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Efficiency and Economic Benefits of Dispute Resolution through Arbitration Compared with U.S. District Court Proceedings

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EFFICIENCY AND ECONOMIC BENEFITS OF DISPUTE RESOLUTION THROUGH ARBITRATION COMPARED WITH U.S. DISTRICT COURT PROCEEDINGS

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I. INTRODUCTION AND EXECUTIVE SUMMARY

In 2009, Micronomics was asked by the Presiding Judge of the Los Angeles Superior Court to calculate the economic impact of significant funding cutbacks facing the judiciary. Hundreds of millions of dollars had been cut from California's judicial budget, the effect of which included closed courtrooms and lost staff positions. These cuts produced crippling reductions in court services at a time when caseloads were increasing. Similar cutbacks have taken place throughout the country, producing layoffs and reduced operating hours in multiple states.

The consequences of these cutbacks have included significant delays in adjudication of pending litigation and increased burdens on our courts. Between 2009 and 2013, the economic impact in California of these cutbacks and delays includes approximately 150,000 lost jobs and $30 billion in lost economic output.

In light of this experience, Micronomics has been engaged to compare the length of time to adjudicate disputes associated with U.S. district court proceedings on the one hand versus length of time to adjudicate disputes associated with arbitration administered by the American Arbitration Association ("AAA") on the other in order to ascertain whether significant differences exist between the two forms of dispute resolution with respect to the amount of time required to administer disputes. In addition, to the extent that we determine such differences exist, we have been asked to estimate the cost to business associated with delays in obtaining adjudication.

We recognize that factors other than time required for adjudication enter into decisions as to whether arbitration or litigation provides the best forum to resolve disputes. These factors are not addressed in this discussion.

Based on our analyses, we found that on average, U.S. district court cases took more than 12 months *longer* to get to *trial* than cases adjudicated by arbitration (24.2 months v. 11.6 months); when the comparison involved time through *appeal*, U.S. district and circuit court cases required at least 21 months *longer* than arbitration to resolve (33.6 months v. 11.6 months).[1] We also

[1] We compare median times required from filing to trial and from filing through appeal in federal court cases with median times required from filing to award in AAA arbitration cases. In our analyses, we make use of median data because statistically, medians better account for outliers, which can skew means in the direction of the

found it useful to conduct the same analysis for eight of the ten states that had the highest caseload in 2015 with respect to both AAA arbitration and U.S. district court proceedings. These eight states (California, New York, Texas, Florida, Pennsylvania, Georgia, New Jersey, and Illinois) account for more than half of the AAA arbitration caseload and more than half of the U.S. district court caseload in 2015. With respect to these states, U.S. district court cases took about 15-17 months *longer* to get to trial than cases adjudicated by arbitration (27.3 months v. 11.8 months); when the time for appeals is added (for the associated U.S. circuit courts), federal cases required about 24-26 months *longer* than arbitration to resolve (36.5 months v. 11.8 months).

The situation in state courts is likely to be even worse: According to our prior investigation, in recent years, 39 state courts have suspended filling clerk vacancies; 36 state courts have reported layoffs or furloughs; 28 state courts are facing increased case backlogs; 23 state courts have reduced operating hours; and ten state courts have reported furloughing judges.[2] An inevitable impact has been an increase in the amount of time required to adjudicate cases. Although state court data on time from filing the complaint to trial are largely unavailable, our prior work in this area leads us to expect that the amount of time required to adjudicate disputes through the state court system is greater than cases tried in federal courts. Accordingly, our conclusions regarding differences in the length of time associated with dispute resolution in the court system on the one hand compared with arbitration on the other are conservative.

Delays to adjudication are not without cost. During the period required to resolve disputes, resources at issue between litigants can be thought of as removed from circulation. When litigation takes longer to resolve, these resources remain unavailable in the sense that neither party can count on receiving them and putting them to use. By way of example: A dispute between a supplier and purchaser in which the supplier claims the purchaser owes $1 million leaves both supplier and purchaser uncertain as to which party will retain the funds after the dispute has been adjudicated. The purchaser cannot comfortably invest the $1 million to hire new

outlier(s). An outlier is an observation point in a data set that is distant (sometimes drastically distant) from other observation points. Moreover, U.S. District Courts and U.S. Courts of Appeals report time intervals as median values, not means. The use of median values enables a valid comparison.

Median, mean, and mode are statistical measurements of data sets. "Median" is the middle value in a data set, meaning that half of the observations in the data set are greater than the median while half the observations are less than the median; "mean" is the average value of all observations in a data set, computed by summing the individual observations and dividing by the number of observations; and "mode" is the observation that occurs most often in a data set.

Consider the following example data set: 195, 197, 199, 200, 204, 204, and 5003. The median is 200 (i.e. half of the observations are greater than 200 and half are less) while the mean is 886 (average of the range). In this example, 200 (the median) better represents six of the seven observations and is not impacted by "5003" (the outlier). In fact, if we exclude the outlier and calculate the mean of all remaining data points, we get 199.8, which is nearly equal to 200, or the median of the entire data set. As this example demonstrates, the presence of an outlier can significantly skew the mean one way or the other; use of the median allows one to avoid the influence of outliers.

[2] Micronomics publication, *Economic Impact of Reduced Judiciary Funding and Resulting Delays in State Civil Litigation, March 2012*, pp. 46-47.

employees since it may be required to pay the supplier once the dispute has been adjudicated. Likewise, the supplier cannot use the funds to purchase new equipment because it may never receive the money. Both parties are thus constrained; the funds are unavailable to either; both parties experience a loss until the dispute is resolved.

Other things equal, the greater the amount at issue, the greater the loss associated with delay. To calculate the direct economic cost of delays to adjudication, we relied on a conservative estimate of the minimum amount at issue in district court cases and on a corresponding minimum amount for arbitration cases. These figures represent resources that neither party can rely upon until the dispute is resolved.

- Based on minimum average estimated amounts at issue in district court cases and on a corresponding minimum amount for arbitration cases, direct losses associated with *additional time to trial* required for district court cases compared with AAA arbitration are approximately **$10.9 - $13.6 billion** between 2011 and 2015 (i.e. more than **$180 million per month**).
- The direct minimum losses associated with *additional time through appeal* required for district and circuit court cases compared with arbitration are approximately **$20.0 - $22.9 billion** over the same period (i.e. more than **$330 million per month**).

These direct losses represent lost resources solely to the parties involved in said disputes and are only the beginning. Economists and others have long recognized that a given change in economic activity (e.g. in this case, "direct" lost resources) produces benefits or costs in excess of that initial change. Often referred to as "multiplier effects," these benefits or costs are based on the initial change and ultimately reflect secondary impacts on the economy at large. In the language of economic multipliers, secondary losses associated with resources unavailable to litigants due to delay are referred to as "indirect" and "induced" losses. We are able to estimate "indirect" and "induced" losses by utilizing an economic model known as IMPLAN, which is described later in this report. These secondary losses, together with the "direct" losses, reflect an estimate for the overall negative impact to society of delays associated with the district court system relative to arbitration.

- Based on the direct, indirect, and induced losses associated with *additional time to trial* for district court cases compared with AAA arbitration, estimated total losses are approximately **$28.3 - $35.3 billion** between 2011 and 2015 (i.e. more than **$470 million per month**).
- The estimated total losses associated with *additional time through appeal* required for district and circuit court cases compared with arbitration are approximately **$51.9 - $59.2 billion** over the same period (i.e. more than **$860 million per month**).

Given the size of these estimates, the conclusion is inescapable: Delays in civil justice carry very real consequences for litigants and our economy. This message should resonate as lawmakers contemplate budget cuts for the judiciary and leave judicial vacancies unfilled. The availability of arbitration as a means of dispute resolution represents one way for litigants to mitigate this impact.

II. DISCUSSION

A. IMPACTS OF ADJUDICATORY DELAYS

The connection between efficient operation of the judiciary and economic well-being of the community is widely recognized:

- "The importance of legal institutions and governance for economic growth is now relatively well-accepted in the economics profession. The association has been well-demonstrated both theoretically and empirically."[3]
- "The role of the judiciary is to set up a framework in which the bargaining for property rights follow predetermined rules…and provides a clear and quick decision in cases of doubt….The anticipated future enforcement of rights is extremely important for current decisions, contracts and future activities of all participants."[4]
- "Judicial slowness may reduce incentives to start businesses by deteriorating the security of property rights. It may also limit possibilities of obtaining loans. Finding ways to speed up judiciaries is thus fundamental to economic growth."[5]
- "The insecurity created by a weak judiciary changes economic behavior in two ways. First, the overall cost structure of the economy increases….Increased collateral to make up for the risk associated with the poor performance of property rights increases the consumer price….Second, not all risk can be covered by higher premiums. If the risk is considered too high, certain transactions simply do not take place."[6]

It also should be noted that since legal work often is clustered around settlement or adjudication of pending cases, if case processing is delayed, less legal work results.[7]

Arbitration, mediation, and negotiation represent alternative dispute resolution ("ADR") methods for settling conflicts without litigation.[8] In this report, we compare cases litigated in federal courts with cases heard and determined in arbitration at the American Arbitration Association.

[3] Cross, F.B., "Law and Economic Growth," *Texas Law Review*, 80 (2002), pp. 1737-1775.

[4] Kohling, W.K.C., "The Economic Consequences of a Weak Judiciary," Center for Development Research, University of Bonn (November 2000).

[5] Chemin, Matthieu, "The Impact of the Judiciary on Entrepreneurship: Evaluation of Pakistan's 'Access to Justice Programme'," *Journal of Public Economics*, 93 (2009), pp. 114-125.

[6] Kohling, W.K.C., "The Economic Consequences of a Weak Judiciary," Center for Development Research, University of Bonn (November 2000).

[7] Spier, Kathryn, "The Dynamics of Pretrial Negotiation," *The Review of Economic Studies*, Vol. 59, No. 1 (Jan. 1992), pp. 93-108.

See also the Micronomics publication, *Economic Impact on the County of Los Angeles and the State of California of Funding Cutbacks Affecting the Los Angeles Superior Court, December 2009*.

The not-for-profit American Arbitration Association (AAA) has administered approximately 4.7 million alternative dispute resolution (ADR) cases since its founding in 1926. With 23 offices in the United States and one in Singapore, the AAA provides organizations of all sizes in virtually every industry with ADR services and products. The AAA's global component, the International Centre for Dispute Resolution ("ICDR"), extends the AAA's legacy globally.[9]

In undertaking this study, we relied on information available from the United States District Courts and United States Courts of Appeals, which report statistical data on the operations of the federal judiciary. These data are available on the U.S. Courts website.[10] We also made use of information provided to Micronomics by the American Arbitration Association. With respect to median time intervals for both arbitration and court proceedings, we limit our analysis to those data that reflect arbitrations that went to award and court proceedings that went to trial or through appeal. These data are described in the Appendix.

[8] "Alternative Dispute Resolution," Legal Information Institute, Cornell University Law School (https://www.law.cornell.edu/wex/alternative_dispute_resolution).

"What is Alternative Dispute Resolution?" *Thomson Reuters FindLaw* (http://hirealawyer.findlaw.com/choosing-the-right-lawyer/alternative-dispute-resolution.html).

[9] For more information, visit www.adr.org.

[10] *See* http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables.

B. THE CASELOADS

A useful starting point for any analysis of the length of time required to adjudicate disputes associated with AAA arbitration on the one hand and U.S. district court civil proceedings on the other involves an examination of the caseload by state. Table 1 sets forth this information in 2015 for arbitration by the AAA and U.S. district courts. Figure 1 (below) shows 2015 AAA arbitration and district court data for (a) the top-ten states based on caseload; (b) the eight states that overlap within the top-ten caseload for both AAA arbitration and district courts (i.e. California, New York, Texas, Florida, Pennsylvania, Georgia, New Jersey, and Illinois); and (c) the overall U.S. total.[11] The only non-overlapping states within the top-ten caseload are Maryland and Michigan from the AAA arbitration data and West Virginia and Ohio from the district court data.

Figure 1: Caseload for Top 10 States, AAA Arbitration Cases Going to Award and U.S. District Court Civil Cases, 2015 (Reflected in Table 1)

	Arbitration				U.S. District Courts		
	State or Territory	Caseload	Percent of Total		State or Territory	Caseload	Percent of Total
1.	California	191	14%	1.	California	22,451	10%
2.	New York	167	12%	2.	New York	19,233	9%
3.	Texas	156	11%	3.	Florida	16,011	7%
4.	Florida	76	6%	4.	Illinois	13,962	6%
5.	Pennsylvania	68	5%	5.	West Virginia	13,813	6%
6.	Maryland	52	4%	6.	Pennsylvania	13,770	6%
7.	Georgia	47	3%	7.	Texas	13,406	6%
8.	New Jersey	47	3%	8.	Ohio	8,956	4%
9.	Michigan	41	3%	9.	New Jersey	8,089	4%
10.	Illinois	37	3%	10.	Georgia	5,531	3%
11.	**Top-10 States Total**	**882**	**64%**	**11.**	**Top-10 States Total**	**135,222**	**62%**
12.	**Overlapping States within Top-10 Total**	**789**	**57%**	**12.**	**Overlapping States within Top-10 Total**	**112,453**	**52%**
13.	**U.S. Total**	**1,375**	**100%**	**13.**	**U.S. Total**	**217,288**	**100%**

[11] U.S. district court caseload in 2015 is comprised of civil cases disposed of by trial or some other method. See Table 1 for additional details.

It is noteworthy that in 2015, the eight overlapping states within the top-ten account for more than half of the entire U.S. caseload for both AAA arbitration and district court data (see Line 12 in Figure 1). Given the substantial weight that the eight overlapping states contribute to the nationwide total, it is useful to calculate the *additional time* required to trial and through appeal in federal courts compared with AAA arbitration for those eight states alone as well as for the entire United States. These analyses are described below.

C. ADDITIONAL TIME TO TRIAL

Table 2 sets forth annual comparisons of the median number of months required on a state by state basis, U.S. district courts v. AAA arbitration, between 2011 and 2015. Figures shown in Table 2 demonstrate that almost without exception (i.e. regardless of the state or territory in which the action is brought), cases going to award at arbitration are fully adjudicated in less time than it takes district court cases to get to trial. For example, in New York, the state with the second highest caseload, the median time required from filing to trial in U.S. district courts was 30.9 months in 2015; the median time required from filing to award with cases administered by the AAA was 12.5 months in the same year. In other words, it took more than 18.4 months *longer* (i.e. more than one and a half years *longer*) for civil cases to get to trial in New York than required for final adjudication of arbitration cases in New York (Table 2.5, Line 34). Federal cases in California, the state with the highest caseload in 2015, similarly took much longer to get to trial when compared with cases fully adjudicated by AAA arbitration. In 2015, for example, getting to trial in district court took nearly 15 months *longer* (i.e. more than one year *longer*) than the time required for final adjudication by AAA arbitration in California (28.1 months v. 13.2 months; Table 2.5, Line 5). These differences are tremendously significant to litigants interested in resolving their dispute and moving on.

Table 3 depicts a summary of the length of time required during the period 2011 through 2015, filing to trial, for the eight overlapping states (i.e. eight states that had both the highest AAA arbitration caseload and highest district court caseload in 2015). For example, the median number of months from filing to trial for civil cases brought in district court in New York fluctuated between 30.9 months in 2015 and 41.2 months in 2013 (Table 3, Line 2). Even in Texas, known as the "rocket docket" for intellectual property cases,[12] the median time to trial was never less than 20 months (Table 3, Line 3).

Table 4 sets forth a summary of the median time required for final adjudication (i.e. filing to award) via arbitration during the period 2011 through 2015 in the same states shown in Table 3, i.e. eight states with the highest caseload in 2015. The differences between the district court system and arbitration are dramatic. In California, where civil cases take at least 25 months to get to trial (Table 3, Line 1), time required for final adjudication with AAA arbitration is on average less than 13 months (Table 4, Line 1). In New Jersey, civil cases required at least 32 months to get to trial (Table 3, Line 7), while final adjudication with AAA arbitration was less than 14 months (Table 4, Line 7).

Table 5 depicts a summary of *additional time* required, district court civil cases going to trial v. AAA arbitration cases going to award, for the same states shown in Tables 3 and 4. The differences (i.e. the *extra time* required to get to trial compared with final adjudication through AAA arbitration) are significant – typically in excess of 12 months and sometimes greater than

[12] *See, for example*, Bell, Jacqueline, "Texas Rocket Docket Faces New Surge of Patent Suits," *Law360,* September 28, 2015 (https://www.law360.com/articles/707840/texas-rocket-docket-faces-new-surge-of-patent-suits).

See also "Rocket Docket Law and Legal Definition," U.S. Legal (https://definitions.uslegal.com/r/rocket-docket/).

24 months (i.e. New York and New Jersey in 2013). Figure 2 below sets forth the *additional time* required (district courts going to trial v. AAA arbitration going to award) from 2011 through 2015 for the eight states with the highest caseload in 2015.

Figure 2: Additional Time Required, U.S. District Court Civil Cases Going to Trial v. AAA Arbitration Cases Going to Award, States with Highest Caseload in 2015, 2011 – 2015 (Reflected in Table 5)

State	Additional Time Required to Trial				
	2011	2012	2013	2014	2015
	(Months)				
1. California	14.6	13.8	12.3	16.3	14.9
2. New York	19.8	22.6	29.4	21.8	18.4
3. Texas	10.8	7.6	8.8	11.9	9.9
4. Florida	6.9	7.4	9.3	6.4	6.3
5. Pennsylvania	17.2	15.4	9.8	16.6	12.9
6. Georgia	16.7	15.5	12.9	18.1	13.4
7. New Jersey	25.0	22.2	24.9	23.2	25.5
8. Illinois	12.6	17.4	14.5	20.4	18.6
9. Average	**15.5**	**15.2**	**15.2**	**16.8**	**15.0**

D. ADDITIONAL TIME THROUGH APPEAL

Table 6 sets forth a summary of the median time required for adjudication taking into account a conservative estimate of time required for appeals from outcomes at the district court level. Entries in Table 6 reflect the combined time required (a) from filing of an action in lower court (i.e. district court) to start of trial in the eight overlapping states with the highest caseload in 2015 plus (b) from filing of notice of appeal through last opinion or final order in each appellate court (i.e. circuit court) associated with the eight overlapping states with the highest caseload in 2015. For example, the median time required from the onset of litigation through appeal in New York (which is part of the Second Circuit) was 43 months in 2011 (i.e. more than three and a half years; Table 6, Line 2, Column 1). Even in Texas (the "rocket docket" for intellectual property cases), the median time required from initial filing through appeal was more than 30 months on average (i.e. approximately two and a half years).

Table 7 presents a summary of *additional time* required in district court cases that are appealed in the eight overlapping states with the highest caseload in 2015 v. AAA arbitration. For example, in New York, where appeals are heard in the Second Circuit, the length of time required for adjudication through appeal was 29-40 months *longer* than dispute resolution administered by AAA (45.7 months v. 12.2 months; Table 7, Line 2). Data for California, where appeals are heard in the Ninth Circuit, indicate that the length of time required for adjudication through appeal was 26-32 months *longer* than final adjudication through AAA arbitration (41.5 months v. 12.6 months; Table 7, Line 1). In other words, district court cases that went to trial in California and appealed in the Ninth Circuit (which includes California) took more than two years *longer* for adjudication through appeals v. resolution for AAA arbitration cases going to award. Regardless of the state or circuit, adjudication through appeal of district court cases took significantly longer than arbitration, as summarized in Figure 3 below.

Figure 3: Additional Time Required, U.S. District and Appellate Court Cases Going through Appeal v. AAA Arbitration Cases Going to Award, States with Highest Caseload in 2015, 2011 – 2015 (Reflected in Table 7)

State	Circuit	Additional Time Required through Appeal				
		2011	2012	2013	2014	2015
		(Months)				
1. California	9th	32.0	29.1	25.6	28.7	29.0
2. New York	2nd	31.9	34.8	39.8	32.4	28.6
3. Texas	5th	21.0	16.6	18.1	20.8	19.3
4. Florida	11th	15.5	14.6	16.9	13.5	13.7
5. Pennsylvania	3rd	26.9	23.1	16.1	23.0	21.3
6. Georgia	11th	25.3	22.7	20.5	25.2	20.8
7. New Jersey	3rd	34.7	29.9	31.2	29.6	33.9
8. Illinois	7th	22.2	25.7	22.5	27.5	25.8
9. Average		**26.2**	**24.6**	**23.8**	**25.1**	**24.1**

E. SUMMARY OF ADDITIONAL TIME TO TRIAL AND THROUGH APPEAL

Table 8 sets forth the length of time required for filing to trial in district courts (Table 8, Column 1) for the period 2011 through 2015. These figures represent the average of figures shown in Table 3. Column 2 of Table 8 depicts the average total time required for filing through appeal for the five years examined (based on Table 6). Column 3 of Table 8 presents the average time required for filing to award in AAA arbitration cases for the eight states with the highest caseload in 2015. Columns 4 and 5 of Table 8 show the *additional time* required by district courts when compared with arbitration. See Figure 4 below.

Figure 4: Median Time Required and Additional Time Required, U.S. District and Appellate Court Cases Going to Trial and through Appeal v. AAA Arbitration Cases Going to Award, States with the Highest Caseload in 2015, 2011 – 2015 (Reflected in Table 8)

State	Circuit	U.S. District Courts (Filing to Trial)	U.S. District and Appellate Courts (Filing through Appeal)	AAA Arbitration (Filing to Award)	Additional Time Required	
					To Trial	Through Appeal
		(1)	(2)	(3)	(1) - (3) (4)	(2) - (3) (5)
				(Months)		
1. California	9th	27.0	41.5	12.6	14.4	28.9
2. New York	2nd	34.6	45.7	12.2	22.4	33.5
3. Texas	5th	22.0	31.4	12.2	9.8	19.2
4. Florida	11th	18.4	26.0	11.2	7.2	14.8
5. Pennsylvania	3rd	24.6	32.3	10.2	14.4	22.1
6. Georgia	11th	25.9	33.5	10.6	15.3	22.9
7. New Jersey	3rd	35.8	43.5	11.7	24.1	31.8
8. Illinois	7th	30.4	38.4	13.7	16.7	24.7

Comparisons for the U.S. as a whole (rather than the eight states with the highest caseload in 2015) are summarized in Table 9, which depicts the length of time required for district court cases to get to trial (Table 9, Column 1), and through appeal (Table 9, Column 2), and for AAA arbitration cases to be fully adjudicated (Table 9, Column 3). Data contained in Table 9 indicate that between 2011 and 2015, the median time required for district court cases to get to trial was approximately 12 months *longer* than the median time for cases completely resolved by

arbitration (24.2 months v. 11.6 months; Table 9, Column 4).[13] These data also indicate that median time from initial filing in lower court to final appeal is more than 21 months *longer* than the median time for cases resolved by arbitration (33.6 months v. 11.6 months; Table 9, Column 5).[14] These differences are systematic throughout the five-year period examined. They indicate that a significant difference exists in time to adjudication between cases that work their way through district courts and cases brought to arbitration. See Figure 5 below.

Figure 5: Median Time Required and Additional Time Required, U.S. District and Appellate Court Cases Going to Trial and through Appeal v. AAA Arbitration Cases Going to Award, All States, 2011 – 2015 (Reflected in Table 9)

Year	U.S. District Courts (Filing to Trial)	U.S. District and Appellate Courts (Filing through Appeal)	AAA Arbitration (Filing to Award)	Additional Time Required	
				To Trial	Through Appeal
	(1)	(2)	(3)	(1) - (3) (4)	(2) - (3) (5)
			(Months)		
1. 2011	23.6	34.6	10.8	12.8	23.8
2. 2012	23.7	33.5	11.8	11.9	21.7
3. 2013	24.1	33.1	11.5	12.6	21.6
4. 2014	25.3	33.8	12.4	12.9	21.4
5. 2015	24.5	33.0	11.6	12.9	21.4

[13] Our use of "filing to trial" is conservative given the time between "start of a trial" on the one hand and "rendering of a final judgment" on the other. See the Appendix for additional details.

[14] Our calculation of "filing through appeal" is conservative given the gap in time between "start of trial" on the one hand and "filing of notice of appeal" on the other. See the Appendix for additional details.

F. DIRECT ECONOMIC CONSEQUENCES OF DELAY IN ADJUDICATION

As noted above, delayed disposition creates uncertainty among affected entities. It is well understood that the presence of such uncertainty makes businesses less prone to invest and expand operations, and can constrain the availability of capital for investment in business activities.[15] Further, entities engaged in litigation are deprived of resources and funds that otherwise would be available. Inability to access these funds and resources can be thought of as the opportunity cost of delayed adjudication.

In order to calculate this direct opportunity cost to the parties in dispute, we have made use of an estimate of minimum amount at issue in cases brought at the district court level. District courts have subject matter jurisdiction over cases in which the parties to the lawsuit are citizens of different states, either foreign or domestic, and there is at least $75,000 at stake in the lawsuit.[16] District courts also have original subject matter jurisdiction over all cases that arise under any federal law. This would include patent infringement cases, antitrust cases, and certain types of civil rights actions.[17] Given this mix of cases that arise in district courts, $75,000 per case represents a highly conservative estimate of minimum resources at risk in federal litigation. For example, patent infringement and antitrust actions brought in district courts typically involve multi-million dollar damage claims.

Table 10 depicts an estimate of the total amounts at issue in civil litigation at the district court level. Column 1 of Table 10 sets forth figures for the number of civil cases at the district court level disposed of at trial or through some other method (i.e. summary judgment, settlement, etc.) by year, 2011-2015.[18] Using $75,000 as a conservative estimate of the minimum average amount at issue per case (Table 10, Column 2), it is possible to estimate the total minimum amount at issue in civil cases litigated at the district court level (Table 10, Column 3). Annual total minimum amounts at issue varied between $14.9 billion in 2014 (and 2012) and $18.6 billion in 2011. See Figure 6 below.

[15] Bloom, Nicholas, "The Impact of Uncertainty Shocks," *Econometrica*, Vol. 77, No. 3 (May 2009), pp. 623-685.

[16] "Federal or State Court: Subject Matter Jurisdiction," *Thomson Reuters FindLaw* (http://litigation.findlaw.com/filing-a-lawsuit/federal-or-state-court-subject-matter-jurisdiction.html).

Also, see 28 U.S. Code § 1331 (https://www.law.cornell.edu/uscode/text/28/1331) and 28 U.S. Code § 1332 (https://www.law.cornell.edu/uscode/text/28/1332).

[17] "Federal or State Court: Subject Matter Jurisdiction," *Thomson Reuters FindLaw* (http://litigation.findlaw.com/filing-a-lawsuit/federal-or-state-court-subject-matter-jurisdiction.html).

[18] As noted in the Appendix, U.S. District Court civil cases exclude criminal cases, prisoner petitions, land condemnations, deportation reviews, recovery of overpayments, and enforcement of judgments.

Although not every case filed in district court goes to trial, all cases have the potential to go to trial or through appeal.

Figure 6: U.S. District Court Civil Cases, Number of Cases and Minimum Amount at Issue, 2011 – 2015 (Reflected in Table 10)

Year	Number of Cases Terminated	Minimum Amount At Issue Per Case ($)	Total Minimum Amount At Issue ($Billions)
1. 2011	247,419	$75,000	$18.6
2. 2012	198,023	75,000	14.9
3. 2013	199,400	75,000	15.0
4. 2014	198,998	75,000	14.9
5. 2015	217,288	75,000	16.3
6. Total	**1,061,128**		**$79.6**

In order to estimate the direct economic opportunity cost (i.e. to the parties in dispute) attributable to delay associated with the slow pace of civil cases that go to trial in district courts relative to adjudication through AAA arbitration, we apply these "at issue" estimates to the *additional time* required to trial at the district court level as shown in Column 4 of Table 9. Table 11 depicts a calculation of the direct economic opportunity cost of delay (also referred to as "lost resources due to delay") in getting to trial v. arbitration. These lost resources have been estimated by calculating the foregone return (i.e. unrealized investment income) from the minimum amount at issue per year (Table 11, Column 1) based on (a) the *additional time* required to trial (Table 11, Column 2) and (b) the average annual return on investments in the S&P 500, which was approximately 13 percent between 2011 and 2015 (Table 11, Column 3).[19] This calculation yields an estimate of lost resources attributable to delay in getting to trial (Table 11, Column 4). The figures in Column 4 represent the value of resources which are unavailable to litigants *for the additional period of time* (i.e. at trial compared with arbitration) because of uncertainty associated with the litigation outcome. Said differently, these estimates reflect the value that could have been created if these resources had been successfully invested. This direct economic opportunity cost is approximately **$10.9 billion** between 2011 and 2015 (Table 11, Column 4).

Table 12 presents a similar calculation to Table 11, i.e. opportunity cost associated with delay in getting to trial versus adjudicating via arbitration, but instead we use the time difference for the eight overlapping states with the highest caseload in 2015 as opposed to the time difference for

[19] Of course, the S&P rate of return varies over time and is only one measure of potential returns on investment. The S&P rate of return is used because it is publicly available, carefully calculated, and representative of returns on an investment in this pool of public companies during the period of time that is the subject of this analysis.

the entire United States (see Table 12, Column 2). Here, the direct economic opportunity cost exceeds **$13.6 billion** between 2011 and 2015 (Table 12, Column 4).[20]

Appealed cases take even longer to adjudicate and thus are subject to additional losses. A calculation of these losses is shown at Table 13, which is based on the same total minimum amount at issue and the same average annual return on investments in the S&P 500 presented in Tables 11 and 12, as well as the *additional time* required through appeal (Table 13, Column 2). The estimated direct loss attributable to delay through appeal between 2011 and 2015 is approximately **$20.0 billion** (Table 13, Column 4).

Table 14 presents a similar calculation to Table 13, i.e. lost resources through appeal, but instead it is based on *additional time* required through appeal for selected U.S. appellate courts for the eight states with the highest caseload in 2015 (see Table 14, Column 2). The estimated direct economic opportunity cost in this instance is roughly **$22.9 billion** (Table 14, Column 4).[21]

A summary of the four distinct "direct loss" analyses is set forth in Figure 7 below.

Figure 7: Direct Economic Opportunity Cost (Lost Resources) Associated with Delay to Trial and Delay through Appeal, 2011 – 2015 (Reflected in Tables 11-14)

	U.S. District Courts v. Arbitration (Delay to Trial)		U.S. Appellate Courts v. Arbitration (Delay through Appeal)	
Year	Based on Delay in Entire U.S. ($Billions)	Based on Delay in States with Highest Caseload in 2015 ($Billions)	Based on Delay in Entire U.S. ($Billions)	Based on Delay in States with Highest Caseload in 2015 ($Billions)
1. 2011	$2.6	$3.2	$5.1	$5.7
2. 2012	1.9	2.5	3.7	4.2
3. 2013	2.0	2.5	3.7	4.1
4. 2014	2.1	2.8	3.6	4.3
5. 2015	2.3	2.7	4.0	4.5
6. Total	**$10.9**	**$13.6**	**$20.0**	**$22.9**

[20] To be clear, this second calculation also uses the total number of U.S. district court civil cases per year (Table 10, Column 1). The only difference in calculating direct economic opportunity cost in Tables 11 and 12 is that the *additional time* required (trial v. arbitration) is based on the entire U.S. in Table 11 and the eight states with the highest caseload (in 2015) in Table 12. In other words, both estimates of the direct economic opportunity cost of delay to trial utilize the entire U.S. district court caseload.

[21] To be clear, this fourth calculation also uses the total number of U.S. district court civil cases per year (Table 10, Column 1). The only difference in calculating direct economic opportunity cost in Tables 13 and 14 is that the *additional time* required (appeal v. arbitration) is based on the entire U.S. in Table 13 and the eight states with the highest caseload (in 2015) in Table 14. In other words, both estimates of the direct economic opportunity cost of delay through appeal utilize the entire U.S. district court caseload.

These analyses reflect comparisons between federal courts and AAA arbitration. As noted above, systematic data reflecting the performance of state courts with respect to time required for adjudication are unavailable. That said, there is significant evidence that the performance of state courts in this area is even worse than that of the federal court system, i.e. it is likely that the amount of time required by state courts to adjudicate disputes is significantly greater than time required by federal courts. Anecdotal evidence in this regard includes the following:

- Michigan has cut 49 judgeships through retirements and attrition;
- Alabama's chief justice ordered the state's courts to close on Fridays to keep costs down;[22]
- In Iowa, courts now operate at 12 percent below staffing standards, causing significant delays in case processing;[23]
- New York laid off approximately 500 employees due to a $178 million cut in state court system funding;[24]
- New York also had to abandon a special program intended to reduce case backlog that made use of retired judges to handles thousands of cases.[25]

There is little doubt that were systematic data available reflecting performance of state courts, overall results would support the conclusions described herein, i.e. administration of cases through the court system requires significantly more time than AAA arbitration.

Recognizing that delays impose costs on litigants, states have enacted statues to award interest for civil case recoveries obtained in district courts or state courts. Each state has its own laws as to the appropriate level of interest and as to how interest is to be calculated. For example, under New York law, interest shall be at the rate of nine percent per year.[26] Under California law, the

[22] Weise, Karen, "U.S. Courts Face Backlogs and Layoffs," Bloomberg Businessweek, April 28, 2011 (http://www.businessweek.com/magazine/content/11_19/b4227024878939.htm).

[23] Hall, Daniel J., "Reshaping the Face of Justice; The Economic Tsunami Continues" (http://www.ncsc.org/~/media/Files/PDF/Information%20and%20Resources/Budget%20Resource%20Center/Hall.ashx).

[24] Adeboyejo, Betsy M. and Buller, Alexandria, "Cuts to State Courts Are Focus of Symposium," American Bar Association News Service, September 23, 2011 (http://web.archive.org/web/20111001051737/http://www.abanow.org/2011/09/cuts-to-state-court-focus-of-symposium/).

As of 2011, at least six states opted to close their courts one day a week due to insufficient funding; New Hampshire suspended all civil cases for one year because of backlogs that were exacerbated by funding issues; and 40 states had decreased the funding for their courts. *See* Adeboyejo, Betsy M. and Buller, Alexandria, "Cuts to State Courts Are Focus of Symposium," American Bar Association News Service, September 23, 2011 (http://web.archive.org/web/20111001051737/http://www.abanow.org/2011/09/cuts-to-state-court-focus-of-symposium/).

[25] Glaberson, William, "Cuts Could Stall Sluggish Courts at Every Turn," New York Times, May 15, 2011 (http://www.nytimes.com/2011/05/16/nyregion/budget-cuts-for-new-york-courts-likely-to-mean-delays.html).

[26] New York Civil Practice Law and Rules § 5004, Rate of Interest (http://codes.findlaw.com/ny/civil-practice-law-and-rules/cvp-sect-5004.html).

interest rate is set by the legislature and is not to exceed 10 percent per year.[27] Under Florida law, the rate reflects a complex formula based on the discount rate of the Federal Reserve Bank of New York for the preceding year.[28] Texas makes use of a complex formula based on the prime rate published by the Federal Reserve Board of Governors.[29] Regardless of the state, interest allowed on money judgments obtained often is well under amounts associated with returns on common indices of invested capital performance such as the S&P 500. Further, we are not aware of any instance where a defendant is compensated for its inability to use capital at risk in litigation when the defendant prevails.

Where the courts have discretion in the determination of interest, they may adopt lower interest rates, sometimes based on "risk-free" federal government instrument rates. Illustrative cases show an award of interest rates as low as 2-3 percent.[30] Post-judgment interest in federal court is governed by 28 U.S.C. § 1961(a), which provides that: "Interest shall be allowed on any money judgment in a civil case recovered in a district court… Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment."[31] In recent years that rate has been less than

[27] "California Interest Rate Laws," *Thomson Reuters FindLaw* (http://statelaws.findlaw.com/california-law/california-interest-rates-laws.html).

California Civil Code – Section 3287-3291: Article 2. Interest As Damages (http://law.justia.com/codes/california/2009/civ/3287-3291.html).

The interest rate on judgments is set by the legislature. The rate of interest will be 7 percent if the legislature does not set the rate. *See* "California Interest Rate Laws," *Thomson Reuters FindLaw* (http://statelaws.findlaw.com/california-law/california-interest-rates-laws.html).

[28] The 2016 Florida Statutes, Title VI Chapter 55 Sec. 55.03 (http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0000-0099/0055/Sections/0055.03.html).

[29] 2005 Texas Finance Code Chapter 304, Judgment Interest (http://law.justia.com/codes/texas/2005/fi/004.00.000304.00.html).

[30] See, for example:

Opinion, *N.Y.Marine & General Insurance Co. v. Tradeline (L.L.C.)*, 266 F.3d 112 (2d Cir. 2001), pp. 6 and 16 ["Interest is intended to make the injured party whole, and generally should be measured by interest on short-term, risk-free obligations… District court did not abuse its discretion by applying United States Treasury Bill rate… in awarding pre-judgment interest… [t]he district court applied the United States Treasury Bill rate as provided in 28 U.S.C. § 1961(a)"].

Decision/Order, *ACM Advance Currency Markets, S.A. v. Bauer*, 2009 WL 1656046 (Sup. Ct. N.Y. Cty, 2009), p. 4 ["Plaintiff also seeks an award of prejudgment interest… the court, in its discretion, will set the interest rate at the average treasury bill rate for fiscal year 2005, 2.25%"].

Decision and Order, *In re CNB International, Inc., et al., v. Timothy S. Kelleher, et al.*, 393 B.R. 306 (Bankr. W.D.N.Y. 2008), p. 25 ["In the present instance, an appropriate level of pre-judgment interest will accomplish an objective similar to that of 28 U.S.C. § 1961, which allows for interest on federal judgments… the court will apply the average of the weekly 1 year constant maturity Treasury yields for the 392 weeks during which this matter has been litigated. This average comes to 2.975 percent. In the court's view, this rate fairly reflects the time value of money"].

[31] 28 U.S.C. 1961 – Post Judgment Interest Rates, U.S. Courts website (http://www.uscourts.gov/services-forms/fees/post-judgement-interest-rate/28-usc-1961-post-judgment-interest-rates).

one percent.[32] Thus, the interest earned in federal court cases following judgment through appeal is significantly less than the state interest statutes suggest would be applied.

[32] 1-Year Treasury Constant Maturity Rate, Economic Data from the Federal Reserve Bank of St. Louis (https://fred.stlouisfed.org/series/DGS1).

H.15 Selected Interest Rates, as of February 16, 2017, Board of Governors of the Federal Reserve System website (https://www.federalreserve.gov/releases/h15/).

G. INDUCED OR INDIRECT ECONOMIC CONSEQUENCES OF DELAY IN ADJUDICATION

The losses shown in Figure 7 (above) represent the direct opportunity cost to the parties involved in litigation. Economists recognize that a given change in economic activity produces benefits or costs in excess of the initial outcome. In economics, these costs or benefits are referred to as "multiplier effects." With respect to resources in limbo due to litigation, multiplier effects would include reduced expenditures by entities during the period of delay. They also will include reduced expenditures by entities that otherwise would have been ultimate beneficiaries of expenditures during the period of delay by the litigating entities. Economists and financial analysts refer to these secondary impacts as "indirect" and "induced" losses respectively. In the context of our analyses, the combined direct, indirect, and induced losses can be thought of as an estimated loss to society as a whole.

In the 1970s and 1980s, policymakers, academics, and U.S. government representatives recognized a need to develop a tool that could provide information on the total economic impact on sectors of the economy associated with changes in various inputs. The tool they developed ultimately became known as IMPLAN, an acronym for "impact analysis and planning." IMPLAN was developed originally at the University of Minnesota and has been in widespread use for decades.[33]

Tables 15, 16, 17, and 18 make use of the IMPLAN model to estimate the indirect and induced economic impact based on direct economic impact (i.e. resources lost due to delay). Overall economic losses associated with delay to trial are roughly **$28.3 billion to $35.3 billion**,[34] while overall economic losses associated with delay through appeal are approximately **$51.9 billion to $59.2 billion**.[35] See Figure 8 below for a summary of our findings.

[33] See www.implan.com. Numerous articles have been written about the application of the IMPLAN model by government, academic, and private industry entities.

[34] The lower estimate is based on delay to trial (district courts v. AAA arbitration) for the entire U.S., while the higher estimate is based on delay to trial for the eight states with the highest caseload in 2015. See Tables 15 and 16.

[35] The lower estimate is based on delay through appeal (appellate courts v. AAA arbitration) for the entire U.S., while the higher estimate is based on delay through appeal for circuit courts associated with the eight states with the highest caseload in 2015. See Tables 17 and 18.

Figure 8: Overall Economic Losses (Direct, Indirect, and Induced Losses) Associated with Delay to Trial and Delay through Appeal, 2011 – 2015 (Reflected in Tables 15-18)

Economic Impact	U.S. District Courts v. Arbitration (Delay to Trial)		U.S. Appellate Courts v. Arbitration (Delay through Appeal)	
	Based on Delay in Entire U.S. ($Billions)	Based on Delay in States with Highest Caseload in 2015 ($Billions)	Based on Delay in Entire U.S. ($Billions)	Based on Delay in States with Highest Caseload in 2015 ($Billions)
1. Direct Loss	$10.9	$13.6	$20.0	$22.9
2. Indirect Loss	8.0	10.0	14.6	16.7
3. Induced Loss	9.4	11.7	17.2	19.6
4. Total Loss	**$28.3**	**$35.3**	**$51.9**	**$59.2**

H. QUALITATIVE DIFFERENCES BETWEEN ARBITRATION AND COURT PROCEEDINGS

In addition to the losses described above, arbitration may provide certain advantages compared with federal courts.

- More control over the process
    - Unlike litigation, arbitration is a creature of contract and the parties control the process. This means that parties can agree to design the arbitration so that it accommodates their respective needs both at the contractual stage and after the arbitration has commenced. The parties can determine the scope of discovery, where and how the hearing should be conducted, the length of time for the entire process and many other procedural issues. Arbitration affords a flexibility that courts, governed appropriately by more directive laws and rules, typically cannot provide.
- Selecting the decision-maker
    - A potential benefit of arbitration relates to the fact that the parties can select their arbitrators and thereby choose decision-makers with qualifications tailored to the needs of the dispute. These desired qualifications can include attributes such as subject matter expertise, temperament, and commitment and ability to conduct an efficient, cost-effective arbitration. At the same time, certain types of cases seem to wind up in particular federal court districts which have developed considerable subject matter expertise (e.g. patent infringement cases in the Eastern District of Texas, pharmaceutical cases in New Jersey).
- Exposure of confidential information
    - Litigated cases typically produce some type of public hearing(s) and/or public record; arbitration can allow parties to avoid such an open platform. Even with the use of Protective Orders that limit access to confidential information, sensitive information is more difficult to conceal with litigation. The ability to keep this kind of information private can prove beneficial.
- Harmful to the relationship between disputing parties
    - All cases are unique, but in general, litigation typically is more antagonistic and may lead to strained or severed relationships between the parties. Arbitration can be less combative.
- Accumulation of additional legal fees and attorney fees
    - Legal fees and attorney fees are significant to litigants, and vary generally with the length of time required to adjudicate disputes. Other things equal, the longer things take, the greater the fees, so that parties choosing the federal court system over arbitration are subject to additional ancillary costs just based on the fact that the process takes

longer. Moreover a court trial can often take longer than an arbitration hearing because procedures followed in court like evidentiary objections, *voir dire*, jury charges, proposed findings of fact, authentication of documents, qualification of experts and the like are often streamlined to save time and cost in arbitration where those procedures are not required.

- Loss of time, energy, and focus of company executives and employees
    - Because litigation to trial and through appeal takes approximately 12-21 months *longer* than arbitration, the choice of litigation over arbitration imposes burdens on executives, managers, and/or employees that are at the expense of revenue-generating business opportunities.
- Benefits for international disputes
    - Arbitration may provide a uniquely detached and neutral forum for dispute resolution decision makers and assure adherence to the rule of law in a familiar procedural setting. Moreover, arbitration permits the parties to choose adjudicators with the necessary expertise to decide a cross-border dispute, including knowledge of more than one legal system, ability to harmonize cultural differences, and fluency in more than one language. The New York Convention enables enforcement of international arbitration agreements and awards across borders in more than 150 countries. In contrast, judgments of national courts are more difficult and often impossible to enforce in other countries.

III. SUMMARY AND CONCLUSIONS

"Justice delayed is justice denied" is a long-standing legal maxim that aligns well with economic theory. The concept is a simple one: A party that experiences compensable economic injury is effectively denied redress if resolution takes too long. State-mandated statutory interest rates are typically lower than the average rate of return that could be earned by investing capital at risk due to litigation. This means that plaintiffs often are not made whole even when statutory interest is awarded. Reducing the amount of time required to resolve disputes represents an important way to mitigate economic losses associated with litigation. Further, while statutory interest compensates the claimant who wins, the defendant is never compensated for its inability to use capital tied up in litigation. This means that defendants no less than plaintiffs have an incentive to speed up the process.

Arbitration represents one way in which the pace of dispute resolution can be accelerated. Significant differences in time required exist between the onset of a dispute and a final determination when the choice is between the federal courts and arbitration. On average, federal courts take much longer to resolve by trial and appeal than arbitration by the AAA. These differences are systematic across almost all states and sections of the country and are especially significant in the states with the highest arbitration and federal court caseloads. In light of these differences and the economic costs associated with delay, other things equal, parties would be well-advised to consider arbitration for dispute resolution.

ABOUT THE AUTHORS

About the Authors

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About Micronomics

Micronomics is an economic research and consulting firm located in Los Angeles, California. Founded in 1988, it specializes in the collection, tabulation and analysis of various types of economic, financial and statistical data. Areas of expertise include industrial organization, antitrust, economic impact studies, the valuation of intellectual property and the calculation of economic damages. Clients include publicly and privately held businesses and government agencies. Industry experience includes sports and entertainment, banking and financial services, pharmaceuticals, telecommunications, and computer hardware and software.

APPENDIX
DESCRIPTION OF DATA

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DATA FROM THE UNITED STATES COURTS GOVERNMENT WEBSITE

1. Tables C-5, "U.S. District Courts – Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Periods Ending December 31, 2011 through 2015."[36]

    - From Tables C-5, we ascertain i) the total number of U.S. District Court civil cases terminated each year and ii) the median time interval from the date a case was filed to the date trial begins (i.e. "filing to trial").[37]
    - Tables C-5 exclude cases relating to land condemnations, prisoner petitions, deportation reviews, recovery of overpayments, and enforcement of judgments.
    - Information in Tables C-5 is available at three levels – district(s) within each state or territory; circuits (i.e. appellate courts); and overall total.[38]

[36] See: http://www.uscourts.gov/sites/default/files/statistics_import_dir/C05Dec11.pdf; http://www.uscourts.gov/sites/default/files/statistics_import_dir/C05Dec12.pdf; http://www.uscourts.gov/sites/default/files/statistics_import_dir/C05Dec13.pdf; http://www.uscourts.gov/sites/default/files/c05dec14_0.pdf; and http://www.uscourts.gov/sites/default/files/data_tables/stfj_c5_1231.2015.pdf.

[37] "Explanation of Selected Terms" (http://www.uscourts.gov/sites/default/files/explanation-of-selected-terms-september-2014_0.pdf).

Our use of "filing to trial" is conservative given the time between the start of trial and the rendering of a final judgment as judges may take weeks or months to issue a judgment after a bench trial. Further, post-trial motion practice following a jury trial in civil cases also may take weeks or months before a final judgment is rendered.

[38] Some states have more than one district court (e.g. California and New York both have four district courts). When a state has two or more district courts, we calculate the average time required from filing to trial for the districts within that state. For example, in California, median time required from filing to trial in 2015 is 28.1 months (shown at Line 5 of Table 2.5), which is the average of time required from filing to trial for the Northern District of California (26.7 months), the Eastern District of California (30.6 months), the Central District of California (20.9 months), and the Southern District of California (34.1 months). *See* Table C-5, U.S. District Courts - Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Period Ending December 31, 2015.

2. Tables B-4, titled "U.S. Courts of Appeals – Median Time Intervals in Months for Merit Terminations of Appeals, by Circuit, During the 12-Month Periods Ending September 30, 2011 through 2015."[39]

    - From Tables B-4, we ascertain the median time interval from filing of notice of appeal to last opinion or final order in appellate court (i.e. filing of appeal through conclusion of appeal).[40]
    - We combine data for (a) filing to trial and (b) filing of appeal through conclusion of appeal in order to calculate the duration of time required between initial filing and the conclusion of appeal (i.e. "filing through appeal").[41]
    - Tables B-4 do not include data from the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit").[42] We do not believe that this omission impacts our results.

[39] See: http://www.uscourts.gov/sites/default/files/statistics_import_dir/B04Sep11.pdf; http://www.uscourts.gov/sites/default/files/statistics_import_dir/B04Sep12.pdf; http://www.uscourts.gov/sites/default/files/statistics_import_dir/B04Sep13.pdf; http://www.uscourts.gov/sites/default/files/statistics_import_dir/B04Sep14.pdf; and http://www.uscourts.gov/sites/default/files/data_tables/B04Sep15.pdf.

Our understanding is that Tables C-5 pertain to civil cases only, while Tables B-4 pertain to both civil and criminal cases. Anecdotal evidence suggests that appeals of criminal cases take less time to resolve than appeals of civil matters. Also, the gap between the end of a trial and the onset of an appeal typically is greater in civil than in criminal cases. Accordingly, use of data contained in Tables B-4 in conjunction with data contained in Tables C-5 is appropriate and probably conservative. See, for example:

The Honorable Carl West Anderson, "Are the American Bar Association's Time Standards Relevant for California Courts of Appeal?" *University of San Francisco Law Review*, Winter 1993, p. 3.

Stephenson, Gail S., "Reaching the Top of the Docket: Louisiana's Preference System," *Loyola Law Review*, Spring 2010, p. 50.

Krown, Lexia B., "Clarity as the Last Resort? Why Federal Rule of Appellate Procedure 4 Should and Could Stipulate Which Judgments are 'Final'," *Ohio State Law Journal*, 2009, pp. 2 and 15.

[40] In Table B-4 for 2011, this is described as median time interval "from filing of notice of appeal to final disposition."

The docket date is used to calculate median time intervals instead of "from filing of notice of appeal" for original proceedings, miscellaneous applications, and appeals from administrative agencies. See Tables B-4 for 2012-2015.

[41] The calculation of filing through appeal is conservative given the gap in time between the start of a trial on the one hand and the filing of notice of appeal on the other. For example, in district court civil cases, parties have 30 days to file an appeal after an entry of judgment is made (or 60 days if the United States is a party). See, for example:

Rule 4, Appeal as of Right – When Taken (https://www.law.cornell.edu/rules/frap/rule_4).

U.S. Court of Appeals for the Fourth Circuit, Appellate Procedure Guide, December 2016 (http://www.ca4.uscourts.gov/AppellateProcedureGuide/General_Provisions/APG-appellatedeadlines.html).

Federal Rules of Appellate Procedure, Ninth Circuit Rules, Circuit Advisory Committee Notes (http://cdn.ca9.uscourts.gov/datastore/uploads/rules/rules.htm).

[42] The Federal Circuit is unique compared with the other twelve Circuit Courts of Appeals in that it has nationwide jurisdiction in a variety of areas, including international trade, government contracts, patents, trademarks, certain

- While systematic Federal Circuit data are difficult to obtain, a business litigation article released by *Quinn Emanuel Trial Lawyers* notes that "the Federal Circuit's median disposition time is in line with many of the other circuits."[43]

- Information in Tables B-4 is available at two levels – circuits and overall total.

money claims against the U.S. Government, federal personnel, veterans' benefits, and public safety officers' benefits claims. More than half of the cases administered by the Federal Circuit involve administrative law, while intellectual property and monetary damages against the U.S. Government account for approximately 31 percent and 11 percent, respectively. *See* United States Court of Appeals for the Federal Circuit, Court Jurisdiction, U.S. Courts website (http://www.cafc.uscourts.gov/the-court/court-jurisdiction).

[43] "Article: March 2013 Appellate Update – The Appellate Timetable," Business Litigation Reports, *Quinn Emanuel Trial Lawyers* (http://www.quinnemanuel.com/the-firm/news-events/article-march-2013-appellate-update-the-appellate-timetable/).

DATA FROM AMERICAN ARBITRATION ASSOCIATION (AAA)

3. AAA provided Micronomics with data for its arbitration cases closed between 2011 and 2015.[44]

    - From these data, we calculate the annual median time required from filing to final resolution in cases determined in arbitration at the American Arbitration Association (i.e. "filing to award").
        - We calculate filing to award for all cases in the data with the status "awarded," i.e. the case was determined in arbitration at the AAA.[45]
            - Our calculation of median time interval from filing to award is based on the timing of the award.
        - We include only AAA and ICDR arbitration cases that had claimed amounts of *at least* $75,000.[46] This matches our treatment of district court cases with subject matter jurisdiction over disputes where at least $75,000 is involved.
    - AAA informed us that its data include cases related to business-to-business, construction, employment, and consumers, its data exclude cases related to labor, no-fault insurance in New York, and automobile accident claims in Illinois.[47]

[44] Length of time for filing to trial in federal cases and filing to award in AAA arbitration is based on calendar year data; length of time for filing of appeal through conclusion of appeal in federal cases is provided on a fiscal year basis. Since all data cover a full year, this difference does not materially affect our analysis.

[45] AAA cases with status of administrative, dismissal based on settlement, withdrawn, settled, or otherwise closed without going to award are not used to calculate median time from filing to award because they were resolved in another manner (e.g. before a final decision was made in arbitration at the AAA).

[46] We have been informed by AAA that most of its data utilized in this report pertain to the domestic United States; some cases were administered by AAA's international division, the International Centre for Dispute Resolution.

[47] Of the 7,416 AAA arbitration cases that went to award from 2011 through 2015, only 637 (or 8.6%) are consumer cases.

TABLES

TABLE 1

CASELOAD FOR TOP 10 STATES
AAA ARBITRATION CASES GOING TO AWARD AND U.S. DISTRICT COURT CIVIL CASES
2015

	Arbitration[1]			U.S. District Courts[2]		
	State or Territory	Caseload	Percent of Total	State or Territory	Caseload	Percent of Total
1.	California	191	13.9%	California	22,451	10.3%
2.	New York	167	12.1%	New York	19,233	8.9%
3.	Texas	156	11.3%	Florida	16,011	7.4%
4.	Florida	76	5.5%	Illinois	13,962	6.4%
5.	Pennsylvania	68	4.9%	West Virginia	13,813	6.4%
6.	Maryland	52	3.8%	Pennsylvania	13,770	6.3%
7.	Georgia	47	3.4%	Texas	13,406	6.2%
8.	New Jersey	47	3.4%	Ohio	8,956	4.1%
9.	Michigan	41	3.0%	New Jersey	8,089	3.7%
10.	Illinois	37	2.7%	Georgia	5,531	2.5%
11.	Delaware	34	2.5%	Minnesota	5,046	2.3%
12.	Ohio	34	2.5%	Michigan	4,907	2.3%
13.	Louisiana	28	2.0%	Louisiana	4,867	2.2%
14.	Arizona	27	2.0%	Indiana	4,104	1.9%
15.	Alabama	25	1.8%	Missouri	3,847	1.8%
16.	Connecticut	25	1.8%	Washington	3,338	1.5%
17.	Missouri	25	1.8%	Maryland	3,228	1.5%
18.	District of Columbia	24	1.7%	Tennessee	3,107	1.4%
19.	Tennessee	24	1.7%	Alabama	2,993	1.4%
20.	Colorado	21	1.5%	Virginia	2,935	1.4%
21.	North Carolina	21	1.5%	North Carolina	2,779	1.3%
22.	Virginia	19	1.4%	Kansas	2,774	1.3%
23.	Minnesota	18	1.3%	Massachusetts	2,719	1.3%
24.	Washington	18	1.3%	Colorado	2,371	1.1%
25.	Massachusetts	17	1.2%	Arizona	2,345	1.1%
26.	Mississippi	14	1.0%	South Carolina	2,341	1.1%
27.	Arkansas	8	0.6%	Oklahoma	2,338	1.1%
28.	Nevada	8	0.6%	Nevada	2,165	1.0%
29.	Oklahoma	8	0.6%	Kentucky	2,025	0.9%
30.	South Carolina	7	0.5%	Arkansas	1,887	0.9%
31.	Iowa	6	0.4%	Oregon	1,794	0.8%
32.	Kentucky	6	0.4%	District of Columbia	1,777	0.8%
33.	Kansas	5	0.4%	Mississippi	1,771	0.8%
34.	North Dakota	5	0.4%	Connecticut	1,745	0.8%
35.	Puerto Rico	5	0.4%	Wisconsin	1,737	0.8%
36.	Utah	5	0.4%	Delaware	1,630	0.8%
37.	Hawaii	4	0.3%	Iowa	1,104	0.5%
38.	Indiana	4	0.3%	Puerto Rico	1,085	0.5%
39.	New Mexico	4	0.3%	New Mexico	1,017	0.5%
40.	Nebraska	3	0.2%	Utah	1,008	0.5%
41.	Oregon	3	0.2%	Rhode Island	797	0.4%
42.	Virgin Islands	3	0.2%	South Dakota	553	0.3%
43.	Wisconsin	3	0.2%	Hawaii	551	0.3%
44.	Idaho	2	0.1%	Nebraska	496	0.2%
45.	Maine	2	0.1%	Maine	470	0.2%
46.	Montana	2	0.1%	New Hampshire	421	0.2%
47.	New Hampshire	2	0.1%	Idaho	419	0.2%
48.	West Virginia	2	0.1%	Montana	407	0.2%
49.	Rhode Island	1	0.1%	Vermont	251	0.1%
50.	Vermont	1	0.1%	Alaska	237	0.1%
51.	Alaska	-	0.0%	Virgin Islands	217	0.1%
52.	Guam	-	0.0%	Wyoming	211	0.1%
53.	South Dakota	-	0.0%	North Dakota	195	0.1%
54.	Wyoming	-	0.0%	Guam	31	0.0%
55.	N/A[3]	20	1.5%	Northern Mariana Islands	26	0.0%
56.	**Top-10 Total**	**882**	**64.1%**	**Top-10 Total**	**135,222**	**62.2%**
57.	**Overall Total**	**1,375**	**100.0%**	**Overall Total**	**217,288**	**100.0%**

TABLE 1

CASELOAD FOR TOP 10 STATES
AAA ARBITRATION CASES GOING TO AWARD AND U.S. DISTRICT COURT CIVIL CASES
2015

Arbitration[1]			U.S. District Courts[2]		
State or Territory	Caseload	Percent of Total	State or Territory	Caseload	Percent of Total

Notes: [1] Entries reflect number of cases in 2015 that went to award in arbitration at the AAA and include cases related to business-to-business, construction, employment, and consumers; data exclude cases related to labor, no-fault insurance in New York, and automobile accident claims in Illinois. Entries include cases with claimed amounts of at least $75,000.

[2] Entries reflect number of cases terminated in 2015 and exclude criminal cases, prisoner petitions, land condemnations, deportation reviews, recovery of overpayments, and enforcement of judgments. Terminated cases include cases going to trial and cases disposed of prior to trial.

[3] N/A -- not available.

Sources: American Arbitration Association Statistics for arbitrations closed 2011-2015.

Table C-5, U.S. District Courts - Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Period Ending December 31, 2015 (Data from Administrative Office of the U.S. Courts on behalf of the Federal Judiciary).

"Explanation of Selected Terms" (http://www.uscourts.gov/sites/default/files/explanation-of-selected-terms-september-2014_0.pdf).

TABLE 2.1

MEDIAN TIME REQUIRED
U.S. DISTRICT COURT CASES GOING TO TRIAL V.
AAA ARBITRATION CASES GOING TO AWARD
2011

State or Territory	U.S. District Courts, Filing to Trial[1]	Arbitration, Filing to Award[2]	Additional Time Required to Trial
	(Months)		
	(1)	(2)	(1) - (2) (3)
1. Alabama	17.3	11.4	5.9
2. Alaska	N/A[3]	14.1	N/A[3]
3. Arizona	24.0	10.1	13.9
4. Arkansas	18.8	12.2	6.6
5. California	25.9	11.3	14.6
6. Colorado	27.5	10.7	16.8
7. Connecticut	38.6	9.0	29.6
8. Delaware	25.5	12.0	13.5
9. District of Columbia	37.6	10.6	27.0
10. Florida	17.6	10.7	6.9
11. Georgia	27.7	11.0	16.7
12. Guam	N/A[3]	N/A[3]	N/A[3]
13. Hawaii	23.3	7.4	15.9
14. Idaho	20.8	17.1	3.7
15. Illinois	27.7	15.1	12.6
16. Indiana	30.0	11.1	18.9
17. Iowa	23.5	8.3	15.2
18. Kansas	27.1	12.3	14.8
19. Kentucky	26.0	7.9	18.1
20. Louisiana	24.3	10.3	14.0
21. Maine	N/A[3]	4.9	N/A[3]
22. Maryland	25.2	6.6	18.6
23. Massachusetts	25.2	11.3	13.9
24. Michigan	22.2	10.1	12.1
25. Minnesota	26.0	9.9	16.1
26. Mississippi	23.3	9.9	13.4
27. Missouri	19.8	8.9	10.9
28. Montana	N/A[3]	13.6	N/A[3]
29. Nebraska	21.2	11.8	9.4
30. Nevada	34.1	13.3	20.8
31. New Hampshire	22.8	6.6	16.2
32. New Jersey	35.5	10.5	25.0
33. New Mexico	17.0	15.3	1.7
34. New York	31.0	11.2	19.8
35. North Carolina	19.5	10.3	9.2
36. North Dakota	N/A[3]	8.0	N/A[3]
37. Northern Mariana Islands	N/A[3]	N/A[3]	N/A[3]
38. Ohio	23.8	9.9	13.9
39. Oklahoma	19.6	9.5	10.1

TABLE 2.1

MEDIAN TIME REQUIRED U.S. DISTRICT COURT CASES GOING TO TRIAL V. AAA ARBITRATION CASES GOING TO AWARD 2011

State or Territory	U.S. District Courts, Filing to Trial[1]	Arbitration, Filing to Award[2]	Additional Time Required to Trial
	(Months)		
	(1)	(2)	(1) - (2) (3)
40. Oregon	26.1	9.3	16.8
41. Pennsylvania	25.4	8.2	17.2
42. Puerto Rico	26.0	17.7	8.3
43. Rhode Island	N/A[3]	12.2	N/A[3]
44. South Carolina	22.4	15.0	7.4
45. South Dakota	30.7	9.3	21.4
46. Tennessee	27.2	12.2	15.0
47. Texas	21.5	10.7	10.8
48. Utah	29.1	10.7	18.4
49. Vermont	N/A[3]	5.8	N/A[3]
50. Virgin Islands	61.2	14.6	46.6
51. Virginia	13.6	9.5	4.1
52. Washington	21.2	11.9	9.3
53. West Virginia	19.9	10.0	9.9
54. Wisconsin	23.9	12.3	11.6
55. Wyoming	12.8	12.2	0.6

Notes: [1] Filing to trial reflects median time from filing to start of trial in civil cases. Data exclude criminal cases, prisoner petitions, land condemnations, deportation reviews, recovery of overpayments, and enforcement of judgments.

[2] Filing to award reflects median time from filing to award in cases determined in arbitration at the AAA. Data include cases related to business-to-business, construction, employment, and consumers; data exclude cases related to labor, no-fault insurance in New York, and automobile accident claims in Illinois. Entries include cases with claimed amounts of at least $75,000.

[3] N/A -- not available.

Sources: Table C-5, U.S. District Courts - Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Period Ending December 31, 2011 (Data from Administrative Office of the U.S. Courts on behalf of the Federal Judiciary).

"Explanation of Selected Terms" (http://www.uscourts.gov/sites/default/files/explanation-of-selected-terms-september-2014_0.pdf).

American Arbitration Association Statistics for arbitrations closed 2011-2015.

TABLE 2.2

MEDIAN TIME REQUIRED
U.S. DISTRICT COURT CASES GOING TO TRIAL V.
AAA ARBITRATION CASES GOING TO AWARD
2012

State or Territory	U.S. District Courts, Filing to Trial[1]	Arbitration, Filing to Award[2]	Additional Time Required to Trial
	(Months)		
	(1)	(2)	(1) - (2) (3)
1. Alabama	21.7	17.0	4.7
2. Alaska	N/A[3]	14.6	N/A[3]
3. Arizona	29.1	10.6	18.5
4. Arkansas	17.7	18.6	(0.9)
5. California	26.3	12.5	13.8
6. Colorado	23.1	11.6	11.5
7. Connecticut	32.9	13.7	19.2
8. Delaware	34.9	12.5	22.4
9. District of Columbia	50.3	10.7	39.6
10. Florida	18.6	11.2	7.4
11. Georgia	23.6	8.1	15.5
12. Guam	N/A[3]	N/A[3]	N/A[3]
13. Hawaii	13.4	6.6	6.8
14. Idaho	29.6	16.6	13.0
15. Illinois	30.1	12.7	17.4
16. Indiana	26.0	10.3	15.7
17. Iowa	N/A[3]	17.5	N/A[3]
18. Kansas	24.2	11.0	13.2
19. Kentucky	N/A[3]	17.7	N/A[3]
20. Louisiana	25.6	12.0	13.6
21. Maine	N/A[3]	8.9	N/A[3]
22. Maryland	30.1	7.5	22.6
23. Massachusetts	28.6	11.5	17.1
24. Michigan	23.5	13.0	10.5
25. Minnesota	23.4	12.5	10.9
26. Mississippi	20.4	11.3	9.1
27. Missouri	23.0	11.6	11.4
28. Montana	N/A[3]	9.5	N/A[3]
29. Nebraska	23.0	10.8	12.2
30. Nevada	36.8	13.8	23.0
31. New Hampshire	23.3	7.4	15.9
32. New Jersey	32.3	10.1	22.2
33. New Mexico	24.0	10.2	13.8
34. New York	35.0	12.4	22.6
35. North Carolina	26.9	9.8	17.1
36. North Dakota	N/A[3]	16.0	N/A[3]
37. Northern Mariana Islands	N/A[3]	N/A[3]	N/A[3]
38. Ohio	26.2	11.8	14.4
39. Oklahoma	18.4	9.8	8.6

TABLE 2.2

MEDIAN TIME REQUIRED U.S. DISTRICT COURT CASES GOING TO TRIAL V. AAA ARBITRATION CASES GOING TO AWARD 2012

State or Territory	U.S. District Courts, Filing to Trial[1]	Arbitration, Filing to Award[2]	Additional Time Required to Trial
	(Months)		
	(1)	(2)	(1) - (2) (3)
40. Oregon	22.2	14.5	7.7
41. Pennsylvania	25.1	9.7	15.4
42. Puerto Rico	29.0	44.0	(15.0)
43. Rhode Island	31.2	23.0	8.2
44. South Carolina	27.3	15.2	12.1
45. South Dakota	N/A[3]	4.2	N/A[3]
46. Tennessee	26.1	11.2	14.9
47. Texas	20.8	13.2	7.6
48. Utah	38.8	9.3	29.5
49. Vermont	N/A[3]	N/A[3]	N/A[3]
50. Virgin Islands	25.7	8.8	16.9
51. Virginia	12.4	9.2	3.2
52. Washington	22.3	11.5	10.8
53. West Virginia	19.7	32.7	(13.0)
54. Wisconsin	15.9	9.8	6.1
55. Wyoming	N/A[3]	7.3	N/A[3]

Notes: [1] Filing to trial reflects median time from filing to start of trial in civil cases. Data exclude criminal cases, prisoner petitions, land condemnations, deportation reviews, recovery of overpayments, and enforcement of judgments.

[2] Filing to award reflects median time from filing to award in cases determined in arbitration at the AAA. Data include cases related to business-to-business, construction, employment, and consumers; data exclude cases related to labor, no-fault insurance in New York, and automobile accident claims in Illinois. Entries include cases with claimed amounts of at least $75,000.

[3] N/A -- not available.

Sources: Table C-5, U.S. District Courts - Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Period Ending December 31, 2012 (Data from Administrative Office of the U.S. Courts on behalf of the Federal Judiciary).

"Explanation of Selected Terms" (http://www.uscourts.gov/sites/default/files/explanation-of-selected-terms-september-2014_0.pdf).

American Arbitration Association Statistics for arbitrations closed 2011-2015.

TABLE 2.3

MEDIAN TIME REQUIRED
U.S. DISTRICT COURT CASES GOING TO TRIAL V.
AAA ARBITRATION CASES GOING TO AWARD
2013

State or Territory	U.S. District Courts, Filing to Trial[1]	Arbitration, Filing to Award[2]	Additional Time Required to Trial
	(Months)		
	(1)	(2)	(1) - (2) (3)
1. Alabama	22.5	15.2	7.3
2. Alaska	N/A[3]	9.2	N/A[3]
3. Arizona	30.4	15.5	14.9
4. Arkansas	21.0	4.8	16.2
5. California	25.0	12.7	12.3
6. Colorado	24.9	8.7	16.2
7. Connecticut	33.3	10.7	22.6
8. Delaware	31.3	13.7	17.6
9. District of Columbia	34.2	10.7	23.5
10. Florida	20.4	11.1	9.3
11. Georgia	22.7	9.8	12.9
12. Guam	N/A[3]	N/A[3]	N/A[3]
13. Hawaii	15.0	N/A[3]	N/A[3]
14. Idaho	24.8	11.1	13.7
15. Illinois	29.1	14.6	14.5
16. Indiana	28.6	11.8	16.8
17. Iowa	23.3	14.3	9.0
18. Kansas	28.5	15.2	13.3
19. Kentucky	36.7	7.4	29.3
20. Louisiana	28.3	15.5	12.8
21. Maine	N/A[3]	13.2	N/A[3]
22. Maryland	22.0	8.1	13.9
23. Massachusetts	31.1	12.0	19.1
24. Michigan	27.9	10.2	17.7
25. Minnesota	22.0	10.3	11.7
26. Mississippi	22.3	9.7	12.6
27. Missouri	20.2	9.0	11.2
28. Montana	N/A[3]	6.4	N/A[3]
29. Nebraska	23.1	4.5	18.6
30. Nevada	41.9	15.8	26.1
31. New Hampshire	N/A[3]	8.8	N/A[3]
32. New Jersey	35.7	10.8	24.9
33. New Mexico	25.1	10.8	14.3
34. New York	41.2	11.8	29.4
35. North Carolina	23.6	9.7	13.9
36. North Dakota	N/A[3]	10.3	N/A[3]
37. Northern Mariana Islands	N/A[3]	N/A[3]	N/A[3]
38. Ohio	26.6	9.2	17.4
39. Oklahoma	17.3	12.4	4.9

TABLE 2.3

MEDIAN TIME REQUIRED
U.S. DISTRICT COURT CASES GOING TO TRIAL V.
AAA ARBITRATION CASES GOING TO AWARD
2013

State or Territory	U.S. District Courts, Filing to Trial[1]	Arbitration, Filing to Award[2]	Additional Time Required to Trial
	(Months)		
	(1)	(2)	(1) - (2) (3)
40. Oregon	21.7	10.3	11.4
41. Pennsylvania	23.0	13.2	9.8
42. Puerto Rico	18.5	17.5	1.0
43. Rhode Island	31.9	11.9	20.0
44. South Carolina	23.6	12.7	10.9
45. South Dakota	N/A[3]	14.8	N/A[3]
46. Tennessee	25.7	10.4	15.3
47. Texas	22.3	13.5	8.8
48. Utah	37.6	13.5	24.1
49. Vermont	N/A[3]	12.0	N/A[3]
50. Virgin Islands	44.1	16.1	28.0
51. Virginia	13.1	12.1	1.0
52. Washington	19.4	10.5	8.9
53. West Virginia	N/A[3]	9.7	N/A[3]
54. Wisconsin	17.3	11.2	6.1
55. Wyoming	N/A[3]	13.6	N/A[3]

Notes: [1] Filing to trial reflects median time from filing to start of trial in civil cases. Data exclude criminal cases, prisoner petitions, land condemnations, deportation reviews, recovery of overpayments, and enforcement of judgments.

[2] Filing to award reflects median time from filing to award in cases determined in arbitration at the AAA. Data include cases related to business-to-business, construction, employment, and consumers; data exclude cases related to labor, no-fault insurance in New York, and automobile accident claims in Illinois. Entries include cases with claimed amounts of at least $75,000.

[3] N/A -- not available.

Sources: Table C-5, U.S. District Courts - Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Period Ending December 31, 2013 (Data from Administrative Office of the U.S. Courts on behalf of the Federal Judiciary).

"Explanation of Selected Terms" (http://www.uscourts.gov/sites/default/files/explanation-of-selected-terms-september-2014_0.pdf).

American Arbitration Association Statistics for arbitrations closed 2011-2015.

TABLE 2.4

MEDIAN TIME REQUIRED
U.S. DISTRICT COURT CASES GOING TO TRIAL V.
AAA ARBITRATION CASES GOING TO AWARD
2014

State or Territory	U.S. District Courts, Filing to Trial[1]	Arbitration, Filing to Award[2]	Additional Time Required to Trial
	(Months)		
	(1)	(2)	(1) - (2) (3)
1. Alabama	22.7	22.7	-
2. Alaska	N/A[3]	9.6	N/A[3]
3. Arizona	27.5	8.1	19.4
4. Arkansas	19.7	15.6	4.1
5. California	29.5	13.2	16.3
6. Colorado	29.9	13.8	16.1
7. Connecticut	39.4	11.1	28.3
8. Delaware	34.2	4.6	29.6
9. District of Columbia	53.6	13.2	40.4
10. Florida	17.6	11.2	6.4
11. Georgia	29.3	11.2	18.1
12. Guam	N/A[3]	6.6	N/A[3]
13. Hawaii	18.0	27.4	(9.4)
14. Idaho	23.4	7.7	15.7
15. Illinois	33.7	13.3	20.4
16. Indiana	26.6	12.4	14.2
17. Iowa	N/A[3]	16.6	N/A[3]
18. Kansas	23.5	5.9	17.6
19. Kentucky	23.1	10.0	13.1
20. Louisiana	27.0	24.4	2.6
21. Maine	25.5	8.5	17.0
22. Maryland	19.1	7.3	11.8
23. Massachusetts	25.3	12.4	12.9
24. Michigan	25.9	16.6	9.3
25. Minnesota	23.7	10.5	13.2
26. Mississippi	22.4	9.0	13.4
27. Missouri	29.8	10.2	19.6
28. Montana	24.5	8.9	15.6
29. Nebraska	29.7	12.6	17.1
30. Nevada	32.2	10.6	21.6
31. New Hampshire	N/A[3]	10.6	N/A[3]
32. New Jersey	36.4	13.2	23.2
33. New Mexico	27.4	14.3	13.1
34. New York	35.1	13.3	21.8
35. North Carolina	25.1	11.9	13.2
36. North Dakota	N/A[3]	9.7	N/A[3]
37. Northern Mariana Islands	N/A[3]	N/A[3]	N/A[3]
38. Ohio	17.3	9.2	8.1
39. Oklahoma	16.0	12.1	3.9

TABLE 2.4

MEDIAN TIME REQUIRED
U.S. DISTRICT COURT CASES GOING TO TRIAL V.
AAA ARBITRATION CASES GOING TO AWARD
2014

State or Territory	U.S. District Courts, Filing to Trial[1]	Arbitration, Filing to Award[2]	Additional Time Required to Trial
	(Months)		
	(1)	(2)	(1) - (2) (3)
40. Oregon	20.8	11.3	9.5
41. Pennsylvania	25.0	8.4	16.6
42. Puerto Rico	29.8	25.3	4.5
43. Rhode Island	N/A[3]	9.6	N/A[3]
44. South Carolina	27.8	10.6	17.2
45. South Dakota	30.0	10.4	19.6
46. Tennessee	37.4	12.9	24.5
47. Texas	24.2	12.3	11.9
48. Utah	35.4	13.6	21.8
49. Vermont	N/A[3]	N/A[3]	N/A[3]
50. Virgin Islands	38.2	25.2	13.0
51. Virginia	14.9	13.5	1.4
52. Washington	25.6	11.6	14.0
53. West Virginia	N/A[3]	8.7	N/A[3]
54. Wisconsin	22.9	12.2	10.7
55. Wyoming	22.9	12.4	10.5

Notes: [1] Filing to trial reflects median time from filing to start of trial in civil cases. Data exclude criminal cases, prisoner petitions, land condemnations, deportation reviews, recovery of overpayments, and enforcement of judgments.

[2] Filing to award reflects median time from filing to award in cases determined in arbitration at the AAA. Data include cases related to business-to-business, construction, employment, and consumers; data exclude cases related to labor, no-fault insurance in New York, and automobile accident claims in Illinois. Entries include cases with claimed amounts of at least $75,000.

[3] N/A -- not available.

Sources: Table C-5, U.S. District Courts - Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Period Ending December 31, 2014 (Data from Administrative Office of the U.S. Courts on behalf of the Federal Judiciary).

"Explanation of Selected Terms" (http://www.uscourts.gov/sites/default/files/explanation-of-selected-terms-september-2014_0.pdf).

American Arbitration Association Statistics for arbitrations closed 2011-2015.

TABLE 2.5

MEDIAN TIME REQUIRED
U.S. DISTRICT COURT CASES GOING TO TRIAL V.
AAA ARBITRATION CASES GOING TO AWARD
2015

State or Territory	U.S. District Courts, Filing to Trial[1]	Arbitration, Filing to Award[2]	Additional Time Required to Trial
	(Months)		
	(1)	(2)	(1) - (2) (3)
1. Alabama	25.1	8.5	16.6
2. Alaska	N/A[3]	N/A[3]	N/A[3]
3. Arizona	30.0	13.2	16.8
4. Arkansas	19.1	9.7	9.4
5. California	28.1	13.2	14.9
6. Colorado	22.1	10.1	12.0
7. Connecticut	36.6	6.7	29.9
8. Delaware	34.4	4.9	29.5
9. District of Columbia	37.1	11.5	25.6
10. Florida	17.9	11.6	6.3
11. Georgia	26.2	12.8	13.4
12. Guam	N/A[3]	N/A[3]	N/A[3]
13. Hawaii	20.8	9.0	11.8
14. Idaho	N/A[3]	16.4	N/A[3]
15. Illinois	31.4	12.8	18.6
16. Indiana	31.5	10.6	20.9
17. Iowa	25.0	12.3	12.7
18. Kansas	24.7	13.4	11.3
19. Kentucky	N/A[3]	8.4	N/A[3]
20. Louisiana	26.7	13.9	12.8
21. Maine	23.7	12.7	11.0
22. Maryland	28.5	7.4	21.1
23. Massachusetts	33.4	11.5	21.9
24. Michigan	19.3	12.0	7.3
25. Minnesota	31.7	10.9	20.8
26. Mississippi	23.6	13.3	10.3
27. Missouri	21.0	10.9	10.1
28. Montana	N/A[3]	10.7	N/A[3]
29. Nebraska	26.8	20.4	6.4
30. Nevada	39.5	12.3	27.2
31. New Hampshire	N/A[3]	23.3	N/A[3]
32. New Jersey	39.3	13.8	25.5
33. New Mexico	28.4	10.7	17.7
34. New York	30.9	12.5	18.4
35. North Carolina	24.9	10.4	14.5
36. North Dakota	N/A[3]	13.3	N/A[3]
37. Northern Mariana Islands	N/A[3]	N/A[3]	N/A[3]
38. Ohio	28.6	10.6	18.0
39. Oklahoma	15.4	9.3	6.1

TABLE 2.5

MEDIAN TIME REQUIRED
U.S. DISTRICT COURT CASES GOING TO TRIAL V.
AAA ARBITRATION CASES GOING TO AWARD
2015

State or Territory	U.S. District Courts, Filing to Trial[1]	Arbitration, Filing to Award[2]	Additional Time Required to Trial
	(Months)		
	(1)	(2)	(1) - (2) (3)
40. Oregon	21.6	16.1	5.5
41. Pennsylvania	24.6	11.7	12.9
42. Puerto Rico	25.8	22.3	3.5
43. Rhode Island	N/A[3]	13.9	N/A[3]
44. South Carolina	28.8	10.3	18.5
45. South Dakota	N/A[3]	N/A[3]	N/A[3]
46. Tennessee	27.4	12.0	15.4
47. Texas	21.3	11.4	9.9
48. Utah	29.3	20.7	8.6
49. Vermont	N/A[3]	8.3	N/A[3]
50. Virgin Islands	N/A[3]	31.6	N/A[3]
51. Virginia	15.5	10.1	5.4
52. Washington	20.3	11.9	8.4
53. West Virginia	21.7	16.5	5.2
54. Wisconsin	20.4	19.9	0.5
55. Wyoming	16.3	N/A[3]	N/A[3]

Notes: [1] Filing to trial reflects median time from filing to start of trial in civil cases. Data exclude criminal cases, prisoner petitions, land condemnations, deportation reviews, recovery of overpayments, and enforcement of judgments.

[2] Filing to award reflects median time from filing to award in cases determined in arbitration at the AAA. Data include cases related to business-to-business, construction, employment, and consumers; data exclude cases related to labor, no-fault insurance in New York, and automobile accident claims in Illinois. Entries include cases with claimed amounts of at least $75,000.

[3] N/A -- not available.

Sources: Table C-5, U.S. District Courts - Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Period Ending December 31, 2015 (Data from Administrative Office of the U.S. Courts on behalf of the Federal Judiciary).

"Explanation of Selected Terms" (http://www.uscourts.gov/sites/default/files/explanation-of-selected-terms-september-2014_0.pdf).

American Arbitration Association Statistics for arbitrations closed 2011-2015.

TABLE 3

MEDIAN TIME REQUIRED
U.S. DISTRICT COURT CIVIL CASES GOING TO TRIAL
STATES WITH HIGHEST CASELOAD IN 2015
2011 - 2015

State	Time Required, Filing to Trial (by State)				
	2011	2012	2013	2014	2015
	(Months)				
	(1)	(2)	(3)	(4)	(5)
1. California	25.9	26.3	25.0	29.5	28.1
2. New York	31.0	35.0	41.2	35.1	30.9
3. Texas	21.5	20.8	22.3	24.2	21.3
4. Florida	17.6	18.6	20.4	17.6	17.9
5. Pennsylvania	25.4	25.1	23.0	25.0	24.6
6. Georgia	27.7	23.6	22.7	29.3	26.2
7. New Jersey	35.5	32.3	35.7	36.4	39.3
8. Illinois	27.7	30.1	29.1	33.7	31.4

Sources: Micronomics Table 1, "Caseload for Top 10 States, AAA Arbitration Cases Going to Award and U.S. District Court Civil Cases, 2015."

Tables C-5, U.S. District Courts - Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Periods Ending December 31, 2011 through 2015 (Data from Administrative Office of the U.S. Courts on behalf of the Federal Judiciary).

"Explanation of Selected Terms" (http://www.uscourts.gov/sites/default/files/explanation-of-selected-terms-september-2014_0.pdf).

TABLE 4

MEDIAN TIME REQUIRED
AAA ARBITRATION CASES GOING TO AWARD
STATES WITH HIGHEST CASELOAD IN 2015
2011 - 2015

State	Time Required, Filing to Award (by State)				
	2011	2012	2013	2014	2015
	(Months)				
	(1)	(2)	(3)	(4)	(5)
1. California	11.3	12.5	12.7	13.2	13.2
2. New York	11.2	12.4	11.8	13.3	12.5
3. Texas	10.7	13.2	13.5	12.3	11.4
4. Florida	10.7	11.2	11.1	11.2	11.6
5. Pennsylvania	8.2	9.7	13.2	8.4	11.7
6. Georgia	11.0	8.1	9.8	11.2	12.8
7. New Jersey	10.5	10.1	10.8	13.2	13.8
8. Illinois	15.1	12.7	14.6	13.3	12.8

Note: Entries reflect median time from filing to award in cases determined in arbitration at the AAA.

Sources: Micronomics Table 1, "Caseload for Top 10 States, AAA Arbitration Cases Going to Award and U.S. District Court Civil Cases, 2015."

American Arbitration Association Statistics for arbitrations closed 2011-2015.

TABLE 5

ADDITIONAL TIME REQUIRED
U.S. DISTRICT COURT CIVIL CASES GOING TO TRIAL V.
AAA ARBITRATION CASES GOING TO AWARD
STATES WITH HIGHEST CASELOAD IN 2015
2011 - 2015

State	Additional Time Required to Trial (by State)				
	2011	2012	2013	2014	2015
	(Months)				
	(1)	(2)	(3)	(4)	(5)
1. California	14.6	13.8	12.3	16.3	14.9
2. New York	19.8	22.6	29.4	21.8	18.4
3. Texas	10.8	7.6	8.8	11.9	9.9
4. Florida	6.9	7.4	9.3	6.4	6.3
5. Pennsylvania	17.2	15.4	9.8	16.6	12.9
6. Georgia	16.7	15.5	12.9	18.1	13.4
7. New Jersey	25.0	22.2	24.9	23.2	25.5
8. Illinois	12.6	17.4	14.5	20.4	18.6
9. Average	**15.5**	**15.2**	**15.2**	**16.8**	**15.0**

Sources: Micronomics Table 3, "Median Time Required, U.S. District Court Civil Cases Going to Trial, States with Highest Caseload in 2015, 2011 - 2015."

Micronomics Table 4, "Median Time Required, AAA Arbitration Cases Going to Award, States with Highest Caseload in 2015, 2011 - 2015."

TABLE 6

MEDIAN TIME REQUIRED
U.S. DISTRICT AND APPELLATE COURT CASES
GOING THROUGH APPEAL
STATES WITH HIGHEST CASELOAD IN 2015
2011 - 2015

State	Circuit	Time Required, Filing through Appeal (by State)				
		2011	2012	2013	2014	2015
		(Months)				
		(1)	(2)	(3)	(4)	(5)
1. California	9th	43.3	41.6	38.3	41.9	42.2
2. New York	2nd	43.1	47.2	51.6	45.7	41.1
3. Texas	5th	31.7	29.8	31.6	33.1	30.7
4. Florida	11th	26.2	25.8	28.0	24.7	25.3
5. Pennsylvania	3rd	35.1	32.8	29.3	31.4	33.0
6. Georgia	11th	36.3	30.8	30.3	36.4	33.6
7. New Jersey	3rd	45.2	40.0	42.0	42.8	47.7
8. Illinois	7th	37.3	38.4	37.1	40.8	38.6

Note: Time required from filing in lower court through appeal is calculated by adding the median times for (a) filing in lower court to trial in each state listed and (b) filing of notice of appeal through last opinion or final order in each circuit court (i.e. appellate court) associated with each state listed.

Sources: Micronomics Table 1, "Caseload for Top 10 States, AAA Arbitration Cases Going to Award and U.S. District Court Civil Cases, 2015."

Tables C-5, U.S. District Courts - Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Periods Ending December 31, 2011 through 2015 (Data from Administrative Office of the U.S. Courts on behalf of the Federal Judiciary).

Tables B-4, U.S. Courts of Appeals - Median Time Intervals in Months for Merit Terminations of Appeals, by Circuit, During the 12-Month Periods Ending September 30, 2011 through 2015 (Data from Administrative Office of the U.S. Courts on behalf of the Federal Judiciary).

"Explanation of Selected Terms" (http://www.uscourts.gov/sites/default/files/explanation-of-selected-terms-september-2014_0.pdf).

TABLE 7

ADDITIONAL TIME REQUIRED
U.S. DISTRICT AND APPELLATE COURT CASES GOING THROUGH APPEAL V.
AAA ARBITRATION CASES GOING TO AWARD
STATES WITH HIGHEST CASELOAD IN 2015
2011 - 2015

State	Circuit	Additional Time Required through Appeal (by State)				
		2011	2012	2013	2014	2015
		(Months)				
		(1)	(2)	(3)	(4)	(5)
1. California	9th	32.0	29.1	25.6	28.7	29.0
2. New York	2nd	31.9	34.8	39.8	32.4	28.6
3. Texas	5th	21.0	16.6	18.1	20.8	19.3
4. Florida	11th	15.5	14.6	16.9	13.5	13.7
5. Pennsylvania	3rd	26.9	23.1	16.1	23.0	21.3
6. Georgia	11th	25.3	22.7	20.5	25.2	20.8
7. New Jersey	3rd	34.7	29.9	31.2	29.6	33.9
8. Illinois	7th	22.2	25.7	22.5	27.5	25.8
9. Average		**26.2**	**24.6**	**23.8**	**25.1**	**24.1**

Sources: Micronomics Table 6, "Median Time Required, U.S. District and Appellate Courts Going through Appeal, States with Highest Caseload in 2015, 2011 - 2015."

Micronomics Table 4, "Median Time Required, AAA Arbitration Cases Going to Award, States with Highest Caseload in 2015, 2011 - 2015."

TABLE 8 -- SUMMARY

MEDIAN TIME REQUIRED AND ADDITIONAL TIME REQUIRED U.S. DISTRICT AND APPELLATE COURT CASES GOING TO TRIAL AND THROUGH APPEAL V. AAA ARBITRATION CASES GOING TO AWARD STATES WITH HIGHEST CASELOAD IN 2015 2011 - 2015

State	Circuit	U.S. District Courts, Filing to Trial[1]	U.S. District and Appellate Courts, Filing through Appeal[2]	Arbitration, Filing to Award[3]	Additional Time Required	
					To Trial	Through Appeal
		(Months)				
		(1)	(2)	(3)	(1) - (3) (4)	(2) - (3) (5)
1. California	9th	27.0	41.5	12.6	14.4	28.9
2. New York	2nd	34.6	45.7	12.2	22.4	33.5
3. Texas	5th	22.0	31.4	12.2	9.8	19.2
4. Florida	11th	18.4	26.0	11.2	7.2	14.8
5. Pennsylvania	3rd	24.6	32.3	10.2	14.4	22.1
6. Georgia	11th	25.9	33.5	10.6	15.3	22.9
7. New Jersey	3rd	35.8	43.5	11.7	24.1	31.8
8. Illinois	7th	30.4	38.4	13.7	16.7	24.7

Notes: Entries reflect averages of the figures shown in Tables 3, 6, and 4 for the years 2011-2015.

[1] Time required for filing to trial reflects median time from filing to start of trial in each state listed. Data exclude criminal cases, prisoner petitions, land condemnations, deportation reviews, recovery of overpayments, and enforcement of judgments.

[2] Time required for filing through appeal is calculated by adding the median times for (a) filing in lower court (i.e. district court) to start of trial in each state listed and (b) filing of notice of appeal through last opinion or final order in each circuit court (i.e. appellate court) associated with each state listed.

[3] Time required for filing to award reflects median time from filing to award in cases determined in arbitration at the AAA in each state listed. Data include cases related to business-to-business, construction, employment, and consumers; data exclude cases related to labor, no-fault insurance in New York, and automobile accident claims in Illinois. Includes cases with claimed amounts of at least $75,000.

Sources: Micronomics Table 3, "Median Time Required, U.S. District Court Civil Cases Going to Trial, States with Highest Caseload in 2015, 2011 - 2015."

Micronomics Table 6, "Median Time Required, U.S. District and Appellate Court Cases Going through Appeal, States with Highest Caseload in 2015, 2011 - 2015."

Micronomics Table 4, "Median Time Required, AAA Arbitration Cases Going to Award, States with Highest Caseload in 2015, 2011 - 2015."

TABLE 9 -- SUMMARY

MEDIAN TIME REQUIRED AND ADDITIONAL TIME REQUIRED U.S. DISTRICT AND APPELLATE COURT CASES GOING TO TRIAL AND THROUGH APPEAL V. AAA ARBITRATION CASES GOING TO AWARD ALL STATES 2011 - 2015

Year	U.S. District Courts, Filing to Trial[1]	U.S. District and Appellate Courts, Filing through Appeal[2]	Arbitration, Filing to Award[3]	Additional Time Required: To Trial	Additional Time Required: Through Appeal
	(Months)				
	(1)	(2)	(3)	(1) - (3) (4)	(2) - (3) (5)
1. 2011	23.6	34.6	10.8	12.8	23.8
2. 2012	23.7	33.5	11.8	11.9	21.7
3. 2013	24.1	33.1	11.5	12.6	21.6
4. 2014	25.3	33.8	12.4	12.9	21.4
5. 2015	24.5	33.0	11.6	12.9	21.4

Notes: [1] Time required for filing to trial reflects median time from filing to start of trial. Data exclude criminal cases, prisoner petitions, land condemnations, deportation reviews, recovery of overpayments, and enforcement of judgments.

[2] Time required from filing through appeal is calculated by adding the median times for (a) filing in lower court (i.e. district court) to start of trial and (b) filing of notice of appeal through last opinion or final order. Entries do not include data for the Federal Circuit.

[3] Time required for filing to award reflects median time from filing to award in cases determined in arbitration at the AAA. Data include cases related to business-to-business, construction, employment, and consumers; data exclude cases related to labor, no-fault insurance in New York, and automobile accident claims in Illinois. Includes cases with claimed amounts of at least $75,000.

Sources: Tables C-5, U.S. District Courts - Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Periods Ending December 31, 2011 through 2015 (Data from Administrative Office of the U.S. Courts on behalf of the Federal Judiciary).

Tables B-4, U.S. Courts of Appeals - Median Time Intervals in Months for Merit Terminations of Appeals, by Circuit, During the 12-Month Periods Ending September 30, 2011 through 2015 (Data from Administrative Office of the U.S. Courts on behalf of the Federal Judiciary).

"Explanation of Selected Terms" (http://www.uscourts.gov/sites/default/files/explanation-of-selected-terms-september-2014_0.pdf).

American Arbitration Association Statistics for arbitrations closed 2011-2015.

TABLE 10

U.S. DISTRICT COURT CIVIL CASES
NUMBER OF CASES AND
MINIMUM AMOUNT AT ISSUE
2011 - 2015

Year	Number of Cases Terminated[1]	U.S. District Courts, Minimum Amount At Issue Per Case[2]	Total Minimum Amount At Issue
		(Dollars)	($000s)
	(1)	(2)	(1) x (2) (3)
1. 2011	247,419	$75,000	$18,556,425
2. 2012	198,023	75,000	14,851,725
3. 2013	199,400	75,000	14,955,000
4. 2014	198,998	75,000	14,924,850
5. 2015	217,288	75,000	16,296,600
6. Total	**1,061,128**		**$79,584,600**

Notes: [1] Number of cases terminated includes cases disposed of by trial or some other method. Excludes criminal cases, prisoner petitions, land condemnations, deportation reviews, recovery of overpayments, and enforcement of judgments.

[2] U.S. District Courts have subject matter jurisdiction over cases that i) arise under any federal law and ii) contain parties of different states (foreign or domestic) and have at least $75,000 at issue. *See* "Federal or State Court: Subject Matter Jurisdiction," *Thomson Reuters FindLaw* (http://litigation.findlaw.com/filing-a-lawsuit/federal-or-state-court-subject-matter-jurisdiction.html).

Sources: Tables C-5, U.S. District Courts - Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Periods Ending December 31, 2011 through 2015 (Data from Administrative Office of the U.S. Courts on behalf of the Federal Judiciary).

"Explanation of Selected Terms" (http://www.uscourts.gov/sites/default/files/explanation-of-selected-terms-september-2014_0.pdf).

"Federal or State Court: Subject Matter Jurisdiction," *Thomson Reuters FindLaw* (http://litigation.findlaw.com/filing-a-lawsuit/federal-or-state-court-subject-matter-jurisdiction.html).

TABLE 11

U.S. DISTRICT COURTS V. AAA ARBITRATION OPPORTUNITY COST ASSOCIATED WITH DELAY TO TRIAL ALL STATES 2011 - 2015

Year	Minimum Amount At Issue	Additional Time Required to Trial[1]	Average But-For Rate of Return[2]	Lost Resources Due to Delays[3]
	($000s)	(Months)	(Percent)	($000s)
	(1)	(2)	(3)	(4)
1. 2011	$18,556,425	12.8	13.0%	$2,583,883
2. 2012	14,851,725	11.9	13.0%	1,913,640
3. 2013	14,955,000	12.6	13.0%	2,047,735
4. 2014	14,924,850	12.9	13.0%	2,095,532
5. 2015	16,296,600	12.9	13.0%	2,288,133
6. Total	**$79,584,600**			**$10,928,923**

Notes: [1] Additional time required to trial represents the difference between median time from filing to trial (U.S. district court civil cases) and median time from filing to award (arbitration).

[2] Average but-for rate of return represents a simple average of the 2011-2015 annual rates of return on investments in the S&P 500.

[3] Lost resources due to delays represent unrealized investment income from funds at risk for longer duration at trial than arbitration. Column 4, lost resources due to delays, is calculated by applying the 13 percent return to the minimum amount at issue each year for the additional time required to trial. The compound interest formula is shown below:
"Column 4 = Column 1 x (1 + Column 3) ^ (Column 2 ÷ months per year) - Column 1".

Sources: Micronomics Table 10, "U.S. District Court Civil Cases, Number of Cases and Minimum Amount At Issue, 2011 - 2015."

Micronomics Table 9, "Median Time Required and Additional Time Required, U.S. District and Appellate Court Cases Going to Trial and through Appeal v. AAA Arbitration Cases Going to Award, All States, 2011 - 2015."

Annual Returns on Stock, Treasury Bonds and Treasury Bills: 1928 - Current, NYU website (http://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/histretSP.html).

TABLE 12

U.S. DISTRICT COURTS V. AAA ARBITRATION OPPORTUNITY COST ASSOCIATED WITH DELAY TO TRIAL FOR EIGHT STATES WITH HIGHEST CASELOAD IN 2015 2011 - 2015

Year	Minimum Amount At Issue	Additional Time Required to Trial[1]	Average But-For Rate of Return[2]	Lost Resources Due to Delays[3]
	($000s)	(Months)	(Percent)	($000s)
	(1)	(2)	(3)	(4)
1. 2011	$18,556,425	15.5	13.0%	$3,162,224
2. 2012	14,851,725	15.2	13.0%	2,493,321
3. 2013	14,955,000	15.2	13.0%	2,510,659
4. 2014	14,924,850	16.8	13.0%	2,791,966
5. 2015	16,296,600	15.0	13.0%	2,687,489
6. Total	**$79,584,600**			**$13,645,659**

Notes: [1] Additional time required to trial represents a simple average of the difference between median time from filing to trial (U.S. district court civil cases) and median time from filing to award (arbitration) for eight states with highest caseload in 2015.

[2] Average but-for rate of return represents a simple average of the 2011-2015 annual rates of return on investments in the S&P 500.

[3] Lost resources due to delays represent unrealized investment income from funds at risk for longer duration at trial than arbitration. Column 4, lost resources due to delays, is calculated by applying the 13 percent return to the minimum amount at issue each year for the additional time required to trial. The compound interest formula is shown below:
"Column 4 = Column 1 x (1 + Column 3) ^ (Column 2 ÷ months per year) - Column 1".

Sources: Micronomics Table 10, "U.S. District Court Civil Cases, Number of Cases and Minimum Amount At Issue, 2011 - 2015."

Micronomics Table 5, "Additional Time Required, U.S. District Court Civil Cases Going to Trial v. AAA Arbitration Cases Going to Award, States with Highest Caseload in 2015, 2011 - 2015."

Annual Returns on Stock, Treasury Bonds and Treasury Bills: 1928 - Current, NYU website (http://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/histretSP.html).

TABLE 13

U.S. DISTRICT AND APPELLATE COURTS V. AAA ARBITRATION OPPORTUNITY COST ASSOCIATED WITH DELAY THROUGH APPEAL ALL STATES 2011 - 2015

Year	Minimum Amount At Issue ($000s)	Additional Time Required through Appeal[1] (Months)	Average But-For Rate of Return[2] (Percent)	Lost Resources Due to Delays[3] ($000s)
	(1)	(2)	(3)	(4)
1. 2011	$18,556,425	23.8	13.0%	$5,090,058
2. 2012	14,851,725	21.7	13.0%	3,673,369
3. 2013	14,955,000	21.6	13.0%	3,679,924
4. 2014	14,924,850	21.4	13.0%	3,634,661
5. 2015	16,296,600	21.4	13.0%	3,968,725
6. Total	**$79,584,600**			**$20,046,737**

Notes: [1] Additional time required through appeal represents the difference between median time from filing in lower court to last opinion or final order in appellate court (U.S. district and appellate courts) and median time from filing to award (arbitration).

[2] Average but-for rate of return represents a simple average of the 2011-2015 annual rates of return on investments in the S&P 500.

[3] Lost resources due to delays represent unrealized investment income from funds at risk for longer duration at appeal than arbitration. Column 4, lost resources due to delays, is calculated by applying the 13 percent return to the minimum amount at issue each year for the additional time required through appeal. The compound interest formula is shown below:
"Column 4 = Column 1 x (1 + Column 3) ^ (Column 2 ÷ months per year) - Column 1".

Sources: Micronomics Table 10, "U.S. District Court Civil Cases, Number of Cases and Minimum Amount At Issue, 2011 - 2015."

Micronomics Table 9, "Median Time Required and Additional Time Required, U.S. District and Appellate Court Cases Going to Trial and through Appeal v. AAA Arbitration Cases Going to Award, All States, 2011 - 2015."

Annual Returns on Stock, Treasury Bonds and Treasury Bills: 1928 - Current, NYU website (http://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/histretSP.html).

TABLE 14

U.S. DISTRICT AND APPELLATE COURTS V. AAA ARBITRATION OPPORTUNITY COST ASSOCIATED WITH DELAY THROUGH APPEAL FOR EIGHT STATES WITH HIGHEST CASELOAD IN 2015 2011 - 2015

Year	Minimum Amount At Issue ($000s)	Additional Time Required through Appeal[1] (Months)	Average But-For Rate of Return[2] (Percent)	Lost Resources Due to Delays[3] ($000s)
	(1)	(2)	(3)	(4)
1. 2011	$18,556,425	26.2	13.0%	$5,672,099
2. 2012	14,851,725	24.6	13.0%	4,221,399
3. 2013	14,955,000	23.8	13.0%	4,109,461
4. 2014	14,924,850	25.1	13.0%	4,344,945
5. 2015	16,296,600	24.1	13.0%	4,523,128
6. Total	**$79,584,600**			**$22,871,032**

Notes: [1] Additional time required through appeal represents a simple average of the difference between median time from filing in lower court to last opinion or final order in appellate court (U.S. district and appellate courts) and median time from filing to award (arbitration) for eight states with highest caseload in 2015.

[2] Average but-for rate of return represents a simple average of the 2011-2015 annual rates of return on investments in the S&P 500.

[3] Lost resources due to delays represent unrealized investment income from funds at risk for longer duration at appeal than arbitration. Column 4, lost resources due to delays, is calculated by applying the 13 percent return to the minimum amount at issue each year for the additional time required through appeal. The compound interest formula is shown below:
"Column 4 = Column 1 x (1 + Column 3) ^ (Column 2 ÷ months per year) - Column 1".

Sources: Micronomics Table 10, "U.S. District Court Civil Cases, Number of Cases and Minimum Amount At Issue, 2011 - 2015."

Micronomics Table 7, "Additional Time Required, U.S. District and Apellate Court Cases Going through Appeal v. AAA Arbitration Cases Going to Award, States with Highest Caseload in 2015, 2011 - 2015."

Annual Returns on Stock, Treasury Bonds and Treasury Bills: 1928 - Current, NYU website (http://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/histretSP.html).

TABLE 15 -- SUMMARY

DIRECT, INDIRECT, AND INDUCED LOSSES DUE TO DELAY TO TRIAL ALL STATES 2011 - 2015

	Estimated Losses Due to Delay to Trial
	($000s)
	(1)
1. Direct Loss[1]	$10,928,923
2. Indirect Loss[2]	7,978,696
3. Induced Loss[3]	9,366,971
4. Total	**$28,274,590**

Notes: [1] Direct losses are equal to Lost Resources Due to Delays calculated at Micronomics Table 11, "U.S. District Courts v. AAA Arbitration, Opportunity Cost Associated with Delay to Trial, All States, 2011 - 2015."

[2] Indirect losses (or indirect effects) are estimated decreases in spending on goods and services by firms that experience direct losses.

[3] Induced losses (or induced effects) are estimated decreases in spending by households containing employees of firms that experienced direct and indirect losses.

Sources: Micronomics Table 11, "U.S. District Courts v. AAA Arbitration, Opportunity Cost Associated with Delay to Trial, All States, 2011 - 2015."

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TABLE 16 -- SUMMARY

DIRECT, INDIRECT, AND INDUCED LOSSES DUE TO DELAY TO TRIAL FOR EIGHT STATES WITH HIGHEST CASELOAD IN 2015 2011 - 2015

	Estimated Losses Due to Delay to Trial
	($000s)
	(1)
1. Direct Loss[1]	$13,645,659
2. Indirect Loss[2]	9,962,058
3. Induced Loss[3]	11,695,431
4. Total	**$35,303,148**

Notes: [1] Direct losses are equal to Lost Resources Due to Delays calculated at Micronomics Table 12, "U.S. District Courts v. AAA Arbitration, Opportunity Cost Associated with Delay to Trial for Eight States with Highest Caseload in 2015, 2011 - 2015."

[2] Indirect losses (or indirect effects) are estimated decreases in spending on goods and services by firms that experience direct losses.

[3] Induced losses (or induced effects) are estimated decreases in spending by households containing employees of firms that experienced direct and indirect losses.

Sources: Micronomics Table 12, "U.S. District Courts v. AAA Arbitration, Opportunity Cost Associated with Delay to Trial for Eight States with Highest Caseload in 2015, 2011 - 2015."

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TABLE 17 -- SUMMARY

DIRECT, INDIRECT, AND INDUCED LOSSES DUE TO DELAY THROUGH APPEAL ALL STATES 2011 - 2015

	Estimated Losses Due to Delay through Appeal
	($000s)
	(1)
1. Direct Loss[1]	$20,046,737
2. Indirect Loss[2]	14,635,186
3. Induced Loss[3]	17,181,672
4. Total	**$51,863,595**

Notes: [1] Direct losses are equal to Lost Resources Due to Delays calculated at Micronomics Table 13, "U.S. District and Appellate Courts v. AAA Arbitration, Opportunity Cost Associated with Delay through Appeal, All States, 2011 - 2015."

[2] Indirect losses (or indirect effects) are estimated decreases in spending on goods and services by firms that experience direct losses.

[3] Induced losses (or induced effects) are estimated decreases in spending by households containing employees of firms that experienced direct and indirect losses.

Sources: Micronomics Table 13, "U.S. District and Appellate Courts v. AAA Arbitration, Opportunity Cost Associated with Delay through Appeal, All States, 2011 - 2015."

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TABLE 18 -- SUMMARY

DIRECT, INDIRECT, AND INDUCED LOSSES DUE TO DELAY THROUGH APPEAL FOR EIGHT STATES WITH HIGHEST CASELOAD IN 2015 2011 - 2015

	Estimated Losses Due to Delay through Appeal
	($000s)
	(1)
1. Direct Loss[1]	$22,871,032
2. Indirect Loss[2]	16,697,072
3. Induced Loss[3]	19,602,323
4. Total	**$59,170,427**

Notes: [1] Direct losses are equal to Lost Resources Due to Delays calculated at Micronomics Table 14, "U.S. District and Appellate Courts v. AAA Arbitration, Opportunity Cost Associated with Delay through Appeal for Eight States with Highest Caseload in 2015, 2011 - 2015."

[2] Indirect losses (or indirect effects) are estimated decreases in spending on goods and services by firms that experience direct losses.

[3] Induced losses (or induced effects) are estimated decreases in spending by households containing employees of firms that experienced direct and indirect losses.

Sources: Micronomics Table 14, "U.S. District and Appellate Courts v. AAA Arbitration, Opportunity Cost Associated with Delay through Appeal for Eight States with Highest Caseload in 2015, 2011 - 2015."

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Protocols for Expeditious, Cost-Effective Commercial Arbitration

The College of Comercial Arbitrators
Thomas J. Stipanowich, Editor-in-Chief
Curtis E. von Kann and Deborah Rothman, Associate Editors

Additional copies of this document may be downloaded at www.thecca.net.
This monograph was printed with the financial assistance of the ABA Section of Dispute Resolution.

The College of Commercial Arbitrators

Protocols

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Expeditious, Cost-Effective Commercial Arbitration

Key Action Steps for

Business Users, Counsel, Arbitrators

& Arbitration Provider Institutions

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The College of Commercial Arbitrators Protocols for Expeditious, Cost-Effective Commercial Arbitration

Key Action Steps for Business Users, Counsel, Arbitrators and Arbitration Provider Institutions

Table of Contents

Foreword

The College of Commercial Arbitrators was established in 2001. Its mission is to promote the highest standards of conduct, professionalism and ethics in commercial arbitration, to develop "best practices" guidelines and materials, and to provide peer training and professional development. Its membership currently consists of approximately two hundred leading commercial arbitrators in the United States and abroad.

In response to mounting complaints that commercial arbitration has become as slow and costly as litigation, thus substantially diminishing its appeal, the College decided in 2008 to convene the following year a National Summit on Business-to-Business Arbitration to identify the chief causes of the problem and explore concrete, practical steps that can be taken now to remedy them. ***The concept of a National Summit sprang from two key insights: (1) lengthy, costly arbitration results from the interaction of business users, in-house attorneys, the institutions that provide arbitration services, outside counsel and arbitrators; and (2) all of these "stakeholders" must collaborate in identifying and achieving desired efficiencies and economies in arbitration.*** Therefore, in addition to its own Fellows, who have considerable experience and expertise as commercial arbitrators (and, in many cases, as advocates), the College invited to the National Summit in-house counsel from numerous major companies that utilize arbitration, skilled advocates who represent such parties in arbitration in a wide variety of geographic regions and commercial specialties, and individuals who occupy key positions in leading institutional providers of arbitration services.

In anticipation of the Summit, the College appointed Task Forces composed of corporate counsel, outside counsel and arbitrators to study the issues and provide insight and perspective concerning the problems and possible solutions. Thereafter, the College's Summit Planning Committee carefully reviewed submissions from the Task Forces and developed a Draft Report for discussion at the Summit. The Report, edited by Fellows Professor Thomas Stipanowich, Curtis von Kann and Deborah Rothman, concluded with four *Protocols* containing proposed action steps for Business Users and In-House Counsel, Arbitration Provider Institutions, Outside Counsel and Arbitrators. The Draft Report, entitled *"How to Drastically Reduce Cost and Delay in Commercial Arbitration,"*[1] was circulated to all Summit invitees in the early fall of 2009.

The National Summit was convened in Washington, D.C. at the end of October, 2009. A measure of the perceived importance of the Summit was the fact that five of the principal organizations involved in commercial arbitration, namely, the American Bar Association Section of Dispute Resolution, the American Arbitration Association, JAMS, the International Institute

[1] As used in the draft report and in this publication, the term "commercial arbitration" refers to arbitration between two or more commercial entities, i.e., business-to-business arbitration. Neither the Summit nor this report has attempted to address the rather separate and distinct issues that arise in arbitration between businesses and employees or consumers. While those scenarios are certainly worthy of thoughtful study and attention, they are beyond the scope of the present initiative. Furthermore, although the recommendations offered herein may be of great benefit in the context of international arbitration, the focus of this report is on commercial arbitration in the United States.

for Conflict Prevention and Resolution ("CPR"), and the Chartered Institute of Arbitrators, joined the College as co-sponsors of the Summit, along with the Straus Institute for Dispute Resolution of Pepperdine University School of Law and seventy-two Fellows of the College.

More than 180 individuals participated in the Summit, which was designed as a structured "conversation" to elicit participants' input on the proposed *Protocols*. Following panel presentations regarding each of the four *Protocols* (conducted by corporate counsel, outside counsel, arbitrators and executives of "provider" institutions), Summit participants had the opportunity to comment on the proposals and recommend amendments or additions. The Summit concluded with a "town hall" meeting during which electronic voting devices were used to gauge the opinion of Summit participants concerning specific action steps.

In the course of producing this Final Report, the Editors thoroughly analyzed the results of the National Summit as well as numerous additional written recommendations for the improvement of the draft *Protocols* and made material revisions to those documents. The *Protocols* and accompanying commentary are designed to produce simple and straightforward guidance for all stakeholders with the intent of encouraging efforts that promote more expeditious and cost-effective arbitration.[2] The commentary provides information on numerous procedural options and tools designed by various organizations to promote the goals and fulfill the action steps set forth in the *Protocols*.

The College expresses its deep gratitude to all of the Summit sponsors as well as the many individuals and organizations that helped plan, organize and produce the National Summit and *Protocols*. While the views and opinions of all participants were extraordinarily valuable in producing this report, the report is ultimately that of the College which takes full responsibility for any deficiencies that may be found in the document.

It is the fervent hope of the College of Commercial Arbitrators that publication of these *Protocols* will sound a clarion call to action by all constituencies involved in business arbitration, encouraging prompt adoption of effective measures to dramatically reduce process costs and delay, restoring arbitration to its rightful place as a valuable and efficient alternative to litigation in the resolution of business disputes.

Bruce W. Belding
President of the College 2008-2009

Curtis E. von Kann
President of the College 2009-2010

[2] The *Protocols* target ways to reduce cost and delay because those factors are the focus of most current complaints about commercial arbitration. Economy and efficiency are usually among the key concerns of arbitrating parties, but these goals may be in tension with, and may even be outweighed by, a desire for court-like due process. In any event, the *Protocols*' value will be in direct proportion to parties' desire to promote economy and efficiency in arbitration.

About the Editors

Thomas J. Stipanowich, William H. Webster Chair in Dispute Resolution and Professor of Law at Pepperdine University School of Law and Academic Director of the Straus Institute for Dispute Resolution, has had a distinguished career as a scholar, teacher, and leader in the field as well as a commercial and construction arbitrator and mediator, federal court special master, and facilitator. From 2001 until mid-2006, he served as CEO of the International Institute for Conflict Prevention & Resolution (CPR); prior to that time he was a litigator with a national construction law firm and, for fourteen years, a chaired professor of law. He was co-author with Ian Macneil and Richard Speidel of the much-cited multi-volume treatise *Federal Arbitration Law* (Little, Brown & Co. 1994). He edited *Commercial Arbitration at Its Best* (ABA 2001), the report of the CPR Commission on the Future of Arbitration. He co-authored a groundbreaking book and materials for law schools entitled *Resolving Disputes: Theory, Practice, and Law* (Aspen Publishing, 2d ed. 2010). In 2008 he was awarded the highest honor of the ABA Dispute Resolution Section, the D'Alemberte-Raven Award, for contributions to the field of conflict resolution. He has twice (1987, 2010) received the CPR Best Professional Article award, most recently for "Arbitration: The 'New Litigation'" and "Arbitration and Choice." He is one of very few individuals accorded the title of Companion by the Chartered Institute of Arbitrators. He holds a Bachelors (with highest honors) and Masters in Architecture as well as a Juris Doctor (*magna cum laude*, Order of the Coif) from the University of Illinois. He is an arbitrator and mediator with JAMS.

Curtis E. von Kann, a graduate of Harvard College and Harvard Law School, was a civil litigator for sixteen years, principally as an associate, then partner in the Washington, DC law firm of Hogan & Hartson. In 1985 President Ronald Reagan appointed him a Judge of the District of Columbia Superior Court where he presided over hundreds of jury and non-jury trials and was a principal designer of the Court's highly successful civil case management and ADR program. Since 1997 he has served as a full-time arbitrator and mediator in the Washington office of JAMS and has written and spoken widely on a variety of ADR topics. He is currently President of the College of Commercial Arbitrators and was Editor-in-Chief of the first edition of the College's *Guide to Best Practices in Commercial Arbitration.*

Deborah Rothman, a *magna cum laude* graduate of Yale College, received her Masters in Public Affairs from the Woodrow Wilson School at Princeton University and her Juris Doctor from NYU School of Law. After practicing law with Manatt Phelps in Los Angeles, she became President and CEO of Baby Fair Enterprises. Since 1991, she has been a full-time mediator and arbitrator with the American Arbitration Association in New York and Los Angeles, specializing in business, entertainment, franchise, intellectual property and employment matters. She also provides arbitration consulting services in high-stakes arbitrations and has been on the Board of the College of Commercial Arbitrators since 2003.

I

Speed, Economy and Efficiency in Commercial Arbitration: Failed Expectations, Shared Responsibility[3]

Despite meaningful efforts to promote better practices and ensure quality among arbitrators and advocates, criticism of American commercial arbitration is at a crescendo. Much of this criticism stems from the fact that business-to-business arbitration has taken on the trappings of litigation—extensive discovery and motion practice, highly contentious advocacy, long cycle time and high cost.[4] While many business users still prefer arbitration to court trial because of other procedural advantages,[5] the great majority of complaints being voiced by arbitration users are the same: commercial arbitration now costs just as much, and takes just as long, as litigation.[6] Clients and counsel often wonder aloud what happened to the economical and efficient alternative to the courtroom.[7]

As a result, some business clients and counsel have removed arbitration clauses from their contracts. This situation has also contributed to the removal of arbitration provisions

[3] Many elements of this Report are borrowed or adapted from documents prepared in anticipation of the National Summit on Business-to-Business Arbitration and the development of the *Protocols*. These include the reports of Task Force Committees including the Committee on Business Users and House Counsel (Jeff Paquin and James Snyder, Chairs); the Committee on Arbitration Advocates (David McLean and Steven Comen, Chairs); and the Committee on Arbitrators (Louise LaMothe and John Wilkinson, Chairs). Concepts and text were also drawn from two extensive articles prepared in anticipation of the National Summit on Business-to-Business Arbitration: Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. ILL. L. REV. 1 (Jan. 2010) *available at* http://ssrn.com/abstract=1297526 [hereinafter Stipanowich, *New Litigation*] (analyzing current trends affecting perception and practice in commercial arbitration); Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the New Litigation, (Symposium Keynote Presentation)*, 7 DEPAUL BUS. & COM. L.J. 401 (2009), *available at* http://ssrn.com/abstract=1372291 [hereinafter Stipanowich, *Arbitration and Choice*].

[4] Stipanowich, *New Litigation, supra* note 3, at 6-27.

[5] FULBRIGHT & JAWORSKI, U.S. CORPORATE COUNSEL LITIGATION TRENDS SURVEY RESULTS 18 (2004); Michael T. Burr, *The Truth About ADR: Do Arbitration and Mediation Really Work?* 14 CORP. LEGAL TIMES 44, 45 (2004).

[6] *See, e.g.*, Mary Swanton, *System Slowdown: Can Arbitration Be Fixed?,* INSIDE COUNSEL, May 2007, at 51; Lou Whiteman, *Arbitration's Fall from Grace*, LAW.COM IN-HOUSE COUNSEL, July 13, 2006, http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id= 900005457792; Leslie A. Gordon, *Clause for Alarm,* A.B.A. J., Nov. 24, 2006, at 19, *available at* http://www.abajournal.com/magazine/article/clause_for_alarm/. Barry Richard, *Corporate Litigation: Arbitration Clause Risks*, NAT'L L.J., June 2004, at 3. *See also* Benjamin J.C. Wolf, *On-line But Out of Touch: Analyzing International Dispute Resolution Through the Lens of the Internet*, 14 CARDOZO J. INT'L & COMP. L. 281, 306-07 (2006) (describing the disadvantages of arbitration, including costs similar to litigation and lengthy discovery process and hearings); *See also Mediation—Knocking Heads Together—Why go to court when you can settle cheaply, quickly and fairly elsewhere?*, THE ECONOMIST, Feb. 3, 2000, at 62 (noting arbitration is no "cheaper, fairer or even quicker" than trial).

[7] Stipanowich, *New Litigation*, *supra* note 3, at 9.

from important standard industry contract forms.[8] As one West Coast in-house counsel recently reported,

> We really sell arbitration to our business clients [as a superior alternative to litigation]. Now they are accusing us of false advertising. . . . Literally all of the top general counsel from the largest corporations in the Bay Area were uniform in their frustration with arbitration and many have said . . . they're not agreeing to it anymore.

Such outcomes are unfortunate, because commercial arbitration offers businesses the prospect of a true alternative to litigation— indeed, a spectrum of alternatives. While litigation may prove desirable to parties who require public proceedings, case precedents, and the contempt power of courts, arbitration offers the inestimable range of advantages that come with *choice*—the ability to tailor the process to the dispute. For this key reason, arbitration should always be a prominent contender in the marketplace of alternatives for resolving business disputes.[9]

In recent years, to be sure, much effort has been devoted to providing guidance for arbitrators, business users and advocates. In addition, leading dispute resolution provider institutions have spent considerable time and effort developing and revising arbitration procedures. Despite all of this, the problems—perceived and real—remain.

At the October 2009 National Summit on Business-to-Business described in the Foreword to this report, the views of all participants—including corporate counsel, outside counsel, arbitrators and executives of institutions providing arbitration and other dispute

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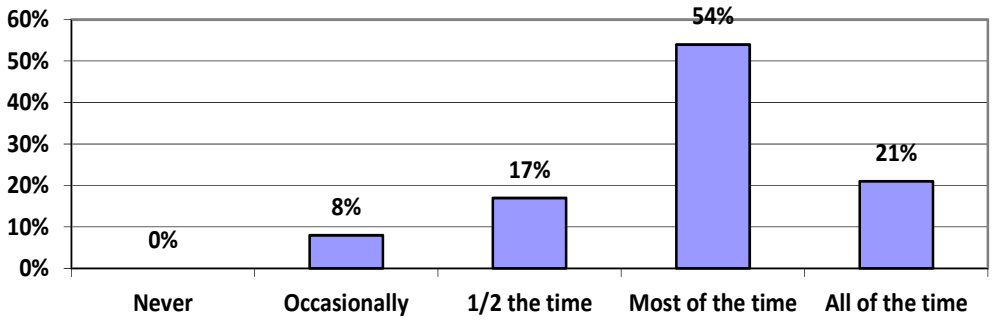
[8] The latest edition of the American Institute of Architects construction forms, the nation's most widely used template for building contracts, eliminates the default binding arbitration provision, long a *sine qua non* of construction contracts; parties must henceforth affirmatively agree to arbitration by checking a box or, by default, go to court. *See* AIA DOCUMENT A201-2007, GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION, art. 15 (2007); AIA DOCUMENT B101-2007, STANDARD FORM OF AGREEMENT BETWEEN OWNER AND ARCHITECT, art. 8 (2007). A new much-heralded rival set of standard contract documents also relegates arbitration to an option rather than a default procedure. CONSENSUSDOCS 240, STANDARD FORM OF AGREEMENT BETWEEN OWNER AND ARCHITECT/ENGINEER, art. 9.5 (2007).

[9] Advocates of arbitration are quick to point out that arbitration awards are likely to prove much more "final" than court judgments, tending to substantially reduce post-hearing process time and costs. Moreover, arbitration offers parties a host of opportunities to craft a process that proves vastly superior to litigation in many cases, such as the ability to choose their decision maker(s) (including subject matter experts), procedures and venue. Parties may also identify the issues that will (and will not) be arbitrated, help set the timetable for the process, and take steps to ensure the confidentiality of proceedings and of documents disclosed during the process. For any or all of these reasons arbitration may be an appealing alternative to litigation regardless of the relative cost and length of arbitration. *See, e.g.,* Curtis E. von Kann, *A Report Card on the Quality of Commercial Arbitration: Assessing and Improving Delivery of the Benefits Customers Seek,* 7 DEPAUL BUS. & COM. L.J. 499 (2009) (concluding that commercial arbitration does quite a good job of meeting user expectations concerning their ability to choose the decision-maker, the opportunity to adapt the process to the needs of individual cases, flexibility in the adjudicative process, privacy of the adjudicative process, accessibility of the decision-maker, efficient and user-friendly case administration, fair and just results, and finality of the decision). Nevertheless, the perception that arbitration processes are unacceptably slow and costly—and in this respect not a demonstrably superior alternative to litigation—has tainted arbitration in the eyes of many business clients and counsel.

resolution services—were sought by means of a "town hall" meeting and electronic voting. While not a scientific survey, the voting data reflected important levels of consensus about the depth of user concerns about arbitration, the roots of those problems, and potential solutions.

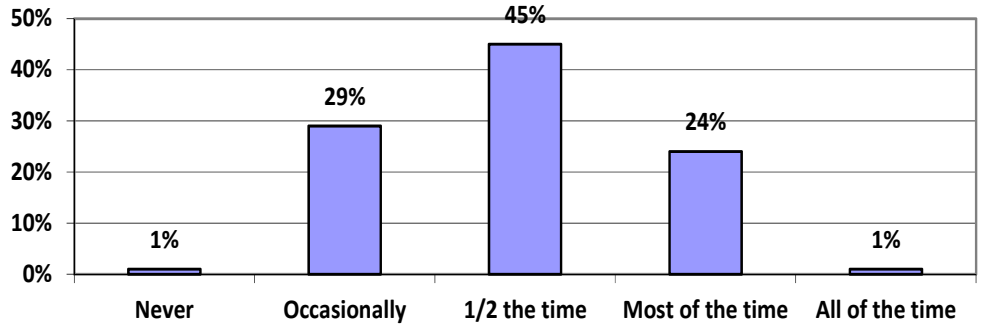
Summit participants overwhelmingly believed that relative speed, efficiency and economy tend to be important to business users of arbitration.

How often do business users desire arbitration to be speedier, more efficient and more economical than litigation?



Moreover, to one degree or another, nearly all participants were convinced that arbitration falls short of users' expectations regarding speed, efficiency and economy at least some of the time. Seven in ten were convinced that this occurred *at least half the time*:

In your experience, how often does arbitration fail to meet the desires of business users when they want speed, efficiency and economy?



Even if these collective perceptions exaggerate to some extent the gap between business users' expectations of arbitration and their actual experiences, there is considerable room for concern.

In order to address this disquieting *status quo*, the Summit focused on identifying the perceived roots of the problem and exploring potential solutions.

II
The Root of the Problem:
Arbitration Has Become Too Much Like Litigation

A. Reduced Use of Trial; Growth of Commercial Arbitration

Over the past three decades large, complex business disputes that used to be filed in court, typically federal court, have been increasingly brought to commercial arbitration. Several factors have contributed to this trend.

A recent ABA Symposium on "The Vanishing Trial" spotlighted an 84% decrease in the percentage of federal cases resolved by trial between 1962 and 2002, and significant parallel declines in state courts.[10] The dramatic fall-off in the rate of trial may be attributed in large part to concerns about the high costs and delays associated with full-blown litigation, its attendant risks and uncertainties, and its impact on business and personal relationships.[11] Businesses have become increasingly gun-shy about entrusting their financial success, even their continued existence, to unpredictable juries or autocratic judges (often with little or no pertinent legal or commercial background or experience). Their first and foremost concern, however, is the costliness and slowness of litigation: in the blunt words of a recent report by a task force of the American College of Trial Lawyers and the Institute for Advancement of the Legal System, "because of expense and delay, both civil bench trials and civil jury trials are disappearing."[12]

The concerns that contributed to the waning of civil litigation offered opportunities for the growth of private adjudication through binding arbitration.[13] Conventional wisdom—and common sense—suggests that businesses choose binding arbitration mainly because it is perceived to be superior to litigation[14] in some or all of the following ways: cost savings, shorter

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[10] Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts,* 1 J. EMPIRICAL LEGAL STUD. 459, 460 (2004).

[11] *See* David R. Fine et al, *The "Vanishing" Civil Jury Trial—Report of The Middle District Bench/Bar Task Force*, 80 PA. B. ASS'N Q. 24 (2009) (citing costs and delays among primary reasons for reduced trials); Nathan L. Hecht, *The Vanishing Civil Jury Trial: Trends in Texas Courts and an Uncertain Future*, 47 S. TEX. L. REV. 163 (2006) (same); Stephen Daniels & Joanne Martin, *The Impact It Has Had Is Between People's Ears: Tort Reform, Mass Culture, and Plaintiff's Lawyers*, 50 DEPAUL L. REV. 453, 454 (2000) (noting businesses' fear of litigation). *See also* John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers' and Executives' Opinions,* 3 HARV. NEGOT. L. REV. 1, 26 (1998) (94% of surveyed executives believed there had been a "litigation explosion"); VALERIE P. HANS, BUSINESS ON TRIAL 56 (2000) (describing public apprehensions regarding litigation).

[12] INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 3 (Mar. 11, 2009) [hereinafter FINAL REPORT ON LITIGATION REFORM].

[13] As one experienced commercial dispute resolution lawyer explains, "Nature abhors a vacuum, and a vacuum has been created with the decreased frequency of bench and jury trials. This portends good things for alternative dispute resolution processes."

[14] William H. Knull, III & Noah D. Rubins, *Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?,* 11 AM. REV. INT'L ARB. 531, 532 (2000); Richard E. Speidel, *Securities Arbitration: A Decade after McMahon*,

resolution times, a more satisfactory process, expert decision makers, privacy and confidentiality, and relative finality.[15] The untiring efforts of arbitration providers in promoting commercial arbitration rules and standard model clauses have encouraged broader use of arbitration in recent decades, while the growth of a large cadre of relatively sophisticated, accomplished, and well-trained professional arbitrators has undoubtedly enhanced confidence that arbitration will produce a reasonable and fair result. A wide variety of simple as well as sophisticated contractual provisions for the resolution of disputes by arbitrators are now featured in many different kinds of commercial contracts.[16] These phenomena, coupled with plenary judicial enforcement of broadly tailored arbitration provisions, have made arbitration a wide-ranging surrogate for trial in a public courtroom.[17]

B. Importation of Trial Practices into Arbitration

Commercial arbitration is, to a large extent, a victim of its own success. The migration of commercial cases from litigation to arbitration has, predictably, brought into arbitration some of the practices associated with commercial case litigation. Many skilled and experienced attorneys, while happy to accept the foregoing advantages of arbitration, nonetheless generally want to try cases in arbitration with the same intensity and the same tactics with which they were conducted in court. Thus, expanded arbitral motion practice and discovery have developed within the framework of standard commercial arbitration rules which tend to afford arbitrators and parties considerable "wiggle room" on matters of procedure. As a consequence, practice under modern arbitration procedures is today often a close, albeit private, analogue to civil trial.

Aside from the natural human tendency to want to do things "the way we've always done them," there are other drivers of the incorporation of litigation-style proceedings into large commercial arbitration. Litigators, being inherently conservative and cautious, on the one hand, and determined to achieve the best possible result for their clients, on the other, are very reluctant to try a big case—in either a court or an arbitration proceeding—until they have sought all possible evidence, analyzed every issue, and played every legal card at their disposal. If, notwithstanding all these efforts, the client suffers an adverse result, counsel can say with confidence that this did not occur because they held back on any actions that might have produced a better outcome. It must be noted, finally, that these practices—constituting the arguable path of prudence—are also significant contributors to law firm revenues.

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62 BROOK. L. REV. 1335 (1996); COMMERCIAL ARBITRATION AT ITS BEST: SUCCESSFUL STRATEGIES FOR BUSINESS USERS 12-13 (Thomas J. Stipanowich & Peter H. Kaskell eds., 2001) [hereinafter COMMERCIAL ARBITRATION AT ITS BEST].

[15] *See* DAVID B. LIPSKY & RONALD L. SEEBER, THE APPROPRIATE RESOLUTION OF CORPORATE DISPUTES—A REPORT ON THE GROWING USE OF ADR BY U.S. CORPORATIONS 17 (1998) (detailing reasons why companies use mediation and arbitration). *See also* Richard W. Naimark & Stephanie E. Keer, *International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Business People: A Forced Rank Analysis*, 30 INT'L BUS. LAW. 203 (2002) (simple forced rank analysis of factors of importance to attorneys and clients in AAA international arbitration cases).

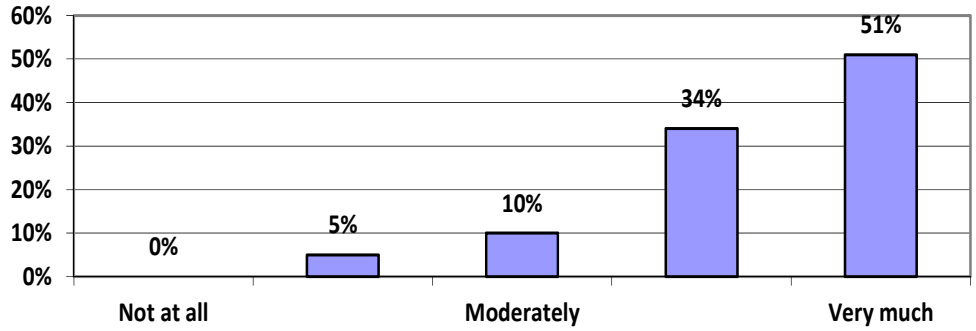
[16] Celeste M. Hammond, *A Real Estate Focus: The (Pre)(As)summed "Consent" of Commercial Binding Arbitration Contracts—An Empirical Study of Attitudes and Expectations of Transactional Lawyers*, 36 J. MARSHALL L. REV. 589, 591 (2003) (commenting on the widespread use of arbitration provisions in commercial contracts).

[17] *See* Thomas J. Stipanowich, *Contract and Conflict Management*, 2001 WIS. L. REV. 831, 839-44.

1. Discovery

Among many aspects of this phenomenon, the expansion of discovery stands out as the primary contributor to greater expense and longer cycle time, as affirmed by a poll of National Summit participants:

> *If you believe arbitration fails to meet the desires of business users regarding speed, efficiency and economy, to what extent does excessive discovery tend to contribute to that result?*



Arbitration hearings are now often preceded by extensive discovery, including requests for voluminous document production and depositions. Since discovery has traditionally accounted for the bulk of litigation-related costs,[18] the importation of discovery into arbitration (which traditionally operated with little or no discovery) is particularly noteworthy. Although many arbitrators and some arbitration rules aim to hold the line on excessive discovery,[19] it is not unusual for legal advocates to agree to litigation-like procedures for discovery, even to the extent of employing standard civil procedural rules.[20] This should not be surprising, since there

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[18] According to a 1999 study, document discovery alone accounts for 50% of litigation costs in the average case, and 90% in active discovery cases. Admin. Office of the U.S. Courts, *Judicial Conference Adopts Rule Changes, Confronts Projected Budget Shortfalls*, THE THIRD BRANCH, Oct. 1, 1999, *available at* http://www.uscourts.gov/News/NewsView/99-09-15/Judicial_Conference_Adopts_Rules_Changes_-_Confronts_Projected_Budget_Shortfalls.aspx. American lawyers devote more time to document discovery than to nearly any other activity, including client counseling, legal research and negotiations. *See* Salvatore Joseph Bauccio, *E-Discovery: Why and How E-Mail is Changing the Way Trials are Won and Lost,* 45 DUQ. L. REV. 269, 269 n.7 (2007). *See also* JAMES S. KAKALIK, ET AL., DISCOVERY MANAGEMENT: FURTHER ANALYSIS OF THE CIVIL JUSTICE REFORM ACT EVALUATION DATA 55 (1998); John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 506 (2000); Wayne D. Brazil, *Civil Discovery: How Bad Are the Problems?*, 67 A.B.A. J. 450 (1981).

[19] *See, e.g.*, INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION (CPR) NON-ADMINISTERED ARBITRATION RULES R. 11 (2007) ("The Tribunal may require and facilitate such discovery as it shall determine is appropriate…taking into account the needs of the parties and the desirability of making discovery expeditious and cost-effective.") *See also* JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURES, R. 22 (2007); AAA COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES R. 30 (2009).

[20] In some cases arbitrators are confronted by a prior agreement of counsel for arbitrating parties to utilize the discovery provisions of the Federal Rules of Civil Procedure in arbitration. This poses a dilemma for the arbitrator, who may or may not be able to persuade counsel to forego requests for admission and interrogatories and to strictly limit the number of depositions, and also to closely supervise the discovery process to avoid unnecessary delays.

is a tendency to use the tools with which one is most familiar, and lawyers schooled in trial may predictably rely on their knowledge and experience in the private analog of the process. Trial practice, with its heavy emphasis on intensive discovery and related motion practice, is reinforced by ethical rules enshrining the model of zealous advocacy.[21] For lawyers accustomed to full-fledged discovery, anything less may seem tantamount to malpractice.[22]

It is not hard for American lawyers to justify intensive discovery to themselves and their clients. Legitimizing a legal position often requires painstaking reconstruction of past events, a highly labor- and time-intensive activity that may require conscientious sifting of vast amounts of information, most of which is of little or no relevancy. The expectation—or hope—is that the "mining" effort will ultimately produce a picture that supports the position.[23] Alternatively, it might at least forestall an undesired resolution for months or years.[24]

Business clients—especially those with significant interests or assets at stake—are often disinclined to challenge this effort to mine information. They may agree with or rely on the advocate's preliminary counsel that the mining operation will yield productive results;[25] indeed, they may have strategic reasons for using discovery to increase their opponent's costs, and/or delay the final resolution of the dispute.[26]

Arbitrators, intent upon striking a balance between fundamental fairness and efficiency, may be reluctant to push parties to limit such practices or to keep to schedule, especially when all parties have agreed to wide-ranging discovery. These tendencies are likely to be reinforced by the reality that arbitration is founded on an agreement between the parties, leading to the common and reasonable perception that arbitrators have no business second-guessing agreements between counsel regarding the conduct of discovery and other procedures. There are also concerns about an arbitration award being subjected to a motion to vacate based on a failure to consider relevant evidence, especially among arbitrators who lack the confidence of long experience.[27] Some have even suggested that a reluctance to limit discovery may reflect an arbitrator's desire to avoid offending anyone in the hope of securing future appointments.[28]

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[21] *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1983).

[22] John Hinchey, Remarks at the Annual Meeting, American College of Construction Lawyers, *Adjudication: Coming to America* (Feb. 22, 2008) (notes on file with author).

[23] *See* Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(A) – 'Much Ado about Nothing?*,' 46 HASTINGS L.J. 679, 697-714 (1995) (noting that overly broad discovery allows parties to go on "fishing expeditions"); Chris A. Carr & Michael R. Jencks, *The Privatization of Business and Commercial Dispute Resolution: A Misguided Policy Decision*, 88 KY. L.J. 183, 222 (2000) (discussing the advent of the "discovery lawyer").

[24] *See* BENJAMIN SELLS, THE SOUL OF THE LAW 88 (1994).

[25] Carr & Jencks, *supra* note 23, at 240.

[26] *See* Sorenson, Jr., *supra* note 23, at 699-700. Discovery has been used as a tactical weapon to impose excessive costs on the opposing party.

[27] There is little case law in this area to provide guidance and reassurance to arbitrators who might otherwise be inclined to more rigorously impose limits over counsel's objection. In Hicks v. UBS Financial Services, Inc., 649 Utah Adv. Rep. 7 No 20080950-CA , filed Feb. 4, 2010 UT, App 26, the Utah Court of Appeals held that "erroneous

For all of these reasons, discovery under standard arbitration procedures has tended to become much like its civil court counterpart. As one corporate general counsel explains:

> [I]f you simply provide for arbitration under [standard rules] without specifying in more detail . . . how discovery will be handled . . . you will end up with a proceeding similar to litigation.[29]

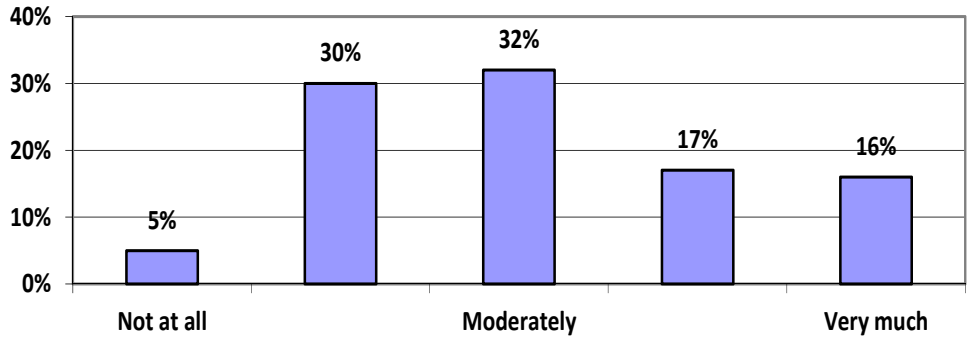
All too often, lamented another corporate lawyer at the National Summit, this expensive, "overblown" process results in little or no useful information, let alone the proverbial "smoking gun."

With the advent of electronic discovery—producing what was recently termed "a nightmare and a morass" for parties in litigation,[30] the costs and stakes of litigation-style discovery have never been higher. Never, moreover, has the need to control discovery in arbitration been more imperative.

2. Motion practice

Another key source of cost and delay in commercial arbitration is motion practice, as reflected in the poll of National Summit participants:

> *If you believe arbitration fails to meet the desires of business users regarding speed, efficiency and economy, to what extent does excessive, inappropriate or mismanaged motion practice tend to contribute to that result?*



discovery decisions" could provide a basis for vacating an arbitration award, but that the showing of "prejudice" resulting from the arbitrator's discovery decisions must be "substantial."

[28] *See* Clyde W. Summers, *Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate*, 6 U. PA. J. LAB. & EMP. L. 685, 717 (2004) (arguing that arbitrators may be less restrictive with discovery than judges because of their concern over obtaining future appointment as an arbitrator).

[29] James Bender, General Counsel, Williams Companies, Remarks at The Torch is Passed, Corporate Counsel Panel Discussion, Annual Meeting, CPR Institute for Dispute Resolution (Jan. 29-30, 2004), *cited in* Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution,"* 1 J. EMPIRICAL LEGAL STUD. 843, 895 n. 292 (2004) [hereinafter Stipanowich, *Vanishing Trial*].

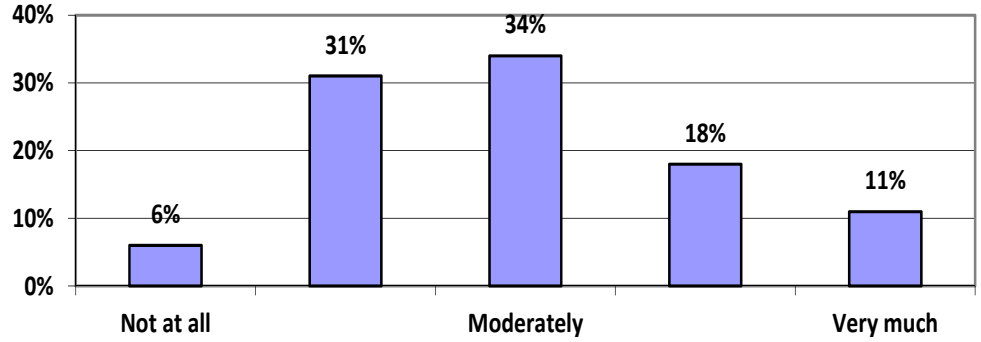
[30] FINAL REPORT ON LITIGATION REFORM, *supra* note 12, at 14.

