilege of doing business in a corporate form and warrants the imposition of liability on individual stockholders.

16. *Donsco, Inc. v. Casper Corp.*, 587 F.2d 602, 606 (3d Cir. 1978).

17. *Walkovszky*, *supra* note 7, 18 N.Y.2d at 417 (internal quotation marks omitted), quoted in *Matter of Morris, supra* note 2, 82 N.Y.2d at 140; *accord Int'l Aircraft Trading Co. v. Mfrs. Trust Co.*, 297 N.Y. 285, 292-93, 79 N.E.2d 249, 252 (1948), quoted in *Wm. Passalacqua Builders, Inc.*, *supra* note 4, 933 F.2d at 138; *In re Oko*, 395 B.R. 559, 563 (Bankr. E.D.N.Y. 2008).

18. *New York Ass'n for Retarded Children, Inc., Montgomery County Chapter*, *supra* note 7, 199 A.D.2d at 922.

19. *Superior Transcribing Serv., LLC*, *supra* note 5, 72 A.D.3d at 676.

20. *Walkovszky*, *supra* note 7, 18 N.Y.2d at 417 (internal quotation marks omitted).

21. *TNS Holdings, Inc.*, *supra* note 10, 92 N.Y.2d at 339; *see also Matter of Morris*, *supra* note 2, 82 N.Y.2d at 141-42.

22. *East Hampton Union Free Sch. Dist.*, *supra* note 5, 66 A.D.3d at 126 (citing *Love*, *supra* note 14, 56 A.D.3d at 733; *Millennium Constr., LLC v. Loupolover*, 44 A.D.3d 1016, 1016, 845 N.Y.S.2d 110, 112 (2d Dep't 2007)).

23. *S. Assocs., Inc. v. United Brands Co.*, 67 A.D.2d 199, 208, 414 N.Y.S.2d 560, 565 (1st Dep't 1979).

24. *ITEL Containers Int'l Corp. v. Atlanttrafik Express Serv. Ltd.*, 909 F.2d 698, 703 (2d Cir. 1990) ("New York law allows the corporate veil to be pierced *either* when there is fraud *or* when the corporation has been used as an alter ego[.]").

25. *Island Seafood Co., Inc.*, *supra* note 6, 303 A.D.2d at 893 (internal quotation marks omitted), *quoted in Williams v. Lovell Safety Mgmt. Co., LLC*, 71 A.D.3d 671, 672, 896 N.Y.S.2d 150, 151 (2d Dep't 2010), *leave denied*, 14 N.Y.3d 713 (2010); *see also Pebble Cove Homeowners' Ass'n, Inc. v. Fidelity New York FSB*, 153 A.D.2d 843, 843, 545 N.Y.S.2d 362, 363 (2d Dep't 1989).

26. *Shisgal v. Brown*, 21 A.D.3d 845, 848, 801 N.Y.S.2d 581, 584 (1st Dep't 2005) (quoting *Wm. Passalacqua Bldrs., Inc.*, *supra* note 4, 933 F.2d at 139).

27. *Millennium Const., LLC*, *supra* note 22, 44 A.D.3d at 1016-17, *quoted in East Hampton Union Free Sch. Dist.*, *supra* note 5, 66 A.D.3d at 126; *see also Superior Transcribing Serv., LLC*, *supra* note 5, 72 A.D.3d at 676; *John John, LLC v. Exit 63 Dev., LLC*, 35 A.D.3d 540, 541, 826 N.Y.S.2d 657, 659 (2d Dep't 2006).

28. *Fantazia Int'l Corp. v. CPL Furs New York, Inc.*, 67 A.D.3d 511, 512, 889 N.Y.S.2d 28, 29 (1st Dep't 2009).

29. *Wm. Passalacqua Builders, Inc.*, *supra* note 4, 933 F.2d at 139, 140.

30. *See Matter of Morris*, *supra* note 2, 82 N.Y.2d at 141 ("[A]n attempt of a third party to pierce the corporate veil does not constitute a cause of action independent of that against the corporation; rather it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners."); *Davis v. CornerStone Tel. Co., LLC*, 19 Misc. 3d 1142(A), 867 N.Y.S.2d 16, 2008 N.Y. Misc. LEXIS 3264, at *32 (N.Y. Sup. Ct. 2008) ("These are not causes of action at all; rather, they are legal theories under which, in certain circumstances, personal liability may be found despite the erection of corporate or similar barriers by a debtor. As they do not state causes of action, they are dismissed." (internal citations omitted)), *aff'd*, 78 A.D.3d 1263, 910 N.Y.S.2d 254 (3d Dep't 2010); *State v. Easton*, 169 Misc.2d 282, 283, 647 N.Y.S.2d 904, 905 (N.Y. Sup. Ct. 1995) ("[P]iercing of the corporate veil is not an independent action but a procedural device to secure separately existing substantive rights owing to the plaintiff.").