The use of dispositive motions in arbitration—now contemplated even by some expedited rules[31]—is, practically speaking, a double-edged sword.[32] This import from the court system, prudently employed, is a potentially useful tool for narrowing arbitral issues prior to hearings and full-blown discovery, thus avoiding unnecessary preparation and hearing time. While arbitrators are properly chary of summarily disposing of matters implicating factual issues, there are certain matters that may be forthrightly addressed early on with little or no discovery, such as contractual limitations on damages, statutory remedies, or statutes of limitations and other legal limitations on causes of action.[33] The problem is that, as in court, motion practice often contributes significantly to arbitration cost and cycle time without clear benefits. The filing of motions leads to the establishment of schedules for briefing and argument entailing considerable effort by advocates, only to have the arbitrators postpone a decision until the close of hearings because of the existence of unresolved factual disputes raised by the motion papers.[34]

3. Other concerns

Another contributor to cost and delay is hearings that drag on too long, as reflected in the poll of National Summit participants:

> *If you believe arbitration fails to meet the desires of business users regarding speed, efficiency and economy, to what extent do <u>too-lengthy hearings</u> tend to contribute to that result?*



[31] *See, e.g.*, JAMS ENGINEERING/CONSTRUCTION EXPEDITED RULES, Rule 18 (2009).

[32] COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 14, at 203-06; Zela G. Claiborne, *Constructing a Fair, Efficient, and Cost-Effective Arbitration*, 26 ALTERNATIVES TO THE HIGH COST OF LITIG. 186 (Nov. 2008). *See also* Albert G. Ferris & W. Lee Biddle, *The Use of Dispositive Motions in Arbitration*, 62 DISP. RESOL. J. 17 (Aug.-Oct. 2007).

[33] COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 14, at 48, 53-55. The new Final Report on Litigation Reform states that "parties and the courts should give greater priority to the resolution of motions that will advance the case more quickly to trial or resolution." FINAL REPORT ON LITIGATION REFORM, *supra* note 12, at 22. It also calls for "a new summary procedure . . . by which parties can submit applications for the determination of enumerated matters (such as rights that are dependent on the interpretation of a contract) on pleadings and affidavits or other evidentiary materials." *Id.* at 6.

[34] *See* Romaine L. Gardner, *Depositions in Arbitration: Thinking the Unthinkable*, 1131 PRACTICING LAW INST. CORP. LAW & PRACTICE COURSE HANDBOOK 379, 389-97 (Jul.-Aug. 1999).

As with discovery and motion practice, the cause of drawn-out hearings is often a complex interaction of several factors. It typically starts with attorneys, intent on pursuing their brand of "zealous advocacy" for strategic or tactical reasons, interposing constant objections, introducing redundant testimony, and framing the same question over and over again. It is facilitated by arbitrators who are unable or unwilling to come down too heavily on the parties—perhaps because of lack of skill or native discomfort with proactive management, or because they may be uncomfortably aware of scheduling issues of their own that may need to be accommodated during the course of trying a complex case. The ballooning of hearing time is especially likely within the ambit of open-ended arbitration procedures with considerable "wiggle room"; however, even previously established timetables and prescribed deadlines sometimes fall by the wayside due to mindsets like those described above.

C. Looking Beyond Litigation-Style Arbitration

When effectively managed by competent arbitrators with the cooperation of counsel, a "hybrid system" which combines the basic features of arbitration (process control, confidentiality, finality and chosen expert decision-maker) with court-like discovery, motion practice, and the like is not inherently bad, and may be a perfectly sensible arrangement for some kinds of disputes. For example, a rational choice might be made in favor of such an approach, despite the prospect of expense and extended process, where the stakes are very high.

In many cases, the case management efforts of skilled arbitrators and/or the cooperation of party representatives will result in a highly satisfactory procedure that is carefully tailored to the circumstances at hand—the result, presumably, that was intended by the drafters of standard arbitration procedures that contain significant "wiggle room." In such circumstances, whether by conscious choice or dumb luck, business users enjoy an arbitration experience fully commensurate with their needs and priorities.

But, while some business clients may be perfectly comfortable with this *status quo*, in which the character, length and cost of the arbitration process are heavily dependent on the interaction of arbitrators and advocates, many others are emphatically not. They desire a higher degree of control—and modes of arbitration that deliberately place greater emphasis on economy and efficiency. Consider, for example, the complaint of two in-house attorneys for one of the world's leading companies:

> The overriding objectives [of businesses in choosing an appropriate forum for resolving disputes] . . . are fairness, efficiency (including speed and cost) and certainty in the enforcement of contractual rights and protections. These are complementary objectives, and to focus on one at the expense of the others leads to a result inconsistent with the expectations of the business world and denies basic commercial needs. Too often the practice of . . . arbitration has

> done just that, by focusing on perceived concepts of due process to the detriment of efficiency, resolution and certainty.[35]

Although this quote refers to commercial arbitration in cross-border disputes, it is perhaps even more relevant in the context of arbitration in the U.S. As one director of litigation for a multi-national company observed at the National Summit, "I'm here to tell you that . . . our current experience is that we are getting quicker and more cost-effective results in U.S. courts!"

Besides driving up costs, delay in the resolution of conflict prolongs uncertainty—potentially postponing the collection of amounts owed, affecting the setting of required financial reserves and impairing the reporting of profits, and leaving in doubt questions of contract interpretation. Thus, "[w]hile business leaders . . . expect a fair resolution, taking excessive time can often be just as damaging as a wrong decision."[36]

While concerns about speed, efficiency, economy and certainty have led many businesses to stop using arbitration, the solution is a lot less drastic. Instead of accepting without question a set of arbitration rules that fails to lay the groundwork for effective cost- and time-saving, business users' best chance to achieve harmony between process and business priorities is to take affirmative steps to move beyond the one-size-fits-all approach.

Powerful support for this conclusion comes from the recent report of the American College of Trial Lawyers task force linking the disappearance of civil trials with high cost and delay: the report recommends a wide range of critical changes in the landscape of American litigation, including an end to the "'one size fits all' approach of the current federal and most state rules."[37] If clear procedural choices are perceived as not just desirable but essential in litigation, the same should be ***even more so in arbitration***—since arbitration is almost wholly a creature of contract and therefore highly amenable to choices that "fit the forum to the fuss."[38]

In the litigation system, speed and economy have sometimes been achieved by court order. For years, a handful of state and federal courts have managed to resolve their civil cases much faster, with attendant cost savings, than their peers. While such expedition sometimes results from unique factors, such as abnormally low case loads, in most instances the time and cost savings occur because the court has adopted a successful vehicle for containing the proceedings. For example, the U.S. District Court for the Eastern District of Virginia has been for many years one of the fastest federal trial courts in the country. It did this without any effort to micromanage proceedings in its cases. Instead, it instituted a case management program in which all civil cases (no matter how complex) were set for trial approximately six months after service of process on defendants, all motions were immediately heard and decided (usually from the bench at hearing), and continuances were virtually never granted.

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[35] Michael McIlwrath & Roland Schroeder, *The View from an International Arbitration Customer: In Dire Need of Early Resolution,* 74 ARBITRATION 3, 4 (2008).

[36] *Id*. at 4-5.

[37] *See* FINAL REPORT ON LITIGATION REFORM, *supra* note 12.

[38] Frank E. A. Sander & S. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49 (1994).

This arrangement, which came to be known as "the rocket docket," soon became the distinguishing feature of the court's reputation and legal culture. Attorneys who had cases there quickly focused their discovery efforts on the most important evidence, eschewed any attempt to track down every marginal lead or possibility, and generally cooperated in discovery and pre-hearing activities (knowing that failure to cooperate would be quickly sanctioned).

This highly successful cost and time containment program is firmly grounded in the universal truth known as Parkinson's Law—to wit, "work expands so as to the fill the time available for its completion."[39] (This is particularly true, one might add, when those doing the work—outside counsel and arbitrators – are paid by the hour.) Some containment mechanism is an essential ingredient of any successful effort to reduce transaction costs and cycle time.

Unfortunately, while external imposition of such a containment mechanism is readily achievable in litigation (though, regrettably, seldom done), it is not in arbitration. The undoubted broad discretion granted trial judges to manage their calendars and proceedings, vests them with authority to impose reasonable restrictions on discovery, motions, and trial time even if all parties vigorously object. Arbitrators, by contrast, have only such power as is conferred by party agreement. If all arbitration parties agree that each should be able to take twenty depositions, file dispositive motions both before and after discovery, and have twenty days to present their evidence at hearing, an arbitrator who recognizes that a fair and just decision could be reached through a much more abbreviated proceeding may try to persuade the parties to drastically scale back. If unable to use persuasion, however, the arbitrator is powerless to override the parties' agreement on how the arbitration shall be conducted.[40] As noted above, moreover, arbitrators may have other reasons not to push back too strenuously when confronted with an unduly expansive proceeding.

If the intent is to have an expeditious and economical process, therefore, it is incumbent upon business clients and counsel to establish the appropriate framework at the outset, preferably when laying the contractual foundation for arbitration, and thereafter to reinforce those choices by other choices during the course of arbitration. It is axiomatic that the less pre-dispute effort is made to establish an appropriate framework for containing the arbitration, the more likely it is that the arbitration proceedings will spiral out of control, with ad hoc decisions being made at the discretion of the arbitrator in this effort.

But business users cannot be expected to act unilaterally. First and foremost, business users need assistance from reputable providers of arbitration and dispute resolution services in the form of clear, user-friendly procedural choices—including procedures that make speed and economy a true priority. Second, they need outside counsel willing and able to share and promote the values of efficiency and economy during the arbitration process. Finally, they need arbitrators with effective management skills and the audacity to use them.

In the following part we will more closely examine the roles of each of these parties.

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[39] This adage initially appeared in The Economist of November 1955 as the first sentence of a humorous essay by Cyril Northcote Parkinson and was later reprinted with other essays in the book PARKINSON'S LAW: THE PURSUIT OF PROGRESS (London, John Murray, 1958).

[40] This sort of agreement is far from fanciful, as many experienced arbitrators can attest.

III
Business Users & In-House Counsel, Providers, Outside Counsel and Arbitrators Must All Play a Role in Promoting Efficiency and Economy in Arbitration

A. The Need for a Mutual Effort

It is time to return to fundamentals in American arbitration. Those who seek economy, efficiency and a true alternative to the courthouse need more than good arbitrators. Real change must begin with the commitment of business users to thoughtful, informed consideration of *discrete process choices* that lay the groundwork for a particular kind of arbitration—whether they seek a highly streamlined, short and sharp process with tight time frames and firmly bounded discovery, a private version of federal court litigation or something in between. In the absence of specific user guidance, arbitration under modern, broadly discretionary procedures is primarily a product of the interaction of advocates and arbitrators, even the best of whom have limited ability, absent a contractual mandate or the stipulation of all parties to blend efficiency and economy with fundamental fairness. All too often, the result is a process that looks and feels like litigation—which is not what the parties expected in electing arbitration over court trial.

For business users, process choice is an illusion in the absence of appropriate alternative process prototypes from arbitration provider institutions. Even before a dispute arises, at which time heated emotions prevent agreement on something as simple as expedited arbitration rules, clients and counsel tend to have neither the time nor the expertise to craft their own process templates and usually need straightforward, dependable guidance from those who develop and administer the procedures upon which they rely. Provider institutions are awakening to the need to promote real choices in arbitration, but much remains to be done.

Users also require outside counsel able and willing to support and further the goals underpinning their agreement to arbitrate. Among those who promote themselves to business clients, there are wide variations in personal philosophy, approach, pertinent knowledge and ability.

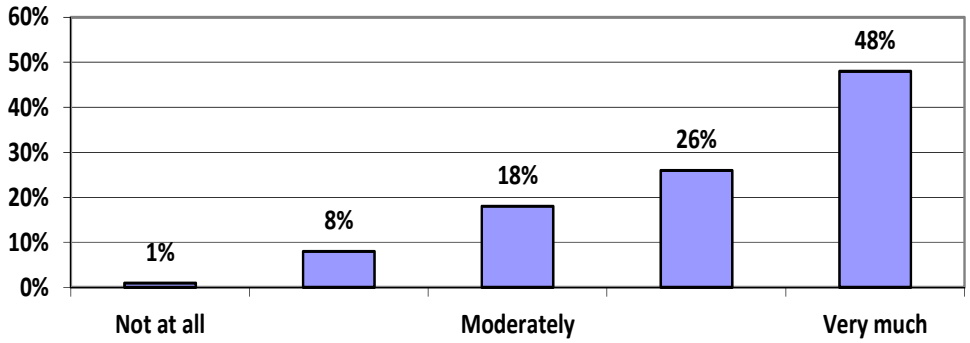
Finally, efficient and economical process depends upon the active efforts of arbitrators to employ effective process management skills, coupled with the discernment and willingness to make early rulings that will effectively truncate or streamline proceedings and the fortitude to enforce agreed timetables. To the extent that business users fail, consciously or unconsciously, to place firm limits on the arbitration timetable, the scope of discovery, and other arbitration procedures, the process management skills of arbitrators—and their interaction with counsel—become all the more critical to an efficient proceeding and speedy outcome.

In the following pages we will examine in detail the roles of each of these four groups of "stakeholders" in the arbitration process, all of which are critical to achieving efficiency and economy in arbitration.

B. The Role of Business Clients and Counsel

Participants at the National Summit thought *corporate in-house counsel* can do considerably more to ensure speed, efficiency and economy *before disputes arise.* Perhaps surprisingly, the in-house counsel participants themselves overwhelmingly agreed with this statement.

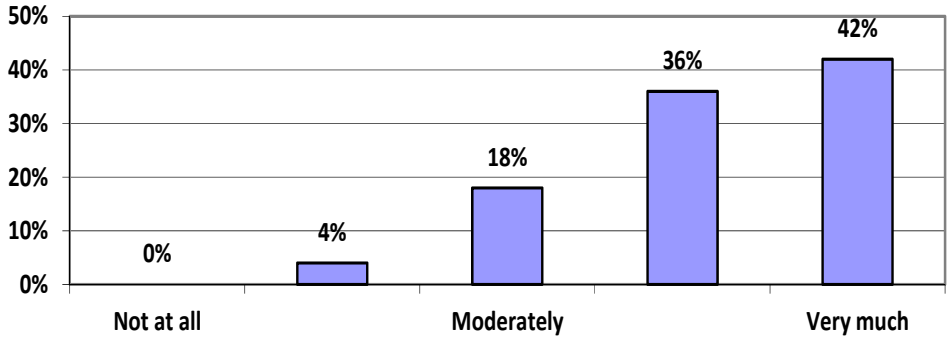
> *When arbitration fails to meet the desires of business users regarding speed, efficiency and economy, how much more can corporate in-house counsel do to help fulfill those expectations before disputes arise?*



Of the four constituencies, *corporate in-house counsel* are best-equipped to assess client goals and priorities across and within transactions. Where speed, economy and efficiency are critical to a client, they have the opportunity to tailor dispute resolution provisions (including binding arbitration) to those particular needs.

Summit participants also believed that corporate in-house counsel could do a good deal more to fulfill client expectations about speed, efficiency and economy later on, in the course of resolving particular disputes:

> *When arbitration fails to meet the desires of business users regarding speed, efficiency and economy, how much more can corporate in-house counsel do to help fulfill those expectations once the decision is made to arbitrate a dispute?*



Rather than "turn over the keys" and relinquish control to outside counsel, in-house attorneys have repeated opportunities to affect the arbitration process, from selection and supervision of counsel to the identification of arbitrators to helping to chart the course of the arbitration process.

1. The Importance of Effective Choice-Making

Business users, guided by knowledgeable and experienced counsel, are in the best position to determine how and when arbitration will be brought to bear on business disputes, and what kind of arbitration process to prescribe. If business parties really want arbitration to be a truly expeditious and efficient alternative to court, they have to assume control of the process and not delegate the responsibility to outside counsel—in other words, principals, and not agents, should act as principals.[41] This must include not only choices made after disputes arise, but also active choice-making at the time of contracting. Ideally, it begins even earlier with strategic discussions regarding the management of conflict in which arbitration is considered among a variety of tools and approaches.[42]

Indeed, at first blush, it would seem that businesses that are incurring excessive transaction costs and delays would be ideally situated to rein them in. Businesses are typically quite experienced in making cost-benefit analyses and in deciding how much they are willing to pay to reduce particular risks to a tolerable level. Experienced counsel (and arbitrators) know, for example, that the law of diminishing returns applies in discovery as it does in nearly everything else. The vast majority of cases end up being decided on the basis of a fairly small body of evidence which is usually obtained in early discovery (or may even be known when the arbitration demand is filed). Continued efforts to turn over every stone and run down every possible lead rarely produce important further evidence (the proverbial "smoking gun") but invariably drive up transaction costs and time greatly. If given the choice between spending $200,000 to achieve 90% assurance of locating most of the important evidence or spending $2,000,000 to achieve 95% assurance, most sophisticated businesses would usually opt for the first choice, while their risk-averse, hourly-billing counsel would often opt for the second.

2. Reasons Business Clients and Counsel Fail to Take Control and Make Effective Choices

Unfortunately, most businesses have not availed themselves of the opportunity to control arbitration costs and speed by adopting arbitration agreements that impose reasonable limits on the arbitration process. Instead, companies tend to reflexively insert standard "boilerplate" arbitration provisions in their transaction contracts, many of which include relatively "loose" procedures that leave considerable leeway to outside counsel and arbitrators.

There appear to be several reasons for the failure of businesses to take active control of their arbitrations from the outset. First of all, it is often difficult to anticipate precisely what disputes will arise under a contract, and what the stakes will be.[43] In-house counsel may feel that the simplest solution to such uncertainty is the adoption of arbitration provisions that leave considerable room for the arbitrators and counsel to adapt the process to whatever circumstances present themselves—the "wiggle room" to which we have alluded.

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[41] *Cf.* BENJAMIN SILLS, THE SOUL OF THE LAW 88 (1994).

[42] *See* GEORGE J. SIEDEL, USING THE LAW FOR COMPETITIVE ADVANTAGE 3 (2002).

[43] *See* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 14, at 6-8.

Second, in most businesses, corporate energy and attention is focused on consummating transactions; in contrast dispute resolution provisions tend to be accorded low priority in contract negotiations, at least partly because raising the specter of conflict seems inappropriate when the emphasis is on coming together.[44] Those insiders who say "but let's also make careful arrangements for what happens if things go wrong" risk being viewed as obstructionists who might derail the deal. Perhaps, too, some transactional lawyers are reluctant to make a negotiating point of arbitration, fearful that that may require trading off more "substantive" elements.

There is also the problem that transactional lawyers often lack direct experience with resolving post-negotiation conflict; for this reason they may have a tendency to fall back on inadequate boilerplate or falter in the minefield of customized drafting.[45] In the effort to define client goals and translate them into meaningful process choices, in-house counsel, the "gatekeeper to legal institutions and facilitator of . . . transactions,"[46] must play a critical role. But the pertinent knowledge and experience about dispute resolution is often reposed in litigators, not transactional counsel.

When disputes arise, moreover, there is undoubtedly a tendency on the part of in-house counsel to turn matters over to outside counsel and monitor outcomes and invoices but not actively co-manage the process. In this, perhaps, there is the perceived comfort of being able to delegate responsibility to another for the consequences of an adjudicative strategy. If the strategies are not in tune with the goals of the client, however, the consequences may be unfortunate, as reflected in the conclusion of one corporate general counsel:

> Arbitration is often unsatisfactory because litigators have been given the keys . . . and they run it exactly like a piece of litigation. It's the corporate counsel's fault [for] simply turning over the keys to a matter.[47]

3. Business Clients and Counsel Must Change These Realities

Despite the often daunting obstacles confronting client and counsel regarding arbitration and dispute resolution, there are compelling reasons why in-house advisors should devote more time and energy to overcoming current obstacles and why business clients should heed and support their efforts. As detailed in Part IV, effective process choices can provide tangible benefits for business and avoid costly and delay-producing legal consequences, thus

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[44] *See id.*

[45] John M. Townsend, *Drafting Arbitration Clauses: Avoiding the Seven Deadly Sins*, 58 DISP. RESOL. J. 28, 30 (Feb.-Apr. 2003).

[46] *See* William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 LAW & SOC'Y REV. 631, 645 (1980-1981).

[47] Stipanowich, *Vanishing Trial*, *supra* note 29, at 895 (quoting Jeffrey W. Carr, Vice President and General Counsel, FMC Technologies, Inc.). *See also* David B. Lipsky & Ronald L. Seeber, *In Search of Control: The Corporate Embrace of ADR*, 1 U. PA. J. LAB. & EMP. L. 133, 142 (1998); Craig A. McEwen, *Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation,* 14 OHIO ST. J. DISP. RESOL. 1 (1998); Lande, *supra* note 11.

fulfilling legal counselors' ethical obligations to actively promote consideration of appropriate dispute resolution alternatives.

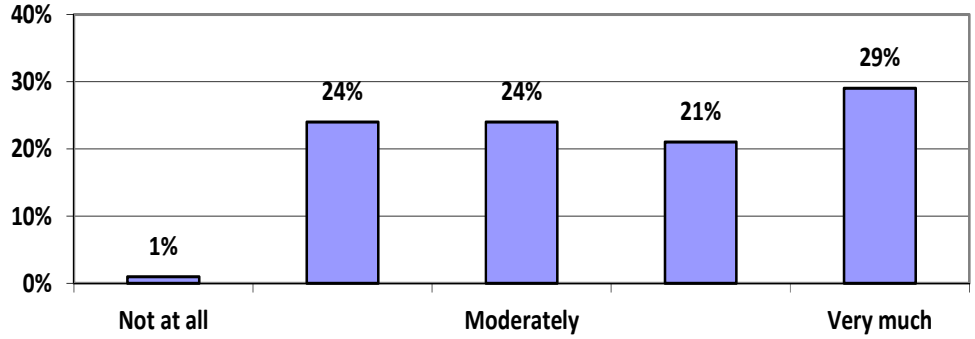
Selecting the right "template" is the first critical choice point for business users and in-house counsel. It is, however, essential to make other good choices after disputes arise. The selection of the right advocates and arbitrators can reinforce earlier process choices by ensuring adherence to the contractual arbitration "template;" the wrong outside counsel or arbitrator may undermine earlier procedural choices.

Finally, business clients and in-house counsel should recognize that, however skilled and committed their outside counsel, it is critical for the user to maintain overall control of the process of dispute resolution. This should begin with an early case assessment that sets the stage for strategic control of the conflict management process. As they do with other large expenditures, businesses should set an appropriate and realistic budget for arbitration and should forbid outside counsel from exceeding that budget without express approval. In-house counsel should attend, in person or by telephone, the initial case management conference and all important subsequent conferences and hearings during the arbitration process, should require periodic status reports from outside counsel, and should actively partner in the management of the arbitration rather than relinquishing such control to outside counsel.

C. The Role of Provider Organizations

National Summit participants also perceived that organizations providing arbitration services should play a major role in bridging the gap between user expectations and experiences regarding speed, efficiency and economy in arbitration:

> *When arbitration fails to meet the desires of business users regarding speed, efficiency and economy, how much more can institutions that provide arbitration rules, panels and administrative services do to help fulfill those expectations?*



Business users rely heavily on the organizations that publish and promote (a) arbitration and dispute resolution procedures, (b) lists of pre-screened, experienced arbitrators and other "neutrals" and (c) related administrative services. In many different respects, these "provider institutions" channel the expectations and behavior of business parties and the arbitrators that serve them and set the stage for the success or failure of arbitration. Their offerings should be closely examined and compared, but never taken for granted.

The published commercial arbitration procedures of major provider institutions offer a number of perceived advantages. For busy lawyers they offer a seemingly "tried and true" alternative to the minefield of customized drafting combined with an administrative support system and access to lists of pre-screened, trained neutrals. Many in-house counsel report that, unless a client is entering into an exceptionally significant commercial relationship or preparing a contract template that will be used multiple times,[48] it is unrealistic to expect counsel to spend considerable time planning and drafting arbitration agreements. Even in circumstances where more attention is appropriate, drafting dispute resolution agreements from whole cloth without reliance on published templates can be a dicey proposition. It therefore makes sense to examine and compare what different administrative institutions have to offer.

The incorporation of a boilerplate arbitration provision is also much less likely to raise the eyebrows of those on the other side of the negotiating table. To the extent that national or regional entities are known and respected in the marketplace, incorporating their rules is less likely to entail a drain on negotiators' time or an expenditure of a party's "bargaining chips."

But while drafters seeking guidance from the websites of institutions sponsoring arbitration have a seemingly wide variety of choices, there are few readily available, reliable guideposts that dependably link specific process alternatives to the varying goals and expectations parties may bring to arbitration.[49] Moreover, despite devoting a great deal of time and effort to developing and promoting institutional rules, most organizations offer a limited range of process templates for commercial arbitration. For example, some institutions heavily emphasize a single set of commercial arbitration rules which may be excellent for certain purposes but less advantageous for others (such as small and medium cases); by incorporating that institution's rules in an arbitration agreement, however, parties will be bound to employ those rules for whatever disputes arise. Relatively few procedures, for example, incorporate "tiered" approaches to dispute resolution in a single document.[50]

Very recently, some providers that heretofore had published a single set of "one-size-fits-all" arbitration rules are starting to give more attention to the diverse needs of business

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[48] *See* Stipanowich*, Arbitration and Choice, supra* note 3, Part III.A. (discussing options for "tailoring" arbitration provisions).

[49] Leading providers provide some basic guidance for drafters about ways of incorporating their own rules in the contract. *See, e.g.*, AAA, DRAFTING DISPUTE RESOLUTION CLAUSES: A PRACTICAL GUIDE (Amended and Effective September 1, 2007); JAMS GUIDE TO DISPUTE RESOLUTION CLAUSES FOR COMMERCIAL CONTRACTS (Rev. June 2000). One relatively comprehensive set of guideposts for business users is the product of the CPR Commission on the Future of Arbitration. See generally COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 14. Even this extensive guide, however, does not approach process questions from the standpoint of various specific user goals. A more recent CPR publication does, however, address many key drafting issues. CPR INSTITUTE FOR DISPUTE RESOLUTION, CPR DRAFTER'S DESKBOOK (Kathleen Scanlon ed., 2002).

[50] The AAA has offered a multi-tiered approach in its basic rules for a number of years. See, e.g., AAA's COMMERICAL ARBITRATION RULES (Amended and Effective September 1, 2007) and AAA's CONSTRUCTION INDUSTRY ARBITRATION RULES (Amended and Effective October 1, 2009). *See generally* Thomas J. Stipanowich, *At the Cutting Edge: Conflict Avoidance and Resolution in the Construction Industry* in ADR & THE LAW 65-86 (1997) (describing rationale for American Arbitration Association's tiered construction procedures).

users of arbitration. For example, there has been a trend among leading U.S. arbitration institutions to create discrete templates for expedited or streamlined arbitration.[51] In light of growing concerns about the scope and cost of arbitration-related discovery, moreover, various institutions have devoted attention to that subject, and choices may now be discerned among existing procedures.[52] These are important steps toward the goal of moving beyond a "one-size-fits-all" approach to arbitration, but much more can be done both from the standpoint of developing alternatives and providing business users with user-friendly roadmaps.

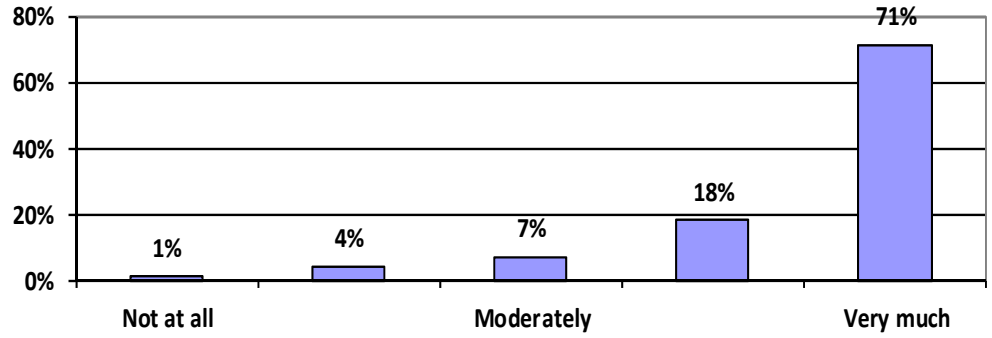
Moreover, providers are ideally positioned to collect and share information about the experience of users with streamlined procedures or other economy- and efficiency-focused devices. Such information is likely to be of critical importance to business clients and counsel as they consider the relative value and appropriateness of different process choices.

Perhaps most importantly, the community of users continues to seek more and better information about the capabilities and skills of arbitrators; this is a significant business opportunity for providers that are able to figure out how to obtain, mine and transmit reliable and relevant data.

D. The Role of Outside Counsel

Legal advocates have considerable control over the arbitration experience, including cost and cycle time. Effective advocates, with the cooperation of opposing counsel and the arbitrator, may overcome the deficiencies of arbitration provisions embodying inadequate procedures. Ineffective advocates, on the other hand, may undermine the best-crafted procedural framework. Not surprisingly, National Summit participants believed that outside counsel could do a great deal more to help meet clients' expectations of speed, efficiency and economy in arbitration:

> *When arbitration fails to meet the desires of business users regarding speed, efficiency and economy, how much more can outside counsel (advocates in arbitration) do to help fulfill those expectations?*



[51] *See* Stipanowich, *Arbitration and Choice, supra* note 3, Part III.B.

[52] *See id.,* Part III.C.

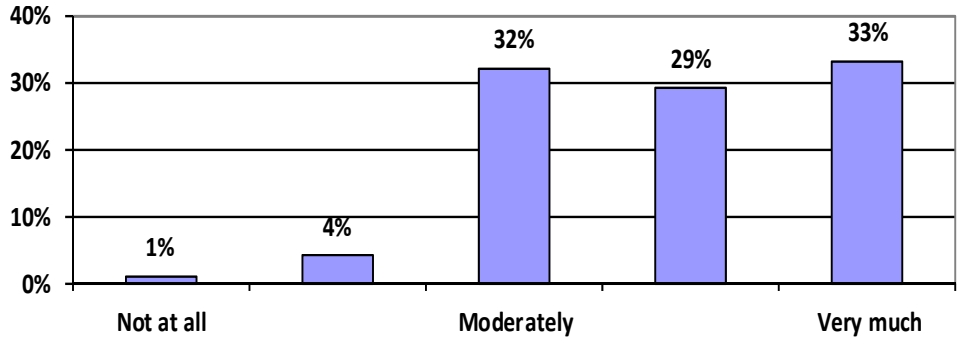
Thoughtful, experienced lawyers who understand arbitration and appreciate the significant differences between arbitration and litigation are in the best position to navigate through the arbitration process in a way that most effectively promotes client goals such as economy and efficiency. At each stage of the process—communicating with administrators, selecting arbitrators, providing arbitrators with guidance for the creation of effective procedural orders and establishing a timetable, setting and participating in hearings, and creating a roadmap for the final award—they have opportunities to further these goals. Some advocates may find it possible to collaborate with opposing counsel in order to develop integrative process solutions that promote expedition and economy along with other mutual benefits.[53]

More attention needs to be given to specific ways advocates can most effectively move the arbitration process along and reduce costs. Advocates, like arbitrators and business users, must also be alerted to the scenarios in discovery, motion practice and hearings that can drive up costs without proportionate benefits.

E. The Role of Arbitrators

Most National Summit participants agreed that arbitrators, too, must share responsibility for meeting user expectations regarding speed, efficiency and economy:

> *When arbitration fails to meet the desires of business users regarding speed, efficiency and economy, how much more can arbitrators do to help fulfill those expectations?*



The critical role of arbitrators in achieving efficiency and cost-saving—and in striking an appropriate balance between efficiency and fairness—is well understood by many experienced arbitrators.[54] That role also helped inspire recent published guidebooks[55] and prompted

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[53] *See generally* Zela G. Claiborne, *Constructing a Fair, Efficient, and Cost-Effective Arbitration*, 26 ALTERNATIVES TO THE HIGH COST OF LITIG. 186 (Nov. 2008) (describing possibilities for collaborative process design).

[54] *See generally* John Wilkinson, *The Future of Arbitration: Striking a Balance Between Quick Justice and Fair Resolution of Complex Claims*, 8 BNA EXPERT EVIDENCE REPORT 189 (Apr. 21, 2008) (discussing ways arbitrators may bring tools to bear).

[55] *See, for example,* THE COLLEGE OF COMMERCIAL ARBITRATORS GUIDE TO BEST PRACTICES IN COMMERCIAL ARBITRATION, 2nd Ed. (James M. Gaitis, Curtis E. von Kann and Robert W. Wachsmuth eds., Juris Net 2010).

leading arbitration provider institutions to develop more rigorous education and training programs for arbitrators. Such guidance, however, does not normally single out approaches that promote economy and speed, but addresses a variety of purposes. Arbitrators need to understand parties' priorities and act accordingly, but in the absence of clear evidence to the contrary arbitrators should assume that their role is to move proceedings forward as quickly and efficiently as possible, consistent with fundamental fairness.[56]

As noted above, more emphasis needs to be placed on specific ways of promoting fairness and on spotting and avoiding circumstances that enhance costs and delays without proportionate benefits. Special attention should be given to care in setting timetables and managing discovery, motion practice and hearings.

F. The Central Lesson

To summarize, the dramatic "success" of arbitration in evolving into a primary role in the resolution of commercial disputes has brought with it complaints that arbitration has become too much like litigation: too slow, and too costly. While much has been done to improve the understanding of business users and the performance of arbitration provider institutions, advocates and arbitrators, there is a need to focus on the specific ways all stakeholders—beginning with business clients and in-house counsel—can more effectively reduce the cost and length of arbitration. This is the purpose of the *Protocols for Expeditious, Cost-Effective Commercial Arbitration*, presented below with accompanying commentary.

[56] *See, e.g.*, McIlwrath & Schroeder, *supra* note 35, at 6 (discussing priorities of corporate counsel).

IV
Protocols for Expeditious, Cost-Effective Commercial Arbitration

General Principles

These *Protocols* are premised on the National Summit consensus that the pace and costs of commercial arbitrations are driven by dependent variables: specific steps taken, or not taken, by each of the four constituencies of the arbitration process (i.e., the parties, the advocates, the arbitrators and the arbitration providers). The *Protocols* are, accordingly, structured to provide specific steps that each constituency can take to alter the current trajectory of increasing costs and extended proceedings in arbitration. For example, if the arbitration provider whose rules control a case provides no option for limited discovery and if the parties and their counsel are battling every issue, the arbitrator's ability to contain discovery costs is seriously constricted. These *Protocols* therefore also contemplate that, in adopting specific steps, the constituencies will strive to cooperate and coordinate their actions, yielding maximum impact. Common to the *Protocols* for each constituency are these overarching principles:

Be deliberate and proactive. Promoting economy and efficiency in arbitration depends first and foremost on deliberate, aggressive action by stakeholders, starting with choices made by businesses and counsel at the time of contract planning and negotiation and continuing throughout the arbitration process. Service providers must actively support good choices in a variety of ways, including publishing and promoting clear procedural choices and putting forward effective arbitrators. Arbitrators must aggressively manage the process from day one of their appointment. All these activities may be strongly reinforced by the cooperative efforts of counsel.

Control discovery. Discovery is the chief culprit of current complaints about arbitration morphing into litigation. Arbitration providers should offer meaningful alternative discovery routes that the parties might take; the parties and their counsel should strive to reach pre-dispute agreement with their adversary on the acceptable scope of discovery, and arbitrators should exercise the full range of their power to implement a discovery plan. The *Protocols* do <u>not</u> assume that the parties in every case will favor truncated discovery; some disputes require deeper discovery to allow for more efficient hearings. The pivotal point is that, by having options to consider and then by electing an appropriate option for the particular dispute, the overall costs of arbitration can still be contained, if only because disputes over the scope of discovery can be averted by agreements and a scheduling order at the outset.

Control motion practice. Substantive motions can be the enemy or the friend of the effort to achieve lower costs and greater efficiencies. Some see current motion practice as adding another layer of court-like procedures, resulting in heavy costs and delay. Others see current motion practice as missing an opportunity for reducing costs and delay, where clear legal issues that might be disposed of at the outset are instead deferred by arbitrators, to allow parties to conduct discovery and then offer their proofs. Recognizing whether in a particular

case a substantive motion would advance the goal of lower cost and greater efficiency is among the most challenging tasks these *Protocols* present to the constituencies; they aim to promote cooperation and close consideration of the role a motion might play.

Control the schedule. Since work expands to fill the time allowed, it is critical to place presumptive time limits on activities in arbitration or on the overall process, coupled with "fail safe" provisions that ensure the process moves forward in the face of inaction by a party. At hearings, for example, the use of a "chess clock" approach is of proven value in expediting examinations and presentations. Some experienced in-house counsel favor establishing overall time limits in large, complex disputes as well as smaller cases.

Use the Protocols as tools, not a straitjacket. While there are certain categories of cases that are alike except for the identity of the parties and other participants, most commercial arbitrations with a substantial amount at stake are distinct in at least some way, be it the twist of circumstance that sparked a dispute or the array of legal issues presented. These *Protocols* offer actions that might apply to the broad range of cases, and yet embedded in them is recognition that parties' needs vary with circumstances and that a well-run arbitration will at some level be custom-tailored for the particular case. The parties and their counsel are encouraged to embrace those elements of the *Protocols* that are most appropriate to their circumstances as understood at contract time or after disputes have arisen.

Remember that arbitration is a consensual process. Arbitration is rooted most often in an arbitration agreement made when the parties were in a constructive, business-enhancing mode. When a dispute arises, the reaction will vary. Some parties, looking to do business again in the future or accepting of the occurrence of a dispute, will be able to cooperate productively towards a common goal of cost containment. Other parties, by the point of a dispute, are entrenched in their respective perspectives of what occurred and why the other side is to blame; parties in this mind-set face a daunting challenge to look beyond grievances in order to find cost savings that might benefit each side. These *Protocols* aim to meet the diverse settings in which cases arise, recognizing that the prescribed behavior ultimately cannot be imposed but can only be encouraged, in a context where the constituencies' efforts permit formulation of the best plan for the particular case.

A Protocol for Business Users and In-House Counsel

While not all business users seek economy and efficiency in arbitration, these are priorities for most businesses much or most of the time. The high cost and/or length of commercial arbitration appear to be the greatest sources of dissatisfaction with the process. There are, however, a number of choices available to business users—in preparing to sign a contract, after disputes arise, and throughout the arbitration process—that will promote cost- and time-saving in dispute resolution. The following Actions are recommended as options for business users and in-house counsel in making choices regarding arbitration. They may be embraced wholly or selectively in light of business priorities in particular relationships and kinds of disputes.

1. Use arbitration in a way that best serves economy, efficiency and other business priorities. Be deliberate about choosing between "one-size-fits-all" arbitration procedures with lots of "wiggle room" and more streamlined or bounded procedures.

Promoting economy and efficiency in arbitration depends first and foremost on proper contract planning. Reflexively "plugging in" a standard form arbitration provision forfeits the single best opportunity business users have for tailoring procedures to limit the scope of discovery, establish timetables and create other boundaries for arbitration. Traditional "one-size-fits-all" provisions afford considerable leeway for arbitrator discretion but also create opportunities for counsel to expand, often excessively, the dimensions and density of the arbitration. The potential benefits of this flexibility must be balanced against significant downsides—the possibility of strategic or tactical manipulation by counsel, and the tendency to convert arbitration into a replica of litigation.

In most cases an arbitration clause should be part of a comprehensive dispute resolution process that might include executive negotiation, mediation and, finally, arbitration. An effective dispute resolution provision incorporating appropriate procedures of a well-established "provider institution" is usually of mutual beneficial to the parties (see *Protocol for Arbitration Providers*).

Comments:

Those charged with choosing business dispute resolution provisions must take a much more considerate approach to the selection of arbitration procedures—preferably after discussing key goals with the affected executives. If customized provisions seem appropriate, special caution is required in the crafting.[57] Choice regarding arbitration is too important to be left until the eleventh hour of negotiation; process options should be considered and developed

[57] One famous nightmare scenario of one-off drafting which generated nine years of litigation involved a contractual provision for expanded judicial review of arbitration awards. *See* Kyocera Corp. v. Prudential-Bache Trade Services, Inc., 341 F.3d 987, 1000 (9th Cir. 2003) *overruling* LaPine Technology Corp. v. Kyocera Corp., 130 F.3d 884, 888 (9th Cir. 1997).

ahead of time.[58] By today's standards, simply ticking off basic options ("mediation," "arbitration") and throwing in convenient boilerplate clauses without reflection might be characterized as malpractice; lawyer-counselors must have or gain access to the knowledge and sophisticated tools necessary to address key process choices and issues.

A number of companies have embraced systematic approaches to handling conflict. They have articulated business goals to be achieved in their program, developed effective mechanisms for the early assessment and affirmative management of conflict,[59] and promoted various appropriate dispute resolution tools (including executive negotiation, mediation and arbitration).[60] Approached in this way, as part of a thoughtful and multi-faceted approach to resolving conflict, arbitration is more likely to prove its particular value as a response to business needs and priorities. Binding arbitration is often a favorable alternative to the litigation process, but it is ill-suited to being the sole process option for serving the day-to-day needs of businesses. Rather, the first step should normally be negotiation, followed in most instances by mediation. Keep in mind that mediation not only offers significant opportunities for effective resolution of claims and controversies but may also reap dividends for commercial relationships. Moreover, even if mediators are unable to help the parties reach a complete settlement of substantive issues, they may be in a position to facilitate the tailoring of arbitration procedures most appropriate to the resolution of those same issues.[61]

If a business client places high priority on speed, efficiency and economy in its arbitrations, consideration should be given to adopting (or carefully adapting) arbitration procedures that effectively address those concerns through one or more of the following, discussed at greater length below:

- mandatory pre-arbitration negotiation and/or mediation;
- early "fleshing out" of claims and defenses;
- early identification by arbitrators of legal or factual issues amenable to early disposition that will narrow or focus the issues in dispute, and procedures to resolve those issues;
- meaningful limits on the scope of discovery;
- expedited procedures for resolving motions and discovery disputes;
- overall time limits on arbitration;

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[58] *See* Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the New Litigation, (Symposium Keynote Presentation)*, 7 DEPAUL BUS. & COM. L.J. 401, 400-03 (2009) [hereinafter Stipanowich, Arbitration and Choice], *available at* http://ssrn.com/abstract=1372291.

[59] *Id*.

[60] By way of comparison, the Final Report on Litigation Reform calls on courts to "raise the possibility of mediation or other forms of alternative dispute resolution early in appropriate cases." INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 3 (Mar. 11, 2009) [hereinafter FINAL REPORT ON LITIGATION REFORM].

[61] *See generally* COMMERCIAL ARBITRATION AT ITS BEST: SUCCESSFUL STRATEGIES FOR BUSINESS USERS Ch. 1, 2 (Thomas J. Stipanowich & Peter H. Kaskell eds., 2001) [hereinafter COMMERCIAL ARBITRATION AT ITS BEST] (discussing general strategies for conflict management and drafting considerations).

- "fast-track" procedures for appropriate cases;
- relying on one rather than multiple arbitrators when appropriate.

2. Limit discovery to what is essential; do not simply replicate court discovery.

Since the most critical factor in the cost and length of litigation or arbitration is nearly always the scope of discovery, parties seeking efficiency and economy in arbitration must make it clear that discovery in arbitration is not for the litigator who will leave no stone unturned.[62]

The first and by far the best opportunity for business users to place meaningful limits on discovery is in the arbitration agreement or incorporated arbitration procedures. There are a number of ways in which arbitration provider institutions' procedures might limit discovery (see *Protocol for Arbitration Providers,* Action 3). A pre-dispute agreement, while not always achievable, is more likely to produce favorable results since post-dispute it is much more difficult to achieve consensus.

A second opportunity occurs when a dispute arises and outside counsel is retained. At this point, in-house counsel may promote discovery limits by acknowledging that, while scaling back on discovery carries some risk that some significant evidence may not be found, the client is prepared to accept that risk in order to secure the greater benefit of a process that is substantially faster and less expensive than litigation. Inside and outside counsel should thoroughly discuss the cost versus benefit of various courses of discovery that might be pursued in the arbitration and memorialize in writing the client's decision concerning the nature and extent of discovery it wishes to initiate (see *Protocol for Outside Counsel*, Actions 2, 5).

If business users have failed or been unable to avail themselves of either of the first two opportunities, it may still be possible to convince the arbitrator(s) to limit the scope of discovery (see *Protocol for Outside Counsel*, Action 3; *Protocol for Arbitrators*, Action 6).

Comments

With regard to options for meaningfully limiting the scope and nature of discovery, see the extensive commentary under the *Protocol for Arbitration Providers*, Action 3.

3. Set specific time limits on arbitration and make sure they are enforced.

Business users should consider agreeing to binding limits on the length of the arbitration in the arbitration agreement. This could be accomplished by simply setting a deadline (e.g., one year) for completion of the arbitration or by incorporating provider rules that establish a

[62] INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION, RULES FOR NON-ADMINISTERED ARBITRATION Commentary to CPR Rule 11 (2007) [hereinafter CPR RULES], *available at* http://www.cpradr.org/ClausesRules/2007CPRRulesforNonAdministeredArbitration/tabid/125/Default.aspx#Commentary.

timetable for each phase of the arbitration. A pre-dispute arbitration agreement might establish different deadlines or timetables corresponding to different total amounts in controversy (see *Protocol for Arbitration Providers*, Action 4). Arbitrators could be afforded authority to establish procedures and timelines for achieving the contractual limits as well as discretion to vary the limits in truly exceptional circumstances.

Some experienced in-house counsel favor prescribing overall time limits in large, complex disputes as well as smaller cases. If binding time limits are not desired in all cases, however, business users should at least consider their application in disputes involving amounts below a certain dollar figure.

Contractual time limits, like other stipulated boundaries, are only effective if they are recognized and enforced. Thus, it is critical for outside counsel to advocate such enforcement and for arbitrators to respond accordingly (see *Protocol for Outside Counsel,* Action 3; *Protocol for Arbitrators*, Action 3).

If businesses are unwilling or unable to establish pre-dispute timetables for arbitration but still hope to set an acceptable deadline, it will be necessary to seek a post-dispute agreement with the other party (if consensus is realistically achievable) or an appropriate arbitral order.

Comments:

C. Northcote Parkinson's famous "law" that work expands to fill the time available for its completion[63] encapsulates the fundamental truth that human beings find it nearly impossible to terminate working on an important matter when there is still time left to do more. This is especially true in commercial arbitration where the stakes are often high, those doing the work are typically conscientious "Type A" lawyers, and all actors – both counsel and arbitrators – are being paid by the hour. However, if work on the matter is firmly limited to a fixed period of time, lawyers are very good at determining how to use that time most effectively by concentrating on the most important tasks and dispensing with activities that offer less promise.

Time limits are accepted norms in many critical aspects of modern life, whether it be delivering a Supreme Court argument, or preparing a multi-billion dollar case for trial in certain state and federal courts, or taking a college entrance exam. There is no reason why time limits cannot be placed on completing a commercial arbitration, and many thoughtful observers believe that such limits are the single most effective device available for reining in arbitration cost and delay. Moreover, time limits in arbitration, particularly where arbitrators have authority to increase the limit in exceptional circumstances, are eminently achievable. One senior attorney, who manages a large portfolio of highly complex arbitrations for one of the world's largest corporations, reported at the National Summit that her company has never had a dispute that could not be fairly and efficiently arbitrated within one year.

[63] *See* PARKINSON'S LAW: THE PURSUIT OF PROGRESS (London, John Murray, 1958).

The best way to impose time limits on arbitration is to include those limits in the arbitration clause or incorporate provider rules that contain such limits. All expedited or streamlined rules are distinguished by fixed or presumptive time limits, although these vary considerably in detail. The *AAA Expedited Procedures*, aimed at small-dollar claims, contemplate the shortest cycle time, with an anticipated time horizon of around sixty days.[64] CPR's procedures embody a conceptual hundred-day time frame, including a maximum of sixty days to the hearing, thirty days for hearings, and ten days for deliberation and preparation of an award.[65] Importantly, the 100-day period does not begin until the date set by the arbitrators at an initial pre-hearing conference; it thus does not include critical early procedures including the selection of arbitrators and detailed statements submitted by both parties.[66] JAMS' models also include shortened procedural stages.[67]

An agreement to time limits, standing alone, is obviously insufficient; drafters must incorporate specific process elements that facilitate a shorter arbitration. These include faster arbitrator selection procedures, early sharing of detailed information, tightly bounded discovery, and (possibly) limitations on the length of the final award.

Importantly, one Summit participant, a senior in-house dispute resolution lawyer at a leading global corporation, urges business users to use time limits in cases of all sizes:

> [E]xpedited [arbitration] rules are often limited to very small dollar values. I am urging my lawyers to break that paradigm. . . . We are not talking about setting the bar at a couple of hundred thousand, [but rather cases involving] $50 million or less in six months, more than $50 million, 12 months.[68]

Once set, timetables should be adhered to in the absence of extraordinary circumstances. One experienced advocate and arbitrator explains:

> Binding limits on the length of proceedings can and should be [utilized]. Often, however, . . . the parties mutually agree they will take the time limits off and [the arbitration] goes on forever.[69]

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[64] The hearing is "to be scheduled to take place within 30 days of confirmation of the arbitrator's appointment." AAA COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, SECTION E: EXPEDITED PROCEDURES (2009) [hereinafter AAA EXPEDITED PROCEDURES], E-7. Awards are to be rendered within 14 days of the close of hearing. *Id.*, E-9. In the absence of a showing of good cause, the hearing itself is limited to a day. *Id.*, E-8(a). *Cf.* CONSTRUCTION INDUSTRY ARBITRATION RULES AND MEDIATION PROCEDURES F-9 (2009) [hereinafter AAA CONSTRUCTION INDUSTRY FAST TRACK RULES].

[65] INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION, EXPEDITED ARBITRATION OF CONSTRUCTION DISPUTES R. 1.3 (2006) [hereinafter CPR EXPEDITED ARBITRATION].

[66] *See id.*, Rules 3, 5, 9.3.

[67] *See* JAMS STREAMLINED ARBITRATION RULES & PROCEDURES (2009) [hereinafter JAMS STREAMLINED RULES].

[68] Michelle Leetham, Esq., Bechtel Corporation, Rossdale Group ADR Teleconference (May 5, 2010).

[69] Larry Harris, Esq., Partner, Greenberg Traurig, Washington, D.C., Rossdale Group ADR Teleconference (May 5, 2010).

4. Use "fast-track arbitration" in appropriate cases.

Businesses should use, in appropriate cases, fast-track (expedited or streamlined) arbitration. Businesses wishing to employ fast-track procedures in a pre-dispute arbitration agreement must either specify those procedures and the circumstances under which they will be used or incorporate an arbitration provider's rules that detail such procedures and the circumstances of their application.

Some businesses may be willing to utilize, in cases of certain types or certain dollar amounts, a highly truncated approach in which discovery and motions are not permitted; the parties' arbitration demand and response are accompanied by detailed statements of their claims and/or defenses as well as all facts to be proven, supplemented by citation to all legal authorities relied upon, copies of exhibits, and summaries of the testimony of all lay and expert witnesses, after which the case proceeds to an immediate hearing (see *Protocol for Arbitration Providers*, Action 5).

Comments:

See comments under Action 3 above.

5. Stay actively involved throughout the dispute resolution process to pursue speed and cost-control as well as other client objectives.

Sophisticated in-house counsel know that it is absolutely essential for business principals and senior in-house counsel to stay actively involved throughout the dispute resolution process. They should conduct an early case assessment to determine how much of an effect the dispute may have on the business's important interests, the prospects for a successful outcome, how much time and money the business is prepared to devote to the resolution of the dispute, and what resolution approach is likely to be most effective. If outside counsel is not involved in early case assessment, in-house counsel should convey the internal assessment to outside counsel and request their independent analysis (see *Protocol for Outside Counsel*, Action 2). As they do with other large expenditures, businesses should set an appropriate and realistic budget for arbitration and should forbid outside counsel from exceeding that budget without express approval. In-house counsel should attend the first case management conference as well as all important subsequent conferences and hearings during the arbitration process in person or by telephone, should require periodic status reports from outside counsel, and should actively partner in the management of the arbitration rather than relinquishing such control to outside counsel.

Comments:

In-house counsel must play an important part in forward planning and continuous management of the arbitration schedule; minimization of interruptions through firm stances supported by flexible solutions such as consensus; and preparing their companies to deal

appropriately with changing circumstances.[70] Communication must be healthy not only with traditional stakeholders but with "the key business person(s) who will often have the best handle on the value to the business of the disputed matter, including its risks. They will discuss frankly the expense, delay, and lost opportunity cost of proceeding in the most litigation-like manner in arbitration, especially discovery and motion costs, scheduling the evidentiary hearing (how soon and how lengthy), and hearing procedures. In arbitration the parties can and should decide how much process they want, and want to pay for."[71]

In-house counsel are a vital part of the effort to distinguish the tone of an arbitration process from that of litigation. This is noted with particular frequency by some commentators in the area of labor disputes, who advocate approaching arbitrations in terms of bottom line savings over the long term.[72] An efficient arbitration process may have a significant impact on relationships with current and past commercial partners.

6. Select outside counsel for arbitration expertise and commitment to business goals.

In-house counsel should select outside arbitration counsel for their expertise in arbitration, not litigation, their likely effectiveness as advocates in the arbitration process, taking account of the key players (opposing party and counsel, the arbitration provider institution, and prospective or appointed arbitrators), and their ability to meet client's objectives regarding speed and economy (including the client's decision regarding the extent of resources to be devoted to the matter). In-house counsel should explore the possibility of billing arrangements other than pure hourly billing such as fixed fees, contingency fees, and other arrangements that incentivize counsel to conduct the arbitration and resolve conflict as efficiently and expeditiously as possible (see *Protocol for Outside Counsel, Action 7*).

Comments:[73]

An international organization recently sponsored a competition among major law firms with the aim of identifying a firm whose practice embodied effective methods of managing and resolving business-related disputes. The entries revealed very different conceptions of what constitutes effective dispute resolution. Some firms simply touted big court victories, while others focused on their expertise in commercial arbitration. Still others portrayed a variegated

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[70] COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 226.

[71] JOAN GRAFSTEIN, IMPROVING COMMERCIAL ARBITRATION: THE VIEW OF AN ARBITRATOR AND FORMER IN-HOUSE COUNSEL (April 30, 2010), *available at* http://www.lexisnexis.com/Community/UCC-Commerciallaw/blogs/ucccommercialcontractsandbusinesslawblog/archive/2010/04/30/improving-commercial-arbitration-the-view-of-an-arbitrator-and-former-in-house-counsel.aspx.

[72] "The Dispute-Wise studies found that the most dispute-savvy businesses considered the full spectrum of legal disputes as a portfolio — where the focus was not on 'winning' each individual dispute through protracted litigation but on 'winning' back the loyalty of Stakeholders who will stay with you for the long haul if you treat them with fair-mindedness and integrity when disputes inevitably occur." THE METROPOLITAN CORPORATE COUNSEL, EXPERTS IDENTIFY ADR TRENDS AND BEST PRACTICES (January 1, 2006), *available at* http://www.metrocorpcounsel.com/current. php?artType=view&EntryNo=4160.

[73] These comments are drawn in large measure from Stipanowich, *Arbitration and Choice*, *supra* note 58.

practice employing different approaches, including early case assessment, negotiation, mediation, arbitration and litigation to address particular client needs.

Business clients typically rely heavily on outside counsel to represent their interests in the management of conflict, including arbitration. These advocates have as much to do with realization of a client's goals and expectations as procedures, administrative framework or neutrals. The wide variation in approaches to conflict makes it inevitable that some law firms—and lawyers—will be more suitable for particular clients—and particular circumstances—than others. Selection of a law firm or lawyer that lacks the willingness or capability to align itself with the client's goals may undermine the most careful contract planning.

Unless a legal dispute is inevitably destined for the courtroom, something beyond litigation experience is essential in outside counsel. Litigation experience is not in itself sufficient to qualify one as arbitration counsel—the legal and practical differences are simply too great. Moreover, as our discussion of varied client goals reveals, arbitration and court trial are very often appropriately relegated to a secondary or tertiary role, forming a backdrop or backstop for efforts at informal dispute resolution.[74] With that in mind, an effort should be made to ensure that counsel is capable of understanding and fulfilling a client's specific goals and priorities in addressing disputes. Consider the following list of questions that might be asked before retaining counsel to resolve a dispute:

- Do you have experience helping clients consider the appropriateness of options for early resolution of disputes? What options do you discuss?
- What methods do you use to analyze options?
- What is your experience with and attitude toward negotiated resolution of disputes? With mediated negotiation?
- Have you had formal training in negotiation or mediation theory and practice?
- What is your experience with commercial arbitration, including arbitration under the relevant procedures and administrative framework?[75] Are you familiar with the case managers or case administrators for this matter?
- Are you familiar with the provider institution's list of arbitrators?
- Are you familiar with applicable ethics rules?
- What experience have you had negotiating, arbitrating or litigating with opposing counsel? What is the nature of your relationship?
- How does your arbitration advocacy differ from your advocacy in litigation?
- What techniques have you found to be most effective in promoting efficiency and economy in commercial arbitration?
- What professional service models do you employ other than hourly fees? Are you willing to explore incentives for early resolution?

As noted above, even after vouchsafing the role of advocate to appropriate outside counsel, a prudent client or inside counsel will continue to be involved in the conflict resolution

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[74] COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 5-6, 10-33, 39-41.

[75] Depending on the circumstances, this might include an exploration of experience with expedited rules, rules for large or complex arbitration, or appellate arbitration rules.

process. This means being present at key decision points before and during arbitration, including pre-hearing conferences at which the timetable and format for the arbitration are discussed and established.[76]

7. Select arbitrators with strong case management skills.

In-house counsel should be actively involved, alongside outside counsel, in selecting arbitrators who are able and willing to promote effective cost- and time-saving procedures. Information from provider institutions may be supplemented by intra-firm communications and discrete queries to listservs and social networking programs. Counsel might agree to pre-screen prospective arbitrators by means of a questionnaire or joint or separate interviews; counsel should be forthright in asking prospective arbitrators about their philosophy and style of case management (see *Protocol for Outside Counsel,* Action 3).

Counsel should be aware that (1) the requirement that its arbitrators continually upgrade their process management skills and (2) the quality and scope of information regarding prospective arbitrators, may offer key points of comparison among arbitration provider institutions (see *Protocol for Arbitration Providers*, Points 7, 10).

Comments:[77]

It has been said that "the arbitrator *is* the process." This is not mere hyperbole: while the appropriate institutional and procedural frameworks are often critical to crafting better solutions for business parties in arbitration, the selection of an appropriate arbitrator or arbitration tribunal is nearly always the single most important choice confronting parties in arbitration;[78] a misstep in the choice of arbitrator(s) may undermine many other good choices.

One should never choose an arbitral institution without doing due diligence regarding the institution's panel or list of neutrals and ascertaining whether or not the requisite experience, abilities and skills are represented. In order to inform and channel the eventual selection process, moreover, it may be appropriate to prepare reasonable guidelines for the choice of neutral(s) for particular kinds of disputes. In considering candidates, some or all of the following may be relevant: legal, professional, commercial or technical background; notability;[79] hearing management experience and skills; attitudes about arbitration; current schedule and availability.

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[76] *See* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 183-190.

[77] These comments are drawn in large measure from Stipanowich, *Arbitration and Choice*, *supra* note 58, 432-434.

[78] JAY FOLBERG ET AL., RESOLVING DISPUTES—THEORY, PRACTICE & LAW 470-73 (2008) ("the choice of arbitrators [is] critical for two reasons: They will likely provide the only review of the case's merits, and arbitrators will have primary control over the process itself.").

[79] Notability in the sense of perceived standing within a commercial community or industry, while insufficient in itself, may be especially desirable if an authoritative pronouncement or application of pertinent norms and practices is needed. Int'l Produce, Inc. v. A/S Rosshavet, 638 F.2d 548, 551-52 (2nd Cir. 1981) ("The most sought-after arbitrators are those who are prominent and experienced members of the specific business community in

Again, the relevant questions depend on goals and priorities. If those priorities include low cost, efficiencies, and the avoidance of undue delay, the following queries may be helpful:

- Should a single arbitrator be sufficient for selected classes or kinds of disputes?[80]
- Does the prospective arbitrator (or chair of the arbitration tribunal) have experience in process management, and does that experience reflect well on his or her ability to supervise an efficient, economical process?
- Is the prospective arbitrator committed to the concept of promoting economies and efficiencies throughout the process?
- Is the prospect available for expedited hearings, or for hearings over the period during which the arbitration is likely to occur? What other standing or prospective commitments does the arbitrator have?

It is reasonable for parties to expect arbitrators to give them what they bargained for.[81] While arbitrators should always seek appropriate ways of promoting efficiency and economy in the absence of contrary agreement, clear contractual language emphasizing the primacy of such expectations should give rise to special effort on their part. Business users and counsel should emphasize to the arbitrator their expectations about arbitrator techniques like the following:

- Emphasizing speed and cost-saving to the parties at the outset, particularly the firmness of the schedule and granting continuances only for good cause;[82]
- Functioning as role models (cooperating with other arbitrators, including party-arbitrators; avoiding scheduling conflicts wherever possible);[83]
- Actively managing the process, beginning with a pre-hearing conference resulting in an initial procedural order and timetable for the entire arbitration;[84]
- Simplifying arrangements for communication, including the elimination of unnecessary communications through case administrators or third parties;[85]
- Simplifying, clarifying, and prioritizing issues;[86]

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which the dispute to be arbitrated arose."); Charles J. Moxley, Jr., *Selecting the Ideal Arbitrator* 60 DISP. RESOL. J. 24, 27 (Aug. 2005) (prominence of arbitrator increases confidence in the process).

[80] H. Henn, *Where Should You Litigate Your Business Dispute? In an Arbitration? Or Through the Courts?* 59 DISP. RESOL. J. 34, 37 (Aug.-Oct. 2004); COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 14, at 46.

[81] *See* John Tackaberry, *Flexing the Knotted Oak: English Arbitration's Task and Opportunity in the First Decade of the New Century*, Society of Construction Law Papers 3 (May 2002).

[82] *See* Louis L. C. Chang, *Keeping Arbitration Easy, Efficient, Economical and User Friendly*, 61 DISP. RESOL. J. 15 (May-Jul. 2006); COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 215-220.

[83] COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 6-8.

[84] THE COLLEGE OF COMMERCIAL ARBITRATORS GUIDE TO BEST PRACTICES IN COMMERCIAL ARBITRATION 2nd Ed. Chs 6, 9 (James M. Gaitis, Curtis E. von Kann and Robert W. Wachsmuth eds., Juris Net 2010) [hereinafter CCA GUIDE TO BEST PRACTICES].

[85] *Id.*, Ch. 6 § V(L).

[86] *Id.,* §§ V(B)-(D), (I); Ch. 7 §§ III(B)-(C), (E)-(L).

- Addressing jurisdictional issues and reasonable requests for interim relief as soon as practicable;[87]
- Facilitating and actively monitoring information exchange/discovery;[88]
- Employing electronic means of communication and document management as appropriate; [89]
- Scheduling hearings with as few interruptions as possible;[90]
- Planning and actively managing the hearings (ending each hearing day with housekeeping sessions); [91]
- Anticipating potential problems (such as the unavailability of witnesses, unanticipated circumstances) and seeking creative solutions to minimize delay.[92]

8. Establish guidelines for early "fleshing out" of issues, claims, defenses, and parameters for arbitration.

Businesses should consider agreeing that before the preliminary conference, parties will provide preliminary statements of legal and factual issues, key facts to be proven, estimated damages broken down by category, and likely witnesses and types of experts (see *Protocol for Arbitration Providers*, Action 8). They should also consider requesting that, following the first, or at the latest, the second case management conference, the arbitrators issue comprehensive case management orders that incorporate limitations on discovery and motion practice, and set time frames and hearing dates that will not be varied except for good cause shown (see *Protocol for Arbitrators*, Actions 3, 4).

Comments:[93]

One significant insight emerging from the development of streamlined rules is the critical importance of requiring parties to furnish detailed information regarding claims and defenses at the front end of the process. By way of illustration, the JAMS expedited construction model calls for claimants to file a

> Submission of Claim . . . including a detailed statement of . . . claim including all material facts to be proved, the legal authority relied upon . . . , copies of all

[87] *Id.,* Ch. 2 § III; Ch. 6 §§ III(C), V(D); Ch. 7 § III(B), (D).

[88] *Id.*, Ch. 8.

[89] *Id.,* Ch. 6 §§ II(D), IV, V(L).

[90] *Id.,* Ch. 9(VI).

[91] *Id.,* Ch. 9 *passim.*

[92] *Id.*, §§V, VI(A)-(D), VII(C)-(D), IX(A), (F).

[93] These comments are drawn in large measure from Stipanowich, *Arbitration and Choice*, *supra* note 73, 410-411.

documents that Claimant intends to reply upon in the arbitration and names of all witnesses and experts Claimant intends to present at the Hearing.[94]

Respondents are then required to prepare a Submission of Response of similar substance and form within twenty days of service of the Submission.[95] These requirements represent a dramatic departure from the current norm in arbitration practice and demand significant adjustment in the expectations of advocates. They can be, however, a critical element of an efficient process, as recognized by the new *Final Report on Litigation Reform,* which concludes that the failure to effectively identify issues early-on "often leads to a lack of focus in discovery."[96]

Of course, the onus of these rules is likely to fall disproportionately on respondents, since claimants will have the opportunity to make preparations in advance of making an initial demand. For this reason, current procedures emphasize arbitrator discretion to give respondents reasonable time extensions.[97] Where arbitration is preceded by negotiation or mediation, moreover, both parties will be on notice of the likelihood that claims will be brought to arbitration.

Recently, some business users have expressed concerns about the cost of "front-loading" preparation costs by requiring extensive disclosure at the outset. These concerns may be at least partially addressed by a simpler approach to "putting flesh on the bones" at the beginning of the arbitration, such as having the parties submit informal memoranda or letters describing the background of the disputes and the factual and legal issues.

In expedited processes the pre-hearing conference assumes special significance as a tool for process planning and guidance.[98] Arbitrators may also find it necessary or appropriate to conduct frequent telephonic status meetings to ensure that progress is being made toward meeting deadlines.

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[94] JAMS STREAMLINED ARBITRATION RULES & PROCEDURES R. 7 (2009) [hereinafter JAMS STREAMLINED RULES]. *See also* INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION EXPEDITED ARBITRATION OF CONSTR. DISPUTES R. 3 (2006) [hereinafter CPR EXPEDITED ARBITRATION] ("Statement of Claim" is to include a detailed statement of all facts to be proved, legal authorities relied upon, copies of all documents Claimant intends to rely on, and names, CV and summary opinion testimonies of expert witnesses Claimant intends to present.").

[95] *See* CPR EXPEDITED ARBITRATION, *supra* note 94.

[96] FINAL REPORT ON LITIGATION REFORM, *supra* note 60. The Report calls for notice pleading "to be replaced by fact-based pleading . . . that "set[s] forth with particularity all the material facts that are known to the pleading party to establish the pleading party's claims or affirmative defenses." *Id.* at 5.

[97] *See, e.g.,* CPR EXPEDITED ARBITRATION, *supra* note 94, Rule 3.6 (permitting the Tribunal to extend the time for the Respondent to deliver its Statement of Defense); *Id*. at Rule 11(e)(permitting Arbitrator to extend deadlines).

[98] *See id*. at Rule 9. A pre-hearing conference held before the arbitration hearing may be necessary to deal with difficult preliminary issues, such as specifying issues to be resolved or stipulating uncontested facts. Joseph L. Daly, *Arbitration: The Basics*, 5 J. AM. ARB. 1, 40 (2006); COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 176-78.

9. Control motion practice.

Businesses should also consider agreeing to procedures for limiting "reflexive" motion practice and expediting the presentation and hearing of motions that have the potential to promote cost- and time-saving in arbitration (see *Protocol for Arbitration Providers*, Action 6).

Comments:[99]

As stated in Part II, the use of dispositive motions in arbitration is a double-edged sword.[100] This import from the court system, prudently employed, is a potentially valuable tool for narrowing arbitral issues prior to hearings and full-blown discovery, thus avoiding unnecessary preparation and hearing time.

The problem is that, as in court, motion practice often contributes significantly to arbitration cost and cycle time without clear benefits. The filing of motions often leads to the establishment of schedules for briefing and argument that entail considerable effort by advocates, only to have the arbitrators postpone a decision until the close of hearings.[101] As two GE counsel lamented:

> Any business lawyer knows that even the most complex disputes usually boil down to one or two critical issues that, once decided, will either determine the lion's share of the dispute or encourage parties to settle. And yet, the experience of many companies . . . is that tribunals in international commercial arbitrations, whether out of concern for due process or other reasons, are rarely willing to grant such relief in the early stages of a proceeding when doing so would have the greatest impact and benefit for the parties.[102]

While it is generally appropriate for arbitrators to steer clear of dispositive motions involving extensive factual issues, there are certain matters that may be forthrightly addressed early on with little or no discovery or testimony, such as contractual limitations on damages, statutory remedies, or statutes of limitations and other legal limitations on causes of action.[103]

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[99] These comments are drawn in large measure from Stipanowich, *Arbitration and Choice*, *supra* note 58, 412-413.

[100] COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 203-06; Zela G. Claiborne, *Constructing a Fair, Efficient, and Cost-Effective Arbitration*, 26 ALTERNATIVES TO THE HIGH COST OF LITIG. 186 (Nov. 2008). *See also* Albert G. Ferris & W. Lee Biddle, *The Use of Dispositive Motions in Arbitration*, 62 DISP. RESOL. J. 17 (Aug.-Oct. 2007).

[101] For a discussion of deposition handling in arbitrations, see Romaine L. Gardner, *Depositions in Arbitration: Thinking the Unthinkable*, 1131 PRACTICING LAW INST. CORP. LAW & PRACTICE COURSE HANDBOOK 379, 389-97 (Jul.-Aug. 1999).

[102] Michael McIlwrath & Roland Schroeder, *The View from an International Arbitration Customer: In Dire Need of Early Resolution,* 74 ARBITRATION 3, 3 (Feb. 2008).

[103] COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 48, 53-55. The new Final Report on Litigation Reform states that "parties and the courts should give greater priority to the resolution of motions that will advance the case more quickly to trial or resolution." FINAL REPORT ON LITIGATION REFORM, *supra* note 60, at 22. It also calls for "a new summary procedure . . . by which parties can submit applications for the determination of enumerated

If dispositive action is foreseen as a useful element in arbitration, there should be an appropriate provision in the arbitration procedure.[104]

At the time of appointment, moreover, parties should assess whether potential arbitrators are temperamentally and philosophically capable of rendering dispositive awards. Indeed, some leading arbitrators insist that motions should be addressed directly and energetically, since in many cases a prompt telephonic discussion may avoid the need for extensive briefing.[105]

10. Use a single arbitrator in appropriate circumstances.

Businesses should consider using a single arbitrator when appropriate. Some in-house counsel believe the costs and practical problems associated with three-member tribunals often outweigh the benefits, and are willing to submit all but the most complex cases to a single arbitrator. Others believe that collegial decision-making usually produces better decisions by decreasing the chance that important points will be overlooked or misunderstood, and that the additional cost of having three arbitrators, which is typically a fairly small part of total arbitration costs, is well worth the expenditure in important cases. Before providing for a three-member tribunal, counsel should always consider whether the complexity of the issues, the stakes involved, or other factors warrant the use of three arbitrators. A strong argument can often be made for sole arbitrators in cases with low or moderate damages exposure. (Depending on the parameters set for the use of a single arbitrator, parties may need to modify the arbitration procedures incorporated in the arbitration agreement to address this issue.)

In cases with three-member panels, businesses should consent to having the chair decide discovery disputes and other procedural matters unless all parties request the involvement of the full tribunal.

Comments:

Using a single arbitrator instead of a panel is an obvious choice for those seeking economy and efficiency; it simplifies every stage of arbitration from appointment to award-writing. Thus, some expedited procedures assume that a single arbitrator will be appointed unless the parties agree otherwise.[106]

While employing a multi-member tribunal may make some lawyers more sanguine about streamlined arbitration of larger claims, it increases costs and increases the likelihood of

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matters (such as rights that are dependent on the interpretation of a contract) on pleadings and affidavits or other evidentiary materials." *Id.* at 6.

[104] *See, e.g.,* JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURES R. 18 (2007) [hereinafter JAMS COMPREHENSIVE RULES].

[105] *See* Chang, *supra* note 82, at 16.

[106] *See, e.g.,* AAA EXPEDITED PROCEDURES, *supra* note 64, E-4; JAMS STREAMLINED RULES, *supra* note 67, Rule 12(a). *But see* CPR EXPEDITED ARBITRATION, *supra* note 65, Rule 5.1 (providing for three neutral arbitrators).

delay. If drafters are truly serious about maintaining timelines, they should require each appointee to the tribunal to expressly represent to the parties that he or she has the time available to ensure that the expedited timetable will be achieved.[107]

11. Specify the form of the award. Do not provide for judicial review for errors of law or fact.

Business users should specify in the arbitration agreement the form of award desired (e.g., bare, reasoned, findings of fact and conclusions of law, etc.) and, where appropriate, a limit on the length of the award, bearing in mind that the more detailed the award, the more costs increase.

Business users should not include in their arbitration clauses an agreement that attempts to authorize courts to review arbitration awards for errors of fact or law. Besides raising issues of enforceability under arbitration law, such provisions may entail significant additional process costs and delays without commensurate benefits. If a business is not content to accept judicial review that is limited to the few grounds for vacatur set forth in the Federal Arbitration Act or comparable state statutes, a course that best achieves the finality which is among the major benefits of arbitration for most business users, it should incorporate in its arbitration clause a well-designed appellate arbitration procedure such as those sponsored by some provider institutions.

Comments:

1. Increased cost and cycle time through questionable choice-making: agreements to expand judicial review

Although increased costs and delays are in large measure a result of business users' failure to plan for arbitration by making appropriate process choices, contract planners may only exacerbate these problems if they make the wrong choices. A contractual provision providing for judicial review and vacatur of arbitration awards for errors of law or fact may well prove to be a "bad choice."

Consistent with the understanding that arbitration offered businesses the opportunity to avoid the "needless contention that [is] incidental to the atmosphere of trials in court,"[108] Congress in the Federal Arbitration Act produced a spare legal framework for the judicial enforcement of arbitration agreements and awards. A keystone of this structure is the rigorously restrained template for judicial confirmation, modification or vacatur of arbitration awards, including a narrow statutory imprimatur for vacating awards (limited in essence to situations where due process was not accorded or where arbitrators clearly acted in excess of their contractually-defined authority[109]). These strictures imbue arbitration awards with a meaningful—or, depending on one's point of view, an awful—finality. The fear of being

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[107] *See, e.g.,* CPR EXPEDITED ARBITRATION, *supra* note 65, Rule 7.2. It makes sense to obtain such a commitment from a sole arbitrator as well.

[108] Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595, 614 n. 44 (1928).

[109] *See* 9 U.S.C. § 10 (West Supp. 1994).

saddled with a truly bad award gives some business lawyers pause—especially when the potential business consequences are dire. This fear inspired in recent years the emergence of a species of arbitration agreements calling for more searching judicial scrutiny of awards, including review of awards for errors of law or fact.[110] Conceptually, one supposes, the result would be a hybrid in which the benefits of private arbitration would be coupled with the checks and balances of the civil appellate process. But the sword is double-edged and the pitfalls for unwary drafters multiple.

While there has been a lot of emphasis on the legalities of contractually expanded judicial review, considerably less attention has been given a more fundamental question—namely, "Do contract planners do their clients a favor by including such provisions in commercial arbitration agreements?" The one gathering of experts that directly addressed the issue, the CPR Commission on the Future of Arbitration, an aggregation of leading arbitrators and attorneys specializing in arbitration, responded with a resounding "No!"[111] They viewed such provisions as undermining key conventional benefits of arbitration, including finality, efficiency and economy, and expert decision-making.[112] Such provisions would, they believed, increase costs and delay the ultimate resolution of conflict without commensurate countervailing benefits. Moreover, such provisions pose particular challenges for drafters, both from the standpoint of creating practical, workable standards for review and addressing all of the pre- and post-award procedures required to implement enhanced review,[113] including: dollar or subject matter limits on review; the creation of an adequate record; the making of a sufficiently specific, reasoned award; notice requirements; the possibility of remand to the original arbitrator(s); and the handling of related costs.

The extreme downside of contracting for expanded review in an atmosphere of uncertainty regarding the legal propriety and enforceability of such provisions was famously exemplified by the nine-year battle punctuated by two decisions of the Ninth Circuit. In *LaPine Technology Corp. v. Kyocera*,[114] the court concluded that it was obliged to honor the parties' agreement that any arbitration award would be subject to judicial review for errors of fact or law. But after six more years of legal maneuvering before the district court and the original arbitration panel, the Ninth Circuit reconsidered its original decision *en banc* and reversed

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[110] *See* Lee Goldman, *Contractually Expanded Review of Arbitration Awards*, 8 HARV. NEGOT. L. REV. 171, 183-184 (2003); Dan C. Hulea, *Contracting to Expand the Scope of Review of Foreign Arbitral Awards: An American Perspective*, 29 BROOK. J. INT'L L. 313, 351 (2003); but *see* Hans Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, 8 AM. REV. INT'L ARB. 147, 150 (1997).

[111] COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 291 (summarizing conclusions of CPR Commission).

[112] *Id.*

[113] *See, e.g.,* Ronald J. Offenkrantz, *Negotiating and Drafting the Agreement to Arbitrate in 2003: Insuring against a Failure of Professional Responsibility*, 8 HARV. NEG. L. REV. 271, 278 (Spring 2003); Kevin A. Sullivan, Comment, *The Problems of Permitting Expanded Judicial Review of Arbitration Awards under the Federal Arbitration Act* 46 ST. LOUIS U. L.J. 509, 548-59 (Spring 2002). *See also* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 297.

[114] La Pine Tech Corp. v. Kyocera Corp., 130 F.3d 884 (9th Cir. 1997) (attorneys were able to provide for expanded judicial review in the arbitration clause that they drafted), *overruled by* Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 1000 (2003).

itself, declaring that enforcing expanded review provisions such as those before it would "rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process."[115]

Compounding the drafter's dilemma is the fact that such provisions have not been uniformly embraced by federal and state courts. The federal circuits split on the question of whether expansion of the FAA grounds for judicial review was permissible; state court decisions also reflect a divergence of authority.

Seeking to resolve the split among federal circuits, the U.S. Supreme Court held in *Hall Street Associates, L.L.C. v. Mattel, Inc*. that the Federal Arbitration Act (FAA) does not permit parties to expand the scope of judicial review of arbitration awards by agreement.[116] Justice Souter's opinion, joined by five other justices, declared that the grounds for judicial review of arbitration awards set forth in §§ 10–11 of the FAA are the exclusive sources of judicial review under that statute.[117] Moreover, the FAA's provisions for confirmation, vacatur and modification should be viewed as "substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway."[118] Having strained mightily to nail down the coffin lid on contractually expanded review under the FAA, however, the Court affirmatively invited consideration of other avenues to the same ends,[119] as where parties "contemplate enforcement under state statutory or common law . . . where judicial review of different scope is arguable."[120] Although it may be some time before the full import of this invitation is clarified, it is likely that state statutes or controlling judicial decisions promoting contractually expanded review will become "safe harbors" for such activity. New Jersey is perhaps the sole example of a statutory template for parties that wish to "opt in" to the legislative framework for elevated scrutiny of awards;[121] in *Cable Connection, Inc. v. DIRECTV, Inc.*,[122] California's highest court recognized a more general "safe harbor" for contractually expanded judicial review under that state's law.

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[115] *Kyocera*, 341 F.3d at 998.

[116] Hall Street Associates LLC v. Mattel Inc., 128 S.Ct. 1396, 1404-1405 (2008).

[117] *Id.* at 1403.

[118] "Any other reading [would open] the door to full-bore legal and evidentiary appeals that can 'rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process." *Id. (quoting Kyocera*, 341 F.3d at 998).

[119] In a highly unusual move, the Court had requested additional briefing on these issues after the initial arguments; its March decision concluded that the supplemental arguments raised new points which required a remand for the development of the issues. The Ninth Circuit subsequently issued a remand order to the district court, concluding that the High Court decision "preserved the issue of sources of authority, other than the Federal Arbitration Act, through which a court may enforce an arbitration award. . . ." Hall Street Associates LLC v. Mattel Inc., No. 05-35721, 2008 U.S. App. LEXIS 14490 (July 8, 2008).

[120] 128 S. Ct. at 1406.

[121] New Jersey law permits parties to arbitration agreements to "opt in" to a heightened standard of review established by the statute. New Jersey Alternative Dispute Resolution Act, N.J. STAT. ANN. 2A, §§ 23A-12. (1999).

[122] Cable Connection, Inc. v. DIRECTV, Inc., 190 P.3d 586 (Ca. 2008).

The foregoing survey of the complex legal landscape surrounding contractually expanded judicial review illustrates the risks and uncertainties confronting those who would seek to include such provisions in their arbitration agreements. In some cases contract planners may come to the conclusion that the difficulties of securing judicial oversight of arbitration awards require them to forego arbitration entirely, at least for certain classes of cases.

2. Alternatives to expanded judicial review; appellate arbitration processes

There are other, less radical choices for those concerned about protection from "off the wall" arbitration awards. These include identifying arbitrators who are likely to deliver an authoritative and rational decision, requiring the arbitrators to produce a detailed rationale for their awards, placing limits on awards of monetary damages (including upper and lower limits for the award), a baseball arbitration format requiring arbitrators to make a choice between two alternative monetary awards, and a prohibition on certain kinds of relief, such as punitive damages.[123] For those who seek a close analogue to judicial review, however, an appellate arbitration procedure may afford the most suitable alternative.

Appellate arbitration procedures afford parties the opportunity of a "second look" at an arbitration award in a controlled setting while avoiding the delays and legal uncertainties associated with expanded judicial review, since properly constituted agreements for "second-tier" arbitration are just as enforceable as any other arbitration agreements, as are resulting awards.[124] Appellate arbitration procedures have been utilized in a variety of commercial contexts, and at least two major institutions,[125] the International Institute for Conflict Prevention & Resolution (CPR) and JAMS, have published appellate arbitration rules that may be utilized in commercial cases.[126]

Crafting an appropriate arbitral appeal process involves consideration of numerous procedural issues, including the qualifications of the appellate arbitrator(s) and method of selection; scope limits on appealable disputes; filing requirements; administrative fees; time limits on filing and appellate procedures; applicable standards of review; the type of record that will be maintained of the original arbitration hearing, and transmitted to the appellate arbitrator(s); the format of the original arbitration award; the form of argument on appeal (written, oral, or both); the remedial authority of the appellate arbitrator(s); the possibility of remand of the award to the original panel or to a different panel; and the handling of costs, including the potential shifting of costs if an appeal is unsuccessful.[127] Given the transaction

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[123] *See id*. at 277-281.

[124] *See, e.g*, *Cummings v. Future Nissan*, 2005 WL 805173 (Cal. Ct. App. 3rd Dist Apr. 8, 2005) (affirming lower court order confirming award by appellate arbitrator).

[125] *See* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 299-300.

[126] *See* INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION, CPR ARBITRATION APPEAL PROCEDURE (1999); JAMS ARBITRATION APPEAL PROCEDURE (revised June 2003), *available at* http://www.jamsadr.com/rules/optional.asp.

[127] *See* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 298-304. *See also* Paul Bennett Marrow, *A Practical Approach to Affording Review of Commercial Arbitration Awards: Using an Appellate Arbitrator*, 60 DISP. RESOL. J. 10 (Aug.-Oct. 2005).

costs associated with their formulation, fully customized appellate rules are probably feasible only in exceptional cases (such as long-term relationships or large-scale business transactions). In most cases, parties will probably want to rely on existing institutional models.

12. Conduct a post-process "lessons learned" review and make appropriate adjustments.

At the conclusion of the arbitration, in-house counsel should conduct a thorough analysis of lessons learned and should make appropriate adjustments in arbitration policies, agreements, rules and management to address concerns regarding efficiency and economy.

Comments:

Self-evaluation is a fundamental strategy for every successful enterprise. Arbitration should be regarded no differently from other strategic processes. Executives and in-house counsel should review the entire proceeding and consider the financial and strategic impact of each tactical decision. These *Protocols* offer a road map for some key decision points to consider, while sections like Action 5 above may assist in-house counsel specifically in a frank self-evaluation. Questions that might be asked include these: Did the particular dispute resolution clause in this contract work well for us in this situation? Why or why not? Did the arbitration rules incorporated in that clause work well? Did our initial case assessment turn out to be accurate? If not, how can we improve our assessments in the future? Are we satisfied with the budget and effort level that we set for this case? Did outside counsel stick to the budget and represent us both effectively and efficiently? Was our fee arrangement with outside counsel appropriate? Did the arbitrator(s) conduct the proceeding efficiently? If not, how could it have been better conducted? Overall, was arbitration preferable to litigation in this instance?

Business users should also seek out arbitration providers who support evaluation and feedback processes through their arbitrators and rules (see *Protocol for Arbitrations Providers*, Actions 10 and 13).

A Protocol for Arbitration Providers

Business users rely heavily on arbitration providers for arbitration procedures, arbitrator selection and administrative services. In order to effectively promote economy and efficiency, providers need to offer users clear-cut process choices and develop and share information on their relative value and effectiveness. They also need to take measures to ensure that parties can find arbitrators with the proper case management skills and philosophy. The following specific Actions should be undertaken by providers for the purpose of achieving these goals.

1. Offer business users clear options to fit their priorities.

Instead of promoting a single "one-size-fits-all" set of procedures, institutions that provide dispute resolution services for business disputes should publish and actively promote a variety of templates, including arbitration clauses and procedures to give users real choices that fit their priorities, including time and cost savings. A provider's website should be organized in a manner that facilitates clear and easy access to different process choices, and should offer straightforward guidance (including, if possible, specific user feedback) about the benefits and costs to users of each process choice.

Comments:

Conceptually, between an arbitration model that seeks maximum expedition and economy and a model that incorporates litigation-like procedures while still preserving many of the advantages of arbitration (selection and accessibility of the decision-makers, privacy, finality, etc.) lies a broad spectrum of graduated arbitration models, each allowing a little greater process with a little less economy. To enable commercial arbitration users to choose the balance that is right for them, or even different balances for different kinds of cases, arbitration providers should offer a basic complement of dispute resolution clauses and rule sets that reflect several different points along the spectrum. Each rule set should prescribe procedures and staged timelines that permit completion of the arbitration by specified deadlines.

For example, the most economical ("fast track") model could involve a highly truncated arbitration with no discovery or motions and award issuance within 90 days of commencement (see *Protocol for Arbitration Providers,* Actions 5 and 8 below). Next could be a streamlined arbitration model that would offer a modicum of discovery (perhaps five document requests and four hours of depositions) but still provide for completion of the arbitration within six months. A standard arbitration model might allow somewhat more discovery and motions practice, though still far less than in litigation, and provide for completion of the arbitration in nine months (see *Protocol for Business Users and In-House Counsel*, Actions 2, 8, 9, and 11, and *Protocol for Arbitration Providers,* Actions 3, 4, 6, and 11). Finally, providers should offer a customized model, in which arbitrators would be empowered to develop, after consulting with counsel, customized procedures, perhaps litigation-like in some respects, which would nevertheless permit completion of the arbitration within one year in all but the most exceptional circumstances. Offering the arbitral counterpart of four, progressively fuller fixed-

price menus would truly provide business users with meaningful, easily implemented choices among arbitration models.

User feedback can be valuable in convincing business users and outside counsel of the viability of alternatives to traditional standard procedures. Dependable information about the application of process choices will make business users and outside counsel significantly more likely to "jump in" and take advantage of fresh options. Providers should aggressively solicit and organize feedback about specific options and their effectiveness in meeting users' priorities and standards.

See comments under *Protocol for Business Users*, Action 1, above. See also Actions 4, 5, 10 and 13 below for discussion of other related issues.

2. Promote arbitration in the context of a range of process choices, including "stepped" dispute resolution processes.

Resolving conflict through negotiation or mediation usually affords parties a superior opportunity to avoid significant cost or delay, and offers several other potential benefits, including greater control over outcome, enhanced privacy and confidentiality, preservation or improvement of business relationships, and better communications. Even if it fails to produce settlement, moreover, mediation may also "set the table" for arbitration. Therefore, provider-developed arbitration clauses and procedures should be employed within comprehensive, stepped dispute resolution provisions that begin with executive negotiation and mediation.

Comments:

See *Protocol for Business Users*, Action 1, above.

Stepped dispute resolution clauses can project a note of flexibility when a commercial agreement is created, while still assuring a binding, arbitrated resolution of any disputes that defy settlement.

One example of arbitration as part of a basic layered dispute resolution process is the following provision for arbitration as a “third layer” process following negotiation (“layer one”) and mediation (“layer two”):

> C. LAYER THREE: THE ARBITRATION STAGE (c) Arbitration. If the mediation provided for in "b" above does not conclude with an agreement between the Parties resolving the Dispute, the Parties agree to submit the Dispute to binding arbitration under the [insert incorporated commercial arbitration procedures]. If the Parties cannot agree on an arbitrator, the person who served as mediator shall select the person to serve as arbitrator from a list compiled by the Parties or, where the Parties do not compile a list, from a list maintained by a bona fide dispute resolution service provider or private arbitrator. The arbitrator's award shall be final, binding and may be converted to a judgment by a court of competent jurisdiction upon application by either party. The arbitrator's award shall be a written, reasoned opinion (unless the reasoned opinion is waived by

the Parties). The Parties shall have ten (10) days from the termination of the mediation to appoint the arbitrator and shall complete the arbitration hearing within six (6) months from the termination of the mediation. The arbitrator shall have the authority to control and limit discovery sought by either party. The arbitrator shall have the same authority as a court of competent jurisdiction to grant equitable relief, and to issue interim measures of protection, including granting an injunction, upon the written request with notice to the other party and after opposition and opportunity to be heard. The arbitrator shall take into consideration the Parties' intent to limit the cost of and the time it takes to complete dispute resolution processes by agreeing to arbitrate any Dispute.[128]

An option to consider is that of an "arbitration reset button." Contained in tiered dispute resolution clause, this clause provides that if the parties' dispute is not first resolved through the prerequisite executive negotiation and/or mediation, "then, within ___ days [or immediately] following the executive discussions and/or mediation, the parties shall confer and determine whether they wish to mutually renegotiate the default arbitration provision contained herein."[129]

A less formal approach to the "reset button" concept may occur in the context of mediation. Where the parties are unable to reach full agreement on substantive issues, it may be possible for an experienced mediator to facilitate a new or modified agreement respecting arbitration procedures. A mediator can play an invaluable role in escorting parties into a structured and economical arbitration process. For example, a mediator can:

- Facilitate agreement on exchange of document and other information;
- Help clarify which issues have been resolved in mediation and frame issues to be resolved in arbitration;
- Encourage parties to jointly submit the one or two most significant questions of law or fact to the arbitrator for speedy resolution, and then return to mediation.
- Assist in selection of an arbitrator;
- Help the parties define or refine any provided arbitration procedures;
- Remain available during the arbitration process itself as a resource to resolve issues informally.[130]

3. Develop and publish rules that provide effective ways of limiting discovery to essential information.

Because discovery is usually the chief determinant of arbitration cost and duration, and because arbitration procedures that leave parties and arbitrators significant "wiggle room"

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[128] Adapted from Robert N. Dobbins, *Practice Guide: The Layered Dispute Resolution Clause: From Boilerplate To Business Opportunity*, 1 HASTINGS BUS. L.J. 161, 171 (2005).

[129] Posting by James M. Gaitis to mediate-and-arbitrate@peach.ease.lsoft.com (May 13, 2010) (on file with author).

[130] *See* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 18.

often result in litigation-like discovery, provider institutions should develop and publish procedures that give business users the ability to effectively limit the scope of discovery in arbitration through their pre-dispute agreement. As a general matter, discovery should be restricted to information that is material and not merely relevant. Among the possible approaches to limiting discovery:

- **limiting document production to documents or categories of documents for which there is a specific, demonstrable need; requiring parties to describe requested documents with specificity, explain their materiality, assure the tribunal they do not have the documents, and make clear why they believe the other party has possession or control of the documents;**
- **prohibiting requests for admission, and instead encouraging party representatives to confer regarding stipulation of facts;**
- **prohibiting form interrogatories and limiting the number of interrogatories;**
- **setting limits on the number and length of depositions, and limiting arbitrator discretion to authorize additional depositions to situations where there is a demonstrated need for the requested information, there are no other reasonable means of obtaining the information, and the request is not unduly burdensome to other parties;**
- **directing parties to cooperate on voluntary information exchange/discovery;**
- **directing arbitrators to manage discovery disputes as expeditiously as possible (e.g., by offering to resolve issues through prompt conference calls before resorting to extensive briefing and written argument);**
- **authorizing arbitrators to consider, when awarding fees and costs, the failure of parties to cooperate in discovery and/or to comply with arbitrator orders, thereby causing delays to the proceeding or additional costs to other parties.**

Special attention should be given to detailed procedures for managing electronic records and handling electronic discovery much more efficiently than is currently done in federal and state courts. At a minimum, the description of custodians from whom electronic discovery can be collected should be narrowly tailored to include only those individuals whose electronic data may reasonably be expected to contain evidence that is material to the dispute and cannot be obtained from other sources. In addition to filtering data based on the custodian, the data should be filtered based on file type, date ranges, sender, receiver, search term or other similar parameters. Normally, disclosure should be limited to reasonably accessible active data from primary storage facilities; information from back-up tapes or back-up servers, cell phones, PDAs, voicemails and the like should only be subject to disclosure if a particularized showing of exceptional need is made.

Comments:[131]

In litigation, parties have broad rights to discover any evidence that may be reasonably calculated to lead to the discovery of admissible evidence without regard to whether such

[131] These comments are drawn in large part from Stipanowich, *Arbitration and Choice*, *supra* note 58, 414-425.

evidence is truly material to the outcome of the case.[132] This approach, coupled with lack of focus at the outset of discovery, means that "discovery costs far too much and becomes an end in itself."[133] Thus, the recent *Final Report on Litigation Reform* calls for dramatic overhauling of the court discovery process based on a "principle of proportionality."[134]

Parties who choose to arbitrate presumably do so with the expectation of reduced discovery. As observed in the Commentary to the *CPR Rules*,

> "[a]rbitration is not for the litigator who will 'leave no stone unturned.'" Unlimited discovery is incompatible with the goals of efficiency and economy. The Federal Rules of Civil Procedure are not applicable. Discovery should be limited to those items for which a party has a substantial, demonstrable need."[135]

Yet, as discussed in Part II, discovery is now very much a part of arbitration processes.[136] The rising scope and cost of discovery in arbitration have been a long time in the making, due in large part to the lack of formal guidelines. As technology, litigation intensity, and the popularity of arbitration have exacerbated the problem, the need for more comprehensive guidelines has become overwhelming. In cases of any size or complexity cogent arguments may be framed in support of document discovery and for a number of depositions. While there are those who will draw firm lines, the response will vary with the arbitrator. Arbitrators will be especially reluctant to draw lines in the face of a broad litigation-style discovery plan embraced by counsel for the parties.[137] Because arbitration is first and last a consensual process, even arbitrators who suspect that business parties would have preferred a more attenuated process will tend to bow to a mutual agreement of the parties' counsel in the absence of (1) clear contractual guidance regarding the parties' intent to circumscribe discovery or (2) clear arbitral authority to modify the agreement of counsel regarding discovery. They are left with the alternative of encouraging or cajoling parties to consider more carefully tailored discovery; for

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[132] THE FEDERAL RULES OF CIVIL PROCEDURE, for example, state:

> Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party….relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

FED. R. CIV. P. 26(b)(1).

[133] FINAL REPORT ON LITIGATION REFORM, *supra* note 60, at 2.

[134] *Id.* at 7-16.

[135] CPR RULES, *supra* note 62, Commentary to CPR Rule 11.

[136] It is worth noting that we have evolved from no mention of prehearing discovery in the Federal Arbitration Act, 9 U.S.C. §§1-14 (1925), and the UNIFORM ARBITRATION ACT (1955) to highly deferential language in the REVISED UNIFORM ARBITRATION ACT (2000).

[137] The CPR Commentary encourages parties' counsel "to agree, preferably before the initial pre-hearing conference, on a discovery plan and schedule and to submit the same to the Tribunal for its approval." *Id.*

this purpose, some arbitrators insist that business principals be present at the pre-hearing conference to participate in the discussion on discovery.[138]

Parties desiring explicit, non-litigation-like guidelines for information exchange and discovery in arbitration, including those who are concerned about the impact of discovery on the cost and duration of arbitration, now have a variety of templates to consider.

1. Emerging discovery templates

Organizations that publish leading arbitration procedures and other institutions have begun to develop specific provisions setting clear limits on discovery or establishing standards to guide arbitral discretion in addressing discovery disputes.

The International Bar Association (IBA) Rules on the Taking of Evidence in International Commercial Arbitration[139] were an early and excellent standard aimed at limiting information exchange. Though designed for international proceedings that involve parties and practitioners from civil law countries as well as sovereign states applying common law, the *IBA Rules* are sometimes applied by agreement in purely domestic (U.S.) arbitration. *The ICDR Guidelines for Arbitrators Concerning Exchanges of Information* are a more recent standard designed for international disputes.[140]

On the domestic scene, discovery limitations are most often built into streamlined or expedited arbitration rules like the *JAMS Streamlined Arbitration Rules & Procedures*.[141] The *CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration* is another effort to offer counselors and drafters clear choices regarding information exchange and discovery.[142] It offers parties the opportunity to select among several alternative standards regarding pre-hearing exchange of documents and witness information—some of which are useful templates.

Emerging standards may enhance the ability of arbitrators to effectively address information exchange issues by encouraging deliberate weighing of burdens and benefits. They

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[138] Alternatively, some arbitrators require principals of the clients to sign-off on any discovery plan submitted by outside counsel.

[139] INTERNATIONAL BAR ASSOCIATION, IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION (May, 29 2010) [hereinafter IBA RULES], *available at* http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx

[140] INT'L CENTER FOR DISPUTE RESOLUTION, ICDR GUIDELINES FOR ARBITRATORS CONCERNING EXCHANGES OF INFORMATION (May 2008) [hereinafter ICDR GUIDELINES], *available at* http://www.adr.org/si.asp?id=5288.

[141] JAMS STREAMLINED RULES, *supra* note 94, R. 13.

[142] INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION, CPR PROTOCOL ON DISCLOSURE OF DOCUMENTS AND PRESENTATION OF WITNESSES IN COMMERCIAL ARBITRATION (2008) [hereinafter CPR PROTOCOL ON DISCLOSURE] (designed in part "to afford to parties to an arbitration agreement the opportunity to adopt certain modes of dealing with pre-hearing disclosures of documents and with the presentation of witnesses, pursuant to Schedules.") *available at* http://www.cpradr.org/ClausesRules/CPRProtocolonDisclosure/tabid/393/Default.aspx.

may also offer arbitrators other tools, including explicit authority to condition production on the payment by the requesting party of associated reasonable costs.[143]

2. Document exchange and discovery

Standard procedures often provide for some exchange of documents, at least to the extent they are non-privileged and relevant to the dispute.[144] In some cases, such production is to occur within a fairly short time frame.[145] Some parties, however, may want to narrow (or expand) this framework or establish more specific standards for document exchange.

A straightforward template for more limited information exchange/discovery may be found in the leading international standard on the subject, the *IBA Rules on the Taking of Evidence in International Commercial Arbitration*.[146] This standard, a compromise in which U.S.-style discovery is tempered by the influence of prevailing practices in civil law countries, initially requires each party only to submit "all documents available to it on which it relies."[147] It also establishes a procedure for arbitral resolution of disputes over further document production that requires parties to describe requested documents with specificity, explain their relevance and materiality, assure the tribunal that they do not have the documents and make clear why they believe the other party has possession or control of the documents.[148]

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[143] *See, e.g., Id.* at § 1(e)(2). *See also* ICDR GUIDELINES, *supra* note 140, 8.a., which provides:

> In resolving any dispute about pre-hearing exchanges of information, the tribunal shall require a requesting party to justify the time and expense that its request may involve, and may condition granting such a request on the payment of part or all of the cost by the party seeking the information. The tribunal may also allocate the costs of providing information among the parties, either in an interim order or in an award.

[144] *See, e.g.*, JAMS COMPREHENSIVE RULES, *supra* note 104, (providing for the parties to "cooperate in . . . the voluntary and informal exchange of all relevant, non-privileged documents, including, but without limitation, copies of all documents in their possession or control on which they rely in support of their positions.").

[145] The JAMS COMPREHENSIVE RULES call for document exchange "within twenty-one (21) calendar days after all pleadings or notice of claims have been received." JAMS COMPREHENSIVE RULES, *supra* note 104, Rule 17(a). Under the JAMS STREAMLINED ARBITRATION RULES & PROCEDURES, this period is reduced to 14 days. *See* JAMS STREAMLINED RULES, *supra* note 67, R. 13(a).

[146] IBA Rules, *supra* note 139.

[147] *Id.*, Article 3, Section 1.

[148] The IBA Rules call for Requests to Produce to contain

> (a)(i) a description of a requested document sufficient to identify it, or (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of documents that are reasonably believed to exist;
>
> (b) a description of how the documents requested are relevant and material to the outcome of the case; and
>
> (c) a statement that the documents requested are not in the possession, custody or control of the requesting Party, and of the reason why that Party assumes the documents requested to be in the possession, custody or control of the other Party.

Id. at 5.

In a similar vein, the *JAMS Streamlined Arbitration Rules & Procedures* call for "voluntary and informal" exchange of all relevant, non-privileged documents and other information, but admonish parties to limit their requests to "material issues in dispute" and to make them "as narrow as reasonably possible." Depositions are not permissible "except upon a showing of exceptional need" and with arbitrator approval. Electronic data may be furnished in the form most convenient for the producing party, and broad requests for email discovery are not permitted.[149] (The more expedited *AAA Construction Industry Fast-Track Rules*, aimed at smaller dollar claims, contemplate no discovery beyond exhibits to be used at the arbitration hearing "except . . . as ordered by the arbitrator in exceptional cases."[150])

The *CPR Protocol on Disclosure*[151] offers parties a choice of four discrete "modes" for document disclosure. These include: Mode A (No disclosure save for documents to be presented at the hearing); Mode B (Disclosure as provided for in Mode A together with "[p]re-hearing production only of documents essential to a matter of import in the proceeding for which a party has demonstrated a substantial need"); Mode C (Disclosure provided for in Mode B together with disclosure, prior to the hearing, "of documents relating to issues in the case that are in the possession of persons who are noticed as witnesses by the party requested to provide disclosure"); and Mode D (Pre-hearing disclosure of documents regarding non-privileged matters that are relevant to any party's claim or defense, subject to limitations of reasonableness, duplication and undue burden).[152] Some arbitrators limit each party to a certain number of document requests, including subparts.[153]

3. Limits on depositions

In the interest of economy or certainty, some parties may want to provide that no depositions, or a specific, limited number of depositions, will be conducted in their

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The IBA RULES appear to have influenced the recent ICDR GUIDELINES FOR ARBITRATORS CONCERNING EXCHANGES OF INFORMATION, which empower the arbitrators,

> upon application, [to] require one party to make available to another party documents in the party's possession, not otherwise available to the party seeking the documents, that are reasonably believed to exist and to be relevant and material to the outcome of the case. Request for documents shall contain a description of specific documents or classes of documents, along with an explanation of their relevance and materiality to the outcome of the case.

ICDR GUIDELINES, *supra* note 140, Guideline 3(a).

[149] *Compare* JAMS STREAMLINED RULES, *supra* note 94, *with* CPR EXPEDITED ARBITRATION, *supra* note 65.

[150] *See* AAA CONSTRUCTION INDUSTRY FAST TRACK RULE, *supra* note 64, F-9.

[151] CPR PROTOCOL ON DISCLOSURE, *supra* note 142, § 1. *Cf.* Lawrence W. Newman & David Zaslowsky, *Predictability in International Arbitration*, 100 N.Y. L. J. 3. (May 25, 2004).

[152] *Id.*, Schedule 1.

[153] *See, e.g.,* Wendy Ho, *Discovery in Commercial Arbitration Proceedings*, Comment, 34 HOUS. L. REV. 199, 224-227 (Spring 1997).

arbitration.[154] A variant of this approach, used by some arbitrators, is to provide each party with a maximum number of hours for deposing persons within the other party's employ or control. Such limitations may be tempered by giving arbitrators discretion to allow additional depositions in exceptional circumstances where justice requires.[155] A useful example of a clear limit coupled with narrowly cabined arbitrator discretion is contained in Rule 17 of the *JAMS Comprehensive Arbitration Rules*, which permits each party to take a single deposition; [t]he necessity of additional depositions is to be determined by the Arbitrator based upon the reasonable need for the requested information, the availability of other discovery options and the burdensomeness of the request on the opposing parties and the witness.[156]

Another proposed response to the burgeoning discovery problem is the adoption of the international arbitration practice of substituting detailed sworn witness statements for direct examination.[157] Such statements, provided to all participants in advance of the hearing, might provide a rough surrogate for depositions and save hearing time. Adjustments to the international practice, such as abbreviated direct examination, might be necessary to provide comfort to American lawyers and arbitrators. The new draft *CPR Protocol on Disclosure* offers parties the choice of embracing such an approach in their arbitration agreement, possibly in lieu of depositions.[158]

4. Guiding and empowering arbitrators.

Another approach to controlling discovery hinges on and provides a useful framework for the "good judgment of the arbitrator." A set of guidelines for arbitrator-supervised discovery developed by the New York State Bar Association (and subsequently adopted in summary form by JAMS) offers tools for arbitrators to manage discovery and other procedural aspects of arbitration.[159] Such guidelines operate on the presumption that parties have not yet established strict guidelines for discovery, and therefore depend upon the arbitrator(s) to control discovery by giving early and active attention to the process, using persuasion and other methods to achieve results appropriate to the specific circumstances and the parties' indicated preferences (see *Protocol for Arbitrators*, Action 6).

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[154] The ICDR GUIDELINES note that "[d]epositions, . . . as developed in American court procedures, are generally not appropriate procedures for obtaining information in international arbitration." ICDR GUIDELINES, *supra* note 140, 6.b.

[155] *See supra* note 94 (discussing discretionary authority of arbitrator under JAMS STREAMLINED RULES).

[156] JAMS COMPREHENSIVE RULES, *supra* note 104, Rule 17(b).

[157] The witness statement concept is embodied in the IBA Rules. IBA RULES, *supra* note 139. Article 4, Sections 4-9.

[158] CPR PROTOCOL ON DISCLOSURE, *supra* note 142, at 2-3, 5, 8-9.

[159] *See* NEW YORK STATE BAR ASSOCIATION DISPUTE RESOLUTION SECTION ARBITRATION COMMITTEE, REPORT ON ARBITRATION DISCOVERY IN DOMESTIC COMMERCIAL CASES (June 2009), *available at* http://www.nysba.org/Content/NavigationMenu42/April42009HouseofDelegatesMeetingAgendaItems/DiscoveryPreceptsReport.pdf (describing factors to consider when artfully drafting arbitration clauses); *see also*, JAMS, RECOMMENDED ARBITRATION DISCOVERY PROTOCOLS FOR DOMESTIC, COMMERCIAL CASES (Jan. 6 2010), *available at* http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Arbitration_Discovery_Protocols.pdf.

Should arbitrators or counsel have the last word on the scope of discovery? In this respect, expert opinion and current standards vary, although under most standards arbitrators must respect and adhere to party agreements regarding discovery. The *AAA Rules for Large, Complex Cases* authorize the arbitrator(s) to override party agreements and "place such limitations on the conduct of such [agreed] discovery as the arbitrator(s) shall deem appropriate."[160] Although both the JAMS and CPR Rules give arbitrators considerable authority regarding exchange of information, neither set of procedures is explicit regarding the authority of arbitrators to "trump" or modify agreements regarding discovery;[161] however, the *JAMS Arbitration Discovery Protocol* recognizes that, while party agreements regarding the scope of discovery should be respected by arbitrators,"[w]here one side wants broad arbitration discovery and the other wants narrow discovery, the arbitrator will set meaningful limitations."[162]

Since parties can always amend their arbitration agreements (even, in most jurisdictions, by amending the provision of the agreement that says it may only be amended by a writing signed by the CEOs of both companies), any provision giving the arbitrator the last word on discovery (or anything else) could theoretically be rescinded by a subsequent agreement of the parties. If that happens, the arbitrators should convene a meeting with

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[160] AAA COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES (2009) [hereinafter AAA COMMERCIAL RULES], L-4(c). An even stronger statement of the "final authority" of arbitrators regarding discovery is set forth in the ICDR GUIDELINES:

> 1. a. The tribunal shall manage the exchange of information among the parties in advance of the hearings with a view to maintaining efficiency and economy. The tribunal and the parties should endeavor to avoid unnecessary delay and expense while at the same time balancing the goals of avoiding surprise, promoting equality of treatment, and safeguarding each party's opportunity to present its claims and defenses fairly.
>
> b. The parties may provide the tribunal with their views on the appropriate level of information exchange for each case, *but the tribunal retains final authority to apply the above standard.* To the extent the Parties wish to depart from this standard, they may do so only on the basis of an express agreement in writing and in consultation with the tribunal. (Emphasis added.)

ICDR GUIDELINES, *supra* note 140, 1.a-b.

[161] The JAMS COMPREHENSIVE RULES grant each party one deposition as of right, and call for "the necessity of additional depositions . . . [to] be determined by the Arbitrator based upon the reasonable need for the requested information, the availability of other discovery options and the burdensomeness of the request on the opposing Parties and the witness." JAMS COMPREHENSIVE RULES, *supra* note 104, Rule 17(b). The JAMS COMPREHENSIVE RULES do not give any indication about what happens when the parties have agreed to multiple depositions.

While empowering the Tribunal to "require and facilitate such discovery as it shall determine is appropriate" taking into account parties' needs, expeditiousness and cost-effectiveness, the CPR RULES also do not address the impact of mutual agreement on discovery issues by the parties. CPR RULES, *supra* note 62, Rule 11. However, the CPR Protocol on Disclosure appears to anticipate that "[w]here the parties have agreed on discovery depositions, the Tribunal should exercise its authority to scrutinize and regulate the process . . . [and possibly impose] strict limits on the length and number of depositions consistent with the demonstrated needs of the parties." CPR PROTOCOL ON DISCLOSURE, *supra* note 142, at 5.

[162] See JAMS, RECOMMENDED ARBITRATION DISCOVERY PROTOCOLS FOR DOMESTIC, COMMERCIAL CASES (Jan. 6 2010), *available at http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Arbitration_Discovery_Protocols.pdf.*

principals present and make sure that they (not just their counsel) want to override the "last word" provision so that outside counsel may engage in much more extensive (and costly) discovery than the arbitrator considers warranted.

5. E-discovery

Particularly troublesome has been the area of electronic discovery. As one leading participant in the development of guidelines for the management and discovery of electronic information explains,

> If the law of e-discovery were allowed to develop on an ad hoc basis, one decision at a time, companies with their complex information technology systems would be eaten alive by process costs. It is essential to develop best practices that work in a real world.[163]

The challenge for arbitrators and arbitration providers is to address these same concerns effectively, but in the context of a highly discretionary system without uniform rules or precedents that is conventionally aimed at efficiency and expedition in conflict resolution.[164] Issues include the essential scope of and limits on e-discovery, and the weighing of burdens and benefits;[165] the handling of the costs of retrieval and review for privilege;[166] the duty to preserve electronic information, spoliation issues and related sanctions.[167]

Will it be possible for arbitrators to effectively meet the challenges of e-discovery in an efficient and relatively economical manner? The answer will depend in part on the effectiveness of choices made by counselors and drafters. But they cannot make good choices when good choices are not drafted and promoted by arbitration providers.

Arbitral institutions are in a unique position to assume more responsibility for providing this critical guidance. Concerns regarding the relative burdens associated with e-discovery may lead parties to consider adopting language similar to that contained in the *ICDR Guidelines*

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[163] THE SEDONA GUIDELINES: BEST PRACTICE GUIDELINES & COMMENTARY FOR MANAGING INFORMATION & RECORDS IN THE ELECTRONIC AGE 11-20, 31-43 (Charles Ragan et al., The Sedona Conference Sept. 2005).

[164] Irene C. Warshauer, Electronic Discovery in Arbitration: Privilege Issues and Spoliation of Evidence, 61 DISP. RESOL. J. 9, 10 (Nov. 2006-Jan. 2007); Jennifer E. Lacroix, *Practical Guidelines for Managing E-Discovery Without Breaking the Bank*, in PLI PATENTS, COPYRIGHTS, TRADEMARKS AND LITERARY PROPERTY COURSE HANDBOOK SERIES 645-665 (Jan. 2008); Theodore C. Hirt, *The Two-Tier Discovery Provision of Rule 26(B)(2)(B) – A Reasonable Measure for Controlling Electronic Discovery?* 12 RICH. J. L. & TECH. 12 (2007); Thomas Y. Allman, *The "Two-Tiered" Approach to E-Discovery: Has Rule 26(B)(2)(B) Fulfilled its Promise?* 14 RICH. J. L. & TECH. 7 (2008).

[165] *See generally* THE SEDONA GUIDELINES, *supra* note 163.

[166] For a discussion of these and other issues, see John B. Tieder, *Electronic Discovery and its Implications for International Arbitration*; (unpublished article, on file with Watt, Tieder, Hoffar & Fitzgerald, LLP); Jessica L. Repa, *Adjudicating Beyond the Scope of Ordinary Business: Why the Inaccessibility Test in Zubulake Unduly Stifles Cost-Shifting During Electronic Discovery*, Comment, 54 AM. U. L. REV. 257 (Oct. 2004); Warshauer, *supra* note 164, at 11 (discussing the development of "claw-back" agreements, which permit a party to produce all of its relevant documents for review without waiving privilege).

[167] Warshauer, *supra* note 164, at 12-15.

which permit a party to make documents maintained in electronic form "available in the form . . . most convenient and economical for it, unless the Tribunal determines, on application . . . that there is a compelling need for access to the documents in a different form."[168] Moreover, requests for such documents "should be narrowly focused and structured to make searching for them as economical as possible." The *Guidelines* conclude by permitting arbitrators to engage in "direct testing or other means of focusing and limiting any search."[169] The use of "test batch production"—such as pilot tests using key search words on a limited scale—is emerging as a critical way of identifying areas that require special attention in advance of major production.

Parties may be able to avoid many of the costs—if not all the risks—of the revelation of privileged material in electronic data by agreeing to have the arbitrators issue a pre-arbitral order relieving the parties of the obligation to conduct a pre-production privilege review of all electronic documents and ordering that the attorney-client and work product privileges are not waived by production of documents that have not been reviewed.[170] Parties may also wish to consider identifying likely informational needs and agreeing on what information needs to be preserved, in what format, and for how long.[171]

A prototypical, multi-faceted template addressing various aspects of pre-hearing disclosure of electronic information is contained in the *CPR Protocol on Disclosure*.[172] That Protocol presents parties with four discrete alternatives regarding pre-hearing disclosure of electronic documents. The alternatives range from no-pre-hearing disclosure, except with respect to copies of printouts of electronic documents to be presented in the hearing, to full disclosures "as required/permitted under the *Federal Rules of Civil Procedure*." The intermediate options permit parties to limit production to documents maintained by a specific number of designated custodians, to limit the time period for which documents will be produced, to identify the sources (primary storage, back-up servers, back-up tapes, cell phones, voicemails, etc.) from which production will be made, and to determine whether or not information may be obtained by forensic means.[173]

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[168] ICDR GUIDELINES, *supra* note 140, Section 4.

[169] *Id.*

[170] Warshauer, *supra* note 164, at 11.

[171] THE SEDONA GUIDELINES, *supra* note 163; William B. Dodero & Thomas J. Smith, *Creating a Strong Foundation for Your Company's Records Management Practices*, 25 ACC DOCKET 52 (Nov. 2007).

[172] *See* Newman & Zaslowsky, *supra* note 81.

[173] *See* CPR PROTOCOL ON DISCLOSURE, *supra* note 142, Schedule B, Modes B, C. The Protocol also offers a set of General Principles which may be adopted by themselves or in tandem with a particular "mode" for pre-hearing disclosure of electronic documents. It provides:

> In making rulings on pre-hearing disclosure, the tribunal should bear in mind the high cost and burden associated with requests for the production of electronic information. It should be recognized that e-mail and other electronically created documents found in the active or archived files of key witnesses or in shared drives used in connection with the matter at issue are more readily accessible and less burdensome to produce when sought pursuant to reasonably specific requests. Production of electronic materials from a wide range of users or custodians tends to be costly and burdensome and should not be permitted without a showing of

6. Other considerations

Depending on the circumstances, parties may consider it appropriate to include other provisions, such as a term giving arbitrators explicit authority to weigh the burdens and benefits of a discovery request, or the ability to condition disclosure on the requesting party paying reasonable costs of production.[174] It may serve efficiency to provide that the chair of the tribunal serve as discovery master; in cases in which confidentiality of sensitive information is of prime concern, there might be a provision for the use of a special master to supervise certain aspects of discovery.[175]

4. Offer rules that set presumptive deadlines for each phase of the arbitration; train arbitrators in the importance of enforcing stipulated deadlines.

In the interest of economy and efficiency, providers should ensure that parties have the opportunity to adopt arbitration procedures that include a presumptive deadline for completion of arbitration. The procedures should facilitate compliance with the final deadline through the inclusion of presumptive time limits for each phase of the arbitration, and by giving arbitrators explicit authority to employ procedures and set deadlines appropriate to the goal of meeting the overall deadline. Providers should also ensure that their training programs offer arbitrators instruction in the importance of adhering to stipulated timetables or deadlines for arbitration except in circumstances clearly beyond the contemplation of the parties when the time limits were established (see *Protocol for Arbitrators*, Action 3).

Comments:

See comments under *Protocol for Business Users*, Action 3.

5. Publish and promote "fast-track" arbitration rules.

Providers should offer a variety of procedural choices with varying degrees of emphasis on expedition and economy, including at least one set of procedures that place heavy emphasis on those goals (see *Protocol for Business Users and In-House Counsel,* Action 4). A "fast-track" approach may feature some or all of the following:

- **relatively short presumptive deadlines;**
- **limits on the number of arbitrators;**

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extraordinary need. Requests for back-up tapes, deleted files and metadata should only be granted if the requesting party can demonstrate a reasonable likelihood that files were deliberately destroyed or altered by a party in anticipation of litigation or arbitration and outside of that party's usual and customary document-retention policies.

Id., Section 4(a).

[174] *See supra* note 89.

[175] *See* JAMS COMPREHENSIVE RULES, *supra* note 104, Rule 17(b).

- **expedited arbitrator appointment procedure;**
- **early disclosure of information;**
- **heavily curtailed discovery and motion practice;**
- **limits on the length and form of the award.**

If fast-track procedures are published separately from a provider's standard procedures, the provider should take measures to ensure that users are equally aware of the fast-track option and are provided with user-friendly guidance on how and when to employ the fast track procedures.

Comments:

See comments under *Protocol for Business Users*, Action 3.

6. Develop procedures that promote restrained, effective motion practice.

Properly employed, motions to narrow or dispose of claims or defenses can promote efficiency and economy in arbitration. Presently, however, there are two major concerns about motion practice in arbitration: (a) the reflexive use of motion practice in arbitration by some litigation attorneys, and (b) the reflexive denial of motions by arbitrators pending a full-blown hearing on the merits of the entire case. Providers should attempt to address these concerns by publishing guidelines for effective and efficient resolution of motions, particularly dispositive motions. This might involve a simple method for screening motions at the outset, including factors to be considered by arbitrators in deciding whether to entertain a motion. In the interest of time- and cost-saving, would-be movants might be required to set up a conference call with the arbitrator(s) and opposing counsel to discuss the issue before filing any motion (see *Protocol for Business Users*, Action 9; *Protocol for Arbitrators*, Action 7).

Comments:

See comments under *Protocol for Business Users*, Action 9.

7. Require arbitrators to have training in process management skills and commitment to cost- and time-saving.

Provider institutions should conduct training in managing hearings fairly but expeditiously, with particular emphasis on ways of reducing cost and promoting efficiency, and should require arbitrators to complete such training before being included on the provider's roster, and to update their knowledge and skills annually. Providers should also consider requiring arbitrators to make a pledge to actively seek ways to promote cost- and time-saving in a manner consistent with the agreement of the parties and fundamental fairness (see *Protocol for Arbitrators*, Action 1).

Comments:

Arbitrators need to anticipate that their predominant challenges are more likely to be encountered during the period prior to hearings. Of increasing importance is the critical role of the pre-hearing conference in establishing discovery and motion practice guidelines for the rest of the arbitration process. Arbitrators must be equipped with process management skills not only for the hearing itself, but for the pre-hearing period.

Among the many steps that skilled arbitrators may take during pre-hearing case management are the following: promoting dialogue between parties; addressing jurisdictional issues; developing a timetable and management plan; addressing requests for interim relief; facilitating information exchange and discovery; addressing dispositive motions; planning the hearings; planning the form of the final award; administrative details like rules, locations, fees, confidentiality, and communication methods.[176]

An arbitrator with a proper skill set will approach the pre-hearing proceedings as aggressively and deliberately as the hearings themselves, increasing the likelihood not only of achieving resolution of the matter before the hearing begins, but of ensuring a hearing that has set and met parties' expectations for efficiency.

8. Offer users a rule option that requires fact pleadings and early disclosure of documents and witnesses.

Providers' should afford users the option of adopting rules that require fact pleading rather than notice pleading in both demands and answers, and require that claimants and respondents serve with their initial pleadings a detailed statement of all facts to be proven, all legal authorities relied upon, copies of all documents supporting each claim or defense, as well as a list of witnesses they expect to call. Such rules should require that parties supplement their documents and witness lists periodically prior to the hearing.

Comments:

See *Protocol for Business Users*, Action 8, and the related entry in Appendix A.

9. Provide for electronic service of submissions and orders.

Arbitration procedures should require that all pleadings, motions, orders and other documents filed in the arbitration be served electronically on each arbitrator and each parties' counsel except where that method of service is impractical (as with documents of too great a length to be conveyed electronically) or where other special considerations require another method.

Comments:

A number of providers and services have begun providing for electronic service of arbitration-related documents. See Appendix A for examples.

[176] COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, Ch. 4.

10. Obtain and make available information on arbitrator effectiveness.

Providers should conduct a post-arbitration telephone interview with arbitrating parties and counsel to obtain information on arbitrator effectiveness in managing arbitration fairly and expeditiously. Such information should periodically be furnished to arbitrators in a way that precludes their identifying the sources of the comments. Such information should also be made available in summary form (and without attribution) to parties and counsel selecting arbitrators. Providers should remove from their rosters those arbitrators who prove incapable of efficiently managing business arbitrations (see *Protocol for Business Users*, Action 7).

Comments:

Perhaps more commonly associated with other dispute resolutions processes, evaluation of neutrals should be a core service offered by arbitration providers. As standards evolve, arbitrators must continue to be held accountable for their knowledge and skill levels. Care should be taken to focus evaluations on objective measures of arbitrators' management skills and knowledge levels and to make effective use of timing and language to prevent evaluations from being colored by arbitration outcomes.[177]

11. Provide for expedited appointment of arbitrators.

Provider rules should expedite the selection of the tribunal by providing that, if all arbitrators have not been appointed within a specific time (say, thirty days from the filing of the arbitration demand), the provider will appoint the arbitrators. The rules should also impose stringent time limits for all communications by parties and by prospective arbitrators that are required as a part of the appointment process.

Comments:

Arbitrations can be greatly delayed when the appointment of arbitrators drags on for many weeks or even months. While arbitrator selection is certainly an important step in the arbitration process, it is one that can be accomplished expeditiously by diligent counsel, particularly when the rules furnish the strong incentive of divesting foot-dragging parties of the right to select their arbitrators.

See below for examples of expedited procedures for appointment of arbitrators.

- AMERICAN ARBITRATION ASSOCIATION, AAA COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, SECTION E: EXPEDITED PROCEDURES R. 4 (June 1, 2009), *available at* http://www.adr.org /sp.asp?id=22440. ("If the parties are unable to agree… each party may strike two names from the list [of arbitrators] and return it to the AAA within seven days

[177] *Cf.* Donald P. Crane & John B. Miner, *Labor Arbitrators' Performance: Views from Union and Management Perspectives*, 9 J. LAB. RES. 1 (Mar. 1988) (discussing a study of performance evaluations of labor arbitrators by union representatives and management representatives that found the arbitrators' awards to so color the evaluation results that the results were either unrelated or negatively related).

from the date of the AAA's mailing... If the appointment… cannot be made from the list, the AAA may make the appointment...")

- AMERICAN ARBITRATION ASSOCIATION, SECURITIES ARBITRATION SUPPLEMENTARY PROCEDURES R. 3(a) (June 1, 2009), *available at* http://www.adr.org/sp.asp?id=22009 ("The list [of proposed arbitrators] must be returned to the AAA within 10 days from the date of the AAA's transmittal to the parties. If for any reason the appointment of an arbitrator cannot be made from the list, the AAA may make the appointment . . .").
- ADR CHAMBERS, EXPEDITED ARBITRATION RULES R. 5 (2010), *available at* http://adrchambers.com/ca/expedited-arbitration/expedited-arbitration-rules/ ("If ADR Chambers is not notified of the selection of an arbitrator… within 5 business days after the Response has been delivered . . . ADR Chambers will select the arbitrator . . .").
- AMERICAN DISPUTE RESOLUTION CENTER, INC., RULES OF EXPEDITED CONSTRUCTION ARBITRATION R. E-4 (Sept. 11, 2009), *available at* http://www.adrcenter.net/pdf/Construction/ExpRules.pdf ("The parties must return their selections to ADR Center within ten calendar days. If ADR Center is unable to appoint the arbitrator from the parties' selections, the Case Manager will appoint the arbitrator.").

12. Require arbitrators to confirm availability.

Providers should require arbitrators being considered for appointment in expedited proceedings to expressly confirm their availability to both manage and hear the case within a specific number of days prior to being confirmed.

Comments:

Per the 2009 International Arbitration Report, the ICC Court now requires arbitrators agreeing to serve in ICC arbitrations to disclose details regarding their availability.[178]

Similarly, the *CPR Expedited Arbitration Rules* provide:

> Any arbitrator appointed by the parties or by the CPR Institute shall accept appointment by expressly representing to the CPR Institute within 2 days of appointment that he or she has the time available to devote to the expeditious process and time periods for Pre-hearing Conference, discovery, hearing and award contemplated by these Rules and to facilitate the expedition contemplated in these Rules.[179]

Obviously, most arbitrators understand the concept of scheduling, but requiring explicit affirmation of availability is intended to serve as reminder to all arbitrators of the importance of avoiding unnecessary delay throughout the entire process. In fact, with the advent of

[178] ICC COMMISSION ON ARBITRATION, ICC PUBLICATION 843 -TECHNIQUES FOR CONTROLLING TIME AND COSTS IN ARBITRATION §12 (2007) *available at* http://www.iccwbo.org/uploadedFiles/TimeCost_E.pdf.

[179] CPR EXPEDITED ARBITRATION RULES, *supra* note 65, Rule 7.2.

electronic calendars, the day is not far off when parties will be able to view prospective arbitrators' calendars to determine for themselves if candidates have sufficient time available in the relevant time frame.

13. Afford business users an effective mechanism for raising and addressing concerns about arbitrator case management.

Providers that offer administrative services, including arbitrator appointment services, should offer users a meaningful mechanism (such as a designated ombud) for addressing party concerns and complaints regarding the arbitrators or the arbitration process. Among other things, the individual/office would be authorized to explore opportunities for addressing concerns about process speed and cost.

Comments:

Identifying and resolving issues with arbitrator case management while still mid-process has a number of advantages, including preserving efficiency; identifying long-term issues with procedures or arbitrators while the matter is still fresh; and increasing party satisfaction with outcomes.

Conflict resolution studies have shown that outcome satisfaction is generally improved by the opportunity to provide feedback during the proceedings. "Increasing shared information is a basic strategy in ameliorating all conflicts. Consultation and feedback mechanisms between parties provide a consistent and reliable method of sharing information."[180]

14. Offer process orientation for inexperienced users.

Providers should make available to business parties and to counsel online or in-person orientation programs that summarize and illustrate (a) the principal differences between arbitration and litigation and (b) how to use arbitration to accomplish the parties' goals of fair, economical and efficient resolution of disputes.

Comments:

Properly educated parties are far more likely to accept efficient process options, establish a constructive tone, set aside courtroom-style tactics in favor of flexibility, and reach an outcome without being frustrated by preconceptions regarding arbitration.

Note that—as discussed under Action 1—user feedback can be an effective way to "sell" a process to parties unfamiliar with the distinctions between arbitration and litigation.[181]

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[180] ERIC BRAHM & JULIAN OUELLET, DESIGNING NEW DISPUTE RESOLUTION SYSTEMS (Sept. 2003), *available at* http://www.beyond intractability.org/essay/designing_dispute_systems/.

[181] Jeffrey R Cruz, *Arbitration vs. Litigation: An Unintentional Experiment*, 60 DISP. RESOL. J. 10 (Jan. 2006) (addressing "combative" construction dispute advocates with candid, anecdotal observations about the advantages of a well-managed arbitration).

A Protocol for Outside Counsel

Business users depend on outside counsel to promote their business interests, which often include economy and efficiency, in arbitration. Outside counsel should be careful to clarify their client's goals and expectations for resolving disputes, and should approach arbitration in a manner that reflects these expectations and exploits the differences between arbitration and litigation. The following Actions are offered as specific guidance to Outside Counsel for this purpose.

1. Be sure you can pursue the client's goals expeditiously.

Outside counsel should only accept an advocacy role in arbitration when they have determined what the client's goals are in the particular case and are sure they have the knowledge, experience, and availability to pursue those goals effectively, efficiently and expeditiously. They should be familiar with the arbitration rules and provider involved in the particular case and should have in-depth knowledge of ways to save time and money in arbitration without compromising either the fairness of the process or the soundness of the result. They should also be certain that they or a partner have the negotiation and mediation skills that may be required at various stages of the arbitration.

Comments:

Rules of professional responsibility in nearly all jurisdictions make it unethical for attorneys to accept an engagement which they are not competent to perform.[182] While that provision has generally been thought to require knowledge and experience in the type of substantive work the attorney is being asked to carry out, the recent client focus on reducing excessive cost and delay in commercial arbitration suggests that the ethical obligation may well extent to knowledge of how to conduct an arbitration efficiently and expeditiously. Arbitration is quite different from litigation in many respects, and techniques that work well in one process may be ineffective, even harmful in the other. Counsel who agree to represent parties in commercial arbitrations need to have a solid understanding of the arbitration rules that will apply, the practices of the provider that is administering the arbitration, and the growing body of state and federal arbitration law. They should know how to navigate the arbitration process in an economical yet effective way. Since arbitrations frequently require or precipitate negotiations and/or mediation between the parties, whoever will serve as lead counsel at the arbitration hearing should be certain that he or she or a partner has the skill needed to effectively conduct such adjunct activities.

[182] ABA MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.1 Competence (2010), *available at* http://www.abanet.org /cpr/mrpc/ rule_1_1.html; CA RULES OF PROFESSIONAL CONDUCT Rule 3-110 (Sept. 2009) *available at* http://rules.calbar .ca.gov/Rules/RulesofProfessionalConduct/CurrentRules.aspx; NY STATE UNIFIED COURT SYSTEM, PART1200 – RULES OF PROFESSIONAL CONDUCT Rule 1.1: Competence (2009) , *available at* http://www.nysba.org/Content/Navigation Menu/ForAttorneys/ProfessionalStandardsforAttorneys/NYRulesofProfessionalConduct4109.pdf; ARTICLE VII: ILLINOIS RULES OF PROFESSIONAL CONDUCT, Rule 1.1. Competence (2010), *available at* http://www.state.il.us/court/ supremecourt/rules/ art_viii/artviii.htm.

2. Memorialize early assessment and client understandings.

Outside counsel should provide the client at the outset with a careful early assessment of the case, including a realistic estimate of the time and cost involved in arbitrating the matter at various levels of depth and detail. Counsel should reach an understanding with the client concerning the approach to be followed, the extent and nature of any discovery to be initiated, the possibility and desirability of a negotiated settlement, the desired overall timetable for arbitration, and the resources the client is prepared to devote to the matter. Counsel should memorialize those understandings in writing and should adhere to the client's expectations and budget. Counsel should periodically review these understandings with the client and should memorialize any significant changes in the client's instructions (see *Protocol for Business Users and In-House Counsel*, Actions 5, 6).

Comments:

Studies show that many disputes arise between clients and counsel because of a failure to reach, at the outset of the engagement, a clear understanding of what counsel is expected to do (and not do) and what that work will likely cost the client.[183] The potential for such problems are clearly present in engagements, like arbitration and litigation, where the lawyer's work may be quite intensive and extend over a period of many weeks. It is essential that outside counsel should make an early and realistic assessment of the case, including the cost and time which various alternative approaches to the arbitration may involve. Ultimately it is up to the client to determine, as a matter of business priorities, what amount of time and money it is willing to devote to the case. Once that decision is made, outside counsel should memorialize it in writing, along with other important client instructions, and should revisit the matter periodically and note any changes that may have occurred in the client's expectations.

3. Select arbitrators with proven management ability. Be forthright with the arbitrators regarding your expectations of a speedy and efficient proceeding.

Outside counsel should help their client select arbitrators with the experience, knowledge and capabilities that are likely to further the client's business goals, including expectations as to cost and time. Counsel should do a thorough "due diligence" of all potential arbitrators under consideration and should, consistent with the Code of Ethics for Arbitrators in Commercial Disputes, interview them concerning their experience, case management practices, availability and amenability to compensation arrangements that would incentivize them to conduct the arbitration efficiently and expeditiously.

Parties desiring speed and economy in the arbitration process should be forthright in conveying their expectations to the arbitrators regarding the duration of the proceedings, beginning at the time candidates for appointment as arbitrator are identified. These expectations can be set down in writing at the beginning of the arbitration process and, even

[183] 2007 LAWYER-CLIENT FEE ARBITRATION REPORT CARD: HALT REPORT CARD FINDS LAWYER-CLIENT FEE DISPUTE PROGRAMS NOT MAKING THE GRADE (Sep. 17, 2007), *available at* http://www.halt.org/reform_projects/lawyer_accountability/lawyer-client_fee_arbitration/report_card.php.

if unilateral and non-binding, may have an impact on scheduling and management decisions made by the arbitrators during the proceedings (see *Protocol for Arbitrators*, Action 3).

Comments:

One of the most important functions of outside arbitration counsel is selecting, in consultation with in-house counsel, the arbitrator(s) for the case. In addition to the traditional considerations such as intelligence, integrity, familiarity with the subject matter, and availability, outside counsel these days also need to determine whether the arbitrator candidates have the knowledge, skill and temperament to manage the arbitration efficiently. Much can be learned on this score by talking with lawyers who have participated in other cases the candidates have arbitrated and by interviewing the candidates concerning the procedures and practices they follow in conducting arbitrations.[184] Counsel should advise the candidates of their client's expectations concerning the cost and length of the arbitration proceedings and should determine whether the candidates are able and willing to meet those expectations. It is not inappropriate to ask prospective arbitrators, through the case manager, about their availability to conduct the hearing during a specific time frame.[185] Counsel may also wish to explore with the candidates alternative billing arrangements that may encourage them to manage the arbitration efficiently.

4. Cooperate with opposing counsel on procedural matters.

If saving time and money is an important client goal in the arbitration, counsel should make clear to the client that the fullest benefits of time- and cost-saving (i.e., those concerning procedures for preparing for and conducting the hearing) can ordinarily only be achieved when opposing counsel cooperate fully and freely with each other and with the arbitrator to achieve those benefits. Counsel should obtain the client's consent to such cooperation and should pursue that approach regarding all procedural and process issues in the arbitration. Counsel should meet and confer early with opposing counsel in order to foster a cordial and professional working relationship and to reach as many agreements as possible concerning matters that will be taken up at the Preliminary Conference and should continue to meet and confer regularly thereafter (see *Protocol for Arbitrators*, Actions 2, 3, 4).

Comments:

Psychologists tell us that, when people have a dispute, there is a natural tendency ("reactive devaluation") to view with suspicion anything proposed by the other side.[186] This phenomenon, coupled with the hostility often accompanying commercial conflict and the ego satisfaction of trouncing one's opponent, frequently impels counsel in arbitration and litigation

[184] Canon III of the ABA/AAA CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (2004) provides that a prospective arbitrator may respond to party inquiries designed to determine his or her suitability and availability for the appointment but may not engage in *ex parte* communications concerning the merits of the case.

[185] This procedure is already offered, for example, by CPR Institute's Director of Dispute Resolution Services.

[186] Ross, L. and C. Stillinger, *Barriers to Conflict Resolution*, 8 NEG. J. 389-404 (1991).

to fight with their opposite number on every substantive and procedural aspect of the case. The most sophisticated outside counsel realize, however, that zealous advocacy on the merits does not preclude cooperation on procedure, which is typically in the best interest of both parties, especially if they wish to reduce cost and delay. Arbitration being entirely a creature of party agreement, arbitrators normally solicit agreement on procedural matters more aggressively than judges and will not take kindly to counsel who refuse to agree to sensible process arrangements. In most cases, if counsel pursue a professional and cooperative relationship with each other concerning the scope of discovery and motions, the length and location of the hearing, stipulations on facts not genuinely in dispute, and similar matters, it is possible to achieve substantial savings of time and money without compromising the client's substantive position. If in-house counsel is inexperienced in arbitration, it may be necessary for outside counsel to explain why such cooperation is beneficial for the client and secure the client's consent to such an approach.

5. Seek to limit discovery in a manner consistent with client goals.

Make clients aware that ordinarily discovery in arbitration will be much more limited than in litigation, even in the absence of clear rules and guidelines, and cooperate with opposing counsel and the arbitrator in looking for appropriate ways to limit or streamline discovery in a manner consistent with the stated goals of the client (see *Protocol for Arbitrators*, Action 6).

Comments:

Discovery is far and away the greatest driver of cost and delay in litigation and in arbitration. In the *Protocol for Arbitration Providers*, Action 3 and the accompanying commentary discuss thoroughly the opportunities and resources available to in-house and outside counsel to greatly reduce discovery in arbitration, thus capitalizing on one of its principal advantages over litigation. Outside counsel have an obligation to make sure the client understands the limitations inherent in arbitration discovery, to assess how much (if any) discovery is truly needed in the case, and to ascertain how much time and money the client is willing to expend in turning over stones. Once that assessment is made, outside counsel should cooperate with opposing counsel and the arbitrator in establishing discovery limitations that match the client's goals.

6. Periodically discuss settlement opportunities with your client.

During the arbitration, counsel should periodically discuss with their client the possible advantages of settlement and opportunities that may arise for pursuing settlement. Unless the case has been thoroughly mediated already, counsel should ask the client to consider the possibility of mediating with an experienced mediator (who is not one of the arbitrators) at an appropriate stage in the arbitration, before substantial sums are spent on preparing for and conducting the hearing.

Comments:

In arbitration as in litigation, a reasonable settlement that avoids risk and heavy transaction costs is often in a client's best interest. Some clients seem to think that settlement may be pursued before arbitration but not once the arbitration has begun. In fact, propitious opportunities for settlement often appear at multiple points during arbitration, including during discussions with opposing counsel in preparation for the preliminary conference, after briefing or rulings on significant threshold matters, on completion of all or particular discovery, after submission of dispositive motions, during the hearing, and after submissions of post-hearing briefs. At all of these stages, outside counsel should re-evaluate their initial case assessment and discuss with the client the pros and cons of pursuing settlement. If a professionally conducted mediation did not precede the arbitration (and sometimes even if it did), counsel should raise with the client the possibility of a thorough mediation with a neutral not involved in the arbitration. In major cases, some experienced outside counsel like to establish two parallel tracks toward resolution, namely, the arbitration conducted by arbitration counsel and a separate, ongoing mediation dialogue conducted by separate counsel who are particularly skilled in the quite different mediation process.

7. Offer clients alternative billing models.

Counsel should offer clients professional service models other than an hourly fee basis, including models that provide incentives for reducing cycle time or the net costs of dispute resolution (see *Protocol for Business Users*, Action 6).

Comments:

In-house counsel are increasingly demanding that outside counsel offer alternatives to hourly billing. Arrangements such as a fixed fee for the entire arbitration or a reduced hourly rate coupled with a "success bonus" of some sort may reduce the client's transaction costs and incentivize economy and efficiency by outside counsel.[187]

8. Recognize and exploit the differences between arbitration and litigation.

Counsel should recognize the many differences between litigation and arbitration, including the absence of a jury on whom rhetorical displays and showboating may have some effect. Arbitrators are generally experienced and sophisticated professionals with whom posturing and grandstanding are almost always inappropriate, counter-productive, and wasteful of the client's time, money and credibility with the arbitrators. Counsel should keep in mind that dispositive motions are rarely granted in arbitration, and should employ such motions only where there will be a clear net benefit in terms of time and cost savings. Counsel should be aware that arbitrators tend to employ more relaxed evidentiary standards, and should therefore avoid littering the record with repeated objections to form and hearsay. An

[187] Ian Meredith & Sarah Aspinall, *Do Alternative Fee Arrangements Have a Place in International Arbitration?*, 72 ARBITRATION 22, 22-26 (2006).

advocate who objects at every turn is likely to try the patience of a tribunal and undermine his or her own credibility (see *Protocol for Arbitrators*, Actions 6, 7, 9).

Comments:

Veteran actors know that the gestures and speech patterns that work well on the stage are often ineffective, even annoying in the much different milieu of cinema or television. Arbitration is a much different milieu from litigation and requires similar adjustments in technique. Outside counsel who are serious about reducing cost and delay in arbitration must be thoroughly familiar with those differences, some obvious, some subtle, and adapt their strategy and style in ways that capitalize on arbitration's flexible, streamlined, more intimate character.

9. Keep the arbitrators informed and enlist their help promptly; rely on the chair as much as possible.

Counsel should work with opposing counsel to keep the arbitrators informed of developments in the interval between the preliminary conference and the hearing so that the arbitrators may assist in resolving potential problems and avoid inefficiencies and unnecessary expenditures of time at the hearing. If it becomes apparent during the pre-hearing phase that one or more significant pre-hearing issues cannot be resolved by agreement of the parties, counsel should not delay in putting the arbitrators to work. Failure to do so could result in the need to postpone the hearing, thus generating avoidable delay and unnecessary costs. Agreeing to have the chair of a three-arbitrator tribunal resolve discovery, scheduling, and other procedural orders will generally produce significant savings of time and money without impairing any party's substantive rights (see *Protocol for Business Users*, Action 10; *Protocol for Arbitrators*, Action 8).

Comments:

Counsel who are primarily litigators and accustomed to dealing with overloaded, somewhat inaccessible judges often fail to take advantage of one of the key benefits of arbitration, namely, readily available decision-makers. Arbitrators who are good case managers know that festering, unresolved issues can seriously derail the best of schedules and thus welcome the opportunity to promptly break any logjams that counsel cannot quickly clear. Outside counsel should not be shy in seeking arbitrator assistance whenever good faith cooperation fails to resolve any process impediments. Many such obstacles can be removed in a short conference call with a sole arbitrator or tribunal chair, without necessity of any written submissions that drive up costs. The flexibility, informality and economy potential of arbitration can only be fully realized if counsel share responsibility with the arbitrators for moving the case along at a brisk pace.

10. Help your client make appropriate changes based on lessons learned.

Once arbitration is completed, counsel should conduct an evaluation of the entire process with the client and attorneys involved in the representation. Counsel should memorialize

lessons learned and make appropriate changes to dispute resolution provisions, firm arbitration training, and firm procedures and policies (see *Protocol for Business Users*, Action 12).

Comments:

Action 12 of the *Protocol for Business Users and In-House Counsel* describes the sort of post-arbitration evaluation that should be conducted by in-house counsel in every case. Outside counsel should be part of that evaluation. In addition, however, outside counsel should conduct their own internal assessment of how they performed in the subject engagement. Did they make an accurate initial assessment of the case? Did they establish with the client a clear understanding of the client's goals and the way in which counsel would pursue them, including the cost and length of the arbitration? Did they take advantage of all opportunities presented for reducing transaction time and costs? What could they have done better? Only by answering questions of this kind will outside counsel be equipped to make necessary changes in their retainer agreements and billing models, training programs, and arbitration procedures and strategy.

11. Work with providers to improve arbitration processes.

Outside counsel should work with arbitration providers to create more effective choices for business arbitration through the development of new alternative process techniques, rules and clauses.

Comments:

Insights gained by outside counsel during arbitration and through post-arbitration evaluations can be very helpful to providers in improving their clauses, rules and administrative procedures. Outside counsel should freely share such insights with providers to the extent that is consistent with the client's business goals and any confidentiality provisions in the subject arbitration.

12. Encourage better arbitration education and training.

Outside counsel should help improve laws governing dispute resolution, including arbitration, and should encourage more effective legal, business and judicial education regarding arbitration and other forms of dispute resolution.

Comments:

Through their affiliations with law schools, bar associations, other professional organizations, and various local and national civic groups, outside counsel are often in a position to affect education and legislation concerning arbitration. Improving arbitration awareness and understanding among business executives, lawyers, judges and the general public increases the opportunities for effective use of this valuable dispute resolution process and may have the collateral benefit of increasing the demand for counsel's arbitration services.

A Protocol for Arbitrators

Whether or not business users have tailored arbitration procedures to most effectively promote economy and efficiency, they commonly rely on arbitrators to conduct arbitration proceedings economically and efficiently. Arbitrator training, experience and philosophy may all play a part in their ability to accomplish these goals through thoughtful case management; adherence to contractual limits on discovery, timetables, etc.; and effectively distinguishing, and appropriately acting upon, dispositive motions that might conclude or streamline a dispute. The following Actions are offered as detailed guidance for arbitrators in addressing these concerns.

1. Get training in managing commercial arbitrations.

It is axiomatic that all arbitrators should have the knowledge, temperament, experience and availability required by the appointment, as well as a working knowledge of arbitration law, practice and procedures of administrative organizations, and the various opportunities for realizing economies and efficiencies throughout the arbitration process. Those who wish to arbitrate large and complex commercial cases should secure special training in how to manage such arbitrations with expedition and efficiency without sacrificing essential fairness, should identify that training in their biographical materials, and should pledge to conduct the arbitration so as to adhere to any time limits in the arbitration agreement or governing rules (see *Protocol for Arbitration Providers*, Action 7).

Comments:

Just as "one size fits all" is not a cost-saving approach to arbitration rules, it is also true that being an effective arbitrator in one field does not assure effectiveness in another. Commercial arbitration, for example, is quite different from labor arbitration or consumer arbitration. One serving as an arbitrator in any of these fields should be well grounded in the arbitration law, practice, and management techniques particular to that field. Fortunately, many institutions, including the American Bar Association, the American Arbitration Association, JAMS and CPR, offer specialized instruction in managing the sort of large, complex cases that typify commercial arbitration. In addition, there are a number of excellent published practice guides, including *The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration* (James M. Gaitis, Curtis E. von Kann & Robert W. Wachsmuth, eds. 2nd ed. Juris Net 2010) and *Commercial Arbitration at Its Best: Successful Strategies for Business Users* (Thomas J. Stipanowich & Peter H. Kaskell, eds. 2001). In short, the resources are there for those who seek to learn how to arbitrate commercial cases fairly but efficiently.

2. Insist on cooperation and professionalism.

Arbitrators should communicate clearly and unequivocally from the outset their expectation that counsel can and will cooperate fully and willingly with each other and with the arbitrator in all procedural aspects of the arbitration. Arbitrators should establish a professionally cordial atmosphere, one that reinforces expectations of cooperation and reasonableness and

affords counsel the fullest opportunity to contribute to shaping the arbitration process. Arbitrators should lead by example by being prepared and punctual for all arbitration proceedings and by fixing and meeting deadlines for their own actions, such as ruling on motions, issuing orders and the like (see *Protocol for Outside Counsel*, Actions 4, 5, 8).

Comments:

Arbitrators set the tone of any arbitration, and establishing a tone of professionalism and mutual respect among participants greatly increases the prospects for developing cooperative approaches to expedite the proceedings. Arbitrators must make clear that they expect reasonable and constructive conduct by counsel and must model such conduct in their own interactions with counsel and parties. Arbitrators can hardly insist on counsel's compliance with deadlines if they themselves are late in issuing rulings, appearing at hearings, and the like. Arbitrators who make their expectations of cooperation clear and lead by example will have built a solid foundation on which to rest reasonable and efficient management actions.

3. Actively manage and shape the arbitration process; enforce contractual deadlines and timetables.

Arbitrators should recognize that commercial parties are generally looking for "muscular" arbitrators who will take control of the arbitration and actively manage it from start to finish, encourage and guide efforts to streamline the process, make a serious effort to avoid unnecessary discovery or motions, and generally conduct the arbitration fairly and thoughtfully but also expeditiously. Commercial arbitrators should utilize their considerable discretion and the natural reluctance of counsel and parties to displease the ultimate decision-maker so as to fashion, with the input and cooperation of the parties and their counsel, an arbitration process that is appropriate for the case at hand and as expeditious as possible while still affording all parties a full and fair hearing.

Arbitrators should routinely enforce contractual deadlines or timetables for arbitration except in circumstances that were clearly beyond the contemplation of the parties when the time limits were established (see *Protocol for Business Users*, Action 3). They should also encourage parties to "tee up" particular issues for early resolution when the resolution of such issues is likely to promote fruitful settlement discussions or expedite the arbitration (see *Protocol for Arbitration Providers*, Action 6; *Protocol for Outside Counsel*, Action 8).

Comments:

A recurrent plea from National Summit participants was that arbitrators take active control of commercial arbitrations. Even when counsel are cooperating with one another, there are inevitably many points during an arbitration when someone needs to make a decision or take other action to keep the proceeding "on time and under budget." All arbitration rules give arbitrators considerable discretion in managing the arbitration process. Business users, in-house counsel, and outside counsel want arbitrators who will accept that responsibility and act. Especially if they have set a collegial tone at the outset and thoughtfully consider the views of

counsel on process issues that arise, arbitrators will find that parties welcome pro-active management by the neutral person(s) to whom they have entrusted the resolution of their dispute. With input from counsel, arbitrators must announce clear procedures and deadlines and must enforce them absent exceptional circumstances. In the commercial arbitration world of today, it is no longer up to arbitrators to decide whether to be pro-active or laissez faire. Thoughtful, well-informed and active management of the arbitration is now a critical part of the service parties are paying arbitrators to deliver. Just as Harry Truman reminded us that those who can't stand the heat should get out of the kitchen, those who are unwilling to devote serious attention to managing their cases should not serve as commercial arbitrators.

4. Conduct a thorough preliminary conference and issue comprehensive case management orders.

As early in the case as possible, arbitrators should conduct a thorough Preliminary Conference in the manner prescribed in Chapter 6 of *The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration.* Arbitrators should emphasize the importance of participation by senior client representatives of each party, in person or by phone, in this critical opportunity to develop a sensible and economical plan for the arbitration. Whenever feasible, the first conference should be conducted in-person, since that setting is more conducive than conference calls to fostering cordial and cooperative relations among parties and counsel. After the conference, arbitrators should issue a comprehensive "case management order" setting forth the procedures and schedule that will govern the arbitration. Arbitrators should only permit departures from those procedures and schedule for good cause shown (see *Protocol for Outside Counsel*, Actions 3, 4, 5).

Comments:

The single greatest tool for achieving a fair and efficient commercial arbitration is a well-conducted preliminary conference. It is the best opportunity for all participants to focus their attention and creativity on how to make the arbitration run smoothly and economically. It is also the ideal time for client representatives to appreciate how costly and protracted a "scorched earth" campaign will be and how much time and money can be saved by scaling back on discovery, motions and hearing time. That is why arbitrators should insist that senior client representatives (business executives or in-house counsel) attend the conference.

Because the preliminary conference is such a critical phase of the arbitration, it must not be given short shrift. Arbitrators should assure that lead counsel appear at the conference and that all parties have reserved ample time for careful consideration of all issues. If possible, the conference should be conducted in-person, which is more conducive to cooperation and mutual brainstorming than a conference call. Unless the amount at stake is quite modest, the increased productivity of an in-person conference is almost always worth the added expense.

A productive preliminary conference requires thorough preparation by all participants. Arbitrators should provide counsel with an agenda of matters to be taken up at the conference and should invite counsel to add to the list. Arbitrators should require counsel to discuss the agenda items in an effort to reach agreement on as many items as possible and provide to the

arbitrators, prior to the conference, a joint email setting forth the agreements they have reached and their respective positions on points of disagreement. How best to conduct a preliminary conference could be a course in itself. *The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration* devotes thirty single-spaced pages to the topic. While that discussion should be consulted in full, here is a summary checklist of the matters that ought to be determined at the preliminary conference:

- Identity of ALL parties to the arbitration (no *et al* descriptions).
- The specific claims, defenses and counterclaims (if any) to be decided. Are all stated with sufficient specificity?
- Under what arbitration agreement is the arbitration being conducted?
- What law governs the arbitration procedure?
- What law governs the merits of the claims and defenses?
- What rules will apply in the arbitration?
- Is there any dispute concerning the arbitrability of any claim or defense?
- Do the arbitrators need any additional information (e.g., names of testifying witnesses and key actors who may not testify) in order to make additional disclosures?
- Does any party seek to join additional parties? On what authority and basis?
- Does any party seek consolidation with another arbitration? On what authority and basis? Who is authorized to make the decision if a party is opposed to consolidation?
- What discovery (if any) will be permitted? What procedures will apply? (See *Protocol for Arbitration Providers*, Action 3.)
- What motions (if any) will be permitted? What procedures and time frames will apply? (See *Protocol for Business Users and In-House Counsel*, Action 9.)
- Does the arbitration involve specialized scientific or technical matters for which the arbitrators should have a "tutorial"? If so, can the parties agree on a treatise or other publication for the arbitrators to read, or neutral expert to teach the Panel?
- Would appointment of one or more neutral experts be appropriate?
- How will the parties submit documents and information to the arbitrators and to each other- email, fax, electronic filing, hand delivery?
- At what location(s) will the hearing be held?
- On what dates will the hearing be held?
- Do the parties need subpoenas for non-party witnesses? What authority to issue?
- Procedures and standards for seeking a continuance of the hearing.
- Procedures for the conduct of the hearing (see Action 9 below).
- Nature of the award (see Action 10 below).
- Due date of the award.

Following the preliminary conference, arbitrators should promptly issue a case management order that memorializes the determinations made on all the foregoing matters and any others addressed at the conference. If subsequent developments require some adjustments in that order, an amended case management order should be promptly be prepared and issued.

5. Schedule consecutive hearing days.

In order to avoid the delay and excess costs caused by having multiple hearing sessions, arbitrators should schedule the hearing on consecutive days whenever possible. Arbitrators should encourage the parties to make a realistic estimate of the number of hearing days they will need and should reserve a sufficient number of days for completing the hearing in the time allotted, even if unexpected developments, or unduly optimistic estimates, lead to a somewhat longer hearing than originally projected.

Comments:

Arbitration hearings that do not run on consecutive days involve much greater expense than those that do.[188] Apart from the possibility of repetitive travel expenses, there is duplicative deployment, preparation and refreshing tasks for all participants and added work that people think to do in the time between sessions. Spreading the hearing out over a period of weeks or months obviously protracts the arbitration. Arbitrators should attempt to schedule consecutive hearing days whenever possible.[189] Arbitrators should also be sure that a realistic number of days are reserved for the hearing. Counsel frequently underestimate, sometimes drastically, the amount of time they will take for examinations and arguments at the hearing. It is better to schedule an ample number of days and cancel those not needed than to schedule too few days and then have to find, on the calendars of busy lawyers and arbitrators, additional, mutually available time for completing the hearing.

6. Streamline discovery; supervise pre-hearing activities.

Arbitrators should make clear at the preliminary conference that discovery is ordinarily much more limited in arbitration than in litigation and should work with counsel in finding ways to limit or streamline discovery in a manner appropriate to the circumstances. Arbitrators should actively supervise the pre-hearing process. They should keep a close eye on the progress of discovery and other preparations for the hearing and should promptly resolve any problems that might disrupt the case schedule (usually through a conference call preceded by a jointly-prepared email outlining the nature of the parties' disagreements and each side's position with regard to the dispute, rather than formal written submissions) (see *Protocol for Outside Counsel*, Action 5).

Comments:

The necessity of containing discovery and multiple ways of doing so are thoroughly discussed in the *Protocol for Arbitration Providers*, Action 3. Such procedures are typically set at the preliminary conference and memorialized in the case management order. However, it is

[188] The AAA COMMERCIAL RULES provide that, "Generally hearings will be scheduled on consecutive days or in blocks of consecutive days in order to maximize efficiency and minimize costs." AAA COMMERCIAL RULES, *supra* note 160, at R. L-4(h).

[189] When a hearing may require multiple weeks, it may be appropriate to have one week day off per week so that counsel and arbitrators can keep up with their other cases.

equally essential for arbitrators to monitor the parties' progress with discovery and other pre-hearing activities and to quickly step in if unexpected developments threaten to disrupt the schedule. Some arbitrators like to schedule periodic conference calls to check the status of pre-hearing activities. Others fear this may encourage counsel to pile up problems for the periodic calls rather than work them out themselves and thus instruct counsel to request a conference call promptly after serious, good faith efforts at resolution have failed. Whichever approach is taken, arbitrators need to "stay on top of the case" from preliminary conference to hearing to make sure that the parties' expectations about the length of the arbitration are met.[190]

An excellent template for arbitrator control of discovery is provided by the *New York State Bar Association Report on Arbitration Discovery* and *JAMS Recommended Arbitration Discovery Protocols* based on the Report.[191]

7. Discourage the filing of unproductive motions; limit motions for summary disposition to those that hold reasonable promise for streamlining or focusing the arbitration process, but act aggressively on those.

Arbitrators should establish procedures to avoid the filing of unproductive and inappropriate motions. They should generally require that, before filing any motion, the moving party demonstrates, either in a short letter or a telephone conference, that the motion is likely to be granted and is likely to produce a net savings in arbitration time and/or costs.

Arbitrators should explain to parties that dispositive motions involving issues of fact are granted less frequently in arbitration than in litigation because there is no appellate court to reinstate the case if they erred in dismissing it. However, there are matters for which a dispositive motion, especially a motion for partial summary disposition, might provide an opportunity for shortening, streamlining or focusing the arbitration process—as, for example, where arbitrators are able to rule on a statute of limitations defense, determine whether a contract permits claims for certain kinds of damages, or construe a key contract provision. Thus, arbitrators should encourage parties to be judicious in filing motions but should be willing to entertain and rule on them in situations where the motion presents a realistic possibility of shortening, streamlining or focusing the arbitration process.

Comments:

After discovery, motions are probably the leading cause of excessive cost and delay in commercial arbitrations. Veteran litigators, acting largely out of habit, frequently file motions

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[190] The ICDR has established a voluntary set of guidelines designed to promote fair and expeditious arbitration proceedings by encouraging voluntary exchanges of the most material documents. *See* ICDR GUIDELINES, *supra* note 140.

[191] NEW YORK STATE BAR ASSOCIATION, REPORT ON ARBITRATION DISCOVERY IN DOMESTIC COMMERCIAL CASES (2009) *available at* http://www.nysba.org/Content/NavigationMenu42/April42009HouseofDelegatesMeetingAgendaItems/DiscoveryPreceptsReport.pdf; JAMS RECOMMENDED ARBITRATION DISCOVERY PROTOCOLS FOR DOMESTIC, COMMERCIAL CASES (2010) *available at* http://www.jamsadr.com/arbitration-discovery-protocols/.

for summary disposition and other relief, which impose substantial burdens of briefing and argument on all counsel and intensive factual and legal review by arbitrators. While arbitrators certainly have the authority to grant such motions, the absence of appellate review typically and properly makes them quite cautious about doing so, especially when the other side has had little or no discovery. On the other hand, there are purely legal issues, such as statute of limitations, interpretation of a contract, or identifying the required elements of a cause of action, which arbitrators can and should undertake to decide early in a case, particularly when a decision in favor of the movants could substantially reduce transaction time and cost for both sides. Arbitrators need to educate counsel on which sorts of motions are likely to be productive in arbitration and which are not and then establish procedures for processing the former quickly and efficiently.[192]

8. Be readily available to counsel.

Arbitrators should recognize that their acceptance of an arbitral appointment carries with it an obligation to be reasonably available to the parties to resolve procedural, process or scheduling disputes that could delay the timely resolution of the case. Thus, they should be willing on fairly short notice (generally not more than two or three business days) to hold a conference call with the parties in order to resolve such matters.

In litigation, parties sometimes wait months to present an issue to a judge or to receive the judge's decision; often the case is at a near standstill until the issue is resolved. Arbitration parties can escape these long delays, but only if arbitrators are prepared to hear their arguments promptly and issue prompt decisions. Arbitrators who are committed to speed and economy in commercial arbitration must encourage counsel to consult them quickly when obstacles to schedule compliance arise, must be willing to convene a conference call within a few days of such a contact, and must be able to rule either at the end of the call or very shortly thereafter.

9. Conduct fair but expeditious hearings.

Arbitrators should conduct hearings in a manner that is both fair and expeditious as described in detail in Chapter 9 of *The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration.*

[192] For example, arbitrators may provide in their case management order that (1) prior to filing any dispositive motion, the moving party must provide the arbitrator with a letter of not more than five pages explaining why the motion is ripe, likely to be granted, and likely to save time and money in the arbitration; (2) the opposing party may have five days to respond with a five page letter; and (3) the arbitrator will promptly decide whether to entertain the motion. If he or she does so, the arbitrator may set an expedited briefing schedule and page limits on the briefs. After receiving the briefs, the arbitrator may deny the motion without argument or schedule a prompt oral argument (perhaps by phone) and then rule. *See generally* CCA GUIDE TO BEST PRACTICES, *supra* note 84.

Comments:

Every day of a hearing, in which one or more lawyers, paralegals, client representatives and witnesses are in attendance, having prepared hours for that day's events, typically costs a client many thousands of dollars. While it is certainly important that the proceedings be fair and contribute to a sound result, it is also important that the proceedings be efficient and respectful of the parties' time and money. Conducting a fair but efficient hearing is almost entirely in the hands of the arbitrators and is the best hallmark of a truly accomplished commercial arbitrator. Chapter 9 of *The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration* provides 45 pages of guidance on how to accomplish that goal and should be reviewed in detail. Major steps toward an efficient arbitration hearing include the following:

- Make clear to counsel that, unless formal rules of evidence apply (which is rare in arbitration), virtually all non-privileged evidence offered by any party will be received and traditional objections (hearsay, foundation, etc.) will not be entertained. Urge counsel to focus on the probativeness of evidence, not its admissibility.
- Determine what order of proof is most appropriate for the particular case, including sequencing the hearing in progressive phases, taking both sides' witnesses issue by issue, or ruling on threshold issues before receiving evidence on other issues.
- Encourage the parties to submit a joint collection of core exhibits in chronological order with key portions highlighted.
- Establish an expedited procedure for receipt of other exhibits. For example, require all parties to submit their tabbed, index exhibits in advance of the hearing and advise counsel that all such exhibits will be received en masse at the start of the hearing save for any that are privileged or genuinely challenged as to authenticity.
- Require that parties show demonstrative exhibits, including power point slides, to each other a reasonable time before they are used in the hearing so that time is not wasted in assessing and possibly challenging their accuracy.
- Discuss with counsel the possible use of written direct testimony for some or all witnesses.
- Establish procedures to narrow and highlight the matters on which opposing experts disagree. For example, require experts to confer before hearing and provide the arbitrators with a list of the points on which they agree, the points on which they disagree, and a summary statement of their respective opinions on the latter.
- Limit the presentation of duplicative or cumulative testimony.
- Make appropriate arrangements for receiving by conference call or otherwise testimony from witnesses in remote locations.
- Consider receiving affidavits or pre-recorded testimony regarding less critical matters.
- Sequester witnesses until they testify unless all parties request otherwise.
- Establish and maintain a realistic daily schedule for the hearing. Start hearings on time and don't allow excessive recesses and lunch breaks.

- Encourage the parties to employ a “chess clock” that limits the total number of ours available to counsel for examination and argumentation.
- At the close of each hearing day (NOT the beginning), discuss with counsel any administrative matters that need attention and monitor their progress against the projected hearing schedule. If needed to meet the scheduled completion date, consider starting hearings earlier, ending them later, or having one or more weekend sessions.
- Don't hesitate to tell counsel when a point has been understood and they may move on, or when a point was not understood and requires clarification.
- Make sure, well prior to the hearing, that counsel have worked out all logistical arrangements concerning transcripts, shared use of power point or other equipment, etc.
- Freely take witnesses out of turn when necessary to accommodate scheduling conflicts.
- Prohibit parties from running out of witnesses on any given day. "Call your next witness" is a powerful tool for keeping a hearing moving.[193]

Through these and similar techniques practiced by experienced arbitrators, commercial arbitration hearings can be conducted both fairly and efficiently.

10. Issue timely and careful awards.

Arbitrators should issue carefully crafted awards that meet the parties' needs in terms of format, level of detail, and timing, and that are unlikely to lead to additional cost and delay due to vacatur and further proceedings. See Chapter 11 of *The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration.*

Comments:

Arbitration award are of multiple types (e.g., interim awards, partial final awards, and final awards) and multiple forms (e.g., bare awards, reasoned awards, awards with findings of fact and conclusions of law). There are pros and cons to each form and type. *See generally* Chapter 11 of *The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration*.[194] Arbitrators should explain these considerations to the parties and ascertain what sort of award they want. Arbitrators should then exercise maximum care and judgment in crafting such an award and issuing it within any applicable time limit. Vacatur proceedings can add substantially to the cost and length of an arbitration; arbitrators thus have a duty to the parties to render awards that are as "vacatur-proof" as possible.

[193] *Id.* at Ch. 9.

[194] *Id.* at Ch. 11.

Appendices

Appendix A: Bibliography/Helpful Sources

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NEW YORK STATE BAR ASSOCIATION

Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of Domestic Commercial Arbitrations

And

Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of International Arbitrations

Prepared by
Dispute Resolution Section

NYSBA

Introduction

Set forth here are separate Guidelines for The Arbitrator's Conduct of the Pre-Hearing Phase of: (i) domestic commercial arbitrations, and (ii) international arbitrations. The Domestic Guidelines were unanimously approved by the Executive Committee and House of Delegates of the New York State Bar Association ("NYSBA") in April 2009, and the International Guidelines were similarly approved in November 2010.

The Guidelines were developed by NYSBA's Dispute Resolution Section Arbitration Committee. The Committee perceived that there was a need to provide guidance to arbitrators and practitioners to help combat increasing complexity and associated cost and delay associated with prehearing proceedings in domestic commercial arbitrations. In order to address this need, a subcommittee was formed to study and draft guidelines for the pre-hearing phase of domestic commercial arbitration ("Domestic Guidelines").

As part of its study, the Committee conducted in-depth interviews with numerous leaders of the New York arbitration bar, including advocates, arbitrators, in-house counsel and representatives of administering organizations, who brought significantly different perspectives to bear on the pre-hearing phase of domestic commercial arbitration. These interviews took the form of a series of in person meetings between subcommittee members and well known arbitration practitioners and, in addition, subcommittee members spoke with many other knowledgeable and respected individuals in a more informal manner. The subcommittee also: (i) studied work done by other organizations on the subject of efficient conduct of domestic commercial arbitration; (ii) engaged in independent legal research on a number of topics which related to domestic commercial arbitration; and (iii) reviewed numerous articles and treatises which also were relevant. Emerging from this effort was a set of guidelines which, if followed, will hopefully help arbitrators handle the pre-hearing phase of domestic

commercial arbitration in a manner which is both cost-effective and fair.

Following the completion of the Domestic Guidelines, the Arbitration Committee determined that it would also be useful to provide guidance for the practice of international arbitration in New York. However, the Committee recognized that because practices in international arbitration differ significantly from those in United States domestic arbitration, the guidance should be different in the international context. Given these significant differences, the Committee formed a separate subcommittee ("International Subcommittee") comprised of prominent practitioners of international arbitration to draft Guidelines for particular use in the pre-hearing phase of international arbitration ("International Guidelines"). In pursuing this project, the International Subcommittee conducted the same kinds of in depth interviews, research and analysis as was done by the domestic subcommittee. However, the focus of the International Subcommittee was more limited since its task was to modify the Domestic Guidelines only where necessary to accommodate the very real differences between domestic and international arbitration.

Set forth below are a few more prefatory comments with respect to each of these sets of Guidelines.

GUIDELINES FOR THE ARBITRATOR'S CONDUCT OF THE PRE-HEARING PHASE OF DOMESTIC COMMERCIAL ARBITRATIONS

Introduction

For years, domestic commercial arbitration was in large part viewed in New York as a vehicle for the rapid resolution of relatively minor disputes. Its primary attraction was that it dispensed with many of the expensive and time-consuming characteristics of litigation while at the same time permitting an expeditious but fair result.

More recently, domestic commercial arbitration has increasingly been used in the largest, most complex commercial cases. Not surprisingly, this trend has led to efforts to inject into domestic commercial arbitration expensive elements that had traditionally been reserved for litigation—elements such as interrogatories; requests to admit; dispositive motions; lengthy depositions; and massive requests for documents, including electronic data. To a limited extent, this development is justified since the arbitration of large commercial cases must include enough discovery to permit a fair result in a complex setting. At present, however, arbitrators conducting the pre-hearing phase of domestic commercial arbitrations have too often permitted discovery which goes far beyond a desirable expansion of arbitration discovery to accommodate increased complexity. And at the other end of the spectrum, arbitrators are sometimes driven by interests of efficiency and cost-effectiveness to place limits on discovery which are too strict to permit a fair result in a complex domestic commercial arbitration. Thus, there has emerged an unfortunate element of unpredictability as to what parties might expect in the pre-hearing phase.

Despite the foregoing criticisms, the fact remains that domestic commercial arbitration has privacy and party control aspects that are not present in court and, in addition, it is still the general experience that such arbitration is less costly, speedier and more efficient than litigation. Still, there is clearly room for improvement and in pursuit of that goal, the Arbitration Committee has developed the following guidelines for the conduct of prehearing procedures in domestic commercial arbitration to help arbitrators set a balance between the sometimes competing goals of conducting an efficient proceeding and enabling the parties to fully present their respective cases.

The Key Element - Good Judgment of the Arbitrator

- While some commercial arbitrations may have similarities, for the most part each case involves unique facts and circumstances. As a result, arbitration discovery must be adapted to meet the unique characteristics of the particular case, and there is no set of objective rules which, if followed, would result in one "correct" approach for all commercial cases.

- The experience, talent and preferences brought to arbitration will vary with the arbitrator. It follows that the framework of arbitration discovery will always be based on the judgment of the arbitrator, brought to bear in the context of variables such as the arbitrator's background, applicable rules, the custom and practice for arbitrations in the industry in question, and the expectations and preferences of the parties and their counsel. Arbitrators must exercise that judgment wisely, to produce a discovery regimen that is specific and appropriate to the given case, to ensure enough discovery and evidence to permit a fair result, balanced against the need for a less expensive and more efficient process than would have occurred if the case had gone to trial.

  Attached as Exhibit A is a list of factors which, if taken into consideration by an arbitrator when addressing the type and breadth

of arbitration discovery, should assist the arbitrator in exercising judgment in a way that will limit discovery to the extent possible while taking into account all relevant factors.

Early Attention to Discovery by the Arbitrator

- It is important that the ground rules governing an arbitration be clearly established in the period immediately following the initiation of the arbitration. Therefore, following appointment, the arbitrator should promptly study the facts and the issues and be fully prepared to preside effectively over the early, formative stages of the case in a way that will ultimately lead to an expeditious, cost-effective and fair process.

- The type and breadth of the discovery regime in an arbitration is subject to applicable rules, which vary significantly with different administering organizations but lack the specificity that one finds, for example, in the Federal Rules of Civil Procedure. That being so, it is imperative for the arbitrator to avoid uncertainty and surprise by ensuring that the parties understand at an early stage what the basic ground rules for discovery are going to be. Early attention to the scope of discovery increases the chance that parties will adopt joint principles of fairness and efficiency before partisan positions arise in concrete discovery disputes.

- The type and breadth of arbitration discovery should be high on the agenda for the first pre-hearing conference at the start of the case. If at all possible, an early, formative discussion about discovery should be attended by in-house counsel or other party representatives, as well as by outside counsel. If practicable, it may also increase the likelihood of an early, meaningful understanding about discovery if the first pre-hearing conference is an in-person meeting, as opposed to a conference call.

- The arbitrator will enhance the chances for limited, efficient discovery if, at the first pre-hearing conference, he/she sets ambitious hearing dates and aggressive interim deadlines which, the parties are told, will be strictly enforced, and which, in fact, are thereafter strictly enforced.

- Where appropriate, the arbitrator should explain at the first pre-hearing conference that document requests:

  should be limited to documents which are directly relevant to significant issues in the case or to the case's outcome.

  should be restricted in terms of time frame, subject matter and persons or entities to which the requests pertain, and

  should not include broad phraseology such as "all documents directly or indirectly related to."

Party Preferences

- Overly broad arbitration discovery can result when all of the parties seek discovery beyond what is needed. This unfortunate circumstance may be caused by parties and/or advocates who are inexperienced in arbitration and simply conduct themselves in a fashion which is commonly accepted in court litigation. In any event, where all participants truly desire unlimited discovery, the arbitrator must respect that decision, since arbitration is governed by the agreement of the parties. In such circumstances, however, the arbitrator should ensure that the parties have knowingly agreed to such broad discovery and that they have intentionally withheld from the arbitrator the power to limit discovery in any fashion. The arbitrator should also make sure that the parties understand the impact of an agreement for broad discovery by discussing the cost of the course on which the parties propose to embark and the benefit or negative consequences likely

to be derived therefrom. The arbitrator should endeavor to have these communications with in-house counsel or other party representatives, as well as with outside counsel, to ensure that the parties, themselves, fully understand the discovery decision.

- If, after discussion with the arbitrator, the parties still wish to engage in expansive discovery, the arbitrator should, nonetheless, pursue agreement on limitations such as the number and length of depositions, and the total time period in which depositions and other forms of discovery are to be conducted.

- Where one side wants broad arbitration discovery and the other wants narrow discovery, the setting is ideal for the arbitrator to set meaningful limitations since the arbitrator has far more latitude in such circumstances than when all parties have agreed on broad, encompassing discovery.

E-Discovery

- The use of electronic media for the creation, storage and transmission of information has substantially increased the volume of available document discovery. It has also substantially increased the cost of the discovery process.

- To be able appropriately to address issues pertaining to e-discovery, arbitrators should at least familiarize themselves generally with the technological issues that arise in connection with electronic data. Such issues include the format in which documents are produced, and the availability and need (or lack thereof) for production of "metadata." A basic understanding by the arbitrator of e-discovery technology and terminology can help the arbitrator reduce discovery costs for the parties.

- While there can be no objective standard for the appropriate scope of e-discovery in all cases, an early order containing language along the following lines can be an important

first step in limiting such discovery in a large number of cases:

> There shall be production of electronic documents only from sources used in the ordinary course of business. Absent a showing of compelling need, no such documents are required to be produced from back-up servers, tapes or other media.
>
> Absent a showing of compelling need, the production of electronic documents shall normally be made on the basis of generally available technology in a searchable format which is usable by the party receiving the e-documents and convenient and economical for the producing party. Absent a showing of compelling need, the parties need not produce metadata with the exception of header fields for email correspondence.
>
> Where the costs and burdens of e-discovery are disproportionate to the nature and gravity of the dispute or to the relevance of the materials requested, the arbitrator will either deny such requests or order disclosure on condition that the requesting party advance the reasonable cost of production to the other side, subject to further allocation of costs in the final award.

Legal Considerations

- Section 10 of the Federal Arbitration Act provides that one of the very few ways an arbitration award can be vacated is "where the arbitrators were guilty of misconduct in refusing ... to hear evidence pertinent and material to the controversy." Some arbitrators tend to grant extensive discovery out of concern that any other approach might lead to a vacated award under Section 10. The Committee believes, however, that this concern is greatly overstated and that very few arbitration awards are vacated because the

arbitrator put strict limits on discovery in the interests of efficiency and cost-effectiveness.

- Some advocates fear malpractice claims if they fail to pursue scorched earth tactics in connection with arbitration discovery. Such a concern ignores the possibility that the mindless pursuit of marginal discovery or the failure to seek reasonable limits on discovery could also lead to a claim for malpractice. In any case, there should be candid communication between attorney and client in the early stages of an arbitration with respect to the scope of discovery that is to be pursued.

Arbitrator Tools

- While arbitrators are expected to act in a deliberate and judicious fashion, always affording the parties due process, it is also essential for the arbitrator to maintain control of the proceedings and to move the case forward to an orderly and timely conclusion. The arbitrator has many tools that can be used both to ensure the fairness of the proceedings and to prevent disruption in the rare case where one side may withhold its cooperation. Those tools may include, for example, the making of adverse factual inferences against a party that has refused to come forward with required evidentiary materials on an important issue, the preclusion of proof, and/or the allocation of costs. Depending upon the applicable institutional rules and arbitration law, it may be possible to award attorneys' fees and, in extreme cases, other monetary sanctions against an obstructing party, *Superadio Ltd. P'ship v. Winstar Radio Productions,* 446 Mass. 330 (2006) (discovery abuse in AAA arbitration); *Goldman Sachcs & Co. v. Patel,* 1999 N.Y. Misc. LEXIS 681 * 17-23 (S. Ct. N.Y. Co.) (NASD arbitration), and possibly even against obstructing counsel. On the last point, see *Polin v. Kellwood Co.* 103 F. Supp.2d 238 (S.D.N.Y. 2000) (monetary award against counsel affirmed), aff d, 34 Appx. 406 (2d Cir.), *cert denied*, 537 U.S. 1003 (2002). *But see*

In re Interchem Asia 2000 PTE Ltd. v. Oceana Petrochemicals AG, 378 F. Supp.2d 347, 355-57 (S.S.N.Y. 2005) (monetary award against counsel vacated); *see also Millmaker v. Bruso* 2008 U.S. Dist. LEXIS 5548 (S.D. Tex. 2008).

- Sanctions may even include the resolution of a claim or defense against a party. See *First Preservation Capital, Inc. v. Smith Barney Harris Upham & Co.* 939 F. Supp.1559 (S.D. Fla. 1996) (NASD arbitration); Patel, *supra* (NASD arbitration; failure to pay monetary sanction and failure to obey arbitrator orders).

- Despite some disagreement as to the outer limits of the arbitrator's authority to impose sanctions, and the paucity of cases on the subject, the cases that do exist demonstrate the courts' generally deferential approach to review of such awards.

Artfully Drafted Arbitration Clauses

- There is significant potential for dealing with time and other limitations on discovery in the arbitration clauses of commercial contracts. An advantage of such drafting is that it is much easier for parties to agree on such limitations before a dispute has arisen. A drawback, however, is the difficulty of rationally providing for how best to arbitrate a dispute that has not yet surfaced. Thus, the use of such clauses may be most productive in circumstances in which parties have a good idea from the outset as to the nature and scope of disputes that might thereafter arise.

- In order for rational time and other discovery limitations to be effectively included in an arbitration clause, it is necessary that an attorney with a good understanding of arbitration be involved in the drafting process.

Depositions

- Because depositions have traditionally not been a major part of the arbitration process,

the best exercise of an arbitrator's judgment might be to direct no depositions or the minimum number of depositions in instances, for example, where the parties' positions are already well known or are fully reflected in surrounding documents.

- However, the size and complexity of commercial arbitrations have now grown to a point where one or more depositions can serve a real purpose in many instances. In fact, at times, the absence of any depositions in a complex arbitration can significantly lengthen the cross-examination of key witnesses and unnecessarily extend the completion of the hearing on the merits. So too, a limited deposition in advance of document requests might serve to focus and restrict the scope of document discovery and/or reduce the risk that the other party is hiding relevant evidence.

- If not carefully regulated, deposition discovery in arbitration can get out of control and become extremely expensive, wasteful and time-consuming. In determining whether and what scope of depositions may be appropriate in a given case, an arbitrator should balance these considerations, consider the factors set forth in Exhibit A, and confer with counsel for the parties. If an arbitrator determines that it is appropriate to permit depositions, it may make sense for an arbitrator to solicit agreement at the first pre-hearing conference on language such as the following

> Each side may take *** discovery depositions. Each side's depositions are to consume no more than a total of *** hours. There are to be no speaking objections at the depositions, except to preserve privilege. The total period for the taking of depositions shall not exceed *** weeks.[1]

1 The asterisked numbers can of course be changed to comport with the particular circumstances of each case.

Discovery Disputes

- It is essential that arbitration discovery disputes be resolved promptly and efficiently since exhaustive discovery motions can unduly extend the discovery period and significantly add to the cost of the arbitration. In addressing discovery disputes, the arbitrator should consider the following practices which can increase the speed and cost-effectiveness of the arbitration:

  Where there is a panel of three arbitrators, the parties may agree, by rule or otherwise, that the Chair or another member of the panel is authorized to resolve discovery issues, acting alone. While the designated panel member may still wish to consult the other arbitrators on matters of importance, the choice of a single arbitrator to decide discovery issues can nonetheless avert scheduling difficulties and avoid the expense and delay of three people separately engaging in the laborious tasks related to resolving discovery issues.

  Lengthy briefs on discovery matters should be avoided. In most cases, a prompt discussion or submission of brief letters will sufficiently inform the arbitrator with regard to the issues to be decided.

  The parties should be required to negotiate discovery differences in good faith before presenting any remaining issues for the arbitrator's decision.

  The existence of discovery issues should not impede the progress of discovery in other areas where there is no dispute.

Requests for Adjournments

- Requests for adjournment of the hearing on the merits are not uncommon and can cause significant delay. While the arbitrator may not reject a joint application of all

parties to adjourn the hearing, the fact is that such adjournments can cause inordinate disruption and delay by needlessly extending unnecessary discovery and can substantially detract from the cost-effectiveness of the arbitration. If the request for adjournment is by all parties and is based on a perceived need for further discovery (as opposed to personal considerations), the arbitrator should ensure that the parties understand the implications of the adjournment they seek and, if possible and except for exceptional circumstances, the arbitrator should try to dissuade them from the adjournment in a way that would still accommodate their perceived needs. The arbitrator may request that the represented parties attend any conference to discuss these subjects if, in the arbitrator's judgment, the presence of clients may facilitate the adoption of a practical solution.

- If one party seeks a continuance and another opposes it, then the arbitrator has discretion to grant or deny the request. Particularly with busy arbitrators and advocates, such requests can cause long delays. In general, courts are well aware that a core goal of arbitration is speed and cost-effectiveness and will not disturb an arbitrator's rejection of an unpersuasive request for an adjournment. However, the arbitrator should carefully consider the merits of the request and the legitimate needs of the parties, as well as the proximity of the request to the scheduled hearing and any earlier requests for adjournments.

- Last minute requests for adjournments sometimes come as a complete surprise to the arbitrator who assumed all was going well because he/she had not heard from the parties for months. In such circumstances, the arbitrator may be at least in part responsible for the breakdown of the process since the arbitrator should have scheduled periodic conference calls throughout the pre-hearing

phase. When the arbitrator does this, he/she will likely get an early sense of problems in maintaining the pre-hearing schedule and will be in a much better position to deal with such problems at a relatively early stage rather than at the eleventh hour.

Written Witness Statements

- The use of written witness statements in lieu of direct testimony ("Witness Statements") has certain benefits. Witness Statements can save considerable time at the hearing. From a discovery perspective, they can avoid or lessen the need for depositions since the cross-examining party has detailed advanced notice of the witness' direct testimony. The effectiveness of witness statements as a discovery tool is greatly increased if they are produced relatively early in the proceedings.

- The use of witness statements also has drawbacks, i.e.: (i) they are written by lawyers and often do not reflect how the witness would actually have said something; (ii) being written by lawyers, the Witness Statements can be very expensive; (iii) the witness often trusts the lawyer too much and only cursorily reviews the Witness Statement before signing it; and (iv) oral direct testimony can be a good time for an arbitrator to assess credibility from a perspective other than cross-examination.

  Thus, use of Witness Statements should be considered on a case by case basis, particularly in connection with secondary witnesses.

Dispositive Motions

- In arbitration, "dispositive" motions can cause significant delay and unduly prolong the discovery period. Such motions are commonly based on lengthy briefs and recitals of facts and, after much time, labor and expense, are generally denied on the ground that they raise issues of fact and are inconsistent with the spirit of arbitration. On the other hand,

dispositive motions can sometimes enhance the efficiency of the arbitration process if directed to discrete legal issues such as statute of limitations or defenses based on clear contractual provisions. In such circumstances an appropriately framed dispositive motion can eliminate the need for expensive and time consuming discovery. On balance, the arbitrator should consider the following procedure with regard to dispositive motions:

Any party wishing to make a dispositive motion must first submit a brief letter (not exceeding five pages) explaining why the motion has merit and why it would speed the proceeding and make it more cost-effective. The other side would have a brief period within which to respond.

Based on the letters, the arbitrator would decide whether to proceed with more comprehensive briefing and argument on the proposed motion.

If the arbitrator decides to go forward with the motion, he/she would place page limits on the briefs and set an accelerated schedule for the disposition of the motion.

Under ordinary circumstances, the pendency of such a motion should not serve to stay any aspect of the arbitration or adjourn any pending deadlines.

Exhibit A

Relevant Factors In Determining The Appropriate Scope Of Arbitration Discovery

Nature of The Dispute

- The factual context of the arbitration and of the issues in question with which the arbitrator should become conversant before making a decision about discovery.
- The amount in controversy.
- The complexity of the factual issues.
- The number of parties and diversity of their interests.
- Whether any or all of the claims appear, on the basis of the pleadings, to have sufficient merit to justify the time and expense associated with the requested discovery.
- Whether there are public policy or ethical issues that give rise to the need for an in depth probe through relatively comprehensive discovery.
- Whether it might be productive to initially address a potentially dispositive issue which does not require extensive discovery.

Agreement of The Parties

- Agreement of the parties, if any, with respect to the scope of discovery.
- Agreement, if any, by the parties with respect to duration of the arbitration from the filing of the arbitration demand to the issuance of the final award.
- The parties' choice of substantive and procedural law and the expectations under that legal regime with respect to arbitration discovery.

Relevance and Reasonable Need For Requested Discovery

- Relevance of the requested discovery to the material issues in dispute or the outcome of the case.

- Whether the requested discovery appears to be sought in an excess of caution, or is duplicative or redundant.

- Whether there are necessary witnesses and/or documents that are beyond the tribunal's subpoena power.

- Whether denial of the requested discovery would, in the arbitrator's judgment (after appropriate scrutinizing of the issues), deprive the requesting party of what is reasonably necessary to allow that party a fair opportunity to prepare and present its case.

- Whether the requested information could be obtained from another source more conveniently and with less expense or other burden on the party from whom the discovery is requested.

- To what extent the discovery sought is likely to lead, as a practical matter, to a case-changing "smoking gun" or to a fairer result.

- Whether broad discovery is being sought as part of a litigation tactic to put the other side to great expense and thus coerce some sort of result on grounds other than the merits.

- The time and expense that would be required for a comprehensive discovery program.

- Whether all or most of the information relevant to the determination of the merits is in the possession of one side.

- Whether the party seeking expansive discovery is willing to advance the other side's reasonable costs and attorneys' fees

in connection with furnishing the requested materials and information.

- Whether a limited deposition program would be likely to: (i) streamline the hearing and make it more cost-effective; (ii) lead to the disclosure of important documents not otherwise available; or (iii) result in expense and delay without assisting in the determination of the merits.

Privilege and Confidentiality

- Whether the requested discovery is likely to lead to extensive privilege disputes as to documents not likely to assist in the determination of the merits.

- Whether there are genuine confidentiality concerns with respect to documents of marginal relevance. Whether cumbersome, time-consuming procedures (attorneys' eyes only, and the like) would be necessary to protect confidentiality in such circumstances.

Characteristics and Needs of The Parties

- The financial and human resources the parties have at their disposal to support discovery, viewed both in absolute terms and relative to one another.

- The financial burden that would be imposed by a broad discovery program and whether the extent of the burden outweighs the likely benefit of the discovery.

- Whether injunctive relief is requested or whether one or more of the parties has some other particular interest in obtaining a prompt resolution of all or some of the controversy.

- The extent to which the resolution of the controversy might have an impact on the continued viability of one or more of the parties.

NEW YORK STATE BAR ASSOCIATION GUIDELINES FOR THE ARBITRATOR'S CONDUCT OF THE PRE-HEARING PHASE OF INTERNATIONAL ARBITRATIONS

Introduction

International arbitration is a substantial practice in New York. Many international contracts provide for applicability of New York law, and such contracts often specify New York as a venue for international arbitration. International arbitration is in many respects very different from domestic arbitration in New York. Among other things, the expectation in the New York international arbitration community is that there will be far less pre-hearing disclosure in international arbitration than is typically encountered in domestic arbitration.

There has nonetheless been concern in recent years that the choice of New York as the site of an international arbitration might prompt the arbitral tribunal to depart from normal international practice by imposing American style discovery on the parties. It is the view of the international arbitration bar in New York that these concerns are not justified. Rather, unless the parties agree otherwise, international arbitration in New York is normally conducted in accordance with internationally accepted practices.

The International Guidelines set forth below are intended to provide guidance to arbitrators as to how best to conduct arbitrations consistent with international arbitration practice and to provide a better understanding to the international arbitration

community of the prevailing practices in international arbitration proceedings which are sited in New York.[2]

The Key Element – an Arbitrator's Sound Judgment Informed By an International Perspective

- While some international cases may have similarities, for the most part each case involves unique facts and circumstances. As a result, pre-hearing arbitration proceedings including whether any pre-hearing exchange of information or taking of evidence will be allowed and, if so, how much, must be adapted to meet the unique characteristics of the particular case. There is no set of objective rules which, if followed, would result in one "correct" approach for all international cases.

  Pre-hearing exchange of information and taking of evidence are collectively referred to in these Guidelines as "Pre-Hearing Disclosure."

- In international arbitrations, documents on which parties intend to rely are exchanged. However, beyond that exchange, there is a strong presumption against Pre-Hearing Disclosure which in any way approaches the scope of discovery which one might expect in a case which is litigated in a U.S. court. The same presumption applies in international arbitration proceedings pending in New York

2. A number of arbitration tribunals and organizations have in recent years developed proposed rules and protocols regarding the collection, disclosure and examination of evidence in international arbitrations. Parties arbitrating in New York are free to be guided by any of these rules. NYSBA has relied on some of this prior work in drafting these International Guidelines. Among the best known of these prior contributions are the Rules on the Taking of Evidence in International Arbitration ("IBA Rules") which were adopted by the Council of the International Bar Association on May 29, 2010 and which are used in many international arbitrations around the world. The within NYSBA International Guidelines complement and in some cases supplement the IBA Rules. Among the areas in which these NYSBA International Guidelines supplement the provisions of the IBA Rules are: the first preliminary conference, electronic discovery, disputes regarding pre-hearing disclosure, adjournments, dispositive motions and the factors to be considered in determining the appropriate scope of pre-hearing disclosure.

subject to the considerations discussed in these Guidelines.

- The experience, talent and preferences brought to arbitration will vary with the arbitrator. It follows that once the arbitrator is chosen, the framework of pre-hearing procedures will always be based on the judgment of the arbitrator, brought to bear in the context of variables such as the arbitrator's background, applicable rules, the custom and practice for arbitrations in the industry in question, and the expectations and preferences of the parties and their counsel. To the extent that the parties seek Pre-Hearing Disclosure, arbitrators must exercise that judgment wisely, to produce a protocol for such disclosure that is specific and appropriate to the given case and is consistent with the accepted norms of international arbitration practice. The arbitrator's exercise of judgment should be directed to ensure there has been enough Pre-Hearing Disclosure to permit a fair result consistent with the expectations and legal traditions of the parties, balanced against the need for a less expensive and more efficient process than would have occurred if the case had been submitted to a U.S. court.

- Attached as Exhibit A is a list of factors which, if taken into consideration by an arbitrator when addressing the type and breadth of Pre-Hearing Disclosure, should assist the arbitrator in exercising judgment in a way that will limit such disclosure to the extent possible while taking into account all relevant factors.

Early Attention to The Pre-Hearing Process by the Arbitrator

- It is important that the ground rules governing an arbitration are clearly established in the period immediately following the initiation of the arbitration. Therefore, following appointment, the arbitrator should promptly study the facts and the issues and be fully

prepared to preside effectively over the early, formative stages of the case in a way that will ultimately lead to an expeditious, cost-effective and fair process.

- It is imperative for the arbitrator to avoid uncertainty and surprise by ensuring that the parties understand at an early stage what the basic ground rules for Pre-Hearing Disclosure, if any, are going to be. Early attention to the scope of such disclosure increases the chance that parties will adopt joint principles of fairness and efficiency before partisan positions arise in specific procedural disputes.

- The type and breadth of Pre-Hearing Disclosure should be high on the agenda for the first pre-hearing conference at the start of the case. If at all possible, an early, formative discussion about Pre-Hearing Disclosure should be attended by in-house counsel or other party representatives with budget responsibilities, as well as by outside counsel. If practicable, it may also increase the likelihood of an early, meaningful understanding of the implications of Pre-Hearing Disclosure if the first pre-hearing conference is an in-person meeting, as opposed to a conference call.

- The arbitrator will enhance the chances for limited, efficient Pre-Hearing Disclosure if, at the first pre-hearing conference, he/she sets achievable but ambitious hearing dates and aggressive interim deadlines. The arbitrator should inform the parties at the time that the deadlines will be strictly enforced and, in fact, the deadlines should thereafter be strictly enforced except in the case of clear good cause.

- Where appropriate, the arbitrator should explain at the first pre-hearing conference that document requests:

  should be limited in number.

should be limited to requests for documents which are directly relevant to significant issues in the case or to the case's outcome.

should be restricted in terms of time frame, subject matter and persons or entities to which the requests pertain, and

should not include broad phraseology such as "all documents directly or indirectly related to."

- In international arbitration, the prevailing practice is that depositions are not permitted. Provision of written direct testimony in advance of the witness' appearance at an arbitration hearing can go far in substituting for the deposition procedure.

- In international arbitration, there is a strong presumption against use of the American discovery devices of interrogatories and requests to admit.

- In international arbitration, when the parties, their counsel or their documents would be subject to different rules or other obligations with respect to things such as privilege, privacy or professional ethics, the arbitrator should

apply the same rule to both sides where possible, giving preference to the rule that provides the highest level of protection.

Party Preferences

- Overly broad Pre-Hearing Disclosure can result when all of the parties seek such disclosure beyond what is needed to prepare the case for an evidentiary hearing. This unfortunate circumstance may be caused by parties and/or advocates who are inexperienced in international arbitration and simply conduct themselves in a fashion which is commonly accepted in United States court litigation. In any event, where all the party participants truly desire unlimited Pre-Hearing Disclosure, the arbitrator must respect that decision, since arbitration is governed by the agreement of the parties. In such circumstances, however, the arbitrator should ensure that the parties have knowingly agreed to such broad disclosure and that they have intentionally withheld from the arbitrator the power to limit Pre-Hearing Disclosure in any fashion. The arbitrator should also make sure that the parties understand the impact of an agreement for broad Pre-Hearing Disclosure by discussing the cost of the course on which the parties propose to embark and the benefit or negative consequences likely to be derived therefrom. The arbitrator should endeavor to have these communications with in-house counsel or other party representatives, as well as with outside counsel, to ensure that the party principals fully understand the decision taken with respect to Pre-Hearing Disclosure.

- Where one side wants broad Pre-Hearing Disclosure in an international arbitration and the other wants such disclosure to be narrow, the setting is ideal for the arbitrator to set meaningful limitations since the arbitrator has far more latitude in such circumstances than when all parties have agreed on broad, encompassing Pre-Hearing Disclosure.

Arbitrator Tools

- While arbitrators are expected to act in a deliberate and judicious fashion, always affording the parties due process, it is also essential for the arbitrator to maintain control of the proceedings and to move the case forward to an orderly and timely conclusion. The arbitrator has many tools that can be used both to ensure the fairness of the proceedings and to prevent disruption in the rare case where one side may withhold its cooperation. Those tools may include, for example, sanctions such as the making of adverse factual inferences against a party that has refused to come forward with required evidentiary materials on an important issue.

Written Witness Statements

- In international arbitrations, the use of written witness statements in lieu of direct testimony ("Witness Statements") is a normal, broadly accepted practice. Arbitrators should be receptive to the use of Witness Statements in international arbitrations and should take full advantage of the efficiencies that can often be achieved through effective use of such statements. Arbitrators should, however, require that Witness Statements be furnished to opposing counsel and the arbitrators sufficiently in advance of the witness' appearance for cross-examination at the arbitration hearing to permit proper preparation.

"E-Discovery"

- "E-discovery" is the Pre-Hearing Disclosure of documentary evidence that is stored in electronic form. The use of electronic media for the creation, storage and transmission of information has substantially increased the volume and cost of discovery in cases litigated in U.S. courts.

- To be consistent with the prevailing standards and governing practice in international arbitration, Pre-Hearing Disclosure of information in electronic form must be narrowly circumscribed in order to protect the

efficiency and economy of the proceedings while allowing parties to obtain necessary and pertinent evidence. Narrowing the time fields, search terms and files to be searched, as well as testing for burden are some of the tools for controlling e-discovery that should be considered.

- To be able appropriately to address issues pertaining to Pre-Hearing Disclosure of electronically stored documentation, arbitrators should at least familiarize themselves generally with the technological issues that arise in connection with electronic data. Such issues include the format in which documents are produced, and the availability and need (or lack thereof) for production of "metadata." A basic understanding by the arbitrator of the pertinent technology and terminology can place the arbitrator in a better position to assist the parties in containing the attendant costs and potential delays associated with the retrieval and exchange of electronic data.

- While there can be no objective standard in all cases for the appropriate scope of Pre-Hearing Disclosure of electronic information, an early order along the following lines can be an important first step in limiting such disclosure in a large number of cases:

  > There shall be production of electronic documents only from sources used in the ordinary course of business. Absent a showing of compelling need, no such documents are required to be produced from back-up servers, tapes or other media.
  >
  > Absent a showing of compelling need, disclosure of electronic documents shall normally be made at the option of the producing party either (a) in native form; or (b) on the basis of generally available technology in a searchable format which is usable by the party receiving the e-documents and convenient and

economical for the producing party. Absent a particularized showing of compelling need, the parties need not produce metadata.

Disputes Regarding Pre-Hearing Disclosure

- It is essential that disputes as to Pre-Hearing Disclosure be resolved promptly and efficiently since exhaustive objections and related applications to the arbitrator can unduly extend the pre-hearing period and significantly add to the cost of the arbitration. In addressing such disputes, the arbitrator should consider the following practices which can increase the speed and cost-effectiveness of the arbitration:

- Where there is a panel of three arbitrators, the parties may agree, by rule or otherwise, that the Chair or another member of the panel, acting alone, is authorized to resolve disputes as to Pre-Hearing Disclosure. While the designated panel member may still wish to consult the other arbitrators on matters of importance, the choice of a single arbitrator to decide such issues can nonetheless avert scheduling difficulties and avoid the expense and delay of three people separately engaging in the laborious tasks related to resolving such pre-hearing disputes.

- Lengthy briefs on Pre-Hearing Disclosure matters should be avoided. In most cases, a prompt discussion or submission of brief letters will sufficiently inform the arbitrator with regard to the issues to be decided.

- The parties should be required to negotiate Pre-Hearing Disclosure differences in good faith before presenting any remaining issues for the arbitrator's decision.

- The existence of Pre-Hearing Disclosure issues should not impede the progress of Pre-Hearing Disclosure in other areas where there is no dispute.

Requests for Adjournments

- Adjournments of the hearing dates can cause inordinate delay and detract from the cost effectiveness of the proceeding. While the arbitrator may not ultimately reject a joint application of all parties to adjourn the hearing, the arbitrator should nonetheless ensure that the parties understand the implications of the adjournment they seek and, if possible and except for exceptional circumstances, the arbitrator should try to dissuade them from the adjournment in a way that would still accommodate their perceived needs. The arbitrator may request that the represented parties attend any conference to discuss these subjects if, in the arbitrator's judgment, the presence of clients may facilitate the adoption of a practical solution.

- If one party seeks a continuance and another opposes it, the arbitrator then has discretion to grant or deny the request. In international arbitrations, a party seeking an adjournment should be required to establish clear good cause for the delay. In general, courts are well aware that a core goal of arbitration is speed and cost-effectiveness and will not disturb an arbitrator's rejection of an unpersuasive request for an adjournment.

Dispositive Motions

- In international arbitration, "dispositive" motions can cause significant delay and unduly prolong the proceeding. Such motions are commonly based on lengthy briefs and recitals of facts and, after much time, labor and expense, are generally denied on the ground that they raise issues of fact and are inconsistent with the spirit of arbitration. On the other hand, dispositive motions can sometimes enhance the efficiency of the arbitration process if directed to discrete legal issues such as statutes of limitations or defenses based on clear contractual provisions. In such circumstances an appropriately framed dispositive motion

can eliminate the need for expensive and time consuming discovery. On balance, the arbitrator should consider the following procedure with regard to dispositive motions:

Any party wishing to make a dispositive motion must first submit a brief letter (not exceeding five pages) explaining why the motion has merit and why it would speed the proceeding and make it more cost-effective. The other side would have a brief period within which to respond.

Based on the letters, the arbitrator would decide whether to proceed with more comprehensive briefing and argument on the proposed motion.

If the arbitrator decides to go forward with the motion, he/she would place page limits on the briefs and set an accelerated schedule for the disposition of the motion.

Under ordinary circumstances, the pendency of such a motion should not serve to stay any aspect of the arbitration or adjourn any pending deadlines.

Conclusion

Arbitrators who serve in international cases sited in New York should continue to employ the best of the ever-developing international case management techniques so as to keep faith with New York's traditional respect for international norms and to preserve the essential nature of the arbitral process as a balanced, fair, cost-effective and highly distinctive alternative to litigation.

Exhibit A

Relevant Factors in Determining the Appropriate Scope of Pre-Hearing Disclosure in International Arbitration

Agreement of the parties, if any, with respect to the scope of Pre-Hearing Disclosure.

- Agreement, if any, by the parties with respect to duration of the arbitration from the filing of the arbitration demand to the issuance of the final award.

- The parties' choice of substantive and procedural law and the expectations under that legal regime with respect to Pre-Hearing Disclosure.

Characteristics and Needs of the Parties

- The nationalities of the parties, the legal tradition of the parties' home states, and the parties' expectations with respect to the arbitration process.

- The financial and human resources the parties have at their disposal to support Pre-Hearing Disclosure, viewed both in absolute terms and relative to one another.

- The financial burden that would be imposed by Pre-Hearing Disclosure and whether the extent of the burden outweighs the likely benefit.

- Whether injunctive relief is requested or whether one or more of the parties has some other particular interest in obtaining a prompt resolution of all or some of the controversy.

- The extent to which the resolution of the controversy might have an impact on the continued viability of one or more of the parties.

Nature of the Dispute

- The factual context of the arbitration and of the issues in question with which the arbitrator should become conversant before making a decision about Pre-Hearing Disclosure.

- The amount in controversy.

- The complexity of the factual issues.

- The number of parties and diversity of their interests.

- Whether any or all of the claims appear, on the basis of the pleadings, to have sufficient merit to justify the time and expense associated with the requested Pre-Hearing Disclosure.

- Whether there are public policy or ethical issues that give rise to the need for particularized Pre-Hearing Disclosure.

- Whether it might be productive to initially address a potentially dispositive issue which does not require Pre-Hearing Disclosure.

Relevance and Reasonable Need for Pre-Hearing Disclosure

- Whether the requested information is directly relevant to significant issues in dispute or to the outcome of the case.

- Whether the requested Pre-Hearing Disclosure appears to be sought in an excess of caution, or is duplicative or redundant.

- Whether there are necessary witnesses and/or documents that are beyond the tribunal's subpoena power.

- Whether denial of the requested Pre-Hearing Disclosure would, in the arbitrator's judgment (after appropriate scrutinizing of the issues), deprive the requesting party of what is reasonably necessary to allow that party a fair opportunity to prepare and present its case.

- Whether the requested information could be obtained from another source more conveniently and with less expense or other burden on the party from whom the Pre-Hearing Disclosure is requested.

- To what extent the requested Pre-Hearing Disclosure is likely to lead, as a practical matter, to a case-changing "smoking gun" or to a fairer result.

- Whether broad Pre-Hearing Disclosure is being sought as part of a litigation tactic to put the other side to great expense and thus coerce some sort of result on grounds other than the merits.

- Whether all or most of the information relevant to the determination of the merits is in the possession of one side.

- Whether the party seeking Pre-Hearing Disclosure is willing to advance the other side's reasonable costs and attorneys' fees in connection with furnishing the requested materials and information.

Privilege and Confidentiality

- Whether the requested information is likely to lead to privilege disputes as to documents not likely to assist in the determination of the merits.

- Whether there are genuine confidentiality concerns with respect to documents of marginal relevance. Whether cumbersome, time-consuming procedures (attorneys' eyes only, and the like) would be necessary to protect confidentiality in such circumstances.

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COMMISSION ON ARBITRATION AND ADR | LEADING DISPUTE RESOLUTION WORLDWIDE

EFFECTIVE MANAGEMENT OF ARBITRATION

A Guide for In-House Counsel and Other Party Representatives

ICC INTERNATIONAL CHAMBER OF COMMERCE

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The views and suggestions contained in this guide originate from the ICC Commission on Arbitration and ADR and the widespread consultations conducted during the drafting of the guide. They should not be thought to represent views and suggestions of the ICC International Court of Arbitration or the ICC International Centre for ADR, nor are they in any way binding on either body.

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EFFECTIVE MANAGEMENT OF ARBITRATION

A Guide for In-House Counsel and Other Party Representatives

The purpose of this guide is to provide in-house counsel and other party representatives, such as managers and government officials, with a practical toolkit for making decisions on how to conduct an arbitration in a time- and cost-effective manner, having regard to the complexity and value of the dispute. The guide can also assist outside counsel in working with party representatives to that effect.

Reflecting the ICC's continuing efforts to provide arbitration users with means to ensure that arbitral proceedings are conducted effectively, the guide focuses on time and cost issues in the management of arbitration. While strategic considerations are of great importance in any arbitration and will have a significant impact on its management, they tend to be case-specific and are beyond the scope of this guide.

While the guide was conceived with the ICC Rules of Arbitration in mind, most of its contents, as well as the dynamic generated by it, can be used in any arbitration. The guide can be useful for both large and small cases.

INTRODUCTION

Arbitration is a dispute resolution mechanism that provides diverse users worldwide with a neutral forum, a uniform system of enforcement and the procedural flexibility that allows parties to tailor-make a procedure to suit their needs in each case. With a joint commitment to efficient management by parties, outside counsel and arbitral tribunals, it can achieve a time- and cost-effective resolution of a dispute. Without that commitment, the opposite can be true: the very flexibility of arbitration can lead to increased time and cost.

As arbitration has become more complex and the scrutiny of dispute resolution mechanisms has intensified, users have expressed the concern that arbitration is often too long and too expensive. One user has queried why a bridge can be built in one or two years but an arbitration to determine responsibility for delays and defects can take as long as three to four years. In light of the concerns of users, the ICC decided to address time- and cost-efficiency in arbitration head-on.

As a first step, in 2007, the ICC Commission on Arbitration (as it was then known) published its report on controlling time and costs in arbitration. Prior research covering a wide range of ICC cases had showed that on average:

- 82% of the costs of an arbitration were party costs, including lawyers' fees and expenses, expenses related to witness and expert evidence, and other costs incurred by the parties for the arbitration;
- 16% of the costs covered arbitrators' fees and expenses; and
- 2% of the costs covered ICC administrative expenses.

It followed that, to minimize costs, special emphasis needed to be placed on reducing the costs connected with the parties' presentation of their cases. The report developed a series of suggested concrete measures for each phase of the arbitration that can be used to reduce time and cost.

Then, in 2009, the Commission began its revision of the ICC Rules of Arbitration. The revised Rules came into force on 1 January 2012.* One of the guiding principles for the revision was to improve the time- and cost-efficiency of arbitration. Among the provisions directed to that end is the requirement of an early case management conference during which the parties and the tribunal can establish an appropriate, time- and cost-effective procedure for the arbitration. The suggestions in the 2007 report, many of which are now included as an appendix to the Rules, may be used for that purpose.

The present guide is a continuation of that effort and is designed to help party representatives implement the new provisions and make appropriate decisions for effective case management. The guide will also assist outside counsel in working with party representatives to ensure well-planned and well-managed proceedings.

As noted above, arbitration rules permit flexibility and do not specify precisely how an arbitration is to be conducted. For example, there is nothing in the ICC Rules of Arbitration about the number of rounds of briefs, document production, the examination of witnesses, oral argument, post-hearing memoranda or bifurcation. The open-ended nature of the Rules enables the parties and the arbitral tribunal to tailor-make an effective procedure that suits the needs and particularities of each case. However, when studying the matter, the Commission came to the conclusion that too often the parties and tribunals do not tailor-make the procedure at an early stage, but rather apply boilerplate solutions or simply decide procedural matters piecemeal as the case progresses. This was found to increase time and cost in many arbitrations. Under the new case management provisions in Articles 22–24 of the Rules, which are specifically designed to address that problem, the process of tailor-making the procedure has now become a formal requirement.

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* Those Rules have since been further revised to include, among other things, an expedited procedure for lower-value cases. Effective as of 1 March 2017, the newly revised Rules can be downloaded from the ICC website (www.iccwbo.org). In this guide, references to the Rules have been updated, where necessary.

Tailor-making the procedure so that the arbitration will be faster and cheaper is not inherently difficult to accomplish. The parties can agree upon faster and cheaper procedures and, failing their agreement, the arbitral tribunal has the power to determine such procedures after consultation with the parties. This will normally be done at the first case management conference. What is more challenging is determining the appropriate level of process and resources to match the value and complexity of the case. It is faster and cheaper to have one round of briefs rather than three, or to hold a three-day rather than a three-week hearing, but an extended opportunity to be heard will necessarily be given up. It is less expensive and less burdensome to present a witness by videoconference, but perhaps also less persuasive. The goal of each party is to present its case in a manner that is most likely to persuade the arbitral tribunal to find in its favour. The time and cost that a party should be willing to devote to that end will vary according to the importance, complexity and value of the dispute. For each phase of the arbitration, cost/risk/benefit decisions have to be made.

Appropriate time and cost decisions can be made when party representatives have a collaborative relationship with outside counsel and actively participate in the making of those decisions. Each party best knows its own internal processes, the value of the underlying transaction and what is ultimately at stake. It is the party's case, the party's risk and the party's money, so the party itself is in the best position to decide what level of risk to accept and what strategic decisions to make. Outside counsel can assist in reaching such decisions on the basis of an informed evaluation of the pros and cons of the available alternatives. In addition, arbitral tribunals play an important role by bringing their experience to bear in devising cost-effective procedures and encouraging all of the parties to assist in conducting the arbitration in an expeditious and cost-effective manner, as contemplated by Article 22(1) of the Rules.

CASE MANAGEMENT CONSIDERATIONS

As a general matter, party representatives should consider the following when managing an arbitration:

Early case assessment. Much time and cost can be saved by not litigating matters with low chances of success, or that are not worth the cost/time/distraction to its personnel. This should be analysed before an arbitration has begun; however, case assessment should also continue during the arbitration.

Maintaining realistic schedules. Setting up of a realistic schedule for the entire arbitration as early as possible and sticking to that schedule, unless there are serious reasons for not doing so, are essential to controlled and predictable proceedings. Parties will be able more accurately to foresee the date of the award and make appropriate financial plans. The arbitral tribunal also has an important role in establishing and maintaining a realistic schedule.

Establishing a tailor-made and cost-effective procedure. Using this guide, party representatives along with outside counsel can determine optimum procedures from the party's perspective. The question then is how to implement those procedures. First, one party may consult with the other party with a view to reaching agreement on the applicable procedures. Any such agreement must be applied pursuant to Article 19 of the Rules. If the parties cannot agree on one or more of the procedures, each can present its position to the arbitral tribunal prior to or during the case management conference. The arbitral tribunal will decide after hearing the parties.

Awareness of settlement procedures. Settlement procedures such as mediation, neutral evaluation and direct settlement discussions can occur at any time before or during an arbitration. As an arbitration progresses, views on the case and parties' needs may change, affecting the desirability and nature of a potential settlement. New facts may come to light, a partial award may be rendered, management changes may occur, and new perspectives in relations between the parties may emerge. The parties should continually reassess their case and determine whether, at any given point in time, there is an opportunity for a meaningful settlement.

STRUCTURE OF THE GUIDE

This guide is composed of three main parts, each of which is designed to assist in making effective time and cost decisions for an arbitration: first, a discussion of settlement considerations; second, a discussion of the case management conference; and third, a series of eleven topic sheets.

Each topic sheet deals independently with a specific step in the arbitration process where cost/risk/benefit decisions need to be made. The topic sheets are not intended to cover every aspect of an arbitration; rather, they are designed to provide a methodology for decision-making. They may also serve as a tool to assist in making appropriate decisions on each topic. The following topics are covered:

- Request for arbitration
- Answer and counterclaims
- Multiparty arbitration
- Early determination of issues
- Rounds of written submissions
- Document production
- Need for fact witnesses
- Fact witness statements
- Expert witnesses
- Hearing on the merits
- Post-hearing briefs

Each topic sheet is designed to serve as an executive summary and follows a standard format consisting of a series of separate sections. The first section presents the topic and identifies the issue(s); the second section sets out the options available to the parties for that topic; the third section discusses the pros and cons of the different options; the fourth section analyses the different choices from a cost/risk/benefit perspective; and the fifth section lists useful questions that will help to focus on the key decisions that need to be made. The list of questions could, for example, serve as a basis for discussion between party representatives and outside counsel regarding the choices that need to be made for that particular phase of the arbitration. Where useful, a final section contains other general points to consider.

The topic sheets are not prescriptive and do not provide any definitive answers but rather contain suggestions that can be used to stimulate discussion and decision-making. It is the hope of the Commission that these topic sheets will help in taking the appropriate cost/risk/benefit decisions that need to be made in order to conduct an expeditious and cost-effective arbitration, having regard to the complexity and value of the dispute.

SETTLEMENT CONSIDERATIONS

A negotiated settlement of the dispute can save a great deal of time and cost, and parties would be well advised to maintain focus on the availability of settlement opportunities before and throughout an arbitration. The case management techniques listed in Appendix IV (h) to the ICC Rules of Arbitration indicate that the arbitral tribunal may inform the parties that they are free to settle all or part of the dispute at any time and, where agreed with the parties, may take steps to facilitate a settlement, subject to enforceability considerations under applicable law.

WHETHER OR NOT TO SETTLE

This is a complex question that will depend on each individual case. It is necessary to weigh the chances of success in an arbitration against a series of factors including the costs, burden and distraction caused by the proceedings and the time required to obtain the result. The choice may be affected by matters of principle or the need to eliminate financial or other uncertainties. Additional considerations include:

Preservation of relationships. Parties to an arbitration may have an ongoing relationship which they wish to preserve. Settlement may support that relationship better than litigating the dispute.

Difficulties of enforcement. If a claimant anticipates difficulties in enforcing an arbitral award against a particular respondent, it should factor that difficulty into its assessment of the strength of its case. When enforcement is uncertain, a settlement for a lower amount may be appropriate.

Reasons not to settle. Various factors may militate against settlement. For example, a claimant may wish to obtain a precedent or guidance from a tribunal for use in future cases or may consider that a given settlement offer does not match the chances of success in an arbitration. A respondent may prefer not to settle in order to discourage other potential claimants from seeking a settlement or because it is concerned that a settlement may be interpreted as an admission of liability.

Importance of confidentiality. A settlement may be preferable to an arbitration that is not confidential. ICC arbitration proceedings will not be confidential unless the parties have so agreed, the tribunal has so ordered or applicable law so requires.

METHODS OF SETTLEMENT

If the parties have decided to explore settlement, various methods are available to them. They may seek a settlement on their own, with the assistance of counsel or with the assistance of a mediator pursuant to the ICC Mediation Rules. Recourse to the Mediation Rules may be based on an agreement between the parties or a unilateral request by one party subsequently accepted by the other. While providing for mediation, the ICC Mediation Rules also allow the parties to choose any other settlement method that may be better suited to their dispute. Settlement methods that can be used under the ICC Mediation Rules include:

Mediation. The neutral acts as a facilitator to help the parties arrive at a negotiated settlement of their dispute. The neutral is not requested to provide any opinion on the merits of the dispute.

Neutral evaluation. The neutral provides a non-binding opinion or evaluation on any of a wide variety of matters including issues of fact or law, technical questions or the interpretation of a contract.

Mini-trial. A panel consisting of the neutral and an authorized executive of each party hears presentations by the parties, after which either the panel or the neutral can mediate the dispute or express an opinion on the merits.

A combination of methods, such as mediation with a neutral evaluation on a particular issue.

The report of an expert, selected pursuant to the ICC Rules for the Administration of Expert Proceedings to make findings on a disputed matter, may help to facilitate settlement. However, unlike a neutral evaluation and unless the parties agree otherwise, the expert's report will be admissible in judicial or arbitral proceedings if no settlement is reached.

CASE MANAGEMENT TECHNIQUES

The parties and their counsel should keep in mind that even where settlement is not feasible before or at the outset of an arbitration, the arbitration can be managed in such a way as to facilitate settlement throughout the proceedings. Appendix IV to the ICC Rules of Arbitration highlights several case management techniques that can be used to that end:

Bifurcation. In appropriate cases, a partial award on jurisdiction or liability may facilitate settlement. For example, if the arbitral tribunal decides that it has jurisdiction, the parties will know that the arbitration will go forward. This could prompt them to discuss settlement. Similarly, if the tribunal finds a party to be liable, the parties may prefer to settle the issue of damages rather than incur the time and expense of completing the arbitration.

Early consideration of controlling issues. In some cases there are issues of law, fact or a mixture of fact and law, which necessarily affect the determination of the claims in the arbitration, yet can be resolved independently at relatively little expense. Examples include the determination of the applicable law, statute of limitations, the interpretation of a particular contractual provision, the determination of a key fact or technical issue or the measure of damages. The parties may find it easier to arrive at a settlement after such issues have been resolved by the tribunal.

Engagement of the arbitral tribunal. Where the parties agree and the applicable law permits, the arbitral tribunal can actively facilitate settlement either by encouraging the parties to pursue one of the settlement methods described above, or through discussions with the parties.

CREATIVITY AND OPEN-MINDEDNESS

Arbitrations often take on a life of their own once the parties have developed their positions and incurred costs. Parties and their counsel should keep in mind that a settlement can occur at any time during an arbitration and that the ICC Rules of Arbitration encourage the parties to explore this possibility. When exercising their will and their creativity in seeking a settlement, parties often arrive at solutions that are unavailable through arbitration.

CASE MANAGEMENT CONFERENCE

The case management conference provides the mechanism for determining the manner in which the arbitration will be conducted. If it is not possible to determine the entire procedure at the first case management conference, the remaining issues may be decided at a subsequent conference. The decisions made at the case management conference can be modified during the course of the arbitration by agreement of all of the parties or, failing such agreement, by a decision of the arbitral tribunal.

Article 24(1) of the ICC Rules of Arbitration requires the arbitral tribunal to convene an early case management conference to consult the parties on the conduct of the arbitration. Thereafter, pursuant to Article 22(2) of the Rules, the arbitral tribunal may adopt procedural measures for the conduct of the arbitration, provided that they are not contrary to any agreement of the parties. Article 22(1) requires the arbitral tribunal and the parties to make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute.

Issues to be decided include: the number of rounds of briefs; the extent of document production, if any; the early determination of issues; fact and expert witnesses; and the conduct of the hearing, if any. The topic sheets contained in this guide are designed to assist the parties, along with their counsel and the arbitral tribunal, in making appropriate choices for the conduct of the arbitration.

In practice, after receiving the case file, the arbitral tribunal may invite the parties to make case management proposals. If it does not do so, the parties can seek to agree between themselves upon the conduct of the proceedings. If they arrive at an agreement, it must be followed, subject to any proposals of the arbitral tribunal that are accepted by all of the parties. If the parties do not reach an agreement, the arbitral tribunal, after listening to the parties, will adopt procedural measures that it deems to be appropriate for the case at hand.

While Article 22(1) of the Rules refers to expeditious and cost-effective proceedings, it also makes clear that speed and low cost are not ends in themselves. The complexity and value of the dispute must be taken into account. A cost-effective and expeditious arbitration will be one in which the time and cost devoted to resolving the dispute is appropriate in light of what is at stake. In each case, it is necessary to make a cost/benefit analysis in order to see whether a particular procedural measure is cost-justified.

The objectives of the parties will play a crucial role in making such choices. Some examples of how parties' goals may translate into case management strategy are set forth below:

- When an important matter of principle is at stake, it may be worth the time and expense needed for a thorough examination of the facts and a full articulation of all legal arguments. A party with this objective may be willing to incur the expense of more extensive document production, multiple rounds of written submissions, a larger number of fact and expert witnesses, and the like.
- When neither an important principle nor great sums are at stake, parties may wish the arbitration to be as inexpensive and rapid as possible. Here, in contrast, parties may seek to limit document production, limit the number of witnesses, shorten hearings or minimize submissions.
- When parties wish to settle the case, for example in order to maintain their relationship or mitigate the risk of loss, they may use the case management conference to seek bifurcation of the proceedings or an early determination of controlling issues, the resolution of which might facilitate settlement. The parties may also agree to undertake settlement procedures either before or during the remaining phases of the arbitration.

TOPIC SHEETS

1. Request for Arbitration
2. Answer and Counterclaims
3. Multiparty Arbitration
4. Early Determination of Issues
5. Rounds of Written Submissions
6. Document Production
7. Need for Fact Witnesses
8. Fact Witness Statements
9. Expert Witnesses (pre-hearing issues)
10. Hearing on the Merits (including witness issues)
11. Post-Hearing Briefs

1. REQUEST FOR ARBITRATION

PRESENTATION

An ICC arbitration is commenced by the filing of a Request for Arbitration with the Secretariat of the ICC International Court of Arbitration (Article 4 of the ICC Rules of Arbitration). In all cases, the Request must contain the information required by Article 4(3) of the Rules. That provision is intended to elicit sufficient information to enable the respondent to respond to the claimant's claims, as required by Article 5(1) of the Rules, and for the International Court of Arbitration to fulfil its functions under the Rules with respect to the constitution of the arbitral tribunal and the setting in motion of the arbitration.

Issue: Should the Request contain only the minimum requirements of the Rules or provide a more elaborate statement of the case?

OPTIONS

A. File a short Request that satisfies the Rules without providing any more content or evidence than is strictly required by the Rules.

B. File a comprehensive Request that constitutes a full statement of the case, including exhibits.

The above options represent two ends of a spectrum. However, there is also the option of filing a Request that provides a level of content and evidence anywhere between those two ends.

PROS AND CONS

A shorter and less comprehensive Request can be prepared more economically and more quickly than a more comprehensive document.

On the other hand, a more comprehensive Request may avoid the need for multiple rounds of subsequent submissions and thereby help to expedite the arbitration. In addition, providing more information may increase the impact of the Request on the respondent. Additional detail may also enable the parties and the

arbitral tribunal to focus on the key issues in the case as early as possible and thereby facilitate the drawing up of the Terms of Reference and the conduct of the case management conference.

COST/BENEFIT ANALYSIS

In all circumstances, the claimant should seriously consider conducting an early assessment of the nature, strengths and weaknesses of its case before filing a Request. This will allow it to determine, in the first instance, whether the claims are sufficiently strong to warrant bringing the arbitration or whether it would be better to seek a settlement of the dispute. If it decides to proceed with the arbitration, the early case assessment will help to ensure that the Request does not contain errors and that the claimant's claims are correctly described and set forth in the most effective manner. While this assessment requires some time and expenditure, it typically results in a saving of both over the arbitration as a whole.

If the claimant decides to proceed with the arbitration, it must determine whether to file a shorter or longer Request. The decision on how comprehensive the Request should be will be heavily influenced by the circumstances of the case and strategic considerations. Some time and cost may be saved by drafting a shorter Request although this may be a temporary saving if the claimant is ultimately required to supplement such a Request with additional detailed information. When the Request and the Answer respectively constitute a full statement of the case and a full statement of defence, time and cost can be saved by avoiding one or more further rounds of submissions. However, in complex cases this may not be possible, and the Request and Answer may be ultimately superseded by subsequent written submissions.

If a primary purpose for filing a Request is to elicit settlement discussions, consideration should be given to whether this is best accomplished with a shorter or a longer Request. A shorter Request may be preferable if the respondent is unlikely to discuss settlement unless an arbitration has been commenced and the substantive aspects of the claim would be best dealt with in the

settlement discussions. A longer Request may be preferable if the goal is to show the respondent in writing the strengths of the claimant's case before commencing settlement discussions.

QUESTIONS TO ASK

1. What is the desired result of filing the Request (e.g. triggering settlement discussions or having the dispute resolved by arbitration)?

2. Are there any valid reasons for not conducting an early case assessment?

3. Are there any real cost savings in filing a shorter Request? Would they be outweighed by the benefits of filing a longer Request for any of the reasons described above?

4. Are there any other strategic or legal considerations that may affect the timing of the filing of the Request and consequently whether it should be shorter or longer?

OTHER POINTS TO CONSIDER

In certain cases, questions of timing may militate in favour of a shorter Request. For example, a Request may need to be filed quickly to avoid being barred by a statute of limitations. A Request may also have to be filed within ten days of receipt by the Secretariat of an application for emergency measures pursuant to Article 1 of the Emergency Arbitrator Rules (Appendix V to the Rules).

Pursuant to Article 23(4) of the Rules, after the Terms of Reference have been established, no new claims may be made without the authorization of the arbitral tribunal. It is therefore prudent for the claimant to make all of its claims prior to the signing of the Terms of Reference.

Article 5(6) of the Rules provides that the claimant shall submit a reply to any counterclaim raised by the respondent pursuant to Article 5(5) of the Rules. The topic sheet relating to the Answer and counterclaims offers guidance on this matter.

2. ANSWER AND COUNTERCLAIMS

PRESENTATION

The respondent is required to file an Answer to the Request for Arbitration with the Secretariat (Article 5 of the ICC Rules of Arbitration). In all cases, the Answer must contain the information required by Article 5(1) of the Rules. The Answer may contain a counterclaim pursuant to Article 5(5) of the Rules.

Issue: How detailed or extensive should the Answer and any counterclaim be, above and beyond what is required by the Rules?

OPTIONS

A. File a short Answer that satisfies the Rules without providing any more content or evidence than is strictly required by the Rules.

B. File a comprehensive Answer that constitutes a full statement of defence, including evidentiary exhibits.

The above options represent two ends of a spectrum. However, there is also the option of filing an Answer that provides a level of content and evidence anywhere between those two ends.

In deciding on the appropriate length of the Answer, the respondent should consider whether or not to match the length and level of detail chosen by the claimant. Specifically, the respondent may choose between the following options:

a) File an Answer that reflects the approach taken by the claimant (e.g. a shorter or a longer document).

b) File an Answer in a form that is different from the form of the Request filed by the claimant.

C. Assert a counterclaim, irrespective of the length and content of the Answer. The raising of a counterclaim is subject to considerations similar to those described in the topic sheet on the Request for Arbitration.

PROS AND CONS

The pros and cons of filing a shorter or a longer Answer may vary depending on the form of the Request filed by the claimant. If the claimant has filed a shorter Request and the respondent reciprocates with an equally short Answer, the arbitration should be able to proceed more expeditiously to the Terms of Reference and the case management conference, in part because the respondent is less likely to need an extension of time for filing the Answer pursuant to Article 5(2) of the Rules. On the other hand, if the claimant files a longer and more detailed Request, then the respondent may be required to seek an extension of time in order to respond with a detailed Answer.

A shorter and less comprehensive Answer can be prepared more economically and more quickly than a more comprehensive document.

If the claimant has filed a comprehensive Request and the respondent decides to file a comprehensive Answer, this may avoid the need for multiple rounds of subsequent submissions and thereby expedite the arbitration.

In addition, providing more information may increase the impact of the Answer. Additional detail may also increase the ability of the parties and the arbitral tribunal to focus on the key issues in the case as early as possible and thereby facilitate the drawing up of the Terms of Reference and the conduct of the case management conference.

COST/BENEFIT ANALYSIS

To the extent possible in the time available, the respondent should conduct an early assessment of the nature, strengths and weaknesses of its case before filing an Answer. This will allow it to determine, in the first instance, whether the case should be defended or whether settlement should be pursued. If the respondent decides to defend the arbitration, and possibly assert counterclaims, the early case assessment will help to ensure that the Answer does not contain errors and that the respondent's defence and/or counterclaims are correctly described and set forth in the most effective manner. While this assessment

requires some time and expenditure, it typically results in a saving of both over the arbitration as a whole.

An additional consideration for the respondent is the limited amount of time available under the Rules for making an early case assessment and filing its Answer. If the respondent has prior knowledge of the dispute, then it may be able to undertake an early case assessment before receiving the Request for Arbitration. If, on the other hand, the receipt of the Request for Arbitration is the respondent's first real opportunity to assess the claimant's claims, the time available to it under the Rules for this purpose will be limited.

Depending on the circumstances described above, the respondent must decide whether to file a shorter or a longer Answer. The decision on how comprehensive the Answer should be will be heavily influenced by the circumstances of the case, strategic considerations and the limited time available for submitting the Answer under the Rules. Some time and cost may be saved by drafting a shorter Answer although this may be a temporary saving if the respondent is ultimately required to supplement such an Answer with additional detailed information.

If the claimant has filed a full statement of the case in its Request and if in the time available it is possible to file a full statement of defence in the Answer, time and cost can be saved by avoiding one or more rounds of further submissions. However, this may not be possible in complex cases.

Consideration should be given to whether filing a shorter or a longer Answer might facilitate settlement discussions. A shorter Answer may be preferable if the substantive aspects of the settlement would best be dealt with in negotiations and there is a reasonable prospect of a settlement. A longer Answer may be preferable if the goal is to show the claimant in writing the strengths of the respondent's defence and any counterclaims for purposes of settlement discussions.

QUESTIONS TO ASK

1. Are there any real cost savings or any other advantages in filing a shorter Answer? Would they be outweighed by the benefits of filing a longer Answer for any of the reasons described above?

2. Is there sufficient time to conduct an early assessment of the defence and file the Answer within the 30 days specified in the Rules, or is it necessary to request an extension of time for filing the Answer pursuant to Article 5(2)?

3. Are there any serious counterclaims that can and should be raised in the arbitration? Should they comply with only the minimum requirements set out in the Rules or be more detailed and accompanied by evidentiary exhibits?

OTHER POINTS TO CONSIDER

Pursuant to Article 23(4) of the Rules, after the Terms of Reference have been established, no new claims may be made, without the authorization of the arbitral tribunal. It is therefore prudent for any counterclaims to be made by the respondent prior to the signing of the Terms of Reference.

If the respondent wishes to join an additional party pursuant to Article 7(1) of the Rules, it must be careful to do so within the time limits specified in that Article.

If there are serious objections to jurisdiction, the respondent may consider keeping the Answer short with respect to the merits.

3. MULTIPARTY ARBITRATION

PRESENTATION

Under the ICC Rules of Arbitration, an arbitration having more than two parties may occur when all of the parties have so agreed. Multiparty arbitrations may result from various procedural choices:

- A claimant may commence an arbitration pursuant to Article 4 of the Rules against two or more respondents.
- Two or more claimants may commence an arbitration pursuant to Article 4 of the Rules against one or more respondents.
- Before the confirmation or appointment of any arbitrator, any party may join another party to the arbitration pursuant to Article 7 of the Rules.
- Upon any party's request, two or more pending arbitrations may be consolidated into a single arbitration by the Court, subject to the requirements of Article 10 of the Rules.

Issue: When is it beneficial to choose a multiparty arbitration?

OPTIONS

A. A single arbitration that includes all relevant parties when they have all so agreed.

B. Two or more separate arbitrations.

PROS AND CONS

A single multiparty arbitration, when possible, results in more comprehensive proceedings and avoids duplication. It also avoids the risk of conflicting decisions in separate arbitrations.

On the other hand, a single multiparty arbitration may result in more complex proceedings, which could increase the length and cost of the arbitration. For example, a party with a small role in the dispute may not wish to participate in a multiparty arbitration and could

refuse to do so in the absence of a binding arbitration agreement. Further, in an arbitration where there is to be a three-member arbitral tribunal, choosing to have more than two parties in the arbitration may deprive the parties of their ability to choose a co-arbitrator, because the ICC International Court of Arbitration may decide to appoint the entire tribunal pursuant to Article 12(8) of the Rules.

COST/BENEFIT ANALYSIS

Consideration should be given to whether a single multiparty arbitration, as opposed to two or more separate arbitrations, would save time and money. While a single arbitration will usually be more cost-efficient, there could be situations in which separate arbitrations may still be the more efficient option for one or more parties.

If a single multiparty arbitration is the more time- and cost-efficient option, the parties should consider whether the time and cost benefits outweigh any of the potential disadvantages, such as the risk of losing the opportunity to choose a co-arbitrator because the International Court of Arbitration may find it necessary to appoint the arbitral tribunal pursuant to Article 12(8) of the Rules.

Another important factor to consider in deciding whether a single multiparty arbitration would be beneficial is the contractual role of each party and the specific interests flowing from that role. Arbitration of your dispute with one party may weaken your position with respect to another party. Where, for example, parties share potential liability with respect to their contractual counterparty, it may be tactically imprudent for them to have their internal disputes heard in the arbitration with the contractual counterparty, since their allegations against each other may support the counterparty's case against them.

4. EARLY DETERMINATION OF ISSUES

PRESENTATION

Issue: In what circumstances would it be beneficial to break out certain issues for early determination by the arbitral tribunal in a partial award?

Various kinds of issues lend themselves to such treatment:

First, there may be threshold issues that could be dispositive of the entire arbitration. Such issues might include:

- whether the tribunal has jurisdiction over the dispute;
- whether the dispute is barred by an applicable statute of limitations;
- whether there is liability;
- whether the dispute is arbitrable;
- whether the parties have capacity to sue or be sued.

For example, were a tribunal to decide that it lacks jurisdiction over the entire dispute, that would result in a final award dismissing all claims made in the arbitration. If the tribunal decides that it has jurisdiction, that decision would result in a partial award and the arbitration would continue, unless the tribunal's decision leads to a settlement. The same pattern would apply, *mutatis mutandis*, to the other examples given above.

Second, there may be discrete issues which could be usefully broken out and decided in a partial award, even though their resolution would not be dispositive of the entire arbitration. The early resolution of a particular issue may narrow or simplify the issues to be decided in the remainder of the arbitration or may facilitate settlement. Such issues may include:

- a decision on the meaning of a contractual provision;
- a decision on the applicable law;
- a decision on certain key facts in dispute;

- a decision on an issue that may significantly affect a party's exposure to one or more claims, such as determination of the types of recoverable damages.

For example, a decision on applicable law may save the parties from having to incur time and cost pleading their case on the basis of alternative applicable laws. The same analysis applies to the other examples above.

OPTIONS

A. Do not break out any issues for early determination.

B. Break out one or more issues for early determination by means of an award.

PROS AND CONS

The early determination of one or more issues in a partial award may resolve the entire dispute, simplify the remainder of the arbitration or facilitate settlement. However, if the award does not achieve one of those objectives, the early determination procedure may result in added time and cost. In addition, breaking out a discrete issue rather than having it decided along with the other issues may affect the way the tribunal decides one or more of the issues.

COST/BENEFIT ANALYSIS

Breaking out issues that could be dispositive of the entire arbitration

A cost/benefit analysis of this question is complicated by the fact that the decision has to be made in the face of important unknowns. When deciding whether or not to break out an issue, the parties cannot know what the arbitral tribunal's decision will be. For example, in a case involving issues of liability and damages, if the issue of liability is broken out and the tribunal decides that there is no liability, a great deal of time and cost will be saved since there will be no need to exchange briefs and hold hearings on damages. On the other hand, if the tribunal finds that there is liability, unless such finding encourages the parties to settle the case, there will have to be a damages phase, and the breaking out of the issue of liability may then actually add to the overall time and cost of the proceedings.

Given these unknowns, the cost/benefit analysis must turn on an appreciation of probabilities and an estimate of potential cost. In deciding whether to break out an issue, it may be useful to estimate likely outcomes as well as time and cost in answer to certain specific questions:

- What is the likelihood that the tribunal's decision will be dispositive of the entire arbitration?
- If the tribunal's decision will not be dispositive of the entire arbitration, what is the likelihood that the tribunal's early determination of the issue may result in a settlement of the case?
- What is the added time and cost likely to result from early determination of the issue in comparison with the likely overall cost, i.e. how much more time and cost would there be if the arbitration were conducted in two parts rather than one?

The answers to these questions can help in deciding whether or not to break out an issue for early determination. The following factors would tend to favour the breaking out of an issue for early determination:

- the likelihood of a dispositive determination is high;
- the likelihood of a settlement, even if there is no dispositive determination, is high;
- the remaining phases are likely to be long and expensive;
- the additional cost caused by early determination is low.

A decision on whether to break out an issue can be made by weighing these factors in relation to each other.

Breaking out issues in a partial award not dispositive of the entire arbitration

A similar type of cost/benefit analysis would apply here, although the relevant questions are slightly different:

- What is the likelihood that the tribunal's early determination of a particular issue will significantly narrow or simplify the other issues to be decided in the remainder of the arbitration?

- What is the likelihood that early determination of a particular issue may result in a settlement of the case?
- What is the additional time and cost likely to result from early determination of a particular issue?

Once again, weighing the answers to those questions against each other can help in deciding whether it is beneficial to break out a particular issue for early determination.

QUESTIONS TO ASK

1. Does the case contain any threshold or discrete issues that could be determined in a separate award?

2. Would the early determination of those issues by the arbitral tribunal be beneficial, in light of the cost/benefit analysis discussed above?

3. Would early determination (a) potentially resolve the entire dispute, (b) facilitate settlement or (c) simplify the rest of the arbitration?

OTHER POINTS TO CONSIDER

Article 38(5) of the Rules permits the arbitral tribunal, when allocating the costs of the arbitration, to take into account the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner. The arbitral tribunal might allocate some amount of costs against a party that loses in the early determination of a potentially dispositive issue if that party is considered to have acted in bad faith or otherwise not to have acted in an expeditious and cost-effective manner.

There may be logistical reasons for breaking out one or more issues for early determination, such as the availability of witnesses, hearing facilities, counsel or arbitrators. In addition, it may allow a complex case to be conducted in a more orderly manner.

There may be compelling reasons for deciding certain issues early in an arbitration, e.g. whether claims made under different arbitration agreements may be heard together in a single arbitration. The breaking out of an issue for decision in a partial award could be agreed upon by the parties or determined by the arbitral tribunal in the absence of an agreement by the parties.

5. ROUNDS OF WRITTEN SUBMISSIONS

PRESENTATION

An ICC arbitration is commenced by the filing of a Request for Arbitration (Article 4 of the ICC Rules of Arbitration). Thereafter, the respondent files an Answer (Article 5). If the Answer contains a counterclaim, the claimant files a reply (Article 5). The Terms of Reference for the arbitration are then established (Article 23).

Issue: How many subsequent rounds of written submissions are appropriate in a particular arbitration?

OPTIONS

A. No further written submissions are necessary, since the Request and the Answer sufficiently state the case.

B. One subsequent round of written submissions.

C. Two or more subsequent rounds of written submissions.

D. Post-hearing briefs (assuming there is a hearing).

PROS AND CONS

Additional rounds of written submissions enable the parties to articulate their positions more extensively and respond to the developing arguments on each side.

However, additional rounds of briefs may lead to unnecessary repetition, excessive detail or dilatory tactics.

COST/BENEFIT ANALYSIS

Each round of written submissions increases the length and cost of the arbitration. It is therefore essential to determine whether, in a particular case, the benefits of an additional round are worth the extra time and cost.

Additional submissions may be particularly useful in certain cases, e.g. where there are complicated issues of fact or law or issues of strategic importance for a party. In such cases, it is very common to have two rounds of pre-hearing written submissions after the initial submissions.

QUESTIONS TO ASK

1. Does the case justify the extra time and cost caused by additional written submissions?

And, in particular,

2. Are additional rounds of submissions genuinely useful or necessary for a party to make its case to the arbitral tribunal, and if so, why?

3. What is the estimated cost of such additional rounds?

4. Is the benefit worth the cost, and if so, why?

OTHER POINTS TO CONSIDER

Consider limiting the number of pages of written submissions.

Consider limiting the scope of such submissions, e.g. to issues raised by the other side in its immediately preceding submission.

Consider having the arbitral tribunal indicate issues on which it wishes the parties to focus in any further round of submissions.

Consider whether any subsequent rounds of submissions should be simultaneous or sequential. For example, it may be efficient for post-hearing briefs to be filed simultaneously.

Consider whether post-hearing briefs are genuinely useful or necessary, or whether one round of pre-hearing briefs and one round of post-hearing briefs are sufficient.

The foregoing suggestions could be put into effect either through an agreement between the parties or in an order from the arbitral tribunal upon a party's request.

6. DOCUMENT PRODUCTION

PRESENTATION

Document production can involve substantial time and cost. Obviously, every party may unilaterally submit documents to support its case. Document production refers to the extent to which one party may demand that another party produce documents.

The ICC Rules of Arbitration contain no specific provisions governing document production. Article 19 of the Rules allows the parties to agree upon the procedures to be applied and empowers the tribunal to decide in the absence of an agreement of the parties. Article 22(4) requires the arbitral tribunal to ensure that each party has a reasonable opportunity to present its case. Article 25(1) provides that the arbitral tribunal shall establish the facts of the case by all appropriate means and Article 25(5) allows it to summon any party to provide additional evidence.

In short, the Rules leave the question of whether and how much document production will occur to the parties and the arbitrators, provided that the parties are treated fairly and impartially and that each party has a reasonable opportunity to present its case. When document production is to occur, the manner in which the process is executed and the degree of production can have a significant impact on time and cost.

In-house counsel or other party representatives, working with outside counsel, should consider whether and to what extent document production is genuinely useful and cost-beneficial. When document production is to occur, time and cost can be significantly reduced by establishing an efficient document production procedure.

Issue: Is document production desirable and, if so, how much document production should there be?

OPTIONS

Options range from no document production at all to full document production.

A. No document production.

- The parties may decide to seek no documents from each other and to rely solely on the documents each of them possesses.
- The parties are always free to submit their own documents.
- The parties are also free to request the arbitral tribunal to order the production of specific documents.

B. Production limited to specific documents or narrow categories of documents, which are relevant and material to deciding an issue in the arbitration.

Consider using:

- the IBA Rules on the Taking of Evidence in International Arbitration ("IBA Rules") as a standard;
- the suggestions in the report of the ICC Commission on Arbitration and ADR entitled "Controlling Time and Costs in Arbitration";
- the report of the ICC Commission on Arbitration and ADR entitled "Managing E-Document Production".

C. Broad document production as used in some common law jurisdictions.

- The parties may agree upon broad requests for documents.
- In rare cases, the parties may agree to common law style "discovery" including depositions and/or interrogatories.

When document production is to occur, the parties may agree upon the ground rules for requesting documents from and producing documents to each other.

If the parties cannot agree on whether to have document production or on the extent of document production or the ground rules for such production, the tribunal will decide.

PROS AND CONS

Document production can be very expensive and time-consuming and the broader the document production the more expensive and time-consuming it

tends to be. It requires time and expenditure from the party that searches for and produces documents as well as from the party that must study and analyse the documents that are produced.

On the other hand, if one of the parties has sole possession of documents needed by the other party, document production may be essential. Moreover, document production can provide the parties and the tribunal with a more complete understanding of the case. Given that parties are unlikely to submit documents spontaneously when they are detrimental to their own case, document production puts them under an obligation to do so.

COST/BENEFIT ANALYSIS

In view of the time and cost required for document production, a cost/benefit analysis is necessary in order to decide whether to seek document production at all and, if so, to determine the desired extent of such production. The parties should explore whether they can effectively meet their burden of proof with the documents that are already in their possession and whether the other side is likely to have documents that are genuinely useful for the first party to make its case.

Each party should then estimate the extra time and cost caused by document production and weigh this against the likelihood that document production will genuinely assist it in making its case. For example, if document production is estimated to cost USD 500,000 and it is considered that there is at best a 10% chance that it will yield valuable results, the question arises as to whether that 10% chance is worth the expense of USD 500,000. This is a decision that can best be made jointly by the party, typically represented by in-house counsel, and outside counsel. Many factors may come into play, such as the amount in dispute, whether there are policy issues, whether there is concern about precedent and whether the benefit of obtaining documents from the other side may be outweighed by the detriment of being required to produce documents oneself.

QUESTIONS TO ASK

1. Are any requests for document production genuinely useful or necessary for a party to make its case or can the party rely effectively on the documents in its possession?

2. What extent of document production is genuinely useful and necessary?

3. When should document production occur?

4. What is the estimated cost of searching for and producing documents, as well as the cost of reviewing and analysing documents that have been produced?

5. Is the benefit of document production worth the cost, and if so, why?

OTHER POINTS TO CONSIDER

Consider whether it is appropriate to deal with document production in the arbitration clause, for example by agreeing that there will be no document production (e.g. in contracts where it is relatively certain that document production will not assist in resolving potential disputes); by agreeing to limited document production in accordance with the IBA Rules; or by agreeing to broad document production or "discovery".

Consider whether document production should occur once or more than once. Consider whether it should occur prior to or after written submissions.

Consider whether it is appropriate to limit documents transmitted to the arbitral tribunal to a manageable quantity.

Take into account any costs of translation when estimating the cost of document production.

Consider the ground rules to be adopted for implementing document production, including the use of a Redfern Schedule and the setting of the shortest reasonable time frames for production.

Special considerations may be needed if the parties agree upon or the tribunal orders the production of electronic documents. In such cases, the report of the ICC Commission on Arbitration and ADR entitled "Managing E-Document Production" can be used to assist in choosing the most efficient methods of e-document production.

7. NEED FOR FACT WITNESSES

PRESENTATION

Article 25(1) of the ICC Rules of Arbitration requires the arbitral tribunal to establish the facts of the case by all appropriate means. This can include the hearing of fact witnesses. Article 25(3) of the Rules specifically allows the arbitral tribunal to decide to hear witnesses. However, Article 25(6) allows the arbitral tribunal to decide the case solely on documents, unless a party requests a hearing. This would permit an arbitration with no hearing and no fact witnesses.

Issue: Is there a genuine need for fact witnesses?

OPTIONS

A. No fact witnesses at all.

B. One or more fact witnesses.

- Identify the issues on which fact witness testimony is necessary.
- Identify the appropriate fact witnesses for the issues.

PROS AND CONS

Fact witnesses can be essential to proving a case. However, they significantly increase the length and cost of an arbitration, since there will typically be one or more written witness statements for each witness and the oral testimony of each witness may be required at a hearing.

COST/BENEFIT ANALYSIS

Fact witnesses may be genuinely necessary in order to prove disputed facts or to present a broader picture of the circumstances surrounding the dispute. In determining whether fact witnesses are needed, the following issues can be considered:

- Are there any disputed facts? It may appear from the pleadings that there are disputed facts, but it may turn out after discussion between the parties that those facts are not really disputed. In addition, a party may agree not to contest certain disputed facts in order to save time and cost when the dispute over those facts is not sufficiently important.
- If there are disputed facts, are they relevant and material for deciding an issue in the dispute? There is no need to incur the extra time and cost involved in having a fact witness testify on disputed facts that will not affect the determination of an issue in the dispute.
- If there are disputed facts that are relevant and material, can they be proved by documents alone or do they genuinely need to be proved through fact witnesses?
- Is it useful to call fact witnesses to make a general presentation on the circumstances of the dispute?

When a party has decided to use fact witnesses, time and cost can be reduced by avoiding having many witnesses testify as to the same facts and by carefully focusing the scope of the testimony of each witness.

QUESTIONS TO ASK

1. Is there a genuine need for fact witnesses at all?

2. If so, who should they be? What should be the scope of their testimony? How many fact witnesses are genuinely necessary to establish a particular fact or present the circumstances of the case?

OTHER POINTS TO CONSIDER

Consider using videoconferencing for oral witness testimony to save time and cost.

Consider what is the most effective way of examining the fact witnesses at a hearing: e.g. direct examination and cross-examination; opening presentation by the witness followed by cross-examination; use of the witness's written statement as a substitute for direct examination and proceeding straightaway with cross-examination; questioning of fact witnesses by the tribunal only or by the tribunal followed by questions from counsel.

Determine whether it is preferable for a given witness to testify in the language of the arbitration or in his or her native language. When a witness is testifying in a language other than the language of the arbitration, appropriate translation will often need to be arranged, which will increase time and cost.

8. FACT WITNESS STATEMENTS

PRESENTATION

Issues arising when a party has decided to present fact witness evidence: Should witness statements be submitted? What should their scope be? When should they be submitted?

OPTIONS

Form

A. No written witness statements.

B. Brief summary of the scope of witness evidence (witness summary).

C. Full witness statements.

Scope of full witness statements

A. Lengthy and comprehensive statement.

B. Short statement limited to key factual issues in dispute.

Number and timing

A. One or more rounds of witness statements.

B. Witness statements submitted with written submissions.

C. Witness statements submitted following the exchange of written submissions.

D. Witness statements submitted simultaneously or sequentially.

PROS AND CONS

Form

Written witness statements increase the length and cost of the pre-hearing phase, but can reduce the length and cost of the hearing by replacing direct examination and allowing for a more focused cross-examination. The absence of witness statements, or the submission of witness summaries only, will reduce pre-hearing costs but can increase the length and cost of the hearing.

Scope

Comprehensive witness statements can be a valuable part of case presentation, allowing witnesses to tell the story of the dispute and place documentary evidence in its context. However, lengthy witness statements will increase time and cost as well as the scope of cross-examination.

Number and timing

More than one round of witness statements provides witnesses with the opportunity to rebut the evidence of other witnesses, but will increase time and cost prior to the hearing.

Submitting witness statements with the written submissions provides direct proof of the facts at the time they are alleged. It also allows the parties to identify and progressively narrow down the factual issues, which may make for shorter, more targeted submissions later.

Submitting witness statements only after the exchange of written submissions may allow the parties to narrow down the factual issues in dispute before preparing and submitting witness statements, which may consequently be more focused on the disputed issues.

COST/BENEFIT ANALYSIS

While witness statements can provide valuable evidence in support of a party's position, they can add significantly to time and cost. The importance of the evidence to be presented must therefore be weighed against the time and expense required to present it. For example, if alternative sources of evidence are available (e.g. contemporaneous documentary evidence), there may be no cost justification for providing a witness statement on those facts. Similarly, if a witness is submitting a statement on a given fact, the submission of another witness statement evidencing the same fact may not be cost-justified, particularly if the fact is of little importance.

Full witness statements require more work and are therefore more expensive to prepare than witness summaries. However, they may subsequently save time and cost during a hearing by obviating the need for lengthy direct examination of the witness at the hearing.

The case management techniques set out in Appendix IV to the Rules include limiting the length and scope of written witness evidence so as to avoid repetition and focus on key issues. In line with Appendix IV, parties may wish to consider how to structure their fact witness evidence as efficiently as possible.

QUESTIONS TO ASK

1. In light of the other sources of evidence available, is the preparation of a given witness statement justified in terms of time and cost?

2. Is a witness statement required to prove a disputed question of fact or provide necessary background information? Is more than one witness statement necessary to accomplish this? Is there a good reason not to limit the witness statement to the key factual issues in dispute?

3. Should the witness evidence be presented in the form of full witness statements or witness summaries?

4. Is it necessary to have more than one round of witness statements?

5. Should the witness statements be filed concurrently with, or only after, the parties' written submissions?

9. EXPERT WITNESSES (PRE-HEARING ISSUES)

PRESENTATION

Article 25(3) of the ICC Rules of Arbitration contemplates the possibility of experts appointed by the parties, while Article 25(4) provides that, after consulting the parties, the arbitral tribunal may appoint one or more experts, define their terms of reference, and receive their reports.

Issues: Is there a genuine need to appoint experts? Should they be appointed by the parties, the tribunal, or both? How should they be selected? How should the written expert reports be produced?

OPTIONS

Whether and how to appoint experts

A. No experts at all.

B. Party-appointed expert(s) only.

C. Tribunal-appointed expert(s) only.

D. Both party-appointed and tribunal-appointed experts.

How to select party-appointed experts

A. Selection of an expert by the parties or their counsel.

B. Selection of an expert proposed by the ICC International Centre for ADR at a party's request.

How to select tribunal-appointed experts

A. Selection by the tribunal alone after obtaining the parties' comments on the expert to be appointed, including with respect to the expert's independence and impartiality. This option includes the tribunal's selection of an expert proposed by the ICC International Centre for ADR at the tribunal's request.

B. Selection by the tribunal of an expert agreed by the parties or from a list of experts jointly submitted by the parties.

Production of written reports

A. Separate reports by each party-appointed expert.

- These reports can be produced with the parties' briefs or after the parties have produced their fact witness statements.
- These reports can be produced either simultaneously or sequentially.

B. Instead of, or subsequent to, the production of separate reports, the party-appointed experts meet to determine points of agreement and disagreement and produce reports laying out their respective positions on the points of disagreement.

C. Preparation by the tribunal of terms of reference for tribunal-appointed experts after submitting a draft to the parties for comment. Thereafter, the expert produces a written report based upon the terms of reference.

PROS AND CONS

Certain technical issues may need to be presented through expert opinions. In some cases, expert opinions can be decisive for a case. However, expert witnesses significantly increase the length and cost of an arbitration.

If there are to be experts, the pros and cons of party-appointed experts and/or tribunal-appointed experts must be considered. In particular cases, a tribunal-appointed expert may be the most persuasive expert for arbitrators from certain legal cultures, but reliance on a tribunal-appointed expert deprives the parties of some degree of control. Whether a tribunal-appointed expert should be requested is an important matter of strategy to be considered on a case-by-case basis.

Recourse to a tribunal-appointed expert alone, with no party-appointed experts, will no doubt be the least expensive option. However, there may be cases where a tribunal-appointed expert's views cannot be adequately questioned or tested by the parties without the assistance of party-appointed experts. Recourse to both will increase time and cost.

COST/BENEFIT ANALYSIS

Whether and how to appoint experts

Whether or not to appoint experts can be a complex question requiring consideration of a number of factors, including the nature of the issues, the legal and cultural background of the tribunal, the availability of experts, case strategy and the impact on time and cost. A key consideration will be whether the cost and time associated with expert witnesses is justified by a genuine need in the case at hand.

How to select party-appointed experts

A. Selection of an expert by the parties or their counsel

In order to present evidence on issues requiring expertise, the parties or their counsel may select an outside expert to produce an expert report. Alternatively, evidence on such issues can be presented by the parties' in-house technical experts. The in-house experts may be very knowledgeable in their field and have hands-on knowledge of the specific technical matters at issue. Yet, there is a risk that the tribunal could perceive them as being partial. Outside experts are more expensive and more time-consuming but, depending on their qualifications and professional demeanour, could be viewed as more impartial.

B. Selection of an expert proposed by the ICC International Centre for ADR at a party's request.

The ICC International Centre for ADR offers parties and tribunals a service of finding experts from a wide range of sectors and countries. This may speed up the process of identifying experts and minimize the cost. In addition, the fact that a party-appointed expert has been identified by the ICC International Centre for ADR can reflect well upon the expert's qualifications, independence and impartiality.

How to select tribunal-appointed experts

A. Selection by the tribunal alone after obtaining the parties' comments on the expert to be appointed, including with respect to the expert's independence and impartiality. This option includes the selection by the tribunal of an expert proposed by the ICC International Centre for ADR at the tribunal's request.

The selection of an expert by the arbitral tribunal alone may be more expeditious and may avoid disputes between the parties over the suitability of their respective proposals. Moreover, the appointment of one expert will reduce time and cost. However, this method excludes the parties from the selection process and creates a risk that the chosen expert may fall short of the parties' expectations. From the parties' perspective, a further disadvantage is that the content of the expert's opinion may remain unknown to them until produced before the arbitral tribunal.

B. Selection by the tribunal of an expert agreed by the parties or from a list of experts jointly submitted by the parties.

This is a more time-consuming process than the appointment of an expert by the tribunal alone, but has the advantage of restricting selection to an expert acceptable to the parties and the tribunal. Moreover, the appointment of a single expert will reduce time and cost. However, a potential disadvantage from the parties' perspective will again be that the content of the expert's opinion remains unknown to the parties until produced before the arbitral tribunal.

Production of written reports

A. Separate reports by each party-appointed expert.

- These reports can be produced with the parties' briefs or after the parties have produced their fact witness statements.

  The submission of expert evidence with a party's briefs has the advantage of enabling a more comprehensive understanding of that party's case. It may help to focus the content of any subsequent briefs on the actual rather than the assumed areas in which expert evidence may be submitted. The disadvantage is that the expert evidence may not take account of any evidence introduced by the other party in subsequent witness statements, expert reports or subsequent briefs and may either be incomplete or create a need for supplemental expert evidence.

- These reports can be produced either simultaneously or sequentially.

In cases where the points of disagreement are sufficiently clear, simultaneous filings will generally be faster than sequential filings because there will be fewer rounds. However, when the points of disagreement are not sufficiently clear, simultaneous filings may result in expert reports that do not correspond or respond to each other, which could actually increase time and cost.

The ultimate choice will also depend upon tactical or strategic considerations that go beyond issues of time and cost.

B. Instead of, or subsequent to, the production of separate reports, the party-appointed experts meet to determine points of agreement and disagreement and produce reports laying out their respective positions on the points of disagreement.

The production of written expert reports can be time-consuming and expensive. Reducing the scope of those reports will reduce time and cost. If the party-appointed experts are given the opportunity to meet and clearly identify the points over which they disagree, their reports can be shortened and focus on the points of disagreement.

C. Preparation by the tribunal of terms of reference for tribunal-appointed experts after submitting a draft to the parties for comment. Thereafter, the expert produces a written report based on the terms of reference.

It is important to ensure that the tribunal-appointed expert focuses and provides an opinion on the specific issues in dispute within the relevant area of expertise. The terms of reference are designed to serve this purpose. By being allowed to comment on and provide input into the terms of reference, the parties will have a degree of control over the process.

QUESTIONS TO ASK

1. Is there a genuine need to appoint experts or can the case be effectively made without expert evidence?

2. Should there be party-appointed experts, tribunal-appointed experts or both?

3. What is the appropriate method for selecting party-appointed experts or tribunal-appointed experts, as the case may be?

4. If there are to be party-appointed experts, how many experts are genuinely necessary?

5. When and in what form should expert reports be produced?

6. Should reports be submitted simultaneously or sequentially?

7. Should party-appointed experts be required to meet in order to determine points of agreement and disagreement?

8. If such a meeting is held, should counsel be present at the meeting?

OTHER POINTS TO CONSIDER

Consider avoiding more than one party-appointed expert per topic on each side.

Consider whether it is genuinely necessary to have an expert witness on issues of law. A great deal of time and cost can be saved if legal issues are argued by outside counsel in their briefs and at the hearing.

10. HEARING ON THE MERITS (INCLUDING WITNESS ISSUES)

PRESENTATION

Pursuant to Article 25(2) of the ICC Rules of Arbitration, a hearing must be held if requested by any party. In addition, pursuant to Articles 25(2) and 25(3), the arbitral tribunal may hear the parties, witnesses, experts or any other person, if it so decides of its own motion.

Hearings are expensive to hold and the longer they are, the more costly they become.

Issues: Is it genuinely necessary to hold a hearing at all? If so, is there a need for more than one hearing? What is the appropriate length for the hearing and how should it be organized?

OPTIONS

A. Hold no hearing and have the case decided solely on the documents submitted by the parties.

B. Hold one or more hearings, as appropriate.

When a hearing is to be held, a certain number of choices need to be made, including:

- appropriate location;
- dates;
- attendees;
- appropriate duration;
- allocation of time between the parties;
- whether there are to be opening and/or closing statements and their duration;
- whether there should be direct examination, cross-examination and/or witness conferencing for fact and expert witnesses;
- whether the hearing should be transcribed and if so, whether daily transcripts and/or live transcripts (i.e. real-time transcripts available electronically to participants during the hearing) should be made;

- when interpreting is needed, whether it should be consecutive or simultaneous;
- whether to use videoconferencing for all or part of the hearing.

PROS AND CONS

Oral hearings are often considered as a key opportunity for the parties to present their case and for the arbitrators to understand it and assess the evidence.

On the other hand, oral hearings are typically one of the most expensive and time-consuming phases of the arbitral process. Costs are generated by a number of factors, including the extensive preparation that is usually necessary and the number of people attending the hearing. In addition, the arbitration is often delayed by the difficulty of finding a mutually convenient time in the calendars of all relevant participants.

Cost and time can nevertheless be reduced by making appropriate choices with respect to the organization of the hearing.

COST/BENEFIT ANALYSIS

In deciding whether to request or agree upon a hearing, the parties should take various factors into consideration. Hearings tend to be most useful when there are disputed issues of fact to be addressed by fact and expert witnesses. Parties may consider proceeding without a hearing, for example, when:

- the case turns exclusively on questions of contract interpretation that do not require witness testimony;
- the case turns exclusively on a question of law;
- no respondent is participating;
- the value of the dispute is low;
- there is a need for a quick decision.

It should be determined whether the potential benefits of a hearing justify the associated time and cost. The choices made with respect to the organization of the hearing may reduce time and cost and may affect the decision on whether or not to hold a hearing at all.

Appropriate location

Pursuant to Article 18(2) of the Rules, hearings may be conducted at any location and not necessarily at the place of the arbitration. The cost of the hearing can be reduced if a location likely to be advantageous in terms of cost is chosen.

Dates

To avoid delay, the dates for the hearing should be set at the earliest reasonable opportunity and recorded in everyone's calendars. Ideally, the hearing dates should be fixed during the first case management conference.

Attendees

Attendees should be limited to those genuinely necessary for the conduct of the hearing.

Time and cost can be reduced if an informed and knowledgeable party representative with decision-making authority participates in the preparation of and attends the hearing. Such a person will be in a position to make cost/benefit decisions in consultation with outside counsel. For companies, the party representative is often an in-house counsel. For states or state entities, an individual with decision-making authority can be appointed.

Appropriate duration

Under the Rules, there is no prescribed length for hearings. In practice, parties often request hearings that are longer than necessary. However, the longer the hearing, the greater the cost. The length of the hearing should be carefully chosen so as to allow no more time than is necessary for adequately presenting the case.

Use and duration of opening/closing statements

An opening statement is an opportunity to make a summary and synthesis of the case and can help focus the arbitral tribunal's attention on the key issues. The longer the statement, the greater the cost. When the case has already been fully developed in briefs with supporting documents and witness statements, it may not be necessary to repeat these matters in an opening statement.

A closing statement is an opportunity to make a summary and a synthesis of what happened at the hearing. However, if the parties are not given sufficient time to prepare a closing statement, it may be of little use. Furthermore, it may not be necessary to have both a closing statement and a post-hearing brief, as they are likely to repeat each other and unnecessarily increase time and cost.

Direct examination, cross-examination, witness conferencing

In some legal systems, the questioning of witnesses is largely conducted by the arbitral tribunal, with counsel for each side being invited to ask follow-up questions. Under this approach there is no direct examination or cross-examination.

In other legal systems, and increasingly in international arbitration, the questioning of witnesses is largely conducted by counsel through direct examination and cross-examination, with the arbitral tribunal having the right to interject questions or ask questions at the end of the witness's testimony.

The first approach will often result in a shorter and less expensive hearing. The second approach will often allow a more comprehensive examination of the witnesses. Since the first approach leaves the arbitral tribunal largely in control, there is little scope for the parties to make cost/benefit decisions. While the overall duration and cost of the second approach will often be greater, a number of choices can be made to reduce the time and cost, as follows:

Direct examination

Direct examination is the questioning of a witness by the party presenting that witness. In international arbitration, witnesses often submit written witness statements setting forth their evidence. When such statements have been submitted, direct examination may be dispensed with entirely or kept short (e.g. 10 or 15 minutes). This will reduce the length and cost of the hearing.

Cross-examination

Cross-examination is the questioning of a witness presented by the opposing party. If each side is given an

overall allocation of time at the hearing, a party is free to determine how much time to use for each witness so long as the total time is not exceeded. Alternatively, time and cost can be reduced by setting time limits on the cross-examination of witnesses.

Consideration should also be given to the appropriate scope of cross-examination. Limiting its scope to matters covered in a witness's statement or in direct examination, if any, may reduce the length and cost of the hearing.

If it is not necessary to cross-examine certain witnesses who have provided statements for the other side, time and cost can be saved by not doing so. However, in that case, it may be necessary to obtain agreement from the other side or an order from the tribunal stipulating that the decision not to cross-examine a witness does not constitute an admission of the truth of that witness's written statement.

Witness conferencing

Witness conferencing can function as an alternative or an addition to cross-examination. In witness conferencing, two or more witnesses dealing with the same area of evidence are questioned together either by the arbitral tribunal first and then by counsel, or vice versa. The witnesses are also given the opportunity to debate with each other.

Witness conferencing (in particular of expert witnesses) can save time and cost insofar as it helps to focus on, clarify and resolve areas of evidential disagreement.

If the witness conferencing is directed by the arbitral tribunal, the arbitrators will need to prepare carefully beforehand in order to be able to fulfil their inquisitorial role effectively. It may deprive the parties of some control over the presentation of the case.

If the witness conferencing is directed by counsel, they retain greater control over the process and debate can still occur between the witnesses. In addition, the tribunal will have the opportunity to ask its own questions. However, some of the benefits of witness conferencing may be lost as the process is likely to be longer, more expensive and less focused.

Nature of transcripts, if needed

Transcripts are expensive, especially daily transcripts and live transcripts (i.e. real-time transcripts available electronically to participants during the hearing). A cost/benefit decision should be made on what is genuinely necessary. A transcript enables the parties and the tribunal to have a complete and accurate record of the evidence adduced at the hearing. It can be very helpful to the parties when preparing post-hearing briefs, if any, and to the tribunal when preparing the award. In very low value or simple cases, it may be possible to save the expense of a transcript at no great loss. In complex cases with many witnesses, the additional cost of daily transcripts and live transcripts may well be justified. They will facilitate effective cross-examination and be useful when preparing further witness questioning.

Consecutive or simultaneous interpreting, if needed

A choice must be made between simultaneous and consecutive interpreting.

Consecutive interpreting requires fewer interpreters and equipment, but is more than twice as long as simultaneous interpreting, which makes it more costly due notably to the extra time lawyers and experts will have to spend at the hearing. While it may be easier to control the accuracy of consecutive interpreting, that benefit must be weighed against the considerable time and cost it may add to the hearing.

Use of videoconferencing for all or part of the hearing

While it is generally preferable to hold hearings in the physical presence of the arbitrators, the parties and the witnesses, the significant time commitment and travel expenditure this may require from certain witnesses can be avoided by using videoconferencing.

QUESTIONS TO ASK

1. Is an oral hearing necessary for the fair determination of the issues in dispute so as to justify the extra time and cost it involves?

2. Is it necessary to test a written witness statement by cross-examining the witnesses at a hearing?

3. Is there a more convenient location for the hearing than the place of arbitration?

4. What is the earliest time at which dates for the hearing can be set?

5. Who genuinely needs to attend the hearing?

6. Should fact witnesses and/or expert witnesses be allowed to attend the hearing while other witnesses are giving testimony?

7. Taking into account the nature of the issues in dispute, the value of the dispute and the number of witnesses, what is the total number of days genuinely necessary for the hearing? Is the proposed length of the hearing justified in terms of cost?

8. How should the total time of the hearing be allocated between the parties?

9. Should there be an opening statement and if so, how long should it be? Is it genuinely necessary to have both a closing statement and a post-hearing brief? If there is to be a closing statement, how long should it be and how much time should be allocated for its preparation?

10. Does every witness need to be cross-examined?

11. Which areas of evidence require examination and what is the most efficient method of examination (cross-examination or witness conferencing)?

12. Should the hearing be transcribed and if so, should there be daily transcripts and/or live transcripts?

13. If interpreting is needed, should it be consecutive or simultaneous?

14. Should videoconferencing be used for all or part of the hearing?

11. POST-HEARING BRIEFS

PRESENTATION

Parties in an arbitration have the opportunity to present their legal arguments and the relevant facts in pre-hearing submissions and during the hearing itself. The issue here is whether it is necessary or useful for the parties to submit post-hearing briefs.

Post-hearing briefs may be used to draw the arbitral tribunal's attention to relevant facts that have emerged at the hearing and place them in the context of the parties' claims and defences. They may be drafted in a manner that assists the arbitral tribunal with drafting the arbitral award. In some cases, the arbitral tribunal may identify key issues to be addressed by the parties in their post-hearing briefs.

If closing statements are made at the end of a hearing, post-hearing briefs may be unnecessary. Conversely, if there are post-hearing briefs, closing statements may be unnecessary.

Issue: Should there be post-hearing briefs and/or closing statements?

OPTIONS

A. Proceed directly from the hearing to an award with no closing statements or post-hearing briefs.

B. Provide for closing statements immediately after the hearing or at some agreed time thereafter, but no post-hearing briefs.

C. Provide for post-hearing briefs but no closing statements.

D. Provide for both closing statements and post-hearing briefs.

E. Post-hearing briefs, if any, can be submitted simultaneously or sequentially, and there can be more than one round of post-hearing briefs.

PROS AND CONS

The submission of post-hearing briefs can serve a number of useful purposes, as mentioned above. In a

long and complex hearing, it may be useful for each party to sum up what they consider to have been demonstrated at the hearing. Post-hearing briefs can include valuable references to the hearing transcript and present a short final synthesis of the evidence and facts of the case, which can be of great value to the arbitral tribunal when drafting the award.

On the other hand, post-hearing briefs add to the cost of the arbitration and may delay the rendering of the award. In addition, they may be of little use if they merely repeat facts and arguments already well understood by the arbitral tribunal.

COST/BENEFIT ANALYSIS

The additional time and expense required for post-hearing briefs need to be balanced against the likelihood that they will genuinely serve one of the purposes indicated above. For example, post-hearing briefs will be especially useful where there are numerous witnesses, complicated or disputed facts, or extensive cross-examination. In all cases, the time and cost associated with post-hearing briefs should be weighed against their likely impact on the arbitral tribunal's decision.

The time and expense required for post-hearing briefs can often be reduced if measures are agreed to keep them relatively short and concise, e.g. limiting the number of pages.

QUESTIONS TO ASK

1. Does the case justify the extra time and expense required for post-hearing briefs, closing statements, or both?

And, in particular,

2. Are post-hearing briefs genuinely useful or necessary for a party to make its case to the arbitral tribunal, and if so, why?

3. What is the estimated cost of preparing the post-hearing briefs?

4. Is the benefit worth the cost, and if so, why?

OTHER POINTS TO CONSIDER

Consider limiting the scope, length and timing of any post-hearing briefs.

Consider having post-hearing briefs filed simultaneously to save time.

In some cases, it may be genuinely necessary to allow each party a short period of time in which to reply briefly to the other party's post-hearing brief.

In some cases, simultaneous post-hearing briefs may have the undesirable consequence of creating a need for further rounds of submissions. Care should therefore be taken to define properly the parameters of post-hearing briefs.

Post-hearing briefs may include submissions on costs, which are normally not discussed at the hearing. This can also save time.

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The Commission aims to:

- *Promote on a worldwide scale the settlement of international disputes by means of arbitration, mediation, expertise, dispute boards and other forms of dispute resolution.*
- *Provide guidance on a range of topics of current relevance to the world of international dispute resolution, with a view to improving dispute resolution services.*
- *Create a link among arbitrators, counsel and users to enable ICC dispute resolution to respond effectively to users' needs.*

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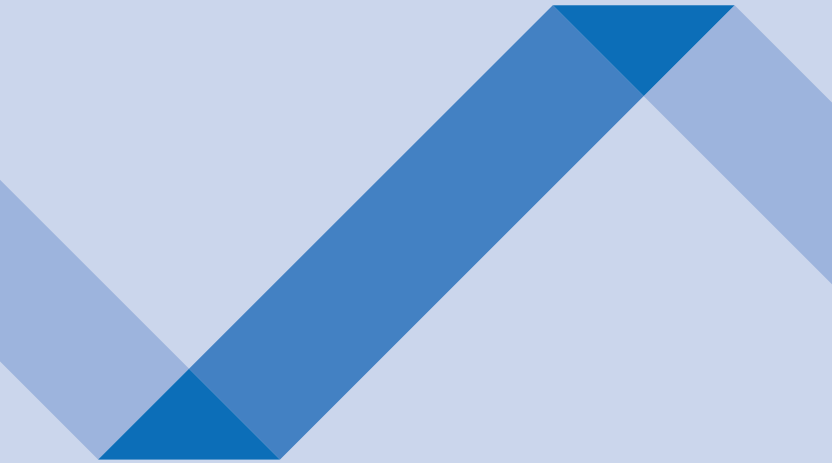

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Tips for CEOs and CFOs from
40 experienced commercial arbitrators.

THE TOP 10 ways to make ARBITRATION FASTER and more cost *effective*

AMERICAN ARBITRATION ASSOCIATION®

Forty experienced arbitrators from across the United States were asked what ten things they would tell CEOs and CFOs in order to maximize the benefits of commercial arbitration. The arbitrators represent a broad range of legal and business experience throughout the spectrum of commercial and governmental law. Experience as an arbitrator ranged from two years to forty years.

Arbitrators responding to the survey possessed wide experience in both business and law:

- Partners in large and small law firms
- General Counsel
- Executive Vice Presidents
- Corporate Secretaries in large and small companies, including family owned enterprises
- Law Professors
- Transaction Attorneys
- Litigation Attorneys
- Former Judges
- Legal Aid Attorneys
- Public Defenders
- US Attorneys
- State Attorneys
- International Law and Business
- State and Federal Agencies
- State Government Elected and Appointed Officials

The top 10 ways to make arbitration faster and more cost effective

By:
David L. Evans, Esquire
Murphy & King
Boston

India Johnson, President and CEO
American Arbitration Association®
New York

But for arbitration to fulfill these expectations, companies and their counsel must evaluate their practices and take steps to ensure that arbitration does not become the functional equivalent of a trip to court. These "top ten tips," gleaned from the experiences of seasoned AAA® arbitrators, are a good starting point for the true stakeholders – the parties – to understand how to use the arbitration process to further their objectives.

1 Pay Attention to Your Arbitration Clause

Thoughtlessly inserting a boilerplate arbitration clause into your contract can turn a manageable dispute into a more time consuming, expensive and disruptive case. Companies and their transactional lawyers carefully evaluate the business terms in their contracts, but they often reflexively insert a boilerplate arbitration clause from other contracts or a form book. This oversight jeopardizes the inherent benefits of arbitration and could result in a more expensive, disruptive and inefficient proceeding. It is vital to give up-front consideration to the details of the procedures most suitable to any likely disputes under a contract and not simply hope for the best once hostilities have arisen. While an entire article could be written on clause drafting (a checklist of issues is included in the side bar), some key issues to address are:

- Case deadlines
- Discovery limits
- Arbitrator selection and qualifications
- Confidentiality

Courts have fixed rules of procedure regulating most aspects of a case. Arbitration is a creature of contract, enabling the parties to tailor the process to fit their needs and bypass litigation procedures. If you do not take advantage of this critical distinction, you may well be relegated to a more cumbersome and costly proceeding. As an arbitration administrator, the AAA has broad experience in these clause components, but you must include AAA in the clause to access its expertise.

2 Select Attorneys Experienced in Arbitration

While arbitration should be economical and efficient, less experienced attorneys often unnecessarily apply time-consuming litigation processes. While arbitration and litigation are both adversarial proceedings, there are important differences between the two and understanding those differences is critical to the cost- effective presentation of a case. Lawyers unfamiliar with the arbitration process tend to treat arbitration as though it were a court proceeding, resulting in requests (or even stipulations) for extensive discovery, evidentiary skirmishes and unnecessary motion practice. Critically, since arbitration should not be burdened with full blown litigation discovery, you should hire a lawyer unafraid to try a case without having deposed every conceivable witness or unearthed every document. And, it is totally appropriate to ask prospective counsel how many arbitrations they have actually tried to conclusion! Make sure counsel understands your business objectives and is prepared to take the straightest path towards the fulfillment of those objectives.

Checklist for Arbitration Clauses:

- Number and qualifications of arbitrators
- Hearing locale
- Time (case duration) limits
- Discovery (including e-discovery) limits
- Attorney's fees and arbitration costs (divide equally or prevailing party)
- Phased ADR regime (meet and confer, mediation, med/arb hybrid)
- Confidentiality (documents, testimony, award)
- Dispositive motions (summary judgment)
- Form of award (reasoned or standard)
- Interim or injunctive relief
- Governing law and rules

> *"Arbitration is a creature of contract, enabling the parties to tailor the process to fit their needs and bypass litigation procedures."*

3 Request and Enforce Budgets

Your arbitration decisions should be based on traditional cost-benefit or ROI analyses. How many important business projects are launched without a budget? Arbitration should be treated no differently. Companies should require their lawyers to prepare and regularly update a budget for the various phases of the case (i.e. claim/answer, discovery, witness preparation, experts, hearings, motions, and briefs), justify the line items and track billings against the budget. Alternative fee arrangements such as blended hourly rates, contingent fees or fixed fees should also be considered. Overall, and absent special circumstances (e.g. customer relations or precedential concerns), your arbitration decisions should be based on traditional cost-benefit or ROI analyses familiar to most businesses.

4 Choose the "Right" Arbitrator

Researching an arbitrator with the right expertise, temperament and background is an often overlooked yet essential step. Every arbitration award is rendered by a human being, or panel of them, each with his or her own backgrounds and experiences. Yet, it is surprising how little attention parties devote to the arbitrator selection process, and specifically to identifying an arbitrator with the substantive expertise, temperament and training to be receptive to the evidence. The first opportunity to narrow the field begins with the arbitration clause itself. Ask yourself: if there is a dispute under the contract, what will be the likely claim(s)? Do I want a lawyer to decide the claims, or an accountant, or an engineer? Once the demand is filed, and the case administrator has disseminated a list of arbitrator candidates (subject to any requirements specified in the arbitration clause), businesses should review the arbitrators' biographies, search the internet and any public data bases, and, if appropriate, solicit feedback from those with experience with the arbitrator. In short, conduct due diligence as you would with any important business decision.

An entire seminar could be dedicated to arbitrator selection, but three additional points are worth noting. First, the AAA's Enhanced Neutral Selection Process enables the parties to interview potential arbitrators or pose mutually agreeable written questions to ascertain whether the arbitrator has the proper experience and disposition. The process helps winnow the field to those arbitrators with the ability to exert requisite management skills and handle any unique issues in the case. Second, parties should vet carefully any clause which requires a three person panel and avoid whenever possible a tripartite panel comprised of two party-appointed arbitrators. The running costs of a panel case can be substantial and scheduling becomes more problematic. Third, if there are a flurry of claims under your standard form contract, analyze what is wrong and fix it. An arbitrator cannot be expected to provide relief from a bad agreement.

"Every arbitration award is rendered by a human being, or panel of them, each with his or her own backgrounds and experiences."

5 Limit Discovery to What is Essential for the Arbitrator

Establish a strict discovery schedule focused on the exchange of necessary information. Discovery costs are often the largest part of any litigation budget. But this should not be the case in arbitration, especially if the arbitration clause specifies that discovery will be limited to reasonable procedures consistent with the contours of the dispute. Even if the clause is silent, it is in the parties' mutual interests (and is the duty of the arbitrator) to develop a discovery schedule that is restricted to the exchange of information necessary (not merely desired) for the arbitrator to understand and fairly decide the case. Written discovery requests (interrogatories or requests for admissions) are rarely appropriate. Depositions of witnesses who will testify at the hearings should be avoided, or at least confined to the key decision maker(s). Document exchange is commonplace, but that practice must be given special attention in this age of electronically stored information (ESI). E-discovery has spawned its own cottage industry of consultants and experts, and budgets can easily be exhausted in endless fields of back-up tapes, metadata, .pst files, and TIFF images. Unless the parties can work out an ESI treaty on their own, the issue should be presented to the arbitrator at the preliminary hearing. Even before a case is actually filed, it is prudent to investigate the burden of producing ESI because it could influence the decision on whether to file in the first instance.

6 Participate in the Preliminary Hearing

Gauge the arbitrator, hear the other side's position and have a say in developing the schedule. The preliminary conference is the first occasion for the parties to present their positions to the arbitrator and discuss a case schedule. This need not be a lawyers-only gathering. Clients have the right to be present at the preliminary hearing (most are conducted by conference call), and by participating you have the ability to gauge the arbitrator, hear the other side's unfiltered position and react to the schedule being developed. The product of the conference is a case management or scheduling order which codifies the arrangements from initial discovery through issuance of the award. Be sure to review its terms. Thereafter, monitor any requests for continuances or extensions of the deadlines, as you would with any business project.

7 Limit Motion Practice

Potential motions must be scrutinized, as they are time-consuming and may not have any practical significance. Companies and their counsel should consider whether any potential motion truly "advances the ball." Motions designed to restrict evidence at the hearings (so-called motions in limine) may be inappropriate because the formal rules of evidence do not apply in arbitration, and the arbitrator should rightfully consider evidence designed to further his or her understanding of the case. Similarly, arbitrators may be reluctant to grant dispositive (summary judgment) motions absent a stipulation by the parties because one of the few grounds for vacating an award under the Federal Arbitration Act is a refusal to hear material evidence. Consider suggesting to the arbitrator that any party wishing to file a motion first seek permission so the arbitrator can assess its potential effect on the case. At a minimum, have your attorneys explain the rationale for any motion, and evaluate its possible efficacy in comparison to the risks and costs.

> *"Monitor any requests for continuances or extensions of the deadlines, as you would with any business project"*

8 Remain Open to Settlement

Keep an open mind and set aside emotions during the case as opportunities for settlement develop. Few lawsuits proceed as scripted, and arbitration is no different. Businesses need to be alert to case developments, and evaluate whether any new information affects the value of the case. Leave your emotions aside. Consider direct talks with the adverse party's management or the use of a mediator, and reassess the options throughout the proceeding. Indeed, many cases settle during or after the hearings. As arbitration administrator, the AAA usually attempts to include a voluntary mediation step during your arbitration and, when adopted, many cases are settled or partially settled prior to hearing. Even settling some of the disputes in a case can make the hearings less expensive and quicker.

9 Trust the Expertise of the Arbitrator

Arbitrators have specialized knowledge in your field and are more receptive to the facts of your case than to generalized pleas for fairness and equity. Attorneys who regularly represent clients in arbitration recognize the differences between a jury case and arbitration before someone knowledgeable about the industry or subject matter. Arbitrators want to understand how your case fits into a framework which they already have experienced. Present your claims in the clearest possible manner, with an eye towards demonstrating how the particular facts of your situation warrant relief. Focus on the key issues in dispute. Generalized pleas for fairness or equity are less likely to resonate with the arbitrator.

10 Present the Case Efficiently and Professionally

You play a critical role in completing the arbitration as efficiently and persuasively as possible. By the time the first witness is sworn, procedures should be in place to ensure that the hearings flow smoothly. Time limits should be considered. Exhibits books containing stipulated exhibits should be pre-marked, with copies available for all participants, including witnesses. Slides or demonstrative exhibits can be effective presentation tools, particularly for opening statements or complicated technical or damages matters. The parties should have discussed any witness sequencing issues, considered the use of video or web testimony and affidavits, and presented any witness disputes to the arbitrator for disposition. Do have a party representative at the hearings. Do not groan, scoff or chortle during an opponent's case or slump in your chair after an unfavorable ruling or testimony. When testifying, direct your comments to the arbitrator and avoid unnecessary sparring with counsel during cross-examination.