31. *15th Ave. Assocs., L.P. v. 75 Owners Corp.*, 303 A.D.2d 183, 755 N.Y.S.2d 242 (1st Dep't 2003); *Azte Inc. v. The Auto Collection, Inc.*, 36 Misc. 3d 1238(A), 961 N.Y.S.2d 356, 2012 N.Y. Misc. LEXIS 4291, at *34 (N.Y. Sup. Ct. 2012).

32. *East Hampton Union Free Sch. Dist.*, *supra* note 5, 66 A.D.3d at 126-27; *Sound Communications, Inc. v. Rack and Roll, Inc.*, 88 A.D.3d 523, 524, 930 N.Y.S.2d 577, 579 (1st Dep't 2011).

33. *Love v. Rebecca Dev., Inc.*, 24 Misc.3d 1224(A), 897 N.Y.S.2d 670, 2007 N.Y. Misc. LEXIS 9059, at *7-8 (N.Y. Sup. Ct. 2007), *aff'd*, 56 A.D.3d 733, *supra* note 14.

34. *See Walkovszky*, *supra* note 7, 18 N.Y.2d at 420 (complaint should have "sufficiently [particularized] statements" of wrongdoing); *AHA Sales, Inc. v. Creative Bath Prods., Inc.*, 58 A.D.3d 6, 24, 867 N.Y.S.2d 169, 183 (2d Dep't 2008) ("Mere conclusory statements that a corporation is dominated or controlled by a shareholder are insufficient to sustain a cause of action against a shareholder in his individual capacity.") (citing *Andejo Corp. v. S. St. Seaport Ltd. P'ship*, 40 A.D.3d 407, 407, 836 N.Y.S.2d 571, 572 (1st Dep't 2007); *Itamari v. Giordan Dev. Corp.*, 298 A.D.2d 559, 560, 748 N.Y.S.2d 678, 678 (2d Dep't 2002)).

35. *See, e.g., Austin Powder Co. v. McCullough*, 216 A.D.2d 825, 628 N.Y.S.2d 855 (3d Dep't 1995); *Island Seafood Co., Inc.*, *supra* note 6, 303 A.D.2d 892.

36. *See* CPLR 211(b); *see also County of Suffolk v. Love'M Sheltering, Inc.*, 27 Misc.3d 1127, 1130-31, 899 N.Y.S.2d 809, 813 (N.Y. Sup. Ct. 2010) ("Actions for enforcement of a judgment against those charged with control and domination of a corporate judgment debtor under corporate veil piercing theories are governed by the 20-year statute of limitations set forth in CPLR 211(b) that runs from the docketing of the judgment.").

Barry A. Wadler is a sole practitioner admitted in the States of New York and New Jersey.

Section Committees and Chairs

Arbitration and ADR
Charles J. Moxley Jr.
MoxleyADR LLC
850 Third Avenue, 14th Fl.
New York, NY 10022
cmoxley@moxleyadr.com

Antitrust
Aidan Synnott
Paul, Weiss, Rifkind, Wharton
& Garrison LLP
1285 Ave of the Americas
New York, NY 10019-6064
asynnott@paulweiss.com

Jay L. Himes
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
jhimes@labaton.com

Appellate Practice
James M. McGuire
Dechert LLP
1095 Avenue of the Americas
New York, NY 10036-6797
james.mcguire@dechert.com

Mary Kay Vyskocil
Simpson Thacher & Bartlett LLP
425 Lexington Avenue
New York, NY 10017
mvyskocil@stblaw.com

Bankruptcy Litigation
Douglas T. Tabachnik
Law Offices of Douglas T. Tabachnik, PC
63 West Main Street, Ste. C
Freehold, NJ 07728
dtabachnik@dttlaw.com

Civil Practice Law and Rules
James Michael Bergin
Morrison & Foerster LLP
1290 Avenue of the Americas
New York, NY 10104-0012
jbergin@mofo.com

Thomas C. Bivona
Milbank Tweed Hadley McCloy LLP
One Chase Manhattan Plaza, 45th Fl.
New York, NY 10005-1413
tbivona@milbank.com