As the stakeholders with the greatest economic interest, the parties have the most to gain from an efficient, fair and expeditious resolution of their dispute. Businesses, in consultation with in-house and outside counsel, must assume ownership of the arbitration process to leverage the unique benefits of arbitration over court. With a customized arbitration clause and careful monitoring of the proceeding, the parties are uniquely situated to rein in costs and produce speedy outcomes. Attention to these ten tips will put the parties on the path towards better outcomes.

"Few lawsuits proceed as scripted, and arbitration is no different."

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NYSBA/Fordham Law School
Arbitration 2019: Commercial Arbitration at Its Best
March 25, 2019

The 10 Most Important Things for Arbitrators
Charles J. Moxley, Jr.

1. Diligent and full disclosure through a well-thought out and reliable conflicts system
2. Overriding mental orientation: humility and sense of the honor of the role
3. Diligence––being fully familiar with the procedural and ethical rules and working as hard as the attorneys from the outset of the case in addressing the substantive issues raised and managing the process, including through
    a. Being up-to-speed on all phases of the case at each conference in the case
    b. Being available to counsel on short notice
    c. Papering every decision, providing reasons, albeit in short form, for all decisions that could be the basis of a vacatur application
4. Communicating and implementing the arbitration difference—the distinctive differences between arbitration and court-based litigation, including as to such matters as the following, usually addressed in the first instance through one's "Arbitration Speech" and "Discovery Speech"):
    a. Time factors—including the general expectation that the hearing will be scheduled 6-9 months from the preliminary hearing
    b. The "architectural" preliminary hearing, establishing the design of the case, including an overall schedule for all matters likely to come up (*See e.g.* the AAA's Checklist at P-2 of the Revised Commercial Arbitration Rules)
    c. The active management of discovery
    d. Limits on substantive motion practice
    e. Status conferences, to keep the case on track
    f. The conducting of the hearing
    g. Advising the parties as to what, if anything, to include in any post-hearing briefs or oral argument
    h. Eliciting the parties' agreement at the end of the hearing that they have had full and fair opportunity to present their case
    i. The form and extent of the award, addressing all issues raised in the case

5. Protecting the award from the beginning of the process—one area where the parties do *not* "own the process"
6. Proactively, creatively, and collaboratively designing the process most appropriate for the individual case, delivering on the flexibility that is intended to be a hallmark of arbitration
7. The Managerial Arbitrator---being proactive throughout the case, albeit essentially within the framework of letting the parties present the case they want to present for hearing
8. Proactively managing discovery/disclosure, including particularly ESI
9. Heuristics—developing awareness and proactively managing potential unconscious influences on one's perception and evaluation of the case in all its phases
10. Open, candid, and continuous communications among panel members as to all aspects of the case

Talking Points on Best Practices of Arbitrators in Conducting Effective Arbitrations

Charles J. Moxley, Jr.

- **The arbitration difference**: Subject to the needs of the particular case, it is good practice generally for arbitrators to communicate to counsel early on their expectations as to how arbitration differs from litigation, particularly as to discovery, motion practice, and the conduct of the hearing.
- **Requirements of arbitration clauses**: Arbitrators should generally be alert to any issues as to compliance by the parties and the arbitrators with the requirements of the arbitration clause in a case and address the situation as necessary so as to protect the award.
- **Relations with other arbitrators**: It is important early on panel members to establish a good working relationship among themselves.
- **Listening and Hearing**: It is obviously important for arbitrators to listen to and understand the parties' arguments before ruling. It is generally best to "mediate" a ruling on intermediate disputes between the parties, such as discovery disputes, to the extent possible, rather than simply ruling on them off the top. This is particularly important in the early phases of the case when the lawyers know the case much better than the arbitrators.
- **Detailed pleadings, with the main supporting documents attached**: Where the parties present bare-bones pleadings, it will often make sense for the arbitrators to require that the parties interpose detailed pleadings, perhaps with supporting documents attached. This can sometimes lessen the scope of discovery/disclosure needed in the case. Doing this also advances the goal of giving each side reasonable notice of the other side's factual and legal assertions. This also applies to the need in some cases for the early particularization of a party's claimed damages, subject to any experts' reports on the subject that may be submitted later in the case.
- **Applications for interim relief**: Where parties press applications for interim relief, arbitrators should hear them on an expedited basis, conducting fact hearings as necessary. However, one should be very careful to limit one's rulings on such applications to matters that need to be decided at the time, and to make it clear, as a general matter, that the interim rulings are only that and do not necessarily reflect how the subject matters will be decided on the merits.
- **Focusing on the overall design of the case**: Arbitrators should see as their central role at the outset of a case figuring out the appropriate process for the case, the type of proceeding most suited to the needs of the case. This involves familiarizing oneself with the file and giving counsel a reasonable opportunity at the preliminary hearing to describe their views as to the case – most essentially, their sense of the appropriate scope of

process for the case, including with respect to discovery, particularly e-discovery and depositions (if any), motion practice, schedule and the like. Salient issues in this regard include the following:

- **The preliminary hearing/organizational meeting/scheduling conference/management conference**: This first meeting, usually telephonic, between counsel and the arbitrators can be a pivotal moment in the case for formulating the design – the very architecture – of the case. It generally makes sense for arbitrators to conduct a robust preliminary hearing, essentially covering, at least broadly, everything that can be anticipated that may come up in the case
- **Whether to ask counsel in advance of the preliminary hearing to try to work out a schedule and protocol for the case**: It is a judgment call in each case whether to ask parties to do this. Requiring this pre-hearing coordination among counsel can be efficient, and counsel tend to like it, but it can lead to counsels' agreeing to a litigation-style process, making it harder at the preliminary hearing to get buy-in from counsel on a scope of discovery that is appropriate for arbitration. However, it generally makes sense for arbitrators to at least figure out their mutual days of availability for the hearing and be prepared to present them to counsel on a unified basis. Where the arbitrators know from the papers or the case manager the general timeframe in which the parties would like to conduct the hearing (and when that timeframe makes sense to the arbitrators), it can be helpful for the arbitrators to advise counsel of their mutually available dates in advance of the preliminary hearing, so counsel can figure out which of those dates are most convenient for the parties. It will sometimes make sense for the arbitrators to send a detailed agenda to counsel several weeks in advance of the preliminary hearing. However, this has the disadvantage that it may be too cookie-cutter, in that the arbitrators may not yet know enough to really adapt the agenda to the particular needs of the case. As a result, sometimes it's best to just go into the preliminary hearing without a pre-fixed agenda and move forward as the needs of the case unfold.
- **The possibility of having the preliminary hearing in person with clients present:** Everyone seems to agree that this is a good idea when the scope of the case and the location of the parties, counsel, and arbitrators make it convenient. Nonetheless, preliminary hearings are still largely conducted telephonically. Perhaps, as arbitrators, we should be pushing harder for in-person preliminary hearings when the scope of the case and complexity of the issues justify it.
- **The scope of the preliminary hearing**: My sense is that it is now recognized as a Best Practice that arbitrators should conduct a robust preliminary hearing extending over several hours or more, when necessary, essentially covering, at least broadly, all the things that one can anticipate may come up in the arbitration. Nonetheless, there still appear to be some experienced arbitrators who prefer conducting the preliminary hearing essentially as a scheduling conference, generally taking an hour or less, without getting into any real discussion of the case. Perhaps this is a topic we might want to talk about in some detail. It is important to remember, if one intends to conduct a robust preliminary hearing, to give the parties advance notice, so they can allow sufficient time.

- **Standards as to discovery**: It still happens fairly often that counsel approach arbitration with a litigation mindset as to the scope of discovery and the like. This makes it important for arbitrators early on to discuss with counsel the arbitrators' expectations, subject to the needs of the particular case, as to the scope of discovery/disclosure in the case, perhaps even going so far, when it seems warranted, as to advise counsel of the robust body of "soft law" that exists in reports and studies by bar associations and other professional groups and the like and of the standards that can be found in the arbitration rules applicable to the case at hand.
- **Reliance documents**: The production by parties of their reliance documents is a normal expectation in international cases. However, this approach can also be helpful in domestic cases, sometimes serving as a substitute for the more expansive document production approach more typically used in arbitration in the United States, or at least for limiting the scope of the document production phase of the case. On the other hand, if, in a domestic case, the parties are going to want, in any event, to conduct more traditional discovery as to documents, with document requests, objections, and the like, requiring the production of reliance documents can be redundant, depending of the facts of the particular case. It is important to discuss this matter with counsel in the preliminary hearing and to review the advantages and disadvantages of the various approaches.
- **E-discovery**: It is broadly recognized that many arbitrations will succeed or fail in terms of efficiency and economy based on whether e-discovery is conducted in an efficient and proportionate way. Not so long ago, most of us tended not to address the subject until a dispute concerning e-discovery was presented for decision. However, I think it is now a clear Best Practice to raise the issue of the appropriate scope of e-discovery in the preliminary hearing (or in a follow-up conference on the scope of discovery), and to suggest that the parties meet and confer on the subject within a reasonable timeframe, addressing such potential issues as the following: search terms and the possible testing thereof, time periods, custodians, hit counts, format in which documents will be produced, predictive coding as a possible option, metadata and other points relating to electronic discovery that may arise. It is probably worth telling the parties in the first procedural order that something along the lines of the following will apply to e-discovery in the case:
    - There shall be production of electronic documents only from sources used in the ordinary course of business. Absent a showing of compelling need, electronic documents are not required to be produced from back-up servers, tapes or other media.
    - Absent a showing of compelling need, the production of electronic documents shall normally be made on the basis of generally available technology in a searchable format which is usable by the party receiving the e-documents and convenient and economical for the producing party. Absent a showing of compelling need, the parties need not produce metadata, with the exception of header fields for email correspondence.
    - Where the costs and burdens of e-discovery are disproportionate to the nature and/or gravity of the dispute or to the relevance of the materials requested, the Arbitrators will consider either denying such request or

ordering disclosure on the condition that the requesting party advance the reasonable costs of production to the other side, subject to further allocation of costs in the final award.

- **Depositions**: Arbitrators should generally make an effort to limit depositions in domestic cases (U.S.) and avoid them in international cases, subject to special need or other good cause shown. One will need to make the "deposition speech" in most preliminary hearings and to try to walk counsel back from the out-size deposition programs that they will often be proposing. Even in cases where the parties are in agreement on extensive depositions, arbitrators still have the option of trying to "jawbone" them down to something more reasonable and to requiring that in-house party representatives be present for a discussion of the time and expense factors attendant to depositions (although this is very rarely done). In many cases, it will be possible to get counsel to agree to a limited number of depositions per side and a limited total number of hours for all depositions taken by each side. However, the depositions issue is no longer as important a threshold issue as it used to me, given the emergence of e-discovery as the worst offender in imposing extraordinary costs and delay on the arbitration process. Paradoxically, there may now be cases where it will be efficient to permit a limited number of depositions as a way to limit e-discovery.
- **Using a discovery master**: This practice is efficient and to be recommended.
- **Parties' cooperation in making non-party witnesses available**: In contemporary arbitration there will often be non-party witnesses whose documents or testimony will be needed in the case. Quite often, such non-party witnesses are associated with one of the parties, often as a consultant, accountant, valuation expert, banker or the like. In probably most such instances, the party will not control such non-parties in a formal or legal sense, but will have influence over them and the *de facto* ability to get them to cooperate in providing the needed documents or testimony, subject, perhaps, to a pro forma subpoena. It is appropriate – and, I would argue, a Best Practice – for arbitrators to advise the parties early in the case that the arbitrators expect parties to exert best efforts to secure the cooperation of such non-parties, subject to the risk of an adverse inference if they fail to do so and it turns out at the hearing that they could have done it. This is a matter worth discussing.
- **Non-Party Subpoenas**: Issues as to non-party subpoenas in arbitration in the United States can be quite complicated. This is such an area of specialized knowledge and there are so many pitfalls in obtaining enforcement of subpoenas in the US courts that I think this area deserves special attention. Specifically, I think it appropriate for arbitrators to advise counsel as to the range of issues that may come up as to non-party subpoenas and give them some guidance as to the form of such subpoenas that may be most effective or at least point them in the direction of bar reports or the like providing wisdom on the subject. I think arbitrators should also exercise some kind of gateway function in terms of making sure that the scope of subpoenas that they sign is reasonably limited to what is necessary in the case and appropriate in the context of arbitration.
- **Substantive motions**: This is a tricky area. The bottom line as to arbitrators' Best Practices in this area comes down essentially to the following: that

arbitrators should permit substantive motions that appear likely to foster the efficient administration of the case and not permit substantive motions that fail to meet that test.

- **Witness statements**: This is an area that deserves attention by arbitrators early on in a case and that should be discussed with counsel at the preliminary hearing. The use of sworn witness statements is a normal practice in international arbitration and increasingly used in domestic arbitration. If witness statements are presented early in a case, they can potentially obviate a fair amount of discovery. On other hand, where there are important issue of credibility, it may be more helpful to the arbitrators to hear the direct testimony live. Overall, it is by no means clear that witness statements save much time or money, although opinions differ on the matter. Arbitrators should encourage sworn witness statements where this approach seems effective and efficient in a particular case and discourage it when it does not.

- **Confidentiality**: This area is a trap for the unwary in that counsel often assume that arbitration proceedings are necessarily more confidential than they typically are. I would suggest that it is now a Best Practice to alert counsel to the limits of the confidentiality that may exist in a case and invite them to stipulate to a broader scope of confidentiality if they so desire.
- **Sanctions**: It used to be extraordinarily rare that there was any need to consider sanctions in arbitration. However, the issue does occasionally arise in contemporary arbitration practice. The important thing is for arbitrators to be alert to recognize it when it does happen and stop it promptly and definitively, failing which, a detailed record should be kept of the matter so it can be dealt with at an appropriate time.
- **Timing and length of the hearing**: It is important to assure that the hearing is scheduled at a realistic time and that enough time is reserved for the hearing. Extreme delays can result, given the schedules of busy counsel and arbitrators, when established hearing dates need to be rescheduled or when more time is needed than had been reserved for the case. The last thing we want to do is schedule too many days and create a self-fulfilling prophecy. On the other hand, given the disadvantages of having to schedule additional days, it will often make sense, after a candid and substantive discussion with counsel as to the likely requirements of the hearing, to build in a little cushion, perhaps an extra day or two, or the like, in the schedule.
- **Evidentiary nature of designated hearing exhibits**: There are various approaches here that make sense. The important thing is to establish a clear rule for each particular case. Perhaps the most usual approach in contemporary arbitration is to establish the procedure whereby all previously identified exhibits that have not been specifically objected to by the opening of the hearing are deemed in evidence as of the opening of the hearing. There is also the alternate approach whereby all exhibits actually used in the hearing are deemed in evidence as of the time of their use or as of the close of the hearing. It also makes sense to be clear early on, after consulting with counsel, as to whether documents relating solely to credibility need to be identified and marked in advance.
- **Having as much of the case briefed on a pre-hearing basis as possible**: While there are obviously cases where extensive post-hearing briefing is necessary and helpful, it can often be efficient to have the parties brief as much of their case on a pre-haring basis as possible, making it possible after the hearing to have only limited and relatively quick

briefing or oral argument, getting the case to the panel quicker when it is fresh in their minds.

- **Summaries, Chronologies and *Dramatis Personae***: It can be quite helpful to have such materials in complex cases and well-worth asking counsel for them.
- **Stipulated facts**: These can be great if the parties want to embark on the effort, but it is often more efficient to have each side submit its own proposed factual findings or the like.
- **Opening statements using PowerPoint**: These can be quite helpful, but it is important to remember to require parties to exchange them in advance of the hearing, lest disputes about them take up valuable hearing time.
- **Disruptive counsel performance at the hearing**: As noted above, it is important for arbitrators to recognize trial abuses promptly when they are occurring and deal with them promptly.
- **Rules of evidence**: It is sometimes worth reminding counsel that, while the rules of evidence are not generally binding in arbitration, there are reasons for such rules – and that often evidence, such as extreme hearsay or extremely leading questions on key issues, that is problematical under the rules of evidence will also be lacking in credibility.
- **Heuristics**: Arbitrators are now generally familiar with recent psychological studies and popular books about heuristics, mental shortcuts that our minds take in assimilating information and making judgments that can produce distorted thinking. Contemporary arbitrators should be alert to red flags for problematic heuristics and take compensatory steps to correct for them.
- **Mediation window**: If arbitration is to be at least competitive with litigation, if not better, it must offer similar opportunities for settlement as litigation. I think it can be said that it is a contemporary Best Practice for arbitrators to build a time into the schedule for the parties to consider whether they want to engage in mediation. Any such effort by the parties should generally take place independently of the arbitrators, but their fostering this possibility for the parties is a service to the process of arbitration.
- **Motions to disqualify adversary counsel**: In some jurisdictions, including New York, such motions are reserved for decision by courts. This is such an esoteric area of arbitration practice that it is, in my view, appropriate for arbitrators to advise counsel of it when the issue comes up. I think it is appropriate, as a matter of arbitration practice, for arbitrators to entertain such motions, if the parties give their informed consent for the arbitrators to do so.
- **Choosing counsel who will create a conflict with an arbitrator**: This is a current hot issue. If it comes up, the ordinary practice of arbitrators would be to have the parties brief it, whereupon the arbitrators can decide it under the applicable rules and law.
- **Posing questions during the hearing**: When testimony is unclear, it is certainly fine for arbitrators to ask questions for clarification, and it will often make sense to do this as the testimony unfolds. However, subject to the needs of the particular case, I think it is generally preferable for arbitrators to refrain from asking extensive questions until counsel have completed their examinations. It is particularly important, it seems to me, for arbitrators, absent special circumstances, generally to refrain from asking questions that are outside the scope of the case as the parties have framed it.
- **Form of award**: It is generally good practice for arbitrators to have an open discussion with counsel as to the advantages and disadvantages of the different kinds of awards and

then, subject to the needs of the particular case, to do the form of award that the parties want when they are in agreement.

- **Presenting one's case as to costs and attorneys' fees sooner rather than later**: There are real efficiencies in having the parties tee this issue up for resolution in their final post-hearing papers, so it can be dealt with by the arbitrators in the final award when they decide the substantive issues in the case. The alternate approach of having the arbitrators only issue an interim award on the merits and thereafter address the attorneys' fees issue runs the risk of having that part of the case take on a life of its own, causing unnecessary delay and expense.

Discussion Points on Best Practices of Counsel in Representing Clients in Arbitration

Charles J. Moxley, Jr.

- **The arbitration difference**: It is important to appreciate the extent to which arbitration is different from litigation. It can be quite instructive reading through the "soft law," the numerous available "Best Practices" reports and protocols of bar and other professional groups, arbitration providers, and the like, when embarking on representing clients in arbitration.
- **Arbitration clauses**: Obviously, it can greatly streamline the administration of a case when the parties' arbitration clause is specific as to the various usual bones of contention in a case, such as discovery, motion practice, schedule and the like.
- **Selection of effective arbitrators**: It is important to select arbitrators who not only have subject matter expertise, management ability, and computer know-how (if e-discovery will be a significant issue), but who also have the ability to work effectively with the other panel members. Care should be given to the make-up of the panel qua panel.
- **Credibility with the arbitrators**: The most fundamental requirement for effective representation in an arbitration is credibility with the arbitrators. Cases that go to hearing are often characterized by hotly contested factual, contractual, and legal issues. Sometimes arbitrators have to really struggle to figure out who is right. Arbitrators expect counsel to represent their clients vigorously, but are also more likely to be persuaded by counsel whose representations as to the facts and law seem to be reliable. Acknowledging and addressing the issues in the case tend to work better and are certainly more helpful to the arbitrators than the two ships passing in the night scenario. Nor is extreme argumentativeness, essentially treating the arbitrators as if they were a jury, helpful.
- **Compliance or waiver of express requirements of arbitration clauses**: The requirements of arbitration clauses as to step clauses, timing and the like have binding effect, making it important that both sides comply with or expressly waive them.
- **Detailed pleadings, with the main supporting documents attached**: Detailed pleadings setting forth the factual and legal bases of a party's claims or defenses, along with supporting documents, can be quite helpful in educating arbitrators early on as to a party's view of the world, although there will be situations where one would prefer, or need to take, a more bare-bones approach, at least initially.
- **Pleadings that tell a clear and consistent story**: Pleadings that present a clear and consistent story are often more effective with arbitrators than pleadings that set forth multiple positions in the alternative or the like, although, of course, there will be cases when the latter is necessary or will otherwise make sense. The same applies to counsels' arguments generally in an arbitration.

- **Applications for interim relief**: Counsel generally have the option of making such applications before an arbitrator or a judge. The standards may be more open-ended and discretionary before an arbitrator, but an arbitrator does not have enforcement power, so it will generally make sense to proceed in court when time is of the essence, one really needs the relief, and it is uncertain that the other side would comply with an order by the arbitrator. Interim applications, particularly when made to the arbitrator(s), can serve as a way to get a case jump-started – and sometimes to lay a basis for settlement discussions, if that is what one wants in the particular case.
- **Focusing on the overall design of one's arbitration**: There are many considerations that go into the design of any particular arbitration. Different parties, counsel, and arbitrators will inevitably have different views of such matters in any particular case, including with respect to discovery, particularly e-discovery and depositions, if any, motion practice, schedule and the like. It well behooves arbitration counsel to focus on this aspect of the case early on and be prepared to advocate for the type of design of the case that they believe appropriate in the circumstances. Salient issues in this regard include the following:
  - **The preliminary hearing/organizational meeting/scheduling conference/management conference**: This first meeting, usually telephonic, between counsel and the arbitrators, can be a pivotal moment in the case for formulating the design – the very architecture – of the case. Counsel are well advised to put a lot of time into preparing for this conference as comprehensively as possible, given the uncertainties as to what matters may come up in it.
  - **Conferring with one's adversary in advance of the preliminary hearing to work out a schedule and protocol for the case**: It is a real judgment call whether to confer with one's adversary in advance. Relevant considerations include whether one thinks one will do better with one's adversary or with the arbitrators in terms of getting the design of the arbitration that one wants. This deserves a lot of thought and planning.
  - **The possibility of having the preliminary hearing in person with clients present:** While preliminary hearings are typically conducted telephonically, there can be real advantages, in cases that justify the expense, to holding them in person. An in-person session can provide a real opportunity for the parties, counsel, and the arbitrators to size one another up and begin to develop a working relationship. Having clients present can help with keeping the scope of discovery and the like under control, but can also lead to unhelpful showboating.
  - **The scope of the preliminary hearing**: Parties, counsel and arbitrators have different views as to the appropriate scope of a preliminary hearing, both in general and with respect to individual cases. On the one hand, many now believe that a very robust preliminary hearing extending over several hours or more and essentially covering, at least broadly, all the things that one can imagine may come up in the arbitration, makes sense. Others prefer the older practice of having the preliminary hearing serve essentially as a scheduling conference, generally taking an hour or less, leaving more detailed subjects for later discussion as they come up. It well behooves counsel to think in advance about what kind of preliminary hearing they would like in the particular case and to be able to advocate for that level of process.

- **Standards as to discovery**: Whether counsel in a particular case want expansive or narrow discovery, it can be quite helpful to frame one's arguments in either direction based on the wide array of "soft law" that is out there, in terms of reports and studies by bar associations and other professional organizations and the like. It is also important to be able to frame one's arguments based upon the standards expressed or implicit in the applicable provider rules, although they tend to be of a general nature.
- **Reliance documents**: The production by the parties of reliance documents early on can often serve, at least to some extent, as a substitute for a more expansive document production approach, particularly in international cases, but also in domestic ones. Building in an approach for the early exchange of reliance documents can be efficient in some cases.
- **E-discovery**: It is broadly recognized that many arbitrations will succeed or fail in terms of efficiency and economy based on whether e-discovery is conducted in an efficient and proportionate way. Everyone has stories as to cases where e-discovery has gotten out of hand. It accordingly becomes important for counsel to be conversant with their clients' electronic systems and the underlying technical issues involved in e-discovery or to have a technical expert ready and available for discussions with the arbitrators concerning such matters and the overall administration of e-discovery. Whether one wants expansive or narrow e-discovery, the issue must be addressed, and the earlier the better. There are also emerging technologies that offer efficiencies in this regard, with which one should be aware, whether personally or through a technical expert.
- **Depositions**: Obviously attitudes towards depositions in arbitration differ and depositions are particularly disfavored in international arbitration. Whether counsel in any particular case want several or many depositions or to avoid them entirely, it is essential to be aware of the applicable standards emanating from the soft law as well as from the applicable rules to be able to advocate effectively for whatever scope of depositions, if any, one thinks appropriate in the particular case.
- **Using a discovery master**: This practice can be efficient, but sometimes, where important conceptual issues will be developed in connection with the discussion of discovery matters, it may make sense to have all three panel members be part of this issue. It well behooves counsel to think about this in advance. It is also worth remembering that, even when the chair is designated to serve as discovery master, any party may request the involvement of the entire panel on any particular issue. There may be issues of such broad potential impact that it will make sense to do this at times.
- **Cooperation or not as to non-party witnesses**: In many cases there will be non-party witnesses whose documents and testimony are potentially important in the case. A big threshold question will be whether parties are expected to cooperate in making non-party witnesses over whom they have influence available to produce documents and testify, whether on a pre-hearing or hearing basis, and whether the failure of a party to cooperate in this regard may serve as a basis for an adverse inference. There are arguments on both sides of this issue. It well

behooves counsel to think about it in advance of the preliminary hearing, since the issue may well (and should) come up there.

- **Subpoenas**: Issues as to non-party subpoenas in arbitration in the United States and in other jurisdictions can be quite complicated. It well behooves counsel to be think about this issue in advance and be prepared on it.
- **Substantive motions**: Whether substantive motions will be permitted is an important issue in some cases. There will be cases where such motions will be potentially successful and also cases where making such a motion will be productive in terms of providing useful discovery and also potentially leading to a posture of the case where productive settlement discussions can take place. It well behooves counsel to focus on this issue in advance.
- **Witness statements**: The use of sworn witness statements is a normal practice in international arbitration and increasingly used in domestic arbitration, as well as in many bench trials in court. If witness statements are presented early in a case, they can potentially obviate a fair amount of discovery. On other hand, where there are important issue of credibility, it may be more helpful to the arbitrators to hear the direct testimony live. Overall, it is by no means whether witness statements save much time or money, although opinions differ on the matter. It well behooves counsel to think this out in advance and to have support for whichever approach they think appropriate for the particular case.

- **Confidentiality**: Parties sometimes assume that arbitration proceedings are necessarily more confidential than they actually are. This area deserves real attention and planning by counsel so that they will be in a position to seek to obtain a broad confidentiality order when they think it appropriate for the particular case and to avoid such an order when they don't think it appropriate.
- **Sanctions**: If one's adversary is acting in a sanctionable way, it is important to maintain a detailed log of contemporaneous examples of such conduct, as such details tend to get lost with the passage of time. There is no reason for counsel to be shy about raising the issue of sanctions when there is a significant basis for such relief.
- **Timing and length of the hearing**: It is important to assure that the hearing is scheduled at a realistic time and that enough time is reserved for the hearing. Extreme delays can result, given the schedules of sometimes numerous busy counsel and arbitrators, when established hearing dates need to be rescheduled or when more time is needed than had been reserved for the case.
- **Evidentiary nature of designated hearing exhibits**: There are various approaches that arbitrators typically take as to the admission of documents, including the approach that all previously identified exhibits that had not been specifically objected to are deemed in evidence as of the opening of the hearing or the alternate approach that all previously marked exhibits that were actually used in the hearing are deemed in evidence as of the time of their use or as of the end of the close of the hearing. The issue also arises as to whether documents relating solely to credibility need to be identified and marked in advance. It well behooves counsel to think these through and be prepared to advocate for whatever approach they think appropriate in a particular case.
- **Briefing as much of one's case on a pre-hearing basis as possible**: While there are obviously cases where extensive post-hearing briefing is needed, it can often be efficient to have the parties brief as much of their case on a pre-haring basis as possible, making it

possible to thereafter have a limited number of fairly expedited post-hearing memoranda, if any, submitted, and/or possibly closing statements a week or two after the close of the hearing. The advantage of having as much as possible of the parties' briefing done on a pre-hearing basis is that this can make it possible to get the case to the arbitrators for decision faster, sometimes several months faster, when the case is fresher in their memory.

- **Summaries, Chronologies and *Dramatis Personae*:** Up to the time of the hearing, counsel are generally living with the case far more than the arbitrators. At times the arbitrators, particularly the wing arbitrators if the chair is handling discovery, will only pick up the file occasionally. In such circumstances, it can be quite helpful for counsel to have provided the arbitrators with summaries, chronologies, *dramatis personae* and the like.
- **Stipulated facts**: While stipulated facts can be helpful, they often take more time than they are worth, except as to the most basic matters. It is often more efficient to have each side present its own chronology or the like.
- **Opening statements using PowerPoint**: These can be very effective, particularly if they are keyed to the documents. The arbitrators may use the PowerPoint printouts as a handy reference throughout the hearing.
- **Counsel performance at the hearing**: Excessive showmanship, harshness, and disruptive objections can harm counsel's credibility with counsel, depending on the facts of the case. Vigorous representation of one's client, which arbitrators expect and respect, does not generally require harsh litigation practices. Arbitrators tend to want to get to the merits and may typically be less than impressed by excessive litigiousness.
- **Rules of evidence**: The rules of evidence are not generally applicable in arbitration. However, this freedom from such rules should not lead counsel to become completely untethered from them. There are reasons for the rules of evidence, such as the hearsay rule. Arbitrators are more likely, for example, to give weight to the testimony of witnesses with personal knowledge.
- **Heuristics**: Recent psychological studies and popular books have identified heuristics, mental shortcuts that our minds take in assimilating information and making judgments. Be familiar with such heuristics and how one can protect one's client from unsound thinking in this regard. Some might add that one may consider how one might advantage one's own client by the exploitation of such heuristics, although ethical issues may be raised by such actions.
- **Mediation window**: While the possibility of building a mediation window into the schedule of a case may generally be something better raised by the arbitrators than by counsel, counsel should be alert to the potential to mediate the case concurrently with the conducting of the arbitration, given the substantial savings of time and money that can result from a successful mediation.
- **Motions to disqualify adversary counsel**: In some jurisdictions, including New York, such motions are reserved for decision by courts. However, agreement by both sides, under conditions of informed consent, may provide an appropriate basis for arbitrators to hear such motions.
- **Choosing counsel who will create a conflict with an arbitrator**: Whether this is permissible is a hot contemporary issue that bears study before one embarks on such a course of conduct.

- **Providing ammunition to an arbitrator who appears to favor one's view of the world**: If one senses that one has made headway with one of the arbitrators, that is no time to let up on nailing the point down, as that arbitrator may need ammunition to use with the other arbitrators in discussing the point.
- **Respond to, value, and catalogue questions from panel**: It's important to not only answer such questions on the spot or asap, but to also be sure to follow up on them in any way that seems potentially helpful.
- **Don't embarrasses the arbitrators by excessive chitchat**: A certain amount of collegiality with the arbitrators is human nature, but be careful not to overdo it to the extent of unnecessarily creating an issue or making the arbitrators feel uncomfortable.
- **If an arbitrator misses a matter that should have been disclosed, disclose it yourself**: It's far better to have a clean record than to have something come out later that could compromise the award.
- **Form of award**: Counsel should put real thought into this. There will be times when clients will prefer *not* to have a reasoned award, so as to avoid precedents on a particular point and, of course, times when just the opposite will be desired. Parties often like reasoned awards because they show the thinking of the arbitrators. On the other hand, the scope of appeal in arbitration is so narrow that at times it may make sense, at least in domestic cases in the United States, to go with a standard award, particularly when one has confidence that one's arbitrators will go through the full necessary analysis of the case even if they are not required to produce a reasoned award. In international cases, reasoned awards are not only the norm, but are required in many jurisdictions for the enforceability of an award.
- **Presenting one's case as to costs and attorneys' fees sooner rather than later**: In cases where parties are seeking the award of costs and attorneys' fees, it can be helpful to tee this issue up for resolution at the latest in the final post-hearing papers, so that it can be dealt with by the panel in the final award when they decide the substantive issues in the case. Taking the other approach of having the arbitrators only issue an interim award on the merits and thereafter address the attorneys' fees issue runs the risk of having the attorneys' fee part of the case take on an importance of its own, causing unnecessary delay and expense.
- **Clarification or Modification of Awards**: The scope of the doctrine of *functus officio* is somewhat fuzzy around the edges. Counsel should not be overly reluctant to go back to arbitrators for clarification of awards when there is a real need for it. This step is potentially available before moving in court for remand to the arbitrators or for vacatur.

POINTS TO BE COVERED IN PRELIMINARY HEARING

Charles J. Moxley, Jr.
Draft to be Adapted to the Individual Case

Following are some general topics/points to be covered in preliminary hearings, subject to the needs of the particular case:

- **Purpose:**
  - Purpose of preliminary hearing – _____
- **Arbitration speech:**
  - Discussion with counsel about how arbitration is supposed to be different – _____
    - Discovery – _____
    - Motion practice – _____
    - Pre-hearing disputes – _____
- **Proportionality:** – _____
  - Amount at issue in this case – _____
    - Claims – _____
    - Counterclaims – _____
  - Specific discussion of the appropriate limits of this case in light of proportionality – _____
    - Discovery – _____
    - Motion practice – _____
    - Pre-hearing disputes – _____
- **Applicable arbitration rules:**
  - Commercial rules – _____
  - Employment rules – _____
  - ICDR rules – _____
  - Large and complex case rules
- **Applicable law**:
  - Substantive law – _____
  - Arbitration law – _____
- **Issues raised by the arbitration clause:** – _____
  - Special requirements:
    - Step clause
    - ????
  - Any issues as to arbitrability – _____
    - Objecting party's motion as to same – _____
    - Responding party's papers as to same – _____
- **The Parties' descriptions of their respective views of the world with respect to the case and how it should be administered** – _____

- **Amendments tf Pleadings:**
  - Whether amendments of pleadings are indicated, and, if so, whether reliance documents should be attached to them – _____
    - Date for amended pleadings (complaint/answer) – _____
    - Date for opposing papers – _____
    - Date for reply papers – _____
    - Documents to be attached to each – _____
- **Particularizations:**
  - Whether particularizations of alleged claims and/or damages are indicated – _____
  - And, if so:
    - Opening particularization by (Claimant/Respondent) – _____
    - Corresponding particularization by (Claimant/Respondent) – _____
    - Response to particularizations by (Claimant/Respondent) – _____
    - Response to particularization by (Claimant/Respondent) – _____
  - Date for particularizations of claims – _____
  - Date for particularization of damages – _____
  - Whether documents are to be attached– _____
- **Possible substantive motions**: – _____
  - Procedure to be followed:
    - generally, exchanges of letter briefs of 3-5 pages as to why hearing the proposed motion would foster the expeditious, economical, and fair administration of the case
    - generally, with the case proceeding in the ordinary course in the meantime, subject to what makes sense on the facts of the particular case
    - schedule as to same
      - date for initial letter of proponent – _____
      - opposing papers – _____
      - reply papers – _____
      - oral argument as to same – _____
    - cut-off date for substantive motions – _____
- **Confidentiality:**
  - As to documents – _____
  - As to the entire proceeding as a whole – _____
  - Date for submission of proposed stipulation of confidentiality to be so ordered or to submit any dispute concerning same to the Tribunal – _____
  - **Things to avoid in the stip:**
    - Binding the arbitrator – arbitrator is bound under the AAA rules and ethical rules – _____
    - Binding the AAA -- same – _____
- **Discovery Master:**
  - Whether the Chair will serve as Discovery Master or the entire Panel will hear discovery and routine administrative matters – _____
  - Chair to do it – _____

- Entire Panel to do it – _____

- **Reliance Documents:**
  - Whether the production of reliance documents makes sense in place of, in advance of, or along with normal document production – _____
  - Date for submitting reliance documents – _____
  - Date for any responses to reliance documents – _____
- **Witness Statements:**
  - Whether sworn witness statements, with reliance documents attached, will be used in the case, in whole or in part, in lieu of direct testimony – _____
  - Date for the parties' deciding whether they wish to use witness statements – _____
  - Date for submitting witness statements – _____
  - Date for submitting responsive witness statements – _____
- **Document Production:** Schedule for document production, if any, including for the following:
  - Document requests – _____
  - Responses and objections – _____
  - Counsels' meeting and conferring on objections – _____
  - Privilege logs, if any – _____
  - Production of uncontested documents – _____
    - Possibility of use of generic descriptions in the logs – _____
  - Letter briefs to the Discovery Master or the Panel concerning any discovery disputes – _____ and
  - Schedule for argument of any discovery disputes before the Discovery Master or Panel – _____
- **Client Files:** The expectation that Counsel will familiarize themselves as to how their clients' files are maintained and as to how discovery can best be managed, including electronic discovery – _____
- **Discussion of how electronic discovery can be most effectively managed in the case, including with respect to such matters as:**
  - Date for counsel to meet and confer on the subject – _____
  - Date for conference call with the Discovery Master or Panel if it would be helpful – _____
  - Search terms – _____
  - The possible testing of search terms – _____
  - Hit counts – _____
  - Time periods – _____
  - Custodians – _____
  - Format in which documents will be produced – _____
  - The possible use of predictive coding – _____
  - Possible communications among each side's electronic search experts – _____
  - Other points relating to electronic discovery that are of concern on the facts of the particular case – _____

- **General approach as to submissions to the Tribunal**: General procedure to be followed before submitting a detailed letter brief to the other side:
  - Meet and confer first– _____
  - Confirm in any communication to the Tribunal that such meeting and conferring has taken place – _____
- **Timetable for communications among counsel and to the Tribunal:** Turnaround time concerning communications from either side
  - Response by the other side – within 24 hours – _____
  - Response by the Arbitrator – within 24 hours thereafter – _____
  - Subject to faster turnaround, if needed– _____
- **Extensive written application to be avoided as possible:** General point as that many matters may be handled by conference call with the Arbitrator without substantial written submissions
- **Other discovery**, if any – _____
  - **Interrogatories** – _____
  - **Requests to admit** – _____
  - **Offers of Proof** – _____
- **Non-party subpoenas: –** _____
  - Dates for submitting discovery subpoenas to the Tribunal– _____
  - Date for submitting hearing subpoenas to the Tribunal – _____
  - General rule – 3 business days for the other side to respond before the Tribunal will sign – _____
- **Cooperation of parties as to non-party witnesses:** Expectation that parties will exert best efforts to make non-parties over whom they have influence available for discovery or testimony in the case, where such non-parties have relevant and material documents or information – _____
- **Cut-off date for fact discovery** – _____
- **Experts: –** _____
  - Identification of areas of expert testimony on issues as to which a party has the burden of proof – _____
  - Identification of each side's anticipated expert witnesses on issues on which a party has the burden of proof – _____
  - Identification of rebuttal expert testimony – _____
  - Identification of each side's anticipated expert witnesses on other issues – _____
  - Date for experts' reports on issues as to which a party has a burden of proof – _____
  - Date, where applicable, for reply experts' reports – _____
- **Status conferences: –** _____
  - _____
  - _____
  - _____
  - _____
- **Possible Stipulated Facts: –** _____

- **Summaries, Chronologies and *Dramatis Personae*:** – _____
- **Witness lists**: Identification of witnesses, including as follows:
  - Their present business affiliations – _____
  - Their anticipated areas of testimony – _____
  - Mode of testimony – _____
    - In person – _____
    - By videoconference – _____
    - By telephone – _____
    - By deposition testimony, whether videotaped or not – _____
- **Hearing exhibits**, including as follows: – _____
  - Date for the Parties' exchanges of exhibits to be offered – _____
  - Date for counsels' meeting and conferring to agree on joint exhibits and avoid duplication – _____
  - Finalization of joint exhibits and of each side's identification of its other exhibits and – _____
  - Organization of exhibits binders by category or chronology or the like, as makes sense in the case – _____
- **Key Exhibits** – _____
- **Demonstrative exhibits** – _____
- **Pre-hearing memoranda** – _____
- **Motions *in limine*** – _____
- **The hearing:**
  - When – _____
  - Where – _____
  - Hours – _____
  - Particular focus on length of hearing day – _____
  - Panel's approach to evidentiary, administrative, timing, and other matters – _____
- **Evidentiary nature of designated hearing exhibits**, including as follows:
  - The most typical approach: exhibits to be received into evidence as of the opening of hearing, unless objected to in advance thereto or – _____
  - The more restrictive approach, whereby only documents actually used at the hearing are deemed in evidence – _____
  - Clarification that foundations for the admission of documents need not ordinarily be laid and – _____
  - Decision as to whether pre-marking applies to documents used for impeachment only – _____
- **Provision to arbitrators of copies of cases and other authorities relied upon:** – _____
  - Hard copies – _____
  - Electronic copies – _____
- **Accelerated Exchange Program** – _____
- **Form of the Parties' submissions** to the Arbitrators, whether by electronic and/or hard copies – _____
- **Word copies of submissions**, including briefs and experts' reports

- **Use of electronics at hearings** – _____
- **Post-hearing submissions**, including:
  - Post-hearing memoranda and – _____
  - Closing statements and possibly schedule as to same – _____
- **Form of award:** – _____
  - Standard – _____
  - Reasoned – _____
  - Reasoned lite and – _____
  - Findings of fact and conclusions of law – _____
- **Court reporter** – _____
- **Cyber security** – _____
  - Discuss – _____
  - Areas of focus – _____
    - Means of exchanging documents and other materials – _____
      - Paper only – _____
      - Email – _____
      - What requirements as to type of programs – _____
      - What requirements as to whether emails are to be encrypted – _____
  - Means of storing it – _____
  - Means of using it – _____
  - Means of disposing of it – _____
  - What to do with the passwords – _____
    - Need to constantly change the password – _____
- **Level of cyber securities sensitivity and whether special measure should be taken** – _____
  - Communications with the Panel
  - Submissions to the Panel
  - Exhibits
  - Transcripts
  - Anything else
- **Length of time by which I may destroy the case files**
  - Hard copies other than pleadings
  - Exhibits and transcripts from the hearing
  - Electronic copies of same
- **Costs and attorneys' fees, including**: – _____
  - Whether to be handled through post-hearing declarations and computer sheets as to attorney time – _____
  - Or in a separate process after the merits of the case are decided by interim award or the like – _____
- **Parties' ongoing duty of disclosure as to conflicts** – _____
- **Mediation window** – _____
- **Document retention** – _____
- **Parties' expectations** – _____

- **Anything else either side or any panel member wants to raise** – _____

The Fair and Efficient Hearing

What Advocates and Arbitrators Need To Do To Conduct a Fair, Effective and Well-Managed International Arbitration Hearing

Charles J. Moxley, Jr.

Overview

- Much of what we have said about conducting hearings in domestic arbitrations is applicable to international arbitrations.
- However, there are some distinctive differences between domestic and international arbitration, which are highlighted in this outline. The differences largely flow from differences in how litigation is conducted in different legal systems. A big contrast is between the common law and civil law systems. While domestic arbitration in the United States is heavily reflective of the common law approach followed in the U.S. legal system, international arbitration, to the extent it involves counsel and/or arbitrators from civil law systems, will often consist of an amalgam of the main characteristics of the two systems.
- In recent years, there have been significant convergences of the characteristic features of the litigative approaches of the common law and civil law systems, as such features are carried over into international arbitration. However, significant distinctive features of the two systems are still reflected in contemporary international arbitration practice, making it essential for lawyers and arbitrators making the transition from domestic to international arbitration to have a sensitivity to the differing expectations of participants in international arbitration coming from civil law systems.
- Salient differences between the common law and civil law systems arise, *inter alia*, in the following areas, each of which can have a significant impact on a hearing in an international arbitration:
    - the detailed nature of pleadings and attachments thereto and the continuing importance of such papers in civil law systems, as contrasted with the lesser focus on pleadings in common law systems;
    - the less extensive use of substantive motions in civil law systems;
    - the pervasive use of witness statements in civil law systems;
    - differing overall attitudes towards oral versus written testimony in the two systems;
    - broadly divergent views as to discovery/disclosure in the two systems;
    - the different ways in which expert witnesses are used in the two systems; and
    - the types of cross-examination used in the two systems.
- It is the experience of practitioners and arbitrators in the area that the calibration of the respective use of common law and civil law approaches in a particular

international arbitration will largely depend upon the attitudes of the arbitrators in the particular case.

- The purpose of this outline is to highlight the main distinctive features of hearings in international arbitration that result from the amalgam of common law and civil law approaches that may be used in the particular case, depending on the expectations, attitudes and pre-conceptions of the arbitrators and attorneys involved.

Witness Statements

- In civil law systems, there is a preference for written as opposed to oral testimony. The normal practice is for the direct testimony of witnesses to be presented in detailed sworn witness statements, to which the documents upon which the witness relies are attached. While this practice has become not uncommon in bench trials in some courts in the United States, it is not favored by many common law-based arbitrators, who like to hear the direct testimony orally and be able to assess it as it is presented.
- A main – almost epistemological – point is that, just as common law-oriented advocates and arbitrators tend to regard oral testimony as most persuasive, civil law-oriented practitioners and judges tend to see the written word as more persuasive, essentially believing that "all witnesses lie" and not being particularly enamored with the notion of cross-examination as the "most powerful engine for unearthing truth ever designed."
- The focus on witness statements in international arbitration persists, notwithstanding that everyone understands that witness statements are prepared by the lawyers and, indeed, that, given limitations on lawyers' talking with witnesses in some civil law systems, the lawyers preparing the witness statements have, in some instances, had limited communications at most with the witnesses in question.
- The use of witness statements imposes special burdens on counsel and arbitrators. Obviously, it requires counsel to develop their case and present it in some detail in advance of the hearing, both as to testimony and exhibits.
- For arbitrators from a common law system, there is a risk of overlooking the need to allot and spend whatever time is necessary to really assimilate the witness statements and the exhibits thereto in advance of the hearing, to the extent that, at least theoretically, the arbitrator is as familiar with them as he or she would have been if the witness's testimony and accompanying exhibits had been presented live on direct.
- When witness statements are used in international arbitration, it becomes important, particularly for common law-based arbitrators not that familiar with the civil law approach, to be careful to control the extent of redirect testimony, so

that redirect does not become, in effect, a delayed direct examination. Specifically, within reason, the scope of redirect testimony in international arbitration should be rather strictly limited to that of the cross, subject, obviously, to the needs of the particular case.

- It should be noted that the witness statement approach assumes the availability of the witness for cross-examination at the hearing. However, there are traps for the unwary here, both for counsel and arbitrators, if the opposing party decides not to cross–examine the witness, leading to the situation where the only evidence of record directly from the witness will be the witness statement. Many practitioners and arbitrators believe that, in such circumstances, it is appropriate for arbitrators to permit or even require some direct testimony from the witness, so they can get a sense of the witness's demeanor and the like and have any questions answered.
- It should also be noted that, under the witness statement approach, there will generally be a "warm-up period" of some period of time, typically 15 to 30 minutes or the like, for the witness to summarize his or her testimony very broadly and comment on what the other side's expert witness on the subject has said and other matters that have come up in the case subsequent to the preparation of the witness statement, provided, however, that this warm-up period can be extended for good cause shown.
- It is worth noting that witness statements, if interposed early enough in a case, can serve a purpose akin to discovery, at least to the extent of giving an adversary notice of what the direct testimony of the witness will be – indeed what that testimony is.
- The jury is out on the extent to which arbitrators actually rely on witness statements, as opposed to largely ignoring them and relying almost exclusively on the cross-examination and redirect testimony. Some practitioners and arbitrators believe that arbitrators generally rely fairly heavily on witness statements and others believe that they tend to largely discount them because of the known reality that the witness statements are generally prepared by counsel.
- However, in support of the notion that arbitrators often rely rather heavily on witness statements, it is noteworthy that it is the practice of some arbitrators in international arbitrations to meet after receipt and review of the witness statements, but before the commencement of the hearing, to discuss their preliminary views of the case.

Cross-Examination

- While the opposing side in civil law trials has the opportunity and usually utilizes it to cross-examine witnesses whose witness statements have been offered into evidence, civil law practitioners are not accustomed to the aggressive cross-examination that often occurs in common law systems and are can be offended by

it. It is important both for counsel in international arbitrations and for members of arbitration panels in such cases to be aware of the varying approaches and attitudes of case participants as to the appropriateness of harsh cross-examination.

Underlying Cognitive Issues

- These differing attitudes as to the reliability of written versus oral testimony may affect, if only subliminally, the cognitive styles of advocates and arbitrators from the two systems, leading to the situation where common law-based arbitration practitioners may assimilate witnesses' view of the world more readily from oral testimony and civil law-based practitioners may assimilate such matters more readily from written statements.
- Individual arbitrators will, of course, each have their own particular epistemological and cognitive styles, affecting how they best assimilate evidence, whether from oral or written presentations, and what kinds of evidence they will ultimately find most persuasive.
- A lot of work has also been done in recent years on the subject of heuristics – mental short cuts – that humans typically use in hearing, assimilating, and evaluating information. Such heuristics are made up essentially of unconscious, instantaneous reactions humans have to what is presented to them, based on preconceptions, ways of looking at the world, and even physiological factors, such as the time of day, food one has imbibed, the order of the evidence presented, and the like. Given differences in life experience — perhaps across the entire spectrum of influences based on nature and nurture — between people from different parts of world and cultures, it may be that the heuristics affecting common and civil law practitioners are somewhat different.

Expert Witnesses

- Where, in common law-based domestic arbitration, counsel select expert witnesses and generally expect them to present as strong a case as they can on behalf of the side that retained them, in international arbitrations influenced by civil law systems, the arbitrators will sometimes select the experts and expect them to be truly neutral.
- In international arbitration, the practice of "hot-tubbing" of expert witnesses is often followed, whereby, to one extent or another, such witnesses will be expected to cooperate with one another in narrowing their areas of disagreement and refining their analysis as to such areas.

Secrecy Laws

- Some civil law systems, including notably in Western Europe, have secrecy laws that are very protective of individual witnesses, including of employees of

corporate and other entities. These laws essentially create a zone of privacy that cannot be invaded by the arbitration process, even as to matters at issue in the arbitration that the witnesses were involved in as part of their employment.

- While issues relating to such secrecy laws will typically have been addressed earlier in an arbitration, particularly in the early planning phase of the case, such as at the preliminary hearing and in follow-up preliminary hearings, such issues can come up at the hearing, making it important for counsel and the arbitrators to be prepared to make whatever adjustments to the hearing process are reasonably necessary in light of such privacy laws.
- A most important consideration in this regard is to make sure that the two sides to the case are treated fairly and equally in that they are playing by and subject to the same rules, to the extent practicable.

Party-Appointed Arbitrators

- While in domestic arbitration in the United States, there is still a sense, depending somewhat on the arbitrators, provider institutions, and industries involved in the particular case, that party-appointed arbitrators may be partisan, or somewhat partisan, notwithstanding the default rule under the ABA/AAA Code of Ethics that arbitrators are neutral unless specifically designated as non-neutral, in international arbitration the expectation is much higher and more definite that party-appointed arbitrators will be truly neutral.
- Nonetheless, this expectation in international arbitration is ameliorated somewhat by the preconception, even in international arbitration, at least in the mind of some practitioners and arbitrators in the area, that party-appointed arbitrators are expected to make sure that their appointing party's positions in the case are "understood."
- Accordingly, even in international arbitration, the situation can arise where a party-appointed arbitrator is aggressively asking questions of witnesses designed to elicit or develop the position espoused by his or her appointing-party in the particular case or is overtly partisan in the deliberations in this regard.
- The arbitrators in each case need to make sure the case is being handled appropriately and fairly. The chair will have particular responsibility in this regard.
- Among other things, the chair has to devise and administer a fair approach for communications within the panel and for communications of the arbitrators with counsel and the parties at the hearing.

The Role of Arbitrators in Finding/Developing the Facts

- In civil law systems, judges play an active role in developing the facts at trial, as contrasted with the common law approach, where judges are typically more reliant on counsel to develop and present their case.
- This civil law approach sometimes flows over into the attitude of some civil law-based arbitrators in international arbitration, who sometimes see themselves as having somewhat more of a fact-finding role than arbitrators schooled in the common law system would typically expect.
- This can lead to arbitrators with such a civil law-orientation sometimes taking a somewhat more active role in questioning than U.S. arbitrators are prone to do in domestic arbitration.
- It is important that arbitrators communicate clearly and candidly with one another in this regard to make sure that the particular case is administered in a way that is both fair and has the appearance of being fair. The chair has particular responsibility in this regard.

Absence of Depositions

- Because depositions have historically not been used and are even today rarely used in civil law systems, civil law-based arbitrators in international arbitrations generally believe that depositions are not the norm and should rarely be permitted.
- Nonetheless, as noted above, there has been somewhat of a convergence of common law and civil law practice in international arbitration, to the extent that depositions are occasionally now proposed by counsel in international arbitrations and permitted, at least to some extent, in such arbitrations by arbitrators whose backgrounds are in civil law systems.
- This point as to whether depositions have been permitted can have an impact on the conduct of the hearing in an international arbitration, in terms of whether testimony is presented by deposition and available to counsel for use in cross-examination.

Significance to the Hearing of Potential Issues as to the Enforcement of Awards in International Arbitrations

- Since, by definition, international arbitrations will typically involve parties located in many jurisdictions, awards in international arbitrations will often potentially have to be enforced in multiple jurisdictions, depending on where assets of the losing party are located. Given the overriding importance to arbitrators that their awards be enforceable, this reality as to the need for awards to be enforceable in multiple jurisdictions imposes the burden on counsel and arbitrators in international arbitrations to take whatever steps are reasonably

necessary to assure that the award in the particular case meets the standards of the various jurisdictions in which enforcement might be sought.

- This concern is greatly simplified by the existence of several widely acceded-to multi-national conventions, including, most notably, the New York Convention, to which most of the countries in the world are signatories, making arbitration awards generally enforceable in most countries throughout the world.
- It is obviously quite important for counsel and arbitrators to have a sense of the requirements of such conventions so the award in the particular case will be enforceable. As merely one example, in many countries of the world, unlike in the United States, arbitration awards generally must be of a reasoned nature to be enforced.
- Arbitrators need to be aware of the extent, if any, to which the manner of administration of the hearing may affect the enforceability of the resultant award in the potentially relevant jurisdictions.

Rules Regulating the Conduct of Counsel in International Arbitrations

- To the extent that differences in the ethical regimes applicable to different attorneys and even, possibly, arbitrators in a case can impact on what conduct is permissible in the arbitration, it is obviously important that this matter be focused on early in the case, so everyone is prepared to do whatever is necessary to make the process work smoothly and effectively within the applicable standards.
- The IBA Guidelines on Party Representation in International Arbitration set forth guidelines for the conducting of international arbitrations by advocates, including provisions directly applicable to advocates' performance of their representation of clients at the hearing.
- For example, the Guidelines provide that advocates, who discover that they or a fact or expert witness has made a false statement of fact to the tribunal, should, subject to applicable considerations of privilege and confidentiality, take prompt remedial measures (discussed in the Guidelines) as to the false statement;
- While the Guidelines are merely that, guidelines, they highlight the need for counsel and arbitrators to be aware of whatever legal and ethical regimes may apply in each particular international arbitration.
- While the Guidelines are new and not yet widely followed, they are an invaluable resource for counsel and arbitrators in terms of meeting and managing reasonable expectations in international arbitration.
- Counsel and arbitrators are well advised to familiarize themselves with the Guidelines and refer to them frequently throughout the course of an international arbitration.

Choice of Law

- Because of the multiple jurisdictions from which parties, counsel and arbitrators may come in the typical international arbitration, and the multinational nature of the transactions that are typically involved in such arbitrations, complex issues as to choice of law will often be presented, including as to the law applicable to such matters as the following:
  - arbitrability of claims or defenses asserted in the case;
  - the underlying transactions or matters at issue in the case;
  - the conducting of the hearing;
  - the enforcement of the award in the various – sometimes numerous – jurisdictions in which enforcement may need to be sought; and
  - the ethical and legal obligations of counsel and the arbitrators.
- Advocates and arbitrators need to be aware of the requirements of these various possible legal regimes that may apply in a particular international arbitration.
- Obviously, arbitrators need to conduct the hearing in light of legal considerations applicable to matters being presented in the hearing.

Implication of Need for Reasoned Award

- Arbitrators in international cases will need to consider the need for a reasoned award and take whatever steps are necessary to enable them to prepare such an award.
- Some arbitrator believe that they need a transcript of the hearing to write the award and hence press counsel to arrange for a court reporter for the case. Other arbitrators are more flexible in this regard and are comfortable preparing their awards based on their notes.

Arbitrability

- While issues in an international case as to the arbitrability of the claims presented will typically have been addressed earlier in the case, at times the issue will be left for the hearing and in other instances there will be a separate hearing as to arbitrability, where much of what is said in this outline may be applicable.

Rules of Evidence Applied at the Hearing

- While in international arbitration, as in domestic arbitration, the rules of evidence are not strictly enforceable, nonetheless, since the lawyers and many of the arbitrators will be present or former litigators and sometimes retired judges, the rules of evidence will nonetheless continue to have an impact, or at least a potential impact, on the conducting of international arbitrations.
- This makes the underlying attitudes and expectations of the lawyers and arbitrators involved as to the purpose and usefulness of the rules of evidence

particularly important in the given case, making it crucial that counsel understand the orientation of their arbitrators in this regard and that arbitrators have a sense of the attitudes and expectations of counsel and parties in terms of what is fair and reasonable.

- It is equally important that co-arbitrators consult with one another in advance of the hearing in an effort to get on the same page as to what approach will be taken as to the application of rules of evidence in the hearing.
- Because of the potential for different approaches and expectations in terms of the approach to be taken with respect to the receipt of evidence at hearings in international arbitrators, it is important that this matter and matters of this nature be sorted out as much as possible in advance of the hearing, to avoid undue surprises and potential unfairness at the hearing.

Getting Acknowledgements from Parties at the End of the Hearing that They Had the Opportunity to Offer Whatever Evidence They Wanted to Offer

- Because of the differences in expectations of participants in international as opposed to domestic arbitration, the practice, generally followed in domestic arbitration, of asking parties at the end of the case whether they have had an opportunity to offer any evidence and make any arguments that they want to make, is particularly important in international arbitration.

Interpreters

- Witnesses will often need to testify in different languages at hearings in international arbitrations, requiring the use of interpreters.
- This presents various issues that need to be addressed in advance and worked out, to make the hearing go as smoothly as possible, including such issues as the following: the qualifications of the interpreters; who the interpreters will be; the mode of interpretation, whether sequential or simultaneous; the extent to which questions and comments by the interpreter will be permitted; how it will be handled if the other side wants to have its own interpreter in the room and wants to question interpretations provided by the official interpreter, as the matter proceeds; what the official language of the proceeding is; who bears the cost of the interpreter; and the like.

Translations of Documents

- Similar issues are regularly presented in international arbitration as to the language of exhibits that are presented in the case, including issues as to the official language of the proceeding; the permissible language or languages in which exhibits may be presented to the arbitrators; the handling of the original

documents and the translated versions thereof; proceedings for challenging translations; and the like.

IBA Rules on the Taking of Evidence in International Arbitration

- Approaches to many of the above matters are set forth in the IBA Rules on Taking Evidence. Matters covered in the Rules include hearing the testimony of witnesses, the admission into evidence of exhibits, the use of witness statements, the hearing of experts (both party and tribunal-appointed), the order of testimony at the hearing, and the overall admissibility and assessment of evidence.
- While the Rules are not necessarily binding, they are applied in many international arbitrations, in some cases because the parties have agreed or the arbitrators have directed that they will be applicable, and in other cases because counsel and arbitrators rely on them informally, whether specifically or implicitly.
- It well behooves counsel and arbitrators in international arbitrations to review the Rules throughout the proceeding.

Arbitration Discovery Protocols

JAMS Recommended Arbitration Discovery Protocols For Domestic, Commercial Cases

Effective January 6, 2010

Introduction

JAMS is committed to providing the most efficient, cost-effective arbitration process that is possible in the particular circumstances of each case. Its experienced, trained and highly qualified arbitrators are committed to: (1) being sufficiently assertive to ensure that an arbitration will be resolved much less expensively and in much less time than if it had been litigated in court; and (2) at the same time, being sufficiently patient and restrained to ensure that there is enough discovery and evidence to permit a fair result.

The JAMS Recommended Arbitration Discovery Protocols (**"**Protocols**"**), which are set forth below, provide JAMS arbitrators with an effective tool that will help them exercise their sound judgment in furtherance of achieving an efficient, cost-effective process that affords the parties a fair opportunity to be heard.

An executive summary may be downloaded **here**.

Download Arbitration Discovery Protocols

The Key Element: Good Judgment of the Arbitrator

- JAMS arbitrators understand that while some commercial arbitrations may have similarities, for the most part each case involves unique facts and circumstances. As a result, JAMS arbitrators adapt arbitration discovery to meet the unique characteristics of the particular case, understanding that there is no set of objective rules that, if followed, would result in one "correct" approach for all commercial cases.
- JAMS appreciates that the experience, talent and preferences brought to arbitration will vary with the arbitrator. It follows that the framework of arbitration discovery will always be based on the judgment of the arbitrator, brought to bear in the context of variables such as the applicable rules, the custom and practice for arbitrations in the industry in question and the expectations and preferences of the parties and their counsel.

- Attached as **Exhibit A** is a list of factors that JAMS arbitrators take into consideration when addressing the type and breadth of arbitration discovery.

Early Attention to Discovery by the Arbitrator

- JAMS understands the importance of establishing the ground rules governing an arbitration in the period immediately following the initiation of the arbitration. Therefore, following appointment, JAMS arbitrators promptly study the facts and the issues and become prepared to preside effectively over the early stages of the case in a way that will ultimately lead to an expeditious, cost-effective and fair process.

- Depending upon the provisions of the parties' agreement, JAMS arbitrations may be governed by the JAMS Comprehensive Arbitration Rules and Procedures or by the arbitration rules of another provider organization. Such rules, for good reason, lack the specificity that one finds, for example, in the Federal Rules of Civil Procedure. That being so, JAMS arbitrators seek to avoid uncertainty and surprise by ensuring that the parties understand at an early stage the basic ground rules for discovery. This early attention to the scope of discovery increases the chance that parties will adopt joint principles of fairness and efficiency before partisan positions arise in concrete discovery disputes.

- JAMS arbitrators place the type and breadth of arbitration discovery high on the agenda for the first pre-hearing conference at the start of the case. If at all possible, in-house counsel should attend the pre-hearing conference at which discovery will be discussed.

- JAMS arbitrators strive to enhance the chances for limited, efficient discovery by acting at the first pre-hearing conference to set hearing dates and interim deadlines that, the parties are told, will be strictly enforced and that, in fact, are thereafter strictly enforced.

- Where appropriate, JAMS arbitrators explain at the first pre-hearing conference that document requests:

    - should be limited to documents that are directly relevant to significant issues in the case or to the case's outcome;

    - should be restricted in terms of time frame, subject matter and persons or entities to which the requests pertain; and

    - should not include broad phraseology such as **"**all documents directly or indirectly related to.**"**

Party Preferences

- Overly broad arbitration discovery can result when all of the parties seek discovery beyond what is needed. This unfortunate circumstance may be caused by parties and/or advocates who are inexperienced in arbitration and simply conduct themselves in a fashion that is commonly accepted in court litigation. In any event, where all participants truly desire unlimited discovery, JAMS arbitrators will respect that decision, since

arbitration is governed by the agreement of the parties.

- Where one side wants broad arbitration discovery and the other wants narrow discovery, the arbitrator will set meaningful limitations.

E-Discovery

- The use of electronic media for the creation, storage and transmission of information has substantially increased the volume of available document discovery. It has also substantially increased the cost of the discovery process.

- To be able to appropriately address issues pertaining to e-discovery, JAMS arbitrators are trained to deal with the technological issues that arise in connection with electronic data.

- While there can be no objective standard for the appropriate scope of e-discovery in all cases, JAMS arbitrators recognize that an early order containing language along the following lines can be an important first step in limiting such discovery in a large number of cases:

    - There shall be production of electronic documents only from sources used in the ordinary course of business. Absent a showing of compelling need, no such documents are required to be produced from backup servers, tapes or other media.

    - Absent a showing of compelling need, the production of electronic documents shall normally be made on the basis of generally available technology in a searchable format that is usable by the party receiving the e-documents and convenient and economical for the producing party. Absent a showing of compelling need, the parties need not produce metadata, with the exception of header fields for email correspondence.

    - Where the costs and burdens of e-discovery are disproportionate to the nature and gravity of the dispute or to the amount in controversy, or to the relevance of the materials requested, the arbitrator will either deny such requests or order disclosure on condition that the requesting party advance the reasonable cost of production to the other side, subject to the allocation of costs in the final award.

Artfully Drafted Arbitration Clauses

- JAMS recognizes that there is significant potential for dealing with time and other limitations on discovery in the arbitration clauses of commercial contracts. An advantage of such drafting is that it is much easier for parties to agree on such limitations before a dispute has arisen. A drawback, however, is the difficulty of rationally providing for how best to arbitrate a dispute that has not yet surfaced. Thus, the use of such clauses may be most productive in circumstances in which parties have a good idea from the outset as to the nature and scope of disputes that might thereafter arise.

- JAMS understands that in order for rational time and other discovery limitations to be effectively included in an arbitration clause, it is necessary that an attorney with a good understanding of arbitration be involved in the drafting process.

Depositions

- Rule 17(c) of the JAMS Rules provides that in a domestic arbitration, each party is entitled to one deposition of an opposing party or an individual under the control of an opposing party and that each side may apply for the taking of additional depositions, if necessary.

- JAMS recognizes that the size and complexity of commercial arbitrations have now grown to a point where more than a single deposition can serve a useful purpose in certain instances. Depositions in a complex arbitration, for example, can significantly shorten the cross-examination of key witnesses and shorten the hearing on the merits.

- If not carefully regulated, however, deposition discovery in arbitration can become extremely expensive, wasteful and time-consuming. In determining what scope of depositions may be appropriate in a given case, a JAMS arbitrator balances these considerations, considers the factors set forth in Exhibit A and confers with counsel for the parties. If a JAMS arbitrator determines that it is appropriate to permit multiple depositions, he/she may attempt to solicit agreement at the first pre-hearing conference on language such as the following:
  Each side may take 3* discovery depositions. Each side's depositions are to consume no more than a total of 15* hours. There are to be no speaking objections at the depositions, except to preserve privilege. The total period for the taking of depositions shall not exceed 6* weeks.[1]

  [1] *The asterisked numbers can of course be changed to comport with the particular circumstances of each case.*

Discovery Disputes

- Discovery disputes must be resolved promptly and efficiently. In addressing discovery disputes, JAMS arbitrators consider use of the following practices, which can increase the speed and cost-effectiveness of the arbitration:

  - Where there is a panel of three arbitrators, the parties may agree, by rule or otherwise, that the Chair or another member of the panel is authorized to resolve discovery issues, acting alone.

  - Lengthy briefs on discovery matters should be avoided. In most cases, a prompt discussion or submission of brief letters will sufficiently inform the arbitrator with regard to the issues to be decided.

  - The parties should negotiate discovery differences in good faith before presenting any remaining issues

for the arbitrator's decision.

- The existence of discovery issues should not impede the progress of discovery where there are no discovery differences.

Discovery and Other Procedural Aspects of Arbitration

Other aspects of arbitration have interplay with, and impact on, discovery in arbitration, as discussed below.

Requests for Adjournments

- Where parties encounter discovery difficulties, this circumstance often leads to a request for adjournment and the possible delay of the hearing. While the arbitrator may not reject a joint application of all parties to adjourn the hearing, the fact is that such adjournments can cause inordinate disruption and delay by needlessly extending unnecessary discovery and can substantially detract from the cost-effectiveness of the arbitration. If the request for adjournment is by all parties and is based on a perceived need for further discovery (as opposed to personal considerations), a JAMS arbitrator ensures that the parties understand the implications in time and cost of the adjournment they seek.

- If one party seeks a continuance and another opposes it, then the arbitrator has discretion to grant or deny the request. Factors that affect the exercise of such discretion include the merits of the request and the legitimate needs of the parties, as well as the proximity of the request to the scheduled hearing and whether any earlier requests for adjournments have been made.

Discovery and Dispositive Motions

- In arbitration, "dispositive" motions can cause significant delay and unduly prolong the discovery period. Such motions are commonly based on lengthy briefs and recitals of facts and, after much time, labor and expense, are generally denied on the ground that they raise issues of fact and are inconsistent with the spirit of arbitration. On the other hand, dispositive motions can sometimes enhance the efficiency of the arbitration process if directed to discrete legal issues such as statute of limitations or defenses based on clear contractual provisions. In such circumstances, an appropriately framed dispositive motion can eliminate the need for expensive and time-consuming discovery. On balance, a JAMS arbitrator will consider the following procedure with regard to dispositive motions:

    - Any party wishing to make a dispositive motion must first submit a brief letter (not exceeding five pages) explaining why the motion has merit and why it would speed the proceeding and make it more cost-effective. The other side would have a brief period within which to respond.

    - Based on the letters, the arbitrator would decide whether to proceed with more comprehensive briefing and argument on the proposed motion.

- If the arbitrator decides to go forward with the motion, he/she would place page limits on the briefs and set an accelerated schedule for the disposition of the motion.

- Under ordinary circumstances, the pendency of such a motion should not serve to stay any aspect of the arbitration or adjourn any pending deadlines.

Note: These Protocols are adapted from the April 4, 2009, Report on Arbitration Discovery by the New York Bar Association.

Exhibit A

Relevant Factors Considered by JAMS Arbitrators in Determining the Appropriate Scope of Domestic Arbitration Discovery

Nature of the Dispute

- The factual context of the arbitration and of the issues in question with which the arbitrator should become conversant before making a decision about discovery.

- The amount in controversy.

- The complexity of the factual issues.

- The number of parties and diversity of their interests.

- Whether any or all of the claims appear, on the basis of the pleadings, to have sufficient merit to justify the time and expense associated with the requested discovery.

- Whether there are public policy or ethical issues that give rise to the need for an in-depth probe through relatively comprehensive discovery.

- Whether it might be productive to initially address a potentially dispositive issue that does not require extensive discovery.

Agreement of the Parties

- Agreement of the parties, if any, with respect to the scope of discovery.

- Agreement, if any, by the parties with respect to duration of the arbitration from the filing of the arbitration

demand to the issuance of the final award.

- The parties' choice of substantive and procedural law and the expectations under that legal regime with respect to arbitration discovery.

Relevance and Reasonable Need for Requested Discovery

- Relevance of the requested discovery to the material issues in dispute or the outcome of the case.
- Whether the requested discovery appears to be sought in an excess of caution, or is duplicative or redundant.
- Whether there are necessary witnesses and/or documents that are beyond the tribunal's subpoena power.
- Whether denial of the requested discovery would, in the arbitrator's judgment (after appropriate scrutinizing of the issues), deprive the requesting party of what is reasonably necessary to allow that party a fair opportunity to prepare and present its case.
- Whether the requested information could be obtained from another source more conveniently and with less expense or other burden on the party from whom the discovery is requested.
- To what extent the discovery sought is likely to lead, as a practical matter, to a case-changing "smoking gun" or to a fairer result.
- Whether broad discovery is being sought as part of a litigation tactic to put the other side to great expense and thus coerce some sort of result on grounds other than the merits.
- The time and expense that would be required for a comprehensive discovery program.
- Whether all or most of the information relevant to the determination of the merits is in the possession of one side.
- Whether the party seeking expansive discovery is willing to advance the other side's reasonable costs and attorneys' fees in connection with furnishing the requested materials and information.
- Whether a limited deposition program would be likely to (i) streamline the hearing and make it more cost-effective, (ii) lead to the disclosure of important documents not otherwise available or (iii) result in expense and delay without assisting in the determination of the merits.

Privilege and Confidentiality

- Whether the requested discovery is likely to lead to extensive privilege disputes as to documents not likely to assist in the determination of the merits.

- Whether there are genuine confidentiality concerns with respect to documents of marginal relevance. Whether cumbersome, time-consuming procedures (attorneys' eyes only, and the like) would be necessary to protect confidentiality in such circumstances.

Characteristics and Needs of the Parties

- The financial and human resources the parties have at their disposal to support discovery, viewed both in absolute terms and relative to one another.

- The financial burden that would be imposed by a broad discovery program and whether the extent of the burden outweighs the likely benefit of the discovery.

- Whether injunctive relief is requested or whether one or more of the parties has some other particular interest in obtaining a prompt resolution of all or some of the controversy.

- The extent to which the resolution of the controversy might have an impact on the continued viability of one or more of the parties.

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2018 B2B Case Statistics Demonstrate Expertise of AAA-ICDR®

Year-End Data from the AAA-ICDR Shows Industries Continue to Trust Arbitration for Resolving Disputes Fairly and Efficiently

NEW YORK, N.Y.—March 12, 2019—The American Arbitration Association-International Centre for Dispute Resolution® (AAA-ICDR), the largest alternative dispute resolution institution, provided conflict management and dispute resolution services for 8,983 B2B cases involving $15.6 billion in total claims in 2018.

To view the AAA-ICDR's latest arbitration caseload, visit: http://go.adr.org/2018-b2b-statistics.

Out of the 8,983 cases arbitrated last year, the industries that experienced the most growth included food and beverage (88%), financial services (78%), chemicals (36%) and commercial insurance (33%). Financial services cases represented the largest share of claim awards, with a total of $2.8 billion, followed by technology ($1 billion) and steel/metals ($800 million).

"Businesses of all types are increasingly recognizing that arbitration is fair, efficient, and a cost-effective way to resolve disputes," said **India Johnson, President and CEO of the AAA-ICDR.** "As more businesses choose arbitration, we will continue to adhere to the highest standards with an ever-greater commitment to fostering diversity and transparency through our numerous and ongoing efforts."

The average claim for large business-to-business cases facilitated by the AAA-ICDR in 2018 was $8.9 million, with the average large-case counterclaim at $4.9 million.

The AAA-ICDR serves parties from more than 90 countries, offering access to a variety of experienced and respected independent arbitrators and mediators. This international presence, and the AAA-ICDR's broad array of scalable resources, enable the organization to resolve disputes quickly and cost effectively for large multinational corporations. As part of the AAA-ICDR's commitment to diversity, it continues to add diverse legal and business experts to its roster of arbitrators and mediators.

About the American Arbitration Association

The not-for-profit American Arbitration Association® (AAA®) is the leading provider of alternative dispute resolution (ADR) services for parties in commercial disputes, having administered approximately 5.6 million ADR cases since its founding in 1926. With 26 offices in the United States, in addition to Mexico, Singapore, and Bahrain, the AAA provides organizations of all sizes in virtually every industry with ADR services and products. For more information, visit www.adr.org.

About the International Centre for Dispute Resolution

As the international division of the American Arbitration Association (AAA), the International Centre for Dispute Resolution® (ICDR®) is the world's largest provider of arbitral and dispute resolution services. The ICDR provided dispute resolution services for 1,026 international cases filed in 2017. Established in 1996, the ICDR serves parties in more than 90 counties, with a staff fluent in over a dozen languages. Through more than 725 independent arbitrators and mediators, the ICDR provides a flexible, party-centered process over a broad range of industries and geopolitical issue. Its recently revised Rules have once again set a standard for arbitration case management. For more information, visit www.icdr.org.

AMERICAN ARBITRATION ASSOCIATION® | INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION®

2018 B2B DISPUTE RESOLUTION INFOGRAPHIC

8,983 Commercial Cases

2018 Claims

Total Claims:

$15,649,741,305

Large Case Average Claim: **$8,969,916**

Large Case Median Claim: **$1,334,246**

2018 Counterclaims

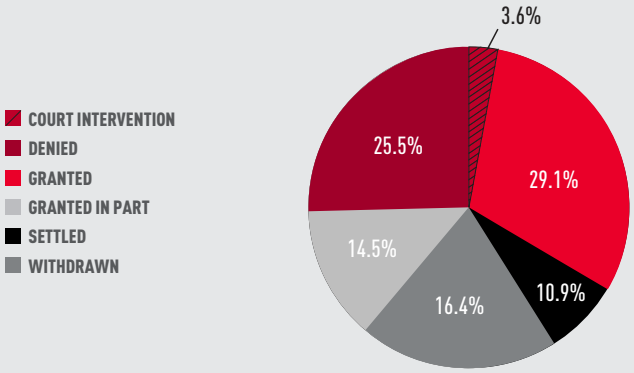
Total Counterclaims:

$3,175,737,627

Large Case Average Counterclaim: **$4,945,069**

Large Case Median Counterclaim: **$905,413**

Emergency Arbitrations Filed with AAA-ICDR® in 2018

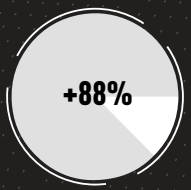


60 Applications for Emergency Measure of Protection were Filed in 2018. As of December 21, 2018, five were pending and 55 were resolved as detailed in the pie chart.

Largest Claim Amounts by Industry

FINANCIAL SERVICES	$2.8B
TECHNOLOGY	$1B
STEEL/METALS	$800M
CONSTRUCTION	$570M
ENERGY	$545M
ACCOUNTING	$500M
HEALTHCARE	$230M
LEGAL SERVICES	$217M
PHARMACEUTICALS/LIFE SCIENCES	$180M
CHEMICALS	$143M
TRANSPORTATION	$126M
COMMERCIAL REAL ESTATE	$115M

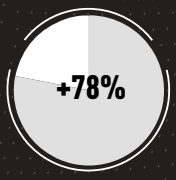
2018 CHANGES IN CASELOAD BY INDUSTRY



FOOD/BEVERAGE

CHEMICALS

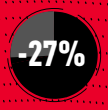
ACCOUNTING



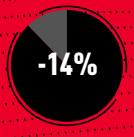
FINANCIAL SERVICES

COMMERCIAL INSURANCE

CONSTRUCTION



ENTERTAINMENT AND MEDIA



FRANCHISE

Commitment to Diversity

25% diverse roster

28% diverse appointments

AAA240

American Arbitration Association®

AAA® À LA CARTE SERVICES

An Alternative to Fully-Administered Arbitration

The American Arbitration Association specializes in end-to-end administered arbitration as a time-tested, cost-effective alternative to litigation. While the AAA offers high value case management services, some contracts provide for ad hoc or self-administered arbitration and we make it possible for parties in such cases to utilize various stand-alone administrative services offered by the AAA.

These services provide the AAA's high standards, but allow parties to choose only the processes suited to their specific circumstances.

ARBITRATOR SELECT - *LIST ONLY* OR *LIST AND APPOINTMENT SERVICES*

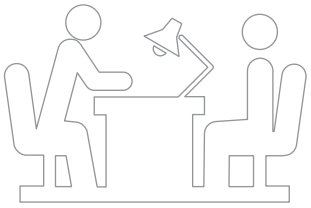
An option for users to select the best, most appropriate arbitrator for their dispute–without additional administration by the AAA. This allows parties to receive a list of arbitrators whose credentials best match the criteria specified by the parties. Parties can also choose to allow the AAA to assist in appointing a mutually agreed upon arbitrator from the list provided.

Fees range from $750 to $3,500 depending on the number of arbitrators and the process.

ARBITRATOR CHALLENGE REVIEW PROCEDURES FOR NON-ADMINISTERED ARBITRATIONS

By utilizing the Arbitrator Challenge Review Procedures, parties to non-administered arbitrations have the option of agreeing to submit objections or challenges to an arbitrator's continued service to the AAA's Administrative Review Council (ARC) for determination. These procedures provide an expeditious, cost-effective alternative to having such challenges decided by a court.

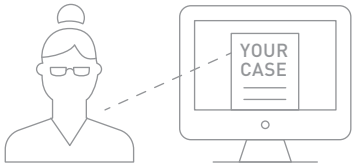
Fee: $3,500.

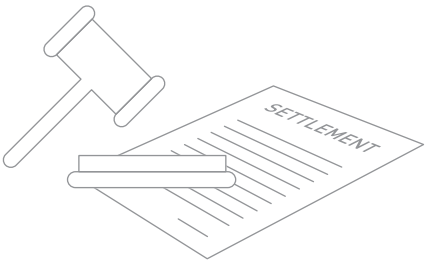


CASEXPLORER® ARBITRATION™

This online tool enables parties to receive an expert evaluation on the strengths and weaknesses of their arbitration cases from a panel of AAA arbitrators not associated with their case.

Fees range from $15,750 to $21,250 depending on the number of arbitrators and include the arbitrators' charges.





JUDICIAL SETTLEMENT CONFERENCE

AAA Judicial Settlement Conference provides businesses, individuals, and government agencies with an alternative dispute resolution procedure that is similar in methods to judicial settlement conferences used successfully by the courts. However, with this service parties can set their own schedule, select their own judge neutral, and devise their own remedy.

Fees: Based on the hourly or daily Judicial Settlement Conference rate of the Settlement Conference Judge plus an administrative fee for the AAA's services of $75 for each hour charged.

OPTIONAL APPELLATE ARBITRATION RULES

When parties seek a more comprehensive appeal of an arbitral award, these rules allow for a streamlined, high-level review of the awards within the arbitration process. However, these rules can only be used when both parties agree to appeal.

Fees: $6,000 plus the arbitral tribunal's fees.

The following sample language provides for such appellate review assuming a standard arbitration clause is already in place:

> *Notwithstanding any language to the contrary in the contract documents, the parties hereby agree: that the Underlying Award may be appealed pursuant to the AAA's Optional Appellate Arbitration Rules ("Appellate Rules"); that the Underlying Award rendered by the arbitrator(s) shall, at a minimum, be a reasoned award; and that the Underlying Award shall not be considered final until after the time for filing the notice of appeal pursuant to the Appellate Rules has expired. Appeals must be initiated within thirty (30) days of receipt of an Underlying Award, as defined by Rule A-3 of the Appellate Rules, by filing a Notice of Appeal with any AAA office. Following the appeal process the decision rendered by the appeal tribunal may be entered in any court having jurisdiction thereof.*

HEARING ROOM RENTALS

The AAA maintains hearing rooms available for rental across the country, as a convenience to the parties. Availability and rates vary by the offices and can be obtained by contacting each location.

Fees range from $200 per day to $1,000 per day.

- New York City
- Philadelphia
- Atlanta
- Miami
- Chicago
- Los Angeles
- San Francisco

ALTERNATIVE DISPUTE RESOLUTION

ClauseBuilder™ Tool

ClauseBuilder

An innovative drafting tool from the AAA®

A well-constructed alternative dispute resolution (ADR) clause lays the foundation for an effective dispute resolution process — and is one of the best ways to provide for a quick and cost-effective method of resolving disputes.

What is ClauseBuilder?

ClauseBuilder is an online arbitration and mediation drafting tool that assists individuals and organizations in creating clear, effective arbitration and mediation agreements.

Why should I use ClauseBuilder?

ClauseBuilder assists individuals and organizations in creating customized dispute resolution clauses that incorporate time and court tested rules and procedures.

Is ClauseBuilder easy to use?

Yes. ClauseBuilder will walk you through a simple, self-guided process that will also allow you to preview, save, review and edit clauses.

Are options for arbitration clauses included in ClauseBuilder?

Yes. ClauseBuilder provides an array of options that are commonly considered when crafting ADR clauses for contracts. For example, users can specify the number of arbitrators, arbitrator qualifications, locale provisions, governing law, duration of arbitration proceedings and the use of arbitration, mediation or both.

Is there a fee to use ClauseBuilder?

ClauseBuilder is a free resource made available by the American Arbitration Association®.

How can I access ClauseBuilder?

You can access ClauseBuilder by visiting **www.clausebuilder.org.**

What types of clauses can I build?

The current version of ClauseBuilder deals with commercial arbitration contracts. Future versions in development will address construction, international and employment contracts.

If I have any question about ClauseBuilder or drafting a clause, whom can I contact?

For questions pertaining to the ClauseBuilder Tool, you can email us at **clausebuilder@adr.org.**

If you have questions about drafting a clause, you can reach us at **800.778.7869** or you can find a Vice President in your area by visiting **www.adr.org/contact.**

COMMERCIAL

Commercial

Arbitration Rules and Mediation Procedures

Including Procedures for Large, Complex Commercial Disputes

AMERICAN ARBITRATION ASSOCIATION®

Available online at **adr.org/commercial**

Rules Amended and Effective October 1, 2013

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Table of Contents

Commercial Arbitration Rules and Mediation Procedures

(Including Procedures for Large, Complex Commercial Disputes)

Important Notice

These rules and any amendment of them shall apply in the form in effect at the time the administrative filing requirements are met for a demand for arbitration or submission agreement received by the AAA®. To ensure that you have the most current information, see our web site at **www.adr.org.**

Introduction

Each year, many millions of business transactions take place. Occasionally, disagreements develop over these business transactions. Many of these disputes are resolved by arbitration, the voluntary submission of a dispute to an impartial person or persons for final and binding determination. Arbitration has proven to be an effective way to resolve these disputes privately, promptly, and economically.

The American Arbitration Association® (AAA), a not-for-profit, public service organization, offers a broad range of dispute resolution services to business executives, attorneys, individuals, trade associations, unions, management, consumers, families, communities, and all levels of government. Services are available through AAA headquarters in New York and through offices located in major cities throughout the United States. Hearings may be held at locations convenient for the parties and are not limited to cities with AAA offices. In addition, the AAA serves as a center for education and training, issues specialized publications, and conducts research on various forms of alternative dispute resolution.

Standard Arbitration Clause

The parties can provide for arbitration of future disputes by inserting the following clause into their contracts:

> *Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.*

Arbitration of existing disputes may be accomplished by use of the following:

> *We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules the following Controversy: (describe briefly). We further agree that the above controversy be submitted to (one) (three) arbitrator(s). We further agree that we will faithfully observe this agreement and the rules, that we will abide by and perform any award rendered by the arbitrator(s), and that a judgment of any court having jurisdiction may be entered on the award.*

The services of the AAA are generally concluded with the transmittal of the award. Although there is voluntary compliance with the majority of awards, judgment on the award can be entered in a court having appropriate jurisdiction if necessary.

Administrative Fees

The AAA charges a filing fee based on the amount of the claim or counterclaim. This fee information, which is included with these rules, allows the parties to exercise control over their administrative fees. The fees cover AAA administrative services; they do not cover arbitrator compensation or expenses, if any, reporting services, or any post-award charges incurred by the parties in enforcing the award.

Mediation

Subject to the right of any party to opt out, in cases where a claim or counterclaim exceeds $75,000, the rules provide that the parties shall mediate their dispute upon the administration of the arbitration or at any time when the arbitration is pending. In mediation, the neutral mediator assists the parties in

reaching a settlement but does not have the authority to make a binding decision or award. Mediation is administered by the AAA in accordance with its Commercial Mediation Procedures. There is no additional filing fee where parties to a pending arbitration attempt to mediate their dispute under the AAA's auspices.

Although these rules include a mediation procedure that will apply to many cases, parties may still want to incorporate mediation into their contractual dispute settlement process. Parties can do so by inserting the following mediation clause into their contract in conjunction with a standard arbitration provision:

> *If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures before resorting to arbitration, litigation, or some other dispute resolution procedure.*

If the parties want to use a mediator to resolve an existing dispute, they can enter into the following submission agreement:

> *The parties hereby submit the following dispute to mediation administered by the American Arbitration Association under its Commercial Mediation Procedures. (The clause may also provide for the qualifications of the mediator(s), method of payment, locale of meetings, and any other item of concern to the parties.)*

Large, Complex Cases

Unless the parties agree otherwise, the procedures for Large, Complex Commercial Disputes, which appear in this pamphlet, will be applied to all cases administered by the AAA under the Commercial Arbitration Rules in which the disclosed claim or counterclaim of any party is at least $500,000 exclusive of claimed interest, arbitration fees and costs. The key features of these procedures include:

- A highly qualified, trained Roster of Neutrals;
- A mandatory preliminary hearing with the arbitrators, which may be conducted by teleconference;
- Broad arbitrator authority to order and control the exchange of information, including depositions;
- A presumption that hearings will proceed on a consecutive or block basis.

Commercial Arbitration Rules

R-1. Agreement of Parties*

(a) The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter AAA) under its Commercial Arbitration Rules or for arbitration by the AAA of a domestic commercial dispute without specifying particular rules. These rules and any amendment of them shall apply in the form in effect at the time the administrative requirements are met for a Demand for Arbitration or Submission Agreement received by the AAA. Any disputes regarding which AAA rules shall apply shall be decided by the AAA. The parties, by written agreement, may vary the procedures set forth in these rules. After appointment of the arbitrator, such modifications may be made only with the consent of the arbitrator.

(b) Unless the parties or the AAA determines otherwise, the Expedited Procedures shall apply in any case in which no disclosed claim or counterclaim exceeds $75,000, exclusive of interest, attorneys' fees, and arbitration fees and costs.

Parties may also agree to use these procedures in larger cases. Unless the parties agree otherwise, these procedures will not apply in cases involving more than two parties. The Expedited Procedures shall be applied as described in Sections E-1 through E-10 of these rules, in addition to any other portion of these rules that is not in conflict with the Expedited Procedures.

(c) Unless the parties agree otherwise, the Procedures for Large, Complex Commercial Disputes shall apply to all cases in which the disclosed claim or counterclaim of any party is at least $500,000 or more, exclusive of claimed interest, attorneys' fees, arbitration fees and costs. Parties may also agree to use the procedures in cases involving claims or counterclaims under $500,000, or in nonmonetary cases. The Procedures for Large, Complex Commercial Disputes shall be applied as described in Sections L-1 through L-3 of these rules, in addition to any other portion of these rules that is not in conflict with the Procedures for Large, Complex Commercial Disputes.

(d) Parties may, by agreement, apply the Expedited Procedures, the Procedures for Large, Complex Commercial Disputes, or the Procedures for the Resolution of Disputes through Document Submission (Rule E-6) to any dispute.

(e) All other cases shall be administered in accordance with Sections R-1 through R-58 of these rules.

* *Beginning October 1, 2017, AAA will apply the Employment Fee Schedule to any dispute between an individual employee or an independent contractor (working or performing as an individual and not incorporated) and a business or organization and the dispute involves work or work-related claims, including any statutory claims and including work-related claims under independent contractor agreements. A dispute arising out of an employment plan will be administered under the AAA's Employment Arbitration Rules and Mediation Procedures. A dispute arising out of a consumer arbitration agreement will be administered under the AAA's Consumer Arbitration Rules.*

R-2. AAA and Delegation of Duties

When parties agree to arbitrate under these rules, or when they provide for arbitration by the AAA and an arbitration is initiated under these rules, they thereby authorize the AAA to administer the arbitration. The authority and duties of the AAA are prescribed in the agreement of the parties and in these rules, and may be carried out through such of the AAA's representatives as it may direct. The AAA may, in its discretion, assign the administration of an arbitration to any of its offices. Arbitrations administered under these rules shall only be administered by the AAA or by an individual or organization authorized by the AAA to do so.

R-3. National Roster of Arbitrators

The AAA shall establish and maintain a National Roster of Arbitrators ("National Roster") and shall appoint arbitrators as provided in these rules. The term "arbitrator" in these rules refers to the arbitration panel, constituted for a particular case, whether composed of one or more arbitrators, or to an individual arbitrator, as the context requires.

R-4. Filing Requirements

(a) Arbitration under an arbitration provision in a contract shall be initiated by the initiating party ("claimant") filing with the AAA a Demand for Arbitration, the administrative filing fee, and a copy of the applicable arbitration agreement from the parties' contract which provides for arbitration.

(b) Arbitration pursuant to a court order shall be initiated by the initiating party filing with the AAA a Demand for Arbitration, the administrative filing fee, and a copy of any applicable arbitration agreement from the parties' contract which provides for arbitration.

- **i.** The filing party shall include a copy of the court order.
- **ii.** The filing fee must be paid before a matter is considered properly filed. If the court order directs that a specific party is responsible for the filing fee, it is the responsibility of the filing party to either make such payment to the AAA and seek reimbursement as directed in the court order or to make other such arrangements so that the filing fee is submitted to the AAA with the Demand.
- **iii.** The party filing the Demand with the AAA is the claimant and the opposing party is the respondent regardless of which party initiated the court action. Parties may request that the arbitrator alter the order of proceedings if necessary pursuant to R-32.

(c) It is the responsibility of the filing party to ensure that any conditions precedent to the filing of a case are met prior to filing for an arbitration, as well as any time requirements associated with the filing. Any dispute regarding whether a condition precedent has been met may be raised to the arbitrator for determination.

(d) Parties to any existing dispute who have not previously agreed to use these rules may commence an arbitration under these rules by filing a written submission agreement and the administrative filing fee. To the extent that the parties' submission agreement contains any variances from these rules, such variances should be clearly stated in the Submission Agreement.

(e) Information to be included with any arbitration filing includes:

- **i.** the name of each party;
- **ii.** the address for each party, including telephone and fax numbers and e-mail addresses;
- **iii.** if applicable, the names, addresses, telephone and fax numbers, and e-mail addresses of any known representative for each party;
- **iv.** a statement setting forth the nature of the claim including the relief sought and the amount involved; and
- **v.** the locale requested if the arbitration agreement does not specify one.

(f) The initiating party may file or submit a dispute to the AAA in the following manner:

- **i.** through AAA WebFile, located at **www.adr.org;** or
- **ii.** by filing the complete Demand or Submission with any AAA office, regardless of the intended locale of hearing.

(g) The filing party shall simultaneously provide a copy of the Demand and any supporting documents to the opposing party.

(h) The AAA shall provide notice to the parties (or their representatives if so named) of the receipt of a Demand or Submission when the administrative filing requirements have been satisfied. The date on which the filing requirements are satisfied shall establish the date of filing the dispute for administration. However, all disputes in connection with the AAA's determination of the date of filing may be decided by the arbitrator.

(i) If the filing does not satisfy the filing requirements set forth above, the AAA shall acknowledge to all named parties receipt of the incomplete filing and inform the parties of the filing deficiencies. If the deficiencies are not cured by the date specified by the AAA, the filing may be returned to the initiating party.

R-5. Answers and Counterclaims

(a) A respondent may file an answering statement with the AAA within 14 calendar days after notice of the filing of the Demand is sent by the AAA. The respondent shall, at the time of any such filing, send a copy of any answering statement to the claimant and to all other parties to the arbitration. If no answering statement is filed within the stated time, the respondent will be deemed to deny the claim. Failure to file an answering statement shall not operate to delay the arbitration.

(b) A respondent may file a counterclaim at any time after notice of the filing of the Demand is sent by the AAA, subject to the limitations set forth in Rule R-6. The respondent shall send a copy of the counterclaim to the claimant and all other parties to the arbitration. If a counterclaim is asserted, it shall include a statement setting forth the nature of the counterclaim including the relief sought and the amount involved. The filing fee as specified in the applicable AAA Fee Schedule must be paid at the time of the filing of any counterclaim.

(c) If the respondent alleges that a different arbitration provision is controlling, the matter will be administered in accordance with the arbitration provision submitted by the initiating party subject to a final determination by the arbitrator.

(d) If the counterclaim does not meet the requirements for filing a claim and the deficiency is not cured by the date specified by the AAA, it may be returned to the filing party.

R-6. Changes of Claim

(a) A party may at any time prior to the close of the hearing or by the date established by the arbitrator increase or decrease the amount of its claim or counterclaim. Written notice of the change of claim amount must be provided to the AAA and all parties. If the change of claim amount results in an increase in administrative fee, the balance of the fee is due before the change of claim amount may be accepted by the arbitrator.

(b) Any new or different claim or counterclaim, as opposed to an increase or decrease in the amount of a pending claim or counterclaim, shall be made in writing and filed with the AAA, and a copy shall be provided to the other party, who shall have a period of 14 calendar days from the date of such transmittal within which to file an answer to the proposed change of claim or counterclaim with the AAA. After the arbitrator is appointed, however, no new or different claim may be submitted except with the arbitrator's consent.

R-7. Jurisdiction

(a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.

(b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

(c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

R-8. Interpretation and Application of Rules

The arbitrator shall interpret and apply these rules insofar as they relate to the arbitrator's powers and duties. When there is more than one arbitrator and a difference arises among them concerning the meaning or application of these rules, it shall be decided by a majority vote. If that is not possible, either an arbitrator or a party may refer the question to the AAA for final decision. All other rules shall be interpreted and applied by the AAA.

R-9. Mediation

In all cases where a claim or counterclaim exceeds $75,000, upon the AAA's administration of the arbitration or at any time while the arbitration is pending, the parties shall mediate their dispute pursuant to the applicable provisions of the AAA's Commercial Mediation Procedures, or as otherwise agreed by the parties. Absent an agreement of the parties to the contrary, the mediation shall take place concurrently with the arbitration and shall not serve to delay the arbitration proceedings. However, any party to an arbitration may unilaterally opt out of this rule upon notification to the AAA and the other parties to the arbitration. The parties shall confirm the completion of any mediation or any decision to opt out of this rule to the AAA. Unless agreed to by all parties and the mediator, the mediator shall not be appointed as an arbitrator to the case.

R-10. Administrative Conference

At the request of any party or upon the AAA's own initiative, the AAA may conduct an administrative conference, in person or by telephone, with the parties and/or their representatives. The conference may address such issues as arbitrator selection, mediation of the dispute, potential exchange of information, a timetable for hearings, and any other administrative matters.

R-11. Fixing of Locale

The parties may mutually agree on the locale where the arbitration is to be held. Any disputes regarding the locale that are to be decided by the AAA must be submitted to the AAA and all other parties within 14 calendar days from the date of the AAA's initiation of the case or the date established by the AAA. Disputes regarding locale shall be determined in the following manner:

(a) When the parties' arbitration agreement is silent with respect to locale, and if the parties disagree as to the locale, the AAA may initially determine the place of

arbitration, subject to the power of the arbitrator after appointment, to make a final determination on the locale.

(b) When the parties' arbitration agreement requires a specific locale, absent the parties' agreement to change it, or a determination by the arbitrator upon appointment that applicable law requires a different locale, the locale shall be that specified in the arbitration agreement.

(c) If the reference to a locale in the arbitration agreement is ambiguous, and the parties are unable to agree to a specific locale, the AAA shall determine the locale, subject to the power of the arbitrator to finally determine the locale.

The arbitrator, at the arbitrator's sole discretion, shall have the authority to conduct special hearings for document production purposes or otherwise at other locations if reasonably necessary and beneficial to the process.

R-12. Appointment from National Roster

If the parties have not appointed an arbitrator and have not provided any other method of appointment, the arbitrator shall be appointed in the following manner:

(a) The AAA shall send simultaneously to each party to the dispute an identical list of 10 (unless the AAA decides that a different number is appropriate) names of persons chosen from the National Roster. The parties are encouraged to agree to an arbitrator from the submitted list and to advise the AAA of their agreement.

(b) If the parties are unable to agree upon an arbitrator, each party to the dispute shall have 14 calendar days from the transmittal date in which to strike names objected to, number the remaining names in order of preference, and return the list to the AAA. The parties are not required to exchange selection lists. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable to that party. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an arbitrator to serve. If the parties fail to agree on any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from among other members of the National Roster without the submission of additional lists.

(c) Unless the parties agree otherwise, when there are two or more claimants or two or more respondents, the AAA may appoint all the arbitrators.

R-13. Direct Appointment by a Party

(a) If the agreement of the parties names an arbitrator or specifies a method of appointing an arbitrator, that designation or method shall be followed. The notice of appointment, with the name and address of the arbitrator, shall be filed with the AAA by the appointing party. Upon the request of any appointing party, the AAA shall submit a list of members of the National Roster from which the party may, if it so desires, make the appointment.

(b) Where the parties have agreed that each party is to name one arbitrator, the arbitrators so named must meet the standards of Section R-18 with respect to impartiality and independence unless the parties have specifically agreed pursuant to Section R-18(b) that the party-appointed arbitrators are to be non-neutral and need not meet those standards.

(c) If the agreement specifies a period of time within which an arbitrator shall be appointed and any party fails to make the appointment within that period, the AAA shall make the appointment.

(d) If no period of time is specified in the agreement, the AAA shall notify the party to make the appointment. If within 14 calendar days after such notice has been sent, an arbitrator has not been appointed by a party, the AAA shall make the appointment.

R-14. Appointment of Chairperson by Party-Appointed Arbitrators or Parties

(a) If, pursuant to Section R-13, either the parties have directly appointed arbitrators, or the arbitrators have been appointed by the AAA, and the parties have authorized them to appoint a chairperson within a specified time and no appointment is made within that time or any agreed extension, the AAA may appoint the chairperson.

(b) If no period of time is specified for appointment of the chairperson, and the party-appointed arbitrators or the parties do not make the appointment within 14 calendar days from the date of the appointment of the last party-appointed arbitrator, the AAA may appoint the chairperson.

(c) If the parties have agreed that their party-appointed arbitrators shall appoint the chairperson from the National Roster, the AAA shall furnish to the party-appointed arbitrators, in the manner provided in Section R-12, a list selected from the National Roster, and the appointment of the chairperson shall be made as provided in that Section.

R-15. Nationality of Arbitrator

Where the parties are nationals of different countries, the AAA, at the request of any party or on its own initiative, may appoint as arbitrator a national of a country other than that of any of the parties. The request must be made before the time set for the appointment of the arbitrator as agreed by the parties or set by these rules.

R-16. Number of Arbitrators

(a) If the arbitration agreement does not specify the number of arbitrators, the dispute shall be heard and determined by one arbitrator, unless the AAA, in its discretion, directs that three arbitrators be appointed. A party may request three arbitrators in the Demand or Answer, which request the AAA will consider in exercising its discretion regarding the number of arbitrators appointed to the dispute.

(b) Any request for a change in the number of arbitrators as a result of an increase or decrease in the amount of a claim or a new or different claim must be made to the AAA and other parties to the arbitration no later than seven calendar days after receipt of the R-6 required notice of change of claim amount. If the parties are unable to agree with respect to the request for a change in the number of arbitrators, the AAA shall make that determination.

R-17. Disclosure

(a) Any person appointed or to be appointed as an arbitrator, as well as the parties and their representatives, shall disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration. Failure on the part of a party or a representative to comply with the requirements of this rule may result in the waiver of the right to object to an arbitrator in accordance with Rule R-41.

(b) Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others.

(c) Disclosure of information pursuant to this Section R-17 is not an indication that the arbitrator considers that the disclosed circumstance is likely to affect impartiality or independence.

R-18. Disqualification of Arbitrator

(a) Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for:

- **i.** partiality or lack of independence,
- **ii.** inability or refusal to perform his or her duties with diligence and in good faith, and
- **iii.** any grounds for disqualification provided by applicable law.

(b) The parties may agree in writing, however, that arbitrators directly appointed by a party pursuant to Section R-13 shall be non-neutral, in which case such arbitrators need not be impartial or independent and shall not be subject to disqualification for partiality or lack of independence.

(c) Upon objection of a party to the continued service of an arbitrator, or on its own initiative, the AAA shall determine whether the arbitrator should be disqualified under the grounds set out above, and shall inform the parties of its decision, which decision shall be conclusive.

R-19. Communication with Arbitrator

(a) No party and no one acting on behalf of any party shall communicate *ex parte* with an arbitrator or a candidate for arbitrator concerning the arbitration, except that a party, or someone acting on behalf of a party, may communicate *ex parte* with a candidate for direct appointment pursuant to R-13 in order to advise the candidate of the general nature of the controversy and of the anticipated proceedings and to discuss the candidate's qualifications, availability, or independence in relation to the parties or to discuss the suitability of candidates for selection as a third arbitrator where the parties or party-designated arbitrators are to participate in that selection.

(b) Section R-19(a) does not apply to arbitrators directly appointed by the parties who, pursuant to Section R-18(b), the parties have agreed in writing are non-neutral. Where the parties have so agreed under Section R-18(b), the AAA shall as an administrative practice suggest to the parties that they agree further that Section R-19(a) should nonetheless apply prospectively.

(c) In the course of administering an arbitration, the AAA may initiate communications with each party or anyone acting on behalf of the parties either jointly or individually.

(d) As set forth in R-43, unless otherwise instructed by the AAA or by the arbitrator, any documents submitted by any party or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.

R-20. Vacancies

(a) If for any reason an arbitrator is unable or unwilling to perform the duties of the office, the AAA may, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in accordance with the applicable provisions of these rules.

(b) In the event of a vacancy in a panel of neutral arbitrators after the hearings have commenced, the remaining arbitrator or arbitrators may continue with the hearing and determination of the controversy, unless the parties agree otherwise.

(c) In the event of the appointment of a substitute arbitrator, the panel of arbitrators shall determine in its sole discretion whether it is necessary to repeat all or part of any prior hearings.

R-21. Preliminary Hearing

(a) At the discretion of the arbitrator, and depending on the size and complexity of the arbitration, a preliminary hearing should be scheduled as soon as practicable after the arbitrator has been appointed. The parties should be invited to attend the preliminary hearing along with their representatives. The preliminary hearing may be conducted in person or by telephone.

(b) At the preliminary hearing, the parties and the arbitrator should be prepared to discuss and establish a procedure for the conduct of the arbitration that is appropriate to achieve a fair, efficient, and economical resolution of the dispute. Sections P-1 and P-2 of these rules address the issues to be considered at the preliminary hearing.

R-22. Pre-Hearing Exchange and Production of Information

(a) *Authority of arbitrator.* The arbitrator shall manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute, while at the same time promoting equality of treatment and safeguarding each party's opportunity to fairly present its claims and defenses.

(b) *Documents.* The arbitrator may, on application of a party or on the arbitrator's own initiative:

i. require the parties to exchange documents in their possession or custody on which they intend to rely;

ii. require the parties to update their exchanges of the documents on which they intend to rely as such documents become known to them;

iii. require the parties, in response to reasonable document requests, to make available to the other party documents, in the responding party's possession or custody, not otherwise readily available to the party seeking the documents, reasonably believed by the party seeking the documents to exist and to be relevant and material to the outcome of disputed issues; and

iv. require the parties, when documents to be exchanged or produced are maintained in electronic form, to make such documents available in the form most convenient and economical for the party in possession of such documents, unless the arbitrator determines that there is good cause for requiring the documents to be produced in a different form. The parties should attempt to agree in advance upon, and the arbitrator may determine, reasonable search parameters to balance the need for production of electronically stored documents relevant and material to the outcome of disputed issues against the cost of locating and producing them.

R-23. Enforcement Powers of the Arbitrator

The arbitrator shall have the authority to issue any orders necessary to enforce the provisions of rules R-21 and R-22 and to otherwise achieve a fair, efficient and economical resolution of the case, including, without limitation:

(a) conditioning any exchange or production of confidential documents and information, and the admission of confidential evidence at the hearing, on appropriate orders to preserve such confidentiality;

(b) imposing reasonable search parameters for electronic and other documents if the parties are unable to agree;

(c) allocating costs of producing documentation, including electronically stored documentation;

(d) in the case of willful non-compliance with any order issued by the arbitrator, drawing adverse inferences, excluding evidence and other submissions, and/or making special allocations of costs or an interim award of costs arising from such non-compliance; and

(e) issuing any other enforcement orders which the arbitrator is empowered to issue under applicable law.

R-24. Date, Time, and Place of Hearing

The arbitrator shall set the date, time, and place for each hearing. The parties shall respond to requests for hearing dates in a timely manner, be cooperative in scheduling the earliest practicable date, and adhere to the established hearing schedule. The AAA shall send a notice of hearing to the parties at least 10 calendar days in advance of the hearing date, unless otherwise agreed by the parties.

R-25. Attendance at Hearings

The arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary. Any person having a direct interest in the arbitration is entitled to attend hearings. The arbitrator shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other person.

R-26. Representation

Any party may participate without representation (*pro se*), or by counsel or any other representative of the party's choosing, unless such choice is prohibited by applicable law. A party intending to be so represented shall notify the other party and the AAA of the name, telephone number and address, and email address if available, of the representative at least seven calendar days prior to the date set for the hearing at which that person is first to appear. When such a representative initiates an arbitration or responds for a party, notice is deemed to have been given.

R-27. Oaths

Before proceeding with the first hearing, each arbitrator may take an oath of office and, if required by law, shall do so. The arbitrator may require witnesses to testify under oath administered by any duly qualified person and, if it is required by law or requested by any party, shall do so.

R-28. Stenographic Record

(a) Any party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify the other parties of these arrangements at least three calendar days in advance of the hearing. The requesting party or parties shall pay the cost of the record.

(b) No other means of recording the proceedings will be permitted absent the agreement of the parties or per the direction of the arbitrator.

(c) If the transcript or any other recording is agreed by the parties or determined by the arbitrator to be the official record of the proceeding, it must be provided to the arbitrator and made available to the other parties for inspection, at a date, time, and place determined by the arbitrator.

(d) The arbitrator may resolve any disputes with regard to apportionment of the costs of the stenographic record or other recording.

R-29. Interpreters

Any party wishing an interpreter shall make all arrangements directly with the interpreter and shall assume the costs of the service.

R-30. Postponements

The arbitrator may postpone any hearing upon agreement of the parties, upon request of a party for good cause shown, or upon the arbitrator's own initiative.

R-31. Arbitration in the Absence of a Party or Representative

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award.

R-32. Conduct of Proceedings

(a) The claimant shall present evidence to support its claim. The respondent shall then present evidence to support its defense. Witnesses for each party shall also submit to questions from the arbitrator and the adverse party. The arbitrator has the discretion to vary this procedure, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.

(b) The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute and may direct the order of proof, bifurcate proceedings and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.

(c) When deemed appropriate, the arbitrator may also allow for the presentation of evidence by alternative means including video conferencing, internet communication, telephonic conferences and means other than an in-person presentation. Such alternative means must afford a full opportunity for all parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute and, when involving witnesses, provide an opportunity for cross-examination.

(d) The parties may agree to waive oral hearings in any case and may also agree to utilize the Procedures for Resolution of Disputes Through Document Submission, found in Rule E-6.

R-33. Dispositive Motions

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.

R-34. Evidence

(a) The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. Conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent, in default, or has waived the right to be present.

(b) The arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant.

(c) The arbitrator shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client.

(d) An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.

R-35. Evidence by Written Statements and Post-Hearing Filing of Documents or Other Evidence

(a) At a date agreed upon by the parties or ordered by the arbitrator, the parties shall give written notice for any witness or expert witness who has provided a written witness statement to appear in person at the arbitration hearing for examination. If such notice is given, and the witness fails to appear, the arbitrator may disregard the written witness statement and/or expert report of the witness or make such other order as the arbitrator may consider to be just and reasonable.

(b) If a witness whose testimony is represented by a party to be essential is unable or unwilling to testify at the hearing, either in person or through electronic or other means, either party may request that the arbitrator order the witness to appear in person for examination before the arbitrator at a time and location where the witness is willing and able to appear voluntarily or can legally be compelled to do so. Any such order may be conditioned upon payment by the requesting party of all reasonable costs associated with such examination.

(c) If the parties agree or the arbitrator directs that documents or other evidence be submitted to the arbitrator after the hearing, the documents or other evidence shall be filed with the AAA for transmission to the arbitrator. All parties shall be afforded an opportunity to examine and respond to such documents or other evidence.

R-36. Inspection or Investigation

An arbitrator finding it necessary to make an inspection or investigation in connection with the arbitration shall direct the AAA to so advise the parties. The arbitrator shall set the date and time and the AAA shall notify the parties. Any party who so desires may be present at such an inspection or investigation. In the event that one or all parties are not present at the inspection or investigation, the arbitrator shall make an oral or written report to the parties and afford them an opportunity to comment.

R-37. Interim Measures

(a) The arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods.

(b) Such interim measures may take the form of an interim award, and the arbitrator may require security for the costs of such measures.

(c) A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

R-38. Emergency Measures of Protection

(a) Unless the parties agree otherwise, the provisions of this rule shall apply to arbitrations conducted under arbitration clauses or agreements entered on or after October 1, 2013.

(b) A party in need of emergency relief prior to the constitution of the panel shall notify the AAA and all other parties in writing of the nature of the relief sought and the reasons why such relief is required on an emergency basis. The application shall also set forth the reasons why the party is entitled to such relief. Such notice may be given by facsimile or e-mail or other reliable means, but must include a statement certifying that all other parties have been notified or an explanation of the steps taken in good faith to notify other parties.

(c) Within one business day of receipt of notice as provided in section (b), the AAA shall appoint a single emergency arbitrator designated to rule on emergency applications. The emergency arbitrator shall immediately disclose any circumstance likely, on the basis of the facts disclosed on the application, to affect such arbitrator's impartiality or independence. Any challenge to the appointment of the emergency arbitrator must be made within one business day of the communication by the AAA to the parties of the appointment of the emergency arbitrator and the circumstances disclosed.

(d) The emergency arbitrator shall as soon as possible, but in any event within two business days of appointment, establish a schedule for consideration of the application for emergency relief. Such a schedule shall provide a reasonable opportunity to all parties to be heard, but may provide for proceeding by telephone or video conference or on written submissions as alternatives to a formal hearing. The emergency arbitrator shall have the authority vested in the tribunal under Rule 7, including the authority to rule on her/his own jurisdiction, and shall resolve any disputes over the applicability of this Rule 38.

(e) If after consideration the emergency arbitrator is satisfied that the party seeking the emergency relief has shown that immediate and irreparable loss or damage shall result in the absence of emergency relief, and that such party is entitled to such relief, the emergency arbitrator may enter an interim order or award granting the relief and stating the reason therefore.

(f) Any application to modify an interim award of emergency relief must be based on changed circumstances and may be made to the emergency arbitrator until the panel is constituted; thereafter such a request shall be addressed to the panel. The emergency arbitrator shall have no further power to act after the panel is constituted unless the parties agree that the emergency arbitrator is named as a member of the panel.

(g) Any interim award of emergency relief may be conditioned on provision by the party seeking such relief for appropriate security.

(h) A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with this rule, the agreement to arbitrate or a waiver of the right to arbitrate. If the AAA is directed by a judicial authority to nominate a special master to consider and report on an application for emergency relief, the AAA shall proceed as provided in this rule and the references to the emergency arbitrator shall be read to mean the special master, except that the special master shall issue a report rather than an interim award.

(i) The costs associated with applications for emergency relief shall initially be apportioned by the emergency arbitrator or special master, subject to the power of the tribunal to determine finally the apportionment of such costs.

R-39. Closing of Hearing

(a) The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearing closed.

(b) If documents or responses are to be filed as provided in Rule R-35, or if briefs are to be filed, the hearing shall be declared closed as of the final date set by the arbitrator for the receipt of briefs. If no documents, responses, or briefs are to be filed, the arbitrator shall declare the hearings closed as of the date of the last hearing (including telephonic hearings). If the case was heard without any oral hearings, the arbitrator shall close the hearings upon the due date established for receipt of the final submission.

(c) The time limit within which the arbitrator is required to make the award shall commence, in the absence of other agreements by the parties, upon the closing of the hearing. The AAA may extend the time limit for rendering of the award only in unusual and extreme circumstances.

R-40. Reopening of Hearing

The hearing may be reopened on the arbitrator's initiative, or by the direction of the arbitrator upon application of a party, at any time before the award is made. If reopening the hearing would prevent the making of the award within the specific time agreed to by the parties in the arbitration agreement, the matter may not be reopened unless the parties agree to an extension of time. When no specific date is fixed by agreement of the parties , the arbitrator shall have 30 calendar days from the closing of the reopened hearing within which to make an award (14 calendar days if the case is governed by the Expedited Procedures).

R-41. Waiver of Rules

Any party who proceeds with the arbitration after knowledge that any provision or requirement of these rules has not been complied with and who fails to state an objection in writing shall be deemed to have waived the right to object.

R-42. Extensions of Time

The parties may modify any period of time by mutual agreement. The AAA or the arbitrator may for good cause extend any period of time established by these rules, except the time for making the award. The AAA shall notify the parties of any extension.

R-43. Serving of Notice and Communications

(a) Any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these rules, for any court action in connection therewith, or for the entry of judgment on any award made under these rules may be served on a party by mail addressed to the party or its representative at the last known address or by personal service, in or outside the state where the arbitration is to be held, provided that reasonable opportunity to be heard with regard to the dispute is or has been granted to the party.

(b) The AAA, the arbitrator and the parties may also use overnight delivery or electronic facsimile transmission (fax), or electronic (e-mail) to give the notices required by these rules. Where all parties and the arbitrator agree, notices may be transmitted by e-mail or other methods of communication.

(c) Unless otherwise instructed by the AAA or by the arbitrator, any documents submitted by any party to the AAA or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.

(d) Unless otherwise instructed by the AAA or by the arbitrator, all written communications made by any party to the AAA or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.

(e) Failure to provide the other party with copies of communications made to the AAA or to the arbitrator may prevent the AAA or the arbitrator from acting on any requests or objections contained therein.

(f) The AAA may direct that any oral or written communications that are sent by a party or their representative shall be sent in a particular manner. The failure of a party or their representative to do so may result in the AAA's refusal to consider the issue raised in the communication.

R-44. Majority Decision

(a) When the panel consists of more than one arbitrator, unless required by law or by the arbitration agreement or section (b) of this rule, a majority of the arbitrators must make all decisions.

(b) Where there is a panel of three arbitrators, absent an objection of a party or another member of the panel, the chairperson of the panel is authorized to resolve any disputes related to the exchange of information or procedural matters without the need to consult the full panel.

R-45. Time of Award

The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than 30 calendar days from the date of closing the hearing, or, if oral hearings have been waived, from the due date set for receipt of the parties' final statements and proofs.

R-46. Form of Award

(a) Any award shall be in writing and signed by a majority of the arbitrators. It shall be executed in the form and manner required by law.

(b) The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate.

R-47. Scope of Award

(a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract.

(b) In addition to a final award, the arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders, and awards. In any interim, interlocutory, or partial award, the arbitrator may assess and apportion the fees, expenses, and compensation related to such award as the arbitrator determines is appropriate.

(c) In the final award, the arbitrator shall assess the fees, expenses, and compensation provided in Sections R-53, R-54, and R-55. The arbitrator may apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate.

(d) The award of the arbitrator(s) may include:

- **i.** interest at such rate and from such date as the arbitrator(s) may deem appropriate; and
- **ii.** an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement.

R-48. Award Upon Settlement—Consent Award

(a) If the parties settle their dispute during the course of the arbitration and if the parties so request, the arbitrator may set forth the terms of the settlement in a "consent award." A consent award must include an allocation of arbitration costs, including administrative fees and expenses as well as arbitrator fees and expenses.

(b) The consent award shall not be released to the parties until all administrative fees and all arbitrator compensation have been paid in full.

R-49. Delivery of Award to Parties

Parties shall accept as notice and delivery of the award the placing of the award or a true copy thereof in the mail addressed to the parties or their representatives at their last known addresses, personal or electronic service of the award, or the filing of the award in any other manner that is permitted by law.

R-50. Modification of Award

Within 20 calendar days after the transmittal of an award, any party, upon notice to the other parties, may request the arbitrator, through the AAA, to correct any clerical, typographical, or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided. The other

parties shall be given 10 calendar days to respond to the request. The arbitrator shall dispose of the request within 20 calendar days after transmittal by the AAA to the arbitrator of the request and any response thereto.

R-51. Release of Documents for Judicial Proceedings

The AAA shall, upon the written request of a party to the arbitration, furnish to the party, at its expense, copies or certified copies of any papers in the AAA's possession that are not determined by the AAA to be privileged or confidential.

R-52. Applications to Court and Exclusion of Liability

(a) No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.

(b) Neither the AAA nor any arbitrator in a proceeding under these rules is a necessary or proper party in judicial proceedings relating to the arbitration.

(c) Parties to an arbitration under these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.

(d) Parties to an arbitration under these rules shall be deemed to have consented that neither the AAA nor any arbitrator shall be liable to any party in any action for damages or injunctive relief for any act or omission in connection with any arbitration under these rules.

(e) Parties to an arbitration under these rules may not call the arbitrator, the AAA, or AAA employees as a witness in litigation or any other proceeding relating to the arbitration. The arbitrator, the AAA and AAA employees are not competent to testify as witnesses in any such proceeding.

R-53. Administrative Fees

As a not-for-profit organization, the AAA shall prescribe administrative fees to compensate it for the cost of providing administrative services. The fees in effect when the fee or charge is incurred shall be applicable. The filing fee shall be advanced by the party or parties making a claim or counterclaim, subject to final apportionment by the arbitrator in the award. The AAA may, in the event of extreme hardship on the part of any party, defer or reduce the administrative fees.

R-54. Expenses

The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the arbitration, including required travel and other expenses of the arbitrator, AAA representatives, and any witness and

the cost of any proof produced at the direct request of the arbitrator, shall be borne equally by the parties, unless they agree otherwise or unless the arbitrator in the award assesses such expenses or any part thereof against any specified party or parties.

R-55. Neutral Arbitrator's Compensation

(a) Arbitrators shall be compensated at a rate consistent with the arbitrator's stated rate of compensation.

(b) If there is disagreement concerning the terms of compensation, an appropriate rate shall be established with the arbitrator by the AAA and confirmed to the parties.

(c) Any arrangement for the compensation of a neutral arbitrator shall be made through the AAA and not directly between the parties and the arbitrator.

R-56. Deposits

(a) The AAA may require the parties to deposit in advance of any hearings such sums of money as it deems necessary to cover the expense of the arbitration, including the arbitrator's fee, if any, and shall render an accounting to the parties and return any unexpended balance at the conclusion of the case.

(b) Other than in cases where the arbitrator serves for a flat fee, deposit amounts requested will be based on estimates provided by the arbitrator. The arbitrator will determine the estimated amount of deposits using the information provided by the parties with respect to the complexity of each case.

(c) Upon the request of any party, the AAA shall request from the arbitrator an itemization or explanation for the arbitrator's request for deposits.

R-57. Remedies for Nonpayment

If arbitrator compensation or administrative charges have not been paid in full, the AAA may so inform the parties in order that one of them may advance the required payment.

(a) Upon receipt of information from the AAA that payment for administrative charges or deposits for arbitrator compensation have not been paid in full, to the extent the law allows, a party may request that the arbitrator take specific measures relating to a party's non-payment.

(b) Such measures may include, but are not limited to, limiting a party's ability to assert or pursue their claim. In no event, however, shall a party be precluded from defending a claim or counterclaim.

(c) The arbitrator must provide the party opposing a request for such measures with the opportunity to respond prior to making any ruling regarding the same.

(d) In the event that the arbitrator grants any request for relief which limits any party's participation in the arbitration, the arbitrator shall require the party who is making a claim and who has made appropriate payments to submit such evidence as the arbitrator may require for the making of an award.

(e) Upon receipt of information from the AAA that full payments have not been received, the arbitrator, on the arbitrator's own initiative or at the request of the AAA or a party, may order the suspension of the arbitration. If no arbitrator has yet been appointed, the AAA may suspend the proceedings.

(f) If the arbitration has been suspended by either the AAA or the arbitrator and the parties have failed to make the full deposits requested within the time provided after the suspension, the arbitrator, or the AAA if an arbitrator has not been appointed, may terminate the proceedings.

R-58. Sanctions

(a) The arbitrator may, upon a party's request, order appropriate sanctions where a party fails to comply with its obligations under these rules or with an order of the arbitrator. In the event that the arbitrator enters a sanction that limits any party's participation in the arbitration or results in an adverse determination of an issue or issues, the arbitrator shall explain that order in writing and shall require the submission of evidence and legal argument prior to making of an award. The arbitrator may not enter a default award as a sanction.

(b) The arbitrator must provide a party that is subject to a sanction request with the opportunity to respond prior to making any determination regarding the sanctions application.

Preliminary Hearing Procedures

P-1. General

(a) In all but the simplest cases, holding a preliminary hearing as early in the process as possible will help the parties and the arbitrator organize the proceeding in a manner that will maximize efficiency and economy, and will provide each party a fair opportunity to present its case.

(b) Care must be taken to avoid importing procedures from court systems, as such procedures may not be appropriate to the conduct of arbitrations as an alternative form of dispute resolution that is designed to be simpler, less expensive and more expeditious.

P-2. Checklist

(a) The following checklist suggests subjects that the parties and the arbitrator should address at the preliminary hearing, in addition to any others that the parties or the arbitrator believe to be appropriate to the particular case. The items to be addressed in a particular case will depend on the size, subject matter, and complexity of the dispute, and are subject to the discretion of the arbitrator:

- **(i)** the possibility of other non-adjudicative methods of dispute resolution, including mediation pursuant to R-9;
- **(ii)** whether all necessary or appropriate parties are included in the arbitration;
- **(iii)** whether a party will seek a more detailed statement of claims, counterclaims or defenses;
- **(iv)** whether there are any anticipated amendments to the parties' claims, counterclaims, or defenses;
- **(v)** which
  - **(a)** arbitration rules;
  - **(b)** procedural law; and
  - **(c)** substantive law govern the arbitration;
- **(vi)** whether there are any threshold or dispositive issues that can efficiently be decided without considering the entire case, including without limitation,
  - **(a)** any preconditions that must be satisfied before proceeding with the arbitration;
  - **(b)** whether any claim or counterclaim falls outside the arbitrator's jurisdiction or is otherwise not arbitrable;
  - **(c)** consolidation of the claims or counterclaims with another arbitration; or
  - **(d)** bifurcation of the proceeding.

(vii) whether the parties will exchange documents, including electronically stored documents, on which they intend to rely in the arbitration, and/or make written requests for production of documents within defined parameters;

(viii) whether to establish any additional procedures to obtain information that is relevant and material to the outcome of disputed issues;

(ix) how costs of any searches for requested information or documents that would result in substantial costs should be borne;

(x) whether any measures are required to protect confidential information;

(xi) whether the parties intend to present evidence from expert witnesses, and if so, whether to establish a schedule for the parties to identify their experts and exchange expert reports;

(xii) whether, according to a schedule set by the arbitrator, the parties will

(a) identify all witnesses, the subject matter of their anticipated testimonies, exchange written witness statements, and determine whether written witness statements will replace direct testimony at the hearing;

(b) exchange and pre-mark documents that each party intends to submit; and

(c) exchange pre-hearing submissions, including exhibits;

(xiii) the date, time and place of the arbitration hearing;

(xiv) whether, at the arbitration hearing,

(a) testimony may be presented in person, in writing, by videoconference, via the internet, telephonically, or by other reasonable means;

(b) there will be a stenographic transcript or other record of the proceeding and, if so, who will make arrangements to provide it;

(xv) whether any procedure needs to be established for the issuance of subpoenas;

(xvi) the identification of any ongoing, related litigation or arbitration;

(xvii) whether post-hearing submissions will be filed;

(xviii) the form of the arbitration award; and

(xix) any other matter the arbitrator considers appropriate or a party wishes to raise.

(b) The arbitrator shall issue a written order memorializing decisions made and agreements reached during or following the preliminary hearing.

Expedited Procedures

E-1. Limitation on Extensions

Except in extraordinary circumstances, the AAA or the arbitrator may grant a party no more than one seven-day extension of time to respond to the Demand for Arbitration or counterclaim as provided in Section R-5.

E-2. Changes of Claim or Counterclaim

A claim or counterclaim may be increased in amount, or a new or different claim or counterclaim added, upon the agreement of the other party, or the consent of the arbitrator. After the arbitrator is appointed, however, no new or different claim or counterclaim may be submitted except with the arbitrator's consent. If an increased claim or counterclaim exceeds $75,000, the case will be administered under the regular procedures unless all parties and the arbitrator agree that the case may continue to be processed under the Expedited Procedures.

E-3. Serving of Notices

In addition to notice provided by Section R-43, the parties shall also accept notice by telephone. Telephonic notices by the AAA shall subsequently be confirmed in writing to the parties. Should there be a failure to confirm in writing any such oral notice, the proceeding shall nevertheless be valid if notice has, in fact, been given by telephone.

E-4. Appointment and Qualifications of Arbitrator

(a) The AAA shall simultaneously submit to each party an identical list of five proposed arbitrators drawn from its National Roster from which one arbitrator shall be appointed.

(b) The parties are encouraged to agree to an arbitrator from this list and to advise the AAA of their agreement. If the parties are unable to agree upon an arbitrator, each party may strike two names from the list and return it to the AAA within seven days from the date of the AAA's mailing to the parties. If for any reason the appointment of an arbitrator cannot be made from the list, the AAA may make the appointment from other members of the panel without the submission of additional lists.

(c) The parties will be given notice by the AAA of the appointment of the arbitrator, who shall be subject to disqualification for the reasons specified in Section R-18. The parties shall notify the AAA within seven calendar days of any objection to the arbitrator appointed. Any such objection shall be for cause and shall be confirmed in writing to the AAA with a copy to the other party or parties.

E-5. Exchange of Exhibits

At least two business days prior to the hearing, the parties shall exchange copies of all exhibits they intend to submit at the hearing. The arbitrator shall resolve disputes concerning the exchange of exhibits.

E-6. Proceedings on Documents and Procedures for the Resolution of Disputes Through Document Submission

Where no party's claim exceeds $25,000, exclusive of interest, attorneys' fees and arbitration costs, and other cases in which the parties agree, the dispute shall be resolved by submission of documents, unless any party requests an oral hearing, or the arbitrator determines that an oral hearing is necessary. Where cases are resolved by submission of documents, the following procedures may be utilized at the agreement of the parties or the discretion of the arbitrator:

(a) Within 14 calendar days of confirmation of the arbitrator's appointment, the arbitrator may convene a preliminary management hearing, via conference call, video conference, or internet, to establish a fair and equitable procedure for the submission of documents, and, if the arbitrator deems appropriate, a schedule for one or more telephonic or electronic conferences.

(b) The arbitrator has the discretion to remove the case from the documents-only process if the arbitrator determines that an in-person hearing is necessary.

(c) If the parties agree to in-person hearings after a previous agreement to proceed under this rule, the arbitrator shall conduct such hearings. If a party seeks to have in-person hearings after agreeing to this rule, but there is not agreement among the parties to proceed with in-person hearings, the arbitrator shall resolve the issue after the parties have been given the opportunity to provide their respective positions on the issue.

(d) The arbitrator shall establish the date for either written submissions or a final telephonic or electronic conference. Such date shall operate to close the hearing and the time for the rendering of the award shall commence.

(e) Unless the parties have agreed to a form of award other than that set forth in rule R-46, when the parties have agreed to resolve their dispute by this rule, the arbitrator shall render the award within 14 calendar days from the date the hearing is closed.

(f) If the parties agree to a form of award other than that described in rule R-46, the arbitrator shall have 30 calendar days from the date the hearing is declared closed in which to render the award.

(g) The award is subject to all other provisions of the Regular Track of these rules which pertain to awards.

E-7. Date, Time, and Place of Hearing

In cases in which a hearing is to be held, the arbitrator shall set the date, time, and place of the hearing, to be scheduled to take place within 30 calendar days of confirmation of the arbitrator's appointment. The AAA will notify the parties in advance of the hearing date.

E-8. The Hearing

(a) Generally, the hearing shall not exceed one day. Each party shall have equal opportunity to submit its proofs and complete its case. The arbitrator shall determine the order of the hearing, and may require further submission of documents within two business days after the hearing. For good cause shown, the arbitrator may schedule additional hearings within seven business days after the initial day of hearings.

(b) Generally, there will be no stenographic record. Any party desiring a stenographic record may arrange for one pursuant to the provisions of Section R-28.

E-9. Time of Award

Unless otherwise agreed by the parties, the award shall be rendered not later than 14 calendar days from the date of the closing of the hearing or, if oral hearings have been waived, from the due date established for the receipt of the parties' final statements and proofs.

E-10. Arbitrator's Compensation

Arbitrators will receive compensation at a rate to be suggested by the AAA regional office.

Procedures for Large, Complex Commercial Disputes

L-1. Administrative Conference

Prior to the dissemination of a list of potential arbitrators, the AAA shall, unless the parties agree otherwise, conduct an administrative conference with the parties and/or their attorneys or other representatives by conference call. The conference will take place within 14 calendar days after the commencement of the arbitration. In the event the parties are unable to agree on a mutually acceptable time for the conference, the AAA may contact the parties individually to discuss the issues contemplated herein. Such administrative conference shall be conducted for the following purposes and for such additional purposes as the parties or the AAA may deem appropriate:

(a) to obtain additional information about the nature and magnitude of the dispute and the anticipated length of hearing and scheduling;

(b) to discuss the views of the parties about the technical and other qualifications of the arbitrators;

(c) to obtain conflicts statements from the parties; and

(d) to consider, with the parties, whether mediation or other non-adjudicative methods of dispute resolution might be appropriate.

L-2. Arbitrators

(a) Large, complex commercial cases shall be heard and determined by either one or three arbitrators, as may be agreed upon by the parties. With the exception in paragraph (b) below, if the parties are unable to agree upon the number of arbitrators and a claim or counterclaim involves at least $1,000,000, then three arbitrator(s) shall hear and determine the case. If the parties are unable to agree on the number of arbitrators and each claim and counterclaim is less than $1,000,000, then one arbitrator shall hear and determine the case.

(b) In cases involving the financial hardship of a party or other circumstance, the AAA at its discretion may require that only one arbitrator hear and determine the case, irrespective of the size of the claim involved in the dispute.

(c) The AAA shall appoint arbitrator(s) as agreed by the parties. If they are unable to agree on a method of appointment, the AAA shall appoint arbitrators from the Large, Complex Commercial Case Panel, in the manner provided in the regular Commercial Arbitration Rules. Absent agreement of the parties, the arbitrator(s) shall not have served as the mediator in the mediation phase of the instant proceeding.

L-3. Management of Proceedings

(a) The arbitrator shall take such steps as deemed necessary or desirable to avoid delay and to achieve a fair, speedy and cost-effective resolution of a Large, Complex Commercial Dispute.

(b) As promptly as practicable after the selection of the arbitrator(s), a preliminary hearing shall be scheduled in accordance with sections P-1 and P-2 of these rules.

(c) The parties shall exchange copies of all exhibits they intend to submit at the hearing at least 10 calendar days prior to the hearing unless the arbitrator(s) determines otherwise.

(d) The parties and the arbitrator(s) shall address issues pertaining to the pre-hearing exchange and production of information in accordance with rule R-22 of the AAA Commercial Rules, and the arbitrator's determinations on such issues shall be included within the Scheduling and Procedure Order.

(e) The arbitrator, or any single member of the arbitration tribunal, shall be authorized to resolve any disputes concerning the pre-hearing exchange and production of documents and information by any reasonable means within his discretion, including, without limitation, the issuance of orders set forth in rules R-22 and R-23 of the AAA Commercial Rules.

(f) In exceptional cases, at the discretion of the arbitrator, upon good cause shown and consistent with the expedited nature of arbitration, the arbitrator may order depositions to obtain the testimony of a person who may possess information determined by the arbitrator to be relevant and material to the outcome of the case. The arbitrator may allocate the cost of taking such a deposition.

(g) Generally, hearings will be scheduled on consecutive days or in blocks of consecutive days in order to maximize efficiency and minimize costs.

Administrative Fee Schedules (Standard and Flexible Fees)

FOR THE CURRENT ADMINISTRATIVE FEE SCHEDULE, PLEASE VISIT ***www.adr.org/feeschedule.***

Commercial Mediation Procedures

M-1. Agreement of Parties

Whenever, by stipulation or in their contract, the parties have provided for mediation or conciliation of existing or future disputes under the auspices of the American Arbitration Association or under these procedures, the parties and their representatives, unless agreed otherwise in writing, shall be deemed to have made these procedural guidelines, as amended and in effect as of the date of filing of a request for mediation, a part of their agreement and designate the AAA as the administrator of their mediation.

The parties by mutual agreement may vary any part of these procedures including, but not limited to, agreeing to conduct the mediation via telephone or other electronic or technical means.

M-2. Initiation of Mediation

Any party or parties to a dispute may initiate mediation under the AAA's auspices by making a request for mediation to any of the AAA's regional offices or case management centers via telephone, email, regular mail or fax. Requests for mediation may also be filed online via WebFile at **www.adr.org.**

The party initiating the mediation shall simultaneously notify the other party or parties of the request. The initiating party shall provide the following information to the AAA and the other party or parties as applicable:

(i) A copy of the mediation provision of the parties' contract or the parties' stipulation to mediate.

(ii) The names, regular mail addresses, email addresses, and telephone numbers of all parties to the dispute and representatives, if any, in the mediation.

(iii) A brief statement of the nature of the dispute and the relief requested.

(iv) Any specific qualifications the mediator should possess.

M-3. Representation

Subject to any applicable law, any party may be represented by persons of the party's choice. The names and addresses of such persons shall be communicated in writing to all parties and to the AAA.

M-4. Appointment of the Mediator

If the parties have not agreed to the appointment of a mediator and have not provided any other method of appointment, the mediator shall be appointed in the following manner:

(i) Upon receipt of a request for mediation, the AAA will send to each party a list of mediators from the AAA's Panel of Mediators. The parties are encouraged to agree to a mediator from the submitted list and to advise the AAA of their agreement.

(ii) If the parties are unable to agree upon a mediator, each party shall strike unacceptable names from the list, number the remaining names in order of preference, and return the list to the AAA. If a party does not return the list within the time specified, all mediators on the list shall be deemed acceptable. From among the mediators who have been mutually approved by the parties, and in accordance with the designated order of mutual preference, the AAA shall invite a mediator to serve.

(iii) If the parties fail to agree on any of the mediators listed, or if acceptable mediators are unable to serve, or if for any other reason the appointment cannot be made from the submitted list, the AAA shall have the authority to make the appointment from among other members of the Panel of Mediators without the submission of additional lists.

M-5. Mediator's Impartiality and Duty to Disclose

AAA mediators are required to abide by the *Model Standards of Conduct for Mediators* in effect at the time a mediator is appointed to a case. Where there is a conflict between the *Model Standards* and any provision of these Mediation Procedures, these Mediation Procedures shall govern. The Standards require mediators to (i) decline a mediation if the mediator cannot conduct it in an impartial manner, and (ii) disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality.

Prior to accepting an appointment, AAA mediators are required to make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for the mediator. AAA mediators are required to disclose any circumstance likely to create a presumption of bias or prevent a resolution of the parties' dispute within the time-frame desired by the parties. Upon receipt of such disclosures, the AAA shall immediately communicate the disclosures to the parties for their comments.

The parties may, upon receiving disclosure of actual or potential conflicts of interest of the mediator, waive such conflicts and proceed with the mediation. In the event that a party disagrees as to whether the mediator shall serve, or in the event that the mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, the mediator shall be replaced.

M-6. Vacancies

If any mediator shall become unwilling or unable to serve, the AAA will appoint another mediator, unless the parties agree otherwise, in accordance with section M-4.

M-7. Duties and Responsibilities of the Mediator

(i) The mediator shall conduct the mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.

(ii) The mediator is authorized to conduct separate or *ex parte* meetings and other communications with the parties and/or their representatives, before, during, and after any scheduled mediation conference. Such communications may be conducted via telephone, in writing, via email, online, in person or otherwise.

(iii) The parties are encouraged to exchange all documents pertinent to the relief requested. The mediator may request the exchange of memoranda on issues, including the underlying interests and the history of the parties' negotiations. Information that a party wishes to keep confidential may be sent to the mediator, as necessary, in a separate communication with the mediator.

(iv) The mediator does not have the authority to impose a settlement on the parties but will attempt to help them reach a satisfactory resolution of their dispute. Subject to the discretion of the mediator, the mediator may make oral or written recommendations for settlement to a party privately or, if the parties agree, to all parties jointly.

(v) In the event a complete settlement of all or some issues in dispute is not achieved within the scheduled mediation session(s), the mediator may continue to communicate with the parties, for a period of time, in an ongoing effort to facilitate a complete settlement.

(vi) The mediator is not a legal representative of any party and has no fiduciary duty to any party.

M-8. Responsibilities of the Parties

The parties shall ensure that appropriate representatives of each party, having authority to consummate a settlement, attend the mediation conference.

Prior to and during the scheduled mediation conference session(s) the parties and their representatives shall, as appropriate to each party's circumstances, exercise their best efforts to prepare for and engage in a meaningful and productive mediation.

M-9. Privacy

Mediation sessions and related mediation communications are private proceedings. The parties and their representatives may attend mediation sessions. Other persons may attend only with the permission of the parties and with the consent of the mediator.

M-10. Confidentiality

Subject to applicable law or the parties' agreement, confidential information disclosed to a mediator by the parties or by other participants (witnesses) in the course of the mediation shall not be divulged by the mediator. The mediator shall maintain the confidentiality of all information obtained in the mediation, and all records, reports, or other documents received by a mediator while serving in that capacity shall be confidential.

The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceeding or judicial forum.

The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial, or other proceeding the following, unless agreed to by the parties or required by applicable law:

(i) Views expressed or suggestions made by a party or other participant with respect to a possible settlement of the dispute;

(ii) Admissions made by a party or other participant in the course of the mediation proceedings;

(iii) Proposals made or views expressed by the mediator; or

(iv) The fact that a party had or had not indicated willingness to accept a proposal for settlement made by the mediator.

M-11. No Stenographic Record

There shall be no stenographic record of the mediation process.

M-12. Termination of Mediation

The mediation shall be terminated:

(i) By the execution of a settlement agreement by the parties; or

(ii) By a written or verbal declaration of the mediator to the effect that further efforts at mediation would not contribute to a resolution of the parties' dispute; or

(iii) By a written or verbal declaration of all parties to the effect that the mediation proceedings are terminated; or

(iv) When there has been no communication between the mediator and any party or party's representative for 21 days following the conclusion of the mediation conference.

M-13. Exclusion of Liability

Neither the AAA nor any mediator is a necessary party in judicial proceedings relating to the mediation. Neither the AAA nor any mediator shall be liable to any party for any error, act or omission in connection with any mediation conducted under these procedures.

M-14. Interpretation and Application of Procedures

The mediator shall interpret and apply these procedures insofar as they relate to the mediator's duties and responsibilities. All other procedures shall be interpreted and applied by the AAA.

M-15. Deposits

Unless otherwise directed by the mediator, the AAA will require the parties to deposit in advance of the mediation conference such sums of money as it, in consultation with the mediator, deems necessary to cover the costs and expenses of the mediation and shall render an accounting to the parties and return any unexpended balance at the conclusion of the mediation.

M-16. Expenses

All expenses of the mediation, including required traveling and other expenses or charges of the mediator, shall be borne equally by the parties unless they agree otherwise. The expenses of participants for either side shall be paid by the party requesting the attendance of such participants.

M-17. Cost of the Mediation

FOR THE CURRENT ADMINISTRATIVE FEE SCHEDULE, PLEASE VISIT ***www.adr.org/feeschedule.***

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AAA® ARBITRATION ROAD MAP

REACHING RESOLUTION

American Arbitration Association®

Arbitration is the out-of-court submission of a dispute to an impartial third party or parties for a binding decision. The AAA arbitration administration process comprises a well-defined set of steps by which most commercial cases proceed.

FILING AND INITIATION

DAY 1 - 15

The AAA typically commences administration of an arbitration case when one party submits a **Demand for Arbitration**, a **copy of the arbitration provision** from the contract between the parties, and the **appropriate filing fee** to the AAA. The AAA acknowledges receipt to all parties and sets a deadline for the respondent to answer and/or to file a counterclaim. If no arbitration clause exists or the AAA is not named as the resolution provider in the parties' contract, cases may commence with the **consent of all parties, a filed Submission to Dispute Resolution**, and the **appropriate filing fee** to the AAA.

EXPECTED COSTS AT THIS STAGE

Filing fees are based on claim amounts and are paid by the party that asserts the claim or counterclaim.

ARBITRATOR SELECTION

DAY 15 – 44

Based upon the parties' expressed criteria of qualifications, the AAA identifies arbitrators from the **AAA National Roster of Arbitrators** and provides their curriculum vitae to the parties. If parties are unable to agree upon the arbitrator(s), the AAA establishes a deadline for each party to independently state its preferences from the list. The AAA invites the most mutually agreeable arbitrator(s) to serve on the case.

EXPECTED COSTS

Partial refunds of filing and counterclaim fees are available under some AAA fee schedules. No refunds are available after an arbitrator has been appointed.

PRELIMINARY HEARING

DAY 44 – 85

Conducted by the arbitrator often via conference call, this management meeting is the first time the parties and arbitrator discuss the substantive issues of the case and procedural matters, such as exchange of information, witness lists, and dates. The Scheduling Order, which serves as the framework for hearing prepara-tions, is established.

EXPECTED COSTS

Parties will incur compensation charges by each arbitrator for time spent before and during the Preliminary Hearing and in preparation of the Scheduling Order.

INFORMATION EXCHANGE AND PREPARATION

DAY 85 – 222

The parties work within the time frames set forth at the Preliminary Hearing to exchange information and prepare their presentations. The arbitrator addresses any impasses or challenges related to information sharing.

EXPECTED COSTS

The time spent by the arbitrator in this phase is proportional to the number of procedural matters needing resolution. Additionally, the arbitrator will spend time reviewing the parties' pre-hearing submissions, if any.

MEDIATION STEP

Subject to the right of any party to opt out, in cases where a claim or counterclaim exceeds $75,000, the rules provide that the parties shall mediate their dispute with the AAA concurrently with arbitration, at no additional fee. The mediator assists parties in reaching a settlement but has no authority to make a binding decision or award.

EXPECTED COSTS

The parties are responsible for the mediator's fee plus an AAA fee of $75.

HEARING

DAY 222-223

Parties present testimony and evidence to the arbitrator.

EXPECTED COSTS

The arbitrator is compensated for time spent in hearings, reviewing evidence, and reasonable expenses, such as mileage and tolls.

POST-HEARING SUBMISSIONS

DAY 223 – 258

If the arbitrator allows, parties may submit additional documentation, usually shortly after the hearing.

EXPECTED COSTS

The arbitrator is compensated for reviewing evidence and any post-hearing submissions, as well as drafting the award. Any unused deposits are returned to the parties.

THE AWARD

DAY 258 – 288

The arbitrator closes the record and, no more than 30 days later, issues a decision addressing all claims raised in the arbitration. The award may direct one or more parties to pay another party a monetary amount, or it may direct parties to take specific actions. Aside from any administrative matters unrelated to the merits of the case, the services of the arbitrator and the AAA are completed when the award is issued.

EXPECTED COSTS

The arbitrator apportions arbitrator compensation and expenses and AAA fees among the parties.

AAA197

COMMERCIAL

Commercial

Arbitration Rules and Mediation Procedures

Including Procedures for Large, Complex Commercial Disputes

AMERICAN ARBITRATION ASSOCIATION®

Available online at **adr.org/commercial**

Rules Amended and Effective October 1, 2013
Fee Schedule Amended and Effective July 1, 2016

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Commercial Arbitration Rules and Mediation Procedures

(Including Procedures for Large, Complex Commercial Disputes)

Important Notice

These rules and any amendment of them shall apply in the form in effect at the time the administrative filing requirements are met for a demand for arbitration or submission agreement received by the AAA®. To ensure that you have the most current information, see our web site at **www.adr.org.**

Introduction

Each year, many millions of business transactions take place. Occasionally, disagreements develop over these business transactions. Many of these disputes are resolved by arbitration, the voluntary submission of a dispute to an impartial person or persons for final and binding determination. Arbitration has proven to be an effective way to resolve these disputes privately, promptly, and economically.

The American Arbitration Association® (AAA), a not-for-profit, public service organization, offers a broad range of dispute resolution services to business executives, attorneys, individuals, trade associations, unions, management, consumers, families, communities, and all levels of government. Services are available through AAA headquarters in New York and through offices located in major cities throughout the United States. Hearings may be held at locations convenient for the parties and are not limited to cities with AAA offices. In addition, the AAA serves as a center for education and training, issues specialized publications, and conducts research on various forms of alternative dispute resolution.

Standard Arbitration Clause

The parties can provide for arbitration of future disputes by inserting the following clause into their contracts:

> *Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.*

Arbitration of existing disputes may be accomplished by use of the following:

> *We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules the following Controversy: (describe briefly). We further agree that the above controversy be submitted to (one) (three) arbitrator(s). We further agree that we will faithfully observe this agreement and the rules, that we will abide by and perform any award rendered by the arbitrator(s), and that a judgment of any court having jurisdiction may be entered on the award.*

The services of the AAA are generally concluded with the transmittal of the award. Although there is voluntary compliance with the majority of awards, judgment on the award can be entered in a court having appropriate jurisdiction if necessary.

Administrative Fees

The AAA charges a filing fee based on the amount of the claim or counterclaim. This fee information, which is included with these rules, allows the parties to exercise control over their administrative fees. The fees cover AAA administrative services; they do not cover arbitrator compensation or expenses, if any, reporting services, or any post-award charges incurred by the parties in enforcing the award.

Mediation

Subject to the right of any party to opt out, in cases where a claim or counterclaim exceeds $75,000, the rules provide that the parties shall mediate their dispute upon the administration of the arbitration or at any time when the arbitration is pending. In mediation, the neutral mediator assists the parties in

reaching a settlement but does not have the authority to make a binding decision or award. Mediation is administered by the AAA in accordance with its Commercial Mediation Procedures. There is no additional filing fee where parties to a pending arbitration attempt to mediate their dispute under the AAA's auspices.

Although these rules include a mediation procedure that will apply to many cases, parties may still want to incorporate mediation into their contractual dispute settlement process. Parties can do so by inserting the following mediation clause into their contract in conjunction with a standard arbitration provision:

> *If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures before resorting to arbitration, litigation, or some other dispute resolution procedure.*

If the parties want to use a mediator to resolve an existing dispute, they can enter into the following submission agreement:

> *The parties hereby submit the following dispute to mediation administered by the American Arbitration Association under its Commercial Mediation Procedures. (The clause may also provide for the qualifications of the mediator(s), method of payment, locale of meetings, and any other item of concern to the parties.)*

Large, Complex Cases

Unless the parties agree otherwise, the procedures for Large, Complex Commercial Disputes, which appear in this pamphlet, will be applied to all cases administered by the AAA under the Commercial Arbitration Rules in which the disclosed claim or counterclaim of any party is at least $500,000 exclusive of claimed interest, arbitration fees and costs. The key features of these procedures include:

- A highly qualified, trained Roster of Neutrals;
- A mandatory preliminary hearing with the arbitrators, which may be conducted by teleconference;
- Broad arbitrator authority to order and control the exchange of information, including depositions;
- A presumption that hearings will proceed on a consecutive or block basis.

Commercial Arbitration Rules

R-1. Agreement of Parties*

(a) The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter AAA) under its Commercial Arbitration Rules or for arbitration by the AAA of a domestic commercial dispute without specifying particular rules. These rules and any amendment of them shall apply in the form in effect at the time the administrative requirements are met for a Demand for Arbitration or Submission Agreement received by the AAA. Any disputes regarding which AAA rules shall apply shall be decided by the AAA. The parties, by written agreement, may vary the procedures set forth in these rules. After appointment of the arbitrator, such modifications may be made only with the consent of the arbitrator.

(b) Unless the parties or the AAA determines otherwise, the Expedited Procedures shall apply in any case in which no disclosed claim or counterclaim exceeds $75,000, exclusive of interest, attorneys' fees, and arbitration fees and costs.

Parties may also agree to use these procedures in larger cases. Unless the parties agree otherwise, these procedures will not apply in cases involving more than two parties. The Expedited Procedures shall be applied as described in Sections E-1 through E-10 of these rules, in addition to any other portion of these rules that is not in conflict with the Expedited Procedures.

(c) Unless the parties agree otherwise, the Procedures for Large, Complex Commercial Disputes shall apply to all cases in which the disclosed claim or counterclaim of any party is at least $500,000 or more, exclusive of claimed interest, attorneys' fees, arbitration fees and costs. Parties may also agree to use the procedures in cases involving claims or counterclaims under $500,000, or in nonmonetary cases. The Procedures for Large, Complex Commercial Disputes shall be applied as described in Sections L-1 through L-3 of these rules, in addition to any other portion of these rules that is not in conflict with the Procedures for Large, Complex Commercial Disputes.

(d) Parties may, by agreement, apply the Expedited Procedures, the Procedures for Large, Complex Commercial Disputes, or the Procedures for the Resolution of Disputes through Document Submission (Rule E-6) to any dispute.

(e) All other cases shall be administered in accordance with Sections R-1 through R-58 of these rules.

* *A dispute arising out of an employer-promulgated plan will be administered under the AAA's Employment Arbitration Rules and Mediation Procedures. A dispute arising out of a consumer arbitration agreement will be administered under the AAA's Consumer Arbitration Rules.*

R-2. AAA and Delegation of Duties

When parties agree to arbitrate under these rules, or when they provide for arbitration by the AAA and an arbitration is initiated under these rules, they thereby authorize the AAA to administer the arbitration. The authority and duties of the AAA are prescribed in the agreement of the parties and in these rules, and may be carried out through such of the AAA's representatives as it may direct. The AAA may, in its discretion, assign the administration of an arbitration to any of its offices. Arbitrations administered under these rules shall only be administered by the AAA or by an individual or organization authorized by the AAA to do so.

R-3. National Roster of Arbitrators

The AAA shall establish and maintain a National Roster of Arbitrators ("National Roster") and shall appoint arbitrators as provided in these rules. The term "arbitrator" in these rules refers to the arbitration panel, constituted for a particular case, whether composed of one or more arbitrators, or to an individual arbitrator, as the context requires.

R-4. Filing Requirements

(a) Arbitration under an arbitration provision in a contract shall be initiated by the initiating party ("claimant") filing with the AAA a Demand for Arbitration, the administrative filing fee, and a copy of the applicable arbitration agreement from the parties' contract which provides for arbitration.

(b) Arbitration pursuant to a court order shall be initiated by the initiating party filing with the AAA a Demand for Arbitration, the administrative filing fee, and a copy of any applicable arbitration agreement from the parties' contract which provides for arbitration.

- **i.** The filing party shall include a copy of the court order.
- **ii.** The filing fee must be paid before a matter is considered properly filed. If the court order directs that a specific party is responsible for the filing fee, it is the responsibility of the filing party to either make such payment to the AAA and seek reimbursement as directed in the court order or to make other such arrangements so that the filing fee is submitted to the AAA with the Demand.
- **iii.** The party filing the Demand with the AAA is the claimant and the opposing party is the respondent regardless of which party initiated the court action. Parties may request that the arbitrator alter the order of proceedings if necessary pursuant to R-32.

(c) It is the responsibility of the filing party to ensure that any conditions precedent to the filing of a case are met prior to filing for an arbitration, as well as any time requirements associated with the filing. Any dispute regarding whether a condition precedent has been met may be raised to the arbitrator for determination.

(d) Parties to any existing dispute who have not previously agreed to use these rules may commence an arbitration under these rules by filing a written submission agreement and the administrative filing fee. To the extent that the parties' submission agreement contains any variances from these rules, such variances should be clearly stated in the Submission Agreement.

(e) Information to be included with any arbitration filing includes:

- **i.** the name of each party;
- **ii.** the address for each party, including telephone and fax numbers and e-mail addresses;
- **iii.** if applicable, the names, addresses, telephone and fax numbers, and e-mail addresses of any known representative for each party;
- **iv.** a statement setting forth the nature of the claim including the relief sought and the amount involved; and
- **v.** the locale requested if the arbitration agreement does not specify one.

(f) The initiating party may file or submit a dispute to the AAA in the following manner:

- **i.** through AAA WebFile, located at **www.adr.org;** or
- **ii.** by filing the complete Demand or Submission with any AAA office, regardless of the intended locale of hearing.

(g) The filing party shall simultaneously provide a copy of the Demand and any supporting documents to the opposing party.

(h) The AAA shall provide notice to the parties (or their representatives if so named) of the receipt of a Demand or Submission when the administrative filing requirements have been satisfied. The date on which the filing requirements are satisfied shall establish the date of filing the dispute for administration. However, all disputes in connection with the AAA's determination of the date of filing may be decided by the arbitrator.

(i) If the filing does not satisfy the filing requirements set forth above, the AAA shall acknowledge to all named parties receipt of the incomplete filing and inform the parties of the filing deficiencies. If the deficiencies are not cured by the date specified by the AAA, the filing may be returned to the initiating party.

R-5. Answers and Counterclaims

(a) A respondent may file an answering statement with the AAA within 14 calendar days after notice of the filing of the Demand is sent by the AAA. The respondent shall, at the time of any such filing, send a copy of any answering statement to the claimant and to all other parties to the arbitration. If no answering statement is filed within the stated time, the respondent will be deemed to deny the claim. Failure to file an answering statement shall not operate to delay the arbitration.

(b) A respondent may file a counterclaim at any time after notice of the filing of the Demand is sent by the AAA, subject to the limitations set forth in Rule R-6. The respondent shall send a copy of the counterclaim to the claimant and all other parties to the arbitration. If a counterclaim is asserted, it shall include a statement setting forth the nature of the counterclaim including the relief sought and the amount involved. The filing fee as specified in the applicable AAA Fee Schedule must be paid at the time of the filing of any counterclaim.

(c) If the respondent alleges that a different arbitration provision is controlling, the matter will be administered in accordance with the arbitration provision submitted by the initiating party subject to a final determination by the arbitrator.

(d) If the counterclaim does not meet the requirements for filing a claim and the deficiency is not cured by the date specified by the AAA, it may be returned to the filing party.

R-6. Changes of Claim

(a) A party may at any time prior to the close of the hearing or by the date established by the arbitrator increase or decrease the amount of its claim or counterclaim. Written notice of the change of claim amount must be provided to the AAA and all parties. If the change of claim amount results in an increase in administrative fee, the balance of the fee is due before the change of claim amount may be accepted by the arbitrator.

(b) Any new or different claim or counterclaim, as opposed to an increase or decrease in the amount of a pending claim or counterclaim, shall be made in writing and filed with the AAA, and a copy shall be provided to the other party, who shall have a period of 14 calendar days from the date of such transmittal within which to file an answer to the proposed change of claim or counterclaim with the AAA. After the arbitrator is appointed, however, no new or different claim may be submitted except with the arbitrator's consent.

R-7. Jurisdiction

(a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.

(b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

(c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

R-8. Interpretation and Application of Rules

The arbitrator shall interpret and apply these rules insofar as they relate to the arbitrator's powers and duties. When there is more than one arbitrator and a difference arises among them concerning the meaning or application of these rules, it shall be decided by a majority vote. If that is not possible, either an arbitrator or a party may refer the question to the AAA for final decision. All other rules shall be interpreted and applied by the AAA.

R-9. Mediation

In all cases where a claim or counterclaim exceeds $75,000, upon the AAA's administration of the arbitration or at any time while the arbitration is pending, the parties shall mediate their dispute pursuant to the applicable provisions of the AAA's Commercial Mediation Procedures, or as otherwise agreed by the parties. Absent an agreement of the parties to the contrary, the mediation shall take place concurrently with the arbitration and shall not serve to delay the arbitration proceedings. However, any party to an arbitration may unilaterally opt out of this rule upon notification to the AAA and the other parties to the arbitration. The parties shall confirm the completion of any mediation or any decision to opt out of this rule to the AAA. Unless agreed to by all parties and the mediator, the mediator shall not be appointed as an arbitrator to the case.

R-10. Administrative Conference

At the request of any party or upon the AAA's own initiative, the AAA may conduct an administrative conference, in person or by telephone, with the parties and/or their representatives. The conference may address such issues as arbitrator selection, mediation of the dispute, potential exchange of information, a timetable for hearings, and any other administrative matters.

R-11. Fixing of Locale

The parties may mutually agree on the locale where the arbitration is to be held. Any disputes regarding the locale that are to be decided by the AAA must be submitted to the AAA and all other parties within 14 calendar days from the date of the AAA's initiation of the case or the date established by the AAA. Disputes regarding locale shall be determined in the following manner:

(a) When the parties' arbitration agreement is silent with respect to locale, and if the parties disagree as to the locale, the AAA may initially determine the place of

arbitration, subject to the power of the arbitrator after appointment, to make a final determination on the locale.

(b) When the parties' arbitration agreement requires a specific locale, absent the parties' agreement to change it, or a determination by the arbitrator upon appointment that applicable law requires a different locale, the locale shall be that specified in the arbitration agreement.

(c) If the reference to a locale in the arbitration agreement is ambiguous, and the parties are unable to agree to a specific locale, the AAA shall determine the locale, subject to the power of the arbitrator to finally determine the locale.

The arbitrator, at the arbitrator's sole discretion, shall have the authority to conduct special hearings for document production purposes or otherwise at other locations if reasonably necessary and beneficial to the process.

R-12. Appointment from National Roster

If the parties have not appointed an arbitrator and have not provided any other method of appointment, the arbitrator shall be appointed in the following manner:

(a) The AAA shall send simultaneously to each party to the dispute an identical list of 10 (unless the AAA decides that a different number is appropriate) names of persons chosen from the National Roster. The parties are encouraged to agree to an arbitrator from the submitted list and to advise the AAA of their agreement.

(b) If the parties are unable to agree upon an arbitrator, each party to the dispute shall have 14 calendar days from the transmittal date in which to strike names objected to, number the remaining names in order of preference, and return the list to the AAA. The parties are not required to exchange selection lists. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable to that party. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an arbitrator to serve. If the parties fail to agree on any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from among other members of the National Roster without the submission of additional lists.

(c) Unless the parties agree otherwise, when there are two or more claimants or two or more respondents, the AAA may appoint all the arbitrators.

R-13. Direct Appointment by a Party

(a) If the agreement of the parties names an arbitrator or specifies a method of appointing an arbitrator, that designation or method shall be followed. The notice of appointment, with the name and address of the arbitrator, shall be filed with the AAA by the appointing party. Upon the request of any appointing party, the AAA shall submit a list of members of the National Roster from which the party may, if it so desires, make the appointment.

(b) Where the parties have agreed that each party is to name one arbitrator, the arbitrators so named must meet the standards of Section R-18 with respect to impartiality and independence unless the parties have specifically agreed pursuant to Section R-18(b) that the party-appointed arbitrators are to be non-neutral and need not meet those standards.

(c) If the agreement specifies a period of time within which an arbitrator shall be appointed and any party fails to make the appointment within that period, the AAA shall make the appointment.

(d) If no period of time is specified in the agreement, the AAA shall notify the party to make the appointment. If within 14 calendar days after such notice has been sent, an arbitrator has not been appointed by a party, the AAA shall make the appointment.

R-14. Appointment of Chairperson by Party-Appointed Arbitrators or Parties

(a) If, pursuant to Section R-13, either the parties have directly appointed arbitrators, or the arbitrators have been appointed by the AAA, and the parties have authorized them to appoint a chairperson within a specified time and no appointment is made within that time or any agreed extension, the AAA may appoint the chairperson.

(b) If no period of time is specified for appointment of the chairperson, and the party-appointed arbitrators or the parties do not make the appointment within 14 calendar days from the date of the appointment of the last party-appointed arbitrator, the AAA may appoint the chairperson.

(c) If the parties have agreed that their party-appointed arbitrators shall appoint the chairperson from the National Roster, the AAA shall furnish to the party-appointed arbitrators, in the manner provided in Section R-12, a list selected from the National Roster, and the appointment of the chairperson shall be made as provided in that Section.

R-15. Nationality of Arbitrator

Where the parties are nationals of different countries, the AAA, at the request of any party or on its own initiative, may appoint as arbitrator a national of a country other than that of any of the parties. The request must be made before the time set for the appointment of the arbitrator as agreed by the parties or set by these rules.

R-16. Number of Arbitrators

(a) If the arbitration agreement does not specify the number of arbitrators, the dispute shall be heard and determined by one arbitrator, unless the AAA, in its discretion, directs that three arbitrators be appointed. A party may request three arbitrators in the Demand or Answer, which request the AAA will consider in exercising its discretion regarding the number of arbitrators appointed to the dispute.

(b) Any request for a change in the number of arbitrators as a result of an increase or decrease in the amount of a claim or a new or different claim must be made to the AAA and other parties to the arbitration no later than seven calendar days after receipt of the R-6 required notice of change of claim amount. If the parties are unable to agree with respect to the request for a change in the number of arbitrators, the AAA shall make that determination.

R-17. Disclosure

(a) Any person appointed or to be appointed as an arbitrator, as well as the parties and their representatives, shall disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration. Failure on the part of a party or a representative to comply with the requirements of this rule may result in the waiver of the right to object to an arbitrator in accordance with Rule R-41.

(b) Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others.

(c) Disclosure of information pursuant to this Section R-17 is not an indication that the arbitrator considers that the disclosed circumstance is likely to affect impartiality or independence.

R-18. Disqualification of Arbitrator

(a) Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for:

- **i.** partiality or lack of independence,
- **ii.** inability or refusal to perform his or her duties with diligence and in good faith, and
- **iii.** any grounds for disqualification provided by applicable law.

(b) The parties may agree in writing, however, that arbitrators directly appointed by a party pursuant to Section R-13 shall be non-neutral, in which case such arbitrators need not be impartial or independent and shall not be subject to disqualification for partiality or lack of independence.

(c) Upon objection of a party to the continued service of an arbitrator, or on its own initiative, the AAA shall determine whether the arbitrator should be disqualified under the grounds set out above, and shall inform the parties of its decision, which decision shall be conclusive.

R-19. Communication with Arbitrator

(a) No party and no one acting on behalf of any party shall communicate *ex parte* with an arbitrator or a candidate for arbitrator concerning the arbitration, except that a party, or someone acting on behalf of a party, may communicate *ex parte* with a candidate for direct appointment pursuant to R-13 in order to advise the candidate of the general nature of the controversy and of the anticipated proceedings and to discuss the candidate's qualifications, availability, or independence in relation to the parties or to discuss the suitability of candidates for selection as a third arbitrator where the parties or party-designated arbitrators are to participate in that selection.

(b) Section R-19(a) does not apply to arbitrators directly appointed by the parties who, pursuant to Section R-18(b), the parties have agreed in writing are non-neutral. Where the parties have so agreed under Section R-18(b), the AAA shall as an administrative practice suggest to the parties that they agree further that Section R-19(a) should nonetheless apply prospectively.

(c) In the course of administering an arbitration, the AAA may initiate communications with each party or anyone acting on behalf of the parties either jointly or individually.

(d) As set forth in R-43, unless otherwise instructed by the AAA or by the arbitrator, any documents submitted by any party or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.

R-20. Vacancies

(a) If for any reason an arbitrator is unable or unwilling to perform the duties of the office, the AAA may, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in accordance with the applicable provisions of these rules.

(b) In the event of a vacancy in a panel of neutral arbitrators after the hearings have commenced, the remaining arbitrator or arbitrators may continue with the hearing and determination of the controversy, unless the parties agree otherwise.

(c) In the event of the appointment of a substitute arbitrator, the panel of arbitrators shall determine in its sole discretion whether it is necessary to repeat all or part of any prior hearings.

R-21. Preliminary Hearing

(a) At the discretion of the arbitrator, and depending on the size and complexity of the arbitration, a preliminary hearing should be scheduled as soon as practicable after the arbitrator has been appointed. The parties should be invited to attend the preliminary hearing along with their representatives. The preliminary hearing may be conducted in person or by telephone.

(b) At the preliminary hearing, the parties and the arbitrator should be prepared to discuss and establish a procedure for the conduct of the arbitration that is appropriate to achieve a fair, efficient, and economical resolution of the dispute. Sections P-1 and P-2 of these rules address the issues to be considered at the preliminary hearing.

R-22. Pre-Hearing Exchange and Production of Information

(a) *Authority of arbitrator.* The arbitrator shall manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute, while at the same time promoting equality of treatment and safeguarding each party's opportunity to fairly present its claims and defenses.

(b) *Documents.* The arbitrator may, on application of a party or on the arbitrator's own initiative:

i. require the parties to exchange documents in their possession or custody on which they intend to rely;

ii. require the parties to update their exchanges of the documents on which they intend to rely as such documents become known to them;

iii. require the parties, in response to reasonable document requests, to make available to the other party documents, in the responding party's possession or custody, not otherwise readily available to the party seeking the documents, reasonably believed by the party seeking the documents to exist and to be relevant and material to the outcome of disputed issues; and

iv. require the parties, when documents to be exchanged or produced are maintained in electronic form, to make such documents available in the form most convenient and economical for the party in possession of such documents, unless the arbitrator determines that there is good cause for requiring the documents to be produced in a different form. The parties should attempt to agree in advance upon, and the arbitrator may determine, reasonable search parameters to balance the need for production of electronically stored documents relevant and material to the outcome of disputed issues against the cost of locating and producing them.

R-23. Enforcement Powers of the Arbitrator

The arbitrator shall have the authority to issue any orders necessary to enforce the provisions of rules R-21 and R-22 and to otherwise achieve a fair, efficient and economical resolution of the case, including, without limitation:

(a) conditioning any exchange or production of confidential documents and information, and the admission of confidential evidence at the hearing, on appropriate orders to preserve such confidentiality;

(b) imposing reasonable search parameters for electronic and other documents if the parties are unable to agree;

(c) allocating costs of producing documentation, including electronically stored documentation;

(d) in the case of willful non-compliance with any order issued by the arbitrator, drawing adverse inferences, excluding evidence and other submissions, and/or making special allocations of costs or an interim award of costs arising from such non-compliance; and

(e) issuing any other enforcement orders which the arbitrator is empowered to issue under applicable law.

R-24. Date, Time, and Place of Hearing

The arbitrator shall set the date, time, and place for each hearing. The parties shall respond to requests for hearing dates in a timely manner, be cooperative in scheduling the earliest practicable date, and adhere to the established hearing schedule. The AAA shall send a notice of hearing to the parties at least 10 calendar days in advance of the hearing date, unless otherwise agreed by the parties.

R-25. Attendance at Hearings

The arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary. Any person having a direct interest in the arbitration is entitled to attend hearings. The arbitrator shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other person.

R-26. Representation

Any party may participate without representation (*pro se*), or by counsel or any other representative of the party's choosing, unless such choice is prohibited by applicable law. A party intending to be so represented shall notify the other party and the AAA of the name, telephone number and address, and email address if available, of the representative at least seven calendar days prior to the date set for the hearing at which that person is first to appear. When such a representative initiates an arbitration or responds for a party, notice is deemed to have been given.

R-27. Oaths

Before proceeding with the first hearing, each arbitrator may take an oath of office and, if required by law, shall do so. The arbitrator may require witnesses to testify under oath administered by any duly qualified person and, if it is required by law or requested by any party, shall do so.

R-28. Stenographic Record

(a) Any party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify the other parties of these arrangements at least three calendar days in advance of the hearing. The requesting party or parties shall pay the cost of the record.

(b) No other means of recording the proceedings will be permitted absent the agreement of the parties or per the direction of the arbitrator.

(c) If the transcript or any other recording is agreed by the parties or determined by the arbitrator to be the official record of the proceeding, it must be provided to the arbitrator and made available to the other parties for inspection, at a date, time, and place determined by the arbitrator.

(d) The arbitrator may resolve any disputes with regard to apportionment of the costs of the stenographic record or other recording.

R-29. Interpreters

Any party wishing an interpreter shall make all arrangements directly with the interpreter and shall assume the costs of the service.

R-30. Postponements

The arbitrator may postpone any hearing upon agreement of the parties, upon request of a party for good cause shown, or upon the arbitrator's own initiative.

R-31. Arbitration in the Absence of a Party or Representative

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award.

R-32. Conduct of Proceedings

(a) The claimant shall present evidence to support its claim. The respondent shall then present evidence to support its defense. Witnesses for each party shall also submit to questions from the arbitrator and the adverse party. The arbitrator has the discretion to vary this procedure, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.

(b) The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute and may direct the order of proof, bifurcate proceedings and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.

(c) When deemed appropriate, the arbitrator may also allow for the presentation of evidence by alternative means including video conferencing, internet communication, telephonic conferences and means other than an in-person presentation. Such alternative means must afford a full opportunity for all parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute and, when involving witnesses, provide an opportunity for cross-examination.

(d) The parties may agree to waive oral hearings in any case and may also agree to utilize the Procedures for Resolution of Disputes Through Document Submission, found in Rule E-6.

R-33. Dispositive Motions

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.

R-34. Evidence

(a) The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. Conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent, in default, or has waived the right to be present.

(b) The arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant.

(c) The arbitrator shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client.

(d) An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.

R-35. Evidence by Written Statements and Post-Hearing Filing of Documents or Other Evidence

(a) At a date agreed upon by the parties or ordered by the arbitrator, the parties shall give written notice for any witness or expert witness who has provided a written witness statement to appear in person at the arbitration hearing for examination. If such notice is given, and the witness fails to appear, the arbitrator may disregard the written witness statement and/or expert report of the witness or make such other order as the arbitrator may consider to be just and reasonable.

(b) If a witness whose testimony is represented by a party to be essential is unable or unwilling to testify at the hearing, either in person or through electronic or other means, either party may request that the arbitrator order the witness to appear in person for examination before the arbitrator at a time and location where the witness is willing and able to appear voluntarily or can legally be compelled to do so. Any such order may be conditioned upon payment by the requesting party of all reasonable costs associated with such examination.

(c) If the parties agree or the arbitrator directs that documents or other evidence be submitted to the arbitrator after the hearing, the documents or other evidence shall be filed with the AAA for transmission to the arbitrator. All parties shall be afforded an opportunity to examine and respond to such documents or other evidence.

R-36. Inspection or Investigation

An arbitrator finding it necessary to make an inspection or investigation in connection with the arbitration shall direct the AAA to so advise the parties. The arbitrator shall set the date and time and the AAA shall notify the parties. Any party who so desires may be present at such an inspection or investigation. In the event that one or all parties are not present at the inspection or investigation, the arbitrator shall make an oral or written report to the parties and afford them an opportunity to comment.

R-37. Interim Measures

(a) The arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods.

(b) Such interim measures may take the form of an interim award, and the arbitrator may require security for the costs of such measures.

(c) A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

R-38. Emergency Measures of Protection

(a) Unless the parties agree otherwise, the provisions of this rule shall apply to arbitrations conducted under arbitration clauses or agreements entered on or after October 1, 2013.

(b) A party in need of emergency relief prior to the constitution of the panel shall notify the AAA and all other parties in writing of the nature of the relief sought and the reasons why such relief is required on an emergency basis. The application shall also set forth the reasons why the party is entitled to such relief. Such notice may be given by facsimile or e-mail or other reliable means, but must include a statement certifying that all other parties have been notified or an explanation of the steps taken in good faith to notify other parties.

(c) Within one business day of receipt of notice as provided in section (b), the AAA shall appoint a single emergency arbitrator designated to rule on emergency applications. The emergency arbitrator shall immediately disclose any circumstance likely, on the basis of the facts disclosed on the application, to affect such arbitrator's impartiality or independence. Any challenge to the appointment of the emergency arbitrator must be made within one business day of the communication by the AAA to the parties of the appointment of the emergency arbitrator and the circumstances disclosed.

(d) The emergency arbitrator shall as soon as possible, but in any event within two business days of appointment, establish a schedule for consideration of the application for emergency relief. Such a schedule shall provide a reasonable opportunity to all parties to be heard, but may provide for proceeding by telephone or video conference or on written submissions as alternatives to a formal hearing. The emergency arbitrator shall have the authority vested in the tribunal under Rule 7, including the authority to rule on her/his own jurisdiction, and shall resolve any disputes over the applicability of this Rule 38.

(e) If after consideration the emergency arbitrator is satisfied that the party seeking the emergency relief has shown that immediate and irreparable loss or damage shall result in the absence of emergency relief, and that such party is entitled to such relief, the emergency arbitrator may enter an interim order or award granting the relief and stating the reason therefore.

(f) Any application to modify an interim award of emergency relief must be based on changed circumstances and may be made to the emergency arbitrator until the panel is constituted; thereafter such a request shall be addressed to the panel. The emergency arbitrator shall have no further power to act after the panel is constituted unless the parties agree that the emergency arbitrator is named as a member of the panel.

(g) Any interim award of emergency relief may be conditioned on provision by the party seeking such relief for appropriate security.

(h) A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with this rule, the agreement to arbitrate or a waiver of the right to arbitrate. If the AAA is directed by a judicial authority to nominate a special master to consider and report on an application for emergency relief, the AAA shall proceed as provided in this rule and the references to the emergency arbitrator shall be read to mean the special master, except that the special master shall issue a report rather than an interim award.

(i) The costs associated with applications for emergency relief shall initially be apportioned by the emergency arbitrator or special master, subject to the power of the tribunal to determine finally the apportionment of such costs.

R-39. Closing of Hearing

(a) The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearing closed.

(b) If documents or responses are to be filed as provided in Rule R-35, or if briefs are to be filed, the hearing shall be declared closed as of the final date set by the arbitrator for the receipt of briefs. If no documents, responses, or briefs are to be filed, the arbitrator shall declare the hearings closed as of the date of the last hearing (including telephonic hearings). If the case was heard without any oral hearings, the arbitrator shall close the hearings upon the due date established for receipt of the final submission.

(c) The time limit within which the arbitrator is required to make the award shall commence, in the absence of other agreements by the parties, upon the closing of the hearing. The AAA may extend the time limit for rendering of the award only in unusual and extreme circumstances.

R-40. Reopening of Hearing

The hearing may be reopened on the arbitrator's initiative, or by the direction of the arbitrator upon application of a party, at any time before the award is made. If reopening the hearing would prevent the making of the award within the specific time agreed to by the parties in the arbitration agreement, the matter may not be reopened unless the parties agree to an extension of time. When no specific date is fixed by agreement of the parties , the arbitrator shall have 30 calendar days from the closing of the reopened hearing within which to make an award (14 calendar days if the case is governed by the Expedited Procedures).

R-41. Waiver of Rules

Any party who proceeds with the arbitration after knowledge that any provision or requirement of these rules has not been complied with and who fails to state an objection in writing shall be deemed to have waived the right to object.

R-42. Extensions of Time

The parties may modify any period of time by mutual agreement. The AAA or the arbitrator may for good cause extend any period of time established by these rules, except the time for making the award. The AAA shall notify the parties of any extension.

R-43. Serving of Notice and Communications

(a) Any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these rules, for any court action in connection therewith, or for the entry of judgment on any award made under these rules may be served on a party by mail addressed to the party or its representative at the last known address or by personal service, in or outside the state where the arbitration is to be held, provided that reasonable opportunity to be heard with regard to the dispute is or has been granted to the party.

(b) The AAA, the arbitrator and the parties may also use overnight delivery or electronic facsimile transmission (fax), or electronic (e-mail) to give the notices required by these rules. Where all parties and the arbitrator agree, notices may be transmitted by e-mail or other methods of communication.

(c) Unless otherwise instructed by the AAA or by the arbitrator, any documents submitted by any party to the AAA or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.

(d) Unless otherwise instructed by the AAA or by the arbitrator, all written communications made by any party to the AAA or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.

(e) Failure to provide the other party with copies of communications made to the AAA or to the arbitrator may prevent the AAA or the arbitrator from acting on any requests or objections contained therein.

(f) The AAA may direct that any oral or written communications that are sent by a party or their representative shall be sent in a particular manner. The failure of a party or their representative to do so may result in the AAA's refusal to consider the issue raised in the communication.

R-44. Majority Decision

(a) When the panel consists of more than one arbitrator, unless required by law or by the arbitration agreement or section (b) of this rule, a majority of the arbitrators must make all decisions.

(b) Where there is a panel of three arbitrators, absent an objection of a party or another member of the panel, the chairperson of the panel is authorized to resolve any disputes related to the exchange of information or procedural matters without the need to consult the full panel.

R-45. Time of Award

The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than 30 calendar days from the date of closing the hearing, or, if oral hearings have been waived, from the due date set for receipt of the parties' final statements and proofs.

R-46. Form of Award

(a) Any award shall be in writing and signed by a majority of the arbitrators. It shall be executed in the form and manner required by law.

(b) The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate.

R-47. Scope of Award

(a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract.

(b) In addition to a final award, the arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders, and awards. In any interim, interlocutory, or partial award, the arbitrator may assess and apportion the fees, expenses, and compensation related to such award as the arbitrator determines is appropriate.

(c) In the final award, the arbitrator shall assess the fees, expenses, and compensation provided in Sections R-53, R-54, and R-55. The arbitrator may apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate.

(d) The award of the arbitrator(s) may include:

- **i.** interest at such rate and from such date as the arbitrator(s) may deem appropriate; and
- **ii.** an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement.

R-48. Award Upon Settlement—Consent Award

(a) If the parties settle their dispute during the course of the arbitration and if the parties so request, the arbitrator may set forth the terms of the settlement in a "consent award." A consent award must include an allocation of arbitration costs, including administrative fees and expenses as well as arbitrator fees and expenses.

(b) The consent award shall not be released to the parties until all administrative fees and all arbitrator compensation have been paid in full.

R-49. Delivery of Award to Parties

Parties shall accept as notice and delivery of the award the placing of the award or a true copy thereof in the mail addressed to the parties or their representatives at their last known addresses, personal or electronic service of the award, or the filing of the award in any other manner that is permitted by law.

R-50. Modification of Award

Within 20 calendar days after the transmittal of an award, any party, upon notice to the other parties, may request the arbitrator, through the AAA, to correct any clerical, typographical, or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided. The other

parties shall be given 10 calendar days to respond to the request. The arbitrator shall dispose of the request within 20 calendar days after transmittal by the AAA to the arbitrator of the request and any response thereto.

R-51. Release of Documents for Judicial Proceedings

The AAA shall, upon the written request of a party to the arbitration, furnish to the party, at its expense, copies or certified copies of any papers in the AAA's possession that are not determined by the AAA to be privileged or confidential.

R-52. Applications to Court and Exclusion of Liability

(a) No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.

(b) Neither the AAA nor any arbitrator in a proceeding under these rules is a necessary or proper party in judicial proceedings relating to the arbitration.

(c) Parties to an arbitration under these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.

(d) Parties to an arbitration under these rules shall be deemed to have consented that neither the AAA nor any arbitrator shall be liable to any party in any action for damages or injunctive relief for any act or omission in connection with any arbitration under these rules.

(e) Parties to an arbitration under these rules may not call the arbitrator, the AAA, or AAA employees as a witness in litigation or any other proceeding relating to the arbitration. The arbitrator, the AAA and AAA employees are not competent to testify as witnesses in any such proceeding.

R-53. Administrative Fees

As a not-for-profit organization, the AAA shall prescribe administrative fees to compensate it for the cost of providing administrative services. The fees in effect when the fee or charge is incurred shall be applicable. The filing fee shall be advanced by the party or parties making a claim or counterclaim, subject to final apportionment by the arbitrator in the award. The AAA may, in the event of extreme hardship on the part of any party, defer or reduce the administrative fees.

R-54. Expenses

The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the arbitration, including required travel and other expenses of the arbitrator, AAA representatives, and any witness and

the cost of any proof produced at the direct request of the arbitrator, shall be borne equally by the parties, unless they agree otherwise or unless the arbitrator in the award assesses such expenses or any part thereof against any specified party or parties.

R-55. Neutral Arbitrator's Compensation

(a) Arbitrators shall be compensated at a rate consistent with the arbitrator's stated rate of compensation.

(b) If there is disagreement concerning the terms of compensation, an appropriate rate shall be established with the arbitrator by the AAA and confirmed to the parties.

(c) Any arrangement for the compensation of a neutral arbitrator shall be made through the AAA and not directly between the parties and the arbitrator.

R-56. Deposits

(a) The AAA may require the parties to deposit in advance of any hearings such sums of money as it deems necessary to cover the expense of the arbitration, including the arbitrator's fee, if any, and shall render an accounting to the parties and return any unexpended balance at the conclusion of the case.

(b) Other than in cases where the arbitrator serves for a flat fee, deposit amounts requested will be based on estimates provided by the arbitrator. The arbitrator will determine the estimated amount of deposits using the information provided by the parties with respect to the complexity of each case.

(c) Upon the request of any party, the AAA shall request from the arbitrator an itemization or explanation for the arbitrator's request for deposits.

R-57. Remedies for Nonpayment

If arbitrator compensation or administrative charges have not been paid in full, the AAA may so inform the parties in order that one of them may advance the required payment.

(a) Upon receipt of information from the AAA that payment for administrative charges or deposits for arbitrator compensation have not been paid in full, to the extent the law allows, a party may request that the arbitrator take specific measures relating to a party's non-payment.

(b) Such measures may include, but are not limited to, limiting a party's ability to assert or pursue their claim. In no event, however, shall a party be precluded from defending a claim or counterclaim.

(c) The arbitrator must provide the party opposing a request for such measures with the opportunity to respond prior to making any ruling regarding the same.

(d) In the event that the arbitrator grants any request for relief which limits any party's participation in the arbitration, the arbitrator shall require the party who is making a claim and who has made appropriate payments to submit such evidence as the arbitrator may require for the making of an award.

(e) Upon receipt of information from the AAA that full payments have not been received, the arbitrator, on the arbitrator's own initiative or at the request of the AAA or a party, may order the suspension of the arbitration. If no arbitrator has yet been appointed, the AAA may suspend the proceedings.

(f) If the arbitration has been suspended by either the AAA or the arbitrator and the parties have failed to make the full deposits requested within the time provided after the suspension, the arbitrator, or the AAA if an arbitrator has not been appointed, may terminate the proceedings.

R-58. Sanctions

(a) The arbitrator may, upon a party's request, order appropriate sanctions where a party fails to comply with its obligations under these rules or with an order of the arbitrator. In the event that the arbitrator enters a sanction that limits any party's participation in the arbitration or results in an adverse determination of an issue or issues, the arbitrator shall explain that order in writing and shall require the submission of evidence and legal argument prior to making of an award. The arbitrator may not enter a default award as a sanction.

(b) The arbitrator must provide a party that is subject to a sanction request with the opportunity to respond prior to making any determination regarding the sanctions application.

Preliminary Hearing Procedures

P-1. General

(a) In all but the simplest cases, holding a preliminary hearing as early in the process as possible will help the parties and the arbitrator organize the proceeding in a manner that will maximize efficiency and economy, and will provide each party a fair opportunity to present its case.

(b) Care must be taken to avoid importing procedures from court systems, as such procedures may not be appropriate to the conduct of arbitrations as an alternative form of dispute resolution that is designed to be simpler, less expensive and more expeditious.

P-2. Checklist

(a) The following checklist suggests subjects that the parties and the arbitrator should address at the preliminary hearing, in addition to any others that the parties or the arbitrator believe to be appropriate to the particular case. The items to be addressed in a particular case will depend on the size, subject matter, and complexity of the dispute, and are subject to the discretion of the arbitrator:

- **(i)** the possibility of other non-adjudicative methods of dispute resolution, including mediation pursuant to R-9;
- **(ii)** whether all necessary or appropriate parties are included in the arbitration;
- **(iii)** whether a party will seek a more detailed statement of claims, counterclaims or defenses;
- **(iv)** whether there are any anticipated amendments to the parties' claims, counterclaims, or defenses;
- **(v)** which
  - **(a)** arbitration rules;
  - **(b)** procedural law; and
  - **(c)** substantive law govern the arbitration;
- **(vi)** whether there are any threshold or dispositive issues that can efficiently be decided without considering the entire case, including without limitation,
  - **(a)** any preconditions that must be satisfied before proceeding with the arbitration;
  - **(b)** whether any claim or counterclaim falls outside the arbitrator's jurisdiction or is otherwise not arbitrable;
  - **(c)** consolidation of the claims or counterclaims with another arbitration; or
  - **(d)** bifurcation of the proceeding.

(vii) whether the parties will exchange documents, including electronically stored documents, on which they intend to rely in the arbitration, and/or make written requests for production of documents within defined parameters;

(viii) whether to establish any additional procedures to obtain information that is relevant and material to the outcome of disputed issues;

(ix) how costs of any searches for requested information or documents that would result in substantial costs should be borne;

(x) whether any measures are required to protect confidential information;

(xi) whether the parties intend to present evidence from expert witnesses, and if so, whether to establish a schedule for the parties to identify their experts and exchange expert reports;

(xii) whether, according to a schedule set by the arbitrator, the parties will

(a) identify all witnesses, the subject matter of their anticipated testimonies, exchange written witness statements, and determine whether written witness statements will replace direct testimony at the hearing;

(b) exchange and pre-mark documents that each party intends to submit; and

(c) exchange pre-hearing submissions, including exhibits;

(xiii) the date, time and place of the arbitration hearing;

(xiv) whether, at the arbitration hearing,

(a) testimony may be presented in person, in writing, by videoconference, via the internet, telephonically, or by other reasonable means;

(b) there will be a stenographic transcript or other record of the proceeding and, if so, who will make arrangements to provide it;

(xv) whether any procedure needs to be established for the issuance of subpoenas;

(xvi) the identification of any ongoing, related litigation or arbitration;

(xvii) whether post-hearing submissions will be filed;

(xviii) the form of the arbitration award; and

(xix) any other matter the arbitrator considers appropriate or a party wishes to raise.

(b) The arbitrator shall issue a written order memorializing decisions made and agreements reached during or following the preliminary hearing.

Expedited Procedures

E-1. Limitation on Extensions

Except in extraordinary circumstances, the AAA or the arbitrator may grant a party no more than one seven-day extension of time to respond to the Demand for Arbitration or counterclaim as provided in Section R-5.

E-2. Changes of Claim or Counterclaim

A claim or counterclaim may be increased in amount, or a new or different claim or counterclaim added, upon the agreement of the other party, or the consent of the arbitrator. After the arbitrator is appointed, however, no new or different claim or counterclaim may be submitted except with the arbitrator's consent. If an increased claim or counterclaim exceeds $75,000, the case will be administered under the regular procedures unless all parties and the arbitrator agree that the case may continue to be processed under the Expedited Procedures.

E-3. Serving of Notices

In addition to notice provided by Section R-43, the parties shall also accept notice by telephone. Telephonic notices by the AAA shall subsequently be confirmed in writing to the parties. Should there be a failure to confirm in writing any such oral notice, the proceeding shall nevertheless be valid if notice has, in fact, been given by telephone.

E-4. Appointment and Qualifications of Arbitrator

(a) The AAA shall simultaneously submit to each party an identical list of five proposed arbitrators drawn from its National Roster from which one arbitrator shall be appointed.

(b) The parties are encouraged to agree to an arbitrator from this list and to advise the AAA of their agreement. If the parties are unable to agree upon an arbitrator, each party may strike two names from the list and return it to the AAA within seven days from the date of the AAA's mailing to the parties. If for any reason the appointment of an arbitrator cannot be made from the list, the AAA may make the appointment from other members of the panel without the submission of additional lists.

(c) The parties will be given notice by the AAA of the appointment of the arbitrator, who shall be subject to disqualification for the reasons specified in Section R-18. The parties shall notify the AAA within seven calendar days of any objection to the arbitrator appointed. Any such objection shall be for cause and shall be confirmed in writing to the AAA with a copy to the other party or parties.

E-5. Exchange of Exhibits

At least two business days prior to the hearing, the parties shall exchange copies of all exhibits they intend to submit at the hearing. The arbitrator shall resolve disputes concerning the exchange of exhibits.

E-6. Proceedings on Documents and Procedures for the Resolution of Disputes Through Document Submission

Where no party's claim exceeds $25,000, exclusive of interest, attorneys' fees and arbitration costs, and other cases in which the parties agree, the dispute shall be resolved by submission of documents, unless any party requests an oral hearing, or the arbitrator determines that an oral hearing is necessary. Where cases are resolved by submission of documents, the following procedures may be utilized at the agreement of the parties or the discretion of the arbitrator:

(a) Within 14 calendar days of confirmation of the arbitrator's appointment, the arbitrator may convene a preliminary management hearing, via conference call, video conference, or internet, to establish a fair and equitable procedure for the submission of documents, and, if the arbitrator deems appropriate, a schedule for one or more telephonic or electronic conferences.

(b) The arbitrator has the discretion to remove the case from the documents-only process if the arbitrator determines that an in-person hearing is necessary.

(c) If the parties agree to in-person hearings after a previous agreement to proceed under this rule, the arbitrator shall conduct such hearings. If a party seeks to have in-person hearings after agreeing to this rule, but there is not agreement among the parties to proceed with in-person hearings, the arbitrator shall resolve the issue after the parties have been given the opportunity to provide their respective positions on the issue.

(d) The arbitrator shall establish the date for either written submissions or a final telephonic or electronic conference. Such date shall operate to close the hearing and the time for the rendering of the award shall commence.

(e) Unless the parties have agreed to a form of award other than that set forth in rule R-46, when the parties have agreed to resolve their dispute by this rule, the arbitrator shall render the award within 14 calendar days from the date the hearing is closed.

(f) If the parties agree to a form of award other than that described in rule R-46, the arbitrator shall have 30 calendar days from the date the hearing is declared closed in which to render the award.

(g) The award is subject to all other provisions of the Regular Track of these rules which pertain to awards.

E-7. Date, Time, and Place of Hearing

In cases in which a hearing is to be held, the arbitrator shall set the date, time, and place of the hearing, to be scheduled to take place within 30 calendar days of confirmation of the arbitrator's appointment. The AAA will notify the parties in advance of the hearing date.

E-8. The Hearing

(a) Generally, the hearing shall not exceed one day. Each party shall have equal opportunity to submit its proofs and complete its case. The arbitrator shall determine the order of the hearing, and may require further submission of documents within two business days after the hearing. For good cause shown, the arbitrator may schedule additional hearings within seven business days after the initial day of hearings.

(b) Generally, there will be no stenographic record. Any party desiring a stenographic record may arrange for one pursuant to the provisions of Section R-28.

E-9. Time of Award

Unless otherwise agreed by the parties, the award shall be rendered not later than 14 calendar days from the date of the closing of the hearing or, if oral hearings have been waived, from the due date established for the receipt of the parties' final statements and proofs.

E-10. Arbitrator's Compensation

Arbitrators will receive compensation at a rate to be suggested by the AAA regional office.

Procedures for Large, Complex Commercial Disputes

L-1. Administrative Conference

Prior to the dissemination of a list of potential arbitrators, the AAA shall, unless the parties agree otherwise, conduct an administrative conference with the parties and/or their attorneys or other representatives by conference call. The conference will take place within 14 calendar days after the commencement of the arbitration. In the event the parties are unable to agree on a mutually acceptable time for the conference, the AAA may contact the parties individually to discuss the issues contemplated herein. Such administrative conference shall be conducted for the following purposes and for such additional purposes as the parties or the AAA may deem appropriate:

(a) to obtain additional information about the nature and magnitude of the dispute and the anticipated length of hearing and scheduling;

(b) to discuss the views of the parties about the technical and other qualifications of the arbitrators;

(c) to obtain conflicts statements from the parties; and

(d) to consider, with the parties, whether mediation or other non-adjudicative methods of dispute resolution might be appropriate.

L-2. Arbitrators

(a) Large, complex commercial cases shall be heard and determined by either one or three arbitrators, as may be agreed upon by the parties. With the exception in paragraph (b) below, if the parties are unable to agree upon the number of arbitrators and a claim or counterclaim involves at least $1,000,000, then three arbitrator(s) shall hear and determine the case. If the parties are unable to agree on the number of arbitrators and each claim and counterclaim is less than $1,000,000, then one arbitrator shall hear and determine the case.

(b) In cases involving the financial hardship of a party or other circumstance, the AAA at its discretion may require that only one arbitrator hear and determine the case, irrespective of the size of the claim involved in the dispute.

(c) The AAA shall appoint arbitrator(s) as agreed by the parties. If they are unable to agree on a method of appointment, the AAA shall appoint arbitrators from the Large, Complex Commercial Case Panel, in the manner provided in the regular Commercial Arbitration Rules. Absent agreement of the parties, the arbitrator(s) shall not have served as the mediator in the mediation phase of the instant proceeding.

L-3. Management of Proceedings

(a) The arbitrator shall take such steps as deemed necessary or desirable to avoid delay and to achieve a fair, speedy and cost-effective resolution of a Large, Complex Commercial Dispute.

(b) As promptly as practicable after the selection of the arbitrator(s), a preliminary hearing shall be scheduled in accordance with sections P-1 and P-2 of these rules.

(c) The parties shall exchange copies of all exhibits they intend to submit at the hearing at least 10 calendar days prior to the hearing unless the arbitrator(s) determines otherwise.

(d) The parties and the arbitrator(s) shall address issues pertaining to the pre-hearing exchange and production of information in accordance with rule R-22 of the AAA Commercial Rules, and the arbitrator's determinations on such issues shall be included within the Scheduling and Procedure Order.

(e) The arbitrator, or any single member of the arbitration tribunal, shall be authorized to resolve any disputes concerning the pre-hearing exchange and production of documents and information by any reasonable means within his discretion, including, without limitation, the issuance of orders set forth in rules R-22 and R-23 of the AAA Commercial Rules.

(f) In exceptional cases, at the discretion of the arbitrator, upon good cause shown and consistent with the expedited nature of arbitration, the arbitrator may order depositions to obtain the testimony of a person who may possess information determined by the arbitrator to be relevant and material to the outcome of the case. The arbitrator may allocate the cost of taking such a deposition.

(g) Generally, hearings will be scheduled on consecutive days or in blocks of consecutive days in order to maximize efficiency and minimize costs.

Administrative Fee Schedules (Standard and Flexible Fees)

FOR THE CURRENT ADMINISTRATIVE FEE SCHEDULE, PLEASE VISIT ***www.adr.org/feeschedule.***

Commercial Mediation Procedures

M-1. Agreement of Parties

Whenever, by stipulation or in their contract, the parties have provided for mediation or conciliation of existing or future disputes under the auspices of the American Arbitration Association or under these procedures, the parties and their representatives, unless agreed otherwise in writing, shall be deemed to have made these procedural guidelines, as amended and in effect as of the date of filing of a request for mediation, a part of their agreement and designate the AAA as the administrator of their mediation.

The parties by mutual agreement may vary any part of these procedures including, but not limited to, agreeing to conduct the mediation via telephone or other electronic or technical means.

M-2. Initiation of Mediation

Any party or parties to a dispute may initiate mediation under the AAA's auspices by making a request for mediation to any of the AAA's regional offices or case management centers via telephone, email, regular mail or fax. Requests for mediation may also be filed online via WebFile at **www.adr.org.**

The party initiating the mediation shall simultaneously notify the other party or parties of the request. The initiating party shall provide the following information to the AAA and the other party or parties as applicable:

(i) A copy of the mediation provision of the parties' contract or the parties' stipulation to mediate.

(ii) The names, regular mail addresses, email addresses, and telephone numbers of all parties to the dispute and representatives, if any, in the mediation.

(iii) A brief statement of the nature of the dispute and the relief requested.

(iv) Any specific qualifications the mediator should possess.

M-3. Representation

Subject to any applicable law, any party may be represented by persons of the party's choice. The names and addresses of such persons shall be communicated in writing to all parties and to the AAA.

M-4. Appointment of the Mediator

If the parties have not agreed to the appointment of a mediator and have not provided any other method of appointment, the mediator shall be appointed in the following manner:

(i) Upon receipt of a request for mediation, the AAA will send to each party a list of mediators from the AAA's Panel of Mediators. The parties are encouraged to agree to a mediator from the submitted list and to advise the AAA of their agreement.

(ii) If the parties are unable to agree upon a mediator, each party shall strike unacceptable names from the list, number the remaining names in order of preference, and return the list to the AAA. If a party does not return the list within the time specified, all mediators on the list shall be deemed acceptable. From among the mediators who have been mutually approved by the parties, and in accordance with the designated order of mutual preference, the AAA shall invite a mediator to serve.

(iii) If the parties fail to agree on any of the mediators listed, or if acceptable mediators are unable to serve, or if for any other reason the appointment cannot be made from the submitted list, the AAA shall have the authority to make the appointment from among other members of the Panel of Mediators without the submission of additional lists.

M-5. Mediator's Impartiality and Duty to Disclose

AAA mediators are required to abide by the *Model Standards of Conduct for Mediators* in effect at the time a mediator is appointed to a case. Where there is a conflict between the *Model Standards* and any provision of these Mediation Procedures, these Mediation Procedures shall govern. The Standards require mediators to (i) decline a mediation if the mediator cannot conduct it in an impartial manner, and (ii) disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality.

Prior to accepting an appointment, AAA mediators are required to make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for the mediator. AAA mediators are required to disclose any circumstance likely to create a presumption of bias or prevent a resolution of the parties' dispute within the time-frame desired by the parties. Upon receipt of such disclosures, the AAA shall immediately communicate the disclosures to the parties for their comments.

The parties may, upon receiving disclosure of actual or potential conflicts of interest of the mediator, waive such conflicts and proceed with the mediation. In the event that a party disagrees as to whether the mediator shall serve, or in the event that the mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, the mediator shall be replaced.

M-6. Vacancies

If any mediator shall become unwilling or unable to serve, the AAA will appoint another mediator, unless the parties agree otherwise, in accordance with section M-4.

M-7. Duties and Responsibilities of the Mediator

(i) The mediator shall conduct the mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.

(ii) The mediator is authorized to conduct separate or *ex parte* meetings and other communications with the parties and/or their representatives, before, during, and after any scheduled mediation conference. Such communications may be conducted via telephone, in writing, via email, online, in person or otherwise.

(iii) The parties are encouraged to exchange all documents pertinent to the relief requested. The mediator may request the exchange of memoranda on issues, including the underlying interests and the history of the parties' negotiations. Information that a party wishes to keep confidential may be sent to the mediator, as necessary, in a separate communication with the mediator.

(iv) The mediator does not have the authority to impose a settlement on the parties but will attempt to help them reach a satisfactory resolution of their dispute. Subject to the discretion of the mediator, the mediator may make oral or written recommendations for settlement to a party privately or, if the parties agree, to all parties jointly.

(v) In the event a complete settlement of all or some issues in dispute is not achieved within the scheduled mediation session(s), the mediator may continue to communicate with the parties, for a period of time, in an ongoing effort to facilitate a complete settlement.

(vi) The mediator is not a legal representative of any party and has no fiduciary duty to any party.

M-8. Responsibilities of the Parties

The parties shall ensure that appropriate representatives of each party, having authority to consummate a settlement, attend the mediation conference.

Prior to and during the scheduled mediation conference session(s) the parties and their representatives shall, as appropriate to each party's circumstances, exercise their best efforts to prepare for and engage in a meaningful and productive mediation.

M-9. Privacy

Mediation sessions and related mediation communications are private proceedings. The parties and their representatives may attend mediation sessions. Other persons may attend only with the permission of the parties and with the consent of the mediator.

M-10. Confidentiality

Subject to applicable law or the parties' agreement, confidential information disclosed to a mediator by the parties or by other participants (witnesses) in the course of the mediation shall not be divulged by the mediator. The mediator shall maintain the confidentiality of all information obtained in the mediation, and all records, reports, or other documents received by a mediator while serving in that capacity shall be confidential.

The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceeding or judicial forum.

The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial, or other proceeding the following, unless agreed to by the parties or required by applicable law:

(i) Views expressed or suggestions made by a party or other participant with respect to a possible settlement of the dispute;

(ii) Admissions made by a party or other participant in the course of the mediation proceedings;

(iii) Proposals made or views expressed by the mediator; or

(iv) The fact that a party had or had not indicated willingness to accept a proposal for settlement made by the mediator.

M-11. No Stenographic Record

There shall be no stenographic record of the mediation process.

M-12. Termination of Mediation

The mediation shall be terminated:

(i) By the execution of a settlement agreement by the parties; or

(ii) By a written or verbal declaration of the mediator to the effect that further efforts at mediation would not contribute to a resolution of the parties' dispute; or

(iii) By a written or verbal declaration of all parties to the effect that the mediation proceedings are terminated; or

(iv) When there has been no communication between the mediator and any party or party's representative for 21 days following the conclusion of the mediation conference.

M-13. Exclusion of Liability

Neither the AAA nor any mediator is a necessary party in judicial proceedings relating to the mediation. Neither the AAA nor any mediator shall be liable to any party for any error, act or omission in connection with any mediation conducted under these procedures.

M-14. Interpretation and Application of Procedures

The mediator shall interpret and apply these procedures insofar as they relate to the mediator's duties and responsibilities. All other procedures shall be interpreted and applied by the AAA.

M-15. Deposits

Unless otherwise directed by the mediator, the AAA will require the parties to deposit in advance of the mediation conference such sums of money as it, in consultation with the mediator, deems necessary to cover the costs and expenses of the mediation and shall render an accounting to the parties and return any unexpended balance at the conclusion of the mediation.

M-16. Expenses

All expenses of the mediation, including required traveling and other expenses or charges of the mediator, shall be borne equally by the parties unless they agree otherwise. The expenses of participants for either side shall be paid by the party requesting the attendance of such participants.

M-17. Cost of the Mediation

FOR THE CURRENT ADMINISTRATIVE FEE SCHEDULE, PLEASE VISIT ***www.adr.org/feeschedule.***

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Commercial Arbitration Rules and Mediation PROCEDURES
(Including Procedures for Large, Complex Commercial Disputes)

Summary of Changes
Amended and Effective July 1, 2003

The American Arbitration Association (AAA) recently undertook a review of the Commercial Dispute Resolution Procedures. This was done in anticipation of upcoming changes in the Code of Ethics for Arbitrators in Commercial Disputes, and because case law is evolving in this area and provides for full disclosure, neutrality, impartiality, and independence for all arbitrators, including party-appointed arbitrators. You will notice the Applicability sections (R-7, E-1, and L-1) have been consolidated into R-1 (Agreement of Parties), and R-12 (Qualifications of an Arbitrator) has been deleted. Due to these changes, the remaining rules have been renumbered R-7 through R-54, E-1 through E-10, and L-1 through L-4. Also, since the Procedures for Large, Complex Commercial Disputes are no longer optional for cases involving claims of at least $500,000, the word "Optional" has been removed from the title. Additionally, the commercial rules have been renamed "Commercial Arbitration Rules and Mediation Procedures." Below is a summary of the significant changes made to the rules.

M-2. Initiation

The "Appropriate filing fee" was replaced by the amount of the filing party's case set-up fee ($325).

Mediation Administrative Fees

The nonrefundable case set-up fee was increased from $150 per party to $325 per party. Reference to the additional AAA administrative fee of $75 per hour of conference time spent by the mediator was deleted, since this hourly administrative fee is no longer applicable.

R-1. Agreement of Parties

This rule combines the information regarding the applicability of our various procedures that had previously been contained in three separate rules (R-7, E-1, and L-1). Language was revised to clarify that the rules in effect at the time the demand's administrative filing requirements are met will apply. After the appointment of the arbitrator, modifications to the procedures set forth in the rules may only be made with the consent of the arbitrator. Unless the parties agree otherwise, the Large, Complex Commercial case procedures are now applicable to all commercial cases with claims of at least $500,000. The first footnote was revised to explain our new policy for applying the Supplementary Procedures for Consumer-Related Disputes. A second footnote has also been added to notify parties that disputes arising out of employer-promulgated plans will be administered under the AAA's National Rules for the Resolution of Employment Disputes.

R-9. Administrative Conference

Since a filing fee is required to initiate a case, the last sentence, stating that there is no administrative fee for the conference, was deleted.

R-11. Appointment from National Roster

The "Panel" is now referred to as the "National Roster." Subsection (a) was revised to include that the AAA will send a list of ten arbitrators unless the AAA decides that a different number is appropriate. Subsection (c) was revised to eliminate the 15 day time limit for parties in multiparty cases to notify the AAA of their agreement to receive an AAA list of arbitrators. To provide AAA discretion in deciding whether to appoint arbitrators in multi-party cases, "shall" was replaced with "may."

R-12. Direct Appointment by a Party

This rule is revised to require party-appointed arbitrators to meet impartiality and independence standards (delineated in R-17), unless the parties specifically agree otherwise.

R-13. Appointment of Chairperson by Party-Appointed Arbitrators or Parties

The language is updated to comport with revisions to R-11 and R-12, explained above.

R-14. Nationality of Arbitrator

This rule is revised to (1) limit the applicability of this rule to nationals of different countries; and (2) expand the appointment authority of the AAA to include all arbitrators.

R-15. Number of Arbitrators

The language is revised to clarify that a party may request three arbitrators in the demand or answer.

R-16. Disclosure

This rule is revised to (1) require all arbitrators to disclose circumstances likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence; (2) clarify that the disclosure obligation remains in effect throughout the arbitration; (3) explain that disclosures made pursuant to the rules are not to be construed as an indication that the arbitrator considers the disclosed circumstances likely to affect his or her impartiality or independence.

R-17. Disqualification of Arbitrator

Additional language has been added to outline an arbitrator's responsibility to be impartial and independent, as well as grounds for disqualification. Also, the AAA may now, "on its own initiative," disqualify an arbitrator.

R-18. Communication with Arbitrator

This rule is revised to clarify acceptable and unacceptable *ex parte* communication with arbitrators or candidates for arbitrator.

R-20. Preliminary Hearing

The last sentence in subsection (a) was deleted. Even if the parties have more than one preliminary hearing, the AAA will not charge a case service fee.

R-44. Award upon Settlement

This rule is revised to provide that a consent award must include an allocation of arbitration costs, including administrative fees and expenses, as well as arbitrator fees and expenses.

R-48. Application to Court and Exclusion of Liability

Subsection (d) has been revised to clarify that parties have consented to relieve the AAA and arbitrators from any liability for any act or omission in connection with the arbitration under the rules.

R-51. Neutral Arbitrator's Compensation

This rule is revised to eliminate reference to arbitrators customarily serving without compensation on cases where no claim exceeds $10,000.

E-7. Date, Time and Place of Hearing

The first sentence was deleted to allow for an administrative conference, if necessary.

E-10. Arbitrator's Compensation

This new rule explains that arbitrators on cases administered under the Expedited Procedures will receive compensation at a rate to be suggested by the AAA regional office.

Summary of Changes
Procedures for Large, Complex Commercial Disputes

L-1. Administrative Conference

This rule is revised to provide that the administrative conference will (1) be held via conference call; and (2) take place within 14 days of the commencement of the arbitration. If the conference cannot be scheduled within the 14 days, the AAA is authorized to contact the parties individually to discuss the conference issues.

L-2. Arbitrators

Additional language was included to provide for one arbitrator when the parties are unable to agree on the number of arbitrators and all claims and counterclaims are less than $1,000,000. When the parties are unable to agree on the number of arbitrators and a claim or counterclaim involves at least $1,000,000, then three arbitrators will hear and determine the case.

L-3. Preliminary Hearing

This rule is revised to provide that the preliminary hearing will be conducted via conference call

unless the parties agree otherwise. A new issue, a procedure for the issuance of subpoenas, has been added to the list of discussion items for the preliminary hearing. In this way, subpoenas, and the procedural issues surrounding their issuance, can be addressed up front, lessening the chance for disputes in the future of the proceedings. Finally, the rule now contemplates that a "Scheduling and Procedure Order" will memorialize the agreements of the parties and the orders of the arbitrator.

L-4. Management of Proceedings

Subpart (c) now uses the word "discovery" rather than "document discovery." This contemplates the arbitrator and parties addressing all issues of discovery. Subpart (e) now provides that the exchange of exhibits must be completed at least ten days prior to the hearing unless the arbitrator(s) determines otherwise. Subpart (f) incorporates the "Scheduling and Procedure Order" into the discovery process. Subpart (g) is a general statement on the arbitrator's authority to resolve disputes regarding discovery. Finally, the reference to an arbitrator ordering the recording of the hearing on his or her own has been removed. This was taken out so as to not raise the costs of the process for something neither party wants.

Administrative Fees

A reference to the fee section in the Supplementary Procedures for Consumer-Related Disputes has been added, as well as a further explanation for when the Supplementary Consumer Procedures will apply.

Fees

The word "non-refundable" was deleted from the first sentence since the rules now have a refund schedule. Filing fees and case service fees were increased for certain claim ranges.

Refund Schedule

Filing fees will now be subject to a refund schedule. If a case is settled or withdrawn within 60 days of filing, a portion of the filing fee will be returned. Filing fees will not be refunded on cases that (1) are not settled or withdrawn within 60 days of filing; (2) have an arbitrator appointed; or (3) are awarded.

Arbitration Discovery Protocols

JAMS Recommended Arbitration Discovery Protocols For Domestic, Commercial Cases

Effective January 6, 2010

Introduction

JAMS is committed to providing the most efficient, cost-effective arbitration process that is possible in the particular circumstances of each case. Its experienced, trained and highly qualified arbitrators are committed to: (1) being sufficiently assertive to ensure that an arbitration will be resolved much less expensively and in much less time than if it had been litigated in court; and (2) at the same time, being sufficiently patient and restrained to ensure that there is enough discovery and evidence to permit a fair result.

The JAMS Recommended Arbitration Discovery Protocols (**"**Protocols**"**), which are set forth below, provide JAMS arbitrators with an effective tool that will help them exercise their sound judgment in furtherance of achieving an efficient, cost-effective process that affords the parties a fair opportunity to be heard.

An executive summary may be downloaded **here**.

Download Arbitration Discovery Protocols

The Key Element: Good Judgment of the Arbitrator

- JAMS arbitrators understand that while some commercial arbitrations may have similarities, for the most part each case involves unique facts and circumstances. As a result, JAMS arbitrators adapt arbitration discovery to meet the unique characteristics of the particular case, understanding that there is no set of objective rules that, if followed, would result in one "correct" approach for all commercial cases.
- JAMS appreciates that the experience, talent and preferences brought to arbitration will vary with the arbitrator. It follows that the framework of arbitration discovery will always be based on the judgment of the arbitrator, brought to bear in the context of variables such as the applicable rules, the custom and practice for arbitrations in the industry in question and the expectations and preferences of the parties and their counsel.

- Attached as **Exhibit A** is a list of factors that JAMS arbitrators take into consideration when addressing the type and breadth of arbitration discovery.

Early Attention to Discovery by the Arbitrator

- JAMS understands the importance of establishing the ground rules governing an arbitration in the period immediately following the initiation of the arbitration. Therefore, following appointment, JAMS arbitrators promptly study the facts and the issues and become prepared to preside effectively over the early stages of the case in a way that will ultimately lead to an expeditious, cost-effective and fair process.

- Depending upon the provisions of the parties' agreement, JAMS arbitrations may be governed by the JAMS Comprehensive Arbitration Rules and Procedures or by the arbitration rules of another provider organization. Such rules, for good reason, lack the specificity that one finds, for example, in the Federal Rules of Civil Procedure. That being so, JAMS arbitrators seek to avoid uncertainty and surprise by ensuring that the parties understand at an early stage the basic ground rules for discovery. This early attention to the scope of discovery increases the chance that parties will adopt joint principles of fairness and efficiency before partisan positions arise in concrete discovery disputes.

- JAMS arbitrators place the type and breadth of arbitration discovery high on the agenda for the first pre-hearing conference at the start of the case. If at all possible, in-house counsel should attend the pre-hearing conference at which discovery will be discussed.

- JAMS arbitrators strive to enhance the chances for limited, efficient discovery by acting at the first pre-hearing conference to set hearing dates and interim deadlines that, the parties are told, will be strictly enforced and that, in fact, are thereafter strictly enforced.

- Where appropriate, JAMS arbitrators explain at the first pre-hearing conference that document requests:

    - should be limited to documents that are directly relevant to significant issues in the case or to the case's outcome;

    - should be restricted in terms of time frame, subject matter and persons or entities to which the requests pertain; and

    - should not include broad phraseology such as **"**all documents directly or indirectly related to.**"**

Party Preferences

- Overly broad arbitration discovery can result when all of the parties seek discovery beyond what is needed. This unfortunate circumstance may be caused by parties and/or advocates who are inexperienced in arbitration and simply conduct themselves in a fashion that is commonly accepted in court litigation. In any event, where all participants truly desire unlimited discovery, JAMS arbitrators will respect that decision, since

arbitration is governed by the agreement of the parties.

- Where one side wants broad arbitration discovery and the other wants narrow discovery, the arbitrator will set meaningful limitations.

E-Discovery

- The use of electronic media for the creation, storage and transmission of information has substantially increased the volume of available document discovery. It has also substantially increased the cost of the discovery process.

- To be able to appropriately address issues pertaining to e-discovery, JAMS arbitrators are trained to deal with the technological issues that arise in connection with electronic data.

- While there can be no objective standard for the appropriate scope of e-discovery in all cases, JAMS arbitrators recognize that an early order containing language along the following lines can be an important first step in limiting such discovery in a large number of cases:

    - There shall be production of electronic documents only from sources used in the ordinary course of business. Absent a showing of compelling need, no such documents are required to be produced from backup servers, tapes or other media.

    - Absent a showing of compelling need, the production of electronic documents shall normally be made on the basis of generally available technology in a searchable format that is usable by the party receiving the e-documents and convenient and economical for the producing party. Absent a showing of compelling need, the parties need not produce metadata, with the exception of header fields for email correspondence.

    - Where the costs and burdens of e-discovery are disproportionate to the nature and gravity of the dispute or to the amount in controversy, or to the relevance of the materials requested, the arbitrator will either deny such requests or order disclosure on condition that the requesting party advance the reasonable cost of production to the other side, subject to the allocation of costs in the final award.

Artfully Drafted Arbitration Clauses

- JAMS recognizes that there is significant potential for dealing with time and other limitations on discovery in the arbitration clauses of commercial contracts. An advantage of such drafting is that it is much easier for parties to agree on such limitations before a dispute has arisen. A drawback, however, is the difficulty of rationally providing for how best to arbitrate a dispute that has not yet surfaced. Thus, the use of such clauses may be most productive in circumstances in which parties have a good idea from the outset as to the nature and scope of disputes that might thereafter arise.

- JAMS understands that in order for rational time and other discovery limitations to be effectively included in an arbitration clause, it is necessary that an attorney with a good understanding of arbitration be involved in the drafting process.

Depositions

- Rule 17(c) of the JAMS Rules provides that in a domestic arbitration, each party is entitled to one deposition of an opposing party or an individual under the control of an opposing party and that each side may apply for the taking of additional depositions, if necessary.

- JAMS recognizes that the size and complexity of commercial arbitrations have now grown to a point where more than a single deposition can serve a useful purpose in certain instances. Depositions in a complex arbitration, for example, can significantly shorten the cross-examination of key witnesses and shorten the hearing on the merits.

- If not carefully regulated, however, deposition discovery in arbitration can become extremely expensive, wasteful and time-consuming. In determining what scope of depositions may be appropriate in a given case, a JAMS arbitrator balances these considerations, considers the factors set forth in Exhibit A and confers with counsel for the parties. If a JAMS arbitrator determines that it is appropriate to permit multiple depositions, he/she may attempt to solicit agreement at the first pre-hearing conference on language such as the following:
  Each side may take 3* discovery depositions. Each side's depositions are to consume no more than a total of 15* hours. There are to be no speaking objections at the depositions, except to preserve privilege. The total period for the taking of depositions shall not exceed 6* weeks.[1]

  [1] *The asterisked numbers can of course be changed to comport with the particular circumstances of each case.*

Discovery Disputes

- Discovery disputes must be resolved promptly and efficiently. In addressing discovery disputes, JAMS arbitrators consider use of the following practices, which can increase the speed and cost-effectiveness of the arbitration:

  - Where there is a panel of three arbitrators, the parties may agree, by rule or otherwise, that the Chair or another member of the panel is authorized to resolve discovery issues, acting alone.

  - Lengthy briefs on discovery matters should be avoided. In most cases, a prompt discussion or submission of brief letters will sufficiently inform the arbitrator with regard to the issues to be decided.

  - The parties should negotiate discovery differences in good faith before presenting any remaining issues

for the arbitrator's decision.

- The existence of discovery issues should not impede the progress of discovery where there are no discovery differences.

Discovery and Other Procedural Aspects of Arbitration

Other aspects of arbitration have interplay with, and impact on, discovery in arbitration, as discussed below.

Requests for Adjournments

- Where parties encounter discovery difficulties, this circumstance often leads to a request for adjournment and the possible delay of the hearing. While the arbitrator may not reject a joint application of all parties to adjourn the hearing, the fact is that such adjournments can cause inordinate disruption and delay by needlessly extending unnecessary discovery and can substantially detract from the cost-effectiveness of the arbitration. If the request for adjournment is by all parties and is based on a perceived need for further discovery (as opposed to personal considerations), a JAMS arbitrator ensures that the parties understand the implications in time and cost of the adjournment they seek.

- If one party seeks a continuance and another opposes it, then the arbitrator has discretion to grant or deny the request. Factors that affect the exercise of such discretion include the merits of the request and the legitimate needs of the parties, as well as the proximity of the request to the scheduled hearing and whether any earlier requests for adjournments have been made.

Discovery and Dispositive Motions

- In arbitration, "dispositive" motions can cause significant delay and unduly prolong the discovery period. Such motions are commonly based on lengthy briefs and recitals of facts and, after much time, labor and expense, are generally denied on the ground that they raise issues of fact and are inconsistent with the spirit of arbitration. On the other hand, dispositive motions can sometimes enhance the efficiency of the arbitration process if directed to discrete legal issues such as statute of limitations or defenses based on clear contractual provisions. In such circumstances, an appropriately framed dispositive motion can eliminate the need for expensive and time-consuming discovery. On balance, a JAMS arbitrator will consider the following procedure with regard to dispositive motions:

    - Any party wishing to make a dispositive motion must first submit a brief letter (not exceeding five pages) explaining why the motion has merit and why it would speed the proceeding and make it more cost-effective. The other side would have a brief period within which to respond.

    - Based on the letters, the arbitrator would decide whether to proceed with more comprehensive briefing and argument on the proposed motion.

- If the arbitrator decides to go forward with the motion, he/she would place page limits on the briefs and set an accelerated schedule for the disposition of the motion.

- Under ordinary circumstances, the pendency of such a motion should not serve to stay any aspect of the arbitration or adjourn any pending deadlines.

Note: These Protocols are adapted from the April 4, 2009, Report on Arbitration Discovery by the New York Bar Association.

Exhibit A

Relevant Factors Considered by JAMS Arbitrators in Determining the Appropriate Scope of Domestic Arbitration Discovery

Nature of the Dispute

- The factual context of the arbitration and of the issues in question with which the arbitrator should become conversant before making a decision about discovery.

- The amount in controversy.

- The complexity of the factual issues.

- The number of parties and diversity of their interests.

- Whether any or all of the claims appear, on the basis of the pleadings, to have sufficient merit to justify the time and expense associated with the requested discovery.

- Whether there are public policy or ethical issues that give rise to the need for an in-depth probe through relatively comprehensive discovery.

- Whether it might be productive to initially address a potentially dispositive issue that does not require extensive discovery.

Agreement of the Parties

- Agreement of the parties, if any, with respect to the scope of discovery.

- Agreement, if any, by the parties with respect to duration of the arbitration from the filing of the arbitration

demand to the issuance of the final award.

- The parties' choice of substantive and procedural law and the expectations under that legal regime with respect to arbitration discovery.

Relevance and Reasonable Need for Requested Discovery

- Relevance of the requested discovery to the material issues in dispute or the outcome of the case.
- Whether the requested discovery appears to be sought in an excess of caution, or is duplicative or redundant.
- Whether there are necessary witnesses and/or documents that are beyond the tribunal's subpoena power.
- Whether denial of the requested discovery would, in the arbitrator's judgment (after appropriate scrutinizing of the issues), deprive the requesting party of what is reasonably necessary to allow that party a fair opportunity to prepare and present its case.
- Whether the requested information could be obtained from another source more conveniently and with less expense or other burden on the party from whom the discovery is requested.
- To what extent the discovery sought is likely to lead, as a practical matter, to a case-changing "smoking gun" or to a fairer result.
- Whether broad discovery is being sought as part of a litigation tactic to put the other side to great expense and thus coerce some sort of result on grounds other than the merits.
- The time and expense that would be required for a comprehensive discovery program.
- Whether all or most of the information relevant to the determination of the merits is in the possession of one side.
- Whether the party seeking expansive discovery is willing to advance the other side's reasonable costs and attorneys' fees in connection with furnishing the requested materials and information.
- Whether a limited deposition program would be likely to (i) streamline the hearing and make it more cost-effective, (ii) lead to the disclosure of important documents not otherwise available or (iii) result in expense and delay without assisting in the determination of the merits.

Privilege and Confidentiality

- Whether the requested discovery is likely to lead to extensive privilege disputes as to documents not likely to assist in the determination of the merits.

- Whether there are genuine confidentiality concerns with respect to documents of marginal relevance. Whether cumbersome, time-consuming procedures (attorneys' eyes only, and the like) would be necessary to protect confidentiality in such circumstances.

Characteristics and Needs of the Parties

- The financial and human resources the parties have at their disposal to support discovery, viewed both in absolute terms and relative to one another.

- The financial burden that would be imposed by a broad discovery program and whether the extent of the burden outweighs the likely benefit of the discovery.

- Whether injunctive relief is requested or whether one or more of the parties has some other particular interest in obtaining a prompt resolution of all or some of the controversy.

- The extent to which the resolution of the controversy might have an impact on the continued viability of one or more of the parties.

A History of JAMS

1979 JAMS (originally Judicial Arbitration and Mediation Services) is established in Orange County, California.

1981 Endispute is formed on the East Coast.

1992 Bruce Edwards and John Bates, founders of the Bates/Edwards Group, merge with Endispute.

1994 Endispute owners Bruce Edwards and John Bates merge their company with JAMS to form JAMS/Endispute. New offices located in Washington, D.C., Chicago, Los Angeles and San Francisco.

1998 JAMS has grown to more than 200 full-time neutrals in 20 offices nationwide.

1999 After 20 years of providing clients with a complete range of ADR services, a group of 45 JAMS neutrals and managers purchases the company from institutional investors in July 1999.

JAMS/Endispute officially changes name to JAMS.

2000 JAMS adds 22 new neutrals from across the country to its panel.

2001 JAMS adds 37 new neutrals to its panel nationally.

2002 JAMS formalizes its longstanding tradition of community service by creating the JAMS Foundation. Funded entirely by contributions from JAMS neutrals and associates, the Foundation's mission is to support education about collaborative processes for resolving differences at all levels, promote innovation in conflict resolution, and advance the settlement of conflict worldwide.

The JAMS Society was created to recognize and support volunteer opportunities and community involvement for JAMS associates at a local, "hands-on" level. All associates are encouraged to become members of their local Society to collaborate on outreach programs, or to work individually on a project of their choice.

2003 JAMS, Inc. was created as a separate entity from JAMS LLC to allow future expansion and opportunities for the company.

2004 JAMS and ADR Associates, LLC, one of the nation's preeminent full-service dispute resolution providers (with offices in Washington, DC, New York, Boston and Chicago), combined companies to create the premier national ADR provider.

JAMS celebrates 25 years of providing excellence in dispute resolution.

JAMS enters new market with the opening of a JAMS Resolution Center in Philadelphia.

2005 JAMS enters new market with the opening of a JAMS Resolution Center in Las Vegas.

JAMS joins four other leading international mediation service providers to form "MEDAL – The International Mediation Services Alliance." The founding members of MEDAL, all of whom are pre-eminent providers of commercial mediation and conflict management services in their own jurisdictions, are: JAMS, ACBMediation in the Netherlands, ADR Center in Italy, CEDR Solve in the UK, and CMAP in France.

A History of JAMS

2008 Chris Poole, former CEO at Thomson Elite, becomes JAMS President and CEO.

JAMS moves into the New York Times Building, significantly expanding our presence in New York and responding to the increased demand for all types of ADR services, including more international and arbitration work.

JAMS Foundation creates the Weinstein International Fellowship Program to increase global use of ADR.

2009 JAMS celebrates its 30th Anniversary in the ADR and legal community.

JAMS and ADR Center in Italy announce an agreement to form what is now known as JAMS International to provide mediation and arbitration of cross-border disputes and training services worldwide.

2010 JAMS enters new market with the opening of a JAMS Resolution Center in Minneapolis, Minnesota.

2011 JAMS enters new market with the opening of a JAMS Resolution Center in Greenbelt, Maryland.

JAMS International opens London headquarters with additional hearing centers in the European Union through a network of local partners, including ADR Center in Italy, JAMS Ireland and Results ADR in the Netherlands.

2012 JAMS enters new markets with the opening of JAMS Resolution Centers in Miami, Florida and Toronto, Ontario, Canada.

2013 JAMS Foundation has awarded more than $5 million in grant funding since its inception.

Judge Daniel Weinstein and JAMS Foundation Partner to endow International Fellowship Program for the next 20 years.

2014 JAMS receives Firm of the Year recognition in both Mediation and Arbitration from *U.S. News & World Report*. The Firm of the Year is awarded to one firm for each specialty in the country, making JAMS the only company with this distinction.

JAMS announces partnership with Korean-based organization, International IP ADR Center.

JAMS opens state-of-the-art courtroom in Los Angeles.

2015 JAMS International announces three additional global affiliates, including the Arab Mediation Centre in Egypt; Neutrales ADR in Spain; and ADR Partners in Serbia.

2016 JAMS announces it is a Silver Sponsor of the 2016-2017 Global Pound Conference series organized by the International Mediation Institute (IMI).

JAMS Foundation has awarded more than $6 million in grant funding since its inception.

JAMS announces partnership with Chinese Provider Shanghai Commercial Mediation Center.

2017 JAMS enters new market with the opening of a JAMS Resolution Center in Detroit, Michigan.

JAMS Comprehensive Arbitration Rules & Procedures

Effective July 1, 2014

JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURES

JAMS provides arbitration and mediation services worldwide. We resolve some of the world's largest, most complex and contentious disputes, utilizing JAMS Rules & Procedures as well as the rules of other domestic and international arbitral institutions.

JAMS arbitrators and mediators are full-time neutrals who come from the ranks of retired state and federal judges and prominent attorneys. These highly trained, experienced ADR professionals are dedicated to the highest ethical standards of conduct.

Parties wishing to write a pre-dispute JAMS arbitration clause into their agreement should review the sample arbitration clauses on pages 4 and 5. These clauses may be modified to tailor the arbitration process to meet the parties' individual needs.

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Standard Arbitration Clauses Referring to the JAMS Comprehensive Arbitration Rules

JAMS Comprehensive Arbitration Rules & Procedures

Administrative Fees

For two-party matters, JAMS charges a $1,500 Filing Fee, to be paid by the party initiating the Arbitration. JAMS also charges a $1,500 Filing Fee for counterclaims. For matters involving three or more parties, the Filing Fee is $2,000. A Case Management Fee of 12% will be assessed against all Professional Fees, including time spent for hearings, pre- and post-hearing reading and research and award preparation.

JAMS neutrals set their own hourly, partial and full-day rates. For information on individual neutrals' rates and the administrative fees, please contact JAMS at 800.352.5267. The fee structure is subject to change.

Standard Arbitration Clauses Referring to the JAMS Comprehensive Arbitration Rules

Standard Commercial Arbitration Clause*

Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in (insert the desired place of arbitration), before (one) (three) arbitrator(s). The arbitration shall be administered by JAMS pursuant to its Comprehensive Arbitration Rules & Procedures (Streamlined Arbitration Rules & Procedures). Judgment on the Award may be entered in any court having jurisdiction. This clause shall not preclude parties from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction.

(Optional) Allocation of Fees and Costs: The arbitrator may, in the Award, allocate all or part of the costs of the arbitration, including the fees of the arbitrator and the reasonable attorneys' fees of the prevailing party.

(Optional) Expedited Procedures: The parties agree that the Expedited Procedures set forth in JAMS Comprehensive Rules 16.1 and 16.2 shall be employed.

Sometimes contracting parties may want their agreement to allow a choice of provider organizations (JAMS being one) that can be used if a dispute arises. The following clause permits a choice between JAMS and another provider organization at the option of the first party to file the arbitration.

Standard Commercial Arbitration Clause Naming JAMS or Another Provider*

Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in (insert the desired place of arbitration), before (one) (three) arbitrator(s). At the option of the first party to file an arbitration, the arbitration shall be

administered either by JAMS pursuant to its (Comprehensive Arbitration Rules & Procedures) (Streamlined Arbitration Rules & Procedures), or by (name an alternate provider) pursuant to its (identify the rules that will govern). Judgment on the Award may be entered in any court having jurisdiction. This clause shall not preclude parties from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction.

(Optional) Allocation of Fees and Costs: The arbitrator may, in the Award, allocate all or part of the costs of the arbitration, including the fees of the arbitrator and the reasonable attorneys' fees of the prevailing party.

(Optional) Expedited Procedures: The parties agree that the Expedited Procedures set forth in JAMS Comprehensive Rules 16.1 and 16.2 shall be employed.

*The drafter should select the desired option from those provided in the parentheses.

Optional Expedited Procedures

JAMS offers optional Expedited Arbitration Procedures, whereby parties can choose a process that limits depositions, document requests and e-discovery. When parties utilizing JAMS Comprehensive Arbitration Rules elect to use these procedures, they agree to the voluntary and informal exchange of all non-privileged documents and other information relevant to the dispute. See Comprehensive Rules 16.1 and 16.2.

Streamlined Rules

JAMS provides clients with the option to select a simplified arbitration process for those cases where the claims and counterclaims are less than $250,000. JAMS Streamlined Arbitration Rules & Procedures are designed to minimize the arbitration costs associated with these cases while providing a full and fair hearing for all parties.

All of the JAMS Rules, including the Comprehensive Arbitration Rules set forth below, can be accessed at the JAMS website: **www.jamsadr.com/rules-clauses.**

JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURES

Rule 1. Scope of Rules

(a) The JAMS Comprehensive Arbitration Rules and Procedures ("Rules") govern binding Arbitrations of disputes or claims that are administered by JAMS and in which the Parties agree to use these Rules or, in the absence of such agreement, any disputed claim or counterclaim that exceeds $250,000, not including interest or attorneys' fees, unless other Rules are prescribed.

(b) The Parties shall be deemed to have made these Rules a part of their Arbitration agreement ("Agreement") whenever they have provided for Arbitration by JAMS under its Comprehensive Rules or for Arbitration by JAMS without specifying any particular JAMS Rules and the disputes or claims meet the criteria of the first paragraph of this Rule.

(c) The authority and duties of JAMS as prescribed in the Agreement of the Parties and in these Rules shall be carried out by the JAMS National Arbitration Committee ("NAC") or the office of JAMS General Counsel or their designees.

(d) JAMS may, in its discretion, assign the administration of an Arbitration to any of its Resolution Centers.

(e) The term "Party" as used in these Rules includes Parties to the Arbitration and their counsel or representatives.

(f) "Electronic filing" (e-file) means the electronic transmission of documents to and from JAMS and other Parties for the purpose of filing via the Internet. "Electronic service" (e-service) means the electronic transmission of documents via JAMS Electronic Filing System to a Party, attorney or representative under these Rules.

Rule 2. Party Self-Determination and Emergency Relief Procedures

(a) The Parties may agree on any procedures not specified herein or in lieu of these Rules that are consistent with the applicable law and JAMS policies (including, without limitation, Rules 15(i), 30 and 31). The Parties shall promptly notify JAMS of any such Party-agreed procedures and shall confirm such procedures in writing. The Party-agreed procedures shall be enforceable as if contained in these Rules.

(b) When an Arbitration Agreement provides that the Arbitration will be non-administered or administered by an entity other than JAMS and/or conducted in accordance with rules other than JAMS Rules, the Parties may subsequently agree to modify that Agreement to provide that the Arbitration will be administered by JAMS and/or conducted in accordance with JAMS Rules.

(c) Emergency Relief Procedures. These Emergency Relief Procedures are available in Arbitrations filed and served after July 1, 2014, and where not otherwise prohibited by law. Parties may agree to opt out of these Procedures in their Arbitration Agreement or by subsequent written agreement.

(i) A Party in need of emergency relief prior to the appointment of an Arbitrator may notify JAMS and all other Parties in writing of the relief sought and the basis for an Award of such relief. This Notice shall include an explanation of why such relief is needed on an expedited basis. Such Notice shall be given by facsimile, email or personal delivery. The Notice must include a statement certifying that all other Parties have been notified. If all other Parties have not been notified, the Notice shall include an explanation of the efforts made to notify such Parties.

(ii) JAMS shall promptly appoint an Emergency Arbitrator to rule on the emergency request. In most cases the appointment of an Emergency Arbitrator will be done within 24 hours of receipt of the request. The Emergency Arbitrator shall promptly disclose any circumstance likely, on the basis disclosed in the application, to affect the Arbitrator's ability to be impartial or independent. Any challenge to the appointment of the Emergency Arbitrator shall be made within 24 hours of the disclosures by the Emergency Arbitrator. JAMS will promptly review and decide any such challenge. JAMS' decision will be final.

(iii) Within two business days, or as soon as practicable thereafter, the Emergency Arbitrator shall establish a schedule for the consideration of the request for emergency relief. The schedule shall provide a reasonable opportunity for all Parties to be heard taking into account the nature of the relief sought. The Emergency Arbitrator has the authority to rule on his or her own jurisdiction and shall resolve any disputes with respect to the request for emergency relief.

(iv) The Emergency Arbitrator shall determine whether the Party seeking emergency relief has shown that immediate and irreparable loss or damage will result in the absence of emergency relief and whether the requesting Party is entitled to such relief. The Emergency Arbitrator shall enter an order or Award granting or denying the relief, as the case may be, and stating the reasons therefor.

(v) Any request to modify the Emergency Arbitrator's order or Award must be based on changed circumstances and may be made to the Emergency Arbitrator until such time as an Arbitrator or Arbitrators are appointed in accordance with the Parties' Agreement and JAMS' usual procedures. Thereafter, any request related to the relief granted or denied by the Emergency Arbitrator shall be determined by the Arbitrator(s) appointed in accordance with the Parties' Agreement and JAMS' usual procedures.

(vi) At the Emergency Arbitrator's discretion, any interim Award of emergency relief may be conditioned on the provision of adequate security by the Party seeking such relief.

Rule 3. Amendment of Rules

JAMS may amend these Rules without notice. The Rules in effect on the date of the commencement of an Arbitration (as defined in Rule 5) shall apply to that Arbitration, unless the Parties have agreed upon another version of the Rules.

Rule 4. Conflict with Law

If any of these Rules, or modification of these Rules agreed to by the Parties, is determined to be in conflict with a provision of applicable law, the provision of law will govern over the Rule in conflict, and no other Rule will be affected.

Rule 5. Commencing an Arbitration

(a) The Arbitration is deemed commenced when JAMS issues a Commencement Letter based upon the existence of one of the following:

(i) A post-dispute Arbitration Agreement fully executed by all Parties specifying JAMS administration or use of any JAMS Rules; or

(ii) A pre-dispute written contractual provision requiring the Parties to arbitrate the dispute or claim and specifying JAMS administration or use of any JAMS Rules or that the Parties agree shall be administered by JAMS; or

(iii) A written confirmation of an oral agreement of all Parties to participate in an Arbitration administered by JAMS or conducted pursuant to any JAMS Rules; or

(iv) The Respondent's failure to timely object to JAMS administration; or

(v) A copy of a court order compelling Arbitration at JAMS.

(b) The issuance of the Commencement Letter confirms that requirements for commencement have been met, that JAMS has received all payments required under the applicable fee schedule and that the Claimant has provided JAMS with contact information for all Parties along with evidence that the Demand for Arbitration has been served on all Parties.

(c) If a Party that is obligated to arbitrate in accordance with subparagraph (a) of this Rule fails to agree to participate in the Arbitration process, JAMS shall confirm in writing that Party's failure to respond or participate, and, pursuant to Rule 22(j), the Arbitrator, once appointed, shall schedule, and provide appropriate notice of, a Hearing or other opportunity for the Party demanding the Arbitration to demonstrate its entitlement to relief.

(d) The date of commencement of the Arbitration is the date of the Commencement Letter but is not intended to be applicable to any legal requirements such as the statute of limitations, any contractual limitations period or claims notice requirements. The term "commencement," as used in this Rule, is intended only to pertain to the operation of this and other Rules (such as Rules 3, 13(a), 17(a) and 31(a)).

Rule 6. Preliminary and Administrative Matters

(a) JAMS may convene, or the Parties may request, administrative conferences to discuss any procedural matter relating to the administration of the Arbitration.

(b) If no Arbitrator has yet been appointed, at the request of a Party and in the absence of Party agreement, JAMS may determine the location of the Hearing, subject to Arbitrator review. In determining the location of the Hearing, such factors as the subject matter of the dispute, the convenience of the Parties and witnesses, and the relative resources of the Parties shall be considered.

(c) If, at any time, any Party has failed to pay fees or expenses in full, JAMS may order the suspension or termination of the proceedings. JAMS may so inform the Parties in order that one of them may advance the required payment. If one Party advances the payment owed by a non-paying Party, the Arbitration shall proceed, and the Arbitrator may allocate the non-paying Party's share of such costs, in accordance with Rules 24(f) and 31(c). An administrative suspension shall toll any other time limits contained in these Rules or the Parties' Agreement.

(d) JAMS does not maintain an official record of documents filed in the Arbitration. If the Parties wish to have any documents returned to them, they must advise JAMS in writing within thirty (30) calendar days of the conclusion of the Arbitration. If special arrangements are required regarding file maintenance or document retention, they must be agreed to in writing, and JAMS reserves the right to impose an additional fee for such special arrangements. Documents that are submitted for e-filing are retained for thirty (30) calendar days following the conclusion of the Arbitration.

(e) Unless the Parties' Agreement or applicable law provides otherwise, JAMS, if it determines that the Arbitrations so filed have common issues of fact or law, may consolidate Arbitrations in the following instances:

(i) If a Party files more than one Arbitration with JAMS, JAMS may consolidate the Arbitrations into a single Arbitration.

(ii) Where a Demand or Demands for Arbitration is or are submitted naming Parties already involved in another Arbitration or Arbitrations pending under these Rules, JAMS may decide that the new case or cases shall be consolidated into one or more of the pending proceedings and referred to one of the Arbitrators or panels of Arbitrators already appointed.

(iii) Where a Demand or Demands for Arbitration is or are submitted naming Parties that are not identical to the

Parties in the existing Arbitration or Arbitrations, JAMS may decide that the new case or cases shall be consolidated into one or more of the pending proceedings and referred to one of the Arbitrators or panels of Arbitrators already appointed.

When rendering its decision, JAMS will take into account all circumstances, including the links between the cases and the progress already made in the existing Arbitrations.

Unless applicable law provides otherwise, where JAMS decides to consolidate a proceeding into a pending Arbitration, the Parties to the consolidated case or cases will be deemed to have waived their right to designate an Arbitrator as well as any contractual provision with respect to the site of the Arbitration.

(f) Where a third party seeks to participate in an Arbitration already pending under these Rules or where a Party to an Arbitration under these Rules seeks to compel a third party to participate in a pending Arbitration, the Arbitrator shall determine such request, taking into account all circumstances he or she deems relevant and applicable.

Rule 7. Number and Neutrality of Arbitrators; Appointment and Authority of Chairperson

(a) The Arbitration shall be conducted by one neutral Arbitrator, unless all Parties agree otherwise. In these Rules, the term "Arbitrator" shall mean, as the context requires, the Arbitrator or the panel of Arbitrators in a tripartite Arbitration.

(b) In cases involving more than one Arbitrator, the Parties shall agree on, or, in the absence of agreement, JAMS shall designate, the Chairperson of the Arbitration Panel. If the Parties and the Arbitrators agree, a single member of the Arbitration Panel may, acting alone, decide discovery and procedural matters, including the conduct of hearings to receive documents and testimony from third parties who have been subpoenaed to produce documents.

(c) Where the Parties have agreed that each Party is to name one Arbitrator, the Arbitrators so named shall be neutral and independent of the appointing Party, unless the Parties have agreed that they shall be non-neutral.

Rule 8. Service

(a) The Arbitrator may at any time require electronic filing and service of documents in an Arbitration. If an Arbitrator requires electronic filing, the Parties shall maintain and regularly monitor a valid, usable and live email address for the receipt of all documents filed through JAMS Electronic Filing System. Any document filed electronically shall be considered as filed with JAMS when the transmission to JAMS Electronic Filing System is complete. Any document e-filed by 11:59 p.m. (of the sender's time zone) shall be deemed filed on that date. Upon completion of filing, JAMS Electronic Filing System shall issue a confirmation receipt that includes the date and time of receipt. The confirmation receipt shall serve as proof of filing.

(b) Every document filed with JAMS Electronic Filing System shall be deemed to have been signed by the Arbitrator, Case Manager, attorney or declarant who submits the document to JAMS Electronic Filing System, and shall bear the typed name, address and telephone number of a signing attorney. Documents containing signatures of third parties (i.e., unopposed motions, affidavits, stipulations, etc.) may also be filed electronically by indicating that the original signatures are maintained by the filing Party in paper format.

(c) Delivery of e-service documents through JAMS Electronic Filing System to other registered users shall be considered as valid and effective service and shall have the same legal effect as an original paper document. Recipients of e-service documents shall access their documents through JAMS Electronic Filing System. E-service shall be deemed complete when the Party initiating e-service completes the transmission of the electronic document(s) to JAMS Electronic Filing System for e-filing and/or e-service. Upon actual or constructive receipt of the electronic document(s) by the Party to be served, a Certificate of Electronic Service shall be issued by JAMS Electronic Filing System to the Party initiating e-service, and that Certificate shall serve as proof of service. Any Party who ignores or attempts to refuse e-service shall be deemed to have received the electronic document(s) 72 hours following the transmission of the electronic document(s) to JAMS Electronic Filing System.

(d) If an electronic filing or service does not occur because of (1) an error in the transmission of the document to JAMS Electronic Filing System or served Party that was unknown to the sending Party; (2) a failure to process the electronic

document when received by JAMS Electronic Filing System; (3) the Party being erroneously excluded from the service list; or (4) other technical problems experienced by the filer, the Arbitrator or JAMS may, for good cause shown, permit the document to be filed *nunc pro tunc* to the date it was first attempted to be sent electronically. Or, in the case of service, the Party shall, absent extraordinary circumstances, be entitled to an order extending the date for any response or the period within which any right, duty or other act must be performed.

(e) For documents that are not filed electronically, service by a Party under these Rules is effected by providing one signed copy of the document to each Party and two copies in the case of a sole Arbitrator and four copies in the case of a tripartite panel to JAMS. Service may be made by hand-delivery, overnight delivery service or U.S. mail. Service by any of these means is considered effective upon the date of deposit of the document.

(f) In computing any period of time prescribed or allowed by these Rules for a Party to do some act within a prescribed period after the service of a notice or other paper on the Party and the notice or paper is served on the Party only by U.S. mail, three (3) calendar days shall be added to the prescribed period.

Rule 9. Notice of Claims

(a) Each Party shall afford all other Parties reasonable and timely notice of its claims, affirmative defenses or counterclaims. Any such notice shall include a short statement of its factual basis. No claim, remedy, counterclaim or affirmative defense will be considered by the Arbitrator in the absence of such prior notice to the other Parties, unless the Arbitrator determines that no Party has been unfairly prejudiced by such lack of formal notice or all Parties agree that such consideration is appropriate notwithstanding the lack of prior notice.

(b) Claimant's notice of claims is the Demand for Arbitration referenced in Rule 5. It shall include a statement of the remedies sought. The Demand for Arbitration may attach and incorporate a copy of a Complaint previously filed with a court. In the latter case, Claimant may accompany the Complaint with a copy of any Answer to that Complaint filed by any Respondent.

(c) Within fourteen (14) calendar days of service of the notice of claim, a Respondent may submit to JAMS and

serve on other Parties a response and a statement of any affirmative defenses, including jurisdictional challenges, or counterclaims it may have.

(d) Within fourteen (14) calendar days of service of a counterclaim, a Claimant may submit to JAMS and serve on other Parties a response to such counterclaim and any affirmative defenses, including jurisdictional challenges, it may have.

(e) Any claim or counterclaim to which no response has been served will be deemed denied.

(f) Jurisdictional challenges under Rule 11 shall be deemed waived, unless asserted in a response to a Demand or counterclaim or promptly thereafter, when circumstances first suggest an issue of arbitrability.

Rule 10. Changes of Claims

After the filing of a claim and before the Arbitrator is appointed, any Party may make a new or different claim against a Party or any third party that is subject to Arbitration in the proceeding. Such claim shall be made in writing, filed with JAMS and served on the other Parties. Any response to the new claim shall be made within fourteen (14) calendar days after service of such claim. After the Arbitrator is appointed, no new or different claim may be submitted, except with the Arbitrator's approval. A Party may request a hearing on this issue. Each Party has the right to respond to any new or amended claim in accordance with Rule 9(c) or (d).

Rule 11. Interpretation of Rules and Jurisdictional Challenges

(a) Once appointed, the Arbitrator shall resolve disputes about the interpretation and applicability of these Rules and conduct of the Arbitration Hearing. The resolution of the issue by the Arbitrator shall be final.

(b) Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.

(c) Disputes concerning the appointment of the Arbitrator shall be resolved by JAMS.

(d) The Arbitrator may, upon a showing of good cause or *sua sponte*, when necessary to facilitate the Arbitration, extend any deadlines established in these Rules, provided that the time for rendering the Award may be altered only in accordance with Rules 22(i) or 24.

Rule 12. Representation

(a) The Parties, whether natural persons or legal entities such as corporations, LLCs or partnerships, may be represented by counsel or any other person of the Party's choice. Each Party shall give prompt written notice to the Case Manager and the other Parties of the name, address, telephone and fax numbers and email address of its representative. The representative of a Party may act on the Party's behalf in complying with these Rules.

(b) Changes in Representation. A Party shall give prompt written notice to the Case Manager and the other Parties of any change in its representation, including the name, address, telephone and fax numbers and email address of the new representative. Such notice shall state that the written consent of the former representative, if any, and of the new representative, has been obtained and shall state the effective date of the new representation.

Rule 13. Withdrawal from Arbitration

(a) No Party may terminate or withdraw from an Arbitration after the issuance of the Commencement Letter (see Rule 5), except by written agreement of all Parties to the Arbitration.

(b) A Party that asserts a claim or counterclaim may unilaterally withdraw that claim or counterclaim without prejudice by serving written notice on the other Parties and the Arbitrator. However, the opposing Parties may, within seven (7) calendar days of service of such notice, request that the Arbitrator condition the withdrawal upon such terms as he or she may direct.

Rule 14. *Ex Parte* Communications

(a) No Party may have any *ex parte* communication with a neutral Arbitrator, except as provided in section (b) of this Rule. The Arbitrator(s) may authorize any Party to communicate directly with the Arbitrator(s) by email or other written means as long as copies are simultaneously forwarded to the JAMS Case Manager and the other Parties.

(b) A Party may have *ex parte* communication with its appointed neutral or non-neutral Arbitrator as necessary to secure the Arbitrator's services and to assure the absence of conflicts, as well as in connection with the selection of the Chairperson of the arbitral panel.

(c) The Parties may agree to permit more extensive *ex parte* communication between a Party and a non-neutral Arbitrator. More extensive communication with a non-neutral Arbitrator may also be permitted by applicable law and rules of ethics.

Rule 15. Arbitrator Selection, Disclosures and Replacement

(a) Unless the Arbitrator has been previously selected by agreement of the Parties, JAMS may attempt to facilitate agreement among the Parties regarding selection of the Arbitrator.

(b) If the Parties do not agree on an Arbitrator, JAMS shall send the Parties a list of at least five (5) Arbitrator candidates in the case of a sole Arbitrator and ten (10) Arbitrator candidates in the case of a tripartite panel. JAMS shall also provide each Party with a brief description of the background and experience of each Arbitrator candidate. JAMS may replace any or all names on the list of Arbitrator candidates for reasonable cause at any time before the Parties have submitted their choice pursuant to subparagraph (c) below.

(c) Within seven (7) calendar days of service upon the Parties of the list of names, each Party may strike two (2) names in the case of a sole Arbitrator and three (3) names in the case of a tripartite panel, and shall rank the remaining Arbitrator candidates in order of preference. The remaining Arbitrator candidate with the highest composite ranking shall be appointed the Arbitrator. JAMS may grant a reasonable extension of the time to strike and rank the Arbitrator candidates to any Party without the consent of the other Parties.

(d) If this process does not yield an Arbitrator or a complete panel, JAMS shall designate the sole Arbitrator or as many members of the tripartite panel as are necessary to complete the panel.

(e) If a Party fails to respond to a list of Arbitrator candidates within seven (7) calendar days after its service, or fails to respond according to the instructions provided by

JAMS, JAMS shall deem that Party to have accepted all of the Arbitrator candidates.

(f) Entities whose interests are not adverse with respect to the issues in dispute shall be treated as a single Party for purposes of the Arbitrator selection process. JAMS shall determine whether the interests between entities are adverse for purposes of Arbitrator selection, considering such factors as whether the entities are represented by the same attorney and whether the entities are presenting joint or separate positions at the Arbitration.

(g) If, for any reason, the Arbitrator who is selected is unable to fulfill the Arbitrator's duties, a successor Arbitrator shall be chosen in accordance with this Rule. If a member of a panel of Arbitrators becomes unable to fulfill his or her duties after the beginning of a Hearing but before the issuance of an Award, a new Arbitrator will be chosen in accordance with this Rule, unless, in the case of a tripartite panel, the Parties agree to proceed with the remaining two Arbitrators. JAMS will make the final determination as to whether an Arbitrator is unable to fulfill his or her duties, and that decision shall be final.

(h) Any disclosures regarding the selected Arbitrator shall be made as required by law or within ten (10) calendar days from the date of appointment. Such disclosures may be provided in electronic format, provided that JAMS will produce a hard copy to any Party that requests it. The Parties and their representatives shall disclose to JAMS any circumstance likely to give rise to justifiable doubt as to the Arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the Arbitration or any past or present relationship with the Parties or their representatives. The obligation of the Arbitrator, the Parties and their representatives to make all required disclosures continues throughout the Arbitration process.

(i) At any time during the Arbitration process, a Party may challenge the continued service of an Arbitrator for cause. The challenge must be based upon information that was not available to the Parties at the time the Arbitrator was selected. A challenge for cause must be in writing and exchanged with opposing Parties, who may respond within seven (7) calendar days of service of the challenge. JAMS shall make the final determination as to such challenge. Such determination shall take into account the materiality of the facts and any prejudice to the Parties. That decision will be final.

(j) Where the Parties have agreed that a Party-appointed Arbitrator is to be non-neutral, that Party-appointed Arbitrator is not obliged to withdraw if requested to do so only by the Party who did not appoint that Arbitrator.

Rule 16. Preliminary Conference

At the request of any Party or at the direction of the Arbitrator, a Preliminary Conference shall be conducted with the Parties or their counsel or representatives. The Preliminary Conference may address any or all of the following subjects:

(a) The exchange of information in accordance with Rule 17 or otherwise;

(b) The schedule for discovery as permitted by the Rules, as agreed by the Parties or as required or authorized by applicable law;

(c) The pleadings of the Parties and any agreement to clarify or narrow the issues or structure the Arbitration Hearing;

(d) The scheduling of the Hearing and any pre-Hearing exchanges of information, exhibits, motions or briefs;

(e) The attendance of witnesses as contemplated by Rule 21;

(f) The scheduling of any dispositive motion pursuant to Rule 18;

(g) The premarking of exhibits, the preparation of joint exhibit lists and the resolution of the admissibility of exhibits;

(h) The form of the Award; and

(i) Such other matters as may be suggested by the Parties or the Arbitrator.

The Preliminary Conference may be conducted telephonically and may be resumed from time to time as warranted.

Rule 16.1. Application of Expedited Procedures

(a) If these Expedited Procedures are referenced in the Parties' agreement to arbitrate or are later agreed to by all Parties, they shall be applied by the Arbitrator.

(b) The Claimant or Respondent may opt into the Expedited Procedures. The Claimant may do so by indicating the election in the Demand for Arbitration. The Respondent may opt into the Expedited Procedures by so indicating in writing to JAMS with a copy to the Claimant served within fourteen (14) days of receipt of the Demand for Arbitration. If a Party opts into the Expedited Procedures, the other side shall indicate within seven (7) calendar days of notice thereof whether it agrees to the Expedited Procedures.

(c) If one Party elects the Expedited Procedures and any other Party declines to agree to the Expedited Procedures, each Party shall have a client or client representative present at the first Preliminary Conference (which should, if feasible, be an in-person conference), unless excused by the Arbitrator for good cause.

Rule 16.2. Where Expedited Procedures Are Applicable

(a) The Arbitrator shall require compliance with Rule 17(a) prior to conducting the first Preliminary Conference. Each Party shall confirm in writing to the Arbitrator that it has so complied or shall indicate any limitations on full compliance and the reasons therefor.

(b) Document requests shall (1) be limited to documents that are directly relevant to the matters in dispute or to its outcome; (2) be reasonably restricted in terms of time frame, subject matter and persons or entities to which the requests pertain; and (3) not include broad phraseology such as "all documents directly or indirectly related to." The Requests shall not be encumbered with extensive "definitions" or "instructions." The Arbitrator may edit or limit the number of requests.

(c) E-Discovery shall be limited as follows:

(i) There shall be production of electronic documents only from sources used in the ordinary course of business. Absent a showing of compelling need, no such documents are required to be produced from backup servers, tapes or other media.

(ii) Absent a showing of compelling need, the production of electronic documents shall normally be made on the basis of generally available technology in a searchable format that is usable by the requesting Party and convenient and economical for the producing Party. Absent a showing of compelling need, the Parties need not produce

metadata, with the exception of header fields for email correspondence.

(iii) The description of custodians from whom electronic documents may be collected should be narrowly tailored to include only those individuals whose electronic documents may reasonably be expected to contain evidence that is material to the dispute.

(iv) Where the costs and burdens of e-discovery are disproportionate to the nature of the dispute or to the amount in controversy, or to the relevance of the materials requested, the Arbitrator may either deny such requests or order disclosure on the condition that the requesting Party advance the reasonable cost of production to the other side, subject to the allocation of costs in the final Award.

(v) The Arbitrator may vary these Rules after discussion with the Parties at the Preliminary Conference.

(d) Depositions of percipient witnesses shall be limited as follows:

(i) The limitation of one discovery deposition per side (Rule 17(b)) shall be applied by the Arbitrator, unless it is determined, based on all relevant circumstances, that more depositions are warranted. The Arbitrator shall consider the amount in controversy, the complexity of the factual issues, the number of Parties and the diversity of their interests and whether any or all of the claims appear, on the basis of the pleadings, to have sufficient merit to justify the time and expense associated with the requested discovery.

(ii) The Arbitrator shall also consider the additional factors listed in the JAMS Recommended Arbitration Discovery Protocols for Domestic Commercial Cases.

(e) Expert depositions, if any, shall be limited as follows: Where written expert reports are produced to the other side in advance of the Hearing (Rule 17(a)), expert depositions may be conducted only by agreement of the Parties or by order of the Arbitrator for good cause shown.

(f) Discovery disputes shall be resolved on an expedited basis.

(i) Where there is a panel of three Arbitrators, the Parties are encouraged to agree, by rule or otherwise, that the Chair or another member of the panel is authorized to resolve discovery issues, acting alone.

(ii) Lengthy briefs on discovery matters should be avoided. In most cases, the submission of brief letters will

sufficiently inform the Arbitrator with regard to the issues to be decided.

(iii) The Parties should meet and confer in good faith prior to presenting any issues for the Arbitrator's decision.

(iv) If disputes exist with respect to some issues, that should not delay the Parties' discovery on remaining issues.

(g) The Arbitrator shall set a discovery cutoff not to exceed seventy-five (75) calendar days after the Preliminary Conference for percipient discovery and not to exceed one hundred five (105) calendar days for expert discovery (if any). These dates may be extended by the Arbitrator for good cause shown.

(h) Dispositive motions (Rule 18) shall not be permitted, except as set forth in the JAMS Recommended Arbitration Discovery Protocols for Domestic Commercial Cases or unless the Parties agree to that procedure.

(i) The Hearing shall commence within sixty (60) calendar days after the cutoff for percipient discovery. Consecutive Hearing days shall be established, unless otherwise agreed by the Parties or ordered by the Arbitrator. These dates may be extended by the Arbitrator for good cause shown.

(j) The Arbitrator may alter any of these Procedures for good cause.

Rule 17. Exchange of Information

(a) The Parties shall cooperate in good faith in the voluntary and informal exchange of all non-privileged documents and other information (including electronically stored information ("ESI")) relevant to the dispute or claim immediately after commencement of the Arbitration. They shall complete an initial exchange of all relevant, non-privileged documents, including, without limitation, copies of all documents in their possession or control on which they rely in support of their positions, and names of individuals whom they may call as witnesses at the Arbitration Hearing, within twenty-one (21) calendar days after all pleadings or notice of claims have been received. The Arbitrator may modify these obligations at the Preliminary Conference.

(b) Each Party may take one deposition of an opposing Party or of one individual under the control of the opposing Party. The Parties shall attempt to agree on the time, location and duration of the deposition. If the Parties do not agree, these issues shall be determined by the Arbitrator.

The necessity of additional depositions shall be determined by the Arbitrator based upon the reasonable need for the requested information, the availability of other discovery options and the burdensomeness of the request on the opposing Parties and the witness.

(c) As they become aware of new documents or information, including experts who may be called upon to testify, all Parties continue to be obligated to provide relevant, non-privileged documents to supplement their identification of witnesses and experts and to honor any informal agreements or understandings between the Parties regarding documents or information to be exchanged. Documents that were not previously exchanged, or witnesses and experts that were not previously identified, may not be considered by the Arbitrator at the Hearing, unless agreed by the Parties or upon a showing of good cause.

(d) The Parties shall promptly notify JAMS when a dispute exists regarding discovery issues. A conference shall be arranged with the Arbitrator, either by telephone or in person, and the Arbitrator shall decide the dispute. With the written consent of all Parties, and in accordance with an agreed written procedure, the Arbitrator may appoint a special master to assist in resolving a discovery dispute.

Rule 18. Summary Disposition of a Claim or Issue

The Arbitrator may permit any Party to file a Motion for Summary Disposition of a particular claim or issue, either by agreement of all interested Parties or at the request of one Party, provided other interested Parties have reasonable notice to respond to the request.

Rule 19. Scheduling and Location of Hearing

(a) The Arbitrator, after consulting with the Parties that have appeared, shall determine the date, time and location of the Hearing. The Arbitrator and the Parties shall attempt to schedule consecutive Hearing days if more than one day is necessary.

(b) If a Party has failed to participate in the Arbitration process, the Arbitrator may set the Hearing without consulting with that Party. The non-participating Party shall be served with a Notice of Hearing at least thirty (30) calendar days prior to the scheduled date, unless the law of the relevant

jurisdiction allows for, or the Parties have agreed to, shorter notice.

(c) The Arbitrator, in order to hear a third-party witness, or for the convenience of the Parties or the witnesses, may conduct the Hearing at any location. Any JAMS Resolution Center may be designated a Hearing location for purposes of the issuance of a subpoena or subpoena *duces tecum* to a third-party witness.

Rule 20. Pre-Hearing Submissions

(a) Except as set forth in any scheduling order that may be adopted, at least fourteen (14) calendar days before the Arbitration Hearing, the Parties shall file with JAMS and serve and exchange (1) a list of the witnesses they intend to call, including any experts; (2) a short description of the anticipated testimony of each such witness and an estimate of the length of the witness' direct testimony; (3) any written expert reports that may be introduced at the Arbitration Hearing; and (4) a list of all exhibits intended to be used at the Hearing. The Parties should exchange with each other copies of any such exhibits to the extent that they have not been previously exchanged. The Parties should pre-mark exhibits and shall attempt to resolve any disputes regarding the admissibility of exhibits prior to the Hearing.

(b) The Arbitrator may require that each Party submit a concise written statement of position, including summaries of the facts and evidence a Party intends to present, discussion of the applicable law and the basis for the requested Award or denial of relief sought. The statements, which may be in the form of a letter, shall be filed with JAMS and served upon the other Parties at least seven (7) calendar days before the Hearing date. Rebuttal statements or other pre-Hearing written submissions may be permitted or required at the discretion of the Arbitrator.

Rule 21. Securing Witnesses and Documents for the Arbitration Hearing

At the written request of a Party, all other Parties shall produce for the Arbitration Hearing all specified witnesses in their employ or under their control without need of subpoena. The Arbitrator may issue subpoenas for the attendance of witnesses or the production of documents either prior to or at the Hearing pursuant to this Rule or Rule 19(c). The subpoena or subpoena *duces tecum* shall be issued in accordance with the applicable law. Pre-issued

subpoenas may be used in jurisdictions that permit them. In the event a Party or a subpoenaed person objects to the production of a witness or other evidence, the Party or subpoenaed person may file an objection with the Arbitrator, who shall promptly rule on the objection, weighing both the burden on the producing Party and witness and the need of the proponent for the witness or other evidence.

Rule 22. The Arbitration Hearing

(a) The Arbitrator will ordinarily conduct the Arbitration Hearing in the manner set forth in these Rules. The Arbitrator may vary these procedures if it is determined to be reasonable and appropriate to do so.

(b) The Arbitrator shall determine the order of proof, which will generally be similar to that of a court trial.

(c) The Arbitrator shall require witnesses to testify under oath if requested by any Party, or otherwise at the discretion of the Arbitrator.

(d) Strict conformity to the rules of evidence is not required, except that the Arbitrator shall apply applicable law relating to privileges and work product. The Arbitrator shall consider evidence that he or she finds relevant and material to the dispute, giving the evidence such weight as is appropriate. The Arbitrator may be guided in that determination by principles contained in the Federal Rules of Evidence or any other applicable rules of evidence. The Arbitrator may limit testimony to exclude evidence that would be immaterial or unduly repetitive, provided that all Parties are afforded the opportunity to present material and relevant evidence.

(e) The Arbitrator shall receive and consider relevant deposition testimony recorded by transcript or videotape, provided that the other Parties have had the opportunity to attend and cross-examine. The Arbitrator may in his or her discretion consider witness affidavits or other recorded testimony even if the other Parties have not had the opportunity to cross-examine, but will give that evidence only such weight as he or she deems appropriate.

(f) The Parties will not offer as evidence, and the Arbitrator shall neither admit into the record nor consider, prior settlement offers by the Parties or statements or recommendations made by a mediator or other person in connection with efforts to resolve the dispute being arbitrated, except

to the extent that applicable law permits the admission of such evidence.

(g) The Hearing, or any portion thereof, may be conducted telephonically or videographically with the agreement of the Parties or at the discretion of the Arbitrator.

(h) When the Arbitrator determines that all relevant and material evidence and arguments have been presented, and any interim or partial Awards have been issued, the Arbitrator shall declare the Hearing closed. The Arbitrator may defer the closing of the Hearing until a date determined by the Arbitrator in order to permit the Parties to submit post-Hearing briefs, which may be in the form of a letter, and/or to make closing arguments. If post-Hearing briefs are to be submitted or closing arguments are to be made, the Hearing shall be deemed closed upon receipt by the Arbitrator of such briefs or at the conclusion of such closing arguments, whichever is later.

(i) At any time before the Award is rendered, the Arbitrator may, *sua sponte* or on application of a Party for good cause shown, reopen the Hearing. If the Hearing is reopened, the time to render the Award shall be calculated from the date the reopened Hearing is declared closed by the Arbitrator.

(j) The Arbitrator may proceed with the Hearing in the absence of a Party that, after receiving notice of the Hearing pursuant to Rule 19, fails to attend. The Arbitrator may not render an Award solely on the basis of the default or absence of the Party, but shall require any Party seeking relief to submit such evidence as the Arbitrator may require for the rendering of an Award. If the Arbitrator reasonably believes that a Party will not attend the Hearing, the Arbitrator may schedule the Hearing as a telephonic Hearing and may receive the evidence necessary to render an Award by affidavit. The notice of Hearing shall specify if it will be in person or telephonic.

(k) Any Party may arrange for a stenographic or other record to be made of the Hearing and shall inform the other Parties in advance of the Hearing.

(i) The requesting Party shall bear the cost of such stenographic record. If all other Parties agree to share the cost of the stenographic record, it shall be made available to the Arbitrator and may be used in the proceeding.

(ii) If there is no agreement to share the cost of the stenographic record, it may not be provided to the Arbitrator

and may not be used in the proceeding, unless the Party arranging for the stenographic record agrees to provide access to the stenographic record either at no charge or on terms that are acceptable to the Parties and the reporting service.

(iii) If the Parties agree to the Optional Arbitration Appeal Procedure (Rule 34), they shall, if possible, ensure that a stenographic or other record is made of the Hearing and shall share the cost of that record.

(iv) The Parties may agree that the cost of the stenographic record shall or shall not be allocated by the Arbitrator in the Award.

Rule 23. Waiver of Hearing

The Parties may agree to waive the oral Hearing and submit the dispute to the Arbitrator for an Award based on written submissions and other evidence as the Parties may agree.

Rule 24. Awards

(a) The Arbitrator shall render a Final Award or a Partial Final Award within thirty (30) calendar days after the date of the close of the Hearing, as defined in Rule 22(h) or (i), or, if a Hearing has been waived, within thirty (30) calendar days after the receipt by the Arbitrator of all materials specified by the Parties, except (1) by the agreement of the Parties; (2) upon good cause for an extension of time to render the Award; or (3) as provided in Rule 22(i). The Arbitrator shall provide the Final Award or the Partial Final Award to JAMS for issuance in accordance with this Rule.

(b) Where a panel of Arbitrators has heard the dispute, the decision and Award of a majority of the panel shall constitute the Arbitration Award.

(c) In determining the merits of the dispute, the Arbitrator shall be guided by the rules of law agreed upon by the Parties. In the absence of such agreement, the Arbitrator shall be guided by the rules of law and equity that he or she deems to be most appropriate. The Arbitrator may grant any remedy or relief that is just and equitable and within the scope of the Parties' agreement, including, but not limited to, specific performance of a contract or any other equitable or legal remedy.

(d) In addition to a Final Award or Partial Final Award, the Arbitrator may make other decisions, including interim or partial rulings, orders and Awards.

(e) Interim Measures. The Arbitrator may grant whatever interim measures are deemed necessary, including injunctive relief and measures for the protection or conservation of property and disposition of disposable goods. Such interim measures may take the form of an interim or Partial Final Award, and the Arbitrator may require security for the costs of such measures. Any recourse by a Party to a court for interim or provisional relief shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

(f) The Award of the Arbitrator may allocate Arbitration fees and Arbitrator compensation and expenses, unless such an allocation is expressly prohibited by the Parties' Agreement. (Such a prohibition may not limit the power of the Arbitrator to allocate Arbitration fees and Arbitrator compensation and expenses pursuant to Rule 31(c).)

(g) The Award of the Arbitrator may allocate attorneys' fees and expenses and interest (at such rate and from such date as the Arbitrator may deem appropriate) if provided by the Parties' Agreement or allowed by applicable law. When the Arbitrator is authorized to award attorneys' fees and must determine the reasonable amount of such fees, he or she may consider whether the failure of a Party to cooperate reasonably in the discovery process and/or comply with the Arbitrator's discovery orders caused delay to the proceeding or additional costs to the other Parties.

(h) The Award shall consist of a written statement signed by the Arbitrator regarding the disposition of each claim and the relief, if any, as to each claim. Unless all Parties agree otherwise, the Award shall also contain a concise written statement of the reasons for the Award.

(i) After the Award has been rendered, and provided the Parties have complied with Rule 31, the Award shall be issued by serving copies on the Parties. Service may be made by U.S. mail. It need not be sent certified or registered.

(j) Within seven (7) calendar days after service of a Partial Final Award or Final Award by JAMS, any Party may serve upon the other Parties and on JAMS a request that the Arbitrator correct any computational, typographical or other similar error in an Award (including the reallocation of fees pursuant to Rule 31(c) or on account of the effect of an offer to allow judgment), or the Arbitrator may *sua sponte* propose to correct such errors in an Award. A Party opposing such correction shall have seven (7) calendar days thereafter in which to file any objection. The Arbitrator

may make any necessary and appropriate corrections to the Award within twenty-one (21) calendar days of receiving a request or fourteen (14) calendar days after his or her proposal to do so. The Arbitrator may extend the time within which to make corrections upon good cause. The corrected Award shall be served upon the Parties in the same manner as the Award.

(k) The Award is considered final, for purposes of either the Optional Arbitration Appeal Procedure pursuant to Rule 34 or a judicial proceeding to enforce, modify or vacate the Award pursuant to Rule 25, fourteen (14) calendar days after service is deemed effective if no request for a correction is made, or as of the effective date of service of a corrected Award.

Rule 25. Enforcement of the Award

Proceedings to enforce, confirm, modify or vacate an Award will be controlled by and conducted in conformity with the Federal Arbitration Act, 9 U.S.C. Sec 1, *et seq.*, or applicable state law. The Parties to an Arbitration under these Rules shall be deemed to have consented that judgment upon the Award may be entered in any court having jurisdiction thereof.

Rule 26. Confidentiality and Privacy

(a) JAMS and the Arbitrator shall maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing, except as necessary in connection with a judicial challenge to or enforcement of an Award, or unless otherwise required by law or judicial decision.

(b) The Arbitrator may issue orders to protect the confidentiality of proprietary information, trade secrets or other sensitive information.

(c) Subject to the discretion of the Arbitrator or agreement of the Parties, any person having a direct interest in the Arbitration may attend the Arbitration Hearing. The Arbitrator may exclude any non-Party from any part of a Hearing.

Rule 27. Waiver

(a) If a Party becomes aware of a violation of or failure to comply with these Rules and fails promptly to object in writing, the objection will be deemed waived, unless the Arbitrator determines that waiver will cause substantial injustice or hardship.

(b) If any Party becomes aware of information that could be the basis of a challenge for cause to the continued service of the Arbitrator, such challenge must be made promptly, in writing, to the Arbitrator or JAMS. Failure to do so shall constitute a waiver of any objection to continued service by the Arbitrator.

Rule 28. Settlement and Consent Award

(a) The Parties may agree, at any stage of the Arbitration process, to submit the case to JAMS for mediation. The JAMS mediator assigned to the case may not be the Arbitrator or a member of the Appeal Panel, unless the Parties so agree, pursuant to Rule 28(b).

(b) The Parties may agree to seek the assistance of the Arbitrator in reaching settlement. By their written agreement to submit the matter to the Arbitrator for settlement assistance, the Parties will be deemed to have agreed that the assistance of the Arbitrator in such settlement efforts will not disqualify the Arbitrator from continuing to serve as Arbitrator if settlement is not reached; nor shall such assistance be argued to a reviewing court as the basis for vacating or modifying an Award.

(c) If, at any stage of the Arbitration process, all Parties agree upon a settlement of the issues in dispute and request the Arbitrator to embody the agreement in a Consent Award, the Arbitrator shall comply with such request, unless the Arbitrator believes the terms of the agreement are illegal or undermine the integrity of the Arbitration process. If the Arbitrator is concerned about the possible consequences of the proposed Consent Award, he or she shall inform the Parties of that concern and may request additional specific information from the Parties regarding the proposed Consent Award. The Arbitrator may refuse to enter the proposed Consent Award and may withdraw from the case.

Rule 29. Sanctions

The Arbitrator may order appropriate sanctions for failure of a Party to comply with its obligations under any of these Rules or with an order of the Arbitrator. These sanctions may include, but are not limited to, assessment of Arbitration fees and Arbitrator compensation and expenses; assessment of any other costs occasioned by the actionable conduct, including reasonable attorneys' fees; exclusion of certain evidence; drawing adverse inferences; or, in extreme cases, determining an issue or issues submitted to Arbitration adversely to the Party that has failed to comply.

Rule 30. Disqualification of the Arbitrator as a Witness or Party and Exclusion of Liability

(a) The Parties may not call the Arbitrator, the Case Manager or any other JAMS employee or agent as a witness or as an expert in any pending or subsequent litigation or other proceeding involving the Parties and relating to the dispute that is the subject of the Arbitration. The Arbitrator, Case Manager and other JAMS employees and agents are also incompetent to testify as witnesses or experts in any such proceeding.

(b) The Parties shall defend and/or pay the cost (including any attorneys' fees) of defending the Arbitrator, Case Manager and/or JAMS from any subpoenas from outside parties arising from the Arbitration.

(c) The Parties agree that neither the Arbitrator, nor the Case Manager, nor JAMS is a necessary Party in any litigation or other proceeding relating to the Arbitration or the subject matter of the Arbitration, and neither the Arbitrator, nor the Case Manager, nor JAMS, including its employees or agents, shall be liable to any Party for any act or omission in connection with any Arbitration conducted under these Rules, including, but not limited to, any disqualification of or recusal by the Arbitrator.

Rule 31. Fees

(a) Each Party shall pay its *pro rata* share of JAMS fees and expenses as set forth in the JAMS fee schedule in effect at the time of the commencement of the Arbitration, unless the Parties agree on a different allocation of fees and expenses. JAMS' agreement to render services is jointly with the Party and the attorney or other representative of the Party in the Arbitration. The non-payment of fees may result in an administrative suspension of the case in accordance with Rule 6(c).

(b) JAMS requires that the Parties deposit the fees and expenses for the Arbitration from time to time during the course of the proceedings and prior to the Hearing. The Arbitrator may preclude a Party that has failed to deposit its *pro rata* or agreed-upon share of the fees and expenses from offering evidence of any affirmative claim at the Hearing.

(c) The Parties are jointly and severally liable for the payment of JAMS Arbitration fees and Arbitrator compensation

and expenses. In the event that one Party has paid more than its share of such fees, compensation and expenses, the Arbitrator may award against any other Party any such fees, compensation and expenses that such Party owes with respect to the Arbitration.

(d) Entities whose interests are not adverse with respect to the issues in dispute shall be treated as a single Party for purposes of JAMS' assessment of fees. JAMS shall determine whether the interests between entities are adverse for purpose of fees, considering such factors as whether the entities are represented by the same attorney and whether the entities are presenting joint or separate positions at the Arbitration.

Rule 32. Bracketed (or High-Low) Arbitration Option

(a) At any time before the issuance of the Arbitration Award, the Parties may agree, in writing, on minimum and maximum amounts of damages that may be awarded on each claim or on all claims in the aggregate. The Parties shall promptly notify JAMS and provide to JAMS a copy of their written agreement setting forth the agreed-upon minimum and maximum amounts.

(b) JAMS shall not inform the Arbitrator of the agreement to proceed with this option or of the agreed-upon minimum and maximum levels without the consent of the Parties.

(c) The Arbitrator shall render the Award in accordance with Rule 24.

(d) In the event that the Award of the Arbitrator is between the agreed-upon minimum and maximum amounts, the Award shall become final as is. In the event that the Award is below the agreed-upon minimum amount, the final Award issued shall be corrected to reflect the agreed-upon minimum amount. In the event that the Award is above the agreed-upon maximum amount, the final Award issued shall be corrected to reflect the agreed-upon maximum amount.

Rule 33. Final Offer (or Baseball) Arbitration Option

(a) Upon agreement of the Parties to use the option set forth in this Rule, at least seven (7) calendar days before the Arbitration Hearing, the Parties shall exchange and provide to JAMS written proposals for the amount of money damages they would offer or demand, as applicable, and

that they believe to be appropriate based on the standard set forth in Rule 24(c). JAMS shall promptly provide copies of the Parties' proposals to the Arbitrator, unless the Parties agree that they should not be provided to the Arbitrator. At any time prior to the close of the Arbitration Hearing, the Parties may exchange revised written proposals or demands, which shall supersede all prior proposals. The revised written proposals shall be provided to JAMS, which shall promptly provide them to the Arbitrator, unless the Parties agree otherwise.

(b) If the Arbitrator has been informed of the written proposals, in rendering the Award, the Arbitrator shall choose between the Parties' last proposals, selecting the proposal that the Arbitrator finds most reasonable and appropriate in light of the standard set forth in Rule 24(c). This provision modifies Rule 24(h) in that no written statement of reasons shall accompany the Award.

(c) If the Arbitrator has not been informed of the written proposals, the Arbitrator shall render the Award as if pursuant to Rule 24, except that the Award shall thereafter be corrected to conform to the closest of the last proposals and the closest of the last proposals will become the Award.

(d) Other than as provided herein, the provisions of Rule 24 shall be applicable.

Rule 34. Optional Arbitration Appeal Procedure

The Parties may agree at any time to the JAMS Optional Arbitration Appeal Procedure. All Parties must agree in writing for such procedure to be effective. Once a Party has agreed to the Optional Arbitration Appeal Procedure, it cannot unilaterally withdraw from it, unless it withdraws, pursuant to Rule 13, from the Arbitration.

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JAMS Streamlined Arbitration Rules & Procedures

Effective July 1, 2014

JAMS STREAMLINED ARBITRATION RULES & PROCEDURES

JAMS provides arbitration and mediation services worldwide. We resolve some of the world's largest, most complex and contentious disputes, utilizing JAMS Rules & Procedures as well as the rules of other domestic and international arbitral institutions.

JAMS arbitrators and mediators are full-time neutrals who come from the ranks of retired state and federal judges and prominent attorneys. These highly trained, experienced ADR professionals are dedicated to the highest ethical standards of conduct.

Parties wishing to write a pre-dispute JAMS arbitration clause into their agreement should review the sample arbitration clauses on pages 3 and 4. These clauses may be modified to tailor the arbitration process to meet the parties' individual needs.

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Administrative Fees

For two-party matters, JAMS charges a $1,500 Filing Fee, to be paid by the party initiating the Arbitration. JAMS also charges a $1,500 Filing Fee for counterclaims. For matters involving three or more parties, the Filing Fee is $2,000. A Case Management Fee of 12% will be assessed against all Professional Fees, including time spent for hearings, pre- and post-hearing reading and research and award preparation.

JAMS neutrals set their own hourly, partial and full-day rates. For information on individual neutrals' rates and the administrative fees, please contact JAMS at 800.352.5267. The fee structure is subject to change.

Standard Arbitration Clauses Referring to the JAMS Streamlined Arbitration Rules

Standard Commercial Arbitration Clause*

Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in (insert the desired place of arbitration), before (one) (three) arbitrator(s). The arbitration shall be administered by JAMS pursuant to its

Streamlined Arbitration Rules & Procedures (Comprehensive Arbitration Rules & Procedures). Judgment on the Award may be entered in any court having jurisdiction. This clause shall not preclude parties from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction.

(Optional) Allocation of Fees and Costs: The arbitrator may, in the Award, allocate all or part of the costs of the arbitration, including the fees of the arbitrator and the reasonable attorneys' fees of the prevailing party.

Sometimes contracting parties may want their agreement to allow a choice of provider organizations (JAMS being one) that can be used if a dispute arises. The following clause permits a choice between JAMS or another provider organization at the option of the first party to file the arbitration.

Standard Commercial Arbitration Clause Naming JAMS or Another Provider*

Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in (insert the desired place of arbitration), before (one) (three) arbitrator(s). At the option of the first party to file an arbitration, the arbitration shall be administered either by JAMS pursuant to its (Streamlined Arbitration Rules & Procedures) (Comprehensive Arbitration Rules & Procedures), or by (name an alternate provider) pursuant to its (identify the rules that will govern). Judgment on the Award may be entered in any court having jurisdiction. This clause shall not preclude parties from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction.

(Optional) Allocation of Fees and Costs: The arbitrator may, in the Award, allocate all or part of the costs of the arbitration, including the fees of the arbitrator and the reasonable attorneys' fees of the prevailing party.

*The drafter should select the desired option from those provided in the parentheses.

All of the JAMS Rules, including the Streamlined Arbitration Rules set forth below, can be accessed at the JAMS website: **www.jamsadr.com/rules-clauses.**

JAMS STREAMLINED ARBITRATION RULES & PROCEDURES

Rule 1. Scope of Rules

(a) The JAMS Streamlined Arbitration Rules and Procedures ("Rules") govern binding Arbitrations of disputes or claims that are administered by JAMS and in which the Parties agree to use these Rules or, in the absence of such agreement, no disputed claim or counterclaim exceeds $250,000, not including interest or attorneys' fees, unless other Rules are prescribed.

(b) The Parties shall be deemed to have made these Rules a part of their Arbitration agreement ("Agreement") whenever they have provided for Arbitration by JAMS under its Streamlined Rules or for Arbitration by JAMS without specifying any particular JAMS Rules and the disputes or claims meet the criteria of the first paragraph of this Rule.

(c) The authority and duties of JAMS as prescribed in the Agreement of the Parties and in these Rules shall be carried out by the JAMS National Arbitration Committee ("NAC") or the office of the General Counsel or their designees.

(d) JAMS may, in its discretion, assign the administration of an Arbitration to any of its Resolution Centers.

(e) The term "Party" as used in these Rules includes Parties to the Arbitration and their counsel or representatives.

(f) "Electronic filing" (e-file) means the electronic transmission of documents to and from JAMS and other Parties for the purpose of filing via the Internet. "Electronic service" (e-service) means the electronic transmission of documents via JAMS Electronic Filing System to a Party, attorney or representative under these Rules.

Rule 2. Party Self-Determination

(a) The Parties may agree on any procedures not specified herein or in lieu of these Rules that are consistent with the applicable law and JAMS policies (including, without limitation, Rules 12(j), 25 and 26). The Parties shall promptly notify JAMS of any such Party-agreed procedures and shall confirm such procedures in writing. The Party-agreed procedures shall be enforceable as if contained in these Rules.

(b) When an Arbitration Agreement provides that the arbitration will be non-administered or administered by an entity other than JAMS and/or conducted in accordance with rules other than JAMS rules, the Parties may subsequently agree to modify that agreement to provide that the arbitration will be administered by JAMS and/or conducted in accordance with JAMS rules.

Rule 3. Amendment of Rules

JAMS may amend these Rules without notice. The Rules in effect on the date of the commencement of an Arbitration (as defined in Rule 5) shall apply to that Arbitration, unless the Parties have agreed upon another version of the Rules.