Civil Prosecution
Neil V. Getnick
Getnick & Getnick LLP
521 Fifth Avenue, 33rd Fl.
New York, NY 10175
ngetnick@getnicklaw.com

Richard J. Dircks
Getnick & Getnick
521 5th Ave., 33rd Fl.
New York, NY 10175
rdircks@getnicklaw.com

Commercial Division
Mitchell J. Katz
Menter, Rudin & Trivelpiece, P.C.
308 Maltbie Street, Ste. 200
Syracuse, NY 13204-1498
mkatz@menterlaw.com

Julie Ann North
Cravath, Swaine & Moore LLP
825 Eighth Avenue
New York, NY 10019-7416
jnorth@cravath.com

Commercial Jury Charges
Melissa A. Crane
Manhattan Criminal Court
100 Centre Street
New York, NY 10013
macrane@courts.state.ny.us

Andrea Masley
New York City Civil Court
111 Centre Street
New York, NY 10013
amasley@nycourts.gov

Continuing Legal Education
Kevin J. Smith
Shepherd Mullin Richter & Hampton LLP
30 Rockefeller Plaza
New York, NY 10112
KJSmith@sheppardmullin.com

Corporate Litigation Counsel
Michael W. Leahy
American International Group, Inc.
80 Pine Street - 13th Floor
New York, NY 10005
michael.leahy2@aig.com

Robert J. Giuffra Jr.
Sullivan & Cromwell LLP
125 Broad Street
New York, NY 10004-2400
giuffrar@sullcrom.com

Creditors' Rights and Banking Litigation
Michael Luskin
Luskin, Stern & Eisler LLP
Eleven Times Square
New York, NY 10036
luskin@lsellp.com

S. Robert Schrager
Hodgson Russ LLP
1540 Broadway, 24th Fl.
New York, NY 10036
rschrager@hodgsonruss.com

Diversity
Carla M. Miller
Universal Music Group
1755 Broadway, 4th Fl.
New York, NY 10019
carla.miller@umusic.com

Sylvia Ometa Hinds-Radix
Supreme Court, Kings County
360 Adams, Room 1140
Brooklyn, NY 11201
shradix@courts.state.ny.us

Electronic Discovery
Constance M. Boland
Nixon Peabody LLP
437 Madison Avenue, 23rd Fl.
New York, NY 10022
cboland@nixonpeabody.com

Adam I. Cohen
Ernst & Young
Fraud Investigations & Dispute Svcs
5 Times Square
New York, NY 10036
Adam.Cohen1@ey.com

Employment and Labor Relations
Gerald T. Hathaway
Mitchell Silberberg & Knupp LLP
12 East 49th Street, 30th Fl.
New York, NY 10017
gth@msk.com

Robert N. Holtzman
Kramer Levin Naftalis & Frankel LLP
1177 Avenue of the Americas
New York, NY 10036-2714
rholtzman@kramerlevin.com

Ethics and Professionalism
James M. Wicks
Farrell Fritz PC
1320 RXR Plaza
Uniondale, NY 11556-1320
jwicks@farrellfritz.com

Anthony J. Harwood
Rakower Lupkin PLLC
488 Madison Avenue, 18th Fl.
New York, NY 10022
tony.harwood@aharwoodlaw.com

Federal Judiciary
Jay G. Safer
Locke Lord LLP
3 World Financial Center, 20th Fl.
New York, NY 10281
jsafer@lockelord.com

Dawn Kirby
DelBello Donnellan Weingarten Wise & Wiederkehr, LLP
One North Lexington Ave., 11th Floor
White Plains, NY 10601
dkirby@ddw-law.com

Federal Procedure
James F. Parver
Blank Rome LLP
The Chrysler Building
405 Lexington Avenue
New York, NY 10174-0208
jparver@blankrome.com

Michael C. Rakower
Rakower, Lupkin PLLC
488 Madison Ave, 18th Fl.
New York, NY 10022
mrakower@rakowerlupkin.com

Hedge Funds and Capital Markets Litigation
Stephen Louis Ascher
Jenner & Block LLP
919 Third Avenue, 37th Fl.
New York, NY 10022
sascher@jenner.com

Benjamin R. Nagin
Sidley Austin LLP
787 Seventh Avenue
New York, NY 10019-6018
bnagin@sidley.com

Immigration Litigation
Sophia M. Goring-Piard
Law Offices of Sophia M. Goring-Piard
1825 Park Avenue, Suite 1102
New York, NY 10035
sgpiard@gmail.com