Rule 4. Conflict with Law

If any of these Rules, or modification of these Rules agreed to by the Parties, is determined to be in conflict with a provision of applicable law, the provision of law will govern over the Rule in conflict, and no other Rule will be affected.

Rule 5. Commencing an Arbitration and Service

(a) The Arbitration is deemed commenced when JAMS issues a Commencement Letter based upon the existence of one of the following:

(i) A post-dispute Arbitration Agreement fully executed by all Parties specifying JAMS administration or use of any JAMS Rules; or

(ii) A pre-dispute written contractual provision requiring the Parties to arbitrate the dispute or claim specifying JAMS administration or use of any JAMS Rules or that the Parties agree shall be administered by JAMS; or

(iii) A written confirmation of an oral agreement of all Parties to participate in an Arbitration administered by JAMS or conducted pursuant to any JAMS Rules, confirmed in writing by the Parties; or

(iv) The Respondent's failure to timely object to JAMS administration; or

(v) A copy of a court order compelling Arbitration at JAMS.

(b) The issuance of the Commencement Letter confirms that the requirements for commencement have been met, that JAMS has received all payments required under the applicable fee schedule and that the Claimant has provided JAMS with contact information for all Parties along with evidence that the Demand for Arbitration has been served on all Parties.

(c) If a Party that is obligated to arbitrate in accordance with subparagraph (a) of this Rule fails to agree to participate in the Arbitration process, JAMS shall confirm in writing that Party's failure to respond or participate, and, pursuant to Rule 14, the Arbitrator shall schedule, and provide appropriate notice of, a Hearing or other opportunity for the Party demanding the Arbitration to demonstrate its entitlement to relief.

(d) The date of commencement of the Arbitration is the date of the Commencement Letter but is not intended to be applicable to any legal requirements such as the statute of limitations, any contractual limitations period or claims notice requirements. The term "commencement," as used in this Rule, is intended only to pertain to the operation of this and other Rules (such as Rule 3, 10(a) and 26(a)).

(e) Service by a Party under these Rules is effected by providing one signed copy of the document to each Party and two copies to JAMS. Service may be made by hand-delivery, overnight delivery service or U.S. mail. Service by any of these means is considered effective upon the date of deposit of the document. In computing any period of time prescribed or allowed by these Rules for a Party to do some act within a prescribed period after the service of a notice or other paper on the Party and the notice or paper is served on the Party only by U.S. mail, three (3) calendar days shall be added to the prescribed period.

(f) Electronic Filing. The Arbitrator may at any time require electronic filing and service of documents in an Arbitration. If an Arbitrator requires electronic filing, the Parties shall maintain and regularly monitor a valid, usable and live email address for the receipt of all documents filed through JAMS Electronic Filing System. Any document

filed electronically shall be considered as filed with JAMS when the transmission to JAMS Electronic Filing System is complete. Any document e-filed by 11:59 p.m. (of the sender's time zone) shall be deemed filed on that date. Upon completion of filing, JAMS Electronic Filing System shall issue a confirmation receipt that includes the date and time of receipt. The confirmation receipt shall serve as proof of filing.

Every document electronically filed or served shall be deemed to have been signed by the Arbitrator, Case Manager, attorney or declarant who submits the document to JAMS Electronic Filing System, and shall bear the typed name, address and telephone number of a signing attorney. Typographical signatures shall be treated as personal signatures for all purposes under these Rules. Documents containing signatures of third parties (i.e., unopposed motions, affidavits, stipulations, etc.) may also be filed electronically by indicating that the original signatures are maintained by the filing Party in paper format.

Delivery of e-service documents through JAMS Electronic Filing System to other registered users shall be considered as valid and effective service and shall have the same legal effect as an original paper document. Recipients of e-service documents shall access their documents through JAMS Electronic Filing System. E-service shall be deemed complete when the Party initiating e-service completes the transmission of the electronic document(s) to JAMS Electronic Filing System for e-filing and/or e-service. Upon actual or constructive receipt of the electronic document(s) by the Party to be served, a Certificate of Electronic Service shall be issued by JAMS Electronic Filing System to the Party initiating e-service, and that Certificate shall serve as proof of service. Any Party who ignores or attempts to refuse e-service shall be deemed to have received the electronic document(s) 72 hours following the transmission of the electronic document(s) to JAMS Electronic Filing System.

If an electronic filing or service does not occur because of (1) an error in the transmission of the document to JAMS Electronic Filing System or served Party that was unknown to the sending Party; (2) a failure to process the electronic document when received by JAMS Electronic Filing System; (3) the Party was erroneously excluded from the service list; or (4) other technical problems experienced by the filer, the Arbitrator or JAMS may, for good cause shown, permit the document to be filed *nunc pro tunc* to the date it was first attempted to be sent electronically. Or, in the case of

service, the Party shall, absent extraordinary circumstances, be entitled to an order extending the date for any response or the period within which any right, duty or other act must be performed.

Rule 6. Preliminary and Administrative Matters

(a) JAMS may convene, or the Parties may request, administrative conferences to discuss any procedural matter relating to the administration of the Arbitration.

(b) If no Arbitrator has yet been appointed, at the request of a Party and in the absence of Party agreement, JAMS may determine the location of the Hearing, subject to Arbitrator review. In determining the location of the Hearing, such factors as the subject matter of the dispute, the convenience of the Parties and witnesses, and the relative resources of the Parties shall be considered.

(c) If, at any time, any Party has failed to pay fees or expenses in full, JAMS may order the suspension or termination of the proceedings. JAMS may so inform the Parties in order that one of them may advance the required payment. If one Party advances the payment owed by a non-paying Party, the Arbitration shall proceed, and the Arbitrator may allocate the non-paying Party's share of such costs, in accordance with Rules 19(e) and 26(c). An administrative suspension shall toll any other time limits contained in these Rules or the Parties' Agreement.

(d) JAMS does not maintain an official record of documents filed in the Arbitration. If the Parties wish to have any documents returned to them, they must advise JAMS in writing within thirty (30) calendar days of the conclusion of the Arbitration. If special arrangements are required regarding file maintenance or document retention, they must be agreed to in writing, and JAMS reserves the right to impose an additional fee for such special arrangements. Documents that are submitted for e-filing are retained for thirty (30) calendar days following the conclusion of the Arbitration.

(e) Unless the Parties' Agreement or applicable law provides otherwise, JAMS may consolidate Arbitrations in the following instances:

(i) If a Party files more than one Arbitration with JAMS, JAMS may consolidate the Arbitrations into a single Arbitration.

(ii) Where a Demand or Demands for Arbitration is or are submitted naming Parties already involved in another Arbitration or Arbitrations pending under these Rules, JAMS may decide that the new case or cases shall be consolidated into one or more of the pending proceedings and referred to one of the Arbitrators already appointed.

(iii) Where a Demand or Demands for Arbitration is or are submitted naming parties that are not identical to the Parties in the existing Arbitration or Arbitrations, JAMS may decide that the new case or cases shall be consolidated into one or more of the pending proceedings and referred to one of the Arbitrators already appointed.

When rendering its decision, JAMS will take into account all circumstances, including the links between the cases and the progress already made in the existing Arbitrations.

Unless applicable law provides otherwise, where JAMS decides to consolidate a proceeding into a pending Arbitration, the Parties to the consolidated case or cases will be deemed to have waived their right to designate an Arbitrator as well as any contractual provision with respect to the site of the Arbitration.

(f) Where a third party seeks to participate in an Arbitration already pending under these Rules or where a Party to an Arbitration under these Rules seeks to compel a third party to participate in a pending Arbitration, the Arbitrator shall determine such request, taking into account all circumstances he or she deems relevant and applicable.

Rule 7. Notice of Claims

(a) Each Party shall afford all other Parties reasonable and timely notice of its claims, affirmative defenses or counterclaims. Any such notice shall include a short statement of its factual basis. No claim, remedy, counterclaim, or affirmative defense will be considered by the Arbitrator in the absence of such prior notice to the other Parties, unless the Arbitrator determines that no Party has been unfairly prejudiced by such lack of formal notice or all Parties agree that such consideration is appropriate notwithstanding the lack of prior notice.

(b) Claimant's notice of claims is the Demand for Arbitration referenced in Rule 5. It shall include a statement of the remedies sought. The Demand for Arbitration may attach and incorporate a copy of a Complaint previously filed with a court. In the latter case, Claimant may accompany

the Complaint with a copy of any Answer to that Complaint filed by any Respondent.

(c) Within seven (7) calendar days of service of the notice of claim, a Respondent may submit to JAMS and serve on other Parties a response and a statement of any affirmative defenses, including jurisdictional challenges, or counterclaims it may have.

(d) Within seven (7) calendar days of service of a counterclaim, a Claimant may submit to JAMS and serve on other Parties a response to such counterclaim and any affirmative defenses, including jurisdictional challenges, it may have.

(e) Any claim or counterclaim to which no response has been served will be deemed denied.

(f) Jurisdictional challenges under Rule 8 shall be deemed waived, unless asserted in a response to a Demand or counterclaim or promptly thereafter, when circumstances first suggest an issue of arbitrability.

Rule 8. Interpretation of Rules and Jurisdiction Challenges

(a) Once appointed, the Arbitrator shall resolve disputes about the interpretation and applicability of these Rules and conduct of the Arbitration Hearing. The resolution of the issue by the Arbitrator shall be final.

(b) Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.

(c) Disputes concerning the appointment of the Arbitrator shall be resolved by JAMS.

(d) The Arbitrator may, upon a showing of good cause or *sua sponte*, when necessary to facilitate the Arbitration, extend any deadlines established in these Rules, provided that the time for rendering the Award may only be altered in accordance with Rule 19.

Rule 9. Representation

(a) The Parties, whether natural persons or legal entities such as corporations, LLCs or partnerships, may be represented by counsel or any other person of the Party's choice. Each Party shall give prompt written notice to JAMS and the other Parties of the name, address, telephone and fax numbers and email address of its representative. The representative of a Party may act on the Party's behalf in complying with these Rules.

(b) Changes in Representation. A Party shall give prompt written notice to the Case Manager and the other Parties of any change in its representation, including the name, address, telephone and fax numbers and email address of the new representative. Such notice shall state that the written consent of the former representative, if any, and of the new representative, has been obtained and shall state the effective date of the new representation.

Rule 10. Withdrawal from Arbitration

(a) No Party may terminate or withdraw from an Arbitration after the issuance of the Commencement Letter (see Rule 5), except by written agreement of all Parties to the Arbitration.

(b) A Party that asserts a claim or counterclaim may unilaterally withdraw that claim or counterclaim without prejudice by serving written notice on the other Parties and the Arbitrator. However, the opposing Parties may, within seven (7) calendar days of service of such notice, request that the Arbitrator condition the withdrawal upon such terms as he or she may direct.

Rule 11. *Ex Parte* Communications

No Party will have any *ex parte* communication with the Arbitrator regarding any issue related to the Arbitration. The Arbitrator may authorize any Party to communicate directly with the Arbitrator by email or other written means as long as copies are simultaneously forwarded to the JAMS Case Manager and the other Parties.

Rule 12. Arbitrator Selection, Disclosures and Replacement

(a) JAMS Streamlined Arbitrations will be conducted by one neutral Arbitrator.

(b) Unless the Arbitrator has been previously selected by agreement of the Parties, the Case Manager may attempt to facilitate agreement among the Parties regarding selection of the Arbitrator.

(c) If the Parties do not agree on an Arbitrator, JAMS shall send the Parties a list of at least three (3) Arbitrator candidates. JAMS shall also provide each Party with a brief description of the background and experience of each Arbitrator candidate. JAMS may replace any or all names on the list of Arbitrator candidates for reasonable cause at any time before the Parties have submitted their choice pursuant to subparagraph (d) below.

(d) Within seven (7) calendar days of service by the Parties of the list of names, each Party may strike one (1) name and shall rank the remaining Arbitrator candidates in order of preference. The remaining Arbitrator candidate with the highest composite ranking shall be appointed the Arbitrator. JAMS may grant a reasonable extension of the time to strike and rank the Arbitrator candidates to any Party without the consent of the other Parties.

(e) If this process does not yield an Arbitrator, JAMS shall designate the Arbitrator.

(f) If a Party fails to respond to a list of Arbitrator candidates within seven (7) calendar days after its service, or fails to respond according to the instructions provided by JAMS, JAMS shall deem that Party to have accepted all of the Arbitrator candidates.

(g) Entities whose interests are not adverse with respect to the issues in dispute shall be treated as a single Party for purposes of the Arbitrator selection process. JAMS shall determine whether the interests between entities are adverse for purposes of Arbitrator selection, considering such factors as whether the entities are represented by the same attorney and whether the entities are presenting joint or separate positions at the Arbitration.

(h) If, for any reason, the Arbitrator who is selected is unable to fulfill the Arbitrator's duties, a successor Arbitrator shall be chosen in accordance with this Rule. JAMS will make the final determination as to whether an Arbitrator is unable to fulfill his or her duties, and that decision shall be final.

(i) Any disclosures regarding the selected Arbitrator shall be made as required by law or within ten (10) calendar

days from the date of appointment. Such disclosures may be provided in electronic format, provided that JAMS will produce a hard copy to any Party that requests it. The Parties and their representatives shall disclose to JAMS any circumstances likely to give rise to justifiable doubt as to the Arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the Arbitration or any past or present relationship with the Parties or their representatives. The obligation of the Arbitrator, the Parties and their representatives to make all required disclosures continues throughout the Arbitration process.

(j) At any time during the Arbitration process, a Party may challenge the continued service of an Arbitrator for cause. The challenge must be based upon information that was not available to the Parties at the time the Arbitrator was selected. A challenge for cause must be in writing and exchanged with opposing Parties, who may respond within seven (7) days of service of the challenge. JAMS shall make the final determination as to such challenge. Such determination shall take into account the materiality of the facts and any prejudice to the Parties. That decision will be final.

Rule 13. Exchange of Information

(a) The Parties shall cooperate in good faith in the voluntary and informal exchange of all non-privileged documents and information (including electronically stored information ("ESI")) relevant to the dispute or claim, including copies of all documents in their possession or control on which they rely in support of their positions or that they intend to introduce as exhibits at the Arbitration Hearing, the names of all individuals with knowledge about the dispute or claim and the names of all experts who may be called upon to testify or whose reports may be introduced at the Arbitration Hearing. The Parties and the Arbitrator will make every effort to conclude the document and information exchange process within fourteen (14) calendar days after all pleadings or notices of claims have been received. The necessity of additional information exchange shall be determined by the Arbitrator based upon the reasonable need for the requested information, the availability of other discovery options and the burdensomeness of the request on the opposing Parties and the witness.

(b) As they become aware of new documents or information, including experts who may be called upon to testify, all Parties continue to be obligated to provide relevant, non-

privileged documents, to supplement their identification of witnesses and experts and to honor any informal agreements or understandings between the Parties regarding documents or information to be exchanged. Documents that were not previously exchanged, or witnesses and experts that were not previously identified, may not be considered by the Arbitrator at the Hearing, unless agreed by the Parties or upon a showing of good cause.

(c) The Parties shall promptly notify JAMS when a dispute exists regarding discovery issues. A conference shall be arranged with the Arbitrator, either by telephone or in person, and the Arbitrator shall decide the dispute.

Rule 14. Scheduling and Location of Hearing

(a) The Arbitrator, after consulting with the Parties that have appeared, shall determine the date, time and location of the Hearing. The Arbitrator and the Parties shall attempt to schedule consecutive Hearing days if more than one day is necessary.

(b) If a Party has failed to participate in the Arbitration process, the Arbitrator may set the Hearing without consulting with that Party. The non-participating Party shall be served with a Notice of Hearing at least thirty (30) calendar days prior to the scheduled date, unless the law of the relevant jurisdiction allows for, or the Parties have agreed to, shorter notice.

(c) The Arbitrator, in order to hear a third-party witness, or for the convenience of the Parties or the witnesses, may conduct the Hearing at any location. Any JAMS Resolution Center may be designated a Hearing location for purposes of the issuance of a subpoena or subpoena *duces tecum* to a third-party witness.

Rule 15. Pre-Hearing Submissions

(a) Except as set forth in any scheduling order that may be adopted, at least seven (7) calendar days before the Arbitration Hearing, the Parties shall file with JAMS and serve and exchange (1) a list of the witnesses they intend to call, including any experts; (2) a short description of the anticipated testimony of each such witness and an estimate of the length of the witness' direct testimony; and (3) a list of all exhibits intended to be used at the Hearing. The Parties should exchange with each other copies of any such exhibits to the extent that they have not been previously exchanged. The Parties should pre-mark exhibits and shall

attempt to resolve any disputes regarding the admissibility of exhibits prior to the Hearing.

(b) The Arbitrator may require that each Party submit a concise written statement of position, including summaries of the facts and evidence a Party intends to present, discussion of the applicable law and the basis for the requested Award or denial of relief sought. The statements, which may be in the form of a letter, shall be filed with JAMS and served upon the other Parties at least seven (7) calendar days before the Hearing date. Rebuttal statements or other pre-Hearing written submissions may be permitted or required at the discretion of the Arbitrator.

Rule 16. Securing Witnesses and Documents for the Arbitration Hearing

At the written request of a Party, all other Parties shall produce for the Arbitration Hearing all specified witnesses in their employ or under their control without need of subpoena. The Arbitrator may issue subpoenas for the attendance of witnesses or the production of documents either prior to or at the Hearing pursuant to this Rule or Rule 14(c). The subpoena or subpoena *duces tecum* shall be issued in accordance with the applicable law. Pre-issued subpoenas may be used in jurisdictions that permit them. In the event a Party or a subpoenaed person objects to the production of a witness or other evidence, the Party or subpoenaed person may file an objection with the Arbitrator, who shall promptly rule on the objection, weighing both the burden on the producing Party and witness and the need of the proponent for the witness or other evidence.

Rule 17. The Arbitration Hearing

(a) The Arbitrator will ordinarily conduct the Arbitration Hearing in the manner set forth in these Rules. The Arbitrator may vary these procedures if it is determined to be reasonable and appropriate to do so.

(b) The Arbitrator shall determine the order of proof, which will generally be similar to that of a court trial.

(c) The Arbitrator shall require witnesses to testify under oath if requested by any Party, or otherwise at the discretion of the Arbitrator.

(d) Strict conformity to the rules of evidence is not required, except that the Arbitrator shall apply applicable

law relating to privileges and work product. The Arbitrator shall consider evidence that he or she finds relevant and material to the dispute, giving the evidence such weight as is appropriate. The Arbitrator may be guided in that determination by principles contained in the Federal Rules of Evidence or any other applicable rules of evidence. The Arbitrator may limit testimony to exclude evidence that would be immaterial or unduly repetitive, provided that all Parties are afforded the opportunity to present material and relevant evidence.

(e) The Arbitrator shall receive and consider relevant deposition testimony recorded by transcript or videotape, provided that the other Parties have had the opportunity to attend and cross-examine. The Arbitrator may in his or her discretion consider witness affidavits or other recorded testimony even if the other Parties have not had the opportunity to cross-examine, but will give that evidence only such weight as he or she deems appropriate.

(f) The Parties will not offer as evidence, and the Arbitrator shall neither admit into the record nor consider, prior settlement offers by the Parties or statements or recommendations made by a mediator or other person in connection with efforts to resolve the dispute being arbitrated, except to the extent that applicable law permits the admission of such evidence.

(g) The Hearing, or any portion thereof, may be conducted telephonically or videographically with the agreement of the Parties or at the discretion of the Arbitrator.

(h) When the Arbitrator determines that all relevant and material evidence and arguments have been presented, and any interim or partial Awards have been issued, the Arbitrator shall declare the Hearing closed. The Arbitrator may defer the closing of the Hearing until a date determined by the Arbitrator, to permit the Parties to submit post-Hearing briefs, which may be in the form of a letter. If post-Hearing briefs are to be submitted, the Hearing shall be deemed closed upon receipt by the Arbitrator of such briefs.

(i) At any time before the Award is rendered, the Arbitrator may, *sua sponte* or upon the application of a Party for good cause shown, reopen the Hearing. If the Hearing is reopened, the time to render the Award shall be calculated from the date the reopened Hearing is declared closed by the Arbitrator.

(j) The Arbitrator may proceed with the Hearing in the absence of a Party that, after receiving notice of the Hearing pursuant to Rule 14, fails to attend. The Arbitrator may not render an Award solely on the basis of the default or absence of the Party, but shall require any Party seeking relief to submit such evidence as the Arbitrator may require for the rendering of an Award. If the Arbitrator reasonably believes that a Party will not attend the Hearing, the Arbitrator may schedule the Hearing as a telephonic Hearing and may receive the evidence necessary to render an Award by affidavit. The notice of Hearing shall specify if it will be in person or telephonic.

(k) Any Party may arrange for a stenographic or other record to be made of the Hearing and shall inform the other Parties in advance of the Hearing.

(i) The requesting Party shall bear the cost of such stenographic record. If all other Parties agree to share the cost of the stenographic record, it shall be made available to the Arbitrator and may be used in the proceeding.

(ii) If there is no agreement to share the cost of the stenographic record, it may not be provided to the Arbitrator and may not be used in the proceeding, unless the Party arranging for the stenographic record agrees to provide access to the stenographic record either at no charge or on terms that are acceptable to the Parties and the reporting service.

(iii) The Parties may agree that the cost of the stenographic record shall or shall not be allocated by the Arbitrator in the Award.

Rule 18. Waiver of Hearing

The Parties may agree to waive oral Hearing and submit the dispute to the Arbitrator for an Award based on written submissions and other evidence as the Parties may agree.

Rule 19. Awards

(a) The Arbitrator shall render a Final Award or Partial Final Award within thirty (30) calendar days after the date of the close of the Hearing as defined in Rule 17(h) or (i), or, if a Hearing has been waived, within thirty (30) calendar days after the receipt by the Arbitrator of all materials specified by the Parties, except (1) by the agreement of the Parties; (2) upon good cause for an extension of time to render the Award; or (3) as provided in Rule 17(i). The Arbitrator shall provide the Final Award or Partial Final Award to JAMS for issuance in accordance with this Rule.

(b) In determining the merits of the dispute, the Arbitrator shall be guided by the rules of law agreed upon by the Parties. In the absence of such agreement, the Arbitrator will be guided by the law or the rules of law that he or she deems to be most appropriate. The Arbitrator may grant any remedy or relief that is just and equitable and within the scope of the Parties' agreement, including, but not limited to, specific performance of a contract or any other equitable or legal remedy.

(c) In addition to a Final Award or Partial Final Award, the Arbitrator may make other decisions, including interim or partial rulings, orders and Awards.

(d) Interim Measures. The Arbitrator may grant whatever interim measures are deemed necessary, including injunctive relief and measures for the protection or conservation of property and disposition of disposable goods. Such interim measures may take the form of an interim or Partial Final Award, and the Arbitrator may require security for the costs of such measures. Any recourse by a Party to a court for interim or provisional relief shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

(e) The Award of the Arbitrator may allocate Arbitration fees and Arbitrator compensation and expenses, unless such an allocation is expressly prohibited by the Parties' Agreement. (Such a prohibition may not limit the power of the Arbitrator to allocate Arbitration fees and Arbitrator compensation and expenses pursuant to Rule 26(c).)

(f) The Award of the Arbitrator may allocate attorneys' fees and expenses and interest (at such rate and from such date as the Arbitrator may deem appropriate) if provided by the Parties' Agreement or allowed by applicable law. When the Arbitrator is authorized to award attorneys' fees and must determine the reasonable amount of such fees, he or she may consider whether the failure of a Party to cooperate reasonably in the discovery process and/or comply with the Arbitrator's discovery orders caused delay to the proceeding or additional costs to the other Parties.

(g) The Award shall consist of a written statement signed by the Arbitrator regarding the disposition of each claim and the relief, if any, as to each claim. Unless all Parties agree otherwise, the Award shall also contain a concise written statement of the reasons for the Award.

(h) After the Award has been rendered, and provided the Parties have complied with Rule 26, the Award shall be issued by serving copies on the Parties. Service may be made by U.S. mail. It need not be sent certified or registered.

(i) Within seven (7) calendar days after service of a Partial Final Award or Final Award by JAMS, any Party may serve upon the other Parties and on JAMS a request that the Arbitrator correct any computational, typographical or other similar error in an Award (including the reallocation of fees pursuant to Rule 26(c) or on account of the effect of an offer to allow judgment), or the Arbitrator may *sua sponte* propose to correct such errors in an Award. A Party opposing such correction shall have seven (7) calendar days thereafter in which to file any objection. The Arbitrator may make any necessary and appropriate corrections to the Award within fourteen (14) calendar days of receiving a request or seven (7) calendar days after his or her proposal to do so. The Arbitrator may extend the time within which to make corrections upon good cause. The corrected Award shall be served upon the Parties in the same manner as the Award.

(j) The Award is considered final, for purposes of judicial proceeding to enforce, modify or vacate the Award pursuant to Rule 20, fourteen (14) calendar days after service is deemed effective if no request for a correction is made, or as of the effective date of service of a corrected Award.

Rule 20. Enforcement of the Award

Proceedings to enforce, confirm, modify or vacate an Award will be controlled by and conducted in conformity with the Federal Arbitration Act, 9 U.S.C. Sec 1, *et. seq.*, or applicable state law. The Parties to an Arbitration under these Rules shall be deemed to have consented that judgment upon the Award may be entered in any court having jurisdiction thereof.

Rule 21. Confidentiality and Privacy

(a) JAMS and the Arbitrator shall maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing, except as necessary in connection with a judicial challenge to or enforcement of an Award, or unless otherwise required by law or judicial decision.

(b) The Arbitrator may issue orders to protect the confidentiality of proprietary information, trade secrets or other sensitive information.

(c) Subject to the discretion of the Arbitrator or agreement of the Parties, any person having a direct interest in the Arbitration may attend the Arbitration Hearing. The Arbitrator may exclude any non-Party from any part of a Hearing.

Rule 22. Waiver

(a) If a Party becomes aware of a violation of or failure to comply with these Rules and fails promptly to object in writing, the objection will be deemed waived, unless the Arbitrator determines that waiver will cause substantial injustice or hardship.

(b) If any Party becomes aware of information that could be the basis of a challenge for cause to the continued service of the Arbitrator, such challenge must be made promptly, in writing, to the Arbitrator or JAMS. Failure to do so shall constitute a waiver of any objection to continued service by the Arbitrator.

Rule 23. Settlement and Consent Award

(a) The Parties may agree, at any stage of the Arbitration process, to submit the case to JAMS for mediation. The JAMS mediator assigned to the case may not be the Arbitrator, unless the Parties so agree, pursuant to Rule 23(b).

(b) The Parties may agree to seek the assistance of the Arbitrator in reaching settlement. By their written agreement to submit the matter to the Arbitrator for settlement assistance, the Parties will be deemed to have agreed that the assistance of the Arbitrator in such settlement efforts will not disqualify the Arbitrator from continuing to serve as Arbitrator if settlement is not reached; nor shall such assistance be argued to a reviewing court as the basis for vacating or modifying an Award.

(c) If, at any stage of the Arbitration process, all Parties agree upon a settlement of the issues in dispute and request the Arbitrator to embody the agreement in a Consent Award, the Arbitrator shall comply with such request, unless the Arbitrator believes the terms of the agreement are illegal or undermine the integrity of the Arbitration process. If the Arbitrator is concerned about the possible consequences of the proposed Consent Award, he or she shall inform the Parties of that concern and may request additional specific information from the Parties regarding the proposed Consent Award. The Arbitrator may refuse to enter the proposed Consent Award and may withdraw from the case.

Rule 24. Sanctions

The Arbitrator may order appropriate sanctions for failure of a Party to comply with its obligations under any of these Rules or with an order of the Arbitrator. These sanctions may include, but are not limited to, assessment of Arbitration fees and Arbitrator compensation and expenses; any other costs occasioned by the actionable conduct, including reasonable attorneys' fees; exclusion of certain evidence; drawing adverse inferences; or, in extreme cases, determining an issue or issues submitted to Arbitration adversely to the Party that has failed to comply.

Rule 25. Disqualification of the Arbitrator as a Witness or Party and Exclusion of Liability

(a) The Parties may not call the Arbitrator, the Case Manager or any other JAMS employee or agent as a witness or as an expert in any pending or subsequent litigation or other proceeding involving the Parties and relating to the dispute that is the subject of the Arbitration. The Arbitrator, Case Manager and other JAMS employees and agents are also incompetent to testify as witnesses or experts in any such proceeding.

(b) The Parties shall defend and/or pay the cost (including any attorneys' fees) of defending the Arbitrator, Case Manager and/or JAMS from any subpoenas from outside parties arising from the Arbitration.

(c) The Parties agree that neither the Arbitrator, nor the Case Manager, nor JAMS is a necessary Party in any litigation or other proceeding relating to the Arbitration or the subject matter of the Arbitration, and neither the Arbitrator, nor the Case Manager, nor JAMS, including its employees or agents, shall be liable to any Party for any act or omission in connection with any Arbitration conducted under these Rules, including, but not limited to, any disqualification of or recusal by the Arbitrator.

Rule 26. Fees

(a) Each Party shall pay its *pro rata* share of JAMS fees and expenses as set forth in the JAMS fee schedule in effect at the time of the commencement of the Arbitration, unless the Parties agree on a different allocation of fees and expenses. JAMS' agreement to render services is jointly with the Party and the attorney or other representative of the Party in the Arbitration. The non-payment of fees may

result in an administrative suspension of the case in accordance with Rule 6(c).

(b) JAMS requires that the Parties deposit the fees and expenses for the Arbitration from time to time during the course of the proceedings and prior to the Hearing. The Arbitrator may preclude a Party that has failed to deposit its *pro rata* or agreed-upon share of the fees and expenses from offering evidence of any affirmative claim at the Hearing.

(c) The Parties are jointly and severally liable for the payment of JAMS Arbitration fees and Arbitrator compensation and expenses. In the event that one Party has paid more than its share of such fees, compensation and expenses, the Arbitrator may Award against any Party any such fees, compensation and expenses that such Party owes with respect to the Arbitration.

(d) Entities whose interests are not adverse with respect to the issues in dispute shall be treated as a single Party for purposes of JAMS' assessment of fees. JAMS shall determine whether the interests between entities are adverse for purpose of fees, considering such factors as whether the entities are represented by the same attorney and whether the entities are presenting joint or separate positions at the Arbitration.

Rule 27. Bracketed (or High-Low) Arbitration Option

(a) At any time before the issuance of the Arbitration Award, the Parties may agree, in writing, on minimum and maximum amounts of damages that may be awarded on each claim or on all claims in the aggregate. The Parties shall promptly notify JAMS and provide to JAMS a copy of their written agreement setting forth the agreed-upon minimum and maximum amounts.

(b) JAMS shall not inform the Arbitrator of the agreement to proceed with this option or of the agreed-upon minimum and maximum levels without the consent of the Parties.

(c) The Arbitrator shall render the Award in accordance with Rule 19.

(d) In the event that the Award of the Arbitrator is between the agreed-upon minimum and maximum amounts, the Award shall become final as is. In the event that the

Award is below the agreed-upon minimum amount, the final Award issued shall be corrected to reflect the agreed-upon minimum amount. In the event that the Award is above the agreed-upon maximum amount, the final Award issued shall be corrected to reflect the agreed-upon maximum amount.

Rule 28. Final Offer (or Baseball) Arbitration Option

(a) Upon agreement of the Parties to use the option set forth in this Rule, at least seven (7) calendar days before the Arbitration Hearing, the Parties shall exchange and provide to JAMS written proposals for the amount of money damages they would offer or demand, as applicable, and that they believe to be appropriate based on the standard set forth in Rule 19(b). JAMS shall promptly provide copies of the Parties' proposals to the Arbitrator, unless the Parties agree that they should not be provided to the Arbitrator. At any time prior to the close of the Arbitration Hearing, the Parties may exchange revised written proposals or demands, which shall supersede all prior proposals. The revised written proposals shall be provided to JAMS, which shall promptly provide them to the Arbitrator, unless the Parties agree otherwise.

(b) If the Arbitrator has been informed of the written proposals, in rendering the Award, the Arbitrator shall choose between the Parties' last proposals, selecting the proposal that the Arbitrator finds most reasonable and appropriate in light of the standard set forth in Rule 19(b). This provision modifies Rule 19(g) in that no written statement of reasons shall accompany the Award.

(c) If the Arbitrator has not been informed of the written proposals, the Arbitrator shall render the Award as if pursuant to Rule 19, except that the Award shall thereafter be corrected to conform to the closest of the last proposals and the closest of the last proposals will become the Award.

(d) Other than as provided herein, the provisions of Rule 19 shall be applicable.

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INTERNATIONAL COURT OF ARBITRATION® | INTERNATIONAL CENTRE FOR ADR | LEADING DISPUTE RESOLUTION WORLDWIDE

ARBITRATION RULES

In force as from 1 March 2017

MEDIATION RULES

In force as from 1 January 2014

INTERNATIONAL CHAMBER OF COMMERCE

503

International Chamber of Commerce (ICC)
33-43 avenue du Président Wilson
75116 Paris, France
www.iccwbo.org

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ARBITRATION RULES

MEDIATION RULES

This booklet contains two discrete but complementary dispute resolution procedures offered by the International Chamber of Commerce (ICC). Arbitration under the ICC Arbitration Rules is a formal procedure leading to a binding decision from a neutral arbitral tribunal, susceptible to enforcement pursuant to both domestic arbitration laws and international treaties such as the 1958 New York Convention. Mediation under the ICC Mediation Rules is a flexible procedure aimed at achieving a negotiated settlement with the help of a neutral facilitator. The two sets of Rules are published together in this booklet in answer to the growing demand for a holistic approach to dispute resolution techniques.

Each set of Rules defines a structured, institutional framework intended to ensure transparency, efficiency and fairness in the dispute resolution process while allowing parties to exercise their choice over many aspects of procedure. Arbitration is administered by the International Court of Arbitration and mediation by the International Centre for ADR. These are the only bodies empowered to administer proceedings under their respective Rules, thereby affording parties the benefit of the experience, expertise and professionalism of a leading international dispute resolution provider.

Drafted by dispute resolution specialists and users representing a wide range of legal traditions, cultures and professions, these Rules provide a modern framework for the conduct of procedures and respond to the needs of international trade today. At the same time, they remain faithful to the ethos and essential features of ICC dispute resolution and, in particular, its suitability for use in any part of the world in proceedings conducted in any language and subject to any law.

Arbitration

The Arbitration Rules are those of 2012, as amended in 2017. They are effective as of 1 March 2017.

The most significant of the 2017 amendments is the introduction of an expedited procedure providing for a streamlined arbitration with a reduced scale of fees. This procedure is automatically applicable in cases where the amount in dispute does not exceed US$ 2 million, unless

the parties decide to opt out. It will apply only to arbitration agreements concluded after 1 March 2017.

One of the important features of the Expedited Procedure Rules is that the ICC Court may appoint a sole arbitrator, even if the arbitration agreement provides otherwise.

The expedited procedure is also available on an opt-in basis for higher-value cases, and will be an attractive answer to users' concerns over time and cost.

To further enhance the efficacy of ICC arbitrations, the time limit for establishing Terms of Reference has been reduced from two months to one month, and there are no Terms of Reference in the expedited procedure.

Under the 2017 Rules, ICC arbitrations will become even more transparent, for the Court will now provide reasons for a wide range of important decisions, if requested by one of the parties. Article 11(4) has been amended to that effect.

Mediation

The Mediation Rules, in force from 2014, reflect modern practice and set clear parameters for the conduct of proceedings, while recognizing and maintaining the need for flexibility. Like the ADR Rules, which they replace, they can be used for conducting other procedures or combinations of procedures that are similarly aimed at an amicable settlement of the dispute, such as conciliation or neutral evaluation.

Parties wishing to have recourse to ICC arbitration, mediation, or both, are encouraged to include an appropriate dispute resolution clause in their agreements. For this purpose, each set of Rules is followed by model clauses, together with guidance on their use and how they may be adjusted to particular needs and circumstances. The recommended clauses include multi-tiered clauses providing for a combination of techniques as well as clauses contemplating a single technique.

Both the Rules and the model clauses are available for use by parties, whether or not members of the ICC. For the convenience of users, they have been translated into several languages and can be downloaded from the ICC website.

ARBITRATION RULES

Rules of Arbitration of the International Chamber of Commerce

In force as from 1 March 2017

ARTICLE 1

International Court of Arbitration

1 The International Court of Arbitration (the "Court") of the International Chamber of Commerce (the "ICC") is the independent arbitration body of the ICC. The statutes of the Court are set forth in Appendix I.

2 The Court does not itself resolve disputes. It administers the resolution of disputes by arbitral tribunals, in accordance with the Rules of Arbitration of the ICC (the "Rules"). The Court is the only body authorized to administer arbitrations under the Rules, including the scrutiny and approval of awards rendered in accordance with the Rules. It draws up its own internal rules, which are set forth in Appendix II (the "Internal Rules").

3 The President of the Court (the "President") or, in the President's absence or otherwise at the President's request, one of its Vice-Presidents shall have the power to take urgent decisions on behalf of the Court, provided that any such decision is reported to the Court at its next session.

4 As provided for in the Internal Rules, the Court may delegate to one or more committees composed of its members the power to take certain decisions, provided that any such decision is reported to the Court at its next session.

5 The Court is assisted in its work by the Secretariat of the Court (the "Secretariat") under the direction of its Secretary General (the "Secretary General").

ARTICLE 2

Definitions

In the Rules:

(i) "arbitral tribunal" includes one or more arbitrators;

(ii) "claimant" includes one or more claimants, "respondent" includes one or more respondents, and "additional party" includes one or more additional parties;

(iii) "party" or "parties" include claimants, respondents or additional parties;

(iv) "claim" or "claims" include any claim by any party against any other party;

(v) "award" includes, *inter alia*, an interim, partial or final award.

ARTICLE 3

Written Notifications or Communications; Time Limits

1 All pleadings and other written communications submitted by any party, as well as all documents annexed thereto, shall be supplied in a number of copies sufficient to provide one copy for each party, plus one for each arbitrator, and one for the Secretariat. A copy of any notification or communication from the arbitral tribunal to the parties shall be sent to the Secretariat.

2 All notifications or communications from the Secretariat and the arbitral tribunal shall be made to the last address of the party or its representative for whom the same are intended, as notified either by the party in question or by the other party. Such notification or communication may be made by delivery against receipt, registered post, courier, email, or any other means of telecommunication that provides a record of the sending thereof.

3 A notification or communication shall be deemed to have been made on the day it was received by the party itself or by its representative, or would have been received if made in accordance with Article 3(2).

4 Periods of time specified in or fixed under the Rules shall start to run on the day following the date a notification or communication is deemed to have been made in accordance with Article 3(3). When the day next following such date is an official holiday, or a non-business day in the country where the notification or communication is deemed to have been made, the period of time shall commence on the first following business day. Official holidays and non-business days are included in the calculation of the period of time. If the last day of the relevant period of time granted is an official holiday or a non-business day in the country where the notification or communication is deemed to have been made, the period of time shall expire at the end of the first following business day.

ARTICLE 4

Request for Arbitration

1 A party wishing to have recourse to arbitration under the Rules shall submit its Request for Arbitration (the "Request") to the Secretariat at any of the offices specified in the Internal Rules. The Secretariat shall notify the claimant and respondent of the receipt of the Request and the date of such receipt.

2 The date on which the Request is received by the Secretariat shall, for all purposes, be deemed to be the date of the commencement of the arbitration.

3 The Request shall contain the following information:

a) the name in full, description, address and other contact details of each of the parties;

b) the name in full, address and other contact details of any person(s) representing the claimant in the arbitration;

c) a description of the nature and circumstances of the dispute giving rise to the claims and of the basis upon which the claims are made;

d) a statement of the relief sought, together with the amounts of any quantified claims and, to the extent possible, an estimate of the monetary value of any other claims;

e) any relevant agreements and, in particular, the arbitration agreement(s);

f) where claims are made under more than one arbitration agreement, an indication of the arbitration agreement under which each claim is made;

g) all relevant particulars and any observations or proposals concerning the number of arbitrators and their choice in accordance with the provisions of Articles 12 and 13, and any nomination of an arbitrator required thereby; and

h) all relevant particulars and any observations or proposals as to the place of the arbitration, the applicable rules of law and the language of the arbitration.

The claimant may submit such other documents or information with the Request as it considers appropriate or as may contribute to the efficient resolution of the dispute.

4 Together with the Request, the claimant shall:

a) submit the number of copies thereof required by Article 3(1); and

b) make payment of the filing fee required by Appendix III ("Arbitration Costs and Fees") in force on the date the Request is submitted.

In the event that the claimant fails to comply with either of these requirements, the Secretariat may fix a time limit within which the claimant must comply, failing which the file shall be closed without prejudice to the claimant's right to submit the same claims at a later date in another Request.

5 The Secretariat shall transmit a copy of the Request and the documents annexed thereto to the respondent for its Answer to the Request once the Secretariat has sufficient copies of the Request and the required filing fee.

ARTICLE 5

Answer to the Request; Counterclaims

1 Within 30 days from the receipt of the Request from the Secretariat, the respondent shall submit an Answer (the "Answer") which shall contain the following information:

a) its name in full, description, address and other contact details;

b) the name in full, address and other contact details of any person(s) representing the respondent in the arbitration;

c) its comments as to the nature and circumstances of the dispute giving rise to the claims and the basis upon which the claims are made;

d) its response to the relief sought;

e) any observations or proposals concerning the number of arbitrators and their choice in light of the claimant's proposals and in accordance with the provisions of Articles 12 and 13, and any nomination of an arbitrator required thereby; and

f) any observations or proposals as to the place of the arbitration, the applicable rules of law and the language of the arbitration.

The respondent may submit such other documents or information with the Answer as it considers appropriate or as may contribute to the efficient resolution of the dispute.

2 The Secretariat may grant the respondent an extension of the time for submitting the Answer, provided the application for such an extension contains the respondent's observations or proposals concerning the number of arbitrators and their choice and, where required by Articles 12 and 13, the nomination of an arbitrator. If the respondent fails to do so, the Court shall proceed in accordance with the Rules.

3 The Answer shall be submitted to the Secretariat in the number of copies specified by Article 3(1).

4 The Secretariat shall communicate the Answer and the documents annexed thereto to all other parties.

5 Any counterclaims made by the respondent shall be submitted with the Answer and shall provide:

a) a description of the nature and circumstances of the dispute giving rise to the counterclaims and of the basis upon which the counterclaims are made;

b) a statement of the relief sought together with the amounts of any quantified counterclaims and, to the extent possible, an estimate of the monetary value of any other counterclaims;

c) any relevant agreements and, in particular, the arbitration agreement(s); and

d) where counterclaims are made under more than one arbitration agreement, an indication of the arbitration agreement under which each counterclaim is made.

The respondent may submit such other documents or information with the counterclaims as it considers appropriate or as may contribute to the efficient resolution of the dispute.

6 The claimant shall submit a reply to any counterclaim within 30 days from the date of receipt of the counterclaims communicated by the Secretariat. Prior to the transmission of the file to the arbitral tribunal, the Secretariat may grant the claimant an extension of time for submitting the reply.

ARTICLE 6

Effect of the Arbitration Agreement

1 Where the parties have agreed to submit to arbitration under the Rules, they shall be deemed to have submitted *ipso facto* to the Rules in effect on the date of commencement of the arbitration, unless they have agreed to submit to the Rules in effect on the date of their arbitration agreement.

2 By agreeing to arbitration under the Rules, the parties have accepted that the arbitration shall be administered by the Court.

3 If any party against which a claim has been made does not submit an Answer, or if any party raises one or more pleas concerning the existence, validity or scope of the arbitration agreement or concerning whether all of the claims made in the arbitration may be determined together in a single arbitration, the arbitration shall proceed and any question of jurisdiction or of whether the claims may be determined together in that arbitration shall be decided directly by the arbitral tribunal, unless the Secretary General refers the matter to the Court for its decision pursuant to Article 6(4).

4 In all cases referred to the Court under Article 6(3), the Court shall decide whether and to what extent the arbitration shall proceed. The arbitration shall proceed if and to the extent that the Court is *prima facie* satisfied that an arbitration agreement under the Rules may exist. In particular:

(i) where there are more than two parties to the arbitration, the arbitration shall proceed between those of the parties, including any additional parties joined pursuant to Article 7, with respect to which the Court is *prima facie* satisfied that an arbitration agreement under the Rules that binds them all may exist; and

(ii) where claims pursuant to Article 9 are made under more than one arbitration agreement, the arbitration shall proceed as to those claims with respect to which the Court is *prima facie* satisfied (a) that the arbitration agreements under which those claims are made may be compatible, and (b) that all parties to the arbitration may have agreed that those claims can be determined together in a single arbitration.

The Court's decision pursuant to Article 6(4) is without prejudice to the admissibility or merits of any party's plea or pleas.

5 In all matters decided by the Court under Article 6(4), any decision as to the jurisdiction of the arbitral tribunal, except as to parties or claims with respect to which the Court decides that the arbitration cannot proceed, shall then be taken by the arbitral tribunal itself.

6 Where the parties are notified of the Court's decision pursuant to Article 6(4) that the arbitration cannot proceed in respect of some or all of them, any party retains the right to ask any court having jurisdiction whether or not, and in respect of which of them, there is a binding arbitration agreement.

7 Where the Court has decided pursuant to Article 6(4) that the arbitration cannot proceed in respect of any of the claims, such decision shall not prevent a party from reintroducing the same claim at a later date in other proceedings.

8 If any of the parties refuses or fails to take part in the arbitration or any stage thereof, the arbitration shall proceed notwithstanding such refusal or failure.

9 Unless otherwise agreed, the arbitral tribunal shall not cease to have jurisdiction by reason of any allegation that the contract is non-existent or null and void, provided that the arbitral tribunal upholds the validity of the arbitration agreement. The arbitral tribunal shall continue to have jurisdiction to determine the parties' respective rights and to decide their claims and pleas even though the contract itself may be non-existent or null and void.

ARTICLE 7

Joinder of Additional Parties

1 A party wishing to join an additional party to the arbitration shall submit its request for arbitration against the additional party (the "Request for Joinder") to the Secretariat. The date on which the Request for Joinder is received by the Secretariat shall, for all purposes, be deemed to be the date of the commencement of arbitration against the additional party. Any such joinder shall be subject to the provisions of Articles 6(3)–6(7) and 9. No additional party may be joined after the confirmation or appointment of any arbitrator, unless all parties, including the additional party, otherwise agree. The Secretariat may fix a time limit for the submission of a Request for Joinder.

2 The Request for Joinder shall contain the following information:

a) the case reference of the existing arbitration;

b) the name in full, description, address and other contact details of each of the parties, including the additional party; and

c) the information specified in Article 4(3), subparagraphs c), d), e) and f).

The party filing the Request for Joinder may submit therewith such other documents or information as it considers appropriate or as may contribute to the efficient resolution of the dispute.

3 The provisions of Articles 4(4) and 4(5) shall apply, *mutatis mutandis*, to the Request for Joinder.

4 The additional party shall submit an Answer in accordance, *mutatis mutandis*, with the provisions of Articles 5(1)–5(4). The additional party may make claims against any other party in accordance with the provisions of Article 8.

ARTICLE 8

Claims Between Multiple Parties

1 In an arbitration with multiple parties, claims may be made by any party against any other party, subject to the provisions of Articles 6(3)–6(7) and 9 and provided that no new claims may be made after the Terms of Reference are signed or approved by the Court without the authorization of the arbitral tribunal pursuant to Article 23(4).

2 Any party making a claim pursuant to Article 8(1) shall provide the information specified in Article 4(3), subparagraphs c), d), e) and f).

3 Before the Secretariat transmits the file to the arbitral tribunal in accordance with Article 16, the following provisions shall apply, *mutatis mutandis*, to any claim made: Article 4(4) subparagraph a); Article 4(5); Article 5(1) except for subparagraphs a), b), e) and f); Article 5(2); Article 5(3) and Article 5(4). Thereafter, the arbitral tribunal shall determine the procedure for making a claim.

ARTICLE 9

Multiple Contracts

Subject to the provisions of Articles 6(3)–6(7) and 23(4), claims arising out of or in connection with more than one contract may be made in a single arbitration, irrespective of whether such claims are made under one or more than one arbitration agreement under the Rules.

ARTICLE 10

Consolidation of Arbitrations

The Court may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration, where:

a) the parties have agreed to consolidation; or

b) all of the claims in the arbitrations are made under the same arbitration agreement; or

c) where the claims in the arbitrations are made under more than one arbitration agreement, the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible.

In deciding whether to consolidate, the Court may take into account any circumstances it considers to be relevant, including whether one or more arbitrators have been confirmed or appointed in more than one of the arbitrations and, if so, whether the same or different persons have been confirmed or appointed.

When arbitrations are consolidated, they shall be consolidated into the arbitration that commenced first, unless otherwise agreed by all parties.

ARTICLE 11

General Provisions

1 Every arbitrator must be and remain impartial and independent of the parties involved in the arbitration.

2 Before appointment or confirmation, a prospective arbitrator shall sign a statement of acceptance, availability, impartiality and independence. The prospective arbitrator shall disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality. The Secretariat shall provide such information to the parties in writing and fix a time limit for any comments from them.

3 An arbitrator shall immediately disclose in writing to the Secretariat and to the parties any facts or circumstances of a similar nature to those referred to in Article 11(2) concerning the arbitrator's impartiality or independence which may arise during the arbitration.

4 The decisions of the Court as to the appointment, confirmation, challenge or replacement of an arbitrator shall be final.

5 By accepting to serve, arbitrators undertake to carry out their responsibilities in accordance with the Rules.

6 Insofar as the parties have not provided otherwise, the arbitral tribunal shall be constituted in accordance with the provisions of Articles 12 and 13.

ARTICLE 12

Constitution of the Arbitral Tribunal

Number of Arbitrators

1 The disputes shall be decided by a sole arbitrator or by three arbitrators.

2 Where the parties have not agreed upon the number of arbitrators, the Court shall appoint a sole arbitrator, save where it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators. In such case, the claimant shall nominate an arbitrator within a period of 15 days from the receipt of the notification of the decision of the Court, and the respondent shall nominate an arbitrator within a period of 15 days from the receipt of the notification of the nomination made by the claimant. If a party fails to nominate an arbitrator, the appointment shall be made by the Court.

Sole Arbitrator

3 Where the parties have agreed that the dispute shall be resolved by a sole arbitrator, they may, by agreement, nominate the sole arbitrator for confirmation. If the parties fail to nominate a sole arbitrator within 30 days from the date when the claimant's Request for Arbitration has been received by the other party, or within such additional time as may be allowed by the Secretariat, the sole arbitrator shall be appointed by the Court.

Three Arbitrators

4 Where the parties have agreed that the dispute shall be resolved by three arbitrators, each party shall nominate in the Request and the Answer, respectively, one arbitrator for confirmation. If a party fails to nominate an arbitrator, the appointment shall be made by the Court.

5 Where the dispute is to be referred to three arbitrators, the third arbitrator, who will act as president of the arbitral tribunal, shall be appointed by the Court, unless the parties have agreed upon another procedure for such appointment, in which case the nomination will be subject to confirmation pursuant to Article 13. Should such procedure not result in a nomination within 30 days from the confirmation or appointment of the co-arbitrators or any other time limit agreed by the parties or fixed by the Court, the third arbitrator shall be appointed by the Court.

6 Where there are multiple claimants or multiple respondents, and where the dispute is to be referred to three arbitrators, the multiple claimants, jointly, and the multiple respondents, jointly, shall nominate an arbitrator for confirmation pursuant to Article 13.

7 Where an additional party has been joined, and where the dispute is to be referred to three arbitrators, the additional party may, jointly with the claimant(s) or with the respondent(s), nominate an arbitrator for confirmation pursuant to Article 13.

8 In the absence of a joint nomination pursuant to Articles 12(6) or 12(7) and where all parties are unable to agree to a method for the constitution of the arbitral tribunal, the Court may appoint each member of the arbitral tribunal and shall designate one of them to act as president. In such case, the Court shall be at liberty to choose any person it regards as suitable to act as arbitrator, applying Article 13 when it considers this appropriate.

ARTICLE 13

Appointment and Confirmation of the Arbitrators

1 In confirming or appointing arbitrators, the Court shall consider the prospective arbitrator's nationality, residence and other relationships with the countries of which the parties or the other arbitrators are nationals and the prospective arbitrator's availability and ability to conduct the arbitration in accordance with the Rules. The same shall apply where the Secretary General confirms arbitrators pursuant to Article 13(2).

2 The Secretary General may confirm as co-arbitrators, sole arbitrators and presidents of arbitral tribunals persons nominated by the parties or pursuant to their particular agreements, provided that the statement they have submitted contains no qualification regarding impartiality or independence or that a qualified statement regarding impartiality or independence has not given rise to objections. Such confirmation shall be reported to the Court at its next session. If the Secretary General considers that a co-arbitrator, sole arbitrator or president of an arbitral tribunal should not be confirmed, the matter shall be submitted to the Court.

3 Where the Court is to appoint an arbitrator, it shall make the appointment upon proposal of a National Committee or Group of the ICC that it considers to be appropriate. If the Court does not accept the proposal made, or if the National Committee or Group fails to make the proposal requested within the time limit fixed by the Court, the Court may repeat its request, request a proposal from another National Committee or Group that it considers to be appropriate, or appoint directly any person whom it regards as suitable.

4 The Court may also appoint directly to act as arbitrator any person whom it regards as suitable where:

a) one or more of the parties is a state or may be considered to be a state entity;

b) the Court considers that it would be appropriate to appoint an arbitrator from a country or territory where there is no National Committee or Group; or

c) the President certifies to the Court that circumstances exist which, in the President's opinion, make a direct appointment necessary and appropriate.

5 The sole arbitrator or the president of the arbitral tribunal shall be of a nationality other than those of the parties. However, in suitable circumstances and provided that none of the parties objects within the time limit fixed by the Court, the sole arbitrator or the president of the arbitral tribunal may be chosen from a country of which any of the parties is a national.

ARTICLE 14

Challenge of Arbitrators

1 A challenge of an arbitrator, whether for an alleged lack of impartiality or independence, or otherwise, shall be made by the submission to the Secretariat of a written statement specifying the facts and circumstances on which the challenge is based.

2 For a challenge to be admissible, it must be submitted by a party either within 30 days from receipt by that party of the notification of the appointment or confirmation of the arbitrator, or within 30 days from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based if such date is subsequent to the receipt of such notification.

3 The Court shall decide on the admissibility and, at the same time, if necessary, on the merits of a challenge after the Secretariat has afforded an opportunity for the arbitrator concerned, the other party or parties and any other members of the arbitral tribunal to comment in writing within a suitable period of time. Such comments shall be communicated to the parties and to the arbitrators.

ARTICLE 15

Replacement of Arbitrators

1 An arbitrator shall be replaced upon death, upon acceptance by the Court of the arbitrator's resignation, upon acceptance by the Court of a challenge, or upon acceptance by the Court of a request of all the parties.

2 An arbitrator shall also be replaced on the Court's own initiative when it decides that the arbitrator is prevented *de jure* or *de facto* from fulfilling the arbitrator's functions, or that the arbitrator is not fulfilling those functions in accordance with the Rules or within the prescribed time limits.

3 When, on the basis of information that has come to its attention, the Court considers applying Article 15(2), it shall decide on the matter after the arbitrator concerned, the parties and any other members of the arbitral tribunal have had an opportunity to comment in writing within a suitable period of time. Such comments shall be communicated to the parties and to the arbitrators.

4 When an arbitrator is to be replaced, the Court has discretion to decide whether or not to follow the original nominating process. Once reconstituted, and after having invited the parties to comment, the arbitral tribunal shall determine if and to what extent prior proceedings shall be repeated before the reconstituted arbitral tribunal.

5 Subsequent to the closing of the proceedings, instead of replacing an arbitrator who has died or been removed by the Court pursuant to Articles 15(1) or 15(2), the Court may decide, when it considers it appropriate, that the remaining arbitrators shall continue the arbitration. In making such determination, the Court shall take into account the views of the remaining arbitrators and of the parties and such other matters that it considers appropriate in the circumstances.

ARTICLE 16

Transmission of the File to the Arbitral Tribunal

The Secretariat shall transmit the file to the arbitral tribunal as soon as it has been constituted, provided the advance on costs requested by the Secretariat at this stage has been paid.

ARTICLE 17

Proof of Authority

At any time after the commencement of the arbitration, the arbitral tribunal or the Secretariat may require proof of the authority of any party representatives.

ARTICLE 18

Place of the Arbitration

1 The place of the arbitration shall be fixed by the Court, unless agreed upon by the parties.

2 The arbitral tribunal may, after consultation with the parties, conduct hearings and meetings at any location it considers appropriate, unless otherwise agreed by the parties.

3 The arbitral tribunal may deliberate at any location it considers appropriate.

ARTICLE 19

Rules Governing the Proceedings

The proceedings before the arbitral tribunal shall be governed by the Rules and, where the Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration.

ARTICLE 20

Language of the Arbitration

In the absence of an agreement by the parties, the arbitral tribunal shall determine the language or languages of the arbitration, due regard being given to all relevant circumstances, including the language of the contract.

ARTICLE 21

Applicable Rules of Law

1 The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.

2 The arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages.

3 The arbitral tribunal shall assume the powers of an *amiable compositeur* or decide *ex aequo et bono* only if the parties have agreed to give it such powers.

ARTICLE 22

Conduct of the Arbitration

1 The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute.

2 In order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties.

3 Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.

4 In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.

5 The parties undertake to comply with any order made by the arbitral tribunal.

ARTICLE 23

Terms of Reference

1 As soon as it has received the file from the Secretariat, the arbitral tribunal shall draw up, on the basis of documents or in the presence of the parties and in the light of their most recent submissions, a document defining its Terms of Reference. This document shall include the following particulars:

a) the names in full, description, address and other contact details of each of the parties and of any person(s) representing a party in the arbitration;

b) the addresses to which notifications and communications arising in the course of the arbitration may be made;

c) a summary of the parties' respective claims and of the relief sought by each party, together with the amounts of any quantified claims and, to the extent possible, an estimate of the monetary value of any other claims;

d) unless the arbitral tribunal considers it inappropriate, a list of issues to be determined;

e) the names in full, address and other contact details of each of the arbitrators;

f) the place of the arbitration; and

g) particulars of the applicable procedural rules and, if such is the case, reference to the power conferred upon the arbitral tribunal to act as *amiable compositeur* or to decide *ex aequo et bono*.

2 The Terms of Reference shall be signed by the parties and the arbitral tribunal. Within 30 days of the date on which the file has been transmitted to it, the arbitral tribunal shall transmit to the Court the Terms of Reference signed by it and by the parties. The Court may extend this time limit pursuant to a reasoned request from the arbitral tribunal or on its own initiative if it decides it is necessary to do so.

3 If any of the parties refuses to take part in the drawing up of the Terms of Reference or to sign the same, they shall be submitted to the Court for approval. When the Terms of Reference have been signed in accordance with Article 23(2) or approved by the Court, the arbitration shall proceed.

4 After the Terms of Reference have been signed or approved by the Court, no party shall make new claims which fall outside the limits of the Terms of Reference unless it has been authorized to do so by the arbitral tribunal, which shall consider the nature of such new claims, the stage of the arbitration and other relevant circumstances.

ARTICLE 24

Case Management Conference and Procedural Timetable

1 When drawing up the Terms of Reference or as soon as possible thereafter, the arbitral tribunal shall convene a case management conference to consult the parties on procedural measures that may be adopted pursuant to Article 22(2). Such measures may include one or more of the case management techniques described in Appendix IV.

2 During or following such conference, the arbitral tribunal shall establish the procedural timetable that it intends to follow for the conduct of the arbitration. The procedural timetable and any modifications thereto shall be communicated to the Court and the parties.

3 To ensure continued effective case management, the arbitral tribunal, after consulting the parties by means of a further case management conference or otherwise, may adopt further procedural measures or modify the procedural timetable.

4 Case management conferences may be conducted through a meeting in person, by videoconference, telephone or similar means of communication. In the absence of an agreement of the parties, the arbitral tribunal shall determine the means by which the conference will be conducted. The arbitral tribunal may request the parties to submit case management proposals in advance of a case management conference and may request the attendance at any case management conference of the parties in person or through an internal representative.

ARTICLE 25

Establishing the Facts of the Case

1 The arbitral tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means.

2 After studying the written submissions of the parties and all documents relied upon, the arbitral tribunal shall hear the parties together in person if any of them so requests or, failing such a request, it may of its own motion decide to hear them.

3 The arbitral tribunal may decide to hear witnesses, experts appointed by the parties or any other person, in the presence of the parties, or in their absence provided they have been duly summoned.

4 The arbitral tribunal, after having consulted the parties, may appoint one or more experts, define their terms of reference and receive their reports. At the request of a party, the parties shall be given the opportunity to question at a hearing any such expert.

5 At any time during the proceedings, the arbitral tribunal may summon any party to provide additional evidence.

6 The arbitral tribunal may decide the case solely on the documents submitted by the parties unless any of the parties requests a hearing.

ARTICLE 26

Hearings

1 When a hearing is to be held, the arbitral tribunal, giving reasonable notice, shall summon the parties to appear before it on the day and at the place fixed by it.

2 If any of the parties, although duly summoned, fails to appear without valid excuse, the arbitral tribunal shall have the power to proceed with the hearing.

3 The arbitral tribunal shall be in full charge of the hearings, at which all the parties shall be entitled to be present. Save with the approval of the arbitral tribunal and the parties, persons not involved in the proceedings shall not be admitted.

4 The parties may appear in person or through duly authorized representatives. In addition, they may be assisted by advisers.

ARTICLE 27

Closing of the Proceedings and Date for Submission of Draft Awards

As soon as possible after the last hearing concerning matters to be decided in an award or the filing of the last authorized submissions concerning such matters, whichever is later, the arbitral tribunal shall:

a) declare the proceedings closed with respect to the matters to be decided in the award; and

b) inform the Secretariat and the parties of the date by which it expects to submit its draft award to the Court for approval pursuant to Article 34.

After the proceedings are closed, no further submission or argument may be made, or evidence produced, with respect to the matters to be decided in the award, unless requested or authorized by the arbitral tribunal.

ARTICLE 28

Conservatory and Interim Measures

1 Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The arbitral tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an award, as the arbitral tribunal considers appropriate.

2 Before the file is transmitted to the arbitral tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an arbitral tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the arbitral tribunal.

Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the arbitral tribunal thereof.

ARTICLE 29

Emergency Arbitrator

1 A party that needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal ("Emergency Measures") may make an application for such measures pursuant to the Emergency Arbitrator Rules in Appendix V. Any such application shall be accepted only if it is received by the Secretariat prior to the transmission of the file to the arbitral tribunal pursuant to Article 16 and irrespective of whether the party making the application has already submitted its Request for Arbitration.

2 The emergency arbitrator's decision shall take the form of an order. The parties undertake to comply with any order made by the emergency arbitrator.

3 The emergency arbitrator's order shall not bind the arbitral tribunal with respect to any question, issue or dispute determined in the order. The arbitral tribunal may modify, terminate or annul the order or any modification thereto made by the emergency arbitrator.

4 The arbitral tribunal shall decide upon any party's requests or claims related to the emergency arbitrator proceedings, including the reallocation of the costs of such proceedings and any claims arising out of or in connection with the compliance or non-compliance with the order.

5 Articles 29(1)–29(4) and the Emergency Arbitrator Rules set forth in Appendix V (collectively the "Emergency Arbitrator Provisions") shall apply only to parties that are either signatories of the arbitration agreement under the Rules that is relied upon for the application or successors to such signatories.

6 The Emergency Arbitrator Provisions shall not apply if:

a) the arbitration agreement under the Rules was concluded before 1 January 2012;

b) the parties have agreed to opt out of the Emergency Arbitrator Provisions; or

c) the parties have agreed to another pre-arbitral procedure that provides for the granting of conservatory, interim or similar measures.

7 The Emergency Arbitrator Provisions are not intended to prevent any party from seeking urgent interim or conservatory measures from a competent judicial authority at any time prior to making an application for such measures, and in appropriate circumstances even thereafter, pursuant to the Rules. Any application for such measures from a competent judicial authority shall not be deemed to be an infringement or a waiver of the arbitration agreement. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat.

ARTICLE 30

Expedited Procedure

1 By agreeing to arbitration under the Rules, the parties agree that this Article 30 and the Expedited Procedure Rules set forth in Appendix VI (collectively the "Expedited Procedure Provisions") shall take precedence over any contrary terms of the arbitration agreement.

2 The Expedited Procedure Rules set forth in Appendix VI shall apply if:

a) the amount in dispute does not exceed the limit set out in Article 1(2) of Appendix VI at the time of the communication referred to in Article 1(3) of that Appendix; or

b) the parties so agree.

3 The Expedited Procedure Provisions shall not apply if:

a) the arbitration agreement under the Rules was concluded before the date on which the Expedited Procedure Provisions came into force;

b) the parties have agreed to opt out of the Expedited Procedure Provisions; or

c) the Court, upon the request of a party before the constitution of the arbitral tribunal or on its own motion, determines that it is inappropriate in the circumstances to apply the Expedited Procedure Provisions.

ARTICLE 31

Time Limit for the Final Award

1 The time limit within which the arbitral tribunal must render its final award is six months. Such time limit shall start to run from the date of the last signature by the arbitral tribunal or by the parties of the Terms of Reference or, in the case of application of Article 23(3), the date of the notification to the arbitral tribunal by the Secretariat of the approval of the Terms of Reference by the Court. The Court may fix a different time limit based upon the procedural timetable established pursuant to Article 24(2).

2 The Court may extend the time limit pursuant to a reasoned request from the arbitral tribunal or on its own initiative if it decides it is necessary to do so.

ARTICLE 32

Making of the Award

1 When the arbitral tribunal is composed of more than one arbitrator, an award is made by a majority decision. If there is no majority, the award shall be made by the president of the arbitral tribunal alone.

2 The award shall state the reasons upon which it is based.

3 The award shall be deemed to be made at the place of the arbitration and on the date stated therein.

ARTICLE 33

Award by Consent

If the parties reach a settlement after the file has been transmitted to the arbitral tribunal in accordance with Article 16, the settlement shall be recorded in the form of an award made by consent of the parties, if so requested by the parties and if the arbitral tribunal agrees to do so.

ARTICLE 34

Scrutiny of the Award by the Court

Before signing any award, the arbitral tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to points of substance. No award shall be rendered by the arbitral tribunal until it has been approved by the Court as to its form.

ARTICLE 35

Notification, Deposit and Enforceability of the Award

1 Once an award has been made, the Secretariat shall notify to the parties the text signed by the arbitral tribunal, provided always that the costs of the arbitration have been fully paid to the ICC by the parties or by one of them.

2 Additional copies certified true by the Secretary General shall be made available on request and at any time to the parties, but to no one else.

3 By virtue of the notification made in accordance with Article 35(1), the parties waive any other form of notification or deposit on the part of the arbitral tribunal.

4 An original of each award made in accordance with the Rules shall be deposited with the Secretariat.

5 The arbitral tribunal and the Secretariat shall assist the parties in complying with whatever further formalities may be necessary.

6 Every award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.

ARTICLE 36

Correction and Interpretation of the Award; Remission of Awards

1 On its own initiative, the arbitral tribunal may correct a clerical, computational or typographical error, or any errors of similar nature contained in an award, provided such correction is submitted for approval to the Court within 30 days of the date of such award.

2 Any application of a party for the correction of an error of the kind referred to in Article 36(1), or for the interpretation of an award, must be made to the Secretariat within 30 days of the receipt of the award by such party, in a number of copies as stated in Article 3(1). After transmittal of the application to the arbitral tribunal, the latter shall grant the other party a short time limit, normally not exceeding 30 days, from the receipt of the application by that party, to submit any comments thereon. The arbitral tribunal shall submit its decision on the application in draft form to the Court not later than 30 days following the expiration of the time limit for the receipt of any comments from the other party or within such other period as the Court may decide.

3 A decision to correct or to interpret the award shall take the form of an addendum and shall constitute part of the award. The provisions of Articles 32, 34 and 35 shall apply *mutatis mutandis*.

4 Where a court remits an award to the arbitral tribunal, the provisions of Articles 32, 34, 35 and this Article 36 shall apply *mutatis mutandis* to any addendum or award made pursuant to the terms of such remission. The Court may take any steps as may be necessary to enable the arbitral tribunal to comply with the terms of such remission and may fix an advance to cover any additional fees and expenses of the arbitral tribunal and any additional ICC administrative expenses.

ARTICLE 37

Advance to Cover the Costs of the Arbitration

1 After receipt of the Request, the Secretary General may request the claimant to pay a provisional advance in an amount intended to cover the costs of the arbitration

a) until the Terms of Reference have been drawn up; or

b) when the Expedited Procedure Provisions apply, until the case management conference.

Any provisional advance paid will be considered as a partial payment by the claimant of any advance on costs fixed by the Court pursuant to this Article 37.

2 As soon as practicable, the Court shall fix the advance on costs in an amount likely to cover the fees and expenses of the arbitrators and the ICC administrative expenses for the claims which have been referred to it by the parties, unless any claims are made under Article 7 or 8 in which case Article 37(4) shall apply. The advance on costs fixed by the Court pursuant to this Article 37(2) shall be payable in equal shares by the claimant and the respondent.

3 Where counterclaims are submitted by the respondent under Article 5 or otherwise, the Court may fix separate advances on costs for the claims and the counterclaims. When the Court has fixed separate advances on costs, each of the parties shall pay the advance on costs corresponding to its claims.

4 Where claims are made under Article 7 or 8, the Court shall fix one or more advances on costs that shall be payable by the parties as decided by the Court. Where the Court has previously fixed any advance on costs pursuant to this Article 37, any such advance shall be replaced by the advance(s) fixed pursuant to this Article 37(4), and the amount of any advance previously paid by any party will be considered as a partial payment by such party of its share of the advance(s) on costs as fixed by the Court pursuant to this Article 37(4).

5 The amount of any advance on costs fixed by the Court pursuant to this Article 37 may be subject to readjustment at any time during the arbitration. In all cases, any party shall be free to pay any other party's share of any advance on costs should such other party fail to pay its share.

6 When a request for an advance on costs has not been complied with, and after consultation with the arbitral tribunal, the Secretary General may direct the arbitral tribunal to suspend its work and set a time limit, which must be not less than 15 days, on the expiry of which the relevant claims shall be considered as withdrawn. Should the party in question wish to object to this measure, it must make a request within the aforementioned period for the matter to be decided by the Court. Such party shall not be prevented, on the ground of such withdrawal, from reintroducing the same claims at a later date in another proceeding.

7 If one of the parties claims a right to a set-off with regard to any claim, such set-off shall be taken into account in determining the advance to cover the costs of the arbitration in the same way as a separate claim insofar as it may require the arbitral tribunal to consider additional matters.

ARTICLE 38

Decision as to the Costs of the Arbitration

1 The costs of the arbitration shall include the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court, in accordance with the scales in force at the time of the commencement of the arbitration, as well as the fees and expenses of any experts appointed by the arbitral tribunal and the reasonable legal and other costs incurred by the parties for the arbitration.

2 The Court may fix the fees of the arbitrators at a figure higher or lower than that which would result from the application of the relevant scale should this be deemed necessary due to the exceptional circumstances of the case.

3 At any time during the arbitral proceedings, the arbitral tribunal may make decisions on costs, other than those to be fixed by the Court, and order payment.

4 The final award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.

5 In making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner.

6 In the event of the withdrawal of all claims or the termination of the arbitration before the rendering of a final award, the Court shall fix the fees and expenses of the arbitrators and the ICC administrative expenses. If the parties have not agreed upon the allocation of the costs of the arbitration or other relevant issues with respect to costs, such matters shall be decided by the arbitral tribunal. If the arbitral tribunal has not been constituted at the time of such withdrawal or termination, any party may request the Court to proceed with the constitution of the arbitral tribunal in accordance with the Rules so that the arbitral tribunal may make decisions as to costs.

ARTICLE 39

Modified Time Limits

1 The parties may agree to shorten the various time limits set out in the Rules. Any such agreement entered into subsequent to the constitution of an arbitral tribunal shall become effective only upon the approval of the arbitral tribunal.

2 The Court, on its own initiative, may extend any time limit which has been modified pursuant to Article 39(1) if it decides that it is necessary to do so in order that the arbitral tribunal and the Court may fulfil their responsibilities in accordance with the Rules.

ARTICLE 40

Waiver

A party which proceeds with the arbitration without raising its objection to a failure to comply with any provision of the Rules, or of any other rules applicable to the proceedings, any direction given by the arbitral tribunal, or any requirement under the arbitration agreement relating to the constitution of the arbitral tribunal or the conduct of the proceedings, shall be deemed to have waived its right to object.

ARTICLE 41

Limitation of Liability

The arbitrators, any person appointed by the arbitral tribunal, the emergency arbitrator, the Court and its members, the ICC and its employees, and the ICC National Committees and Groups and their employees and representatives shall not be liable to any person for any act or omission in connection with the arbitration, except to the extent such limitation of liability is prohibited by applicable law.

ARTICLE 42

General Rule

In all matters not expressly provided for in the Rules, the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law.

ARTICLE 1

Function

1 The function of the International Court of Arbitration of the International Chamber of Commerce (the "Court") is to ensure the application of the Rules of Arbitration of the International Chamber of Commerce, and it has all the necessary powers for that purpose.

2 As an autonomous body, it carries out these functions in complete independence from the ICC and its organs.

3 Its members are independent from the ICC National Committees and Groups.

ARTICLE 2

Composition of the Court

The Court shall consist of a President, Vice-Presidents, and members and alternate members (collectively designated as members). In its work it is assisted by its Secretariat (Secretariat of the Court).

ARTICLE 3

Appointment

1 The President is elected by the ICC World Council upon the recommendation of the Executive Board of the ICC.

2 The ICC World Council appoints the Vice-Presidents of the Court from among the members of the Court or otherwise.

3 Its members are appointed by the ICC World Council on the proposal of National Committees or Groups, one member for each National Committee or Group. On the proposal of the President of the Court, the World Council may appoint members in countries and territories where there is no National Committee or Group.

4 On the proposal of the President of the Court, the World Council may appoint alternate members.

5 The term of office of all members, including, for the purposes of this paragraph, the President and Vice-Presidents, is three years. If a member is no longer in a position to exercise the member's functions, a successor is appointed by the World Council for the remainder of the term. Upon the recommendation of the Executive Board, the duration of the term of office of any member may be extended beyond three years if the World Council so decides.

ARTICLE 4

Plenary Session of the Court

The Plenary Sessions of the Court are presided over by the President or, in the President's absence, by one of the Vice-Presidents designated by the President. The deliberations shall be valid when at least six members are present. Decisions are taken by a majority vote, the President or Vice-President, as the case may be, having a casting vote in the event of a tie.

ARTICLE 5

Committees

The Court may set up one or more Committees and establish the functions and organization of such Committees.

ARTICLE 6

Confidentiality

The work of the Court is of a confidential nature which must be respected by everyone who participates in that work in whatever capacity. The Court lays down the rules regarding the persons who can attend the meetings of the Court and its Committees and who are entitled to have access to materials related to the work of the Court and its Secretariat.

ARTICLE 7

Modification of the Rules of Arbitration

Any proposal of the Court for a modification of the Rules is laid before the Commission on Arbitration and ADR before submission to the Executive Board of the ICC for approval, provided, however, that the Court, in order to take account of developments in information technology, may propose to modify or supplement the provisions of Article 3 of the Rules or any related provisions in the Rules without laying any such proposal before the Commission.

ARTICLE 1

Confidential Character of the Work of the International Court of Arbitration

1 For the purposes of this Appendix, members of the Court include the President and Vice-Presidents of the Court.

2 The sessions of the Court, whether plenary or those of a Committee of the Court, are open only to its members and to the Secretariat.

3 However, in exceptional circumstances, the President of the Court may invite other persons to attend. Such persons must respect the confidential nature of the work of the Court.

4 The documents submitted to the Court, or drawn up by it or the Secretariat in the course of the Court's proceedings, are communicated only to the members of the Court and to the Secretariat and to persons authorized by the President to attend Court sessions.

5 The President or the Secretary General of the Court may authorize researchers undertaking work of an academic nature to acquaint themselves with awards and other documents of general interest, with the exception of memoranda, notes, statements and documents remitted by the parties within the framework of arbitration proceedings.

6 Such authorization shall not be given unless the beneficiary has undertaken to respect the confidential character of the documents made available and to refrain from publishing anything based upon information contained therein without having previously submitted the text for approval to the Secretary General of the Court.

7 The Secretariat will in each case submitted to arbitration under the Rules retain in the archives of the Court all awards, Terms of Reference and decisions of the Court, as well as copies of the pertinent correspondence of the Secretariat.

8 Any documents, communications or correspondence submitted by the parties or the arbitrators may be destroyed unless a party or an arbitrator requests in writing within a period fixed by the Secretariat the return of such documents, communications or correspondence. All related costs and expenses for the return of those documents shall be paid by such party or arbitrator.

ARTICLE 2

Participation of Members of the International Court of Arbitration in ICC Arbitration

1 The President and the members of the Secretariat of the Court may not act as arbitrators or as counsel in cases submitted to ICC arbitration.

2 The Court shall not appoint Vice-Presidents or members of the Court as arbitrators. They may, however, be proposed for such duties by one or more of the parties, or pursuant to any other procedure agreed upon by the parties, subject to confirmation.

3 When the President, a Vice-President or a member of the Court or of the Secretariat is involved in any capacity whatsoever in proceedings pending before the Court, such person must inform the Secretary General of the Court upon becoming aware of such involvement.

4 Such person must be absent from the Court session whenever the matter is considered by the Court and shall not participate in the discussions or in the decisions of the Court.

5 Such person will not receive any material documentation or information pertaining to such proceedings.

ARTICLE 3

Relations Between the Members of the Court and the ICC National Committees and Groups

1 By virtue of their capacity, the members of the Court are independent of the ICC National Committees and Groups which proposed them for appointment by the ICC World Council.

2 Furthermore, they must regard as confidential, vis-à-vis the said National Committees and Groups, any information concerning individual cases with which they have become acquainted in their capacity as members of the Court, except when they have been requested by the President of the Court, by a Vice-President of the Court authorized by the President of the Court, or by the Court's Secretary General to communicate specific information to their respective National Committees or Groups.

ARTICLE 4

Committee of the Court

1 In accordance with the provisions of Article 1(4) of the Rules and Article 5 of Appendix I, the Court hereby establishes a Committee of the Court.

2 The members of the Committee consist of a president and at least two other members. The President of the Court acts as the president of the Committee. In the President's absence or otherwise at the President's request, a Vice-President of the Court or, in exceptional circumstances, another member of the Court may act as president of the Committee.

3 The other two members of the Committee are appointed by the Court from among the Vice-Presidents or the other members of the Court. At each Plenary Session the Court appoints the members who are to attend the meetings of the Committee to be held before the next Plenary Session.

4 The Committee meets when convened by its president. Two members constitute a quorum.

5 (a) The Court shall determine the decisions that may be taken by the Committee.

(b) The decisions of the Committee are taken unanimously.

(c) When the Committee cannot reach a decision or deems it preferable to abstain, it transfers the case to the next Plenary Session, making any suggestions it deems appropriate.

(d) The Committee's decisions are brought to the notice of the Court at its next Plenary Session.

6 For the purpose of expedited procedures and in accordance with the provisions of Article 1(4) of the Rules and Article 5 of Appendix I, the Court may exceptionally establish a Committee consisting of one member. Articles 4(2), 4(3), 4(4), 4(5), subparagraphs b) and c), of this Appendix II shall not apply.

ARTICLE 5

Court Secretariat

1 In the Secretary General's absence or otherwise at the Secretary General's request, the Deputy Secretary General and/or the General Counsel shall have the authority to refer matters to the Court, confirm arbitrators, certify true copies of awards and request the payment of a provisional advance, respectively provided for in Articles 6(3), 13(2), 35(2) and 37(1) of the Rule, as well as to take the measure provided for in Article 37(6).

2 The Secretariat may, with the approval of the Court, issue notes and other documents for the information of the parties and the arbitrators, or as necessary for the proper conduct of the arbitral proceedings.

3 Offices of the Secretariat may be established outside the headquarters of the ICC. The Secretariat shall keep a list of offices designated by the Secretary General. Requests for Arbitration may be submitted to the Secretariat at any of its offices, and the Secretariat's functions under the Rules may be carried out from any of its offices, as instructed by the Secretary General, Deputy Secretary General or General Counsel.

ARTICLE 6

Scrutiny of Arbitral Awards

When the Court scrutinizes draft awards in accordance with Article 34 of the Rules, it considers, to the extent practicable, the requirements of mandatory law at the place of the arbitration.

ARTICLE 1

Advance on Costs

1 Each request to commence an arbitration pursuant to the Rules must be accompanied by a filing fee of US$ 5,000. Such payment is non-refundable and shall be credited to the claimant's portion of the advance on costs.

2 The provisional advance fixed by the Secretary General according to Article 37(1) of the Rules shall normally not exceed the amount obtained by adding together the ICC administrative expenses, the minimum of the fees (as set out in the scales hereinafter) based upon the amount of the claim and the expected reimbursable expenses of the arbitral tribunal incurred with respect to the drafting of the Terms of Reference or the holding of the case management conference. If such amount is not quantified, the provisional advance shall be fixed at the discretion of the Secretary General. Payment by the claimant shall be credited to its share of the advance on costs fixed by the Court.

3 In general, the arbitral tribunal shall, in accordance with Article 37(6) of the Rules, proceed only with respect to those claims or counterclaims in regard to which the whole of the advance on costs has been paid.

4 The advance on costs fixed by the Court according to Articles 37(2) or 37(4) of the Rules comprises the fees of the arbitrator or arbitrators (hereinafter referred to as "arbitrator"), any arbitration-related expenses of the arbitrator and the ICC administrative expenses.

5 Each party shall pay its share of the total advance on costs in cash. However, if a party's share of the advance on costs is greater than US$ 500,000 (the "Threshold Amount"), such party may post a bank guarantee for any amount above the Threshold Amount. The Court may modify the Threshold Amount at any time at its discretion.

6 The Court may authorize the payment of advances on costs, or any party's share thereof, in instalments, subject to such conditions as the Court thinks fit, including the payment of additional ICC administrative expenses.

7 A party that has already paid in full its share of the advance on costs fixed by the Court may, in accordance with Article 37(5) of the Rules, pay the unpaid portion of the advance owed by the defaulting party by posting a bank guarantee.

8 When the Court has fixed separate advances on costs pursuant to Article 37(3) of the Rules, the Secretariat shall invite each party to pay the amount of the advance corresponding to its respective claim(s).

9 When, as a result of the fixing of separate advances on costs, the separate advance fixed for the claim of either party exceeds one half of such global advance as was previously fixed (in respect of the same claims and counterclaims that are the subject of separate advances), a bank guarantee may be posted to cover any such excess amount. In the event that the amount of the separate advance is subsequently increased, at least one half of the increase shall be paid in cash.

10 The Secretariat shall establish the terms governing all bank guarantees which the parties may post pursuant to the above provisions.

11 As provided in Article 37(5) of the Rules, the advance on costs may be subject to readjustment at any time during the arbitration, in particular to take into account fluctuations in the amount in dispute, changes in the amount of the estimated expenses of the arbitrator, or the evolving difficulty or complexity of arbitration proceedings.

12 Before any expertise ordered by the arbitral tribunal can be commenced, the parties, or one of them, shall pay an advance on costs fixed by the arbitral tribunal sufficient to cover the expected fees and expenses of the expert as determined by the arbitral tribunal. The arbitral tribunal shall be responsible for ensuring the payment by the parties of such fees and expenses.

13 The amounts paid as advances on costs do not yield interest for the parties or the arbitrator.

ARTICLE 2

Costs and Fees

1 Subject to Article 38(2) of the Rules, the Court shall fix the fees of the arbitrator in accordance with the scales hereinafter set out or, where the amount in dispute is not stated, at its discretion.

2 In setting the arbitrator's fees, the Court shall take into consideration the diligence and efficiency of the arbitrator, the time spent, the rapidity of the proceedings, the complexity of the dispute and the timeliness of the submission of the draft award, so as to arrive at a figure within the limits specified or, in exceptional circumstances (Article 38(2) of the Rules), at a figure higher or lower than those limits.

3 When a case is submitted to more than one arbitrator, the Court, at its discretion, shall have the right to increase the total fees up to a maximum which shall normally not exceed three times the fees of one arbitrator.

4 The arbitrator's fees and expenses shall be fixed exclusively by the Court as required by the Rules. Separate fee arrangements between the parties and the arbitrator are contrary to the Rules.

5 The Court shall fix the ICC administrative expenses of each arbitration in accordance with the scales hereinafter set out or, where the amount in dispute is not stated, at its discretion. Where the parties have agreed upon additional services, or in exceptional circumstances, the Court may fix the ICC administrative expenses at a lower or higher figure than that which would result from the application of such scale, provided that such expenses shall normally not exceed the maximum amount of the scale.

6 At any time during the arbitration, the Court may fix as payable a portion of the ICC administrative expenses corresponding to services that have already been performed by the Court and the Secretariat.

7 The Court may require the payment of administrative expenses in addition to those provided in the scale of administrative expenses as a condition for holding an arbitration in abeyance at the request of the parties or of one of them with the acquiescence of the other.

8 If an arbitration terminates before the rendering of a final award, the Court shall fix the fees and expenses of the arbitrators and the ICC administrative expenses at its discretion, taking into account the stage attained by the arbitral proceedings and any other relevant circumstances.

9 Any amount paid by the parties as an advance on costs exceeding the costs of the arbitration fixed by the Court shall be reimbursed to the parties having regard to the amounts paid.

10 In the case of an application under Article 36(2) of the Rules or of a remission pursuant to Article 36(4) of the Rules, the Court may fix an advance to cover additional fees and expenses of the arbitral tribunal and additional ICC administrative expenses and may make the transmission of such application to the arbitral tribunal subject to the prior cash payment in full to the ICC of such advance. The Court shall fix at its discretion the costs of the procedure following an application or a remission, which shall include any possible fees of the arbitrator and ICC administrative expenses, when approving the decision of the arbitral tribunal.

11 The Secretariat may require the payment of administrative expenses in addition to those provided in the scale of administrative expenses for any expenses arising in relation to a request pursuant to Article 35(5) of the Rules.

12 When an arbitration is preceded by proceedings under the ICC Mediation Rules, one half of the ICC administrative expenses paid for such proceedings shall be credited to the ICC administrative expenses of the arbitration.

13 Amounts paid to the arbitrator do not include any possible value added tax (VAT) or other taxes or charges and imposts applicable to the arbitrator's fees. Parties have a duty to pay any such taxes or charges; however, the recovery of any such charges or taxes is a matter solely between the arbitrator and the parties.

14 Any ICC administrative expenses may be subject to value added tax (VAT) or charges of a similar nature at the prevailing rate.

ARTICLE 3

Scales of Administrative Expenses and Arbitrator's Fees

1 The scales of administrative expenses and arbitrator's fees set forth below shall be effective as of 1 January 2017 in respect of all arbitrations commenced on or after such date, irrespective of the version of the Rules applying to such arbitrations.

2 To calculate the ICC administrative expenses and the arbitrator's fees, the amounts calculated for each successive tranche of the amount in dispute must be added together, except that where the amount in dispute is over US$ 500 million, a flat amount of US$ 150,000 shall constitute the entirety of the ICC administrative expenses.

3 The scales of administrative expenses and arbitrator's fees for the expedited procedure set forth below shall be effective as of 1 March 2017 in respect of all arbitrations commenced on or after such date, irrespective of the version of the Rules applying to such arbitrations. When parties have agreed to the expedited procedure pursuant to Article 30(2), subparagraph b), the scales for the expedited procedure will apply.

4 All amounts fixed by the Court or pursuant to any of the appendices to the Rules are payable in US$ except where prohibited by law or decided otherwise by the Court, in which case the ICC may apply a different scale and fee arrangement in another currency.

A Administrative Expenses

Amount in dispute (in US Dollars)	Administrative expenses*
up to 50,000	$5,000
from 50,001 to 100,000	1.53%
from 100,001 to 200,000	2.72%
from 200,001 to 500,000	2.25%
from 500,001 to 1,000,000	1.62%
from 1,000,001 to 2,000,000	0.788%
from 2,000,001 to 5,000,000	0.46%
from 5,000,001 to 10,000,000	0.25%
from 10,000,001 to 30,000,000	0.10%
from 30,000,001 to 50,000,000	0.09%
from 50,000,001 to 80,000,000	0.01%
from 80,000,001 to 500,000,000	0.0123%
over 500,000,000	$150,000

* For illustrative purposes only, the table on page 57 indicates the resulting administrative expenses in US$ when the proper calculations have been made.

B Arbitrator's Fees

Amount in dispute (in US Dollars)	Fees**	
	minimum	maximum
up to 50,000	$3,000	18.0200%
from 50,001 to 100,000	2.6500%	13.5680%
from 100,001 to 200,000	1.4310%	7.6850%
from 200,001 to 500,000	1.3670%	6.8370%
from 500,001 to 1,000,000	0.9540%	4.0280%
from 1,000,001 to 2,000,000	0.6890%	3.6040%
from 2,000,001 to 5,000,000	0.3750%	1.3910%
from 5,000,001 to 10,000,000	0.1280%	0.9100%
from 10,000,001 to 30,000,000	0.0640%	0.2410%
from 30,000,001 to 50,000,000	0.0590%	0.2280%
from 50,000,001 to 80,000,000	0.0330%	0.1570%
from 80,000,001 to 100,000,000	0.0210%	0.1150%
from 100,000,001 to 500,000,000	0.0110%	0.0580%
over 500,000,000	0.0100%	0.0400%

** For illustrative purposes only, the table on page 58 indicates the resulting range of fees in US$ when the proper calculations have been made.

Amount in Dispute	A Administrative Expenses*	
(in US Dollars)	**(in US Dollars)**	
up to 50,000	5,000	
from 50,001 to 100,000	5,000	+ 1.53% of amt. over 50,000
from 100,001 to 200,000	5,765	+ 2.72% of amt. over 100,000
from 200,001 to 500,000	8,485	+ 2.25% of amt. over 200,000
from 500,001 to 1,000,000	15,235	+ 1.62% of amt. over 500,000
from 1,000,001 to 2,000,000	23,335	+ 0.788% of amt. over 1,000,000
from 2,000,001 to 5,000,000	31,215	+ 0.46% of amt. over 2,000,000
from 5,000,001 to 10,000,000	45,015	+ 0.25% of amt. over 5,000,000
from 10,000,001 to 30,000,000	57,515	+ 0.10% of amt. over 10,000,000
from 30,000,001 to 50,000,000	77,515	+ 0.09% of amt. over 30,000,000
from 50,000,001 to 80,000,000	95,515	+ 0.01% of amt. over 50,000,000
from 80,000,001 to 500,000,000	98,515	+ 0.0123% of amt. over 80,000,000
over 500,000,000	150,000	

* See page 56.

Amount in Dispute (in US Dollars)	B Arbitrator's Fees** (in US Dollars)	
	Minimum	Maximum
up to 50,000	3,000	18.0200% of amount in dispute
from 50,001 to 100,000	3,000 + 2.6500% of amt. over 50,000	9,010 + 13.5680% of amt. over 50,000
from 100,001 to 200,000	4,325 + 1.4310% of amt. over 100,000	15,794 + 7.6850% of amt. over 100,000
from 200,001 to 500,000	5,756 + 1.3670% of amt. over 200,000	23,479 + 6.8370% of amt. over 200,000
from 500,001 to 1,000,000	9,857 + 0.9540% of amt. over 500,000	43,990 + 4.0280% of amt. over 500,000
from 1,000,001 to 2,000,000	14,627 + 0.6890% of amt. over 1,000,000	64,130 + 3.6040% of amt. over 1,000,000
from 2,000,001 to 5,000,000	21,517 + 0.3750% of amt. over 2,000,000	100,170 + 1.3910% of amt. over 2,000,000
from 5,000,001 to 10,000,000	32,767 + 0.1280% of amt. over 5,000,000	141,900 + 0.9100% of amt. over 5,000,000
from 10,000,001 to 30,000,000	39,167 + 0.0640% of amt. over 10,000,000	187,400 + 0.2410% of amt. over 10,000,000
from 30,000,001 to 50,000,000	51,967 + 0.0590% of amt. over 30,000,000	235,600 + 0.2280% of amt. over 30,000,000
from 50,000,001 to 80,000,000	63,767 + 0.0330% of amt. over 50,000,000	281,200 + 0.1570% of amt. over 50,000,000
from 80,000,001 to 100,000,000	73,667 + 0.0210% of amt. over 80,000,000	328,300 + 0.1150% of amt. over 80,000,000
from 100,000,001 to 500,000,000	77,867 + 0.0110% of amt. over 100,000,000	351,300 + 0.0580% of amt. over 100,000,000
over 500,000,000	121,867 + 0.0100% of amt. over 500,000,000	583,300 + 0.0400% of amt. over 500,000,000

** See page 56.

A Administrative Expenses

Amount in dispute (in US Dollars)	Administrative expenses*
up to 50,000	$5,000
from 50,001 to 100,000	1.53%
from 100,001 to 200,000	2.72%
from 200,001 to 500,000	2.25%
from 500,001 to 1,000,000	1.62%
from 1,000,001 to 2,000,000	0.788%
from 2,000,001 to 5,000,000	0.46%
from 5,000,001 to 10,000,000	0.25%
from 10,000,001 to 30,000,000	0.10%
from 30,000,001 to 50,000,000	0.09%
from 50,000,001 to 80,000,000	0.01%
from 80,000,001 to 500,000,000	0.0123%
over 500,000,000	$150,000

* For illustrative purposes only, the table on page 60 indicates the resulting administrative expenses in US$ when the proper calculations have been made.

B Arbitrator's Fees

Amount in dispute (in US Dollars)	Fees**	
	minimum	maximum
up to 50,000	$2,400	14.4160%
from 50,001 to 100,000	2.1200%	10.8544%
from 100,001 to 200,000	1.1448%	6.1480%
from 200,001 to 500,000	1.0936%	5.4696%
from 500,001 to 1,000,000	0.7632%	3.2224%
from 1,000,001 to 2,000,000	0.5512%	2.8832%
from 2,000,001 to 5,000,000	0.3000%	1.1128%
from 5,000,001 to 10,000,000	0.1024%	0.7280%
from 10,000,001 to 30,000,000	0.0512%	0.1928%
from 30,000,001 to 50,000,000	0.0472%	0.1824%
from 50,000,001 to 80,000,000	0.0264%	0.1256%
from 80,000,001 to 100,000,000	0.0168%	0.0920%
from 100,000,001 to 500,000,000	0.0088%	0.0464%
over 500,000,000	0.0080%	0.0320%

** For illustrative purposes only, the table on page 61 indicates the resulting range of fees in US$ when the proper calculations have been made.

SCALES OF ADMINISTRATIVE EXPENSES AND ARBITRATOR'S FEES FOR THE EXPEDITED PROCEDURE

Amount in Dispute — A Administrative Expenses*

(in US Dollars)	(in US Dollars)	
up to 50,000	5,000	
from 50,001 to 100,000	5,000	+ 1.53% of amt. over 50,000
from 100,001 to 200,000	5,765	+ 2.72% of amt. over 100,000
from 200,001 to 500,000	8,485	+ 2.25% of amt. over 200,000
from 500,001 to 1,000,000	15,235	+ 1.62% of amt. over 500,000
from 1,000,001 to 2,000,000	23,335	+ 0.788% of amt. over 1,000,000
from 2,000,001 to 5,000,000	31,215	+ 0.46% of amt. over 2,000,000
from 5,000,001 to 10,000,000	45,015	+ 0.25% of amt. over 5,000,000
from 10,000,001 to 30,000,000	57,515	+ 0.10% of amt. over 10,000,000
from 30,000,001 to 50,000,000	77,515	+ 0.09% of amt. over 30,000,000
from 50,000,001 to 80,000,000	95,515	+ 0.01% of amt. over 50,000,000
from 80,000,001 to 500,000,000	98,515	+ 0.0123% of amt. over 80,000,000
over 500,000,000	150,000	

* See page 59.

Amount in Dispute	B Arbitrator's Fees**			
(in US Dollars)	(in US Dollars)			
	Minimum		Maximum	
up to 50,000	2,400		14.4160% of amount in dispute	
from 50,001 to 100,000	2,400	+ 2.1200% of amt. over 50,000	7,208	+ 10.8544% of amt. over 50,000
from 100,001 to 200,000	3,460	+ 1.1448% of amt. over 100,000	12,635	+ 6.1480% of amt. over 100,000
from 200,001 to 500,000	4,605	+ 1.0936% of amt. over 200,000	18,783	+ 5.4696% of amt. over 200,000
from 500,001 to 1,000,000	7,886	+ 0.7632% of amt. over 500,000	35,192	+ 3.2224% of amt. over 500,000
from 1,000,001 to 2,000,000	11,702	+ 0.5512% of amt. over 1,000,000	51,304	+ 2.8832% of amt. over 1,000,000
from 2,000,001 to 5,000,000	17,214	+ 0.3000% of amt. over 2,000,000	80,136	+ 1.1128% of amt. over 2,000,000
from 5,000,001 to 10,000,000	26,214	+ 0.1024% of amt. over 5,000,000	113,520	+ 0.7280% of amt. over 5,000,000
from 10,000,001 to 30,000,000	31,334	+ 0.0512% of amt. over 10,000,000	149,920	+ 0.1928% of amt. over 10,000,000
from 30,000,001 to 50,000,000	41,574	+ 0.0472% of amt. over 30,000,000	188,480	+ 0.1824% of amt. over 30,000,000
from 50,000,001 to 80,000,000	51,014	+ 0.0264% of amt. over 50,000,000	224,960	+ 0.1256% of amt. over 50,000,000
from 80,000,001 to 100,000,000	58,934	+ 0.0168% of amt. over 80,000,000	262,640	+ 0.0920% of amt. over 80,000,000
from 100,000,001 to 500,000,000	62,294	+ 0.0088% of amt. over 100,000,000	281,040	+ 0.0464% of amt. over 100,000,000
over 500,000,000	97,494	+ 0.0080% of amt. over 500,000,000	466,640	+ 0.0320% of amt. over 500,000,000

** See page 59.

The following are examples of case management techniques that can be used by the arbitral tribunal and the parties for controlling time and cost. Appropriate control of time and cost is important in all cases. In cases of low complexity and low value, it is particularly important to ensure that time and costs are proportionate to what is at stake in the dispute.

a) Bifurcating the proceedings or rendering one or more partial awards on key issues, when doing so may genuinely be expected to result in a more efficient resolution of the case.

b) Identifying issues that can be resolved by agreement between the parties or their experts.

c) Identifying issues to be decided solely on the basis of documents rather than through oral evidence or legal argument at a hearing.

d) Production of documentary evidence:

   (i) requiring the parties to produce with their submissions the documents on which they rely;

   (ii) avoiding requests for document production when appropriate in order to control time and cost;

   (iii) in those cases where requests for document production are considered appropriate, limiting such requests to documents or categories of documents that are relevant and material to the outcome of the case;

   (iv) establishing reasonable time limits for the production of documents;

   (v) using a schedule of document production to facilitate the resolution of issues in relation to the production of documents.

e) Limiting the length and scope of written submissions and written and oral witness evidence (both fact witnesses and experts) so as to avoid repetition and maintain a focus on key issues.

f) Using telephone or video conferencing for procedural and other hearings where attendance in person is not essential and use of IT that enables online communication among the parties, the arbitral tribunal and the Secretariat of the Court.

g) Organizing a pre-hearing conference with the arbitral tribunal at which arrangements for a hearing can be discussed and agreed and the arbitral tribunal can indicate to the parties issues on which it would like the parties to focus at the hearing.

h) Settlement of disputes:

   (i) informing the parties that they are free to settle all or part of the dispute either by negotiation or through any form of amicable dispute resolution methods such as, for example, mediation under the ICC Mediation Rules;

   (ii) where agreed between the parties and the arbitral tribunal, the arbitral tribunal may take steps to facilitate settlement of the dispute, provided that every effort is made to ensure that any subsequent award is enforceable at law.

Additional techniques are described in the ICC publication entitled "Controlling Time and Costs in Arbitration".

ARTICLE 1

Application for Emergency Measures

1 A party wishing to have recourse to an emergency arbitrator pursuant to Article 29 of the Rules of Arbitration of the ICC (the "Rules") shall submit its Application for Emergency Measures (the "Application") to the Secretariat at any of the offices specified in the Internal Rules of the Court in Appendix II to the Rules.

2 The Application shall be supplied in a number of copies sufficient to provide one copy for each party, plus one for the emergency arbitrator, and one for the Secretariat.

3 The Application shall contain the following information:

a) the name in full, description, address and other contact details of each of the parties;

b) the name in full, address and other contact details of any person(s) representing the applicant;

c) a description of the circumstances giving rise to the Application and of the underlying dispute referred or to be referred to arbitration;

d) a statement of the Emergency Measures sought;

e) the reasons why the applicant needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal;

f) any relevant agreements and, in particular, the arbitration agreement;

g) any agreement as to the place of the arbitration, the applicable rules of law or the language of the arbitration;

h) proof of payment of the amount referred to in Article 7(1) of this Appendix; and

i) any Request for Arbitration and any other submissions in connection with the underlying dispute, which have been filed with the Secretariat by any of the parties to the emergency arbitrator proceedings prior to the making of the Application.

The Application may contain such other documents or information as the applicant considers appropriate or as may contribute to the efficient examination of the Application.

4 The Application shall be drawn up in the language of the arbitration if agreed upon by the parties or, in the absence of any such agreement, in the language of the arbitration agreement.

5 If and to the extent that the President of the Court (the "President") considers, on the basis of the information contained in the Application, that the Emergency Arbitrator Provisions apply with reference to Article 29(5) and Article 29(6) of the Rules, the Secretariat shall transmit a copy of the Application and the documents annexed thereto to the responding party. If and to the extent that the President considers otherwise, the Secretariat shall inform the parties that the emergency arbitrator proceedings shall not take place with respect to some or all of the parties and shall transmit a copy of the Application to them for information.

6 The President shall terminate the emergency arbitrator proceedings if a Request for Arbitration has not been received by the Secretariat from the applicant within 10 days of the Secretariat's receipt of the Application, unless the emergency arbitrator determines that a longer period of time is necessary.

ARTICLE 2

Appointment of the Emergency Arbitrator; Transmission of the File

1 The President shall appoint an emergency arbitrator within as short a time as possible, normally within two days from the Secretariat's receipt of the Application.

2 No emergency arbitrator shall be appointed after the file has been transmitted to the arbitral tribunal pursuant to Article 16 of the Rules. An emergency arbitrator appointed prior thereto shall retain the power to make an order within the time limit permitted by Article 6(4) of this Appendix.

3 Once the emergency arbitrator has been appointed, the Secretariat shall so notify the parties and shall transmit the file to the emergency arbitrator. Thereafter, all written communications from the parties shall be submitted directly to the emergency arbitrator with a copy to the other party and the Secretariat. A copy of any written communications from the emergency arbitrator to the parties shall be submitted to the Secretariat.

4 Every emergency arbitrator shall be and remain impartial and independent of the parties involved in the dispute.

5 Before being appointed, a prospective emergency arbitrator shall sign a statement of acceptance, availability, impartiality and independence. The Secretariat shall provide a copy of such statement to the parties.

6 An emergency arbitrator shall not act as an arbitrator in any arbitration relating to the dispute that gave rise to the Application.

ARTICLE 3

Challenge of an Emergency Arbitrator

1 A challenge against the emergency arbitrator must be made within three days from receipt by the party making the challenge of the notification of the appointment or from the date when that party was informed of the facts and circumstances on which the challenge is based if such date is subsequent to the receipt of such notification.

2 The challenge shall be decided by the Court after the Secretariat has afforded an opportunity for the emergency arbitrator and the other party or parties to provide comments in writing within a suitable period of time.

ARTICLE 4

Place of the Emergency Arbitrator Proceedings

1 If the parties have agreed upon the place of the arbitration, such place shall be the place of the emergency arbitrator proceedings. In the absence of such agreement, the President shall fix the place of the emergency arbitrator proceedings, without prejudice to the determination of the place of the arbitration pursuant to Article 18(1) of the Rules.

2 Any meetings with the emergency arbitrator may be conducted through a meeting in person at any location the emergency arbitrator considers appropriate or by videoconference, telephone or similar means of communication.

ARTICLE 5

Proceedings

1 The emergency arbitrator shall establish a procedural timetable for the emergency arbitrator proceedings within as short a time as possible, normally within two days from the transmission of the file to the emergency arbitrator pursuant to Article 2(3) of this Appendix.

2 The emergency arbitrator shall conduct the proceedings in the manner which the emergency arbitrator considers to be appropriate, taking into account the nature and the urgency of the Application. In all cases, the emergency arbitrator shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.

ARTICLE 6

Order

1 Pursuant to Article 29(2) of the Rules, the emergency arbitrator's decision shall take the form of an order (the "Order").

2 In the Order, the emergency arbitrator shall determine whether the Application is admissible pursuant to Article 29(1) of the Rules and whether the emergency arbitrator has jurisdiction to order Emergency Measures.

3 The Order shall be made in writing and shall state the reasons upon which it is based. It shall be dated and signed by the emergency arbitrator.

4 The Order shall be made no later than 15 days from the date on which the file was transmitted to the emergency arbitrator pursuant to Article 2(3) of this Appendix. The President may extend the time limit pursuant to a reasoned request from the emergency arbitrator or on the President's own initiative if the President decides it is necessary to do so.

5 Within the time limit established pursuant to Article 6(4) of this Appendix, the emergency arbitrator shall send the Order to the parties, with a copy to the Secretariat, by any of the means of communication permitted by Article 3(2) of the Rules that the emergency arbitrator considers will ensure prompt receipt.

6 The Order shall cease to be binding on the parties upon:

a) the President's termination of the emergency arbitrator proceedings pursuant to Article 1(6) of this Appendix;

b) the acceptance by the Court of a challenge against the emergency arbitrator pursuant to Article 3 of this Appendix;

c) the arbitral tribunal's final award, unless the arbitral tribunal expressly decides otherwise; or

d) the withdrawal of all claims or the termination of the arbitration before the rendering of a final award.

7 The emergency arbitrator may make the Order subject to such conditions as the emergency arbitrator thinks fit, including requiring the provision of appropriate security.

8 Upon a reasoned request by a party made prior to the transmission of the file to the arbitral tribunal pursuant to Article 16 of the Rules, the emergency arbitrator may modify, terminate or annul the Order.

ARTICLE 7

Costs of the Emergency Arbitrator Proceedings

1 The applicant must pay an amount of US$ 40,000, consisting of US$ 10,000 for ICC administrative expenses and US$ 30,000 for the emergency arbitrator's fees and expenses. Notwithstanding Article 1(5) of this Appendix, the Application shall not be notified until the payment of US$ 40,000 is received by the Secretariat.

2 The President may, at any time during the emergency arbitrator proceedings, decide to increase the emergency arbitrator's fees or the ICC administrative expenses taking into account, *inter alia*, the nature of the case and the nature and amount of work performed by the emergency arbitrator, the Court, the President and the Secretariat. If the party which submitted the Application fails to pay the increased costs within the time limit fixed by the Secretariat, the Application shall be considered as withdrawn.

3 The emergency arbitrator's Order shall fix the costs of the emergency arbitrator proceedings and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.

4 The costs of the emergency arbitrator proceedings include the ICC administrative expenses, the emergency arbitrator's fees and expenses and the reasonable legal and other costs incurred by the parties for the emergency arbitrator proceedings.

5 In the event that the emergency arbitrator proceedings do not take place pursuant to Article 1(5) of this Appendix or are otherwise terminated prior to the making of an Order, the President shall determine the amount to be reimbursed to the applicant, if any. An amount of US$ 5,000 for ICC administrative expenses is non-refundable in all cases.

ARTICLE 8

General Rule

1 The President shall have the power to decide, at the President's discretion, all matters relating to the administration of the emergency arbitrator proceedings not expressly provided for in this Appendix.

2 In the President's absence or otherwise at the President's request, any of the Vice-Presidents of the Court shall have the power to take decisions on behalf of the President.

3 In all matters concerning emergency arbitrator proceedings not expressly provided for in this Appendix, the Court, the President and the emergency arbitrator shall act in the spirit of the Rules and this Appendix.

ARTICLE 1

Application of the Expedited Procedure Rules

1 Insofar as Article 30 of the Rules of Arbitration of the ICC (the "Rules") and this Appendix VI do not provide otherwise, the Rules shall apply to an arbitration under the Expedited Procedure Rules.

2 The amount referred to in Article 30(2), subparagraph a), of the Rules is US$ 2,000,000.

3 Upon receipt of the Answer to the Request pursuant to Article 5 of the Rules, or upon expiry of the time limit for the Answer or at any relevant time thereafter and subject to Article 30(3) of the Rules, the Secretariat will inform the parties that the Expedited Procedure Provisions shall apply in the case.

4 The Court may, at any time during the arbitral proceedings, on its own motion or upon the request of a party, and after consultation with the arbitral tribunal and the parties, decide that the Expedited Procedure Provisions shall no longer apply to the case. In such case, unless the Court considers that it is appropriate to replace and/or reconstitute the arbitral tribunal, the arbitral tribunal shall remain in place.

ARTICLE 2

Constitution of the Arbitral Tribunal

1 The Court may, notwithstanding any contrary provision of the arbitration agreement, appoint a sole arbitrator.

2 The parties may nominate the sole arbitrator within a time limit to be fixed by the Secretariat. In the absence of such nomination, the sole arbitrator shall be appointed by the Court within as short a time as possible.

ARTICLE 3

Proceedings

1 Article 23 of the Rules shall not apply to an arbitration under the Expedited Procedure Rules.

2 After the arbitral tribunal has been constituted, no party shall make new claims, unless it has been authorized to do so by the arbitral tribunal, which shall consider the nature of such new claims, the stage of the arbitration, any cost implications and any other relevant circumstances.

3 The case management conference convened pursuant to Article 24 of the Rules shall take place no later than 15 days after the date on which the file was transmitted to the arbitral tribunal. The Court may extend this time limit pursuant to a reasoned request from the arbitral tribunal or on its own initiative if it decides it is necessary to do so.

4 The arbitral tribunal shall have discretion to adopt such procedural measures as it considers appropriate. In particular, the arbitral tribunal may, after consultation with the parties, decide not to allow requests for document production or to limit the number, length and scope of written submissions and written witness evidence (both fact witnesses and experts).

5 The arbitral tribunal may, after consulting the parties, decide the dispute solely on the basis of the documents submitted by the parties, with no hearing and no examination of witnesses or experts. When a hearing is to be held, the arbitral tribunal may conduct it by videoconference, telephone or similar means of communication.

ARTICLE 4

Award

1 The time limit within which the arbitral tribunal must render its final award is six months from the date of the case management conference. The Court may extend the time limit pursuant to Article 31(2) of the Rules.

2 The fees of the arbitral tribunal shall be fixed according to the scales of administrative expenses and arbitrator's fees for the expedited procedure set out in Appendix III.

ARTICLE 5

General Rule

In all matters concerning the expedited procedure not expressly provided for in this Appendix, the Court and the arbitral tribunal shall act in the spirit of the Rules and this Appendix.

ARBITRATION CLAUSES

It is recommended that parties wishing to make reference to ICC arbitration in their contracts use the standard clause below.

Standard ICC Arbitration Clause

All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.

Parties are free to adapt the clause to their particular circumstances. For instance, they may wish to stipulate the number of arbitrators, given that the ICC Arbitration Rules contain a presumption in favour of a sole arbitrator. Also, it may be desirable for them to stipulate the place and language of the arbitration and the law applicable to the merits. The ICC Arbitration Rules do not limit the parties' free choice of the place and language of the arbitration or the law governing the contract.

When adapting the clause, care must be taken to avoid any risk of ambiguity. Unclear wording in the clause will cause uncertainty and delay and can hinder or even compromise the dispute resolution process.

Parties should also take account of any factors that may affect the enforceability of the clause under applicable law. These include any mandatory requirements that may exist at the place of arbitration and the expected place or places of enforcement.

ICC Arbitration Without Emergency Arbitrator

If the parties wish to exclude any recourse to the Emergency Arbitrator Provisions, they must expressly opt out by adding the following wording to the clause above:

The Emergency Arbitrator Provisions shall not apply.

Expedited Arbitration

The ICC Arbitration Rules provide for use of an expedited procedure in lower-value cases. If parties wish to exclude the application of the Expedited Procedure Provisions, they must expressly opt out by adding the following wording to the clause above:

The Expedited Procedure Provisions shall not apply.

Parties wishing to avail themselves of the expedited procedure in higher-value cases should expressly opt in by adding the following wording to the clause above:

The parties agree, pursuant to Article 30(2)(b) of the Rules of Arbitration of the International Chamber of Commerce, that the Expedited Procedure Rules shall apply irrespective of the amount in dispute.

If parties wish the ceiling for the application of the Expedited Procedure Rules to be higher than that specified in those Rules, the following wording should be added to the clause above:

The parties agree, pursuant to Article 30(2)(b) of the Rules of Arbitration of the International Chamber of Commerce, that the Expedited Procedure Rules shall apply, provided the amount in dispute does not exceed US$ [specify amount] at the time of the communication referred to in Article 1(3) of the Expedited Procedure Rules.

Multi-Tiered Clauses

ICC arbitration may be used as the forum for final determination of a dispute following an attempt at settlement by other means such as mediation. Parties wishing to include in their contracts a tiered dispute resolution clause combining ICC arbitration with ICC mediation should refer to the standard clauses relating to the ICC Mediation Rules (see pages 96-99).

Other combinations of services are also possible. For instance, arbitration may be used as a fallback to expertise or dispute boards. Also, parties who resort to ICC arbitration may wish to provide for recourse to the ICC International Centre for ADR for the proposal of an expert if an expert opinion is required in the course of the arbitration.

Standard clauses for these and other combinations of services are available in several languages at **www.iccarbitration.org.**

MEDIATION RULES

Mediation Rules of the International Chamber of Commerce

In force as from 1 January 2014

ARTICLE 1

Introductory Provisions

1 The Mediation Rules (the "Rules") of the International Chamber of Commerce (the "ICC") are administered by the ICC International Centre for ADR (the "Centre"), which is a separate administrative body within the ICC.

2 The Rules provide for the appointment of a neutral third party (the "Mediator") to assist the parties in settling their dispute.

3 Mediation shall be used under the Rules unless, prior to the confirmation or appointment of the Mediator or with the agreement of the Mediator, the parties agree upon a different settlement procedure or a combination of settlement procedures. The term "mediation" as used in the Rules shall be deemed to cover such settlement procedure or procedures and the term "Mediator" shall be deemed to cover the neutral who conducts such settlement procedure or procedures. Whatever settlement procedure is used, the term "Proceedings" as used in the Rules refers to the process beginning with its commencement and ending with its termination pursuant to the Rules.

4 All of the parties may agree to modify any of the provisions of the Rules, provided, however, that the Centre may decide not to administer the Proceedings if, in its discretion, it considers that any such modification is not in the spirit of the Rules. At any time after the confirmation or appointment of the Mediator, any agreement to modify the provisions of the Rules shall also be subject to the approval of the Mediator.

5 The Centre is the only body authorized to administer Proceedings under the Rules.

ARTICLE 2

Commencement Where there is an Agreement to Refer to the Rules

1 Where there is an agreement between the parties to refer their dispute to the Rules, any party or parties wishing to commence mediation pursuant to the Rules shall file a written Request for Mediation (the "Request") with the Centre. The Request shall include:

a) the names, addresses, telephone numbers, email addresses and any other contact details of the parties to the dispute and of any person(s) representing the parties in the Proceedings;

b) a description of the dispute including, if possible, an assessment of its value;

c) any agreement to use a settlement procedure other than mediation, or, in the absence thereof, any proposal for such other settlement procedure that the party filing the Request may wish to make;

d) any agreement as to time limits for conducting the mediation, or, in the absence thereof, any proposal with respect thereto;

e) any agreement as to the language(s) of the mediation, or, in the absence thereof, any proposal as to such language(s);

f) any agreement as to the location of any physical meetings, or, in the absence thereof, any proposal as to such location;

g) any joint nomination by all of the parties of a Mediator or any agreement of all of the parties as to the attributes of a Mediator to be appointed by the Centre where no joint nomination has been made, or, in the absence of any such agreement, any proposal as to the attributes of a Mediator;

h) a copy of any written agreement under which the Request is made.

2 Together with the Request, the party or parties filing the Request shall pay the filing fee required by the Appendix hereto in force on the date the Request is filed.

3 The party or parties filing the Request shall simultaneously send a copy of the Request to all other parties, unless the Request has been filed jointly by all parties.

4 The Centre shall acknowledge receipt of the Request and of the filing fee in writing to the parties.

5 Where there is an agreement to refer to the Rules, the date on which the Request is received by the Centre shall, for all purposes, be deemed to be the date of the commencement of the Proceedings.

6 Where the parties have agreed that a time limit for settling the dispute pursuant to the Rules shall start running from the filing of a Request, such filing, for the exclusive purpose of determining the starting point of the time limit, shall be deemed to have been made on the date the Centre acknowledges receipt of the Request or of the filing fee, whichever is later.

ARTICLE 3

Commencement Where there is No Prior Agreement to Refer to the Rules

1 In the absence of an agreement of the parties to refer their dispute to the Rules, any party that wishes to propose referring the dispute to the Rules to another party may do so by sending a written Request to the Centre containing the information specified in Article 2(1), subparagraphs a)-g). Upon receipt of such Request, the Centre will inform all other parties of the proposal and may assist the parties in considering the proposal.

2 Together with the Request, the party or parties filing the Request shall pay the filing fee required by the Appendix hereto in force on the date the Request is filed.

3 Where the parties reach an agreement to refer their dispute to the Rules, the Proceedings shall commence on the date on which the Centre sends written confirmation to the parties that such an agreement has been reached.

4 Where the parties do not reach an agreement to refer their dispute to the Rules within 15 days from the date of the receipt of the Request by the Centre or within such additional time as may be reasonably determined by the Centre, the Proceedings shall not commence.

ARTICLE 4

Place and Language(s) of the Mediation

1 In the absence of an agreement of the parties, the Centre may determine the location of any physical meeting of the Mediator and the parties or may invite the Mediator to do so after the Mediator has been confirmed or appointed.

2 In the absence of an agreement of the parties, the Centre may determine the language(s) in which the mediation shall be conducted or may invite the Mediator to do so after the Mediator has been confirmed or appointed.

ARTICLE 5

Selection of the Mediator

1 The parties may jointly nominate a Mediator for confirmation by the Centre.

2 In the absence of a joint nomination of a Mediator by the parties, the Centre shall, after consulting the parties, either appoint a Mediator or propose a list of Mediators to the parties. All of the parties may jointly nominate a Mediator from the said list for confirmation by the Centre, failing which the Centre shall appoint a Mediator.

3 Before appointment or confirmation, a prospective Mediator shall sign a statement of acceptance, availability, impartiality and independence. The prospective Mediator shall disclose in writing to the Centre any facts or circumstances which might be of such a nature as to call into question the Mediator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the Mediator's impartiality. The Centre shall provide such information to the parties in writing and shall fix a time limit for any comments from them.

4 When confirming or appointing a Mediator, the Centre shall consider the prospective Mediator's attributes, including but not limited to nationality, language skills, training, qualifications and experience, and the prospective Mediator's availability and ability to conduct the mediation in accordance with the Rules.

5 Where the Centre appoints a Mediator, it shall do so either on the basis of a proposal by an ICC National Committee or Group, or otherwise. The Centre shall make all reasonable efforts to appoint a Mediator having the attributes, if any, which have been agreed upon by all of the parties. If any party objects to the Mediator appointed by the Centre and notifies the Centre and all other parties in writing, stating the reasons for such objection, within 15 days of receipt of notification of the appointment, the Centre shall appoint another Mediator.

6 Upon agreement of all of the parties, the parties may nominate more than one Mediator or request the Centre to appoint more than one Mediator, in accordance with the provisions of the Rules. In appropriate circumstances, the Centre may propose to the parties that there be more than one Mediator.

ARTICLE 6

Fees and Costs

1 The party or parties filing a Request shall include with the Request the non-refundable filing fee required by Article 2(2) or Article 3(2) of the Rules, as set out in the Appendix hereto. No Request shall be processed unless accompanied by the filing fee.

2 Following the receipt of a Request pursuant to Article 3, the Centre may request that the party filing the Request pay a deposit to cover the administrative expenses of the Centre.

3 Following the commencement of the Proceedings, the Centre shall request the parties to pay one or more deposits to cover the administrative expenses of the Centre and the fees and expenses of the Mediator, as set out in the Appendix hereto.

4 The Centre may stay or terminate the Proceedings under the Rules if any requested deposit is not paid.

5 Upon termination of the Proceedings, the Centre shall fix the total costs of the Proceedings and shall, as the case may be, reimburse the parties for any excess payment or bill the parties for any balance required pursuant to the Rules.

6 With respect to Proceedings that have commenced under the Rules, all deposits requested and costs fixed shall be borne in equal shares by the parties, unless they agree otherwise in writing. However, any party shall be free to pay the unpaid balance of such deposits and costs should another party fail to pay its share.

7 A party's other expenditure shall remain the responsibility of that party, unless otherwise agreed by the parties.

ARTICLE 7

Conduct of the Mediation

1 The Mediator and the parties shall promptly discuss the manner in which the mediation shall be conducted.

2 After such discussion, the Mediator shall promptly provide the parties with a written note informing them of the manner in which the mediation shall be conducted. Each party, by agreeing to refer a dispute to the Rules, agrees to participate in the Proceedings at least until receipt of such note from the Mediator or earlier termination of the Proceedings pursuant to Article 8(1) of the Rules.

3 In establishing and conducting the mediation, the Mediator shall be guided by the wishes of the parties and shall treat them with fairness and impartiality.

4 Each party shall act in good faith throughout the mediation.

ARTICLE 8

Termination of the Proceedings

1 Proceedings which have been commenced pursuant to the Rules shall terminate upon written confirmation of termination by the Centre to the parties after the occurrence of the earliest of:

a) the signing by the parties of a settlement agreement;

b) the notification in writing made to the Mediator by any party, at any time after it has received the Mediator's note referred to in Article 7(2), that such party has decided no longer to pursue the mediation;

c) the notification in writing by the Mediator to the parties that the mediation has been completed;

d) the notification in writing by the Mediator to the parties that, in the Mediator's opinion, the mediation will not resolve the dispute between the parties;

e) the notification in writing by the Centre to the parties that any time limit set for the Proceedings, including any extension thereof, has expired;

f) the notification in writing by the Centre to the parties, not less than seven days after the due date for any payment by one or more parties pursuant to the Rules, that such payment has not been made; or

g) the notification in writing by the Centre to the parties that, in the judgment of the Centre, there has been a failure to nominate a Mediator or that it has not been reasonably possible to appoint a Mediator.

2 The Mediator shall promptly notify the Centre of the signing of a settlement agreement by the parties or of any notification given to or by the Mediator pursuant to Article 8(1), subparagraphs b)–d), and shall provide the Centre with a copy of any such notification.

ARTICLE 9

Confidentiality

1 In the absence of any agreement of the parties to the contrary and unless prohibited by applicable law:

a) the Proceedings, but not the fact that they are taking place, have taken place or will take place, are private and confidential;

b) any settlement agreement between the parties shall be kept confidential, except that a party shall have the right to disclose it to the extent that such disclosure is required by applicable law or necessary for purposes of its implementation or enforcement.

2 Unless required to do so by applicable law and in the absence of any agreement of the parties to the contrary, a party shall not in any manner produce as evidence in any judicial, arbitral or similar proceedings:

a) any documents, statements or communications which are submitted by another party or by the Mediator in or for the Proceedings, unless they can be obtained independently by the party seeking to produce them in the judicial, arbitral or similar proceedings;

b) any views expressed or suggestions made by any party within the Proceedings with regard to the dispute or the possible settlement of the dispute;

c) any admissions made by another party within the Proceedings;

d) any views or proposals put forward by the Mediator within the Proceedings; or

e) the fact that any party indicated within the Proceedings that it was ready to accept a proposal for a settlement.

ARTICLE 10

General Provisions

1 Where, prior to the date of the entry into force of the Rules, the parties have agreed to refer their dispute to the ICC ADR Rules, they shall be deemed to have referred their dispute to the ICC Mediation Rules, unless any of the parties objects thereto, in which case the ICC ADR Rules shall apply.

2 Unless all of the parties have agreed otherwise in writing or unless prohibited by applicable law, the parties may commence or continue any judicial, arbitral or similar proceedings in respect of the dispute, notwithstanding the Proceedings under the Rules.

3 Unless all of the parties agree otherwise in writing, a Mediator shall not act nor shall have acted in any judicial, arbitral or similar proceedings relating to the dispute which is or was the subject of the Proceedings under the Rules, whether as a judge, an arbitrator, an expert or a representative or advisor of a party.

4 Unless required by applicable law or unless all of the parties and the Mediator agree otherwise in writing, the Mediator shall not give testimony in any judicial, arbitral or similar proceedings concerning any aspect of the Proceedings under the Rules.

5 The Mediator, the Centre, the ICC and its employees, the ICC National Committees and Groups and their employees and representatives shall not be liable to any person for any act or omission in connection with the Proceedings, except to the extent such limitation of liability is prohibited by applicable law.

6 In all matters not expressly provided for in the Rules, the Centre and the Mediator shall act in the spirit of the Rules.

ARTICLE 1

Filing Fee

Each Request pursuant to the Rules must be accompanied by a filing fee of US$ 3,000. The filing fee is non-refundable and shall be credited towards the deposit of the party or parties having filed the Request.

ARTICLE 2

Administrative Expenses

1 The administrative expenses of the ICC for the proceedings shall be fixed at the Centre's discretion depending on the tasks carried out by the Centre and shall normally not exceed the following:

US$ 5,000	for amounts in dispute up to and including US$ 200,000
US$ 10,000	for amounts in dispute between US$200,001 and US$ 2,000,000
US$ 15,000	for amounts in dispute between US$ 2,000,001 and US$ 10,000,000
US$ 20,000	for amounts in dispute between US$ 10,000,001 and US$ 50,000,000
US$ 25,000	for amounts in dispute between US$ 50,000,001 and US$ 100,000,000
US$ 30,000	for amounts in dispute over US$ 100,000,000

2 Where the amount in dispute is not stated, the administrative expenses may be fixed by the Centre at its discretion, taking into account all the circumstances of the case, including indications regarding the value of the dispute, but they shall normally not exceed US$ 20,000.

3 In exceptional circumstances, the Centre may fix the administrative expenses at a higher figure than that which would result from the application of the above scale, provided that the Centre shall inform the parties of such possibility beforehand and shall normally not exceed the maximum amount for administrative expenses foreseen in the scale.

4 The Centre may require the payment of administrative expenses in addition to those provided in the scale described in Article 2(1) of this Appendix as a condition for holding the proceedings in abeyance at the request of the parties or of one of them with the acquiescence of the other. Such abeyance fee shall normally not exceed US$ 1,000 per party per year.

ARTICLE 3

Mediator's Fees and Expenses

1 Unless otherwise agreed by the parties and the Mediator, the fees of the Mediator shall be calculated on the basis of the time reasonably spent by the Mediator in the proceedings. These fees shall be based on an hourly rate fixed by the Centre when appointing or confirming the Mediator and after having consulted the Mediator and the parties. The hourly rate shall be reasonable in amount and shall be determined in light of the complexity of the dispute and any other relevant circumstances.

2 If agreed by the parties and the Mediator, the Centre may fix the Mediator's fees on the basis of a single fixed fee for the whole proceedings, rather than an hourly rate. The single fixed fee shall be reasonable in amount and shall be determined in light of the complexity of the dispute, the amount of work that the parties and the Mediator anticipate will be required of the Mediator, and any other relevant circumstances. The Centre, at its discretion, may increase or decrease the amount of the single fixed fee based upon a reasoned request of a party or the Mediator. Prior to increasing or decreasing the single fixed fee, the Centre shall invite observations from all parties and the Mediator.

3 The amount of reasonable expenses of the Mediator shall be fixed by the Centre.

4 The Mediator's fees and expenses shall be fixed exclusively by the Centre as required by the Rules. Separate fee arrangements between the parties and the Mediator are not permitted by the Rules.

ARTICLE 4

Prior ICC Arbitration

When a mediation is preceded by the submission of a request for arbitration pursuant to the ICC Rules of Arbitration concerning the same parties and the same or parts of the same dispute, the filing fee paid for such arbitration proceedings shall be credited to the administrative expenses of the mediation, if the total administrative expenses paid with respect to the arbitration exceed US$ 7,500.

ARTICLE 5

Currency, VAT and Scope

1 All amounts fixed by the Centre or pursuant to any Appendix to the Rules are payable in US$ except where prohibited by law, in which case the ICC may apply a different scale and fee arrangement in another currency.

2 Amounts paid to the Mediator do not include any possible value added tax (VAT) or other taxes or charges and imposts applicable to the Mediator's fees. Parties have a duty to pay any such taxes or charges; however, the recovery of any such taxes or charges is a matter solely between the Mediator and the parties.

3 Any ICC administrative expenses may be subject to value added tax (VAT) or charges of a similar nature at the prevailing rate.

4 The above provisions on the costs of proceedings shall be effective as of 1 January 2018 in respect of all proceedings commenced on or after such date under the present Rules or the ICC ADR Rules.

ARTICLE 6

ICC as Appointing Authority

Any request received for an authority of the ICC to appoint a Mediator will be treated in accordance with the ICC Rules for the Appointment of Experts and Neutrals and shall be accompanied by a non-refundable filing fee of US$ 3,000 per Mediator. No request shall be processed unless accompanied by the said filing fee. For additional services, the ICC may at its discretion fix ICC administrative expenses, which shall be commensurate with the services provided and shall normally not exceed the maximum amount of US$ 10,000.

MEDIATION CLAUSES

Parties wishing to use proceedings under the ICC Mediation Rules should consider choosing one of the clauses below, which cover different situations and needs. Parties are free to adapt the chosen clause to their particular circumstances. For instance, they may wish to specify the use of a settlement procedure other than mediation. Further, they may wish to stipulate the language and place of any mediation and/or arbitration proceedings.

The notes below each clause are intended to help parties select the clause that best meets their specific requirements.

At all times, care must be taken to avoid any risk of ambiguity in the drafting of the clause. Unclear wording causes uncertainty and delay and can hinder or even compromise the dispute resolution process.

When incorporating any of these clauses in their contracts, parties are advised to take account of any factors that may affect their enforceability under applicable law.

Clause A: Option to Use the ICC Mediation Rules

The parties may at any time, without prejudice to any other proceedings, seek to settle any dispute arising out of or in connection with the present contract in accordance with the ICC Mediation Rules.

Notes: By including this clause, the parties acknowledge that proceedings under the ICC Mediation Rules are available to them at any time. This clause does not commit the parties to do anything, but the presence of the clause is designed to remind them of the possibility of using mediation or some other settlement procedure at any time. In addition, it can provide a basis for one party to propose mediation to the other party. One or more parties may also ask the ICC International Centre for ADR for its assistance in this process.

Clause B: Obligation to Consider the ICC Mediation Rules

In the event of any dispute arising out of or in connection with the present contract, the parties agree in the first instance to discuss and consider referring the dispute to the ICC Mediation Rules.

Notes: This clause goes a step further than Clause A and requires the parties, when a dispute arises, to discuss and consider together referring the dispute to proceedings under the ICC Mediation Rules. One or more parties may ask the ICC International Centre for ADR for its assistance in this process.

This clause may be appropriate where the parties do not wish to commit to referring a dispute to proceedings under the Rules at the outset but prefer to retain flexibility as to whether to use mediation to try and settle a dispute.

Clause C: Obligation to Refer Dispute to the ICC Mediation Rules While Permitting Parallel Arbitration Proceedings if Required

(x) In the event of any dispute arising out of or in connection with the present contract, the parties shall first refer the dispute to proceedings under the ICC Mediation Rules. The commencement of proceedings under the ICC Mediation Rules shall not prevent any party from commencing arbitration in accordance with sub-clause y below.

(y) All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.

Notes: This clause creates an obligation to refer a dispute to proceedings under the ICC Mediation Rules. It is designed to ensure that when a dispute arises, the parties will attempt to settle the dispute using proceedings under the Rules.

The clause also makes it clear that the parties do not need to conclude the proceedings under the ICC Mediation Rules, or wait for an agreed period of time, before commencing arbitration proceedings. This is also the default position under Article 10(2) of the Rules.

The clause provides for ICC arbitration as the forum for final determination of the dispute. If desired, the clause can be adapted to provide instead for a different form of arbitration, or for judicial or other similar proceedings.

Clause D: Obligation to Refer Dispute to the ICC Mediation Rules, Followed by Arbitration if Required

In the event of any dispute arising out of or in connection with the present contract, the parties shall first refer the dispute to proceedings under the ICC Mediation Rules. If the dispute has not been settled pursuant to the said Rules within [45] days following the filing of a Request for Mediation or within such other period as the parties may agree in writing, such dispute shall thereafter be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.

Notes: Like Clause C, this clause creates an obligation to refer a dispute to proceedings under the ICC Mediation Rules.

Unlike Clause C, this clause provides that arbitration proceedings may not be commenced until an agreed period has elapsed following the filing of a Request for Mediation. The lapse of time suggested in the model clause is 45 days, but parties should select a period that they consider to be appropriate for the contract in question.

Clause D changes the default position under Article 10(2) of the ICC Mediation Rules allowing judicial, arbitral or similar proceedings to be commenced in parallel with proceedings under the ICC Mediation Rules.

Like Clause C, Clause D provides for ICC arbitration as the forum for final determination of the dispute. If desired, the clause can be adapted to provide instead for a different form of arbitration, or for judicial or other similar proceedings.

Specific Issues Concerning the Emergency Arbitrator Provisions

The parties should determine whether they wish to have recourse to the Emergency Arbitrator Provisions under Clauses C and D.

Clauses C and D

If the parties wish to exclude any recourse to the Emergency Arbitrator Provisions, the following wording should be added to Clause C or D as applicable:

The Emergency Arbitrator Provisions shall not apply.

Clause D

1 If the parties wish to have recourse to the Emergency Arbitrator Provisions, and want that recourse expressly to be available prior to expiry of the 45-day or other agreed period following filing of the Request for Mediation, the following wording should be added to Clause D:

The requirement to wait [45] days, or any other agreed period, following the filing of a Request for Mediation, before referring a dispute to arbitration shall not prevent the parties from making an application, prior to expiry of those [45] days or other agreed period, for Emergency Measures under the Emergency Arbitrator Provisions in the Rules of Arbitration of the International Chamber of Commerce.

2 If the parties wish to have recourse to the Emergency Arbitrator Provisions, but only after expiry of the 45-day or other agreed period following filing of the Request for Mediation, the following wording should be added to Clause D:

The parties shall not have the right to make an application for Emergency Measures under the Emergency Arbitrator Provisions in the Rules of Arbitration of the International Chamber of Commerce prior to expiry of the [45] days or other agreed period following the filing of a Request for Mediation.

For further information on drafting clauses providing for ICC arbitration, see pages 76–77 above.

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NOTE TO PARTIES AND ARBITRAL TRIBUNALS ON THE CONDUCT OF THE ARBITRATION UNDER THE ICC RULES OF ARBITRATION

Table of Contents

I - General Information

1. This Note is intended to provide parties and arbitral tribunals with practical guidance concerning the conduct of arbitrations under the ICC Rules of Arbitration ("Rules") as well as the practices of the International Court of Arbitration of the International Chamber of Commerce ("Court").

2. Unless otherwise indicated, this Note applies to all ICC arbitrations regardless of the version of the Rules pursuant to which they are conducted. The numbering of Articles in this Note refers to the 2017 Rules.

A - The ICC International Court of Arbitration and its Secretariat

3. The Court is an administrative body that ensures that ICC arbitrations are conducted in accordance with the Rules. It does not itself resolve disputes (Article 1(2)).

4. The Court is assisted by its Secretariat (Article 1(5)). The Secretariat is directed by the Secretary General, the Deputy Secretary General and the Managing Counsel. It is composed of case management teams each headed by a Counsel.

5. The Secretariat closely monitors the progress of the proceedings and assists the parties and the arbitral tribunals with any questions relating to the conduct of the arbitration. The parties and/or their legal representatives are encouraged to contact the Secretariat with any questions or comments arising from the Rules and/or this Note.

6. At the end of the arbitration, the parties, their representatives and the arbitrators will be invited to submit an evaluation form to the Secretariat.

B - Communications

7. Pursuant to Article 3(1), parties and arbitrators must send copies of all written correspondence directly to all other parties, arbitrators and the Secretariat.

8. The Request for Arbitration (Article 4), the Answer and any counterclaims (Article 5), and any Request for Joinder (Article 7) must be sent to the Secretariat in hard copy as well as in electronic form by email. To the extent possible, any other written documents should be sent to the Secretariat in electronic form by email only. Sending hard copies to the Secretariat is not necessary, even where the arbitral tribunal has asked to be provided with hard copies.

9. The Secretariat will generally send correspondence by email. The parties, their counsel and prospective arbitrators must provide the Secretariat with their email addresses.

II - Parties

A - Where Requests for Arbitration can be Submitted

10. ICC arbitration is commenced upon the Secretariat's receipt of a Request for Arbitration at any of its offices (Articles 4(1) of the Rules and 5(3) of Appendix II). For the purposes of Articles 4(1) of the Rules and 5(3) of Appendix II, the Secretariat maintains offices in Paris, Hong Kong, New York, Sao Paulo and Singapore, as well as a representative office in

Abu Dhabi Global Market. Offices in New York, Sao Paulo and Singapore are hosted by independent legal entities affiliated with ICC.

11. Upon receipt of the Request for Arbitration, the Secretary General will assign the case to one of the Secretariat's case management teams in any of the Secretariat's offices. The case file may be transferred to an office of the Secretariat other than the office in which the Request for Arbitration was filed.

B - Representation

12. The parties must inform the Secretariat and the arbitral tribunal of the name(s) and address(es) of their representative(s). The parties must promptly inform the Secretariat and the arbitral tribunal of any changes in their representation.

C - Joinder of Additional Parties

13. Requests for Joinder of a party are similar to Requests for Arbitration (Article 7). When a Request for Joinder is submitted, the additional party becomes a party to the arbitration and may raise pleas pursuant to Article 6(3). No additional party may be joined after the confirmation or appointment of an arbitrator, unless the parties and the additional party agree otherwise. Thus, a party to an arbitration wishing to join an additional party must file its Request for Joinder before any arbitrator is confirmed or appointed under the Rules.

D - Communication of Reasons for Court Decisions

14. Upon request of any party, the Court may communicate the reasons for (i) a decision made on the challenge of an arbitrator pursuant to Article 14; (ii) a decision to initiate replacement proceedings and subsequently to replace an arbitrator pursuant to Article 15(2); and (iii) decisions pursuant to Articles 6(4) and 10.

15. For arbitrations conducted under the Rules in effect prior to the entry into force of the 2017 Rules, a request for communication of reasons must be made jointly by all parties.

16. Any request for the communication of reasons must be made in advance of the decision in respect of which reasons are sought. For decisions pursuant to Article 15(2), a party shall address its request to the Court when invited to comment pursuant to Article 15(3).

17. The Court has full discretion to accept or reject a request for communication of reasons.

III - Arbitral Tribunal

A - Statement of Acceptance, Availability, Impartiality and Independence

18. All arbitrators, including emergency arbitrators, have the duty to act at all times in an impartial and independent manner (Articles 11 and 22(4)).

19. The Court requires all prospective arbitrators to complete and sign a Statement of Acceptance, Availability, Impartiality and Independence ("Statement") (Article 11(2)).

20. The parties have a legitimate interest in being fully informed of all facts or circumstances that may be relevant in their view in order to be satisfied that an arbitrator or prospective arbitrator is and remains independent and impartial or, if they so wish, to explore the matter further and/or take the initiatives contemplated by the Rules.

21. An arbitrator or prospective arbitrator must therefore disclose in his or her Statement, at the time of his or her appointment and as the arbitration is ongoing, any circumstance that might be of such a nature as to call into question his or her independence in the eyes of any of the parties or give rise to reasonable doubts as to his or her impartiality. Any doubt must be resolved in favour of disclosure.

22. A disclosure does not imply the existence of a conflict. On the contrary, arbitrators who make disclosures consider themselves to be impartial and independent, notwithstanding the disclosed facts, or else they would decline to serve. In the event of an objection or a challenge, it is for the Court to assess whether the matter disclosed is an impediment to service as arbitrator. Although failure to disclose is not in itself a ground for disqualification, it will however be considered by the Court in assessing whether an objection to confirmation or a challenge is well founded.

23. Each arbitrator or prospective arbitrator must assess what circumstances, if any, are such as to call into question his or her independence in the eyes of the parties or give rise to reasonable doubts as to his or her impartiality. In making such assessment, an arbitrator or prospective arbitrator should consider all potentially relevant circumstances, including **but not limited to** the following:

- The arbitrator or prospective arbitrator or his or her law firm represents or advises, or has represented or advised, one of the parties or one of its affiliates.
- The arbitrator or prospective arbitrator or his or her law firm acts or has acted against one of the parties or one of its affiliates.
- The arbitrator or prospective arbitrator or his or her law firm has a business relationship with one of the parties or one of its affiliates, or a personal interest of any nature in the outcome of the dispute.
- The arbitrator or prospective arbitrator or his or her law firm acts or has acted on behalf of one of the parties or one of its affiliates as director, board member, officer, or otherwise.
- The arbitrator or prospective arbitrator or his or her law firm is or has been involved in the dispute, or has expressed a view on the dispute in a manner that might affect his or her impartiality.
- The arbitrator or prospective arbitrator has a professional or close personal relationship with counsel to one of the parties or the counsel's law firm.
- The arbitrator or prospective arbitrator acts or has acted as arbitrator in a case involving one of the parties or one of its affiliates.
- The arbitrator or prospective arbitrator acts or has acted as arbitrator in a related case.
- The arbitrator or prospective arbitrator has in the past been appointed as arbitrator by one of the parties or one of its affiliates, or by counsel to one of the parties or the counsel's law firm.

24. In assessing whether a disclosure should be made, an arbitrator or prospective arbitrator should consider relationships with non-parties having an interest in the outcome of the arbitration. The Secretariat may in this respect assist prospective arbitrators by identifying relevant entities and individuals in the arbitration. Such an indication does not release an arbitrator or prospective arbitrator from his or her duty to disclose with respect to other relevant entities and individuals he or she may be aware of. In case of doubt with respect to

such an indication made by the Secretariat, an arbitrator or prospective arbitrator is encouraged to consult the Secretariat.

25. The duty to disclose is of an ongoing nature and it therefore applies throughout the duration of the arbitration.

26. Although an advance declaration or waiver in relation to possible conflicts of interest arising from facts and circumstances that may arise in the future may or may not in certain circumstances be taken into account by the Court, it does not discharge an arbitrator from his or her ongoing duty to disclose.

27. When completing his or her Statement and identifying whether he or she should make a disclosure, both at the outset of the arbitration and subsequently, an arbitrator or prospective arbitrator should make reasonable enquiries in his or her records, those of his or her law firm and, as the case may be, in other readily available materials.

28. For the scope of disclosures, an arbitrator will be considered as bearing the identity of his or her law firm, and a legal entity will include its affiliates. In addressing possible objections to confirmation or challenges, the Court will consider the activities of the arbitrator's law firm and the relationship of the law firm with the arbitrator in each individual case. Arbitrators should in each case consider disclosing relationships with another arbitrator or counsel who is a member of the same barristers' chambers. Relationships between arbitrators, as well as relationships with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award, should also be considered in the circumstances of each case.

29. Arbitrators have a duty to devote to the arbitration the time necessary to conduct the proceedings as diligently, efficiently and expeditiously as possible. Accordingly, prospective arbitrators must indicate in the Statement the number of arbitrations in which they are currently acting, specifying whether they are acting as president, sole arbitrator, co-arbitrator or counsel to a party, as well as any other commitments and their availability over the next 24 months.

30. If one or more parties object to the confirmation of a prospective arbitrator, or in case of a challenge, the Secretariat will invite the other party or parties and the arbitrator or prospective arbitrator to comment.

31. By signing the Statement, arbitrators accept that their name and contact details as well as their *curriculum vitae*, may be communicated to the members of the Court, the Secretariat at its various offices, and to ICC National Committees and Groups for the purpose of arbitral proceedings under the Rules. By signing the Statement, arbitrators also accept that their name and related information may be published pursuant to sections C and D below, and that their award(s) and procedural order(s) may be published pursuant to section D below.

B - Assistance by the Secretariat with the Nomination or Appointment of Arbitrators

32. Whenever the parties are to nominate a sole arbitrator or a presiding arbitrator for confirmation by the Court or the co-arbitrators a presiding arbitrator, they may jointly seek the Secretariat's assistance by requesting the Secretariat either to propose names of possible candidates or to provide non-confidential information on prospective arbitrators. Upon joint request of the parties, the Secretariat may also contact prospective arbitrators in order to check their experience, availability and possible conflicts of interests.

33. The parties may agree that the Court's appointment of a sole arbitrator or a presiding arbitrator will take place in consultation between the parties and the Secretariat. In particular, the parties may agree that any such appointment will take place following a list procedure, whereby the Secretariat will establish a list of candidates and submit it to the parties (for example by allowing them to strike a limited number of candidates and rank the others by order of preference) before proceeding with the appointment.

C - Publication of Information Regarding Arbitral Tribunals

34. Increasing the information available to parties, the business community at large and academia is key in ensuring that arbitration remains a trusted tool to facilitate trade. The Court therefore endeavours to make the arbitration process more transparent in ways that do not compromise expectations of confidentiality that may be important to parties. Transparency provides greater confidence in the arbitration process, and helps protect arbitration against inaccurate or ill-informed criticism.

35. Consistent with that policy and unless otherwise agreed by the parties, the Court publishes on the ICC website, for arbitrations registered as from 1 January 2016, the following information: (i) the names of the arbitrators, (ii) their nationality, (iii) their role within a tribunal, (iv) the method of their appointment, and (v) whether the arbitration is pending or closed. The arbitration reference number and the names of the parties and of their counsel will not be published.

36. For arbitrations registered as from 1 July 2019, the Court will also publish on the ICC website the following additional information: (vi) the sector of industry involved and (vii) counsel representing the parties in the case.

37. This information will be published after the Terms of Reference have been transmitted to, or approved by, the Court and will be updated in the event of a change in the arbitral tribunal's composition or party representation (without however mentioning the reason for the change).

38. This information will remain on the ICC website after the closure of the arbitration unless the concerned individual withdraws his/her consent in accordance with applicable data protection regulations.

39. The parties may jointly request the Court to publish additional information about a particular arbitration in which they are involved.

D - Publication of Awards

40. Publicising and disseminating information about arbitration has been one of ICC's commitments since its creation and an instrumental factor in facilitating the development of trade worldwide.

41. Parties and arbitrators in ICC arbitrations accept that ICC awards, as well as any dissenting and/or concurring opinions, made as from 1 January 2019 may be published according to the following provisions.

42. The Secretariat will inform the parties and arbitrators, at the time of notification of any final award made as from 1 January 2019, that such final award, as well as any other award and dissenting or concurring opinion made in the case, may be published in its entirety no less

than two years after the date of said notification. The parties may agree to a longer or shorter time period for publication.

43. At any time before publication, any party may object to publication or require that any award be in all or part anonymised or pseudonymised, in which case the award will not be published or will be anonymised or pseudonymised.

44. In case of a confidentiality agreement covering certain aspects of the arbitration or of the award, publication will be subject to the parties' specific consent.

45. The Secretariat may anonymise or pseudonymise personal data included in the award as necessary pursuant to the applicable data protection regulations.

46. The Secretariat may always, in its discretion, exempt awards from publication.

IV - Conduct of Participants in the Arbitration

47. Arbitral tribunals, parties and their representatives are expected to abide by the highest standards of integrity and honesty, to conduct themselves with honour, courtesy and professionalism, and to encourage all other participants in the arbitral proceedings to do the same.

48. Parties and arbitral tribunals are encouraged to draw inspiration from and, where appropriate, to adopt the IBA Guidelines on Party Representation in International Arbitration.

49. An arbitrator or prospective arbitrator shall not engage in *ex parte* communications with a party or party representative concerning the arbitration. However:

    a. A prospective arbitrator may communicate with a party or party representative on an *ex parte* basis to determine his or her expertise, experience, skills, availability, acceptance and the existence of potential conflicts of interest.
    b. To the extent that the parties so agree, arbitrators may also communicate with parties or party representatives on an *ex parte* basis for the purpose of the selection of the president of the arbitral tribunal.
    c. In all such *ex parte* communications, an arbitrator or prospective arbitrator shall refrain from expressing any views on the substance of the dispute.

V - Emergency Arbitrator

50. Pursuant to Article 29 of the Rules and Appendix V ("Emergency Arbitrator Provisions"), a party that needs urgent interim or conservatory measures ("Emergency Measures") which cannot await the constitution of an arbitral tribunal may make an application to the Secretariat.

51. The Emergency Arbitrator Provisions apply only to parties that are signatories to the arbitration agreement that is relied upon for the application or successors to such signatories.

52. Furthermore, the Emergency Arbitrator Provisions shall not apply if:

    a. the arbitration agreement under the Rules was concluded before 1 January 2012;
    b. the parties have opted out of the Emergency Arbitrator Provisions, whether by the recommended standard clauses contained in the Rules or otherwise; or

c. the parties have agreed to another pre-arbitral procedure that provides for the granting of conservatory, interim or similar measures.

53. Parties may agree that the Emergency Arbitrator Provisions apply to arbitration agreements concluded before 1 January 2012.

54. Parties who wish to file an Application for Emergency Measures ("Application") should inform the Secretariat as soon as possible and preferably before submitting the Application. If the Application precedes the Request for Arbitration, parties should send an email to: emergencyarbitrator@iccwbo.org. If the Application is related to an ongoing arbitration, parties should contact the ICC case management team to which the arbitration has been assigned.

55. Upon receipt of the Application, the President of the Court will be invited to consider whether the Emergency Arbitrator Provisions apply. If the President of the Court considers that they apply, the Secretariat will transmit the Application to the responding party. If the President of the Court considers that they do not apply, the Secretariat will inform the parties that the Emergency Arbitrator proceedings shall not take place. Without prejudice to the parties' status in the main arbitral proceedings, the President of the Court may consider that the Emergency Arbitrator Provisions apply only with respect to some of the parties. In that case, the Secretariat will inform the parties accordingly and transmit a copy of the Application to all parties.

56. The President of the Court will terminate the Emergency Arbitrator proceedings if the Secretariat has not received a Request for Arbitration within 10 days from the Secretariat's receipt of the Application, unless the emergency arbitrator determines that a longer period of time is necessary (Article 1(6) of Appendix V).

57. The President of the Court shall appoint the emergency arbitrator in as short a time as possible, normally within two days from the Secretariat's receipt of the Application.

58. Emergency arbitrators are subject to the requirements set forth in section III above. A challenge against an emergency arbitrator must be made within three days from the challenging party's receipt of the notification of the emergency arbitrator appointment or from the date when that party was informed of the facts and circumstances on which the challenge is made if such date is subsequent to the appointment notification. The Court may decide the challenge, after affording all parties and the emergency arbitrator an opportunity to comment in writing, before or after the Emergency Arbitrator Order ("Order") is rendered.

59. The emergency arbitrator's first task is to establish a procedural timetable as soon as possible, normally within two days from the transmission of the file to the emergency arbitrator (Article 5 of Appendix V). In doing so, the emergency arbitrator must ensure that the responding party is granted time to respond to the Application.

60. The Order must be made no later than 15 days from the date on which the file was transmitted to the emergency arbitrator (Article 6(4) of Appendix V). The President may extend that time limit pursuant to a reasoned request or on his or her own initiative (Article 6(4) of Appendix V).

61. The Court will not scrutinise the draft Order. The emergency arbitrator is however encouraged to seek guidance from the Secretariat, in particular by submitting his/her draft Order for review prior to the expiration of the time limit set out in Article 6(4) of Appendix V. The *Emergency Arbitrator Order Checklist* may also provide guidance to the emergency arbitrator in drafting the Order.

62. The Order may be signed and notified in electronic form if the emergency arbitrator so decides after having consulted the parties. In any event, the emergency arbitrator shall send two originals of the Order to the Secretariat.

63. The effects of the Order are set forth in Article 29(2), (3) and (4) of the Rules, and Articles 6(6), (7) and (8) of Appendix V.

VI - Conduct of the Arbitration

A - Advance on Costs

64. The Secretary General may fix the provisional advance upon receipt of the Request for Arbitration (Article 37(1)). The provisional advance is intended to cover the costs of the arbitration until the Terms of Reference have been drawn up or, when the Expedited Procedure Provisions apply, until the case management conference.

65. Payment of the provisional advance will be considered as a partial payment by the claimant of the advance on costs subsequently fixed by the Court. Transmission of the file to the arbitral tribunal, once constituted, will be subject to prior payment of the provisional advance (Article 16).

66. The advance on costs is intended to cover the arbitral tribunal's fees and arbitration-related expenses, as well as the ICC administrative expenses (Article 37 of the Rules and Article 1(4) of Appendix III). It comprises the total of (i) a figure between the minimum and maximum fee suggested under the scales, (ii) a reasonable amount for tribunal-related expenses and (iii) the amount of administrative expenses under the scales. Whenever the Court fixes or readjusts the advance on costs, a detailed financial table is provided to the parties and arbitrators for information and guidance. The Court does not necessarily use the advance on costs in its entirety when fixing the fees of the arbitrators at the end of the arbitration.

67. Where the amount in dispute is significant, the Court may initially fix the advance on costs at an amount that will not cover the full ICC administrative expenses and arbitrator fees and expenses. In such cases, the Secretariat will inform the parties and arbitrators not to assume that the advance covers the costs until the end of the arbitration and that future readjustments of the advance on costs are therefore likely. The Court may proceed with multiple readjustments of the advance by considering the progress of the case. This practice allows the Court to better appreciate all relevant elements of the case as they occur rather than forecast what the suggested fees may be.

68. The Court may readjust the advance on costs if the development of the arbitration so requires (Article 37(5)). The arbitral tribunal should inform the Secretariat of any developments in the value and complexity of the arbitration or any other issues it considers relevant. To this end, the Secretariat will also request from the arbitrators a periodical report on their activities, which should include a description of the tasks performed, an estimate of the amount of time spent on each of those tasks, and any other information related to those tasks that the arbitrators may deem relevant. For this purpose, arbitrators should use the ICC form on *Statement of Time and Travel for Work Done*, available on the ICC website. If arbitrators use time sheets as part of their normal professional activities, they may provide the Secretariat with such time sheets instead. Arbitrators are also encouraged to send such reports to the Secretariat on their own initiative after completing a procedural milestone or when requesting advances on fees or the readjustment of the advance on costs. Time spent by the arbitrators should not include time spent by the administrative secretary, if any. The arbitral tribunal may include such time spent by the Secretary separately if it wishes to do so.

69. The parties will be invited to pay the advance on costs in accordance with paragraphs 2, 3, 4 and 5 of Article 37 and paragraphs 4, 5, 6, 7, 8 and 9 of Article 1 of Appendix III. As a general rule, payments in ICC arbitration cases must originate directly from parties to the case. Should this not be the case, ICC will accept payments which are made by duly mandated counsels or representatives, provided that the legal relationship between the third party payer and the party in the case is evidenced. Should the legal document not be considered as satisfactory by ICC's banks pursuant to their legal obligations under French law or any other applicable local law, the payment received by ICC may be cancelled and the lack of relevant information reported to the relevant regulatory authorities. The party making the payment must pay all bank charges and/or taxes applicable to the payment of the advance on costs. However, bank transfers made within the European Economic Area (EEA) are subject to shared banking fees.

70. Where claims are made under Articles 7 and 8, the Court may either (1) fix several advances on costs, or (2) fix one advance on costs and establish the respective portions to be paid by each party (Article 37(4)). The parties may also agree to a different apportionment.

71. The arbitral tribunal should clarify with the parties whether they will be directly responsible for the costs of any hearing or whether such costs should be included in the arbitration-related expenses. If hearing costs will be included in the arbitration-related expenses, the arbitral tribunal should provide the Secretariat with an estimate of such costs. Thereafter, the Secretariat may examine whether it is appropriate to invite the Court to reconsider the advance on costs.

B - Expeditious and Efficient Conduct of the Arbitration

72. The Rules require the arbitral tribunal and the parties to make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute (Article 22(1)).

73. In order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties (Article 22(2)). The arbitral tribunal should consider the case management techniques referred to in Appendix IV to the Rules and the report of the ICC Commission on Arbitration and ADR entitled *Controlling Time and Costs in Arbitration*, available on the ICC website.

C - Expeditious Determination of Manifestly Unmeritorious Claims or Defences

74. This section includes guidance as to how an application for the expeditious determination of manifestly unmeritorious claims or defences may be addressed within the broad scope of Article 22.

75. Any party may apply to the arbitral tribunal for the expeditious determination of one or more claims or defences, on grounds that such claims or defences are manifestly devoid of merit or fall manifestly outside the arbitral tribunal's jurisdiction ("application"). The application must be made as promptly as possible after the filing of the relevant claims or defences.

76. The arbitral tribunal has full discretion to decide whether to allow the application to proceed. In so doing, it shall take into consideration any circumstances it considers to be relevant, including the stage of the proceedings and the need to ensure time and cost efficiency.

77. If the arbitral tribunal allows the application to proceed, it shall promptly adopt the procedural measures it considers appropriate, after consulting the parties. The responding party or parties shall be given a fair opportunity to answer the application. Further presentation of evidence will only be allowed exceptionally. When the arbitral tribunal determines that a hearing is appropriate, such hearing may be conducted by videoconference, telephone or similar means of communication.

78. Consistent with the nature of the application, the arbitral tribunal shall decide the application as promptly as possible and may state the reasons for its decision in as concise a fashion as possible. The decision may be in the form of an order or award. In either case, the arbitral tribunal may decide on the costs of the application pursuant to Article 38 or reserve this decision to a later stage.

79. The Court will scrutinise any award made on an application for expeditious determination, in principle within one week of receipt by the Secretariat.

D - Protection of Personal Data

80. ICC recognises the importance of effective and meaningful personal data protections when it collects and uses such personal data as data controller pursuant to data protection regulations, including the European Union Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (the "General Data Protection Regulation" or "GDPR").

81. ICC, the Court and its Secretariat, in order to comply (i) with the Court's and Secretariat's mission to disseminate and improve international knowledge of arbitration and (ii) with the Court's and Secretariat's obligations under the Rules, are led to collect and process the personal data of the parties, their representatives, the arbitrators, the administrative secretary, the witnesses, the experts, and any other individuals that may be involved in any capacity in the arbitration. Arbitral tribunals, in performing their duties under the Rules, also have to process such personal data. For this purpose, such personal data may be transferred by or to the various offices of the Secretariat in and out of the European Union.

82. By accepting to participate in an ICC arbitration, the parties, their representatives, the arbitrators, the administrative secretary, the witnesses, the experts, and any other individuals that may be involved in any capacity in the arbitration, acknowledge that collecting, transferring and archiving personal data is necessary for the purposes of arbitration proceedings, and accept that said data may be published in case of a publication of an award or a procedural order.

83. The parties shall ensure (i) that their representatives, as well as their witnesses, party-appointed experts and any other individual appearing on their behalf or in their interest in the arbitration, are aware and accept that their personal data may have to be collected, transferred, published and archived for purposes of the arbitration, and (ii) that applicable data protection regulations, including the GDPR, are complied with.

84. At an appropriate time in the arbitration, the arbitral tribunal shall remind the party representatives, witnesses, experts and any other individuals appearing before it that the GDPR applies to the arbitration and that by accepting to participate in the proceedings, their personal data may be collected, transferred, published and archived. Arbitral tribunals are encouraged to include in the Terms of Reference a data protection protocol to that effect.

85. Parties and arbitrators shall ensure that only personal data that are necessary and accurate for the purposes of the arbitration proceedings are processed. Any individual, whose data is collected and processed in the context of an arbitration may at any time request the Secretariat and, as the case may be, the arbitral tribunal to exercise notably his right of access and that inaccurate data be corrected or suppressed, according to the applicable data protection regulations.

86. During the arbitration, the parties, their representatives and all other participants in the proceedings shall ensure the security of personal data processed under their responsibility.

87. To that effect, parties and arbitrators shall ensure that secured means of collecting, communicating, and archiving data are used throughout the entire arbitration process and during the applicable retention period of such data. To that effect, arbitral tribunals and parties are encouraged to consult the *Report on the Use of Information Technology in International Arbitration* by the ICC Commission on Arbitration and ADR.

88. Any breach of the security and confidentiality of personal data, such as unauthorised access to or use of personal data, inadvertent disclosure to persons who should not have been identified as recipients, be reported immediately to the individual whose personal data may be affected and to the Secretariat. Notification of such breach to the competent supervisory authority and as the case may be to the concerned individuals shall be made by ICC when it acts as data controller pursuant to the applicable data protection regulations.

89. Once an arbitration is completed, arbitrators may retain the personal data that were processed during the proceedings for as long as they keep the case file in their archives pursuant to applicable laws. Such duration shall be communicated to the parties and the Secretariat.

90. At the end of each case, the Secretariat shall retain, pursuant to its obligations (Article 1(7) of Appendix II), personal data pertaining to the case. Such data shall be archived. Other personal data that are no longer necessary for ICC to discharge its obligation under the Rules shall be destroyed or erased.

91. The archives of the Court and its Secretariat are also kept for scientific and historic research purposes. Access to archives and their publication either in full, as excerpts redacted or not, or in a summarised form, may be allowed by the President or the Secretary General of the Court in furtherance of ICC's mission to disseminate and improve international knowledge of arbitration.

E - Time Limits under the Rules

92. The Rules contain strict time limits which arbitrators and parties must endeavour to comply with, in particular:

a. **Terms of Reference**: must be established within **one month** from the transmission of the file to the arbitral tribunal (Article 23(2)). Terms of Reference are not applicable to arbitrations under the Expedited Procedure Provisions.
b. **Case management conference**: must be convened (1) when drawing up the Terms of Reference or as soon as possible thereafter (Article 24(1)), or (2) no later than 15 days after the date on which the file was transmitted to the arbitral tribunal in arbitrations under the Expedited Procedure Provisions.
c. **Procedural timetable**: must be established during or immediately following the case management conference and transmitted to the Court and the parties (Article 24(2)).

d. **Closing of the proceedings**: must be done as soon as possible after the last hearing on matters to be decided in an award, or the filing of the last authorised submissions concerning such matters (Article 27).

e. **Date for submission of draft awards**: must be indicated to the Secretariat and the parties when the arbitral tribunal closes the proceedings in relation to the award (Article 27).

f. **Final award**: must be rendered within (1) the time limit fixed by the Court based upon the procedural timetable, (2) if the Court does not fix such time limit within **six months** from the date of the last signature added to the Terms of Reference or the date of notification of their approval (Article 31(1)), or (3) **six months** from the date of the case management conference in arbitrations under the Expedited Procedure Provisions.

VII - Expedited Procedure Provisions

A - Scope of the Expedited Procedure Provisions

93. By agreeing to the Rules, the parties agree that Article 30 of the Rules and Appendix VI (collectively, the "Expedited Procedure Provisions") shall take precedence over any contrary terms of the arbitration agreement.

94. The Expedited Procedure Provisions shall apply if:

a. the arbitration agreement was concluded after 1 March 2017; and

b. the amount in dispute does not exceed US$ 2 000 000; and

c. the parties have not opted out of the Expedited Procedure Provisions in the arbitration agreement or at any time thereafter. Agreements to opt out should express in specific terms the parties' intention not to subject themselves to the Expedited Procedure Provisions. It is not sufficient, to that effect, that the parties have referred in the arbitration agreement to a three-member arbitral tribunal, or have adopted time limits that depart from those provided by the Expedited Procedure Provisions. It is recommended that parties wishing to opt out of the Expedited Procedure Provisions use the standard clauses contained in the Rules.

95. The Expedited Procedure Provisions shall also apply, irrespective of the date of conclusion of the arbitration agreement or the amount in dispute, if the parties have agreed to opt in. Such opt in agreements can be concluded in the arbitration agreement or by separate or subsequent agreement. It is recommended that the parties wishing to opt in to the Expedited Procedure Provisions use the standard clauses contained in the Rules.

96. The Court may at any time, upon request of a party or on its own motion after consulting the arbitral tribunal and the parties, decide that the Expedited Procedure Provisions shall no longer apply (Article 1(4) of Appendix VI). The Court may in particular use such power in case new circumstances arise that make the Application of the Expedited Procedure Provisions no longer appropriate.

B - Determination of the Amount in Dispute for the Purpose of the Application of the Expedited Procedure Provisions

97. For purposes of deciding whether the Expedited Procedure Provisions apply, the amount in dispute includes all quantified claims, counterclaims, cross-claims and claims pursuant to Articles 7 and 8. Claims relating to interest and costs will not be considered to that effect.

98. Pursuant to the Rules (Articles 4(3), 5(5)(b), 7(2), 7(4), 8(2) and 8(3)), the parties shall quantify their claims and, to the maximum extent possible, provide an estimate of the value of any non-monetary claims.

99. For purposes of deciding whether the Expedited Procedure Provisions apply, the Secretariat will consider the quantifications or estimates submitted by the parties.

100. In principle, the Expedited Procedure Provisions shall not apply in presence of declaratory or non-monetary claims which value cannot be estimated, unless it appears that such claims are the mere support of a monetary claim or that they do not add significantly to the complexity of the dispute.

101. In case of an objection as to the applicability of the Expedited Procedure Provisions, the matter will be decided by the Court after giving an opportunity to the other parties to state their views.

102. Any submission by the parties with respect to the applicability of the Expedited Procedure Provisions shall be made in the Request for Arbitration and in the Answer, or in any time limit subsequently given by the Secretariat.

103. Any decision made by the Secretariat or by the Court as to the amount in dispute for purposes of deciding whether the Expedited Procedure Provisions apply shall not bind the arbitral tribunal when deciding the substance of the dispute.

104. The arbitral tribunal may take into account, in assessing costs pursuant to Article 38(5), whether by artificially inflating its claims, a party has prevented the Expedited Procedure Provisions from applying.

C - Scales

105. In all cases conducted under the Expedited Procedure Provisions, the Scales of Administrative Expenses and Arbitrator's Fees for the Expedited Procedure shall apply as indicated in section XIII below and any advance on costs will be fixed on this basis. The arbitrators' fees pursuant to these scales are 20% less than under the general scales.

106. Any provisional advance may be fixed by the Secretary General after receipt of the Request for Arbitration on the basis of the Expedited Procedure Provisions and the amount in dispute at that stage. The provisional advance may be readjusted on the basis of the general scales if the Expedited Procedure Provisions ultimately do not apply.

D - Information to the Parties

107. Pursuant to Article 1(3) of Appendix VI, the Secretariat will inform the parties that the Expedited Procedure Provisions shall apply (1) upon receipt of the Answer to the Request for Arbitration, (2) upon expiry of the time limit for the Answer, or (3) at any relevant time thereafter.

108. If a Request for Joinder is filed or claims pursuant to Article 8 are made, the Secretariat will inform the parties as to the applicability of the Expedited Procedure Provisions upon receipt of an Answer to the Request for Joinder or to such claims or upon expiry of the time for such answer.

E - Constitution of the Arbitral Tribunal

109. According to Article 2 of Appendix VI, the Court may appoint a sole arbitrator notwithstanding any contrary provision of the arbitration agreement.

110. By submitting to arbitration under the Rules, the parties agree that any reference of disputes to three arbitrators in their arbitration agreement is subject to the Court's discretion to appoint a sole arbitrator if the Expedited Procedure Provisions apply.

111. When the Expedited Procedure Provisions apply, the Court will normally appoint a sole arbitrator in order to ensure that the arbitration is conducted in an expeditious and cost-effective manner.

112. The Court may nevertheless appoint three arbitrators if appropriate in the circumstances. In all cases, the Court will invite the parties to comment in writing before taking any decision and shall make every effort to ensure that the award is enforceable at law.

113. If the Court decides that the Expedited Procedure Provisions shall no longer apply (paragraph 96 above), the arbitral tribunal shall normally remain in place, unless the Court finds, at the request of the parties or on its own initiative, after giving an opportunity to the parties and the arbitral tribunal to state their views, that circumstances exist which justify to replace and/or reconstitute the arbitral tribunal. If the Court decides to reconstitute the arbitral tribunal and proceed with a three-member arbitral tribunal, it may consider appointing the individual that was acting as sole arbitrator as president of the arbitral tribunal.

F - Proceedings before the Arbitral Tribunal

114. In conducting the arbitration under the Expedited Procedure Provisions, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.

115. Under the Expedited Procedure Provisions, the arbitral tribunal has discretion to adopt such procedural measures as it considers appropriate to conduct the arbitration in accordance with the time limits established therein. In particular, the arbitral tribunal may, after giving an opportunity to the parties to state their views, (1) decide the case on documents only, with no hearing and no examination of witnesses, (2) decide not to allow requests for the production of documents and (3) limit the number, scope and length of submissions.

G - Award

116. The final award shall be made within six months from the date of the case management conference. The Court expects arbitral tribunals acting under the Expedited Procedure Provisions to conduct the procedure in order for this time limit to be effectively complied with, with no need for extensions. In case an extension would nonetheless be needed, the arbitral tribunal shall submit a reasoned application to the Court.

117. Any award under the Expedited Procedure Provisions shall be reasoned. Arbitral tribunals may limit the factual and/or procedural sections of the award to what they consider to be necessary to the understanding of the award, and state the reasons of the award in as concise a fashion as possible.

VIII - Efficiency in the Submission of Draft Awards to the Court

A - General Practice

118. The Court expects arbitral tribunals to render awards within six months from the drawing up of the Terms of Reference, or within the time limit fixed by the Court for this purpose (Article 31(1)).

119. While the Court has the power to extend such time limits, sole arbitrators are expected to submit draft awards within two months, and three-member arbitral tribunals within three months after the last substantive hearing on matters to be decided in the award or the filing of the last written submissions concerning such matters (excluding cost submissions), whichever is later (Article 27).

120. Whenever the arbitral tribunal has conducted the arbitration expeditiously, the Court may increase the arbitrators' fees above the amount that it would otherwise consider fixing.

121. Where the draft award is submitted after the time referred to in paragraph 119 above, the Court may lower the fees as set out below, unless it is satisfied that the delay is attributable to factors beyond the arbitrators' control or to exceptional circumstances, and without prejudice to any other measures that it may take, such as replacing one or more of the arbitrators:

- If the draft award is submitted for scrutiny up to 7 months after the last substantive hearing or written submissions (excluding cost submissions), whichever is later, the fees that the Court would otherwise consider fixing are reduced by 5% to 10%.
- If the draft award is submitted for scrutiny up to 10 months after the last substantive hearing or written submissions (excluding cost submissions), whichever is later, the fees that the Court would otherwise consider fixing are reduced by 10% to 20%.
- If the draft award is submitted for scrutiny more than 10 months after the last substantive hearing or written submissions (excluding cost submissions), whichever is later, the fees that the Court would otherwise consider fixing are reduced by 20% or more.

122. In deciding on the above, the Court may also take into account any delays incurred in the submission of one or more partial awards.

B - Practice under the Expedited Procedure Provisions

123. Under the Expedited Procedure Provisions, the arbitral tribunal must render the final award in six months from the case management conference, with extensions to be granted only in limited and justified circumstances.

124. The Court considers that compliance with such time limit is of the essence under the Expedited Procedure Provisions.

125. In order to effectively comply with such time limit, an arbitral tribunal acting under the Expedited Procedure Provisions is expected to submit its draft award within five months from the case management conference.

126. Whenever the arbitral tribunal has conducted the arbitration expeditiously, the Court may increase the arbitrators' fees above the amount that it would otherwise consider fixing.

127. Where the draft award is submitted after the time referred to in paragraph 125 above, the Court may lower the fees as set out below, unless it is satisfied that the delay is attributable to factors beyond the arbitrators' control or to exceptional circumstances, and without prejudice to any other measures that it may take, such as replacing one or more of the arbitrators:

- If the draft award is submitted for scrutiny up to 7 months after the case management conference, the fees that the Court would otherwise consider fixing are reduced by 5% to 10%.
- If the draft award is submitted for scrutiny up to 10 months after the case management conference, the fees that the Court would otherwise consider fixing are reduced by 10% to 20%.
- If the draft award is submitted for scrutiny more than 10 months after the case management conference, the fees that the Court would otherwise consider fixing are reduced by 20% or more.

IX - Closing of the Proceedings and Scrutiny of Awards

A - Closing of the Proceedings

128. An arbitral tribunal should declare the proceedings closed as soon as possible after the last hearing or the last authorised submission filed in relation to matters to be decided in an award, whether final or otherwise (Article 27). Upon doing so, the arbitral tribunal must inform the Secretariat and the parties of the date by which it expects to submit the draft award for the Court's scrutiny (Article 34).

B - Scrutiny Process

129. The scrutiny process carried out by the Court with the assistance of its Secretariat is a unique and thorough procedure designed to ensure that all awards are of the best possible quality and are more likely to be enforced by state courts. All draft awards undergo a three-step review process, starting with the Counsel of the team in charge of the arbitration that has followed the proceedings since the inception of the arbitration, followed by review by the Secretary General, the Deputy Secretary General or the Managing Counsel, before being submitted for the Court's scrutiny. For certain arbitrations, generally those involving state parties or dissenting opinions, a Court member will draft a report with recommendations on the draft award.

130. All draft awards are scrutinised at a Committee Session of the Court, composed of three Court members, or at a Plenary Session of the Court. Draft awards scrutinised at a Plenary Session include, but are not limited to, matters involving a state or a state entity, matters in which one or more arbitrators have dissented, matters raising issues of policy, and matters in which a Committee Session has been unable to reach a unanimous decision or otherwise makes a referral to the Plenary.

C - Information to the Parties

131. Upon receipt of a draft award, the Secretariat promptly informs the parties and the arbitral tribunal that the draft will be scrutinised at one of the Court's next Sessions.

132. After scrutiny, the Secretariat informs the parties and the arbitral tribunal that the award either was approved or will be further scrutinised at one of the Court's next Sessions.

133. Once a draft award is approved subject to comments, the Secretariat will request the arbitral tribunal to indicate the time needed to finalise the draft award. Implementing the Court's comments should be done by the arbitral tribunal as expeditiously as possible. Based on that information, the Secretariat will inform the parties of the estimated time of notification of the award.

D - Timing of Scrutiny

134. Any draft award submitted to the Court will be scrutinised within three to four weeks of receipt by the Secretariat. As a Plenary Session of the Court is held only once a month (generally the last Thursday of the month), the time needed for Plenary review of a draft award will depend on when it is submitted, and may take up to five or six weeks.

135. If the Expedited Procedure Provisions apply, any draft award submitted to the Court will be scrutinised as soon as possible, and in any event no later than two to three weeks of receipt by the Secretariat. The Court may decide, in exceptional circumstances, that any award made under the Expedited Procedure Provisions will be scrutinised by a Committee consisting of one member of the Court (Article 4(6) of Appendix II).

136. If delay in the scrutiny process is not attributable to exceptional circumstances beyond the Court's control, the Court's administrative expenses will be reduced by up to 20% depending on the length of the delay.

137. For purposes of timing, scrutiny is the first submission of the award to the Court for approval, irrespective of whether the award is approved or not at that Court Session.

X - ICC Award Checklist

138. The *ICC Award Checklist* is intended to provide arbitrators with guidance when drafting awards and is not an exhaustive, mandatory or otherwise binding document. It should not be thought to reflect the opinion of the members of the Court or of its Secretariat, but is intended to facilitate the arbitrators' mission. It may not be published or used for any purpose other than the conduct of ICC arbitrations. The Checklist is not exhaustive of issues that may be raised by the Court under Article 34.

XI - Treaty-based Arbitrations

139. In view of the specific nature of investment arbitrations based on treaties, for the sake of transparency and subject to any considerations of confidentiality, prospective arbitrators are encouraged to state in their *curriculum vitae* a complete list of the treaty-based cases in which they participated as arbitrator, expert or counsel.

140. The parties may agree to adopt the UNCITRAL Rules on Transparency in ICC treaty-based arbitrations either in full or in part, or to adopt rules inspired from the same. In such a case, the Secretariat may act as the repository of published information.

141. In treaty-based cases, the draft award is scrutinised by the President and/or Vice-Presidents of the Court and Court members having experience in investment treaty arbitration.

142. In derogation from section III(D) above, and unless a party objects, a treaty-based award will be published within six months from its notification.

XII - Submissions by *Amici Curiae* and non-disputing parties

143. Pursuant to Article 25(3) of the Rules, the arbitral tribunal may, after consulting the parties, adopt measures to allow oral or written submissions by *amici curiae* and non-disputing parties.

XIII - Arbitral Tribunal's Fees and Administrative Expenses

A - Scales

144. Arbitrators' fees in ICC arbitration are calculated on an ad valorem basis pursuant to the scales set forth in Article 4 of Appendix III which provides two scales: the general scales of administrative expenses and arbitrator's fees, and the scales applicable to the cases conducted under the Expedited Procedure Provisions. Parties and arbitrators are encouraged to consult the Cost Calculator on the ICC website and the applicable scales contained in Article 4 of Appendix III.

B - Advance on Fees

145. The Court fixes arbitrators' fees at the end of the arbitration, although advances on fees may be granted upon request and the completion of concrete milestones in the arbitration.

C - Allocation among Arbitral Tribunal Members

146. When there is a three-member arbitral tribunal, arbitrators may agree on the fee allocation for each arbitrator and inform the Secretariat of their agreement as early as possible in the proceedings. Arbitrators may modify their agreement in the course of the proceedings. Unless the Court is advised in writing that the arbitral tribunal has agreed on a different allocation, the Court will fix the arbitrators' fees so that the president receives between 40% and 50% of the total fees and each co-arbitrator receives between 25% and 30%, as the case may be. The Court may decide upon a different allocation based on the circumstances. Unless otherwise agreed, the same allocation may apply to any advances on fees granted by the Court.

D - Fixing of Fees

147. Arbitrators' fees are fixed exclusively by the Court. Separate fee arrangements between the parties and arbitrators are not permitted.

148. Arbitrators' fees will normally be fixed by the Court at a figure within the limits specified in the scales or, in exceptional circumstances, at a figure higher or lower than those limits. An exceptionally high amount in dispute may be considered as such a circumstance in deciding whether to fix arbitrators' fees at a figure lower than the limits specified in the scales.

149. Pursuant to Article 2 of Appendix III, when fixing the arbitrators' fees the Court will take into consideration the diligence and efficiency of the arbitrator, the time spent, the rapidity of the proceedings, the complexity of the dispute and the timeliness of the submission of any draft

award. To this end, the Secretariat will request from the arbitrators the information specified in paragraph 68.

150. The Court may therefore fix the arbitrators' fees below the average, including at the minimum under the scales, where the amount in dispute is high or very high, or towards the maximum where the amount in dispute is low or very low. The amount of the advance on costs is not an indication of the final amount of the arbitrators' fees.

151. As a matter of guidance only, the Court may proceed as follows when fixing the fees of the arbitrators or granting advances on fees when the advance on costs has been fixed on the basis of the average fee:

a.	Case Management Conference (in Expedited Procedure cases)	35% of minimum fee
b.	Terms of Reference established	50% of minimum fee
c.	A partial award issued / major hearing	Minimum fee
d.	Multiple partial awards	Between 50% of average and average
e.	Final award issued	Average fee

152. The Court may depart from this guidance depending on the circumstances of each arbitration, the criteria set forth in Article 2 of Appendix III, and the practice set forth in section VIII(A) of the present Note.

E - Replacement

153. When fixing the fees of an arbitrator who has been replaced, the Court will take into consideration the nature of and reasons behind the replacement, the milestones completed in the arbitration, and the work expected to be completed by the successor. The Court may deduct the replaced arbitrator's fees from those of the successor.

F - Administrative Expenses

154. The Court will normally fix the ICC administrative expenses in accordance with the scale. In exceptional circumstances, the Court may fix them at a figure higher or lower than that which would result from the application of such scale, provided that they shall normally not exceed the maximum amount of the scale.

155. As a matter of guidance only, when fixing the ICC administrative expenses, the Court may proceed as follows:

a.	File transmitted to the arbitral tribunal	25%
b.	Case Management Conference (in Expedited Procedure cases)	35%
c.	Terms of Reference established	50%
d.	Partial award(s) or other major procedural milestones completed	75%
e.	Final award	100%

156. The Court may depart from this guidance depending on the circumstances of each arbitration. In any event, the figures above do not include abeyance fees, increases in the administrative expenses pursuant to section VIII(A) of the present Note, or additional advances to cover Article 36 applications.

G - Declaration to French Tax Authorities

157. Depending on the applicable law, ICC may be required to declare the amount of fees, including advances on fees, paid to any arbitrator during each calendar year, as well as any expenses reimbursed during the same period.

XIV - Decisions as to the Costs of the Arbitration

158. Arbitral tribunals may make decisions as to costs, except for those to be fixed by the Court, and order payment thereof at any time during the proceedings (Article 38(3)).

159. In making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner (Article 38(5)). Further information on this topic may be found in the ICC Commission Report *Decisions on Costs in International Arbitration*, available on the ICC website.

160. If the parties withdraw their claims or the arbitration terminates before the rendering of a final award, the Court shall fix the fees and expenses of the arbitrators and the ICC administrative expenses. If the parties have not agreed upon the allocation of the costs of the arbitration or other relevant issues with respect to costs, such matters shall be decided by the arbitral tribunal (Article 38(6)). If the arbitral tribunal has not been constituted at the time of the withdrawal, any party may request the Court to proceed with the constitution of the arbitral tribunal so that it may make decisions as to costs.

XV - Signature of Terms of Reference and Awards

161. Subject to any requirements of mandatory law that may be applicable, and unless the parties agree otherwise, (1) the Terms of Reference may be signed by each party and member of the arbitral tribunal in counterparts, and (2) such counterparts may be scanned and communicated to the Secretariat pursuant to Article 3 by email or any other means of telecommunication that provides a record of the sending thereof. An original of the signed Terms of Reference must be provided to the Secretariat.

162. Each party, each arbitrator and the Secretariat receive an original of the awards, *addenda* and decisions signed by the arbitrators after approval of the drafts by the Court. The arbitral tribunal must thus provide the Secretariat with the required number of originals (unbound) requested by the Secretariat. The originals must be signed and dated after the date of the Court Session at which awards, *addenda* and decisions were approved; their date should be the date on which the last arbitrator signed.

163. The arbitral tribunal must also provide the Secretariat with a PDF of the signed original by email, which will be sent to the parties before the originals are received and notified.

164. Subject to any requirements of mandatory law that may be applicable, the parties may agree (1) that any award be signed by the members of the arbitral tribunal in counterparts, and/or (2) that all such counterparts be assembled in a single electronic file and notified to the parties by the Secretariat by email or any other means of telecommunication that provides a record of the sending thereof, pursuant to Article 35.

XVI - Correction and Interpretation of Awards

165. If the arbitral tribunal decides to correct the award on its own initiative, pursuant to Article 36(1), it should inform the parties and the Secretariat of its intention to do so and grant a time limit to the parties to comment in writing. The arbitral tribunal should submit the draft *addendum* to the Court for scrutiny within 30 days of the date of the award.

166. Upon receipt of an Article 36(2) application, the Secretariat may submit the matter to the Court for it to consider whether, in view of the circumstances of the case, an advance to cover additional fees and expenses of the arbitral tribunal and additional ICC administrative expenses (Article 2(10) of Appendix III) is warranted. Should the Court fix an additional advance, such advance must be paid before the Secretariat will transmit the application to the arbitral tribunal. Otherwise, the Secretariat will transmit the application directly to the arbitral tribunal. The arbitral tribunal should not address an application until the Secretariat transmits it to them.

167. If the Court has not asked for an additional advance upon filing of the application, it can nevertheless take a decision on costs at the time of the scrutiny and make the notification of the *addendum* or the decision contingent upon the payment by one or both parties of the costs fixed by the Court.

168. Upon receipt of the application from the Secretariat, the arbitral tribunal should grant the other parties a short time limit, normally not exceeding 30 days, for comments.

169. The arbitral tribunal should then submit its draft decision to the Court for scrutiny not later than 30 days following the expiration of the time limit granted for comments. Should the arbitral tribunal require an extension of such time limit, it should inform the Secretariat.

170. The arbitral tribunal's disposition can take one of four forms:

    a. ***Addendum***: if the arbitral tribunal decides to correct or interpret the award, as this shall constitute part of the award;
    b. **Decision**: if the arbitral tribunal decides that the award does not need to be corrected or interpreted and does not take a decision on costs;
    c. ***Addendum* and decision**: if there are two or more applications and the arbitral tribunal decides to correct or interpret the award on the basis of one or more, but not all applications;
    d. **Decision and *addendum* on costs**: if the arbitral tribunal decides that the award does not need to be corrected or interpreted but takes a decision on costs related to the application.

171. All decisions and *addenda* shall state the reasons upon which they are based. They should also include operative conclusions ("dispositif") or a finding either rejecting or granting the application as the case may be. For further guidance about what should be included in a draft decision or *addendum*, see the *ICC Checklist on Correction and Interpretation of Arbitral Awards*. The Court will scrutinise all draft Decisions and Addenda. Upon approval by the Court, the arbitral tribunal shall sign the decision or *addendum* and send it to the Secretariat for notification to the parties as per section XVII below.

172. In all cases, the arbitral tribunal must first ensure that mandatory rules of law at the place of arbitration do not exclude the correction or interpretation of an award by the tribunal.

173. Where the relevant national law or court practice provide specific circumstances in which an arbitral tribunal may render certain decisions other than corrections or interpretation regarding an award which has already been approved and notified, such situations shall be treated in the spirit of the Rules and this Note.

XVII - Notification of Awards, *Addenda* and Decisions

174. The Secretariat will notify to the parties an original of the awards, *addenda* and decisions (Article 35(1)).

175. The Secretariat will also send a courtesy copy of the PDF signed original of the awards, *addenda* and decisions to the parties by email. The sending of a courtesy copy by email does not trigger any of the time limits under the ICC Rules of Arbitration.

XVIII - International Sanctions Regulations

176. International sanctions regulations may apply to an arbitration. Parties and arbitrators must consult the *Note to Parties and Arbitral Tribunals on ICC Compliance*, available on the ICC website.

XIX - Administrative Secretaries

177. This section sets out the policy and practice of the Court regarding the appointment, duties and remuneration of arbitral tribunal administrative secretaries or other assistants ("Administrative Secretaries"). It applies with respect to any administrative secretary appointed on or after 1 August 2012.

178. Administrative secretaries can provide a useful service to the parties and arbitral tribunals in ICC arbitration. While principally engaged to assist three-member arbitral tribunals, an administrative secretary may also assist a sole arbitrator. Administrative secretaries can be appointed at any time during an arbitration.

A Appointment

179. If an arbitral tribunal envisages the appointment of an administrative secretary, it shall consider carefully whether in the circumstances of that particular arbitration such an appointment would be appropriate.

180. Administrative secretaries must satisfy the same independence and impartiality requirements as those which apply to arbitrators under the Rules. ICC staff members are not permitted to serve as administrative secretaries.

181. There is no formal process for the appointment of an administrative secretary. However, before any steps are taken to appoint an administrative secretary, the arbitral tribunal shall inform the parties of its intention to do so. For this purpose, the arbitral tribunal shall submit to the parties the proposed administrative secretary's *curriculum vitae*, together with a declaration of independence and impartiality, an undertaking on the part of the administrative secretary to act in accordance with the present Note and an undertaking on the part of the arbitral tribunal to ensure that this obligation on the part of the administrative secretary shall be met.

182. The arbitral tribunal shall make clear to the parties that they may object to such proposal and an administrative secretary shall not be appointed if a party has raised an objection.

B - Duties

183. Administrative secretaries act upon the arbitral tribunal's instructions and under its strict and continuous supervision. The arbitral tribunal shall, at all times, be responsible for the administrative secretary's conduct during the arbitration.

184. The tasks entrusted to an administrative secretary shall in no circumstances release the arbitral tribunal from its duty to personally review the file. Under no circumstances may the arbitral tribunal delegate its decision-making functions to an administrative secretary. Nor shall the arbitral tribunal rely on an administrative secretary to perform on its behalf any of the essential duties of an arbitrator.

185. Notwithstanding the above, an administrative secretary may perform organisational and administrative tasks such as:

- transmitting documents and communications on behalf of the arbitral tribunal;
- organising and maintaining the arbitral tribunal's file and locating documents;
- organising hearings and meetings and liaising with the parties in that respect;
- drafting correspondence to the parties and sending it on behalf of the arbitral tribunal;
- preparing for the arbitral tribunal's review drafts of procedural orders as well as factual portions of an award, such as the summary of the proceedings, the chronology of facts, and the summary of the parties' positions;
- attending hearings, meetings and deliberations; taking notes or minutes or keeping time;
- conducting legal or similar research; and
- proof-reading and checking citations, dates and cross-references in procedural orders and awards, as well as correcting typographical, grammatical or calculation errors.

186. The administrative secretary may not act, or be required to act, in such a manner as to prevent or discourage direct communications between the arbitrators, between the arbitral tribunal and the parties, or between the arbitral tribunal and the Secretariat.

187. A request by an arbitral tribunal to an administrative secretary to prepare written notes or memoranda shall in no circumstances release the arbitral tribunal from its duty personally to review the file and/or to draft any decision of the arbitral tribunal.

188. When in doubt about which tasks may be performed by an administrative secretary, the arbitral tribunal or the administrative secretary should consult the Secretariat.

C - Disbursements

189. The arbitral tribunal may seek reimbursement from the parties of the administrative secretary's justified reasonable personal disbursements for hearings and meetings.

D - Remuneration

190. With the exception of the administrative secretary's reasonable personal disbursements, the engagement of an administrative secretary should not pose any additional financial burden on the parties. Accordingly, the arbitral tribunal may not look to the parties for the

reimbursement of any costs associated with an administrative secretary beyond the scope prescribed in this Note.

191. Any remuneration payable to the administrative secretary shall be paid by the arbitral tribunal out of the total funds available for the fees of all arbitrators, such that the fees of the administrative secretary will not increase the total costs of the arbitration.

192. In no circumstances should the arbitral tribunal seek from the parties any form of compensation for the administrative secretary's activity. Direct arrangements between the arbitral tribunal and the parties on the administrative secretary's fees are prohibited. Since the fees of the arbitral tribunal are established on an *ad valorem* basis, any compensation to be paid to the administrative secretary is deemed to be included in the arbitral tribunal's fees.

XX - Expenses

A - How to Submit a Request for Expenses

193. The Secretariat will reimburse expenses and pay *per diem* allowances only upon receipt of a request in a readily comprehensible form including a cover page listing each payment claimed and the reason for it. Expense reimbursement claims must be supported by original receipts. This is necessary so that the Secretariat can carry out its accounting responsibilities and, from time to time, provide the parties with comprehensive statements of expenses incurred by arbitrators.

B - When to Submit a Request for Expenses

194. Arbitrators should submit their requests for the reimbursement of expenses and/or the payment of *per diem* allowances, together with any required supporting documentation as specified below, **as soon as possible after expenses are incurred**. This will help ensure that the advance on costs paid by the parties is adequate to cover the costs of the arbitration.

195. All requests for the reimbursement of expenses and/or the payment of *per diem* allowances relating to any period prior to the submission of the draft final award must be provided at the latest when the draft final award is submitted to the Secretariat. Three-member arbitral tribunals should co-ordinate their submission of requests for reimbursement of expenses and/or payment of *per diem* allowances in order to ensure that they reach the Secretariat no later than the draft final award. Requests for the reimbursement of expenses and/or the payment of *per diem* allowances submitted **after the Court has approved the final award will not be taken into account by the Court when fixing the costs of the arbitration and will not be paid**, save in exceptional circumstances as decided by the Secretary General.

196. In the event of the withdrawal of all claims or the termination of the arbitration before the rendering of a final award, all requests for the reimbursement of expenses and/or the payment of *per diem* allowances must be submitted within the time limit granted by the Secretariat. Requests for the reimbursement of expenses and/or the payment of *per diem* allowances submitted after the Court has fixed the costs of arbitration will not be taken into account by the Court and will not be paid.

C - Travel Expenses

197. If required to travel for the purpose of an ICC arbitration, an arbitrator will be reimbursed for the actual travel expenses he or she incurs travelling from and returning to his or her usual

place of business as indicated on the *curriculum vitae* filed for the relevant ICC arbitration. Travel expenses will be reimbursed in accordance with paragraphs 198 to 200 below.

198. A request for reimbursement of travel expenses must be accompanied by the originals of all receipts claimed or other proper substantiation if receipts are unavailable. Travel expenses that are not fully and comprehensively justified will not be reimbursed.

199. The reimbursement of travel expenses is subject to the following strict limits:

    a. Air travel: an airfare equivalent to the applicable standard business-class airfare.
    b. Rail travel: the applicable first-class train fare.
    c. Transport to and from airport(s) and/or train station(s): the applicable standard taxi fare.
    d. Travel by private car: a flat rate for every kilometre driven, plus all necessary actual parking and toll charges incurred. The flat rate is US$ 0.80 per kilometre.

200. Except for expenses claimed pursuant to paragraph 199(d) above, travel expenses will, where possible, be reimbursed in the currency in which they were incurred. An arbitrator may alternatively request reimbursement in US dollars provided that the request is accompanied by a statement of the US dollar amount and evidence of the exchange rate (for example, a printout from www.oanda.com). The date for the currency conversion should be the date on which the expense was incurred.

D - Per Diem Allowance

201. In addition to travel expenses, an arbitrator will be paid a flat-rate *per diem* allowance for every day of an ICC arbitration that he or she is required to spend outside his or her usual place of business as indicated on the *curriculum vitae* filed for the relevant ICC arbitration. The arbitrator is not required to submit receipts in order to claim the *per diem* allowance, but simply evidence of the travel for purposes of the arbitration.

202. If the arbitrator is not required to use overnight hotel accommodation, the flat-rate *per diem* allowance is US$ 400.

203. If the arbitrator is required to use overnight hotel accommodation, the flat-rate *per diem* allowance is US$ 1 200.

204. The applicable *per diem* allowance is deemed to cover fully all personal living expenses of whatever nature and of whatever actual value (other than travel expenses) incurred by an arbitrator. In particular, the applicable *per diem* allowance is deemed to cover the total cost of, *inter alia*:

- Accommodation
- Meals
- Laundry/ironing/dry cleaning and other housekeeping or similar services
- Inner-city transport
- Telephone calls, faxes, emails and other means of communication
- Gratuities

205. For the avoidance of doubt, no *per diem* allowance will be paid in respect of time spent by an arbitrator travelling to or from the relevant destination.

206. Since the *per diem* allowance is deemed to cover all personal living expenses incurred by an arbitrator while outside his or her usual place of business on ICC arbitration business, the Secretariat will not reimburse expenses over and above the applicable *per diem* allowance under any circumstances.

E - General Office Expenses and Courier Charges

207. General office expenses and overheads incurred in the ordinary course of business by an arbitrator or an arbitral tribunal in connection with an ICC arbitration will not be reimbursed. However, an arbitrator or an arbitral tribunal may request to be reimbursed at cost for any courier, photocopying, fax or telephone charges incurred for the purposes of an ICC arbitration, provided such request is accompanied by detailed receipts.

F - Advance Payments on Expenses

208. An arbitrator may request an advance payment of travel expenses and/or the applicable *per diem* allowance. If an advance is granted, the arbitrator must subsequently submit the relevant supporting documentation to the Secretariat, including all receipts and a statement of working days and nights spent outside of his or her usual place of business on ICC arbitration business.

XXI - Administrative Services

A - Deposit of Funds other than the Advance on Costs for Arbitration

209. ICC may offer arbitrators and parties who expressly so request in writing a service allowing funds to be deposited, in the course of an arbitration, into an account administered by ICC for the purpose of paying an advance on VAT due on the arbitrators' fees or an advance to cover fees and expenses of any expert appointed by the arbitral tribunal, or for escrow purposes.

210. When arbitrators and parties avail themselves of this service and ICC consents to provide it, ICC acts as the depositary of the funds. ICC receives funds from one or more parties who have been instructed accordingly by an arbitrator (president or member of an arbitral tribunal on behalf of the other tribunal members, or sole arbitrator) and makes the payments from the account at the request of the arbitrator.

211. ICC acts as depositary of funds related to:

a. VAT, taxes, charges and imposts applicable to arbitrators' fees
b. Experts
c. Escrow accounts

212. This service is available to arbitrators and parties from any country.

213. The deposit accounts are administered solely in US dollars or in Euros, unless otherwise decided.

214. The deposit accounts do not yield interest for the parties or the arbitrators.

Step 1: Request for a Deposit Account

Any arbitrator wishing to use this service shall inform the Secretariat in writing and request ICC to act as depositary of funds to be paid by one or more parties as an advance on the VAT due on the arbitrators' fees or an advance to cover fees and expenses of any expert appointed by the arbitral tribunal, or for escrow purposes.

The initiative of requesting the opening of a deposit account, calling deposits, and making payments from the amounts deposited lies solely with the arbitrators.

Arbitrators are responsible for ensuring that payments are made in compliance with applicable laws and banking practices.

Step 2: Estimation of Amounts

The arbitrator determines the funds to be paid by one or more parties into a deposit account.

If, in the course of an arbitration, the amount of the advance on costs is increased pursuant to a decision of the Court, this step may be repeated. Likewise, if, in the course of the arbitration, the amount of the funds deposited to cover the fees and expenses of any expert or the amount of the funds deposited into an escrow account is increased pursuant to a decision of the arbitral tribunal, this step may be repeated.

Step 3: Funds to be Deposited

The arbitrator requests one or more parties to pay the funds and sets a time limit in which to do so.

The Secretariat will provide the party/parties with the relevant banking instructions.

As a general rule, payments in ICC arbitration cases, must originate directly from parties to the case. Should this not be the case, ICC will accept payments which are made by duly mandated counsels or representatives, provided that the legal relationship between the third party payer and the party in the case is evidenced. Should the legal document not be considered as satisfactory by ICC's banks pursuant to their legal obligations under French law, the payment received by ICC may be cancelled and the lack of relevant information reported to the relevant regulatory authorities. The party making the payment must pay all bank charges and/or taxes applicable to the payment of the advance on costs. However, bank transfers made within the European Economic Area (EEA) are subject to shared banking fees.

Step 4: Acknowledgement of Payments and Administration

The Secretariat confirms to the arbitrator and the parties receipt of the amounts paid by the party/parties.

If the arbitrator receives no confirmation from the Secretariat of receipt of payment by the party or parties, it is up to the arbitrator to renew his or her request for payment and to fix a time limit for this purpose.

ICC administers the funds on behalf of the arbitrator.

Step 5: Payments

The arbitrator requests ICC to make payments from the funds deposited by the parties.

Payments are made by ICC within the limits of the funds deposited.

Step 6: Balance of Account

At the end of the arbitration the Secretariat seeks instructions from the arbitrator with regard to closing the deposit account. On the basis of the information provided by the arbitrator and in accordance with his or her instructions, the Secretariat closes the deposit accounts and returns to the party or parties any amounts remaining from the funds deposited with ICC.

After advising the arbitrator, ICC may close the deposit account if no balance remains. The account will be closed even if a request by the arbitrator for the payment of funds is still outstanding.

B - Deposits for VAT, Taxes, Charges and Imposts Applicable to Arbitrators' Fees

215. Payments made by ICC to arbitrators do not include Value Added Tax (VAT) or other taxes or charges and imposts of the same nature that may be applicable to the arbitrator's fees (Article 2(13) of Appendix III). Parties have a duty to pay such VAT or similar taxes or charges due pursuant to applicable law. The recovery of any such charges or taxes is a matter solely between the arbitrator and the parties. Such parties' duty does not include the payment of any other taxes, charges and imposts that may be applied to the arbitrator's fees, such as, but not limited to, income or company tax, professional license fees, charges or retentions applied by the arbitrator's Bar association, pension or social security regime, as well as banking charges and commissions. In case of doubt, arbitrators should consult the Secretariat.

216. Arbitrators subject to VAT may request in writing to use the service described above allowing them to have the funds corresponding to their estimate of the VAT due on their fees and expenses (hereinafter "Fees") administered by ICC.

217. This service is completely separate from, and has no effect on, the procedure for paying advances as set out in the Rules. Should the parties fail to pay the VAT on the arbitrators' fees, this cannot be invoked by the arbitrators before the Court, for instance as a ground for suspending the arbitration.

218. If the president of an arbitral tribunal requests a VAT advance on behalf of all those members of the arbitral tribunal who are subject to VAT, the president shall inform the Secretariat of the breakdown of this advance arbitrator-by-arbitrator.

219. Arbitrators bear sole responsibility for ensuring that the procedure described above complies with the tax laws and regulations applicable to the exercise of their profession as arbitrators, including the payment of their fees. Arbitrators are encouraged to check the basis on which they should calculate the amount of VAT due.

220. ICC acts exclusively as depositary and is not in a position to advise arbitrators on tax law issues.

221. The arbitrator determines the amount of VAT on his or her fees according to the rules that apply at the place where he or she is taxable.

222. Arbitrators may use the Cost Calculator on the ICC website to estimate the amount of the fees that may be payable. They are however reminded that the breakdown of fees between the members of the arbitral tribunal (from 40% to 50% for the president, and 25% to 30% for each co-arbitrator) is given merely as a guide and may be varied by the Court.

223. Any invoice issued by an arbitrator to a party for fees and, as the case may be, VAT applicable to those fees should be for the portion of the fees and the amount of tax payable by that party. No invoice should in principle be issued by an arbitrator to ICC, save in special circumstances to be discussed in advance with the Secretariat.

224. When drawing up his or her invoice, the arbitrator requests ICC to pay the amount corresponding to the VAT on the fees due by the party. This applies at the time of the final award, but also in the event that the Court decides to pay an advance on fees to arbitrators who reside in countries where, under local tax law, VAT becomes payable to the tax authorities when fees are paid in advance.

XXII - Assistance with the Conduct of the Arbitration

A - Conduct of the Arbitration

225. The Secretariat may provide parties and arbitral tribunals with assistance regarding the conduct of the arbitration. The services the Secretariat may offer include but are not limited to:

a. **Deposit of documents**: the Secretariat may in certain circumstances act as depositary of documents.
b. **Conference calls**: the Secretariat may assist arbitral tribunals in organising conference calls with the parties and, when required, participate in such calls.
c. **Administrative secretaries**: the Secretariat may assist arbitral tribunals in identifying administrative secretaries for appointment pursuant to section XIX above.
d. **Model documents**: the Secretariat may provide arbitral tribunals with model documents related to the conduct of the arbitration, in particular terms of reference and procedural timetables.
e. **Transparency**: pursuant to paragraph 39 above, the Court may, at the request of parties, publish on its website or otherwise make available to the public information or documents related to an ICC arbitration that is subject to transparency rules or regulations.
f. **ADR**: the ICC International Centre for ADR provides parties and arbitral tribunals with a number of services relevant to ongoing ICC arbitrations, in particular the proposal and appointment of experts (see section XXIV below).
g. **ICC Commercial Crime Services**: the Secretariat may assist arbitral tribunals and parties in liaising with ICC Commercial Crime Services (for more information visit: www.icc-ccs.org).

B - Hearings and Meetings

226. The Secretariat may provide services or assist parties and arbitral tribunals with the organisation of hearings and meetings, in particular:

a. **ICC Hearing Centre in Paris (France)**: the ICC Hearing Centre offers flexible packages and a range of specialised facilities and services for hearings and meetings.

Parties and arbitral tribunals may contact the Secretariat for further information or visit the website at www.icchearingcentre.org. By reserving a room at the ICC Hearing Centre for an ICC arbitration, parties and arbitrators accept that their contact details be communicated by the Secretariat to the ICC Hearing Centre for the sole purpose of their booking.

b. **Other hearing facilities**: ICC has agreements with other hearing facilities around the globe. Parties and arbitral tribunals may consult the Secretariat for further information.

c. **Court reporting**: the Secretariat may also provide parties and arbitral tribunals with information regarding services for hearings such as court reporting and simultaneous interpretation.

d. **Visas and other authorisations**: the Secretariat may issue letters to facilitate the obtaining of visas or other authorisations for individuals participating in a hearing or meeting related to an ICC arbitration.

e. **Hotels**: ICC negotiates preferential rates with a number of hotels in Paris and other jurisdictions. Parties and arbitral tribunals may consult the Secretariat for further information.

C - Sealed Offer(s)

227. The Secretariat may assist the Parties to put information relating to certain unaccepted settlement offers, and related correspondence (commonly referred to as “Sealed Offer(s)”), before an arbitral tribunal. The Secretariat may also assist with any counter-offer(s) made as Sealed Offer(s) by the offeree.

228. The arbitral tribunal should consider consulting the parties at an early stage (e.g. at the first case management conference pursuant to Article 24) and inviting them to agree on a procedure for the possible use of Sealed Offer(s) in the arbitration. Absent initiative by the arbitral tribunal in this respect, any party is free to raise this issue.

229. The Secretariat will keep any such correspondence (referred to in paragraph 227) confidential from the tribunal until all issues of liability and quantum have been resolved.

230. To obtain the Secretariat’s assistance, the following procedure should be followed:

a. At any point after the Secretariat has transmitted the Request for Arbitration to the respondent(s), any party to the arbitration may send to the Secretariat a copy of an offer of settlement previously made to any other party in the arbitration, but not accepted, that is marked “without prejudice save as to costs”. The offer should be submitted to the Secretariat in a sealed envelope marked “without prejudice save as to costs”. An accompanying letter should request the Secretariat to treat the sealed envelope as confidential and not to transmit it to the tribunal until the tribunal has resolved all issues of liability and quantum and is ready to consider the allocation of costs. The sending party should address such correspondence to the Secretariat and simultaneously copy the original recipient of the offer.

b. Following receipt of correspondence pursuant to paragraph (a) above, the Secretariat will inform:
   (i) the sending party (copying the other party) that the sealed envelope will be held in confidence, and
   (ii) the original recipient of the offer (copying the other party) of the circumstances in which the sealed envelope may be submitted to the tribunal and solicit any comments.

c. Further correspondence arising from the original offer (including, for example, any counter-offers) which is sent by a party to the Secretariat in a sealed envelope marked

"without prejudice save as to costs" will be held by the Secretariat on the same basis as the original offer.

d. At an appropriate stage in the proceedings, the Secretariat will write to the tribunal to inform it that the Secretariat is holding correspondence exchanged between the parties that is potentially relevant to its determination of costs under Article 38. The Secretariat will request the tribunal to: (i) inform the Secretariat in writing whether it accepts to receive the Sealed Offer(s); and in such case to (ii) inform the Secretariat in writing once it has completed its deliberations on all liability and quantum issues and is ready to apportion costs.

e. If the tribunal accepts to receive the Sealed Offer(s), it should refrain from closing the proceedings pursuant to Article 27 to the extent necessary to allow the parties to make further submissions on costs.

f. Once the tribunal has informed the Secretariat that it is ready to apportion costs under Article 38, the Secretariat will send to the tribunal all the correspondence marked "without prejudice save as to costs" and held by the Secretariat. Once the tribunal has received this information, it shall open the sealed envelopes and provide copies of any documents contained therein to the parties.

g. The tribunal will decide whether any further procedural steps are necessary or whether it can proceed to allocate costs pursuant to Article 38. For the avoidance of doubt, the tribunal retains discretion to decide what weight, if any, should be given to correspondence marked "without prejudice save as to costs" and received from the Secretariat.

h. Once the tribunal has completed its deliberations on costs, it will add its decision as to the allocation of costs to the draft final award, which will be submitted to the ICC Court for scrutiny pursuant to Article 34.

XXIII - Post-Award Services

231. In accordance with Article 35, the Secretariat shall assist the parties in complying with whatever formalities that may be necessary. These may include, but are not limited to:

a. Certified copies of awards, Terms of Reference, correspondence or any other document issued or approved by the Secretariat or the Court;

b. Notarisation by the ICC notary public in Paris of signatures of members of the Secretariat who certify copies of documents;

c. Certificates;

d. Non-certified copies of documents from the case file, limited in size and number;

e. Letters reminding parties of their obligation to comply with the award.

232. As some post-award services take time and preparation, parties should allow sufficient time when requesting such assistance from the Secretariat.

XXIV - International Centre for ADR

A - ICC Mediation Rules

233. Parties are free to settle their dispute amicably prior to or at any time during an arbitration. They may wish to consider conducting an amicable dispute resolution procedure administered by the ICC International Centre for ADR ("Centre") pursuant to the ICC Mediation Rules, which, in addition to mediation, allow for the use of other amicable settlement procedures. The Centre can also assist the parties in finding a suitable mediator.

234. Where appropriate, arbitrators may wish to remind the parties about the ICC Mediation Rules.

235. Further information is available from the Centre at +33 1 49 53 30 53 or adr@iccwbo.org or www.iccadr.org.

B - ICC Expert Rules

236. If a party requires the assistance of an expert, the Centre can, upon request, propose experts with a wide range of specialisations. The fee for this service is US$ 3 000.

237. Likewise, if the assistance of an expert is required by the arbitral tribunal, the Centre can, upon request, propose experts. This service is provided free of charge to arbitrators.

238. Further information is available from the Centre at +33 1 49 53 30 53 or expertise@iccwbo.org or www.iccexpertise.org.

XXV - Dispatch of Materials to ICC and Customs Charges

239. Materials sent to ICC (correspondence, submissions, binders, tapes, CDs, etc.) must be sent exclusively as “Documentation”. No other description should be indicated on the transportation slip or waybill. Generally, documentation is not subject to customs taxes. Other material may be subject to taxes, which vary according to the origin, content and weight of such material. Customs charges, if any, will increase the costs of arbitration.

Arbitration & ADR Committee

About Us

USCIB (also known as ICC USA) is the U.S. National Committee to the International Chamber of Commerce (ICC). USCIB's Arbitration & ADR Committee, along with the ICC's North America office, serves as a contact point in the United States for the multifaceted dispute resolution services of the ICC International Court of Arbitration® (ICC Court or Court).

The Arbitration Committee promotes ICC arbitration as an expeditious and economical means of settling commercial disputes.

What We Do

- Nominate U.S. members to the ICC Court
- Nominate U.S. arbitrators, mediators & experts to serve in ICC cases
- Nominate U.S. members to serve on the ICC Arbitration & ADR Commission & its Task Forces
- Maintain a database of U.S. arbitrators, mediators & experts
- Provide U.S. business views on international dispute resolution policy, conventions & papers
- Act as a referral source for parties seeking neutrals to serve in ICC arbitration

Join Us

Become a member of USCIB to participate in the Arbitration Committee or any of the other policy committees or working groups. If your company is not a member and you are interested in the Arbitration Committee, join us as a Sole Practitioner member.

Members receive:

- **Special briefings & seminars on business topics geared exclusively for USCIB Associates & Sole Practitioners plus invitations to USCIB's Annual Award Dinner & other functions**
- **Access to regional events through USCIB's Arbitration Committee leadership network**
- **Discounted membership rates for USCIB/ICC conferences, meetings, trainings & luncheons related to Arbitration**
- **Access to ICC's digital Dispute Resolution Bulletin**
- **Newsletters & email updates on a range of topics related to dispute resolution**

USCIB.org

Events

USCIB and ICC Seminar on International Arbitration of Life Sciences Disputes: Key Issues and Best Practices

When: Wednesday, April 10, 2019
Time: 5:00-7:30 PM
Where: Charles River Associates (John Hancock Tower, Floor 9, 200 Clarendon Street, Boston MA)

Click here for further details about the program and the RSVP link.

ICC West Coast Conference

When: Monday, April 29,2019
Time: 1:30-7:00 PM
Where: Arnold & Porter (Three Embarcadero Center, San Francisco, CA 94111)

About: This conference presented by the International Court of Arbitration of the International Chamber of Commerce will address hot topics and recent developments in international arbitration of interest to practitioners on the West Coast. Topics include the developments, challenges and opportunities in the Asia-Pacific region; the ICC's Belt and Road Commission; the ICC's experience with the Expedited Procedure Provisions; and takeaways from the newly released ICC Commission Report on Emergency Arbitrator Proceedings.

2019 Proskauer Lecture on International Arbitration

When: Tuesday, May 14, 2019
Time: 6:00-7:30 PM
Where: Proskauer (Eleven Times Square, 27th floor, New York, NY 10036)

About: Co-sponsored by Columbia University School of Law's Center for International Commercial and Investment Arbitration Law, USCIB/ICC USA and the ICC International Court of Arbitration, this year's Proskauer Lecture will be given by **Mark Kantor** who will present on "Legitimacy Challenges to International Commercial Arbitration on the Horizon?"

Click here for further details about the program and the RSVP link.

More information on these events can be found here.

USCIB
ICCUSA

Arbitrator, Mediator & Expert Database

Our goal is to ensure that we have accurate and current information on all of our neutrals. This database is applicable for all U.S. citizens, wherever located, interested in being considered for ICC arbitrations, mediations or expert proceedings. We also welcome profiles of non-U.S. citizens residing in the United States.

To help increase the chances of being considered for nomination on cases, we highly recommend that those interested in appointments create a free profile on the USCIB Arbitrator, Mediator & Expert Database, which can be found **here**.

Arbitration Committee

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Partner, Baker McKenzie

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International Institute for
Conflict Prevention & Resolution

GUIDELINES FOR ARBITRATORS CONDUCTING COMPLEX ARBITRATIONS

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Kathleen A. Bryan, President & CEO

Changing the Way the World Resolves Conflict

ABOUT CPR

CPR Mission: – CPR is the leading independent resource helping global business and their lawyers resolve complex commercial disputes more cost effectively and efficiently.

About CPR: – CPR is the only independent non-profit organization whose mission is to help global business and their lawyers resolve complex commercial disputes more cost effectively and efficiently. For over 30 years, the legal community has trusted CPR to deliver superior arbitrators and mediators and innovative solutions to business conflict.

CPR Members – CPR's membership comprises an elite group of ADR trailblazers, including executives and legal counsel from the world's most successful companies and global law firms, government officials, retired judges, highly-experienced neutrals, and leading academics. CPR accomplishes its mission by harnessing the expertise of these leading legal minds to change the way the world resolves conflict for generations to come.

CPR Pledge: – In 1979, CPR started this legacy by being the first to bring together Corporate Counsel and their firms to find ways to lower the cost of litigation. Since that time, CPR has changed the way the world resolves conflict by being the first to develop an ADR Pledge. Today, this Pledge obliges over 4,000 operating companies and 1,500 law firms to explore alternative dispute resolution options before pursuing litigation.

CPR 21st Century Pledge: – CPR is once again challenging the way the world resolves conflict by introducing the 21st Century Corporate ADR Pledge. This new Pledge will systemically change the way global business and their leaders resolve complex commercial disputes.

CPR's Clauses and Distinguished Neutrals: – CPR's rules and clauses allow for a self-administered ADR process, enabling practitioners to maintain control and flexibility while minimizing costs. CPR members have unlimited access to a highly qualified panel of more than 600 distinguished neutrals, specializing in over 20 practice areas. CPR employs a highly competitive vetting and evaluation process to ensure that the highest quality and most experienced neutrals are available without administrative expenses.

Guidelines for Arbitrators Conducting Complex Arbitrations

CPR INTERNATIONAL COMMITTEE
ON ARBITRATION

GUIDELINES FOR ARBITRATORS CONDUCTING COMPLEX ARBITRATIONS

Introduction

Arbitration historically had the reputation of providing an efficient, speedy and economical process for the resolution of business disputes. Of late, however, there has been a perception, often expressed in writings and conferences, that arbitration has lost some its appeal to businesses because it has become too formalistic or procedural, too slow and, as a result, too expensive.

Whether or not the perception of a by-gone golden age of arbitration is correct, there is nonetheless a need to address ways in which arbitration proceedings can be dealt with so as to increase speed, efficiency and economy without a sacrifice in procedural fairness.

Much of the responsibility for any improvements lies with the arbitrators, who have the authority, granted to them by the parties, to organize the proceedings before them and to run them.

These Guidelines have as their governing principle the achievement by the arbitrators of a fair award, arrived at efficiently. Thus, the Guidelines urge arbitrators to conduct proceedings in a way that is, from the outset, mindful of what and how the parties will have to present to them that will enable them to deliver a prompt award that takes fully into account the parties' presentations.

The Guidelines are the result of discussions and comments on drafts prepared by the Chairman and represent what all of us who have been involved hope will be regarded as a useful product.

Lawrence W. Newman
Chairman of the CPR Arbitration Committee

GUIDELINES FOR ARBITRATORS CONDUCTING COMPLEX ARBITRATIONS

Preface

These Guidelines are intended to provide to arbitrators conducting complex arbitrations suggestions and recommendations that lead to awards that are promptly rendered, deal fairly and carefully with the issues and (of course) are free of deficiencies that may give rise to judicial challenges.

Running through the Guidelines is the theme, implicit if not expressed, that the arbitrators should bear in mind, from the outset of the case, how actions that are taken by participants in the proceeding will affect the tribunal in its mission to deliver efficiently a fair and soundly reasoned award. Consistent with this approach, the Guidelines suggest or recommend measures that focus not only on the award itself but also on ways in which the conduct of the proceedings may lead most effectively to the issuance of an award that is not only fair and thoughtful but also expeditiously delivered.

The Guidelines are intended to apply to complex cases in which organization and management of the process are of critical importance. Depending on the complexity, nature and needs of the case before them, arbitrators may wish to make use of as many of the procedural measures recommended herein as they deem appropriate. The Guidelines assume a three-person tribunal, as is ordinarily appointed in complex cases.

1. ORGANIZATION AMONG THE ARBITRATORS

The arbitrators should, early in the proceedings, discuss among themselves the roles they will play in the proceedings leading up to the award. Arrangements among the arbitrators should be such as to assure that their capabilities and time are most effectively utilized. There should be a

chairperson of the tribunal. The parties and the arbitrators should agree at the outset of the arbitration the extent to which the chairperson may rule alone on specified procedural matters, conferring, in his or her discretion, or as agreed on, with the other two arbitrators.

The tribunal should also consider, as the case proceeds, whether it is appropriate, in view of the circumstances of the case, to allocate specific duties to the co-arbitrators. For instance, in certain cases it might make sense to have each co-arbitrator assume initial responsibility for the consideration and analysis of particular components or elements of the case, such as certain legal or technical issues. The purpose would be for the tribunal to assure itself that it has, by the end of the case, a thorough understanding of all material factual and legal issues, it being understood that it is not intended that any arbitrator will assume the role of advocate for any party and that all arbitrators must obtain a thorough understanding of all material factual and legal issues in the case.

Should the tribunal wish to be assisted by a secretary or clerk, it should, before employing such person, inform the parties of its desire to have such assistance, disclose the background of and other material facts concerning any such person, check conflicts, propose to the parties how such person might be compensated and state clearly the role that it is proposed that he or she might play.

As the case moves forward, the tribunal may decide that certain arbitrators should take responsibility for drafting particular portions of the award. Thus, one arbitrator might assume responsibility for preparing, as the case proceeds, a description of the procedural events taking place. Similarly, another arbitrator might be given responsibility for developing, as the case moves along, a draft of the portion of the award that deals with the claims and positions of the parties. Such early work can expedite the drafting process and can enable the tribunal to obtain a

clearer understanding of the importance of evidence they are receiving for their ultimate decision-making, and possibly to guide the parties accordingly.

The tribunal should ordinarily not consider itself obliged to apprise the parties of any assignments of the kinds set forth above that are internal within the tribunal.

2. ARRANGEMENTS BETWEEN THE TRIBUNAL AND THE PARTIES THAT WILL FACILITATE PREPARATION OF THE AWARD

In order to assure that the tribunal is in a position to issue an award expeditiously, the tribunal should give consideration to the following measures.

Early in the proceedings, the tribunal should discuss with the parties the denomination and organization of the exhibits, with a view to making them as accessible as possible and avoiding duplication. Consideration should be given to having all exhibits be made part of a single body of "key exhibits" or a "core bundle". The parties should be requested, early in the proceedings, to list the exhibits in a table of contents containing a clear identification of each exhibit, including date, originator and recipient. The tribunal may wish to place time limits on when exhibits may be presented to the tribunal (specifying whether the exhibits are to include those to be used for cross-examination and/or rebuttal) and to arrange for such exhibits to be made part of the record in advance of hearings so that discussions of admissibility at the hearings may be avoided.

In all cases, the arbitrators will be aided in their analysis if the parties are required to include in their briefs detailed citations to the record (exhibits, legal authorities, witness statements, expert reports and transcripts in the event of post-hearing briefs). The tribunal should consider requiring the parties to submit their briefs in Word or searchable PDF format so that the arbitrators may make efficient

use of them. The tribunal should also consider requiring that the parties provide it with electronic versions of the hearing transcripts, searchable across all transcripts. In appropriate cases, it may make sense to request that the parties submit electronic briefs that contain hyperlinks to exhibits, legal authorities, witness statements, expert reports, and/or transcripts.

The tribunal should ordinarily hold a status conference with the parties shortly before merits hearings are to be held, or earlier as appropriate, at which there may be discussion of such matters as the witnesses, including experts, who will be called, the order in which they will be called, the amounts of time needed for their examination and cross-examination, any witness conferencing (see below) that may be done, the extent to which there will be opening statements or briefs, whether and/or how audio-visual aids will be employed, whether there are to be post-hearing briefs and/or oral arguments before or in place of post-hearing briefs and other relevant matters.

3. PRESENTATIONS BY EXPERTS

Although presentations of expert evidence are frequently an important part of arbitral proceedings, they can also have limited value, raising costs and wasting time. The arbitrators should take an active role in ensuring that the expert evidence they receive is useful and that it comes from persons with genuine expertise.

Therefore, the arbitrators should, preferably at the first scheduling conference, elicit from the parties the extent to which they will be relying on expert presentations. The tribunal should consider requiring that the parties submit, at this time, brief memoranda outlining the nature of the expert evidence they wish to present and the relevance of that evidence to the issues in the case. The arbitrators should discuss with the parties whether

there is a need for expert presentations with regard to particular issues, or whether the arbitrators will be able to rule on those issues without expert help and with the aid of the parties' counsel.

The arbitrators should require that expert evidence be presented in written reports earlier rather than later in the proceedings. In order to facilitate the creation of a clear record and to be fair to both parties, the tribunal should set deadlines for the submission of the written reports prior to the hearing in which the experts will testify. The reports should be required to be complete and to include sources of data, calculations and all recent developments, so that there will be no (or limited) need for oral corrections or supplements to the reports at the hearing.

The arbitrators should emphasize to the parties that, in order to be useful to the tribunal in preparing its award, the expert reports should be clearly written, without the use of undefined terminology and with clearly articulated assumptions, and should, where appropriate, include analyses that permit the arbitrators, with respect to damages and other quantitative evidence, to understand the impact of changes in assumptions and to make adjustments they consider warranted.

Ordinarily, expert testimony should be presented by a person who played a substantial role in the preparation of the reports and the identity of the person who will testify in support of the report should be disclosed in advance of the hearing.

The arbitrators should consider the use of techniques that will enable them to assess expert evidence more efficiently. Such techniques include having experts confer together apart from the tribunal and counsel and thereafter reporting on their areas of agreement and disagreement, and having experts on the same subject present oral testimony together for questioning by the tribunal

and the parties ("witness conferencing" or "hot-tubbing"). Generally, the tribunal should emphasize to the parties that it wishes the evidence of the experts not to be an extension of the advocates' briefs but rather to be presented in such a way as to be of maximum value to the tribunal in assessing the issues and preparing its award.

The arbitrators should consider, as early as feasible in the proceedings, whether they believe that they may need their own expert to assist them in their analysis of the issues that are the subject of expertise. Since the employment of a tribunal expert entails considerable expense and adds to the complexity of the proceedings, the tribunal should consider carefully whether it will be able to render its award without such assistance.

Should the arbitrators wish to retain their own expert, they should make clear arrangements, agreed on with the parties, as to how the tribunal expert is to be compensated and to proceed, including whether he or she is to be the only expert in the case on the subject or in addition to party-selected experts. The arrangements for the tribunal expert should afford the parties an opportunity to provide information to, or question, the tribunal expert. The tribunal expert should not be involved in the tribunal's deliberations or its drafting of the award.

4. HEARING AND POST-HEARING MEASURES

Prior to the hearing, the arbitrators should review the record and consult with one another on such matters as the issues to be decided, factual points that require clarification and legal issues that need to be explained. In conducting the hearings, the tribunal should give consideration to how the record being made will facilitate it in rendering its award efficiently. Thus, as the hearings proceed, the tribunal should not hesitate to provide guidance to the parties in their presentation of witnesses to avoid receiving redundant or

otherwise unnecessary evidence. In hearing witnesses, arbitrators should take care to ensure that the record being made is clear, with, for example, exhibits being specifically identified as they are discussed and unclear questions and answers being clarified on the spot.

In its deliberations, the tribunal should take care that all arbitrators are included in discussions of issues to be decided. Each arbitrator should make himself or herself fully familiar with the record and not delegate decision-making to secretaries, clerks or other persons not members of the tribunal.

The tribunal may, in appropriate cases of voluminous records, request that the parties submit proposed findings of fact, including calculations of damages. Prior to drafting their award, in cases where many exhibits have been submitted on which the parties do not appear to rely, the tribunal may wish to request that the parties identify the exhibits in the record on which they rely, with the understanding that the arbitrators will consider only those exhibits. In this way, the arbitrators will be able to deal more efficiently with the record and can provide assurance to all concerned that the tribunal will, at the conclusion of the proceeding, have referred to it all of the evidence that the parties deem pertinent for determination of the issues. The tribunal may also find it useful to ask the parties to provide proposed decretal language to assure that there is clarity as to the relief sought and that all issues are dealt with.

Should the tribunal find itself considering a factual, legal or damages theory not explicitly advanced by the parties that is material to their award, it should communicate with the parties to request their views and positions on the theory.

5. MEETINGS OF THE ARBITRATORS

The arbitrators should consider themselves free to discuss among themselves, in the course of the proceedings, any issues in the case. They should

consider the advisability of meeting, even if briefly, at the end of each hearing day, to exchange views on the case. At the end of the hearings or post-hearing arguments, when they are last physically together, the arbitrators should try to meet then to discuss how the issues should be decided, responsibilities for drafting the award and the scheduling of any further conferences and exchanges of drafts.

6. FINAL AND NON-FINAL AWARDS: THEIR NATURE AND SCOPE

The tribunal should, at the inception of the proceedings, or thereafter, take up with the parties the nature and scope of the award they desire. Only in unusual cases, and with the express agreement of all parties, should the award not be reasoned – that is, without explanation as to the basis for the outcome reached.

Subject to the applicable arbitration rules and the parties' agreement, the tribunal may wish to invite the parties to consider the possibility of its issuing either of two kinds of reasoned awards – (1) a full award, including a description of all procedural events in the case and of the contentions of the parties, or (2) a more limited award that focuses primarily on the outcome and provides a brief statement of the tribunal's reasons for reaching it. In appropriate cases of great complexity, the tribunal may wish, in order to assure itself that it has given consideration to all material facts and that it has not misconstrued or failed to consider certain evidence, make available, with the parties' consent, a non-final draft award for their comments, within a short period of time, on the understanding that the tribunal's fundamental conclusions are not, other than in extraordinary circumstances, open for reconsideration.

The tribunal should, after consultation with or at the request of the parties, consider issuing, in an appropriate case, a partial final award, where there is, for instance, a need for an early ruling on a particular issue.

The arbitrators should endeavor in good faith to reach agreement on the content of their award but, in the event of disagreement, the majority should make their determination on the merits and not be influenced by a desire to avoid the filing of a dissent. An arbitrator disagreeing with the majority should issue a dissent only in the event of a failure to agree on a material matter and only after earnestly seeking to reach a common position with the other arbitrators.

In all events, the tribunal should, with the assistance of the parties, assure itself that all formal and other legal requirements for the award are complied with.

7. AWARD OF COSTS AND INTEREST

Where the parties' agreement or the applicable arbitration rules require or permit the award of interest or legal and other costs, the tribunal should consider them with the same degree of thoroughness that it gives to issues of liability and damages.

The tribunal should consider carefully as of what time any pre-award interest should run, at what rate and whether it should be simple or compound interest, taking into consideration, in making such determinations, the parties' agreement and contractual performance as well as applicable law. The tribunal may wish to issue a non-final award determining liability, damages and interest, and allowing the parties to present subsequent submissions on costs. In this way, the tribunal will be able to give separate consideration to costs after all other matters have been resolved and all costs have been incurred.

Working Group on the Guidelines for Arbitrators Conducting Complex Arbitrations

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Baker & McKenzie LLP

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International Institute for
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CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration

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ABOUT CPR

The International Institute for Conflict Prevention & Resolution is a membership-based nonprofit organization that promotes excellence and innovation in public and private dispute resolution, serving as a primary multinational resource for avoidance, management, and resolution of business-related disputes.

CPR Members – Our membership comprises General Counsel and senior lawyers of Fortune 1000 organizations, as well as partners in the top law firms around the world. It is a committed and active membership, diligently participating in CPR activities and serving on committees.

CPR's Panels of Distinguished Neutrals – CPR's Panels consist of the highest quality arbitrators and mediators, with specialization in over 20 practice areas and industries. As part of CPR's nomination process, we check not only the suitability, but the availability of all neutrals nominated, as well as disclose any conflicts of interest up front.

CPR Pledge Signers – More than 4,000 operating companies have committed to the Corporate Policy Statement on Alternatives to Litigation©. Moreover, better than 1,500 law firms have signed the CPR Law Firm Policy Statement on Alternatives to Litigation©, including 400 of the nation's 500 largest firms. This "Pledge" has been invaluable in bringing disputing parties to the negotiating table.

CPR's Commitment – As we celebrate more than 30 years of achievement, we continue to dedicate the organization to providing effective, innovative ways of preventing and resolving disputes affecting business enterprises. We do so through leadership and advocacy, and by providing comprehensive resources, such as education, training, consultation, neutrals, as well as a networking and collaboration platform for business, the judiciary, government, and other institutions.

CPR PROTOCOL ON DISCLOSURE OF DOCUMENTS AND PRESENTATION OF WITNESSES IN COMMERCIAL ARBITRATION

CPR PROTOCOL ON DISCLOSURE OF DOCUMENTS AND PRESENTATION OF WITNESSES IN COMMERCIAL ARBITRATION

Introduction

The CPR Protocol addresses concerns often expressed by users of arbitration, that there is, particularly in disputes involving parties of different nations, a lack of predictability in the ways in which the arbitration proceedings are conducted and that arbitration is becoming increasingly more complex, costly and time-consuming. The Protocol addresses these concerns by providing guidance in the form of recommendations as to practices that arbitrators may follow in administering proceedings before them, including proceedings conducted under the CPR Rules or under other *ad hoc* or institutional rules. The practices recommended deal with ways in which reasonable limitations may be placed on disclosure and efficiencies gained in the presentation of witness testimony in arbitration hearings.

Recognizing that there may be different interests and expectations on the part of arbitration users and their counsel, the Protocol offers various "modes" of disclosure and presentation of witnesses, ranging from minimal to extensive, so that the parties to an agreement to arbitrate may choose, at the time of entering into their agreement or thereafter, the general way in which their arbitration proceedings will be conducted in the important areas of document disclosure and witness presentation.

The Protocol is the product of two working groups of the Information Exchange Subcommittee chaired by Prof. Thomas J. Stipanowich of the CPR Arbitration Committee. The Working Group on the presentation of witnesses was chaired by Ben H. Sheppard, Jr. and the other Working Group, on documentary disclosure, was chaired by me. Members of those groups and members of the Arbitration Committee who have participated in the several meetings over the time since early in 2007 when this project was started are listed on the last page of this document.

Lawrence W. Newman
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Preamble

1. This Protocol has two purposes. The first is to assist the arbitrators in CPR or other tribunals (hereinafter "the arbitrators" or "the tribunal") in carrying out their responsibilities under Rule 11 of the CPR Rules by setting out general principles for dealing with requests for the disclosure of documents and electronic information[1] and for establishing procedures for the testimony of witnesses. The second purpose is to afford to the parties to an arbitration agreement the opportunity to adopt, before or after a dispute arises, certain modes of dealing with the disclosure of documents and the presentation of witnesses, as they may select from Schedules 1, 2 and 3.

2. The tribunal is encouraged to direct the attention of the parties to this Protocol at the outset of the arbitration and to draw upon it in organizing and managing the proceeding.

3. References to CPR Rules are to the CPR Non-Administered Arbitration Rules effective November 1, 2007. However, arbitrators are encouraged to draw upon this Protocol in organizing and managing arbitrations under any of the CPR arbitration rules or under the rules of any other institution.

Section 1. DISCLOSURE OF DOCUMENTS

General Considerations

(a) Philosophy Underlying Document Disclosure

Whether or not the parties adopt any of the modes of disclosure as provided herein, parties whose arbitrations are conducted under the CPR Rules should understand that CPR arbitrators are expected to conduct proceedings before them in accordance with the general principle that arbitration be expeditious and cost-effective as well as fundamentally fair. Consistent with this philosophy, it is expected that the parties will ensure that their counsel appreciate that arbitration is not the place for an approach of "leave no stone unturned," and that zealous advocacy in arbitration must be tempered by an appreciation for the need for speed and efficiency. Since

[1] As used herein, the term "documents" is intended to refer to all types of stored or recorded information, whether in the form of physical documents or not, including electronic information.

requests for information based on possible relevance are generally incompatible with these goals, disclosure should be granted only as to items that are relevant and material and for which a party has a substantial, demonstrable need in order to present its position. CPR arbitrators should supervise any disclosure process actively to ensure that these goals are met.

(b) Attorney-Client Privilege and Attorney-Work-Product Protection

No documents obtained through inadvertent disclosure of documents covered by the attorney-client privilege or attorney work-product protection may be introduced in evidence and any documents so obtained must upon request of the party holding the privilege or work product protection, be returned forthwith, unless such party expressly waives the privilege or work product protection. The arbitrators should apply the provisions of applicable law that afford the greatest protection of attorney client communications and work product documents.

(c) Party-Agreed Disclosure

The parties to an arbitration may provide, in their agreement to arbitrate, or separately thereafter, for certain modes of disclosure that they and the tribunal will follow. Suggested modes are set forth in Schedule 1 hereto and may be agreed to by the parties in such language as the following:

> ***"The parties agree that disclosure of documents shall be implemented by the tribunal consistently with Mode [ ] in Schedule 1 to the CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration."***

If the parties have agreed on the applicability of any one of such modes, the tribunal shall issue orders for disclosure of documents pursuant to a time schedule and other reasonable conditions that are consistent with the parties' agreement. Any mode of disclosure so chosen by the parties shall be binding upon the parties and the tribunal and shall govern the proceedings, unless all parties thereafter agree on a different form of disclosure. Disclosure of documents different from that which is provided for in the mode of disclosure selected by the parties may be ordered by the tribunal if it determines that there is a compelling need for such disclosure.

(d) Disclosure of Electronic Information

(1) General Principles

In making rulings on disclosure, the tribunal should bear in mind the high cost and burdens associated with compliance with requests for the disclosure of electronic information. It is frequently recognized that e-mail and other electronically created documents found in the active or archived files of key witnesses or in shared drives used in connection with the matter at issue are more readily accessible and less burdensome to produce when sought pursuant to reasonably specific requests. Production of electronic materials from a wide range of users or custodians tends to be costly and burdensome and should be granted only upon a showing of extraordinary need. Requests for back-up tapes, or fragmented or deleted files should only be granted if the requesting party can demonstrate a reasonable likelihood that files were deliberately destroyed or altered by a party in anticipation of litigation or arbitration and outside of that party's document-retention policies operated in good faith.

(2) Modes of Disclosure

In order to give themselves greater assurance of predictability as to the extent of disclosure of electronic information, the parties may wish to provide, in their agreement to arbitrate or separately thereafter, for certain modes of disclosure of electronic information as set out in Schedule 2, pursuant to such language as the following:

> ***"The parties agree that disclosure of electronic information shall be implemented by the tribunal consistently with Mode [ ] in Schedule 2 to the CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration."***

If the parties do not select a mode of disclosure for electronic documents under Schedule 2, the mode of disclosure selected by the parties from Schedule 1 shall apply to both electronic information and non-electronic documents.

(3) Preservation of Electronic Information

In view of the high cost and burden of preserving documents, particularly in the form of electronic information, issues regarding the scope of the parties' obligation to preserve documents for potential disclosure in the arbitration should be dealt with at an early scheduling conference, or as soon as possible thereafter. The parties' preservation obligations should comport with the Schedule 2 mode of disclosure of electronic information selected.

(e) Tribunal Orders for the Disclosure of Documents and Information

The arbitrators should ensure that they are sufficiently informed as to the issues to be determined, the burden and costs of preserving and producing requested documents and other information, and the relative value of the requested information to the issues to be determined, so as to enable the arbitrators to make a fair decision as to the requested disclosure.

Whether or not the parties have selected one of the modes for disclosure in Schedules 1 and/or 2, the tribunal, in making rulings on the disclosure of documents and information, should bear in mind the points set forth below:

(1) Timing of Disclosure

The tribunal should establish a reasonable and expeditious timetable for disclosure. Any issues or disagreements regarding disclosure should be identified and resolved as early as possible, preferably at a scheduling conference with the parties held early in the proceeding for the purpose of discussing the scope and timing of disclosure, identifying areas of disagreement and adopting expeditious procedures for resolving any such disagreements.

(2) Burdens *versus* Benefits

Arbitrators should carefully balance the likely value of documents requested against the cost and burdens, both financial and temporal, involved in producing the documents or information requested. Where the costs and burdens of disclosure requested are likely to be substantial in comparison to the amount in dispute or the need for the information to aid in resolving the dispute, the tribunal should ordinarily deny such requests. If extraordinary circumstances justify production of the information, the tribunal should condition disclosure on the requesting party's paying to the requested party the reasonable costs of a disclosure.

(3) Documents for Use in Impeachment in Cross-examination

Except for the purpose of impeaching the testimony of witnesses, the tribunal should not permit a party to use in support of its case, at a hearing or otherwise, documents or electronic information unless the party has presented them as part of its case or previously disclosed them. But the tribunal should not permit a party to withhold documents or electronic information otherwise required to be disclosed on the basis that the documents will be used by it for the impeachment of another party's witnesses.

SCHEDULE 1

Modes of Disclosure

Mode A. No disclosure of documents other than the disclosure, prior to the hearing, of documents that each side will present in support of its case.

Mode B. Disclosure provided for under Mode A together with pre-hearing disclosure of documents essential to a matter of import in the proceeding for which a party has demonstrated a substantial need.

Mode C. Disclosure provided for under Mode B together with disclosure, prior to the hearing, of documents relating to issues in the case that are in the possession of persons who are noticed as witnesses by the party requested to provide disclosure.

Mode D. Pre hearing disclosure of documents regarding non-privileged matters that are relevant to any party's claim or defense, subject to limitations of reasonableness, duplication and undue burden.

SCHEDULE 2

Modes of Disclosure of Electronic Information

Mode A. Disclosure by each party limited to copies of electronic information to be presented in support of that party's case, in print-out or another reasonably usable form.

Mode B. (1) Disclosure, in reasonably usable form, by each party of electronic information maintained by no more than [specify number] of designated custodians. (2) Provision only of information created between the date of the signing of the agreement that is the subject of the dispute and the date of the filing of the request for arbitration. (3) Disclosure of information from primary storage facilities only; no information required to be disclosed from back up servers or back up tapes; no disclosure of information from cell phones, PDAs, voicemails, etc. (4) No disclosure of information other than reasonably accessible active data.

Mode C. Same as Mode B, but covering a larger number of custodians [specify number] and a wider time period [to be specified]. The parties may also agree to permit upon a showing of special need and relevance disclosure of deleted, fragmented or other information difficult to obtain other than through forensic means.

Mode D. Disclosure of electronic information regarding non-privileged matters that are relevant to any party's claim or defense, subject to limitations of reasonableness, duplicativeness and undue burden.

Parties selecting Modes B, C, or D agree to meet and confer, prior to an initial scheduling conference with the tribunal, concerning the specific modalities and timetable for electronic information disclosure.

Section 2. PRESENTATION OF WITNESSES

The CPR Non-Administered Arbitration Rules provide that the testimony of witnesses "may be presented in written and/or oral form as the Tribunal may determine is appropriate." Rule 12.2.

(a) Testimony of Witnesses in Written Form (Witness Statements)

Witness statements are detailed presentations in writing of the testimony, including references to documents that are also presented, that a witness would give if questioned before the tribunal. These statements are exchanged prior to the presentation of oral evidence at a hearing. Witnesses then appear at the hearing to be questioned concerning their written statements.

Witness statements have been found to save considerable time that would otherwise be spent in hearings before the tribunal and offer other advantages as well: They serve to eliminate surprise, narrow the issues and permit more focused questioning of the witness at the hearings. They may also eliminate the need for oral testimony from uncontroversial or distant witnesses. Witness statements also allow the arbitrators and the parties to become acquainted with material facts in advance of the hearing, and they may therefore promote settlement.

The use of witness statements is referred to in the rules of the major international arbitral institutions, in the UNCITRAL Arbitration Rules and in the IBA Rules on the Taking of Evidence in International Commercial Arbitration.

The following are procedures that generally apply to the use of witness statements:

1. Each statement should be signed by the witness, contain an affirmation of its truth and be sufficiently detailed to constitute the entire evidence of that witness.
2. Each witness who has provided a statement must appear for examination at the evidentiary hearing by the opposing parties and the tribunal unless the parties and the tribunal agree otherwise. The tribunal may disregard the statement of any witness who fails to appear in support of it.
3. The parties may agree or the tribunal may direct that the witness statement shall serve as the direct testimony of the witness. In that event, the witness should, at a hearing before the tribunal, swear or affirm to tell the truth, confirm her/his witness statement following an opportunity to make any needed corrections to the statement and then be subject to cross-examination. However, absent party agreement, the tribunal may consider whether to permit witnesses who have submitted a statement to respond to questions from the sponsoring party before being cross-examined so long as this oral testimony is brief and does not introduce matters not contained in the written statement. This allows the witness to "warm to the seat" and permits the tribunal to hear the witness testify in her/his own words.
4. The tribunal may wish to explore with the parties alternative forms of witness statements. Although such statements are commonly submitted in narrative form, they may also be submitted in question and answer format, as they are in some administrative proceedings in the United States. Testimony submitted in question and answer format is potentially more interesting and persuasive than a narrative text and more nearly replicates the presentation of oral testimony.
5. The tribunal should also explore with the parties whether witness statements are to be submitted simultaneously or sequentially, as well as the need for reply or rejoinder submissions.
6. A party may elect, a reasonable time prior to the hearing, not to question a witness presented by an opposing party. In such event, the tribunal should consider whether it wishes to have the witness appear before it for questioning by members of the tribunal.

(b) Testimony of Witnesses in Oral Form

In the absence of a witness statement, the testimony of a witness is presented at a hearing through questioning by counsel and the tribunal. Since the oral process permits the witness to present the evidence in her/his own words, the tribunal may benefit, especially where the credibility of a witness is important, from having the opportunity to observe the demeanor of witness in presenting his or her position in the case.

(c) Depositions

Depositions are recorded sessions at which witnesses are questioned by the parties outside the presence of the tribunal, enabling the parties to obtain information from witnesses in advance of their testifying at the hearings. Depositions should be permitted only where the testimony is expected to be material to the outcome of the case and where one or more of the following exigent circumstances apply: Witness statements are not being used, the parties agree to the taking of the deposition and/or the witness may not be available to testify, in person or by telecommunication, before the tribunal. The tribunal should impose strict limits on the number and length of any depositions allowed. Deposition transcripts may, as the tribunal determines, be used at hearings or otherwise be made part of the record before the tribunal.

(d) Determining the Appropriate Forms of Witness Evidence

The tribunal in its agenda for the initial pre-hearing conference should call to the attention of the parties the options for the presentation of witness testimony and should explore those options with the parties at the conference. The "Modes of Presenting Witnesses" set forth on Schedule 3, to the extent not previously agreed on by the parties, may be useful for this purpose. *See* Section 2(h) below. Any of the "modes" or variants of them can be effective methods for the presentation of witness testimony depending upon the circumstances of the particular case. Any procedure elected should be applied consistently with the expectations of the parties and their counsel and with the cost-effective resolution of the dispute.

(e) Presentations by Party-Appointed Experts

Although the tribunal is empowered to appoint neutral experts, this authority appears to have been seldom employed. Instead, the prevailing practice is for the parties to present the evidence of experts retained by them in support of their positions.

The following procedures may be applied to the use of party-appointed experts.

1. At the initial conference with the parties, the tribunal should ascertain whether the parties intend to present the evidence of expert witnesses and, if so, establish a schedule for the submission of expert reports.

2. Each expert witness should submit a signed report, setting forth the facts considered and conclusions reached in sufficient detail to serve as the entire evidence of the expert, together with a *curriculum vitae* or other biographical information describing the qualifications and experience of the witness.
3. The tribunal should discuss with the parties whether expert reports will be submitted simultaneously or sequentially, and whether there will be a need for reply or rejoinder submissions from the experts.
4 Each expert who has submitted a report must appear at a hearing before the tribunal unless the parties agree otherwise and the tribunal accepts this agreement. The tribunal may disregard the report of an expert who fails to appear at a hearing.
5. The tribunal may wish to consider directing that, within a specified period of time after the exchange of expert reports, opposing experts on the same issues meet and confer, without the parties or their counsel and prior to the submission of any reply expert reports, for the purpose of narrowing the scope of disputed issues among the experts.
6. The sequencing of expert testimony may be important. In order to avoid having experts on the same issue testify days or weeks apart, the tribunal may wish to arrange for such witnesses to testify sufficiently close to one another in time to enable the tribunal most effectively to consider the subjects of their testimony.

(f) Hearings

As a supplement to the applicable arbitration rules, the following procedures may also apply to the conduct of hearings:

1. The tribunal should require every witness to affirm, in a manner determined appropriate by the tribunal, that she or he is telling the truth. If the witness has submitted a witness statement or expert report, he or she should confirm the statement or report and note any corrections to it. In the tribunal's discretion the witness whose testimony has been presented in writing may

thereafter be briefly questioned by the party presenting the witness, provided that no new testimony other than corrections is presented in this way.

2. The tribunal may consider whether to direct that expert or fact witnesses appear before them at the same time for questioning, in a process known as "witness conferencing." A typical application is for expert witnesses to provide their written or oral testimony separately and then appear jointly for further questioning by the tribunal and counsel.

(g) Cross examination of Witnesses

Any witness whose testimony is received by the tribunal must be made available for examination by other parties and the tribunal. The form and length of cross examination should be such as to afford a fair opportunity for the testimony of a witness to be fully clarified and/or challenged.

(h) Party-Agreed Procedures for the Presentation of Witnesses

The parties to an arbitration may provide, in their agreement to arbitrate, or separately thereafter (as in an initial conference with the tribunal – *see* paragraph (d) above), for certain modes of witness presentation that they and the tribunal will follow. Suggested modes are set forth in Schedule 3 hereto and may be agreed to by the parties in such language as the following:

> ***"The parties agree that the presentation of witnesses shall be implemented by the tribunal consistently with Mode [ ] concerning witness presentation selected from Schedule 3 to the CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration."***

If the parties have agreed on the applicability of any one of such modes, the tribunal shall issue orders and shall conduct the proceeding consistently with the parties' agreement. Any agreed mode of witness presentation shall be binding on the parties and the tribunal and shall govern the proceedings, unless all parties thereafter agree on a different form of witness presentation. The tribunal may direct the use of procedures apart from the mode of presentation selected by the parties if it determines that there is a compelling need for such procedure

SCHEDULE 3

Modes of Presenting Witnesses

Mode A. Submission in advance of the hearing of a written statement from each witness on whose testimony a party relies, sufficient to serve as that witness's entire evidence, supplemented, at the option of the party presenting the witness, by short oral testimony by the witness before being cross-examined on matters not outside the written statement. No depositions of witnesses who have submitted statements.

Mode B. No witness statements. Direct testimony presented orally at the hearing. No depositions of witnesses.

Mode C. As in Mode B, except depositions as allowed by the tribunal or as agreed by the parties, but in either event subject to such limitations as the tribunal may deem appropriate.

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NOTES

UNCITRAL
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COMMISSION ON INTERNATIONAL TRADE LAW

UNCITRAL Notes on Organizing Arbitral Proceedings

UNITED NATIONS

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Preface

The United Nations Commission on International Trade Law (UNCITRAL) finalized the Notes at its twenty-ninth session (New York, 28 May–14 June 1996). In addition to the 36 member States of the Commission, representatives of many other States and of a number of international organizations had participated in the deliberations. In preparing the draft materials, the Secretariat consulted with experts from various legal systems, national arbitration bodies, as well as international professional associations.

The Commission, after an initial discussion on the project in 1993,[1] considered in 1994 a draft entitled "Draft Guidelines for Preparatory Conferences in Arbitral Proceedings".[2] That draft was also discussed at several meetings of arbitration practitioners, including the XIIth International Arbitration Congress, held by the International Council for Commercial Arbitration (ICCA) at Vienna from 3 to 6 November 1994.[3] On the basis of those discussions in the Commission and elsewhere, the Secretariat prepared "draft Notes on Organizing Arbitral Proceedings".[4] The Commission considered the draft Notes in 1995,[5] and a revised draft in 1996,[6] when the Notes were finalized.[7]

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[1] Report of the United Nations Commission on International Trade Law on the work of its twenty-sixth session, *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17* (A/48/17) (reproduced in *UNCITRAL Yearbook,* vol. XXIV: 1993, part one), paras. 291-296.

[2] The draft Guidelines have been published as document A/CN.9/396 and Add.1 (reproduced in *UNCITRAL Yearbook*, vol. XXV: 1994, part two, IV); the considerations of the Commission are reflected in the report of the United Nations Commission on International Trade Law on the work of its twenty-seventh session, *Official Records of the General Assembly, Forty-ninth Session Supplement No. 17* (A/49/17) (reproduced in *UNCITRAL Yearbook*, Vol. XXV: 1994, part two, IV), paras. 111-195.

[3] The proceedings of the Congress are published in *Planning Efficient Arbitration Proceedings/The Law Applicable in International Arbitration, ICCA Congress Series No. 7*, Kluwer Law International, The Hague, 1996.

[4] The draft Notes have been published as document A/CN.9/410 (reproduced in *UNCITRAL Yearbook*, vol. XXVI: 1995, part two, III).

[5] Report of the United Nations Commission on International Trade Law on the work of its twenty-eighth session, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 17* (A/50/17) (reproduced in *UNCITRAL Yearbook*, vol. XXVI: 1995, part one), paras. 314-373.

[6] The revised draft Notes have been published as document A/CN.9/423 (reproduced in *UNCITRAL Yearbook*, vol. XXVII: 1996, part two).

[7] Report of the United Nations Commission on International Trade Law on the work of its twenty-ninth session, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17* (A/51/17) (reproduced in *UNCITRAL Yearbook*, vol. XXVII: 1996, part one), paras. 11-54.

Contents

INTRODUCTION

Purpose of the Notes

1. The purpose of the Notes is to assist arbitration practitioners by listing and briefly describing questions on which appropriately timed decisions on organizing arbitral proceedings may be useful. The text, prepared with a particular view to international arbitrations, may be used whether or not the arbitration is administered by an arbitral institution.

Non-binding character of the Notes

2. No legal requirement binding on the arbitrators or the parties is imposed by the Notes. The arbitral tribunal remains free to use the Notes as it sees fit and is not required to give reasons for disregarding them.

3. The Notes are not suitable to be used as arbitration rules, since they do not establish any obligation of the arbitral tribunal or the parties to act in a particular way. Accordingly, the use of the Notes cannot imply any modification of the arbitration rules that the parties may have agreed upon.

Discretion in conduct of proceedings and usefulness of timely decisions on organizing proceedings

4. Laws governing the arbitral procedure and arbitration rules that parties may agree upon typically allow the arbitral tribunal broad discretion and flexibility in the conduct of arbitral proceedings.[8] This is useful in that it enables the arbitral tribunal to take decisions on the organization of proceedings that take into account the circumstances of the case, the expectations of the parties and of the members of the arbitral tribunal, and the need for a just and cost-efficient resolution of the dispute.

[8] A prominent example of such rules are the UNCITRAL Arbitration Rules, which provide in article 15(1): "Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case."

5. Such discretion may make it desirable for the arbitral tribunal to give the parties a timely indication as to the organization of the proceedings and the manner in which the tribunal intends to proceed. This is particularly desirable in international arbitrations, where the participants may be accustomed to differing styles of conducting arbitrations. Without such guidance, a party may find aspects of the proceedings unpredictable and difficult to prepare for. That may lead to misunderstandings, delays and increased costs.

Multi-party arbitration

6. These Notes are intended for use not only in arbitrations with two parties but also in arbitrations with three or more parties. Use of the Notes in multi-party arbitration is referred to below in paragraphs 86-88 (item 18).

Process of making decisions on organizing arbitral proceedings

7. Decisions by the arbitral tribunal on organizing arbitral proceedings may be taken with or without previous consultations with the parties. The method chosen depends on whether, in view of the type of the question to be decided, the arbitral tribunal considers that consultations are not necessary or that hearing the views of the parties would be beneficial for increasing the predictability of the proceedings or improving the procedural atmosphere.

8. The consultations, whether they involve only the arbitrators or also the parties, can be held in one or more meetings, or can be carried out by correspondence or telecommunications such as telefax or conference telephone calls or other electronic means. Meetings may be held at the venue of arbitration or at some other appropriate location.

9. In some arbitrations a special meeting may be devoted exclusively to such procedural consultations; alternatively, the consultations may be held in conjunction with a hearing on the substance of the dispute. Practices differ as to whether such special meetings should be held and how they should be organized. Special procedural meetings of the arbitrators and the parties separate from hearings are in practice referred to by expressions such as “preliminary meeting”, “pre-hearing conference”, “preparatory conference”, “pre-hearing review”, or terms of similar

meaning. The terms used partly depend on the stage of the proceedings at which the meeting is taking place.

List of matters for possible consideration in organizing arbitral proceedings

10. The Notes provide a list, followed by annotations, of matters on which the arbitral tribunal may wish to formulate decisions on organizing arbitral proceedings.

11. Given that procedural styles and practices in arbitration vary widely, that the purpose of the Notes is not to promote any practice as best practice, and that the Notes are designed for universal use, it is not attempted in the Notes to describe in detail different arbitral practices or express a preference for any of them.

12. The list, while not exhaustive, covers a broad range of situations that may arise in an arbitration. In many arbitrations, however, only a limited number of the matters mentioned in the list need to be considered. It also depends on the circumstances of the case at which stage or stages of the proceedings it would be useful to consider matters concerning the organization of the proceedings. Generally, in order not to create opportunities for unnecessary discussions and delay, it is advisable not to raise a matter prematurely, i.e. before it is clear that a decision is needed.

13. When the Notes are used, it should be borne in mind that the discretion of the arbitral tribunal in organizing the proceedings may be limited by arbitration rules, by other provisions agreed to by the parties and by the law applicable to the arbitral procedure. When an arbitration is administered by an arbitral institution, various matters discussed in the Notes may be covered by the rules and practices of that institution.

LIST OF MATTERS FOR POSSIBLE CONSIDERATION IN ORGANIZING ARBITRAL PROCEEDINGS

ANNOTATIONS

1. Set of arbitration rules

If the parties have not agreed on a set of arbitration rules, would they wish to do so

14. Sometimes parties who have not included in their arbitration agreement a stipulation that a set of arbitration rules will govern their arbitral proceedings might wish to do so after the arbitration has begun. If that occurs, the UNCITRAL Arbitration Rules may be used either without modification or with such modifications as the parties might wish to agree upon. In the alternative, the parties might wish to adopt the rules of an arbitral institution; in that case, it may be necessary to secure the agreement of that institution and to stipulate the terms under which the arbitration could be carried out in accordance with the rules of that institution.

15. However, caution is advised as consideration of a set of arbitration rules might delay the proceedings or give rise to unnecessary controversy.

16. It should be noted that agreement on arbitration rules is not a necessity and that, if the parties do not agree on a set of arbitration rules, the arbitral tribunal has the power to continue the proceedings and determine how the case will be conducted.

2. Language of proceedings

17. Many rules and laws on arbitral procedure empower the arbitral tribunal to determine the language or languages to be used in the proceedings, if the parties have not reached an agreement thereon.

(a) Possible need for translation of documents, in full or in part

18. Some documents annexed to the statements of claim and defence or submitted later may not be in the language of the proceedings. Bearing in mind the needs of the proceedings and economy, it may be considered whether the arbitral tribunal should order that any of those documents or parts thereof should be accompanied by a translation into the language of the proceedings.

(b) Possible need for interpretation of oral presentations

19 If interpretation will be necessary during oral hearings, it is advisable to consider whether the interpretation will be simultaneous or consecutive and whether the arrangements should be the responsibility of a party or the arbitral tribunal. In an arbitration administered by an institution, interpretation as well as translation services are often arranged by the arbitral institution.

(c) Cost of translation and interpretation

20. In taking decisions about translation or interpretation, it is advisable to decide whether any or all of the costs are to be paid directly by a party or whether they will be paid out of the deposits and apportioned between the parties along with the other arbitration costs.

3. Place of arbitration

(a) Determination of the place of arbitration, if not already agreed upon by the parties

21. Arbitration rules usually allow the parties to agree on the place of arbitration, subject to the requirement of some arbitral institutions that arbitrations under their rules be conducted at a particular place, usually the location of the institution. If the place has not been so agreed upon, the rules governing the arbitration typically provide that it is in the power of the arbitral tribunal or the institution administering the arbitration to determine the place. If the arbitral tribunal is to make that determination, it may wish to hear the views of the parties before doing so.

22. Various factual and legal factors influence the choice of the place of arbitration, and their relative importance varies from case to case. Among the more prominent factors are: *(a)* suitability of the law on arbitral procedure of the place of arbitration; *(b)* whether there is a multilateral or bilateral treaty on enforcement of arbitral awards between the State where the arbitration takes place and the State or States where the award may have to be enforced; *(c)* convenience of the parties and the arbitrators, including the travel distances; *(d)* availability and cost of support services needed; and *(e)* location of the subject-matter in dispute and proximity of evidence.

(b) Possibility of meetings outside the place of arbitration

23. Many sets of arbitration rules and laws on arbitral procedure expressly allow the arbitral tribunal to hold meetings elsewhere than at the place of arbitration. For example, under the UNCITRAL Model Law on International Commercial Arbitration "the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents" (article 20(2)). The purpose of this discretion is to permit arbitral proceedings to be carried out in a manner that is most efficient and economical.

4. Administrative services that may be needed for the arbitral tribunal to carry out its functions

24. Various administrative services (e.g. hearing rooms or secretarial services) may need to be procured for the arbitral tribunal to be able to carry out its functions. When the arbitration is administered by an arbitral institution, the institution will usually provide all or a good part of the required administrative support to the arbitral tribunal. When an arbitration administered by an arbitral institution takes place away from the seat of the institution, the institution may be able to arrange for administrative services to be obtained from another source, often an arbitral institution; some arbitral institutions have entered into cooperation agreements with a view to providing mutual assistance in servicing arbitral proceedings.

25. When the case is not administered by an institution, or the involvement of the institution does not include providing administrative support, usually the administrative arrangements for the proceedings will be made by the arbitral tribunal or the presiding arbitrator; it may also be acceptable to leave some of the arrangements to the parties, or to one of the parties subject to agreement of the other party or parties. Even in such cases, a convenient source of administrative support might be found in arbitral institutions, which often offer their facilities to arbitrations not governed by the rules of the institution. Otherwise, some services could be procured from entities such as chambers of commerce, hotels or specialized firms providing secretarial or other support services.

26. Administrative services might be secured by engaging a secretary of the arbitral tribunal (also referred to as registrar, clerk,

administrator or rapporteur), who carries out the tasks under the direction of the arbitral tribunal. Some arbitral institutions routinely assign such persons to the cases administered by them. In arbitrations not administered by an institution or where the arbitral institution does not appoint a secretary, some arbitrators frequently engage such persons, at least in certain types of cases, whereas many others normally conduct the proceedings without them.

27. To the extent the tasks of the secretary are purely organizational (e.g. obtaining meeting rooms and providing or coordinating secretarial services), this is usually not controversial. Differences in views, however, may arise if the tasks include legal research and other professional assistance to the arbitral tribunal (e.g. collecting case law or published commentaries on legal issues defined by the arbitral tribunal, preparing summaries from case law and publications, and sometimes also preparing drafts of procedural decisions or drafts of certain parts of the award, in particular those concerning the facts of the case). Views or expectations may differ especially where a task of the secretary is similar to professional functions of the arbitrators. Such a role of the secretary is in the view of some commentators inappropriate or is appropriate only under certain conditions, such as that the parties agree thereto. However, it is typically recognized that it is important to ensure that the secretary does not perform any decision-making function of the arbitral tribunal.

5. Deposits in respect of costs

(a) Amount to be deposited

28. In an arbitration administered by an institution, the institution often sets, on the basis of an estimate of the costs of the proceedings, the amount to be deposited as an advance for the costs of the arbitration. In other cases it is customary for the arbitral tribunal to make such an estimate and request a deposit. The estimate typically includes travel and other expenses by the arbitrators, expenditures for administrative assistance required by the arbitral tribunal, costs of any expert advice required by the arbitral tribunal, and the fees for the arbitrators. Many arbitration rules have provisions on this matter, including on whether the deposit should be made by the two parties (or all parties in a multi-party case) or only by the claimant.

(b) Management of deposits

29. When the arbitration is administered by an institution, the institution's services may include managing and accounting for

the deposited money. Where that is not the case, it might be useful to clarify matters such as the type and location of the account in which the money will be kept and how the deposits will be managed.

(c) Supplementary deposits

30. If during the course of proceedings it emerges that the costs will be higher than anticipated, supplementary deposits may be required (e.g. because the arbitral tribunal decides pursuant to the arbitration rules to appoint an expert).

6. Confidentiality of information relating to the arbitration; possible agreement thereon

31. It is widely viewed that confidentiality is one of the advantageous and helpful features of arbitration. Nevertheless, there is no uniform answer in national laws as to the extent to which the participants in an arbitration are under the duty to observe the confidentiality of information relating to the case. Moreover, parties that have agreed on arbitration rules or other provisions that do not expressly address the issue of confidentiality cannot assume that all jurisdictions would recognize an implied commitment to confidentiality. Furthermore, the participants in an arbitration might not have the same understanding as regards the extent of confidentiality that is expected. Therefore, the arbitral tribunal might wish to discuss that with the parties and, if considered appropriate, record any agreed principles on the duty of confidentiality.

32. An agreement on confidentiality might cover, for example, one or more of the following matters: the material or information that is to be kept confidential (e.g. pieces of evidence, written and oral arguments, the fact that the arbitration is taking place, identity of the arbitrators, content of the award); measures for maintaining confidentiality of such information and hearings; whether any special procedures should be employed for maintaining the confidentiality of information transmitted by electronic means (e.g. because communication equipment is shared by several users, or because electronic mail over public networks is considered not sufficiently protected against unauthorized access); circumstances in which confidential information may be disclosed in part or in whole (e.g. in the context of disclosures of information in the public domain, or if required by law or a regulatory body).

7. Routing of written communications among the parties and the arbitrators

33. To the extent the question how documents and other written communications should be routed among the parties and the arbitrators is not settled by the agreed rules, or, if an institution administers the case, by the practices of the institution, it is useful for the arbitral tribunal to clarify the question suitably early so as to avoid misunderstandings and delays.

34. Among various possible patterns of routing, one example is that a party transmits the appropriate number of copies to the arbitral tribunal, or to the arbitral institution, if one is involved, which then forwards them as appropriate. Another example is that a party is to send copies simultaneously to the arbitrators and the other party or parties. Documents and other written communications directed by the arbitral tribunal or the presiding arbitrator to one or more parties may also follow a determined pattern, such as through the arbitral institution or by direct transmission. For some communications, in particular those on organizational matters (e.g. dates for hearings), more direct routes of communication may be agreed, even if, for example, the arbitral institution acts as an intermediary for documents such as the statements of claim and defence, evidence or written arguments.

8. Telefax and other electronic means of sending documents

(a) Telefax

35. Telefax, which offers many advantages over traditional means of communication, is widely used in arbitral proceedings. Nevertheless, should it be thought that, because of the characteristics of the equipment used, it would be preferable not to rely only on a telefacsimile of a document, special arrangements may be considered, such as that a particular piece of written evidence should be mailed or otherwise physically delivered, or that certain telefax messages should be confirmed by mailing or otherwise delivering documents whose facsimile were transmitted by electronic means. When a document should not be sent by telefax, it may, however, be appropriate, in order to avoid an unnecessarily rigid procedure, for the arbitral tribunal to retain discretion to accept an advance copy of a document by telefax for the purposes of meeting a deadline, provided that the document itself is received within a reasonable time thereafter.

(b) Other electronic means (e.g. electronic mail and magnetic or optical disk)

36. It might be agreed that documents, or some of them, will be exchanged not only in paper-based form, but in addition also in an electronic form other than telefax (e.g. as electronic mail, or on a magnetic or optical disk), or only in electronic form. Since the use of electronic means depends on the aptitude of the persons involved and the availability of equipment and computer programs, agreement is necessary for such means to be used. If both paper-based and electronic means are to be used, it is advisable to decide which one is controlling and, if there is a time-limit for submitting a document, which act constitutes submission.

37. When the exchange of documents in electronic form is planned, it is useful, in order to avoid technical difficulties, to agree on matters such as: data carriers (e.g. electronic mail or computer disks) and their technical characteristics; computer programs to be used in preparing the electronic records; instructions for transforming the electronic records into human-readable form; keeping of logs and back-up records of communications sent and received; information in human-readable form that should accompany the disks (e.g. the names of the originator and recipient, computer program, titles of the electronic files and the back-up methods used); procedures when a message is lost or the communication system otherwise fails; and identification of persons who can be contacted if a problem occurs.

9. Arrangements for the exchange of written submissions

38. After the parties have initially stated their claims and defences, they may wish, or the arbitral tribunal might request them, to present further written submissions so as to prepare for the hearings or to provide the basis for a decision without hearings. In such submissions, the parties, for example, present or comment on allegations and evidence, cite or explain law, or make or react to proposals. In practice such submissions are referred to variously as, for example, statement, memorial, counter-memorial, brief, counter-brief, reply, réplique, duplique, rebuttal or rejoinder; the terminology is a matter of linguistic usage and the scope or sequence of the submission.

(a) Scheduling of written submissions

39. It is advisable that the arbitral tribunal set time-limits for written submissions. In enforcing the time-limits, the arbitral

tribunal may wish, on the one hand, to make sure that the case is not unduly protracted and, on the other hand, to reserve a degree of discretion and allow late submissions if appropriate under the circumstances. In some cases the arbitral tribunal might prefer not to plan the written submissions in advance, thus leaving such matters, including time-limits, to be decided in light of the developments in the proceedings. In other cases, the arbitral tribunal may wish to determine, when scheduling the first written submissions, the number of subsequent submissions.

40. Practices differ as to whether, after the hearings have been held, written submissions are still acceptable. While some arbitral tribunals consider post-hearing submissions unacceptable, others might request or allow them on a particular issue. Some arbitral tribunals follow the procedure according to which the parties are not requested to present written evidence and legal arguments to the arbitral tribunal before the hearings; in such a case, the arbitral tribunal may regard it as appropriate that written submissions be made after the hearings.

(b) Consecutive or simultaneous submissions

41. Written submissions on an issue may be made consecutively, i.e. the party who receives a submission is given a period of time to react with its counter submission. Another possibility is to request each party to make the submission within the same time period to the arbitral tribunal or the institution administering the case; the received submissions are then forwarded simultaneously to the respective other party or parties. The approach used may depend on the type of issues to be commented upon and the time in which the views should be clarified. With consecutive submissions, it may take longer than with simultaneous ones to obtain views of the parties on a given issue. Consecutive submissions, however, allow the reacting party to comment on all points raised by the other party or parties, which simultaneous submissions do not; thus, simultaneous submissions might possibly necessitate further submissions.

10. Practical details concerning written submissions and evidence (e.g. method of submission, copies, numbering, references)

42. Depending on the volume and kind of documents to be handled, it might be considered whether practical arrangements on details such as the following would be helpful:

- Whether the submissions will be made as paper documents or by electronic means, or both (see paragraphs 35-37);
- The number of copies in which each document is to be submitted;
- A system for numbering documents and items of evidence, and a method for marking them, including by tabs;
- The form of references to documents (e.g. by the heading and the number assigned to the document or its date);
- Paragraph numbering in written submissions, in order to facilitate precise references to parts of a text;
- When translations are to be submitted as paper documents, whether the translations are to be contained in the same volume as the original texts or included in separate volumes.

11. Defining points at issue; order of deciding issues; defining relief or remedy sought

(a) Should a list of points at issue be prepared

43. In considering the parties' allegations and arguments, the arbitral tribunal may come to the conclusion that it would be useful for it or for the parties to prepare, for analytical purposes and for ease of discussion, a list of the points at issue, as opposed to those that are undisputed. If the arbitral tribunal determines that the advantages of working on the basis of such a list outweigh the disadvantages, it chooses the appropriate stage of the proceedings for preparing a list, bearing in mind also that subsequent developments in the proceedings may require a revision of the points at issue. Such an identification of points at issue might help to concentrate on the essential matters, to reduce the number of points at issue by agreement of the parties, and to select the best and most economical process for resolving the dispute. However, possible disadvantages of preparing such a list include delay, adverse effect on the flexibility of the proceedings, or unnecessary disagreements about whether the arbitral tribunal has decided all issues submitted to it or whether the award contains decisions on matters beyond the scope of the submission to arbitration. The terms of reference required under some arbitration rules, or in agreements of parties, may serve the same purpose as the above-described list of points at issue.

(b) In which order should the points at issue be decided

44. While it is often appropriate to deal with all the points at issue collectively, the arbitral tribunal might decide to take them

up during the proceedings in a particular order. The order may be due to a point being preliminary relative to another (e.g. a decision on the jurisdiction of the arbitral tribunal is preliminary to consideration of substantive issues, or the issue of responsibility for a breach of contract is preliminary to the issue of the resulting damages). A particular order may be decided also when the breach of various contracts is in dispute or when damages arising from various events are claimed.

45. If the arbitral tribunal has adopted a particular order of deciding points at issue, it might consider it appropriate to issue a decision on one of the points earlier than on the other ones. This might be done, for example, when a discrete part of a claim is ready for decision while the other parts still require extensive consideration, or when it is expected that after deciding certain issues the parties might be more inclined to settle the remaining ones. Such earlier decisions are referred to by expressions such as "partial", "interlocutory" or "interim" awards or decisions, depending on the type of issue dealt with and on whether the decision is final with respect to the issue it resolves. Questions that might be the subject of such decisions are, for example, jurisdiction of the arbitral tribunal, interim measures of protection, or the liability of a party.

(c) Is there a need to define more precisely the relief or remedy sought

46. If the arbitral tribunal considers that the relief or remedy sought is insufficiently definite, it may wish to explain to the parties the degree of definiteness with which their claims should be formulated. Such an explanation may be useful since criteria are not uniform as to how specific the claimant must be in formulating a relief or remedy.

12. Possible settlement negotiations and their effect on scheduling proceedings

47. Attitudes differ as to whether it is appropriate for the arbitral tribunal to bring up the possibility of settlement. Given the divergence of practices in this regard, the arbitral tribunal should only suggest settlement negotiations with caution. However, it may be opportune for the arbitral tribunal to schedule the proceedings in a way that might facilitate the continuation or initiation of settlement negotiations.

13. Documentary evidence

(a) Time-limits for submission of documentary evidence intended to be submitted by the parties; consequences of late submission

48. Often the written submissions of the parties contain sufficient information for the arbitral tribunal to fix the time-limit for submitting evidence. Otherwise, in order to set realistic time periods, the arbitral tribunal may wish to consult with the parties about the time that they would reasonably need.

49. The arbitral tribunal may wish to clarify that evidence submitted late will as a rule not be accepted. It may wish not to preclude itself from accepting a late submission of evidence if the party shows sufficient cause for the delay.

(b) Whether the arbitral tribunal intends to require a party to produce documentary evidence

50. Procedures and practices differ widely as to the conditions under which the arbitral tribunal may require a party to produce documents. Therefore, the arbitral tribunal might consider it useful, when the agreed arbitration rules do not provide specific conditions, to clarify to the parties the manner in which it intends to proceed.

51. The arbitral tribunal may wish to establish time-limits for the production of documents. The parties might be reminded that, if the requested party duly invited to produce documentary evidence fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal is free to draw its conclusions from the failure and may make the award on the evidence before it.

(c) Should assertions about the origin and receipt of documents and about the correctness of photocopies be assumed as accurate

52. It may be helpful for the arbitral tribunal to inform the parties that it intends to conduct the proceedings on the basis that, unless a party raises an objection to any of the following conclusions within a specified period of time: *(a)* a document is accepted as having originated from the source indicated in the document; *(b)* a copy of a dispatched communication (e.g. letter, telex, telefax or other electronic message) is accepted without further proof

as having been received by the addressee; and *(c)* a copy is accepted as correct. A statement by the arbitral tribunal to that effect can simplify the introduction of documentary evidence and discourage unfounded and dilatory objections, at a late stage of the proceedings, to the probative value of documents. It is advisable to provide that the time-limit for objections will not be enforced if the arbitral tribunal considers the delay justified.

(d) Are the parties willing to submit jointly a single set of documentary evidence

53. The parties may consider submitting jointly a single set of documentary evidence whose authenticity is not disputed. The purpose would be to avoid duplicate submissions and unnecessary discussions concerning the authenticity of documents, without prejudicing the position of the parties concerning the content of the documents. Additional documents may be inserted later if the parties agree. When a single set of documents would be too voluminous to be easily manageable, it might be practical to select a number of frequently used documents and establish a set of "working" documents. A convenient arrangement of documents in the set may be according to chronological order or subject-matter. It is useful to keep a table of contents of the documents, for example, by their short headings and dates, and to provide that the parties will refer to documents by those headings and dates.

(e) Should voluminous and complicated documentary evidence be presented through summaries, tabulations, charts, extracts or samples

54. When documentary evidence is voluminous and complicated, it may save time and costs if such evidence is presented by a report of a person competent in the relevant field (e.g. public accountant or consulting engineer). The report may present the information in the form of summaries, tabulations, charts, extracts or samples. Such presentation of evidence should be combined with arrangements that give the interested party the opportunity to review the underlying data and the methodology of preparing the report.

14. Physical evidence other than documents

55. In some arbitrations the arbitral tribunal is called upon to assess physical evidence other than documents, for example, by inspecting samples of goods, viewing a video recording or observing the functioning of a machine.

(a) What arrangements should be made if physical evidence will be submitted

56. If physical evidence will be submitted, the arbitral tribunal may wish to fix the time schedule for presenting the evidence, make arrangements for the other party or parties to have a suitable opportunity to prepare itself for the presentation of the evidence, and possibly take measures for safekeeping the items of evidence.

(b) What arrangements should be made if an on-site inspection is necessary

57. If an on-site inspection of property or goods will take place, the arbitral tribunal may consider matters such as timing, meeting places, other arrangements to provide the opportunity for all parties to be present, and the need to avoid communications between arbitrators and a party about points at issue without the presence of the other party or parties.

58. The site to be inspected is often under the control of one of the parties, which typically means that employees or representatives of that party will be present to give guidance and explanations. It should be borne in mind that statements of those representatives or employees made during an on-site inspection, as contrasted with statements those persons might make as witnesses in a hearing, should not be treated as evidence in the proceedings.

15. Witnesses

59. While laws and rules on arbitral procedure typically leave broad freedom concerning the manner of taking evidence of witnesses, practices on procedural points are varied. In order to facilitate the preparations of the parties for the hearings, the arbitral tribunal may consider it appropriate to clarify, in advance of the hearings, some or all of the following issues.

(a) Advance notice about a witness whom a party intends to present; written witnesses' statements

60. To the extent the applicable arbitration rules do not deal with the matter, the arbitral tribunal may wish to require that each party give advance notice to the arbitral tribunal and the other party or parties of any witness it intends to present. As to the

content of the notice, the following is an example of what might be required, in addition to the names and addresses of the witnesses: *(a)* the subject upon which the witnesses will testify; *(b)* the language in which the witnesses will testify; and *(c)* the nature of the relationship with any of the parties, qualifications and experience of the witnesses if and to the extent these are relevant to the dispute or the testimony, and how the witnesses learned about the facts on which they will testify. However, it may not be necessary to require such a notice, in particular if the thrust of the testimony can be clearly ascertained from the party's allegations.

61. Some practitioners favour the procedure according to which the party presenting witness evidence submits a signed witness's statement containing testimony itself. It should be noted, however, that such practice, which implies interviewing the witness by the party presenting the testimony, is not known in all parts of the world and, moreover, that some practitioners disapprove of it on the ground that such contacts between the party and the witness may compromise the credibility of the testimony and are therefore improper (see paragraph 67). Notwithstanding these reservations, signed witness's testimony has advantages in that it may expedite the proceedings by making it easier for the other party or parties to prepare for the hearings or for the parties to identify uncontested matters. However, those advantages might be outweighed by the time and expense involved in obtaining the written testimony.

62. If a signed witness's statement should be made under oath or similar affirmation of truthfulness, it may be necessary to clarify by whom the oath or affirmation should be administered and whether any formal authentication will be required by the arbitral tribunal.

(b) Manner of taking oral evidence of witnesses

(i) Order in which questions will be asked and the manner in which the hearing of witnesses will be conducted

63. To the extent that the applicable rules do not provide an answer, it may be useful for the arbitral tribunal to clarify how witnesses will be heard. One of the various possibilities is that a witness is first questioned by the arbitral tribunal, whereupon questions are asked by the parties, first by the party who called the witness. Another possibility is for the witness to be questioned by the party presenting the witness and then by the other party or parties, while the arbitral tribunal might pose questions

during the questioning or after the parties on points that in the tribunal's view have not been sufficiently clarified. Differences exist also as to the degree of control the arbitral tribunal exercises over the hearing of witnesses. For example, some arbitrators prefer to permit the parties to pose questions freely and directly to the witness, but may disallow a question if a party objects; other arbitrators tend to exercise more control and may disallow a question on their initiative or even require that questions from the parties be asked through the arbitral tribunal.

(ii) Whether oral testimony will be given under oath or affirmation and, if so, in what form an oath or affirmation should be made

64. Practices and laws differ as to whether or not oral testimony is to be given under oath or affirmation. In some legal systems, the arbitrators are empowered to put witnesses on oath, but it is usually in their discretion whether they want to do so. In other systems, oral testimony under oath is either unknown or may even be considered improper as only an official such as a judge or notary may have the authority to administer oaths.

(iii) May witnesses be in the hearing room when they are not testifying

65. Some arbitrators favour the procedure that, except if the circumstances suggest otherwise, the presence of a witness in the hearing room is limited to the time the witness is testifying; the purpose is to prevent the witness from being influenced by what is said in the hearing room, or to prevent that the presence of the witness would influence another witness. Other arbitrators consider that the presence of a witness during the testimony of other witnesses may be beneficial in that possible contradictions may be readily clarified or that their presence may act as a deterrent against untrue statements. Other possible approaches may be that witnesses are not present in the hearing room before their testimony, but stay in the room after they have testified, or that the arbitral tribunal decides the question for each witness individually depending on what the arbitral tribunal considers most appropriate. The arbitral tribunal may leave the procedure to be decided during the hearings, or may give guidance on the question in advance of the hearings.

(c) The order in which the witnesses will be called

66. When several witnesses are to be heard and longer testimony is expected, it is likely to reduce costs if the order in which they will be called is known in advance and their presence can be

scheduled accordingly. Each party might be invited to suggest the order in which it intends to present the witnesses, while it would be up to the arbitral tribunal to approve the scheduling and to make departures from it.

(d) Interviewing witnesses prior to their appearance at a hearing

67. In some legal systems, parties or their representatives are permitted to interview witnesses, prior to their appearance at the hearing, as to such matters as their recollection of the relevant events, their experience, qualifications or relation with a participant in the proceedings. In those legal systems such contacts are usually not permitted once the witness's oral testimony has begun. In other systems such contacts with witnesses are considered improper. In order to avoid misunderstandings, the arbitral tribunal may consider it useful to clarify what kind of contacts a party is permitted to have with a witness in the preparations for the hearings.

(e) Hearing representatives of a party

68. According to some legal systems, certain persons affiliated with a party may only be heard as representatives of the party but not as witnesses. In such a case, it may be necessary to consider ground rules for determining which persons may not testify as witnesses (e.g. certain executives, employees or agents) and for hearing statements of those persons and for questioning them.

16. Experts and expert witnesses

69. Many arbitration rules and laws on arbitral procedure address the participation of experts in arbitral proceedings. A frequent solution is that the arbitral tribunal has the power to appoint an expert to report on issues determined by the tribunal; in addition, the parties may be permitted to present expert witnesses on points at issue. In other cases, it is for the parties to present expert testimony, and it is not expected that the arbitral tribunal will appoint an expert.

(a) Expert appointed by the arbitral tribunal

70. If the arbitral tribunal is empowered to appoint an expert, one possible approach is for the tribunal to proceed directly to

selecting the expert. Another possibility is to consult the parties as to who should be the expert; this may be done, for example, without mentioning a candidate, by presenting to the parties a list of candidates, soliciting proposals from the parties, or by discussing with the parties the "profile" of the expert the arbitral tribunal intends to appoint, i.e. the qualifications, experience and abilities of the expert.

(i) The expert's terms of reference

71. The purpose of the expert's terms of reference is to indicate the questions on which the expert is to provide clarification, to avoid opinions on points that are not for the expert to assess and to commit the expert to a time schedule. While the discretion to appoint an expert normally includes the determination of the expert's terms of reference, the arbitral tribunal may decide to consult the parties before finalizing the terms. It might also be useful to determine details about how the expert will receive from the parties any relevant information or have access to any relevant documents, goods or other property, so as to enable the expert to prepare the report. In order to facilitate the evaluation of the expert's report, it is advisable to require the expert to include in the report information on the method used in arriving at the conclusions and the evidence and information used in preparing the report.

(ii) The opportunity of the parties to comment on the expert's report, including by presenting expert testimony

72. Arbitration rules that contain provisions on experts usually also have provisions on the right of a party to comment on the report of the expert appointed by the arbitral tribunal. If no such provisions apply or more specific procedures than those prescribed are deemed necessary, the arbitral tribunal may, in light of those provisions, consider it opportune to determine, for example, the time period for presenting written comments of the parties, or, if hearings are to be held for the purpose of hearing the expert, the procedures for interrogating the expert by the parties or for the participation of any expert witnesses presented by the parties.

(b) Expert opinion presented by a party (expert witness)

73. If a party presents an expert opinion, the arbitral tribunal might consider requiring, for example, that the opinion be in writing, that the expert should be available to answer questions at hearings, and that, if a party will present an expert witness at a

hearing, advance notice must be given or that the written opinion must be presented in advance, as in the case of other witnesses (see paragraphs 60-62).

17. Hearings

(a) Decision whether to hold hearings

74. Laws on arbitral procedure and arbitration rules often have provisions as to the cases in which oral hearings must be held and as to when the arbitral tribunal has discretion to decide whether to hold hearings.

75. If it is up to the arbitral tribunal to decide whether to hold hearings, the decision is likely to be influenced by factors such as, on the one hand, that it is usually quicker and easier to clarify points at issue pursuant to a direct confrontation of arguments than on the basis of correspondence and, on the other hand, the travel and other cost of holding hearings, and that the need of finding acceptable dates for the hearings might delay the proceedings. The arbitral tribunal may wish to consult the parties on this matter.

(b) Whether one period of hearings should be held or separate periods of hearings

76. Attitudes vary as to whether hearings should be held in a single period of hearings or in separate periods, especially when more than a few days are needed to complete the hearings. According to some arbitrators, the entire hearings should normally be held in a single period, even if the hearings are to last for more than a week. Other arbitrators in such cases tend to schedule separate periods of hearings. In some cases issues to be decided are separated, and separate hearings set for those issues, with the aim that oral presentation on those issues will be completed within the allotted time. Among the advantages of one period of hearings are that it involves less travel costs, memory will not fade, and it is unlikely that people representing a party will change. On the other hand, the longer the hearings, the more difficult it may be to find early dates acceptable to all participants. Furthermore, separate periods of hearings may be easier to schedule, the subsequent hearings may be tailored to the development of the case, and the period between the hearings leaves time for analysing the records and negotiations between the parties aimed at narrowing the points at issue by agreement.