Jill A. Apa
Damon Morey, LLP
Avant Building, Ste. 1200
200 Delaware Avenue
Buffalo, NY 14202-4005
japa@damonmorey.com

International Litigation
Clara Flebus
New York Supreme Court
Appellate Term
60 Centre Street, Room 401
New York, NY 10007
clara.flebus@gmail.com

Ted G. Semaya
Eaton & Van Winkle LLP
Three Park Avenue, 16th Fl.
New York, NY 10016
tsemaya@evw.com

Internet and Intellectual Property Litigation
Peter J. Pizzi
Connell Foley LLP
888 7th Avenue
New York, NY 10106
ppizzi@connellfoley.com

Joseph V. DeMarco
DeVore & DeMarco, LLP
99 Park Avenue, Ste. 330
New York, NY 10016
jvd@devoredemarco.com

Legislative and Judicial Initiatives
Vincent J. Syracuse
Tannenbaum Helpern Syracuse & Hirschtritt LLP
900 Third Avenue
New York, NY 10022-4728
syracuse@thsh.com

Membership
Heath J. Szymczak
Jaeckle Fleischmann & Mugel, LLP
Avant Building, Ste. 900
200 Delaware Avenue
Buffalo, NY 14202
hszymczak@jaeckle.com

Nicole F. Mastropieri
Nixon Peabody LLP
437 Madison Ave
New York, NY 10022-7001
nmastropieri@nixonpeabody.com

Mentoring
Jonathan D. Lupkin
Rakower Lupkin PLLC
488 Madison Avenue, 18th Fl.
New York, NY 10022
jlupkin@rakowerlupkin.com

Matthew R. Maron
Tannenbaum Helpern Syracuse & Hirschtritt LLP
900 Third Avenue, 17th Fl.
New York, NY 10022
maron@thsh.com

Dana V. Syracuse
NYS Dept. of Financial Services
1 State Street
New York, NY 10004
dana.syracuse@gmail.com

Securities Litigation and Arbitration
James D. Yellen
Yellen Arbitration and Mediation Services
156 East 79th Street, Ste. 1C
New York, NY 10021-0435
jamesyellen@yahoo.com

Jonathan L. Hochman
Schindler Cohen & Hochman LLP
100 Wall Street, 15th Fl.
New York, NY 10005-3701
jhochman@schlaw.com

Social Media
Ignatius A. Grande
Hughes Hubbard & Reed LLP
One Battery Park Plaza
New York, NY 10004
grande@hugheshubbard.com

Mark Arthur Berman
Ganfer & Shore LLP
360 Lexington Avenue, 14th Fl.
New York, NY 10017-6502
mberman@ganfershore.com

State Court Counsel
Deborah E. Edelman
Supreme Court of the State of New York
60 Centre Street, Rm 232
New York, NY 10007
dedelman@courts.state.ny.us

State Judiciary
Charles E. Dorkey III
McKenna Long & Aldridge LLP
230 Park Avenue, 17th Fl.
New York, NY 10169-0005
cdorkey@mckennalong.com

Jeffrey Morton Eilender
Schlam, Stone & Dolan
26 Broadway
New York, NY 10004-1703
jme@schlamstone.com

White Collar Criminal Litigation
Evan T. Barr
Steptoe & Johnson LLP
1114 Avenue of the Americas, 35th Fl.
New York, NY 10036-7703
ebarr@steptoe.com

Joanna Calne Hendon
Spears & Imes LLP
51 Madison Avenue
New York, NY 10010-1603
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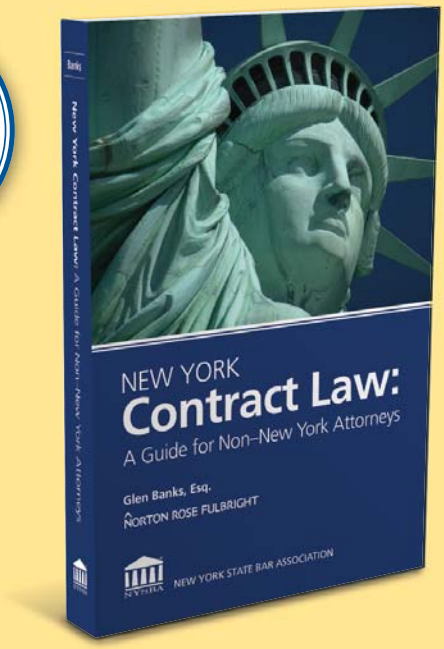

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