(c) Setting dates for hearings

77. Typically, firm dates will be fixed for hearings. Exceptionally, the arbitral tribunal may initially wish to set only "target dates" as opposed to definitive dates. This may be done at a stage of the proceedings when not all information necessary to schedule hearings is yet available, with the understanding that the target dates will either be confirmed or rescheduled within a reasonably short period. Such provisional planning can be useful to participants who are generally not available on short notice.

(d) Whether there should be a limit on the aggregate amount of time each party will have for oral arguments and questioning witnesses

78. Some arbitrators consider it useful to limit the aggregate amount of time each party has for any of the following: *(a)* making oral statements; *(b)* questioning its witnesses; and *(c)* questioning the witnesses of the other party or parties. In general, the same aggregate amount of time is considered appropriate for each party, unless the arbitral tribunal considers that a different allocation is justified. Before deciding, the arbitral tribunal may wish to consult the parties as to how much time they think they will need.

79. Such planning of time, provided it is realistic, fair and subject to judiciously firm control by the arbitral tribunal, will make it easier for the parties to plan the presentation of the various items of evidence and arguments, reduce the likelihood of running out of time towards the end of the hearings and avoid that one party would unfairly use up a disproportionate amount of time.

(e) The order in which the parties will present their arguments and evidence

80. Arbitration rules typically give broad latitude to the arbitral tribunal to determine the order of presentations at the hearings. Within that latitude, practices differ, for example, as to whether opening or closing statements are heard and their level of detail; the sequence in which the claimant and the respondent present their opening statements, arguments, witnesses and other evidence; and whether the respondent or the claimant has the last word. In view of such differences, or when no arbitration rules apply, it may foster efficiency of the proceedings if the arbitral tribunal clarifies to the parties, in advance of the hearings, the manner in which it will conduct the hearings, at least in broad lines.

(f) Length of hearings

81. The length of a hearing primarily depends on the complexity of the issues to be argued and the amount of witness evidence to be presented. The length also depends on the procedural style used in the arbitration. Some practitioners prefer to have written evidence and written arguments presented before the hearings, which thus can focus on the issues that have not been sufficiently clarified. Those practitioners generally tend to plan shorter hearings than those practitioners who prefer that most if not all evidence and arguments are presented to the arbitral tribunal orally and in full detail. In order to facilitate the parties' preparations and avoid misunderstandings, the arbitral tribunal may wish to clarify to the parties, in advance of the hearings, the intended use of time and style of work at the hearings.

(g) Arrangements for a record of the hearings

82. The arbitral tribunal should decide, possibly after consulting with the parties, on the method of preparing a record of oral statements and testimony during hearings. Among different possibilities, one method is that the members of the arbitral tribunal take personal notes. Another is that the presiding arbitrator during the hearing dictates to a typist a summary of oral statements and testimony. A further method, possible when a secretary of the arbitral tribunal has been appointed, may be to leave to that person the preparation of a summary record. A useful, though costly, method is for professional stenographers to prepare verbatim transcripts, often within the next day or a similarly short time period. A written record may be combined with tape-recording, so as to enable reference to the tape in case of a disagreement over the written record.

83. If transcripts are to be produced, it may be considered how the persons who made the statements will be given an opportunity to check the transcripts. For example, it may be determined that the changes to the record would be approved by the parties or, failing their agreement, would be referred for decision to the arbitral tribunal.

(h) Whether and when the parties are permitted to submit notes summarizing their oral arguments

84. Some legal counsel are accustomed to giving notes summarizing their oral arguments to the arbitral tribunal and to the

other party or parties. If such notes are presented, this is usually done during the hearings or shortly thereafter; in some cases, the notes are sent before the hearing. In order to avoid surprise, foster equal treatment of the parties and facilitate preparations for the hearings, advance clarification is advisable as to whether submitting such notes is acceptable and the time for doing so.

85. In closing the hearings, the arbitral tribunal will normally assume that no further proof is to be offered or submission to be made. Therefore, if notes are to be presented to be read after the closure of the hearings, the arbitral tribunal may find it worthwhile to stress that the notes should be limited to summarizing what was said orally and in particular should not refer to new evidence or new argument.

18. Multi-party arbitration

86. When a single arbitration involves more than two parties (multi-party arbitration), considerations regarding the need to organize arbitral proceedings, and matters that may be considered in that connection, are generally not different from two-party arbitrations. A possible difference may be that, because of the need to deal with more than two parties, multi-party proceedings can be more complicated to manage than bilateral proceedings. The Notes, notwithstanding a possible greater complexity of multi-party arbitration, can be used in multi-party as well as in two-party proceedings.

87. The areas of possibly increased complexity in multi-party arbitration are, for example, the flow of communications among the parties and the arbitral tribunal (see paragraphs 33, 34 and 38-41); if points at issue are to be decided at different points in time, the order of deciding them (paragraphs 44-45); the manner in which the parties will participate in hearing witnesses (paragraph 63); the appointment of experts and the participation of the parties in considering their reports (paragraphs 70-72); the scheduling of hearings (paragraph 76); the order in which the parties will present their arguments and evidence at hearings (paragraph 80).

88. The Notes, which are limited to pointing out matters that may be considered in organizing arbitral proceedings in general, do not cover the drafting of the arbitration agreement or the constitution of the arbitral tribunal, both issues that give rise to special questions in multi-party arbitration as compared to two-party arbitration.

19. Possible requirements concerning filing or delivering the award

89. Some national laws require that arbitral awards be filed or registered with a court or similar authority, or that they be delivered in a particular manner or through a particular authority. Those laws differ with respect to, for example, the type of award to which the requirement applies (e.g. to all awards or only to awards not rendered under the auspices of an arbitral institution); time periods for filing, registering or delivering the award (in some cases those time periods may be rather short); or consequences for failing to comply with the requirement (which might be, for example, invalidity of the award or inability to enforce it in a particular manner).

Who should take steps to fulfil any requirement

90. If such a requirement exists, it is useful, some time before the award is to be issued, to plan who should take the necessary steps to meet the requirement and how the costs are to be borne.

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IF NOT NOW, WHEN?

Achieving Equality for Women Attorneys in the Courtroom and in ADR

Report of the New York State Bar Association

Prepared by the Commercial and Federal Litigation Section's Task Force on Women's Initiatives: Hon. Shira A. Scheindlin (ret.); Carrie H. Cohen; Tracee E. Davis; Bernice K. Leber; Sharon M. Porcellio; Lesley F. Rosenthal; Lauren J. Wachtler

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I. Introduction

During the last two decades, much has been written and discussed about whether women attorneys appear in court with the frequency expected given their numbers in the legal profession. The Commercial and Federal Litigation Section of the New York State Bar Association is a preeminent bar group focused on complex commercial state and federal litigation. The Section counts among its former chairs a substantial number of prominent women litigators from both upstate and downstate, including a former United States District Judge who previously served as a federal prosecutor and an attorney in private practice, a former President of the New York State Bar Association who is recognized as one of New York's top female commercial litigators and also serves as a mediator and arbitrator of commercial disputes, a former federal and state prosecutor who now is a partner in a large global law firm, an in-house counsel at a large non-profit corporation, and senior partners in large and mid-size private law firms located both upstate and downstate. With the full support and commitment of the Section's leadership, these female alumnae Section chairs met and formed an ad hoc task force devoted to the issue of women litigators in the courtroom. The task force also examined the related issue of the apparent dearth of women who serve as arbitrators and mediators in complex commercial and international arbitrations and mediations (collectively referred to herein as Alternative Dispute Resolution ("ADR")).

As an initial matter, the task force sought to ascertain whether there was, in fact, a disparity in the number of female attorneys versus male attorneys who appear in speaking roles in federal and state courts throughout New York. Toward that end, the task force devised and distributed a survey to state and federal judges throughout the State and then compiled the survey results. As fully discussed below, based on the survey results, the task force found continued disparity and gender imbalance in the courtroom. This report first details recent studies and research on the issue of gender disparity in the legal profession, then discusses how the court survey was conducted, including methodology and findings, and concludes with recommendations for addressing the disparity and ensuring that women attorneys obtain their rightful equal place in the courtroom. This report further details the task force's findings with respect to the gender gap in the ADR context.

II. Literature Review: Women in Litigation; Women in ADR

There is no shortage of literature discussing the gender gap in the courtroom, which sadly continues to persist at all levels—from law firm associates, to equity partnerships at law firms, to lead counsel at trial. To orient the discussion, the task force sets forth below a brief summary of some of the relevant articles it reviewed.

A. Women in Litigation: Nationwide

ABA Commission on Women in the Profession

The ABA Commission on Women in the Profession (the "ABA Commission") was founded in 1987 "to assess the status of women in the legal profession and to identify barriers to their achievement."[1] The following year, with Hillary Rodham Clinton serving as its inaugural chair, the ABA Commission published a groundbreaking report documenting the lack of adequate advancement opportunities for women lawyers.[2] Thirty years later, the ABA Commission is perhaps the nation's preeminent body for researching and addressing issues faced by women lawyers.[3]

In 2015, the ABA Commission published First Chairs at Trial: More Women Need Seats at the Table (the "ABA Report"), "a first-of-its-kind empirical study of the participation of women and men as lead counsel and trial attorneys in civil and criminal litigation."[4] The study was based on a random sample of 600 civil and criminal cases filed in the United States District Court for the Northern District of Illinois in 2013—a sample that offered a limited but important snapshot into the composition of trial courtrooms at that time.[5] As summarized by its authors, Stephanie A. Scharf and Roberta D. Liebenberg, the ABA Report showed at a high level the following:

> [W]omen are consistently underrepresented in lead counsel positions and in the role of trial attorney . . . . In civil cases, [for example], men are three times more likely than women to appear as lead counsel . . . . That substantial gender gap is a marked departure from what we expected based on the distribution of

[1] Stephanie A. Scharf & Roberta D. Liebenberg, ABA Commission on Women in the Profession, *First Chairs at Trial: More Women Need Seats at the Table–A Research Report on the Participation of Women Lawyers as Lead Counsel and Trial Counsel in Litigation* at 25 (2015).

[2] *See id.*

[3] *See id.*

[4] *Id. At 4.*

[5] *See id.*

> men and women appearing generally in the federal cases we examined (a roughly 2 to 1 ratio) and the distribution of men and women in the legal profession generally (again, a roughly 2 to 1 ratio).[6]

The ABA Report also provided more granular statistics about the sample population, including that out of the 558 civil cases surveyed, 68% of all lawyers and 76% of the lead counsel were male.[7] The disparity was even more exaggerated in the class action context, in which 87% of lead class counsel were men.[8] The 50 criminal cases studied fared no better: among all attorneys appearing, 67% were men and just 33% were women.[9]

Contextualizing these statistics, the ABA Report also outlined factors that might help to explain the gender disparities evidenced by the data. In particular, the ABA Report posited that:

> The underrepresentation of women among lead lawyers may. . . stem from certain client preferences, as some clients prefer a male lawyer to represent them in court. . . . In addition, women may too often be relegated by their law firms to second-chair positions, even though they have the talent and experience to serve as first chairs. The denial of these significant opportunities adversely affects the ability of women to advance at their firms. All of these issues apply with even greater force to women trial attorneys of color, who face the double bind of gender and race.

Id. at 15 (footnote omitted). The ABA Report concluded by offering some "best practices" for law schools, law firms, clients, judges, and women lawyers, many of which focus on cultivating opportunities for women to gain substantive trial experience.[10]

Other research corroborates the extent to which gender disparities continue to persist within the legal profession, particularly within law firm culture. This research shows that the presence of women in the legal profession—now in substantial numbers—has not translated into equal opportunities for women lawyers at all levels. For example, a recent law firm survey, conducted by the New York City Bar Association, found that just 35% of all lawyers at surveyed firms in 2015 were women—"despite [the fact that

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[6] *Id.*

[7] *See id.* at 8-10.

[8] *See id.* at 12.

[9] *See id.* at 12-13.

[10] *Id. See also id.* at 14-17.

women have] represent[ed] almost half of graduating law school classes for nearly two decades."[11] That same survey found a disparity in lawyer attrition rates based on gender and ethnicity, with 18.4% of women and 20.8% of minorities leaving the surveyed firms in 2015 compared to just 12.9% of white men.[12] Serious disparities also have been identified at the most senior levels of the law firm structure. Indeed, a 2015 survey by the National Association of Women Lawyers found that women held only 18% of all equity partner positions—just 2% higher than they did approximately a decade earlier.[13] Based on one study by legal recruiting firm, Major, Lindsey & Africa, it is estimated that the compensation of male partners is, on average, 44% higher than that of female partners.[14]

In April 2017, ALM Intelligence focused on Big Law and asked, "Where Do We Go From Here?: Big Law's Struggle With Recruiting and Retaining Female Talent."[15] The author found that certain niche practices such as education, family law, health care, immigration, and labor and employment had the greatest proportion of women; other areas such as banking, corporate, and litigation had the lowest number of female attorneys.[16]

Promisingly, however, there also have been significant calls to action—across the bar and bench—to increase advancement opportunities for women lawyers. In interviews conducted after the ABA Report was published, top female trial attorneys cited factors such as competing familial demands, law firm culture (including a desire to have "tried and true" lawyers serve as lead counsel), and too few training opportunities for young lawyers as reasons why so few women were present at the highest ranks of the profession.[17] Those interviewed suggested ways in which law firms can foster the development of women lawyers at firms, including by affording female associates more

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[11] Liane Jackson, *How can barriers to advancement be removed for women at large law firms?,* ABA Journal (Jan. 1, 2017), http://www.abajournal.com/magazine/article/visible_difference_women_law.

[12] *See id.*

[13] Andrew Strickler, *Female Attorneys Should Grab High-Profile Work: Bar Panel*, Law360 (Jan. 27, 2016), https://www.law360.com/articles/750952/female-attorneys-should-grab-high-profile-work-bar-panel.

[14] *See id.*

[15] Daniella Isaacson, ALM Intelligence, *Where Do We Go From Here?: Big Law's Struggle With Recruiting and Retaining Female Talent* (Apr. 2017).

[16] Meghan Tribe, *Study Shows Gender Diversity Varies Widely Across Practice Areas*, The Am Law Daily (Apr. 17, 2017) http://www.americanlawyer.com/id=1202783889472/Study-Shows-Gender-Diversity-Varies-Widely-Across-Practice-Areas (citing Daniella Isaacson, ALM Intelligence, *Where Do We Go From Here?: Big Law's Struggle With Recruiting and Retaining Female Talent* (Apr. 2017)).

[17] Mary Ellen Egan, *Too Few Women in Court*, The American Lawyer (Apr. 25, 2016), http://www.americanlawyer.com/id=1202755433078/Too-Few-Women-in-Court.

courtroom opportunities and moving away from using business generation as the basis for determining who is selected to try a case.[18] Among those interviewed was Ms. Liebenberg, one of the co-authors of the ABA Report. She stressed that clients can play an important role by using their economic clout to insist that women play a significant role in their trial teams.[19]

In another follow-up to the ABA Report, Law360 published an article focusing on the ABA Report's recommendation that judges help to close the gender gap by encouraging law firms to give young lawyers (including female and minority associates) visible roles in the courtroom and at trial.[20] The article highlighted the practice of some judges around the country in doing this, such as Judge Barbara Lynn of the Northern District of Texas. As explained in the article, Judge Lynn employs a "standard order"—adapted from one used by Judge William Alsup of the Northern District of California—that encouraged parties to offer courtroom opportunities to less experienced members of their teams.[21] One such order provides: "In those instances where the court is inclined to rule on the papers, a representation that the argument would be handled by a young lawyer will weigh in favor of holding a hearing."[22] As explained in the article, Judge Lynn said that, while her order does not mention gender, younger lawyers in her courtroom tend to include more women.

Indeed, a recent survey revealed that nineteen federal judges have issued standing orders that encourage law firms to provide junior attorneys with opportunities to gain courtroom experience.[23] Here are some examples of such orders:

> • Judge Indira Talwani (D. Mass): "Recognizing the importance of the development of future generations of practitioners through courtroom opportunities, the undersigned judge, as a matter of policy, strongly encourages the participation of relatively inexperienced attorneys in all courtroom proceedings including but not limited to initial scheduling conferences, status conferences, hearings on discovery motions, and examination of witnesses at

[18] *See id.*

[19] *See id.*

[20] Andrew Strickler, *Judges Key to Closing Trial Counsel Gender Gap*, Law360 (July 20, 2015) https://www.law360.com/articles/680493/judges-key-to-closing-trial-counsel-gender-gap.

[21] *Id.*

[22] *Id.*

[23] Michael Rader, *Rising to the Challenge: Junior Attorneys in the Courtroom*, 257 N.Y.L.J. 4 (Apr. 28, 2017).

trial."

> • Judge William Alsup (N.D. Cal.): "The Court strongly encourages lead counsel to permit young lawyers to examine witnesses at trial and to have an important role. It is the way one generation will teach the next to try cases and to maintain our district's reputation for excellence in trial practice."
>
> • Magistrate Judge Christopher Burke (D. Del.) "indicates that the court will make extra effort to grant argument—and will strongly consider allotting additional time for oral argument—when junior lawyers argue."
>
> • Judge Allison Burroughs (D. Mass) offers law firm associates the chance to argue a motion after the lead attorneys have argued the identical motion.[24]

As explained in the article cited below, there are benefits to both the lawyer and the client in having junior attorneys play a more significant role in the litigation:

> When it comes to examining a witness at trial, junior lawyers frequently have a distinct advantage over their more senior colleagues. It is very often the junior lawyer who spent significant time with the witness during the discovery process . . . . In the case of an expert witness, the junior lawyer probably played a key role in drafting the expert report. In the case of a fact witness, the junior lawyer probably worked with the witness to prepare a detailed outline of the direct examination. . . . [C]lients should appreciate that the individual best positioned to present a witness's direct testimony at trial may be the junior attorney who worked with that witness . . . . The investment of time required to prepare a junior attorney to examine a witness or conduct an important argument can be substantial, but this type of hands-on mentoring is one of the most rewarding aspects of legal practice.[25]

At the same time, practitioners also have urged junior female attorneys to seek out advancement opportunities for themselves—a sentiment that was shared by panelists at a conference hosted by the New York State Bar Association in January 2016. Panel members—who spoke from a variety of experiences, ranging from that of a federal District Court Judge to a former Assistant U.S. Attorney to private practice—"uniformly called for rising female attorneys to seek out client matters, pro bono cases, bar roles, and other responsibilities that would give them experience as well as profile beyond their

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[24] *Id.*

[25] *Id.*

home office."[26]

ABA Presidential Task Force on Gender Equity

In 2012, American Bar Association President Laurel G. Bellows appointed a blue-ribbon Task Force on Gender Equity ("Task Force") to recommend solutions for eliminating gender bias in the legal profession.[27] In 2013, the Task Force in conjunction with the ABA Commission published a report that discussed, among other things, specific steps clients can take to ensure that law firms they hire provide, promote, and achieve diverse and inclusive workplaces.[28] Working together, the Task Force concluded, "general counsel and law firms can help reduce and ultimately eliminate the compensation gap that women continue to experience in the legal profession."[29]

The Task Force recommended several "best practices" that in-house counsel can undertake to promote the success of women in the legal profession. As a "baseline effort," corporations that hire outside counsel, including litigators, should inform their law firms that the corporation is interested in seeing female partners serving as "lead lawyers, receiving appropriate origination credit, and being in line for succession to handle their representation on behalf of the firm."[30] Corporate clients can also expand their list of "go-to" lawyers by obtaining referrals to women lawyers from local bar associations; contacting women lawyers in trial court opinions issued in areas of expertise needed; and inviting diverse lawyers to present CLE programs.[31] This allows the corporate clients to use their "purchasing power" to ensure that their hired firms are creating diverse legal teams.[32]

The Task Force also reported that clients can utilize requests for proposal and pitch

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[26] Andrew Strickler, *Female Attorneys Should Grab High-Profile Work: Bar Panel*, Law360 (Jan. 27, 2016) https://www.law360.com/articles/750952/female-attorneys-should-grab-high-profile- work-bar-panel (emphasis added).

[27] *ABA Presidential Task Force on Gender Equity and the Commission on Women in the Profession, Power of the Purse: How General Counsel Can Impact Pay Equity for Women Lawyers* (2013).

[28] *Publications from the ABA Presidential Task Force on Gender Equity*, AMERICAN BAR ASSOCIATION (2012), https://www.americanbar.org/groups/women/gender_equity_task_force/task_force_publications.html.

[29] *Id.*

[30] *Id.* at 6. For an in-depth discussion of recommendations for steps clients can take to combat the gender disparity in courtrooms, *see infra* Part F.

[31] *Id.* at 9.

[32] *Id.* at 8.

meetings to convey their diversity policies to outside firms and "specify metrics by which they can better evaluate a firm's commitment to women lawyers."[33] When in-house counsel ask their outside firms to provide data, they demonstrate to the firms their consciousness of metrics, and the data allows them to benchmark the information against other firms.[34]

Perhaps the most impactful practice corporate clients can undertake is a "deepened level of inquiry," which involves investigating how work is credited within law firms.[35] For example, a general counsel may tell a firm that she wants "the woman lawyer on whom she continually relied to be the relationship partner and to receive fee credit for the client's matters" even if that means "transferring that role from a senior partner" that might cause "tension in the firm."[36]

Finally, clients can "lead by example, both formally and informally" by partnering with law firms committed to bringing about pay equity.[37] The Task force professed that by doing so, corporate clients have the power to shatter the "last vestiges of the glass ceiling in the legal profession."[38]

Call for Diversity by Corporate Counsel

The ABA was not the first and only organization to recognize the growing importance of gender equity in the legal profession. In 1999, Charles R. Morgan, then Chief Legal Officer for BellSouth Corporation, developed a pledge titled Diversity in the Workplace: A Statement of Principle ("Statement of Principle") as a reaction to the lack of diversity at law firms providing legal services to Fortune 500 companies.[39] Mr. Morgan intended the Statement of Principle to function as a mandate requiring law firms to make immediate and sustained improvements in diversity initiatives.[40] More than four hundred Chief Legal Officers of major corporations signed the Statement of Principle,[41]

[33] *Id.* at 10.

[34] *See id.* at 11.

[35] *See id.* at 13.

[36] *Id.* at 10.

[37] *Id.* at 15.

[38] *Id.*

[39] Donald O. Johnson, *The Business Case for Diversity at the CPCU Society* at 5 (2007), https://www.cpcusociety.org/sites/dev.aicpcu.org/files/imported/BusinessDiversity.pdf.

[40] Rick Palmore, *A Call to Action: Diversity in the Legal Profession*, 8 ENGAGE 21, 21 (2004).

which served as evidence of commitment by signatory corporations to a diverse legal profession.[42]

By 2004, however, Rick Palmore, a "nationally recognized advocate for diversity in the legal industry,"[43] then serving as an executive and counsel at Sara Lee Corporation, observed that efforts for law firm diversity had reached a "disappointing plateau."[44] Mr. Palmore authored A Call to Action: Diversity in the Legal Profession, ("Call to Action"), which built upon the Statement of Principle.[45] The Call to Action focused on three major elements: (1) the general principle of having a principal's interest in diversity; (2) diversity performance by law firms, especially in hiring and retention; and (3) commitment to no longer hiring law firms that do not promote diversity initiatives.[46]

Mr. Palmore pledged to "make decisions regarding which law firms represent our companies based in significant part on the diversity performance of the firms." To that end, he called upon corporate legal departments and law firms to increase the numbers of women and minority attorneys hired and retained.[47] Mr. Palmore stated that he intended to terminate relationships with firms whose performances "consistently evidence[] a lack of meaningful interest in being diverse."[48] By December 4, 2004, the Call to Action received signatory responses from seventy-two companies, including corporate giants such as American Airlines, UPS, and Wal-Mart.[49] Both the Statement of Principle and A Call to Action reflect the belief of many leading corporations that diversity is important and has the potential to profoundly impact business performance.[50]

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https://www.cpcusociety.org/sites/dev.aicpcu.org/files/imported/BusinessDiversity.pdf.

[42] Rick Palmore, *A Call to Action: Diversity in the Legal Profession,* 8 ENGAGE 21, 21 (2004).

[43] Rick Palmore, Senior Counsel, Dentons US LLP; LCLD Founding Chair Emeritus http://www.lcldnet.org/media/mce_filebrowser/2017/02/22/Palmore.Rick-Fellows-branded-bio.2.13.17.pdf (last visited May 30, 2017).

[44] Rick Palmore, *A Call to Action: Diversity in the Legal Profession,* 8 ENGAGE 21, 21 (2004).

[45] Melanie Lasoff Levs, *Call to Action: Sara Lee's General Counsel: Making Diversity a Priority,* DIVERSITY & THE BAR (Jan./Feb. 2005), http://archive.mcca.com/index.cfm?fuseaction=page.viewpage&pageid=803.

[46] *See id.*

[47] *Id.*

[48] Rick Palmore, *A Call to Action: Diversity in the Legal Profession,* 8 ENGAGE 21, 21 (2004).

[49] Melanie Lasoff Levs, *Call to Action: Sara Lee's General Counsel: Making Diversity a Priority,* DIVERSITY & THE BAR (Jan./Feb. 2005), http://archive.mcca.com/index.cfm?fuseaction=page.viewpage&pageid=803.

B. Women in ADR

Turning to the ADR context, the governing principle should be that panels of "[n]eutrals should reflect the diverse communities of attorneys and parties whom they serve."[51] This statement strikes us as the best way to begin our survey of the literature concerning the status of women in the world of ADR.

It should come as no surprise that much has been written about the lack of diversity among ADR neutrals, especially those selected for high-value cases. As a 2017 article examining gender differences in dispute resolution practice put it, "the more high-stakes the case, the lower the odds that a woman would be involved."[52] Data from a 2014 ABA Dispute Resolution Section survey indicated that for cases with between one and ten million dollars at issue, 82% of neutrals and 89% of arbitrators were men.[53] Another survey estimated that women arbitrators were involved in just 4% of cases involving one billion dollars or more.[54]

One part of the problem may be that relatively few women and minorities are present within the field. For example, one ADR provider estimated that in 2016 only 25% of its neutrals were women, 7% were minorities, and 95% were over fifty.[55] Similarly, in 2016, the International Centre for Settlement of Investment Disputes (an arm of the World Bank) reported that only 12% of those selected as arbitrators in ICSID cases were women.[56] Similarly, the International Institute for Conflict Prevention and Resolution (CPR)

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https://www.cpcusociety.org/sites/dev.aicpcu.org/files/imported/BusinessDiversity.pdf.

[51] Theodore K. Cheng, *A Celebration of Diversity in Alternative Dispute Resolution*, Diversity and the Bar Spring 2017 MCCA.com at 14.

[52] Noah Hanft, *Making Diversity Happen in ADR: No More Lip Service*, 257 N.Y.L.J. S6 (Mar. 20, 2017).

[53] *See id.* (citing *Gender Differences in Dispute Resolution Practice: Report on the ABA Section of Dispute Resolution Practice Snapshot Survey* (Jan. 2014)).

[54] *See* Christine Simmons, *Where Are the Women and Minorities in Global Dispute Resolution?*, The American Lawyer (Oct. 10, 2016) http://www.americanlawyer.com/id=1202769481566/Where-Are-the-Women-and-Minorities-in-Global-Dispute Resolution?mcode=0&curindex=0&curpage=ALL.

[55] *See* Noah Hanft, *Making Diversity Happen in ADR: No More Lip Service*, 257 N.Y.L.J. S6 (Mar. 20, 2017) (citing Ben Hancock, *ADR Business Wakes Up to Glaring Deficit of Diversity*, http://www.law.com/sites/almstaff/2016/10/05/adr-business-wakes-up-to-glaring-deficit-of-diversity/ (Oct. 5, 2016)).

[56] *See* Christine Simmons, *Where Are the Women and Minorities in Global Dispute Resolution?*, The American Lawyer (Oct. 10, 2016) http://www.americanlawyer.com/id=1202769481566/Where-Are-the-Women-and-Minorities-in-Global-Dispute-Resolution?mcode=0&curindex=0&curpage=ALL.

reported that of more than 550 neutrals who serve on its worldwide panels, about 15% are women and 14% are minorities.[57]

One of the concerns raised by this lack of diversity among neutrals is that it diminishes the legitimacy of the process.[58] But as one recent article in the New York Law Journal suggests, it may be even harder to take steps to improve diversity within ADR than it is to do so in law firms given the incentives of key stakeholders in the ADR context.[59] In particular, the article argues that law firms may be more inclined to recommend familiar, well-established (likely male) neutrals with the intent of trying to achieve a favorable outcome, and their clients may be more willing to accept their lawyers' recommendations for that same reason.[60]

Comparing ADR statistics with those of the judiciary is revealing. Approximately 33% of federal judges are women and 20% are minorities—which is far ahead of the numbers in the world of ADR.[61] Despite ADR's "quasi-public" nature, it remains a private and confidential enterprise for which gender and racial statistics for ADR providers are not fully available.[62]Nonetheless, the information that is available reveals a stark underrepresentation of women and minority arbitrators and mediators.[63] In short, the overwhelming percentage of neutrals are white men and the lowest represented group is minority women. It is no wonder that one attorney reported that, in her twenty-three years of practice, she had just three cases with non-white male neutrals.[64]

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[57] Ben Hancock, *ADR Business Wakes Up to Glaring Deficit of Diversity,* Law.com (Oct. 5, 2016).

[58] *See* Christine Simmons, *Where Are the Women and Minorities in Global Dispute Resolution?*, The American Lawyer (Oct. 10, 2016) http://www.americanlawyer.com/id=1202769481566/Where-Are-the-Women-and-Minorities-in-Global-Dispute-Resolution?mcode=0&curindex=0&curpage=ALL.

[59] *See* Noah Hanft, *Making Diversity Happen in ADR: No More Lip Service*, 257 N.Y.L.J. S6 (Mar. 20, 2017) (citing Ben Hancock, *ADR Business Wakes Up to Glaring Deficit of Diversity*, http://www.law.com/sites/almstaff/2016/10/05/adr-business-wakes-up-to-glaring-deficit-of-diversity/ (Oct. 5, 2016)).

[60] *See id.*

[61] Laura A. Kaster, et al., *The Lack of Diversity in ADR—and the Current Beneath,* American Inns of Court (Mar./Apr. 2017) at 14.

[62] Ben Hancock, *ADR Business Wakes Up to Glaring Deficit of Diversity*, Law.com (Oct. 5, 2016); *see also* Laura A. Kaster, *Choose Diverse Neutral to Resolve Disputes—A Diverse Panel Will Improve Decision Making* ("Because alternative dispute resolution is a privatization of otherwise public court systems, it is . . . valid to compare the public judiciary to private neutrals in commercial arbitration.").

[63] *ABA Presidential Task Force on Gender Equity and the Commission on Women in the Profession, Power of the Purse: How General Counsel Can Impact Pay Equity for Women Lawyers* (2013).

[64] Ben Hancock, *ADR Business Wakes Up to Glaring Deficit of Diversity*, Law.com (Oct. 5, 2016).

The homogeneity within the ADR field is even worse at the case-specific level. A 2014 survey published by the American Bar Association indicated a clear disparity in the types of cases for which women neutrals were selected: whereas 57% of neutrals in family, elder, and probate cases were women, this figure was just 37% for labor and employment actions, 18% for corporate and commercial cases, and 7% for intellectual property cases.[65]

Some have theorized that the reason for the lack of diversity within ADR—both in the neutrals available for selection and the types of cases for which diverse neutrals are selected—is a "chronological lag": most neutrals who are actually selected are retired judges or lawyers with long careers behind them, who comprise a pool of predominantly white males.[66] But, women have been attending law school at equal rates as men for more than ten years and there is no dearth of qualified female practitioners.[67] Accordingly, other important but difficult to overcome factors may include implicit bias by lawyers or their related fear of engaging neutrals who may not share their same background (and therefore, who they believe may arrive at an unfavorable decision).[68] This cannot be an excuse: "the privatization of dispute resolution through ADR . . . cannot alter the legitimacy of requiring that society's dispute resolution professionals, who perform a quasi-public function, reflect the population at large."[69]

This disparity continues to exist despite the well-documented benefits for all stakeholders of diversity in decision-making processes. Indeed, studies indicate that "when arbitration involves a panel of three, the parties are likely to have harder working panelists and a more focused judgment from the neutrals if the panel is diverse."[70] This is because "when members of a group notice that they are socially different from one another, . . . they assume they will need to work harder to come to a consensus. . . . [T]he hard work can lead to better outcomes."[71] In order to move the needle on diversity in the ADR field, especially with respect to lawyers' selection of neutrals which is arguably the

[65] *Id.*

[66] *Id.*

[67] David H. Burt, *et al., Why Bringing Diversity to ADR Is a Necessity,* ACC Docket at 44 (Oct. 2013).

[68] *Id.*; *see also* Ben Hancock, *ADR Business Wakes Up to Glaring Deficit of Diversity,* Law.com (Oct. 5, 2016).

[69] Laura A. Kaster, *Why and How Corporations Must Act Now to Improve ADR Diversity,* Corporate Disputes (Jan.-Mar. 2015).

[70] Laura A. Kaster, *Choose Diverse Neutral to Resolve Disputes—A Diverse Panel Will Improve Decision Making*.

[71] *Id.*

largest driver of the composition of ADR panels, "[w]hat may be missing is the firm belief that diversity matters not just for basic fairness and social equity but also for better judgment."[72]

In a recent article, Theodore Cheng, an ADR specialist, described what he sees as the failure of the legal community to accept the fact that diversity in the selection of neutrals is both necessary and beneficial. He begins by noting that "the decision- making process is generally improved, resulting in normatively better and more correct outcomes, when there exist different points of view."[73] Cheng then notes the gap between the commitment to diversity by companies in their own legal departments versus their commitment to diversity in the ADR process.

The efforts on the part of corporate legal departments to ensure diverse legal teams does not appear to extend to the selection of neutrals – a task routinely delegated to outside counsel. Mr. Cheng's article explains that outside counsel may be afraid of taking a chance on an unknown quantity for fear that they might be held responsible for an unsatisfactory result. Accordingly, they tend to select known quantities, relying on recommendations from within their firms or from friends, which tends to produce the usual suspects – overwhelmingly lawyers like themselves – i.e., older white males. There is also "a failure to acknowledge and address unconscious, implicit biases that permeate any decision-making process."[74] The author concludes that there are many qualified women and minorities available to be selected as neutrals but those doing the selections have somehow failed to recognize that this service – like any other service provided to corporate entities – must consider the need for diversity.

Mr. Cheng also stresses why diversity in ADR is important. His article notes that ADR is the privatization of a public function and it is therefore important that the neutrals be diverse and reflect the communities of attorneys and litigants they serve. Secondly, the author notes (as have many others) that better decisions are made when different points of view are considered. The addition of new perspectives is always a benefit. Some ADR providers are taking steps to document and address the problem. For example, the International Institute for Conflict Prevention and Resolution has developed the following Diversity Commitment which any company can sign: "We ask that our outside law firms and counterparties include qualified diverse neutrals among any list of neutrals or arbitrators they propose. We will do the same with the lists we provide."[75] Similarly, the American Arbitration Association has committed to ensuring that 20% of the arbitrators on the lists it provides to the parties are

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[72] *Id.*

[73] *Id.* (citing Scott Page, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools and Societies* (Princeton Univ. Press 2017) and James Surowiecki, *The Wisdom of Crowds* (Anchor Books 2004)).

[74] *Id.* at 19.

[75] Laura A. Kaster, *Why and How Corporations Must Act Now to Improve ADR Diversity,* Corporate Disputes (Jan.-Mar. 2015).

diverse candidates.[76] Although such initiatives are promising, the role of the parties is just as important: it is incumbent upon law firms, lawyers, and clients to select diverse neutrals.

III. Survey: Methodology and Findings

The task force's survey began with the creation of two questionnaires both drafted by the task force.[77] The first questionnaire was directed to federal and state judges sitting throughout New York. This questionnaire was designed to be an observational study that asked judges to record the presence of speaking counsel by gender in all matters in their courtrooms occurring between approximately September 1, 2016 and December 31, 2016. The second questionnaire was directed to various ADR providers asking them to record by gender both the appearance of counsel in each proceeding and the gender of the neutral conducting the proceeding.

The focus of the first survey was to track the participation of women as lead counsel and trial attorneys in civil and criminal litigation. While there have been many anecdotal studies about women attorneys' presence in the courtroom, the task force believes its survey to be the first study based on actual courtroom observations by the bench. The study surveyed proceedings in New York State at each level of court—trial, intermediate, and court of last resort—in both state and federal courts. Approximately 2,800 questionnaires were completed and returned. The cooperation of the judges and courthouse staff was unprecedented and remarkable: New York's Court of Appeals, all four Appellate Divisions, and Commercial Divisions in Supreme Courts in counties from Suffolk to Onondaga to Erie participated. The United States Court of Appeals for the Second Circuit provided assistance compiling publicly available statistics and survey responses were provided by nine Southern District of New York Judges (including the Chief Judge) and Magistrate Judges and District and Magistrate Judges from the Western District of New York.

The results of the survey are striking:[78]

- Female attorneys represented just 25.2% of the attorneys appearing in commercial and criminal cases in courtrooms across New York.

- Female attorneys accounted for 24.9% of lead counsel roles and 27.6% of additional counsel roles.

- The most striking disparity in women's participation appeared in

[76] Ben Hancock, *ADR Business Wakes Up to Glaring Deficit of Diversity*, Law.com (Oct. 5, 2016).

[77] Each questionnaire is attached hereto as Appendix A.

[78] Survey results in chart format broken down by Court are attached hereto as Appendix B.

> complex commercial cases: women's representation as lead counsel shrank from 31.6% in one-party cases to 26.4% in two-party cases to 24.8% in three-to-four-party cases and to 19.5% in cases involving five or more parties. In short, the more complex the case, the less likely that a woman appeared as lead counsel.

The percentage of female attorneys appearing in court was nearly identical at the trial level (24.7%) to at the appellate level (25.2%). The problem is slightly worse downstate (24.8%) than upstate (26.2%).[79]

In New York federal courts, female attorneys made up 24.4% of all attorneys who appeared in court, with 23.1% holding the position of lead counsel. In New York State courts, women made up 26.9% of attorneys appearing in court and 26.8% of attorneys in the position of lead counsel.

One bright spot is public interest law (mainly criminal matters), where female lawyers accounted for 38.2% of lead counsel and 30.9% of attorneys overall. However, in private practice (including both civil and criminal matters), female lawyers only accounted for 19.4% of lead counsel. In sum, the low percentage of women attorneys appearing in a speaking role in courts was found at every level and in every type of court: upstate and downstate, federal and state, trial and appellate, criminal and civil, ex parte applications and multi-party matters. Set forth below is the breakout in all courtrooms—state, federal, regional, and civil/criminal.

A. Women Litigators in New York State Courts

The view from the New York Court of Appeals is particularly interesting. The statistics collected from that Court showed real progress—perhaps as a result of female leadership of that court, now headed by Chief Judge Janet DiFiore and past Chief Judge Judith S. Kaye, as well as the fact that the Court has had a majority of women judges for more than ten years. Of a total of 137 attorneys appearing in that Court, female attorneys made up 39.4%. This percentage held whether the females were lead or second chair counsels. In cases in which at least one party was represented by a public sector office, women attorneys were in the majority at 51.3%. Of the appearances in civil cases, 30% were by female attorneys. The figure in criminal cases was even higher—female attorneys made up 46.8% of all attorneys appearing in those cases.

Similarly, female attorneys in the public sector were well represented in the Appellate Divisions, approaching the 50% mark in the Second Department. The picture

[79] The task force recognizes that the statistics reported herein may have been affected by which Judges agreed to participate in the survey and other selection bias inherent in any such type of survey. It thus is possible that there is a wider gap between the numbers of women versus men who have speaking roles in courtrooms throughout New York State than the gap demonstrated by the task force's study.

was not as strong in the upstate Appellate Divisions, where, even in cases involving a public entity, women were less well represented (32.6% in the Third Department and 35.3% in the Fourth Department). Women in the private sector in Third Department cases fared worst of all, where they represented 18% of attorneys in the lead and only 12.5% of attorneys in any capacity verses 36.18% of private sector attorneys in the First Department (for civil cases).

Set forth below are some standout figures by county:

- Female public sector attorneys in Erie County represented a whopping 88.9% of all appearances, although the number (n=9) was small.

- Female attorneys in Suffolk County were in the lead position just 13.5% of the time.

- Although the one public sector attorney in Onondaga County during the study period was female, in private sector cases, women represented just 22.2% of all attorneys appearing in state court in that county.

While not studied in every court, the First Department further broke down its statistics for commercial cases and the results are not encouraging. Of the 148 civil cases heard by the First Department during the survey period for which a woman argued or was lead counsel, only 22 of those cases were commercial disputes, which means that women attorneys argued or were lead counsel in only 5.37% of commercial appeals compared to 36.18% for all civil appeals. Such disparity suggests that women are not appearing as lead counsel for commercial cases, which often involve high stakes business-related issues and large dollar amounts.

B. Women Litigators in Federal Courts

Women are not as well represented in the United States Court of Appeals for the Second Circuit as they are in the New York Court of Appeals. Of the 568 attorneys appearing before the Second Circuit during the survey period, 20.6% were female—again, this number held regardless of whether the women were in the lead or in supporting roles. Women made up 35.8% of public sector attorneys but just 13.8% of the private attorneys in that court. Women represented a higher percentage of the attorneys in criminal cases (28.1%) than in civil cases (17.5%).

The Southern District of New York's percentages largely mirrored the sample overall, with women representing 26.1% of the 1627 attorneys appearing in the courtrooms of judges who participated in the survey—24.7% in the role of lead counsel. One anomaly in the Southern District of New York was in the courtroom of the Honorable Deborah A. Batts, where women represented 46.2% of the attorneys and 45.8% of the lead attorneys.

The figures from the Western District of New York fell somewhat below those from the Southern District of New York, again mirroring the slightly lower percentages of female attorneys' participation upstate in state courts as well: 22.9% of the attorneys appearing in the participating Western District of New York cases were women, and 20.8% of the lead attorneys were women.

Overall, women did slightly better in state courts (26.9% of appearances and 25.3% of lead appearances), than in federal courts (24.4% of appearances and 23.1% in the lead).

C. Women Litigators: Criminal & Civil; Private & Public

As has been noted in other areas, female attorneys are better represented among lawyers in criminal cases (30.9%) than in civil cases (23.2%), regardless of trial or appellate court or state or federal court. The difference is explained almost entirely by the difference between female attorneys in the private sector (22.5%) compared to female attorneys in the public sector, particularly with respect to prosecutors and state or federal legal aid offices, which provide services to indigent defendants (totaling 37.0%).

Similarly, women made up 39.6% of the attorneys representing public entities—such as the state or federal government but just 18.5% of lawyers representing private parties in civil litigation.

Overall, female attorneys were almost twice as likely to represent parties in the public sector (38.2% of the attorneys in the sample) than private litigants (19.4%).

Across the full sample, women made up 24.9% of lead counsel and 27.6% of additional counsel.

All these survey findings point to the same conclusion: female attorneys in speaking roles in court account for just about a quarter of counsel who appear in state and federal courts in New York. The lack of women attorneys with speaking roles in court is widespread across different types of cases, varying locations, and at all levels of courts.[80]

[80] The survey did not include family or housing courts. Accordingly, the percentage of women in speaking roles who appear in those courts may be higher, especially in family court as that area of the law tends to have a greater percentage of women practitioners. *See* Vivia Chen, *Do Women Really Choose the Pink Ghetto?; Are women opting for those lower-paying practices or is there an invisible hand that steers them there*?, The American Lawyer (Apr. 26, 2017), http://www.americanlawyer.com/id=1202784558726.

D. Women in Alternative Dispute Resolution

The view from the world of ADR is slightly more positive for women, although more progress is needed. Two leading ADR providers gathered statistics on the proceedings conducted by their neutrals. In a sample size of 589 cases, women were selected as arbitrators 26.8% of the time and selected as mediators about half the time (50.2%). In a small sample size of two cases, women provided 50% of the neutral analyses but they were not chosen as court referees in either of those two cases.

Data from another major ADR provider revealed that women arbitrators comprised between 15-25% of all appointments for both domestic and foreign arbitrations.

IV. Going Forward: Suggested Solutions

The first step in correcting a problem is to identify it. To do so, as noted by this report and the ALM Intelligence study referenced above in its "Gender Diversity Best Practices Checklist"—the metrics component—firms need data.[81] Regular collection and review of data keeps the "problem" front and center and ideally acts as a reminder of what needs to be done. Suggesting solutions, such as insisting within law firms that women have significant roles on trial teams or empowering female attorneys to seek out advancement opportunities for themselves, is easy to do. Implementing these solutions is more challenging.[82]

Litigation Context

A. Women's Initiatives

Many law firms have started Women's Initiatives designed to provide female attorneys with the tools they need to cultivate and obtain opportunities for themselves and to place themselves in a position within their firms to gain trial and courtroom experience. The success of these initiatives depends on "buy in" not only from all female attorneys, but also from all partners. Data supports the fact that the most successful

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[81] Daniella Isaacson, ALM Intelligence, *Where Do We Go From Here?: Big Law's Struggle With Recruiting and Retaining Female Talent* (Apr. 2017) at 12; *see also* Meghan Tribe, *Study Shows Gender Diversity Varies Widely Across Practice Areas*. The Am Law Daily (Apr. 17, 2017) http://www.americanlawyer.com/id=1202783889472/Study-Shows-Gender-Diversity-Varies-Widely-Across-Practice-Areas.

[82] A summary of the suggestions contained in the report are attached hereto as Appendix C. Many of the suggestions for law firms contained in this report may be more applicable to large firms than small or mid-size firms but hopefully are sufficiently broad based to provide guidance for all law firms.

Women's Initiative programs depend on the support from all partners and associates.[83]

One suggestion is that leaders in law firms—whether male or female—take on two different roles. The first is to mentor female attorneys with an emphasis on the mentor discussing various ways in which the female attorney can gain courtroom experience and eventually become a leader in the firm. The second is to provide "hands on" experience to the female attorneys at the firm by assigning them to work with a partner who will not only see that they go to court, but that they also participate in the courtroom proceedings. It is not enough simply to bring an associate to court and have her sit at counsel table while the partner argues the matter. Female associates need opportunities to argue the motion under the supervision of the partner.[84]

Similarly, instead of only preparing an outline for a direct examination of a witness or preparing exhibits to be used during a direct examination, the associate also should conduct the direct examination under the supervision of the partner. While motions and examinations of witnesses at hearings and trials take place in the courtroom, the same technique also can be applied to preparing the case for trial.

Female attorneys should have the opportunity early in their careers to conduct a deposition—not just prepare the outline for a partner. The same is true of defending a deposition. In public sector offices—such as the Corporation Counsel of the City of New York, the Attorney General of the State of New York, District Attorney's Offices and U.S. Attorney's Offices—junior female attorneys have such opportunities early in their careers and on a regular basis. They thus are able to learn hands-on courtroom skills, which they then can take into the private sector after government service.

Firm management, and in particular litigation department heads, also should be educated on how to mentor and guide female attorneys. They should also be encouraged to proactively ensure that women are part of the litigation team and that women on the litigation team are given responsibilities that allow them to appear and speak in court. Formal training and education in courtroom skills should be encouraged and made a part of the law firm initiative. Educational sessions should include mock depositions, oral arguments, and trial skills. These sessions should be available to all junior attorneys, but the firm's Women's Initiative should make a special effort to encourage female attorneys to participate in these sessions.

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[83] *See* Victoria Pynchon, *5 Ways to Ensure Your Women's Initiative Succeeds*, http://www.forbes.com/sites/shenegotiates/2012/05/14/5-ways-to-ensure-your-womens-initiative-succeeds/#20a31614ff92 (May 14, 2012) (citing Lauren Stiller Rikleen, *Ending the Gauntlet, Removing Barriers to Women's Success in the Law* (2006)).

[84] Understandably, all partners, especially women partners, are under tremendous pressures themselves on any given matter. As a result, delegating substantive work to junior attorneys may not always be feasible.

Data also has shown that female attorneys in the private sector may not be effective in seeking out or obtaining courtroom opportunities for themselves within their firm culture. It is important that more experienced attorneys help female attorneys learn how to put themselves in a position to obtain courtroom opportunities. This can be accomplished, at least in part, in two ways. First, female attorneys from within and outside the firm should be recruited to speak to female attorneys and explain how the female attorney should put herself in a position to obtain opportunities to appear in court. Second, women from the business world should also be invited to speak at Women's Initiative meetings and explain how they have achieved success in their worlds and how they obtained opportunities. These are skills that cross various professions and should not be ignored.

Partners in the firms need to understand that increasing the number of women in leadership roles in their firms is a benefit, not only to the younger women in the firm but to them as well. Education and training of all firm partners is the key to the success of any Women's Initiative.

A firm's Women's Initiative also should provide a forum to address other concerns of the firm's female attorneys. This should not be considered a forum for "carping," but for making and taking concrete and constructive steps to show and assist female attorneys in learning how to do what is needed to obtain opportunities in the courtroom and take a leadership role in the litigation of their cases.

B. Formal Programs Focused on Lead Roles in Court and Discovery

Another suggestion is that law firms establish a formal program through which management or heads of litigation departments seek out junior female associates on a quarterly or semi-annual basis and provide them with the opportunity to participate in a program that enables them to obtain the courtroom and pre-trial experiences outlined above. The establishment of a formal program sends an important signal within a firm that management is committed to providing women with substantive courtroom experience early in their careers.

Firm and department management, of course, would need to monitor the success of such a program to determine whether it is achieving the goals of training women and retaining them at the firm. One possible monitoring mechanism would be to track on a monthly or quarterly basis the gender of those attorneys who have taken or defended a deposition, argued a motion, conducted a hearing or a trial during that period. The resulting numbers then would be helpful to the firm in assessing whether its program was effective. The firm also should consider ways in which the program could be improved and expanded. Management and firm leaders should be encouraged to identify, hire, and retain female attorneys within their firms. Needless to say, promoting women to department heads and firm management is one way to achieve these goals. Women are

now significantly underrepresented in both capacities.[85]

C. Efforts to Provide Other Speaking Opportunities for Women

In addition to law firms assigning female litigators to internal and external speaking opportunities, such as educational programs in the litigation department or speaking at a client continuing legal education program, firms should encourage involvement with bar associations and other civic or industry groups that regularly provide speaking opportunities.[86] These opportunities allow junior lawyers to practice their public speaking when a client's fate and money are not at risk. Such speaking opportunities also help junior attorneys gain confidence, credentials, and contacts. In addition, bar associations at all levels present the prospect for leadership roles from tasks as basic as running a committee meeting to becoming a section or overall bar association leader. These opportunities can be instrumental to the lawyer's growth, development, and reputation.

D. Sponsorship

In addition to having an internal or external mentor, an ABA publication has noted that, although law firms talk a lot about the importance of mentoring and how to make busy partners better at it, they spend very little time discussing the importance of, and need for, sponsors:

> Mentors are counselors who give career advice and provide suggestions on how to navigate certain situations. Sponsors can do everything that mentors do but also have the stature and gravitas to affect whether associates make partner. They wield their influence to further junior lawyers' careers by calling in favors, bring attention to the associates' successes and help them cultivate important relationships with other influential lawyers and clients—all of which are absolutely essential in law firms. **Every sponsor can be a mentor, but not every mentor can be a sponsor.**
>
> Sponsorship is inherent in the legal profession's origins as a craft learned by apprenticeship. For generations, junior lawyers learned the practice of law from senior attorneys who, over time, gave them

[85] Lauren Stiller Rikleen, *Women Lawyers Continue to Lag Behind Male Colleagues*, Report of the Ninth Annual National Association of Women Lawyers National Survey on Retention and Promotion of Women in Law Firms (2015).

[86] It is noteworthy that, as of January 1, 2017, women comprise nearly 36% of the New York State Bar Association's membership but comprise only 24% of the Commercial and Federal Litigation Section's membership.

> more responsibility and eventually direct access and exposure to clients. These senior lawyers also sponsored their protégés during the partnership election process. Certain aspects of traditional legal practice are no longer feasible today, so firms have created formal training and mentoring programs to fill the void. While these programs may be effective, there is no substitute for learning at the heels of an experienced, influential lawyer. This was true during the apprenticeship days and remains so today.
>
> Because the partnership election process is opaque and potentially highly political, having a sponsor is essential. Viable candidates need someone to vouch for their legal acumen while simultaneously articulating the business case for promotion . . .[87]

As Sylvia Ann Hewlett, founding president of the Center for Talent Innovation (formerly Center for Work-Life Policy), explained in a 2011 Harvard Business Review article "sponsors may advise or steer [their sponsorees] but their chief role is to develop [them] as leader[s]"[88] and "'use[] chips on behalf of protégés' and 'advocates for promotions.'"[89] "Sponsors advocate on their protégés' behalf, connecting them to important players and assignments. In doing so, they make themselves look good. And precisely because sponsors go out on a limb, they expect stellar performance and loyalty."[90]

Recommendations for successful sponsorship programs include the following activities by a sponsor for his or her sponsoree:

- Expand the sponsoree's perception of what she can do.
- Connect the sponsoree with the firm's senior leaders.

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[87] Kenneth O.C. Imo, *Mentors Are Good, Sponsors Are Better*, American Bar Association Law Practice Magazine (Jan./Feb. 2013) (http://www.americanbar.org/publications/law_practice_magazine/2013/january-february/mentors-are-good-sponsors-are-better.html) (emphasis added).

[88] Sylvia Ann Hewlett, *The Right Way to Find a Career Sponsor*, Harv. Bus. Rev. (Sept. 11, 2013) https://hbr.org/2013/09/the-right-way-to-find-a-career-sponsor.

[89] Kenneth O.C. Imo, *Mentors Are Good, Sponsors Are Better*, American Bar Association Law Practice Magazine (Jan./Feb. 2013), (http://www.americanbar.org/publications/law_practice_magazine/2013/january-february/mentors- are-good-sponsors-are-better.html).

[90] Sylvia Ann Hewlett, *Mentors are Good. Sponsors Are Better*, N.Y. Times, Apr. 13, 2013, http://www.nytimes.com/2013/04/14/jobs/sponsors-seen-as-crucial-for-womens-career-advancement.html.

- Promote the sponsoree's visibility within the firm.
- Connect the sponsoree to career advancement opportunities.
- Advise the sponsoree on how to look and act the part.
- Facilitate external contacts.
- Provide career advice.[91]

Of course, given attorneys' and firms' varying sizes and limited time and resources, firms should consider what works best for that firm and that one size does not fit all.

E. Efforts by the Judiciary

Members of the judiciary also must be committed to ensuring that female attorneys have equal opportunities to participate in the courtroom. When a judge notices that a female associate who has prepared the papers and is most familiar with the case is not arguing the motion, that judge should consider addressing questions to the associate. If this type of exchange were to happen repeatedly—i.e., that the judge expects the person who is most familiar with the issue take a lead or, at least, some speaking role—then partners might be encouraged to provide this opportunity to the female associate before the judge does it for them.

All judges, regardless of gender, also should be encouraged to appoint more women as lead counsel in class actions, and as special masters, referees, receivers, or mediators. Some judges have insisted that they will not appoint a firm to a plaintiffs' management committee unless there is at least one woman on the team. Other judges have issued orders, referred to earlier in this report, that if a female, minority, or junior associate is likely to argue a motion, the court may be more likely to grant a request for oral argument of that motion. Many judges are willing to permit two lawyers to argue for one party – perhaps splitting the issues to be argued. In that way, a senior attorney might argue one aspect of the motion, and a more junior attorney another aspect. Judges have suggested that it might be wise to alert the court in advance if two attorneys plan to argue the motion to ensure that this practice is acceptable to the judge. Judges should be encouraged to amend their individual rules to encourage attorneys to take advantage of these courtroom opportunities. All judges should be encouraged to promote and support women in obtaining speaking and leadership roles in the courtroom. All judges and lawyers should consider participating in panels and roundtable discussions to address these issues and both male and female attorneys should be invited and encouraged to attend such events.

[91] Kenneth O.C. Imo, *Mentors Are Good, Sponsors Are Better,* American Bar Association Law Practice Magazine, (Jan./Feb. 2013), (http://www.americanbar.org/publications/law_practice_magazine/2013/january-february/mentors-are-good-sponsors-are-better.html) (emphasis added).

F. Efforts by Clients

Clients also can combat the gender disparity in courtrooms. Insistence on diverse litigation teams is a growing trend across corporate America. Why should corporate clients push for diverse trial teams? Because it is to their advantage to do so. According to Michael Dillon, general counsel for Adobe Systems, Inc., "it makes sense to have a diverse organization that can meet the needs of diverse customers and business partners in several countries" and diversity makes an organization "resilient."[92]

A diverse litigation team also can favorably impact the outcome of a trial. A team rich in various life experiences and perspectives may be more likely to produce a comprehensive and balanced assessment of information and strategy.[93] A diverse team is also better equipped to collectively pick up verbal and nonverbal cues at trial as well as "read" witnesses, jurors and judges with greater insight and precision.[94]

Additionally, the context surrounding a trial—including the venue, case type, and courtroom environment—can affect how jurors perceive attorneys and ultimately influence the jury's verdict.[95] Consciously or not, jurors assess attorney "[p]ersonality, attractiveness, emotionality, and presentation style" when deciding whether they like the attorney, will take him or her seriously, or can relate to his or her persona and arguments.[96] Because women stereotypically convey different attributes than men, a female attorney actively involved in a trial may win over a juror who was unable to connect with male attorneys on the same litigation team.[97] Accordingly, a team with diverse voices may be more capable of communicating in terms that resonate with a broader spectrum of courtroom decision-makers.[98]

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[92] David Ruiz, *HP, Legal Depts. Ask Firms for Diversity, Make Efforts In-House*, Corporate Counsel (Apr. 5, 2017) http://www.corpcounsel.com/id=1202783051167/Legal-Depts-Ask-Firms-for-Diversity-Make-Efforts-InHouse.

[93] Craig C. Martin & David J. Bradford, *Litigation: Why You Want a Diverse Trial Team,* INSIDE COUNSEL, Oct. 14, 2010, http://www.insidecounsel.com/2010/10/14/litigation-why-you-want-a-diverse-trial-team?slreturn=1495741834.

[94] *Id.*

[95] Ann T. Greeley & Karen L. Hirschman, "*Trial Teams and the Power of Diversity*," at 3 (2012).

[96] *Id.* at 5.

[97] *Id.*

[98] Craig C. Martin & David J. Bradford, *Litigation: Why You Want a Diverse Trial Team,* Inside Counsel *(*Oct. 14, 2010) http://www.insidecounsel.com/2010/10/14/litigation-why-you-want-a-diverse-trial-team?slreturn=1495741834.

Further, a diverse trial team can increase the power of the team's message. A diverse composition indirectly suggests that the truth of the facts and the principles on which the case is based have been "fairly presented and are universal in their message."[99] This creates a cohesive account of events and theory of the case, which would be difficult for an opposing party to dismiss as representing only a narrow slice of society.[100]

The clear advantages of diverse trial teams are leading corporate clients to take direct and specific measures to ensure that their legal matters are handled by diverse teams of attorneys. General Counsels are beginning to press their outside firms to diversify litigation teams in terms of gender at all levels of seniority.[101] Many corporate clients often directly state that they expect their matters will be handled by both men and women.[102]

For example, in 2017, General Counsel for HP, Inc. implemented a policy requiring "at least one diverse firm relationship partner, regularly engaged with HP on billing and staffing issues" or "at least one woman and one racially/ethnically diverse attorney, each performing or managing at least 10% of the billable hours worked on HP matters."[103] The policy reserves for HP the right to withhold up to ten percent of all amounts invoiced to firms failing to meet these diverse staffing requirements.[104] Oracle Corporation has also implemented an outside retention policy "designed to eliminate law firm excuses for not assigning women and minority attorneys to legal matters."[105] Oracle asks its outside firms to actively promote and recruit women; ensure that the first person with appropriate experience considered for assignment to a case is a woman or a minority; and annually report to Oracle the number and percentage of women and

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[99] *Id.*

[100] *Id.*

[101] Ellen Rosen, *Facebook Pushes Outside Law Firms to Become More Diverse,* New York Times (Apr. 2. 2017) https://www.nytimes.com/2017/04/02/business/dealbook/facebook-pushes-outside-law-firms-to-become-more-diverse.html?_r=1.

[102] Ann T. Greeley & Karen L. Hirschman, "*Trial Teams and the Power of Diversity*," at 2 (2012).

[103] Jennifer Williams-Alvarez, *HP, Mandating Diversity, Will Withhold Fees From Some Firm,* Corporate Counsel (Feb. 13, 2017), http://www.corpcounsel.com/id=1202779113475/HP-Mandating-Diversity-Will-Withhold-Fees-From-Some-Firms.

[104] *Id.*

[105] *Hiring Women and Minority Attorneys – One General Counsel's Perspective,* http://corporate.findlaw.com/human-resources/hiring-women-and-minority-attorneys-a-general-counsel-s-perspec.html#sthash.HNE30g5o.dpuf (last visited June 1, 2017).

minority partners in the firm.[106] Similarly, Facebook, Inc. now requires that women and ethnic minorities account for at least thirty-three percent of law firm teams working on its matters.[107] Under Facebook's policy, the firms also must show that they "actively identify and create clear and measurable leadership opportunities for women and minorities" when they represent Facebook in legal matters.[108]

Corporate clients can follow the examples set by their peers to aid the effort to ensure that female attorneys have equal opportunities to participate in all aspects of litigation, including speaking roles in the courtroom.

G. ADR Context

The first step in addressing any issue is to recognize the issue and start a dialogue.

Accordingly, the dialogue that has begun amongst ADR providers and professionals involved in the ADR process is encouraging. One important step that has been undertaken is the Equal Representation in Arbitration pledge—agreed to by a broad group of ADR stakeholders, including counsel, arbitrators, corporate representatives, academics, and others—to encourage the development and selection of qualified female arbitrators.[109] This pledge outlines simple measures including having a fair representation of women on lists of potential arbitrators and tribunal chairs.[110] Other important steps to encourage diverse neutrals have been taken by leading ADR providers, including such diversity commitments as described above.

Another example of a step is the establishment by the ABA's Dispute Resolution Section of "Women in Dispute Resolution." This initiative provides networking opportunities for women neutrals to be exposed to decision makers selecting mediators and arbitrators; develops a list of women neutrals and their areas of expertise; provides professional

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[106] *Id.*

[107] Ellen Rosen, *Facebook Pushes Outside Law Firms to Become More Diverse,* New York Times *(*Apr. 2. 2017) https://www.nytimes.com/2017/04/02/business/dealbook/facebook-pushes-outside-law-firms-to-become-more-diverse.html?_r=1.

[108] *Id.* Some corporations have gone further, even firing law firms because they are run by "old white men." Laura Colby, *Law Firms Risk Losing Corporate Work Unless they Promote Women,* Bloomberg (Dec. 9, 2016), https://www.bloomberg.com/news/articles/2016-12-09/corporate-america-pressures-law-firms-to-promote-minorities.

[109] *See Take the Pledge*, Equal Representation in Arbitration, http://www.arbitrationpledge.com/pledge (last visited Mar. 31, 2017).

[110] *Id.*

development opportunities for women neutrals; and provides skills education for its members.[111] Those who select neutrals must make every effort to eliminate unconscious biases that affect such selection. They also must continually remember to recognize the benefit of diversity in the composition of panels neutrals that leads to better and more accurate results. If corporate counsel, together with outside counsel, make the same efforts to diversify the selection of neutrals, as they do when hiring outside counsel, then there may be a real change in the percentage of women selected as neutrals in all types of cases – particularly including complex large commercial disputes.

V. Conclusion

Unfortunately, the gender gap in the courtroom and in ADR has persisted even decades after women have comprised half of all law school graduates. The federal and state courts in New York are not exempt from this phenomenon. There is much more that law firms, corporate counsel, and judges can do to help close the gap. Similarly, the limited number of women serving as neutrals in ADR and appearing as counsel in complex commercial arbitrations is startling. While one size does not fit all, and the solutions will vary within firms and practice areas, the legal profession must take a more proactive role to assure that female attorneys achieve their equal day in court and in ADR.

The active dialogue that continues today is a promising step in the right direction. It is the task force's hope that this dialogue—and the efforts of all stakeholders in the legal process—will help change the quantitative and qualitative role of female lawyers.

[111] *See* http://apps.americanbar.org/dch/committee.cfm?com=DR589300 for more information.

Task Force on Women's Initiatives*

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*The task force especially thanks former Section Chair Mark A. Berman, Ganfer & Shore LLP, for his leadership and unwavering support and dedication to the women's initiative and this report. The task force also thanks Section Executive Committee Member Carla M. Miller, Universal Music Group, for her significant contributions to the task force and David Szanto and Lillian Roberts for their invaluable assistance in analyzing the survey data set forth in this report.

APPENDIX A

JUDICIAL FORM FOR TRACKING COURT APPEARANCES

Identify your court (*e.g.* SDNY, 1st Dep't; 2d Cir; Commercial Div. N.Y. Co) _____

I. *Type of Case*

A. Trial Court Criminal___(for federal court) Civil ___
(please specify subject matter e.g. contract, negligence, employment, securities)
B. Appeal Criminal___(for federal court) Civil___

II. *Type of Proceeding*

A. Arraignment ____ B. Bail Hearing ___ C. Sentencing ___ (for federal court)
D. Initial Conference ____ E. Status/Compliance Conference
F. Oral Argument on Motion___ (please specify type of motion e.g. discovery, motion to dismiss, summary judgment, TRO/preliminary injunction, class certification, in limine)
G. Evidentiary Hearing___H. Trial__ I. Post-Trial __ J. Appellate Argument ___

III. *Number of Parties (total for all sides)*

A. Two__ B. Two to Five___ C. More than Five___

IV. *Lead Counsel for Plaintiff(s)* (the lawyer who primarily spoke in court)

Plaintiff No. 1	Plaintiff No. 2	Plaintiff No. 3
Male ___	Male ___	Male ___
Female ___	Female ___	Female ___
Public ___	Public ___	Public ___
Private ___	Private ___	Private ___

V. *Lead Counsel for Defendant(s)* (the lawyer who primarily spoke in court)

Defendant No. 1	Defendant No. 2	Defendant No. 3
Male ___	Male ___	Male ___
Female ___	Female ___	Female ___
Public ___	Public ___	Public ___
Private ___	Private ___	Private ___

VI. *Additional Counsel for Plaintiff(s)* (other lawyers at counsel table who did not speak)

Plaintiff No. 1	Plaintiff No. 2	Plaintiff No. 3
Male ___	Male ___	Male ___
Female ___	Female ___	Female ___
Public ___	Public ___	Public ___
Private ___	Private ___	Private ___

VII. *Additional Counsel for Defendant(s)* (other lawyers at counsel table who did not speak)

Defendant No. 1	Defendant No. 2	Defendant No. 3
Male ___	Male ___	Male ___
Female ___	Female ___	Female ___
Public ___	Public ___	Public ___
Private ___	Private ___	Private ___

ADR FORM FOR TRACKING APPEARANCES IN ADR PROCEEDINGS

I. Is this an arbitration or mediation? _____ If it is a mediation, is it court ordered? ___

II. Type of Case (please specify) (e.g., commercial, personal injury, real estate, family law)
_____

III. If there is one neutral, is that person a female? _____

IV. If there is a panel, (a) how many are party arbitrators and, if so, how many are females? ___
(b) how many are neutrals and, if so, how many are females? ___
(c) is the Chair a female? _____

V. Assuming the panel members are neutrals, how was the neutral(s) chosen?

1. From a list provided by a neutral organization? _____
2. By the court? _____
3. Agreed upon by parties? _____
4. Two arbitrators selected the third? _____

VI. Number of Parties (total for all sides) _____

VII. Amount at issue (apx.) on affirmative case $_____Counterclaims, if any $_____

VIII. Lead Counsel for Plaintiff(s):

(lawyer who primarily spoke)	(other lawyers who did not speak, including local counsel)
Male___	Male ___
Female___	Female ___
Government ___	Government ___
Non-Government___	Non-Government ___

IX. Lead Counsel for Defendant(s):

(lawyer who primarily spoke)	(other lawyers who did not speak, including local counsel)
Male___	Male ___
Female___	Female ___
Government___	Government ___
Non-Government___	Non-Government ___

X. Was the Plaintiff a female or, if a corporation, was the GC/CEO/CFO a female? _____

XI. Was the Defendant a female or, if a corporation, was the GC/CEO/CFO female? _____

XII. Was this your first or a repeat ADR matter for these parties or their counsel? If repeat, please describe the prior proceeding(s) in which you served and at whose behest and whether the proceeding involved the same or a different area of the law.

APPENDIX B

TABLE 1

SUMMARY OF FINDINGS

Category	# Men	# Women	% Women
Total - Sample-wide	3886	1309	25.2%
Trial level -all	1805	592	24.7%
Appeal level - all	1007	340	25.2%
Upstate Courts - all	1154	409	26.2%
Downstate Courts - all	2103	694	24.8%
Federal Courts - all	1890	611	24.4%
State Courts - all	1725	635	26.9%
All Courts - Parties of 1	561	259	31.6%
Parties of 2	2532	910	26.4%
Parties of 3-4	681	224	24.8%
Parties of 5+	587	142	19.5%
All Courts - Lead Counsel	3430	1 135	24.9%
All Courts - Additional Counsel	456	174	27.6%
All Courts - Private Civil Lawyers	1688	384	18.5%

TABLE 2
DETAIL DATA CITED IN REPORT

Category	# Men	# Women	% Women
Total - Sample-wide	3886	1309	25.2%
New York Court of Appeals	83	54	39.4%
Court of Appeals - Public Attorneys	39	41	51.3%
Court of Appeals - Civil Cases	42	18	30.0%
Court of Appeals - Criminal Cases	41	36	46.8%
New York Appellate Divisions			
First Department - Civil Cases		148	5.37% (commercial cases)
Second Department - Public Attorneys	64	63	49.6%
Third Department - Lead Counsel	200	44	18.0%
Third Department - Public Attorneys	31	15	32.6%
Third Department - Private Attorneys	168	24	12.5%
Fourth Department - Public Attorneys	209	114	35.3%
Erie County	190	70	26.9%
Erie County - Public Attorneys	1	8	88.9%
Suffolk County	176	28	13.7%
Onondaga County	95	35	26.9%
Onondaga County - Private Attorneys	14	4	22.2%
United States Court of Appeals for the Second Circuit	451	117	20.6%
Second Circuit - Public Attorneys	102	57	35.8%
Second Circuit - Private Attorneys	338	54	13.8%
Second Circuit - Civil Cases	331	70	17.5%
Second Circuit - Criminal Cases	120	47	28.1%
Southern District of New York	1203	424	26.1%
SDNY - Lead Counsel	931	306	24.7%
Western District of New York	236	70	22.9%
WDNY - Lead Counsel	221	58	20.8%
Trial level - all	1805	592	24.7%
Appeal level - all	1007	340	25.2%
Upstate Courts - all	1154	409	26.2%
Downstate Courts - all	2103	694	24.8%

Category	# Men	# Women	% Women
Federal Courts -all	1 890	611	24.4%
Lead Counsel	1595	478	23.1%
State Courts - all	1725	635	26.9%
State Courts - Lead Counsel	1672	613	26.8%
State Courts - Civil Cases	2896	874	23.2%
State Courts - Criminal Cases	628	281	30.9%
State Courts - Public Cases	692	428	38.2%
State Courts - Private Cases	2172	524	19.4%
All Courts - Parties of 1	561	259	31.6%
Parties of 2	2532	910	26.4%
Parties of 3-4	681	224	24.8%
Parties of 5+	587	142	19.5%
All Courts - Lead Counsel	3430	1135	24.9%
All Courts - Additional Counsel	456	174	27.6%
All Courts - Private Civil Lawyers	1688	384	18.5%

APPENDIX C

SUMMARY OF RECOMMENDATIONS

1. The Law Firms

- Women's Initiatives
  - Establish and support strong institutionalized Women's Initiatives with emphasis on the following:
    - Convincing partners to provide speaking opportunities in court and at depositions for junior attorneys
    - Training and education on courtroom skills
    - Leadership training
    - Guest speakers
    - Mentorship programs
- Formal Programs to Ensure Lead Roles in Court and Discovery
  - Establish a formal program through which management or heads of litigation departments ensure that junior associates are provided with speaking opportunities in court and at depositions.
  - Track speaking opportunities in court and at depositions on a quarterly basis
- Promote Outside Speaking Opportunities
  - Provide junior attorneys with internal and external speaking opportunities.
- Sponsorship
  - Establish and support an institutionalized Sponsorship Program.

2. The Judiciary

- Ask junior attorneys to address particular issues before the Court.
- Favor granting oral argument when a junior attorney is scheduled to argue the matter.
- Encourage attorneys who primarily authored the briefs to argue the motions or certain parts of the motions in court.
- Appoint qualified women as lead counsel in class actions and as members of steering committees as well as special masters, referees, receivers, and mediators.
- Include as a court rule that more than one attorney can argue a motion.

3. The Client

- Insist on diverse litigation teams.
- Monitor actual work of diverse team members.
- Impose penalties for failure to have diverse teams or teams where diverse members do not perform significant work on the matter.

4. ADR Context

- **Fair representation of women on lists of potential arbitrators and mediators.**
- Corporate counsel should demand diverse neutrals on matters.
- Stress the benefits of having a diverse panel of decisionmakers for arbitrations.
- Instruct outside counsel to consider diversity when selecting neutrals and monitor such selections.

DIVERSITY

Advice for Men Who Are Nervous About Mentoring Women

by Wendy Murphy

MARCH 15, 2019

C. J. BURTON/GETTY IMAGES

Many senior male managers are reportedly responding to the #MeToo movement with a better-safe-than-sorry attitude and are pulling back from mentoring women. This backlash has little basis in reality. False accusations of sexual harassment are about 2%, the same as any other crime. Aside from being biased, this reaction is also shortsighted: Repercussions of depriving female employees of the counseling, developmental opportunities, exposure, and visibility that come from mentoring relationships have serious consequences for the future of the organization.

It's quite simple: If we want more women leaders, we need men in powerful positions to support their ascension. As a professor at Babson College, I conduct research, speak, and write about mentoring. Mentoring by definition may include career support (sponsorship, coaching, exposure, challenging assignments) and psychosocial support (encouragement, counseling, friendship). Protégés (or mentees) earn higher salaries, are promoted more quickly, are more satisfied with their job, and, most importantly, learn more to improve their performance, their career, and their workplace.

After countless conversations with well-intentioned senior, male executives, it is clear that we need to address one question. How should men approach mentoring in today's workplace? Here are five suggestions:

1. Intentionally seek out women mentees. Mentors should pursue developmental relationships purposefully with respect to differences. Evaluate your current network of protégés and consider how diverse it is. Do you engage with men more than women? Why? What is your key challenge? David Clutterbuck's research on mentoring suggests that strategies such as open dialogue, suspending judgment, and identifying common interests and values can help.

These *internal relationship challenges* mean that you may need to risk some discomfort to make the relationship work. We are naturally attracted to people like us, a sociological principle called homophily, which means that we have a tendency to bond with people similar to ourselves. This also means that young men will be more comfortable approaching their senior male colleagues for mentoring. Thus, the challenge is to ensure that you are actively managing mentoring opportunities beyond the people who show up at your door.

2. Be transparent in your developmental practices. The key to diversity mentoring is to be transparent about the relationship and its professional nature. When do developmental discussions occur? Are they in your office, in a conference room, or traveling to a client site? Reflect on your typical mentoring conversations and consider both the timing and the context of these impactful moments. If dinner together feels inappropriate, you need to ask yourself, "Why"? Do you have one-on-one dinners with junior men? It is fine to choose to meet over lunch rather than dinner, but you have to make that choice with *all* of your protégés.

These *external relationship challenges* mean that you need to ensure that perceptions of your colleagues are managed. Sharing elements of your private life — including spouses/significant others, kids, or community involvement with people in the workplace — can reduce the chances of inadvertent damage to anyone's reputation or career. It is imperative that senior men take the lead in creating professional dynamics in which it is seen as the norm for mixed-gender relationships to develop and thrive.

3. Listen with empathy to ask good questions. Good mentors identify opportunities, open doors, and connect mentees to challenging assignments so they learn and grow. You will only be capable of doing so if you ask questions and then *listen, listen, listen* to understand, affirm, and validate what your mentee needs. Cross-gender mentoring requires that you make efforts to learn about one another and empathize.

Relational empathy has both cognitive and emotional dimensions, meaning you must be attentive with your head and your heart. Listening with empathy also means identifying and managing your own emotional reactions and discomfort. The experience of empathy will enhance your mentee's positive sense of self and facilitate self-disclosure, which increases trust and will enable you both to share your unique experiences. Honing these skills will enhance your mentoring practice across your network as well as your ability to build developmental relationships with anyone.

4. Acknowledge gender issues exist. Your protégé knows that gender may be a factor in her career; after all, it has been a big part of the mainstream media conversation since the publication of Sheryl Sandberg's *Lean In*. The issue is to recognize the role of gender and consider how it may or may not impact opportunities at your workplace. If you need to educate yourself, HBR has published several articles, including this study demonstrating that men and women are treated differently at work, which has links to several other resources.

A key benefit of mentoring women is the potential to learn from one another's perspective and experiences. Be open to this conversation. Ask your protégé if/how gender has impacted her career. Ask her how she experiences the culture of your organization, if she experiences the policies and practices as supportive. Ask her what opportunities she sees for improvement. Help her navigate job and career challenges using your knowledge of the people, processes, and culture of your particular organization.

5. Actively sponsor her and help her connect with other sponsors. If you are in a position of influence, think about how to raise your protégé's visibility. Expose her to the complexities of your role and introduce her to other leaders in positions of power. Raise her name as a high potential candidate for promotion in *both* formal and informal conversations. Women are more willing to ask their managers for stretch assignments if they have a sponsor behind them. Be that sponsor. Spend the time you need to develop a meaningful relationship so that you understand her potential and help her find leadership opportunities that she might otherwise overlook (or be overlooked for). Encourage other men to diversify their own sponsorship networks so that when conversations happen, there are multiple women to consider for promotion. If it is the norm for powerful leaders to have a diverse set of protégés, then the culture of the organization will begin to reflect these practices.

Mentoring both women and men is worth the investment in time and resources. We know that mentoring relationships are mutually beneficial, meaning that both mentors and protégés reap rewards. Further, men who publicly promote and sponsor women get better end-of-year evaluations and are seen as champions for diversity as David Smith and Brad Johnson found in their study on the military. Unfortunately, senior women who mentor women may get lower evaluations and be seen as showing favoritism. This highlights the persistence in inequities between genders and adds urgency to the argument that senior men must get engaged in this important work.

Wendy Murphy is an associate professor of management at Babson College and author of *Strategic Relationships at Work*. Follow her on Twitter @wcmurphy.

This article is about DIVERSITY

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John Cotter 21 days ago

Could the author expand a little bit on, "Sharing elements of your private life — including spouses/significant others, kids, or community involvement with people in the workplace — can reduce the chances of inadvertent damage to anyone's reputation or career"?

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Another Side of #MeToo:
Male Managers Fearful of Mentoring Women

By Katrin Bennhold

Click this link to view the article:
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Lesson for the Trial Lawyer from My Cousin Vinny

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NYSBA Opinion 837 (3/16/10)

New York State Bar Association
Committee on Professional Ethics

Opinion 837 (3/16/10)

Topic: Confronting false evidence and false testimony.

Digest: Rule 3.3 of the New York Rules of Professional Conduct requires an attorney to disclose client confidential information to a tribunal if disclosure is necessary to remedy false evidence or testimony. The exception in former DR 7-102(B)(1) exempting disclosure of information protected as a client "confidences or secret" no longer exists.

Rules: Rule 1.0(k); Rule 1.6; Rule 3.3; DR 4-101; DR 7-102

QUESTION

1. Inquiring counsel's client gave sworn testimony at an arbitration proceeding concerning a document. The document was admitted into evidence based upon the testimony. Counsel's client also testified concerning the client's actions in preparing the document and submitting the document to the client's employer.

2. In a later conversation between client and counsel, the client informed counsel that the document was forged. Counsel thereby came to know that the document was some of the client's testimony concerning the document were false.

3. Inquiring counsel raises the following questions:

(1) Is counsel required to inform the tribunal that the document in question is a forgery and that some of the testimony relating to the document is false?

(2) If not, what other steps would constitute reasonable remedial measures? In particular, would it suffice for counsel to inform the tribunal and opposing counsel that the evidence and any testimony relating to it are being withdrawn, and that he intends to proceed based on all other evidence properly before the tribunal?

(3) Is counsel required to withdraw from representation of the client? If so, would withdrawal constitute a reasonable and sufficient remedial measure?

OPINION

4. The New York Rules of Professional Conduct (the "Rules") were formally adopted by the Appellate Divisions and took effect on April 1, 2009. The Rules replaced the New York Code of Professional Responsibility (the "Code"). The Rules are now codified at 22 NYCRR Part 1200 (as was the Code previously). Comments to the Rules also took effect on April 1, 2009 but have been adopted only by the New York State Bar Association, not by the courts.

The Old Code and the New Rules

5. In the former New York Code of Professional Responsibility, DR 7-102(B) provided (with emphasis added):

> A lawyer who receives information clearly establishing that:
>
> (1) the client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the effected person or tribunal, *except when the information*

is protected as a confidence or secret.

The New Rules

6. Rule 3.3 ("Conduct Before a Tribunal") now covers the same ground that was previously covered by DR 7-102. Rule 3.3(a)(3) provides, in relevant part:

If a lawyer, the lawyer's client, or witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

Rule 3.3(b) provides, in relevant part:

A lawyer who represents a client before a tribunal and who knows that a person . . .is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

Rule 3.3(c) provides:

The duties stated in paragraphs (a) and (b) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6. [1]

Analysis of the Changes

7. In Roy Simon, *Comparing the New NY Rules of Professional Conduct to the Existing NY Code of Professional Responsibility (Part II)*, N.Y. Prof. Resp. Report, March 2009, Professor Simon characterized Rule 3.3 as:

> perhaps the most radical break with the existing Code. Under DR 7 (102(B)(1) of the current Code of Professional Responsibility, if a lawyer learns ("receives information clearly establishing") after the fact that a client has lied to a tribunal, then the lawyer "shall reveal the fraud" to the tribunal, "except when the information is protected as a confidence or secret" – which it nearly always will be, because disclosing that a client has committed perjury is embarrassing and detrimental to the client. Thus, the exception swallows the rule, and confidentiality trumps candor to the court in the current Code. In contrast, Rule 3.3(a) provides that if a lawyer or the lawyer's client has offered evidence to a tribunal and the lawyer later learns ("comes to know") that the evidence is false, the lawyer "shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Rule 3.3(c) makes crystal clear that the disclosure duty applies "even if" the information that the lawyer discloses is protected by the confidentiality rule (Rule 1.6). This is a major change from DR 7-102(B)(1) . . .

8. As noted in Comment [11] to Rule 3.3:

> A disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is for the lawyer to cooperate in deceiving the court, thereby subverting the truth-finding process, which the adversary system is designed to implement. *See*, Rule 1.2(d).

9. By its terms, DR 7-102(B)(1) came into play only if (1) the attorney "receive[d] information clearly establishing that" (2) a "fraud" had been perpetrated upon a person or tribunal.

10. Thus, the benchmark for invoking counsel's responsibility has shifted from DR 7-102(B)'s receipt of information clearly establishing fraud on a tribunal to Rule 3.3(a)'s standard of "actual

knowledge of the fact in question". Rule 1.0(k) defines "knowingly," "known," "know" or knows" with the proviso that "[a] person's knowledge may be inferred from circumstances." That definition is consistent with Rule 3.3, Comment [8], which observes:

> The prohibition against offering or using false evidence applies only if the lawyer knows that the evidence was false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's actual knowledge that evidence is false, however, can be inferred from the circumstances. *See*, Rule 1.0(k) for the definition of "knowledge." Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

11. Another difference between the old Code and the new Rules is that DR 7-102(B)(1) required a "fraud" to have been perpetrated. Rule 3.3(b) likewise applies only in the case of "criminal or fraudulent" conduct, but Rule 3.3(a)(3) requires a lawyer to remedy false evidence even if it was innocently offered.[2]

12. Remedial measures are limited, however, by CPLR §4503(a)(1), the legislatively-enacted attorney-client privilege. The attorney-client privilege takes precedence over the Rules because the Rules are court rules rather than statutory enactments. However, CPLR §4503's limit on remedial measures extends only to the introduction of protected information into evidence. As explained in Comment [3] to Rule 1.6:

> The principle of client-lawyer confidentiality is given effect in three related bodies of law: the attorney-client privilege of evidence law, the work-product doctrine of civil procedure and the professional duty of confidentiality established in legal ethics codes. The attorney-client privilege and the work-product doctrine apply when compulsory process by a judicial or other governmental body seeks to compel a lawyer to testify or produce information or evidence concerning a client. The professional duty of client-lawyer confidentiality, in contrast, applies to a lawyer in all settings and at all times, prohibiting the lawyer from disclosing confidential information unless permitted or required by these Rules or to comply with other law or court order.

See Gregory C. Sisk, *Change and Continuity in Attorney-Client Confidentiality: The New Iowa Rules of Professional Conduct*, 55 Drake L. Rev. 347, 381-384 (Winter 2007) (contrasting exceptions to Iowa's confidentiality rule with exceptions to Iowa's attorney-client privilege and asserting that such exceptions "are not exceptions to the attorney-client privilege"); Gregory C. Sisk, *Rule 1.6 Confidentiality of Information*, 16 Ia. Prac., Lawyer and Judicial Ethics §5:6(d)(E)(2009 ed.).

13. As elaborated by Professor Sisk, Rule 3.3 *Candor Toward the Tribunal*, 16 Ia. Prac., Lawyer and Judicial Ethics § 7:3(e)(3)(2009 ed.):

> Unless an exception to confidentiality under the rules (such as the Rule 3.3 duty to disclose false evidence) is directly co-extensive with an exception to the attorney-client privilege, the lawyer is authorized or required to share information only in the manner and to the extent necessary to prevent or correct the harm or achieve the designed purpose, but not to testify or give evidence against the client. When an exception to confidentiality stated in the ethics rules does not align with an exception to the attorney-client privilege, the lawyer's duty of disclosure is limited to extra-evidentiary forms, namely sharing the information with the appropriate person or authorities. In sum, the exception to confidentiality in Rule 3.3 does not permit introduction of attorney-client communications into evidence through lawyer testimony or permit inquiry about those communications as part of the presentation of evidence before

any tribunal, absent a recognized exception to the privilege itself.[3]

See also, Michael H. Berger and Katie A. Reilly, *The Duty of Confidentiality: Legal Ethics and the Attorney-Client and Work Product Privileges*, 38-JAN Colo. Law. 35, 38 (January 2009) (concluding that privileged communications are subject to the permissive disclosure provisions of Rule 1.6).

14. In the criminal, as opposed to civil, sphere, Rule 3.3's mandate to disclose client confidential information may be limited or prohibited by the Fifth Amendment (self-incrimination) and/or the Sixth Amendment (ineffective assistance of counsel) to the United States Constitution. See Monroe H. Freedman, *Getting Honest About Client Perjury*, 21 Geo. J. Legal Ethics 133 (Winter 2008). As explained in Comment [7] to New York Rule 3.3:

> The lawyer's ethical duty may be qualified by judicial decisions interpreting the constitutional rights to due process and to counsel in criminal cases. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements.

15. Some decisions construing Rule 3.3's predecessor (DR 7-102) did not find such constitutional limitations, but those decisions addressed "future perjury" situations. *See, e.g. People v. Andrades,* 4 N.Y. 3d 355 (2005) (defendant was not deprived of his rights to effective assistance of counsel and to a fair suppression hearing when his attorney advised the court, prior to defendant's testimony at a *Huntley* hearing, that counsel wished to present the client's testimony in narrative form, or else withdraw from the case, pursuant to the mandates of DR 7-102(A)(4) – (8)); *People v. DePallo*, 96 N.Y. 2d 437 (2001) (defendant was not deprived of his right to effective assistance of counsel when his attorney disclosed to the court that defendant intended to commit perjury); *People v. Darrett*, 2 A.D.3d 16 (1st Dep't 2003) (defendant's counsel improperly revealed more than necessary to the court to convey what proved to be an inaccurate belief that the defendant would commit perjury);*Nix v. Whiteside*, 475 U.S. 157 (1986) (right to effective assistance of counsel as not violated by attorney who refused to cooperate in presenting perjured testimony). Situations involving past rather than future perjury will of necessity await further judicial development.

Duration of the duty to take remedial measures

16. The New York State Bar Association recommended that New York Rule 3.3(c) track ABA Model Rule 3.3(c), and thus include the proviso that "[t]he duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding . . .". The State Bar's proposal also included a Comment [13] to Rule 3.3, which explained that proposed Rule 3.3(c) "establishes a practical time limit on the mandatory obligation to rectify false evidence or false statements of law and fact. The conclusion of the proceeding is a reasonably definite point for the termination of the mandatory obligation." *See* Proposed Rules of Professional Conduct, pp. 132-138 (Feb. 1, 2008). But the State Bar's proposal was not embodied in New York Rule 3.3(c) as adopted by the Appellate Divisions. Therefore, the duration of counsel's obligation under New York Rule 3.3(c) as adopted may continue even after the conclusion of the proceeding in which the false material was used. *Cf.*, N.Y. County 706, n. 1 (1995) (noting that under ABA Rule 3.3(b) the duty to take remedial measures would end at the close of the proceeding). This Committee has noted that the endpoint of the obligation nevertheless cannot sensibly or logically be viewed as extending beyond the point at which remedial measures are available, since a disclosure which exposes the client to jeopardy without serving any remedial purpose is not authorized under Rule 3.3. *See* N.Y. State 831, n. 4 (2009).

Application to the facts on this inquiry

17. Rule 3.3(a)(3) does not apply unless the false evidence or testimony that has been offered is also "material." While inquiring counsel has not specifically addressed the question of materiality, for purposes of this opinion we assume that the testimony and the documentary evidence at issue were "material." *See, e.g.,* N.Y. County 732 (2004) at p. 5 (discussion of the materiality requirement under DR 4-101(C) that permitted withdrawal of a lawyer's opinion if based on "materially inaccurate" information). Were this not the case, inquiring counsel would be under no obligation to take any remedial action, and would instead be bound by the usual obligation to safeguard confidential information imposed by Rule 1.6.

18. Here, whether inquiring counsel's conversation with his client constituted a communication covered by the attorney-client privilege presents an issue of law beyond the Committee's purview. *See, .e.g.,* N.Y. State 674 (1994) (noting that whether disclosure is "required by law or court order" is a question beyond the Committee's jurisdiction). However, inquiring counsel has stipulated that he now "knows" that his client has offered material evidence and testimony which was false. Rule 3.3(a)(3) therefore requires inquiring counsel to "take reasonable remedial measures," whether or not the client's conduct was "criminal or fraudulent" (the standard for invoking 3.3(b)).

19. Disclosure of the falsity, however, is required only "if necessary." Moreover, because counsel's knowledge constitutes confidential information under Rule 1.6, and does not fall within any of the exceptions contained in Rule 1.6(b), if disclosure is not "necessary" under Rule 3.3, it would also not be permitted under Rule 1.6. Therefore, if there are any reasonable remedial measures short of disclosure, that course must be taken.

20. In the situation addressed in this opinion, inquiring counsel has suggested an intermediate means of proceeding – he would inform the tribunal that the specific item of evidence and the related testimony are being withdrawn, but he would not expressly make any statement regarding the truth or falsity of the withdrawn items. The Committee approves of this suggestion. This would be the same sort of disclosure typically made when an attorney announces an intent to permit a criminal defendant client to testify in narrative form. It may lead the court or opposing counsel to draw an inference adverse to the lawyer's client, but would not involve counsel's actual disclosure of the falsity. *See People v. Andrades*, 4 N.Y.3d 355 (2005) (counsel advised the court that he planned to present defendant's testimony in narrative form, and counsel's disclosure was open to inference that defendant planned to perjure himself, but counsel's action was proper because it was a passive refusal to lend aid to perjury rather than an unequivocal announcement of counsel's client's perjurious intentions); *Benedict v. Henderson*, 721 F.Supp. 1560, 1563 (N.D.N.Y. 1989) (affirming counsel's use of the narrative form of testimony "without intrusion of direct questions," because counsel thereby met his "obligation . . .not to assist in any way presenting false evidence").

21. Inquiring counsel should be aware that before acting unilaterally, he should bring the issue of false evidence to the client's attention, and seek the client's cooperation in taking remedial action. Comment [10] to New York Rule 3.3 provides:

> The advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunals is reasonably necessary to remedy the situation . . . .

Counsel's actions are thus mandated by Rule 3.3(a)(3) (after client consultation) and are not subject to the client's veto.

22. Counsel remains under the continuing obligation of CPLR §4503(a) to refrain from offering attorney-client privileged evidence adverse to the client, and in fact is under a continuing obligation to invoke the attorney client-privilege if called to testify or otherwise produce evidence adverse to the client. In addition, counsel should be cognizant of the restriction on *ex parte* communications noted in Rule 3.5(a)(2), and in related Comment [2] to New York Rule 3.5

23. Since counsel is able to proceed without violating these Rules, withdrawal from representation pursuant to Rule 1.16(b)(1) is not required. Indeed, since it would not undo the effect of the false evidence, withdrawal would be insufficient to qualify as a "reasonable remedial measure" under Rule 3.3(a).

CONCLUSION

24. Rule 3.3 requires an attorney to take reasonable remedial measures even if doing so would entail the disclosure to a tribunal of client confidential information otherwise protected by Rule 1.6. However, if reasonable remedial measures less harmful to the client than disclosure are available, then disclosure to the tribunal is not "necessary" to remedy the falsehood and the attorney must use measures short of disclosure.

(41-09, 46-09)

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[1] Rule 1.6 ("Confidentiality of Information") governs a lawyer's obligation to safeguard "confidential information." "Confidential information" under the Rules includes what were formerly referred to under the Code as confidences and secrets. *Compare* former DR 4-101(A) of the Code, with Rule 1.6(a).

[2] To the extent that this Committee's prior opinions in N.Y. State 674 (1994), N.Y. State 681 (1996), and N.Y. State 797 (2006) premised their results upon the inability of the Committee to ascertain whether a "fraud" had occurred or was occurring, or upon the existence of an "exception" which relieved an attorney of the obligation to disclose a fraud on a tribunal if the fraud was discovered by the attorney via a client confidence or secret, those results would today require a re-analysis in light of the existing Rules.

[3] The attorney-client privilege itself would not cover material which falls under the crime-fraud exception to the attorney-client privilege. Because the crime-fraud exception has typically been applied tin situations involving documentary discovery which are quite different from the scenarios contemplated by Rule 3.3, and because the crime-fraud exception has been interpreted to apply only to situations in which the client communication was itself in furtherance of the crime or fraud (*see, e.g.*, *United States v. Richard Roe, Inc.*, 68 F. 3d 38, 40 (2d Cir. 1995) ("[A] party seeking to invoke the crime-fraud exception must at least demonstrate that there is probable cause to believe that a crime or fraud has been attempted or committed and that the communications were in furtherance thereof."); *Linde v. Arab Bank, PLC*, 608 F.Supp.2d 351, 357 (E.D.N.Y, 2009) (quoting *U.S. v. Richard Roe, Inc.*, for the proposition that the crime-fraud exception does not apply simply because privileged communications would provide an adversary with evidence of a crime or fraud), the precise nature of the interplay between Rule 3.3, the attorney-client privilege, and the crime-fraud exception to that privilege remains to be explored in further court decisions and ethics opinions.

NYSBA Opinion 980 (9/4/13)

NEW YORK STATE BAR ASSOCIATION
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ETHICS OPINION 980

New York State Bar Association
Committee on Professional Ethics

Opinion 980 (9/4/13)

Topic: Disclosure of confidential information to collect a fee; candor toward a tribunal

Digest: A lawyer, having learned in a prior proceeding that a then-client imparted material and false information about the client's finances to the tribunal, has a duty to take reasonable remedial measures that may still be available, including, if necessary, disclosure to that tribunal. Even if the correct information about the former client's finances is confidential, the lawyer may disclose it in the former client's bankruptcy proceeding if, but only to the extent that, the lawyer reasonably believes that disclosure is necessary to collect a fee that the former client owes to the lawyer.

Rules: 1.6; 3.3(a)-(c)

FACTS

1. While the inquiring attorney was representing a client in a contested judicial proceeding in which the client's finances were at issue, the client disclosed confidential information to the attorney about the client's finances (including that the client was working "off the books"). The information was inconsistent with what the client was providing to the court. The attorney, according to the inquiry, did not "promote" this information in the judicial proceeding.

2. Subsequently, the client filed for protection from creditors, including the inquiring lawyer, who is owed a legal fee from the prior representation. The lawyer wishes to reveal the confidential information from the first proceeding in the bankruptcy proceeding so as to aid the lawyer's effort to be paid the legal fee.

QUESTION

3. Having received confidential information from the client in one proceeding, may the inquiring lawyer disclose that information in a subsequent bankruptcy proceeding in an effort to collect an unpaid legal fee?

OPINION

4. Ordinarily, under Rule 1.6(a) of the New York Rules of Professional Conduct (the Rules), a lawyer shall not "knowingly reveal confidential information" or "use such information to the disadvantage of a client or for the advantage of the lawyer." One of the exceptions to this proscription is Rule 1.6(a)(3), which says that a lawyer may do so if "the disclosure is permitted by paragraph (b)" of Rule 1.6. That paragraph, among other things, permits a lawyer to "reveal or use confidential information to the extent that the lawyer reasonably believes necessary ... to establish or collect a fee." Rule 1.6(b)(5)(ii).

5. We caution that Rule 1.6(b)(5)(ii) is no license for counsel to reveal any confidential information beyond what is "reasonably believe[d] necessary" to collect the fee. The Rules do not shed much light on these terms.[1] Nonetheless, these terms provide significant limits beyond which a lawyer may not go in seeking to collect a fee. We have previously discussed those limits, and while some of the opinions were decided under the prior Code of Professional Responsibility, we believe they generally remain sound guides under the Rules.

6. First, a lawyer should not resort to disclosure to collect a fee except in appropriate circumstances.[2] Second, the lawyer should try to avoid the need for disclosure.[3] Third, disclosure must be truly necessary as part of some appropriate and not abusive process to collect the fee.[4] Fourth, disclosure may not be broader in scope or manner than the need that justifies it, and the lawyer should consider possible means to limit damage to the client.[5]

7. Bearing in mind these limits on the fee-collection exception, we now turn to its applicability. The exception, as set forth in Rule 1.6(b)(5)(ii) and quoted above, is not reserved for any particular kinds of proceedings. In particular, the fee-collection exception "has been applied to bankruptcy proceedings." D.C. Opinion 236 (1993) (citing examples and concluding that a "well-established but narrow exception to the general rule against revealing client confidences and secrets ... permits the disclosure of such information in connection with actions to establish or collect fees in bankruptcy proceedings in limited circumstances").

8. Of course the limits on the exception also apply in bankruptcy proceedings.[6] Indeed, there is some authority as to how those limits may apply to particular uses of confidential information in the bankruptcy context.[7] However, because the inquiry does not specify the particular planned uses of confidential information, we leave to the inquiring attorney a careful consideration of whether disclosure is appropriate under the above principles, and if so, how to limit it to the minimum necessary.

9. The inquiring attorney should also consider whether the information from the client is not only confidential under the rules of ethics, but also subject to attorney-client privilege, and whether such privilege might affect the permissibility of the proposed disclosure.[8] However, questions of privilege are legal matters on which we do not opine.

10. We turn to a second question that was not part of the inquiry but is raised by its facts. The inquiring attorney says that the attorney did not "promote" the client's apparently false evidence about the client's finances during the first proceeding. Depending on when that first proceeding occurred, however, the lawyer may have had a greater duty to the tribunal than forbearing from relying on the false evidence. Specifically, the applicable rule may have obliged the attorney to disclose the confidential information to the first tribunal if the client declined to do so and lesser remedial measures were insufficient to cleanse the record of the untrue evidence.

11. The Rules of Professional Conduct became effective, replacing the former Code of Professional Responsibility, on April 1, 2009. On that day, a lawyer's duty in appearing before a tribunal materially changed. The relevant provision of the Code had required that a lawyer who learned that the lawyer's client had clearly perpetrated a fraud upon a tribunal "shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected ... tribunal, except when the information is protected as a confidence or secret." DR 7-102(B)(1) (emphasis added).

12. In contrast, one of the new rules that took effect on April 1, 2009, sweeps more broadly. The duty to take remedial steps is triggered when "a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity." Rule 3.3(a)(3). The duty is also triggered whenever the lawyer knows of "fraudulent conduct related to the proceeding."[9] In either case, "the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Rule 3.3(a)(3), (b). There is no longer any exception for confidences or secrets. See Rule 3.3(c) (duty applies "even if compliance requires disclosure of information otherwise protected by Rule 1.6"); N.Y. State 837 ¶¶ 6-7 (2010).

13. The application of the new standards of Rule 3.3 depends on when the first proceeding occurred. In N.Y. State 831 (2009), we concluded that, notwithstanding the adoption of Rule 3.3, DR 2-107(a) remained in force as to a fraud committed by the client prior to April 1, 2009, regardless of when the lawyer came to know the falsity of the information. Here, the lawyer's duty to disclose the information to the tribunal depends on whether the client imparted the false information to the tribunal before or after April 1, 2009.

14. If the false information was imparted before that date, the lawyer had a duty to call upon the client to rectify the fraud. However, if the client declined to do so, the lawyer had no further duty to disclose the information to the tribunal if that information was protected as a confidence or secret. And the information was undoubtedly so protected, given its nature and the way the lawyer learned it. On the other hand, if the false information was material and was imparted to the tribunal on or after April 1, 2009, then the lawyer had a duty to take reasonable remedial measures, and if measures short of disclosure were insufficient, then the lawyer would have a duty of disclosure to the tribunal.

15. This leaves us with two remaining matters, each on the assumption that Rule 3.3, not DR 7-102(B), governs the lawyer's obligations. One is the issue of whether, even if the Rules of Professional Conduct would seem to require disclosure of the false information, such information might nevertheless be shielded from disclosure in the first proceeding by the attorney-client privilege.[10] As noted above, however, privilege issues are questions of law beyond our purview.

16. The other remaining issue is the duration of the lawyer's obligation to make a Rule 3.3(a) disclosure to a tribunal. Although the State Bar proposed that the duty continue only to the conclusion of the proceeding, the courts did not adopt that proposal. N.Y. State 837 ¶16 (2010). Thus it appears that the obligation to disclose "may continue even after the conclusion of the proceeding in which the false material was used." We nevertheless opined that the endpoint of the obligation "cannot sensibly or logically be viewed as extending beyond the point at which remedial measures are available, since a disclosure which exposes the client to jeopardy without serving any remedial purpose is not authorized under Rule 3.3." Id. (citations omitted); accord N.Y. City 2013-2 (opining that "for a measure to be remedial, it must have a reasonable prospect of protecting the integrity of the adjudicative process," and discussing how application of that standard requires consideration of law and court procedures applicable to correction of the false evidence in question).

CONCLUSION

17. A lawyer who in one proceeding obtains confidential information about a client's financial affairs may disclose that information in a subsequent bankruptcy proceeding if, but only to the extent that, the lawyer reasonably believes that disclosure is necessary to collect a fee that the former client owes to the lawyer and disclosure is not barred by attorney-client privilege.

18. If a lawyer learns that a client has imparted false and material information to a tribunal since Rule 3.3 has been in effect, then the lawyer has a duty to take reasonable remedial measures that are still available, including, if necessary, disclosure to that tribunal, unless disclosure is barred by attorney-client privilege.

(48-12)

[1] A lawyer "reasonably believes" something when "the lawyer believes the matter in question and ... the circumstances are such that the belief is reasonable." Rule 1.0(r). The Rules do not define "necessary," but Webster's Unabridged Dictionary at 1200 (2nd ed. 1983) says that the word means "unavoidable, essential, indispensable, needful."

[2] See N.Y. State 684 (1996) (analogizing to rule allowing withdrawal when client "deliberately disregards" a fee obligation, which occurs when "'the failure is conscious rather than inadvertent, and is not de minimis in either amount or duration'"); Restatement (Third) of the Law Governing Lawyers §41 cmt. c (2000) [hereinafter Restatement] ("The lawyer's fee claim must be advanced in good faith and with a reasonable basis.").

[3] See Rule 1.6, Cmt. [14] ("Before making a disclosure, the lawyer should, where practicable, first seek to persuade the client to take suitable action to obviate the need for disclosure."); N.Y. State 608 (1990) (noting Code principle that a lawyer should "zealously avoid," and "attempt amicably to resolve," fee controversies with clients, and concluding that lawyer may use a collection agent to collect a fee but only after all other reasonable efforts short of litigation have been exhausted).

[4] See N.Y. State 684 (1996) (disclosure to a credit bureau would appear to aid collection process if at all "only by virtue of its in terrorem effect on the client," and where "the client's potential injury arising from the disclosure of the client secret is the very vehicle of collection, such disclosure cannot be viewed as the type that is 'necessary' for the collection"); Restatement §41 cmt. c (lawyer "may not disclose or threaten to disclose information to nonclients not involved in the suit in order to coerce the client into settling").

[5] See Rule 1.6, Cmt. [14] ("a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose," and disclosure in adjudicative proceeding "should be made in a manner that limits access to the information to the tribunal or other persons having a need to know the information, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable"); Restatement §65, cmt. d (describing requirements that use or disclosure of confidential information in compensation dispute be proportionate and restrained); id. §41, cmt. c ("lawyer should not disclose the information until after exploring whether the harm can be limited by partial disclosure, stipulation with the client, or a protective order").

[6] "[T]he inquirer must have a good faith expectation of recovering more than a de minimis amount of the outstanding fee." D.C. Opinion 236 (1993). "[T]he proposed disclosure to the bankruptcy court must be as narrow as possible, providing only the minimal information necessary to establish or collect a fee. In addition, if possible, the inquirer should use protective orders, in camera proceedings, John Doe pleadings, and/or other appropriate mechanisms to

protect the identity and interests of the client. Id.; accord Los Angeles County Opinion 452 (1988) (attorney may prosecute adversary proceeding to have a debt declared non-dischargeable but "as in any fee collection action, the attorney should avoid the disclosure of confidences and secrets to the extent feasible, and should obtain appropriate confidentiality orders for this purpose").

[7] One ethics committee, while opining that an "attorney may make a claim in the bankruptcy case, and may prosecute a dischargeability proceeding as to the claim," also opined that the attorney may not participate in the "collective collection effort of the bankruptcy process." In other words, "the attorney may not use confidential or secret information to challenge the right of his former client to a discharge, and may not disclose such information to the trustee or other creditors," or otherwise "assist [the] trustee or other creditors in recovering assets." Los Angeles County Opinion 452 (1988).

[8] We have previously noted a question whether the court-adopted rules of legal ethics "can override the statutory protection to the attorney-client privilege afforded by CPLR § 4503(a)." N.Y. State 831 (2009). Even if they cannot, however, it is not clear that privilege would bar disclosure in the case at hand. We note that in certain proceedings seeking relief from creditors, the privilege typically belongs to the Trustee and not to the person seeking relief. Thus, the person with capacity to waive the privilege may reside in someone other than the lawyer's onetime client. Moreover, an exception to the privilege could apply. See, e.g., Alexander, CPLR §4503 Practice Commentaries, C4503:5(b) (McKinney) (discussing, as an exception to the privilege, "the rule that permits a lawyer to reveal confidences in order to collect a fee from the client"); Restatement §83(1) ("attorney-client privilege does not apply to a communication that is relevant and reasonably necessary for a lawyer to employ in a proceeding ... to resolve a dispute with a client concerning compensation or reimbursement that the lawyer reasonably claims the client owes the lawyer"); Restatement §82(a) (exception to privilege when client "consults a lawyer for the purpose, later accomplished, of obtaining assistance to engage in a crime or fraud").

[9] Rule 3.3(b). Under the new rules, "fraudulent" conduct includes not only conduct that is fraudulent under applicable law, but also conduct that "has a purpose to deceive." Rule 1.0(i). This new definition apparently broadened the category of conduct constituting client frauds that could require remedial steps. See N.Y. State 831 (2009).

[10] We have already noted issues as to whether privilege might bar disclosure otherwise permitted for the purpose of collecting a fee, see footnote 8 supra, and some of the same considerations (including possible applicability of the crime-fraud exception) apply to whether privilege might bar disclosure otherwise mandated by Rule 3.3. In any event, even if the privilege applied to the client communications in question, it may not extend to the context of disclosure under Rule 3.3. See Rule 1.6, Cmt. [3] (attorney-client privilege is part of evidence

law and applies "when compulsory process by a judicial or other governmental body seeks to compel a lawyer to testify or produce information or evidence concerning a client"); N.Y. State 837 ¶¶ 12-13 (2010) (noting that CPLR §4503's limit on remedial measures "extends only to the introduction of protected information into evidence"); Restatement §86(1) (privilege may be invoked "[w]hen an attempt is made to introduce in evidence or obtain discovery" of a privileged communication).

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NYSBA Opinion 982 (10/2/13)

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ETHICS OPINION 982

New York State Bar Association
Committee on Professional Ethics

Opinion 982 (10/2/13)

Topic: Obligation to disclose potential fraud on a tribunal

Digest: A lawyer who has not appeared before a tribunal has no duty and no right to disclose confidential information protected by Rule 1.6 even if necessary to correct a prior false statement by the lawyer, made to opposing counsel before any proceeding began, which may be later used as evidence before the tribunal.

Rules: 1.0(b), 1.0(q), 1.0(c), 1.6(a), 1.6(b)(2), 1.6(b)(3), 3.3(a), 3.3.(b),

FACTS

1. The inquiring lawyer represented a client in an estate matter in which a will has yet to be offered for probate. The inquirer is not admitted in this State and so associated with a member of the New York bar to handle the matter.

2. Although the will has not been offered for probate, it is likely to be, and, in the inquirer's judgment, will result in a contested proceeding between two siblings. The inquirer represented one of the siblings – for ease of reference "AB" – who provided the inquirer with seemingly credible and material information which the lawyer in turn sent to counsel for the sibling, the adverse client to whom we refer as "CD." Upon review of the information, CD's counsel responded by strongly questioning the accuracy of the information. When the inquirer confronted AB with CD'S response, AB admitted in confidence that the information AB had provided to the inquirer was false. The inquirer urged AB to correct the information, citing the lawyer's own ethical obligations and AB's potential criminal liability. Despite these entreaties, AB refused to correct the information. Thereafter, the inquirer terminated the attorney-client relationship with AB, and notified opposing counsel of the withdrawal without reference to the inquirer's earlier provision of information to CD's lawyer that the inquirer now knows to be false. While we are not opining on the propriety of the resignation, there is every reason to believe it proper under Rule 1.16.

3. The inquirer states that no basis exists for a reasonable belief that CD's counsel is relying on the statement that the inquirer provided to CD which the inquirer now knows to be untrue, a belief apparently rooted in the tenacity of opposing counsel's rejection of the information. Nevertheless, the inquirer apprehends that some party to the probate proceeding, be it AB or CD, will submit the inquirer's statement to the tribunal. This prospect gives rise to the inquirer's interest in whether, in such a circumstance, a lawyer may or must reveal "confidential information" as defined in Rule 1.6 of the N.Y. Rules of Professional Conduct. For our purposes, we assume that the information AB imparted qualifies as such. We do not address purely legal questions such as the application of evidentiary privileges, in this instance, for example, whether AB provided the information in furtherance of a crime or fraud, thereby removing the information from the protection of the attorney-client privilege. These issues are for courts to decide.

4. The inquirer suggests two exceptions to Rule 1.6(a) that may permit but not require the lawyer to disclose the information. One is Rule 1.6(b)(2), which permits a lawyer to prevent a client "from committing a crime," and the other is Rule 1.6(b)(3), which allows a lawyer to "withdraw a written or oral opinion or representation previously given to the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud." The lawyer also asks whether Rule 3.3(a), which concerns a lawyer's candor to a tribunal, requires the lawyer to disclose the information.

QUESTION

5. The inquiry before us asks that we determine whether a lawyer has an obligation to disclose a fraud on a tribunal when the lawyer is not appearing, and has never appeared, before that tribunal. We find no such language in the Rules of Professional Conduct and accordingly answer the inquiry in the negative.

Analysis

6. We begin with Rule 1.6(b)(2), which permits a lawyer to disclose confidential information to prevent a client from committing a crime. Whether AB's failure to correct the false information constitutes a crime at this stage of the matter, or even later, is also a legal issue beyond our jurisdiction to address. If the inquirer concludes that AB has already committed a crime, then Rule 1.6(b)(2) would not apply and thus would not allow the lawyer to disclose AB's confession. N.Y. State 674 (1994). This is true even though AB is now a former client. N.Y. City 1994-8 (1994). The inquirer's fear that AB may later commit a crime by submitting the false information to a tribunal – namely, the court overseeing the probate proceeding – is unduly speculative. The permissive disclosures in Rule 1.6(b) allow the revelation of confidential information only "to the extent that the lawyer reasonably believes necessary" under one or more of the

enumerated circumstances. As of the date of the inquiry, the probate proceedings have not yet started. That AB and her new counsel may elect not to submit the information remains a possibility and calls into question the necessity of disclosure. Even if the lawyer were to conclude that the commission of a crime were imminent, the restricting language of Rule 1.6(b) cautions that disclosure should be to AB's current counsel, not to the opposing counsel or the court.

7. Whether Rule 1.6(b)(3) permits disclosure of the information depends on the reasonableness of the lawyer's belief that CD's lawyer continues to rely on the information the lawyer provided. That CD's lawyer "rejected" the information – that an adversary questioned its veracity – does not invariably mean that CD and her counsel are not relying on the information. Rule 1.0(b) defines "belief" to mean that "the person involved actually believes the fact in question to be true," which "may be inferred from the circumstances." Rule 1.0(q) defines "reasonable" to be "conduct of a reasonably prudent and competent lawyer." Rule 1.0 (r)'s definition of "reasonable belief" combines these two concepts. "A mere suspicion or theoretical possibility that a third person is still relying is not enough – the lawyer must actually believe it." Simon's Rules of Professional Conduct Annotated 223 (2013). Without knowing the information or the content of the exchanges between counsel, we must accept the inquirer's unqualified statement that the lawyer does not reasonably believe that CD's counsel is still relying on the inquirer's statement. If that is so – if in light of all the facts and circumstances a lawyer does not reasonably believe that CD's counsel is so relying – then Rule 1.6(b)(3) provides no license for the lawyer to reveal the information.

8. This does not end the inquiry, for the lawyer asks also whether Rule 3.3(a) requires the lawyer to disclose the information if the probate proceeds and AB's successor counsel presents the court with lawyer's prior factual representation as a true statement. That Rule mandates disclosure, notwithstanding the confidentiality restrictions of Rule 1.6, in certain circumstances. That a lawyer appearing before a tribunal must correct a client's false statement to the tribunal (after unsuccessfully trying to persuade the client to do so) is not at issue. The question, instead, is whether a lawyer who knows that a former client is using the lawyer's prior statements or work product to place false evidence before a court is required or permitted to disclose the information.

9. The requirement that a lawyer do so is not readily apparent in Rule 3.3. Rule 3.3(a), unlike Rule 3.3(b), does not limit its application to a "lawyer who represents a client before a tribunal," yet the mandate of disclosure in Rule 3.3(a) extends only to the knowing failure of a lawyer "to correct a false statement of material fact or law previously made to the tribunal by the lawyer." It is difficult to read this phrase to mean anything other than a statement that the lawyer personally makes to the tribunal, rather than a statement the lawyer previously made to an adverse counsel which another lawyer then places before the court. In contrast to some other jurisdictions, the New York Rules do not make the obligations of Rule 3.3 "ongoing," or cross-

reference Rule 3.3 in Rules 1.6 and 1.9, e.g., Indiana Opinion 2 (2003); Illinois Opinion 98-07 (1999), which would clarify the duties of former counsel in these circumstances. Absent such clarity, we cannot conclude, based on Rule 3.3 alone, that a lawyer who is not counsel appearing before the court has an obligation to correct information that another lawyer submits to a court. See Virginia Opinion 1777 (2003) (forbidding disclosure); but see ABA 93-376 (1993) (holding that "noisy withdrawal" does not relieve the lawyer of the duty of candor in Rule 3.3).

10. Practical concerns support this conclusion. Rule 1.16(a)(3) permits a client to discharge a lawyer at any time for any reason. For better or worse, Rule 1.6 does not allow a discharged lawyer to reveal confidential information to successor counsel without a client's consent. These Rules, taken together, mean that a client may discharge a lawyer precisely because the lawyer is unwilling to further a client's ill-advised and potentially fraudulent pursuits. The so-called "noisy withdrawal" provisions of Rule 1.6(b)(3) supply some leverage to the lawyer in these circumstances, but only upon a "reasonable" belief that reliance on a lawyer's prior statements persists. As we have said, if, as here, that condition is not met, then the avenue of permissive disclosure is closed. Upon withdrawal from a matter, the lawyer's interest in the representation ends except insofar as Rule 1.9 protects former clients from the disclosure of confidential information and the lawyer's involvement in matters adverse to the onetime client substantially related to the prior representation. To impose on the former lawyer the additional obligation to monitor the client's use of a lawyer's onetime statements to opposing counsel exceeds any duty that the language of the Rules imposes.

11. The inquiry does not require us to speculate on the lawyer's obligations if, despite having no duty to watch over the matter, the lawyer somehow learns that the lawyer's erstwhile client intends to use, or has used, the lawyer's statement before a tribunal. For now, we deal only with the question before us, which does not present those facts. Whether a lawyer may or must disclose information in such circumstances implicates a variety of Rules that are best left for consideration when the issue is presented.

Conclusion

12. A lawyer who has not appeared before a tribunal has no duty and no right to disclose confidential information protected by Rule 1.6 even if necessary to correct a prior false statement by the lawyer, made to opposing counsel before any proceeding began, which may be later used as evidence before the tribunal.

(73-12)

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NYSBA Opinion 1011 (7/29/14)

New York State Bar Association
Committee on Professional Ethics

Opinion 1011 (7/29/2014)

Topic: Duty to remedy fraudulent submissions to administrative agency

Digest: Duty under Rule 3.3 to remedy false statements made to a "tribunal" does not apply to applications for visas or work permits, though other rules may apply.

Rules: 1.2(d), 1.6, 3.3, 4.1, 8.5(b)

FACTS

1. The inquirer is a New York attorney representing a corporate client (the "Employer," or the "Corporation") in matters related to immigration benefits. In the course of the representation, the inquirer filed several employment-based immigrant visa petitions with the Department of Labor, and related petitions with the Department of Homeland Security, in order to obtain the appropriate visas for foreign workers allowed to accept full-time employment in the United States when no U.S. worker is able to fill the position.

2. The application process required the Corporation to certify that it undertook sufficient efforts to locate a U.S. worker qualified for and willing to accept the position before offering the position to a foreign worker. As another required part of the visa petitions, an employee of the Corporation (the "Corporate Recruiter") signed and submitted attestations regarding the various methods of local recruiting the Corporation had supposedly undertaken. Relying on the Corporate Recruiter's assurances, the inquiring lawyer signed each application and submitted them to the Department of Labor. In each instance, the Department of Labor certified each application, at which time the lawyer prepared and filed related petitions with the Department of Homeland Security, which incorporated the applications certified by the DOL, to obtain permanent resident status for the foreign workers.

3. After the submission of these applications, and after some of the foreign workers acquired permanent resident status, the Corporation discovered that its employee, the Corporate Recruiter, had submitted knowingly false attestations.

4. Upon learning of this misconduct, the inquiring lawyer withdrew from representation of the Employer in connection with the applications that were filed but not resolved and in connection with similarly tainted documents that the lawyer had prepared but had not filed, and urged the Employer to disclose the conduct to the federal agencies. The Employer has refused to give the lawyer consent to disclose information regarding the fraudulent conduct to the federal agencies, claiming that the information is privileged and confidential.

QUESTION

5. Where an attorney learns of misconduct by an employee of a client that resulted in both the client and the attorney making false representations to a government agency in an application for a foreign-workers' visa, does Rule 3.3(b) require the attorney to disclose the underlying misconduct to the federal agency that granted the visa if the client declines to do so?

OPINION

<u>The New York Rules of Professional Conduct Apply</u>

6. The inquiry concerns conduct before a federal agency with its own rules of professional

conduct. *See* 8 C.F.R. § 1003.102. The choice-of-law provisions in Rule 8.5 of the New York Rules of Professional Conduct (the "Rules") distinguish between an attorney's "conduct in connection with a proceeding in a court," Rule 8.5(b)(1), and "any other conduct," Rule 8.5(b)(2). For conduct in connection with a proceeding in a court, "the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise." Rule 8.5(b)(1). For all other conduct, if "the lawyer is licensed to practice only in this state" – as is the case here – "the rules to be applied shall be the rules of this state." Rule 8.5(b)(2).

7. Rule 8.5(b)(1) is limited to a proceeding before "a court"; the New York Appellate Division declined to adopt a proposed version of the rule that would have extended it to govern conduct in connection with proceedings before any "tribunal." *See* N.Y. State 968 ¶6 (2013) ("we do not believe we are free to read 'court' in Rule 8.5(b)(1) to include administrative tribunals"). We discuss below whether consideration of a visa application is a proceeding before a "tribunal," but it is clearly not a proceeding before a "court." *See* N.Y. State 750 (2001) (conduct of attorney "who represents individuals in immigration matters" is conduct that "does not involve court proceedings"). Accordingly, Rule 8.5(b)(2) governs, and the conduct is subject to the New York Rules of Professional Conduct.

8. Attorney conduct rules of the federal agencies involved, such as those cited above, could also be relevant to the inquirer's obligations. For example, the rules of professional conduct for practitioners before the Executive Office for Immigration Review provide: "If a practitioner has offered material evidence and comes to know of its falsity, the practitioner shall take appropriate remedial measures." 8 C.F.R § 1003.102(c); *see* 8 C.F.R § 1001.1(i) (defining "practice" to include acts of any person appearing in a case through "the preparation or filing of any brief or other document, paper, application, or petition on behalf of another person or client before or with DHS, or any immigration judge, or the Board"). However, our jurisdiction is limited to interpreting the New York Rules. We thus analyze the inquirer's ethical obligations under those Rules, but we express no view as to whether those obligations are modified or supplemented by ethics rules of the agencies in question.

Rule 3.3 Does Not Apply to False Statements in an Administrative Immigration Proceeding

9. Rule 3.3, which is entitled "Conduct Before a Tribunal," addresses a lawyer's obligations upon learning that evidence provided to a "tribunal" was false. In relevant part, Rule 3.3 provides:

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; . . . or
>
> (3) offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. …
>
> (b) A lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

10. Of central importance here, Rule 3.3(c) requires that a lawyer take such remedial measures "even if compliance requires disclosure of information otherwise protected by Rule 1.6." That is, the duty to remedy false statements of fact or law made to a tribunal, or false "evidence" presented to the tribunal, can override the lawyer's duty of confidentiality to a client.

11. In contrast to Rule 8.5(b)(1), which is limited to proceedings before a "court," Rule 3.3 applies

broadly to false statements made to any "tribunal." Rule 1.0(w) defines the term "tribunal" as follows:

> "Tribunal" denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter.

12. We have previously offered the following general criteria to help guide analysis of whether a particular administrative proceeding is sufficiently adjudicative to qualify as a "tribunal":

(a) Whether specific parties will be affected by the decision;

(b) Whether the parties have the opportunity to present evidence and cross examine other providers [of] evidence; and

(c) Whether the ultimate determination will be made by a person in a policy-making role or by an independent trier of fact, such as an administrative law judge.

N.Y. State 838 ¶12 (2010).

13. Based on the facts provided to us, we conclude that the immigration proceedings at issue here do not qualify as proceedings before a "tribunal." The ordinary meanings of the words "tribunal" and "adjudication" do not encompass an administrative procedure involving a unilateral application for a benefit. In ordinary parlance, the material presented with such an application, although attested to "under penalty of perjury," is not "evidence," and the answers to the questions in the required forms are not "legal argument," both terms used in the Rule's definition of "tribunal." There is also no adverse party, no oral proceeding and no cross-examination, which are hallmarks of many adjudicative proceedings. The consular officers and other government officials who consider these applications, while they presumably endeavor to administer the laws in an impartial and conscientious way, would not be called "triers of fact," another common feature of adjudicative proceedings to which we pointed in N.Y. State 838. We do not say that unilateral proceedings may never be adjudicative – the Rule expressly contemplates that an adjudication may result from a proceeding in which there is "presentation of evidence or legal argument by a [single] party." But the visa and work permit proceedings at issue here do not meet the test.

14. Two ABA ethics opinions have reached a similar conclusion with respect to administrative proceedings, although each involved proceedings that were more akin to investigations than those here. ABA 93-375 advised that a "routine bank examination" should not "be considered an 'adjudicative proceeding' so as to bring into play the lawyer's duty of candor under Rule 3.3(b)." The opinion relied on a prior ABA opinion that had held, for purposes of predecessor rules, that the Internal Revenue Service was "neither a true tribunal, nor even a quasi-judicial institution," at least when settling tax cases. ABA 314 (1965) (withdrawn on other grounds by ABA 85-352). Professor Wolfram concludes that a patent application, which is in some respects similar to the visa applications at issue here, is "a substantially nonadjudicatory proceeding" for purposes of a predecessor to Rule 3.3 in which "tribunal" was similarly defined to mean "all courts and all other adjudicatory bodies." Wolfram, *Modern Legal Ethics* § 12.6.5, at 673-74 (1986). He notes that "many administrative agencies can be regarded as 'adjudicatory bodies' only if the concept of adjudication is taken very far from its judicial roots" and that the "adjudicatory model" involves

"adversarial presentation of two points of view." *Id.*

15. We are aware of contrary authority. In particular, three courts have found applications for a visa or other government benefit to be proceedings before a "tribunal" for purposes of Rule 3.3, but none explained its analysis. In *In re Vohra*, 68 A.3d 766, 781-82 (D.C. 2013), the District of Columbia Court of Appeals affirmed a conclusion that the District of Columbia's version of Rule 3.3 applied to an attorney who forged his clients' signatures on a visa application, but the attorney did not dispute the finding that the Rule applied, and the violation of Rule 3.3 was one of approximately a dozen rules that the underlying disciplinary board had found to have been violated. In *Matter of Bihlmeyer*, 515 N.W.2d 236 (S.D. 1994), the South Dakota Supreme Court found that statements made to the Industrial Commissioner of Iowa regarding the attorney's fee arrangement in an application for a lump-sum payment on a worker's compensation claim were also "before a tribunal" for purposes of Rule 3.3, but the attorney there also had admitted that the rule applied. In *In re Disciplinary Proceeding Against Conteh*, 284 P.3d 724 (Wash. 2012), the Washington Supreme Court found a lawyer's misrepresentation of his own employment history in his asylum application to be a violation of Rule 3.3, but the opinion does not discuss whether the application was made before a "tribunal." *See also* Hazard & Hodes, *The Law of Lawyering* § 29.3, at 29-7 (2007 Supp.) (stating, without citing authority, "Rule 3.3(d) applies to such matters as applications before the Patent Office and other *ex parte* presentations").

16. In addition, while not determinative of the ethics question, we note that Congress, in creating the Bureau of Citizenship and Immigration Services, referred to one of the functions being transferred from the Immigration and Naturalization Service as "[a]djudications of immigrant visa petitions." 6 U.S.C. § 271(b)(1). This is in line with the Administrative Procedure Act, which treats "licensing" as "adjudications." 5. U.S.C. § 551(6), (7).

17. We are not persuaded by these authorities. We are concerned that interpreting the terms "tribunal" and "adjudicatory" to apply to unilateral applications for government benefits would lay a trap for the unwary, because such an application would, as Professor Wolfram notes, take the term "adjudicative" "very far from its judicial roots." Wolfram, *supra*, at 673-74. There may well be, as Professor Wolfram also notes, *id.*, policy reasons that duties of candor should apply with even more rigor in unilateral proceedings. But the drafters of the Rules were conscious of the very strong countervailing force of a lawyer's duty of confidentiality. The circumstances in which a lawyer is required to override that duty are thus very limited. Indeed, the New York Rules do not contain the one other rule in the ABA Model Rules in which the lawyer has an obligation to disclose false testimony, Rule 3.9. ABA Model Rule 3.9 states that a lawyer representing a client "before a legislative body or administrative agency in a nonadjudicative proceeding ... shall conform to the provisions of Rules 3.3(a) through (c) ...." New York's version of that Rule omits the duty to conform to Rule 3.3 and does not does not address the question of correcting false statements.

18. A Comment to the ABA version of Rule 3.9 also supports the conclusion that administrative proceedings such as those at issue here are not "adjudications" for purposes of ABA Model Rule 3.3 (which served as the model for New York's Rule 3.3). Comment [3] provides that Rule 3.9 applies only when the lawyer or the lawyer's client "is presenting evidence or argument. *It does not apply to representation of a client* in a negotiation or other bilateral transaction with a governmental agency or *in connection with an application for a license or other privilege* or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns." ABA Model Rule 3.9 Comment [3] (emphasis added). The Comment thus appears to consider "applications for a license or other privilege" not to involve the presentation of "evidence or argument." As quoted above, the definition of "tribunal" indicates that the presentation of "evidence or legal argument" is one of the required elements of adjudication.

Other Rules or Law May Permit, or Even Require, Disclosure of the False Statements

19. The inquirer asks only about the obligation to correct false statements under Rule 3.3. We note, however, that even if, as we conclude above, Rule 3.3 does not apply to *require* disclosure of the false statements here, Rule 1.6(b)(3) *permits* a lawyer to reveal confidential obligation to the extent that the lawyer reasonably believes necessary to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud.

The forms that we understand the inquirer submitted each require that the "preparer" of the form certify that the information contained in the forms is true to the best of the preparer's knowledge. If the inquirer reasonably believes that the relevant federal agencies are continuing to rely upon any certification that the inquirer may have made, or that such certification is being used to further a crime or fraud, then Rule 1.6 permits (but does not require) him to withdraw that certification.

20. In addition, Rule 1.6(b)(6) permits disclosure of confidential information to the extent a lawyer reasonably believes necessary "when permitted or required under these Rules or *to comply with other law* or court order." (Emphasis added.) Thus, for example, if the federal rule noted in paragraph 8 above (8 C.F.R § 1003.102(c)) requires that the inquirer take action to remedy the false statements here, and the inquirer reasonably concludes that disclosure of confidential information or withdrawal of his certification is necessary to comply with that obligation, then such disclosure or withdrawal would not violate Rule 1.6. However, any such "disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose." Rule 1.6, Cmt. [14].

21. Further, Rule 1.2(d) provides that a lawyer generally shall not assist a client "in conduct that the lawyer knows is illegal or fraudulent," and Rule 4.1 provides that a lawyer, in representing a client, "shall not knowingly make a false statement of fact or law to a third person." A comment notes that "[s]ometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like." Rule 4.1, Cmt. [3]. We do not express any view on whether silence in the present circumstances could be deemed to be a continuing affirmative statement of fact such as to *require* correction. *Cf.* D.C. Ethics Op. 336 (2006) (opining that when incapacitated person gave false name and social security number, and court-appointed guardian used that information to obtain benefits and learned later that the information was false, withholding those facts in periodic reports to the court "would likely constitute a 'circumstance[] where the failure to make a disclosure is the equivalent of an affirmative misrepresentation'" for purposes of Rules 3.3 and 8.4).

CONCLUSION

22. The lawyer's conduct is subject to the New York Rules of Professional Conduct. The immigration proceedings at issue here do not constitute adjudicative proceedings before a "tribunal" so as to trigger the lawyer's obligations under Rule 3.3. The lawyer should consider, however, whether obligations may by imposed by other ethics rules including rules of the federal agencies involved.

(23-14)

[1]The ABA opinion predates the inclusion of the definition of "tribunal" in the ABA Model Rules, but the ABA committee viewed Rule 3.3 as applying to an "'adjudicative proceeding' before a 'tribunal,'" a view derived from the contrast to Rule 3.9, which applies to "nonadjudicative proceedings." The opinion thus predicted the definition of "tribunal" that was later adopted.

[2]The D.C. definition of "tribunal" is different from New York's, although the gist of the test appears to be similar. In place of the term "adjudicative capacity," the D.C. rule defines "tribunal" to be "a court, regulatory agency, commission, and any other body or individual authorized by law to render decisions of a *judicial or quasi-judicial nature*, based on information presented before it, regardless of the degree of formality or informality of the proceedings." *See* Report and Recommendation of Hearing Comm. No. 1, *In the Matter of Robert N. Vohra*, Bar Dkt. 324-06, at 42 n.6 (Aug. 9, 2011) (emphasis added).

[3]Issuance of a visa appears to be a form of "licensing," which is defined as, among other things, the grant of "an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission." 5 U.S.C. § 551(8)-(9).

NYSBA Opinion 1123 (5/15/17)

NEW YORK STATE BAR ASSOCIATION
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ETHICS OPINION 1123

New York State Bar Association
Committee on Professional Ethics

Opinion 1123 (5/15/17)

Topic: False evidence; remedial measures

Digest: A divorce lawyer who learns that a client omitted a material asset in a sworn Statement of Net Worth has a duty to take reasonable remedial measures that are available, even after the conclusion of the proceeding. What measures are reasonable will depend on the facts and circumstances. They will begin with remonstrating with the former client to correct the Statement. If the client refuses, they may include withdrawing the lawyer's certification of the incomplete statement and withdrawing the statement. Disclosure of client confidences is required only "if necessary."

Rules: 1.0(i) & (k), 1.6(b), 3.3(a), (b) & (c)

FACTS

1. After a divorce case resulted in a decree of divorce and property distribution, the inquiring lawyer's client revealed the existence of an asset that was omitted from the client's sworn Statement of Net Worth ("SNW"). The omitted asset was legally required to be included in the SNW and was subject to equitable distribution in the divorce. The client now wishes to use the omitted asset to pay off other obligations under the judgment of divorce. The value of the omitted asset is material to the size of the estate.

QUESTION

2. When a lawyer who represented one of the parties in a divorce action learns, post-judgment, that the lawyer's client omitted an asset from the mandatory Statement of Net Worth, is the lawyer ethically obligated or permitted to reveal the omission?

OPINION

Offering Material Evidence that is False

3. We begin with Rule 3.3(a)(3), which provides, in relevant part:

> If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. [Emphasis added.]

The language of the rule raises at least five subordinate questions: Was the SNW "evidence"? Was it "material"? Was it "false"? Does the inquirer now "know" of its falsity? What "remedial measures" are necessary?

4. The SNW plays a central role in a divorce case. Section 236 of the N.Y. Domestic Relations Law ("DRL") provides for compulsory disclosure by both parties to the divorce of their respective financial states and prohibits the concealment of any property, if demanded by the other party. DRL § 236 also requires that a completed SNW be sworn before a notary under penalty of perjury. The court relies on the SNW in determining the equitable distribution of assets and liabilities, and in awarding maintenance. Thus, we believe the SNW is "evidence" and that the omission of an asset renders the SNW "false." Further, the inquiry states that the inquirer has knowledge of the omission. See Rule 1.0(k) (defining "knows" and "knowledge").

5. The question of whether evidence is "material" can be a more complicated question of law and fact. Although the term "material" or its variants is used as an adjective or adverb more than 200 times in the Rules and their Comments, it is not defined there. Black's Law Dictionary defines "material evidence" as evidence that "goes to the substantial matters in dispute, or has a legitimate and effective influence or bearing on the decision in the case." In a useful discussion of Rule 3.3, the New York City Bar Committee on Professional Ethics explained the importance of the materiality standard:

> Rather than imposing a duty to remedy every possible falsity that might later be discovered after the close of a proceeding, Rule 3.3(a)(3) imposes a duty to act only when evidence that was "material" to the underlying proceeding is later discovered to be false. Determining whether the evidence is material is fact specific, depending on the factors relevant to the ruling in the particular matter, and particularly whether the evidence is of a kind that could have changed the result.

N.Y. City 2013-2.

6. We agree that evidence is material if it could have materially changed the result in the matter – i.e. it has a consequence and is not merely an inconsequential omission. Here, evidence is material if it would have materially changed the equitable distribution of property, which will depend on the value of the asset that was not disclosed. This is a factual question that is beyond our jurisdiction to determine. However, for purposes of the remainder of this opinion, we will assume that the value of the asset is material.

7. Rule 3.3(b) may also apply here. It states, in part, that a lawyer who represents a client before a tribunal and who knows that a person has engaged in criminal or fraudulent conduct related to the proceeding "shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Rule 1.0(i) defines "fraud" as denoting conduct that is "fraudulent under the substantive or procedural law of the applicable jurisdiction or has a purpose to deceive," unless it lacks an element of scienter or a knowing failure to correct misrepresentations that can be reasonably expected to induce detrimental reliance by another. If the inquirer concludes that the client's omission was knowingly made with a purpose to deceive, Rule 3.3(b) would also be implicated.

Duty to Take Remedial Measures

8. As noted above, under Rule 3.3(a)(3), if the lawyer or the lawyer's client has offered material evidence and the lawyer comes to know of its falsity, the lawyer must take "reasonable remedial measures, including, if necessary, disclosure to the tribunal." Similarly, Rule 3.3(b) requires a lawyer who knows that a client has engaged in fraudulent conduct relating to a proceeding before a tribunal to take "reasonable remedial measures, including, if necessary, disclosure to the tribunal."

9. The rule does not contain a time limitation on the lawyer's duty to take remedial measures. In this respect, it differs from Rule 3.3(c) of the ABA Model Rules of Professional Conduct, which states "The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding . . . ." (Emphasis added.) New York omits the phrase "continue to the conclusion of the proceeding," and does not specify any other time limit. Since the marital proceeding here has concluded, it is important to determine whether New York's omission of the phrase "continue to the conclusion of the proceeding" is significant.

10. In N.Y. State 837 (2010), we concluded that the difference between the NY version of Rule 3.3 and the ABA version of the same rule is significant:

> The New York State Bar Association recommended that New York Rule 3.3(c) track ABA Model Rule 3.3(c), and thus include the proviso that "[t]he duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding . . . . But the State Bar's proposal was not embodied in New York Rule 3.3(c) as adopted by the Appellate Divisions. Therefore, the duration of counsel's obligation under New York Rule 3.3(c) as adopted may continue even after the conclusion of the proceeding in which the false material was used. [Emphasis added.]

Consequently, the fact that the divorce case here has concluded does not, by itself, terminate the lawyer's obligation of remediation.

11. How long does the obligation to remediate endure? We said in Opinion 837:

> [T]he endpoint of the obligation . . . cannot sensibly or logically be viewed as extending beyond the point at which remedial measures are available, since a disclosure which exposes the client to jeopardy without serving any remedial purpose is not authorized under Rule 3.3. See N.Y. State 831, n.4 (2009).

See also N.Y. State 980 (2013) (a lawyer who learned in a prior proceeding that a then-client imparted material and false information about the client's finances to the tribunal has a duty to take reasonable remedial reassures that may still be available, including, if necessary, disclosure to the tribunal); N.Y. City 2013-2 ("because the rule only requires an attorney to take reasonable remedial measures, the duties imposed by Rule 3.3(a)(3) should end when a reasonable 'remedial' measure is no longer available"). Cf. N.Y. State 781 (2004) (matrimonial lawyer who learns that a financial statement submitted by the lawyer to family court omitted material information and perpetrated a fraud on the tribunal must call upon client to rectify and, if client refuses, lawyer must withdraw the financial statement).

12. N.Y. City 2013-2 concludes that Rule 3.3(a)(3) imposes a duty to take remedial action either before the tribunal to which the false evidence was presented, or before a tribunal that could review the decision of the tribunal to which the false evidence was submitted, as long as

the tribunal is in a position to consider the new evidence and provide a basis for reopening the matter and/or amending, modifying or vacating the prior judgment. See also N.Y. City 2013-2, note 8 (discussing the bases for reopening a judgment under CPLR 5015(a)).

13. It is not uncommon to re-open divorce decrees due to changed circumstances. Consequently, if it is still possible here to remediate the omission, the lawyer must pursue remediation.

14. What action does remediation require? Comment [10] to Rule 3.3 sets out the contours of that obligation.

> The advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation . . . .

15. In N.Y. State 837 (2010) we discussed the concept under Rule 3.3(a) and (b) that disclosure is required only "if necessary." Counsel's knowledge came from the client, constituted confidential information under Rule 1.6, and did not fall within any of the exceptions contained in Rule 1.6(b). Consequently, we stated that, if disclosure was not "necessary" under Rule 3.3, it would not be permitted under Rule 1.6. Rather, we said, "if there are any reasonable remedial measures short of disclosure, that course must be taken." Id. at ¶ 19. Moreover, we noted that, in the criminal sphere, Rule 3.3's mandate to disclose may be limited or prohibited by the Fifth Amendment (self-incrimination) and/or the Sixth Amendment (ineffective assistance of counsel) to the U.S. Constitution.

16. Here, counsel's knowledge of the falsity of the SNW also comes from the client. It may be confidential because it is protected by the attorney-client privilege or because its disclosure is likely to be embarrassing or detrimental to the client. What information is protected by the attorney-client privilege and whether any exceptions to the privilege apply are questions of law that are beyond the jurisdiction of this Committee. See, e.g. the discussion of continuing crimes in Rule 1.6, Cmt. [6D].

17. Because the proceeding has ended, the lawyer's withdrawal from the representation will not remediate the false evidence. Therefore, the lawyer's duty to remediate begins with remonstrating with the client to amend the SNW to disclose the unreported asset. Moreover, the lawyer should inform the client that, if the client does not voluntarily correct the false SNW, the lawyer will be required to take reasonable remedial measures.

18. If the client refuses, we believe that, consistent with N.Y. State 837, there are measures short of disclosure that may achieve remediation. For example, if the lawyer has certified the client's SNW or has referred to it in court proceedings, and the lawyer believes the SNW was materially inaccurate and is still be relied upon by the client's spouse or by the tribunal, Rule 1.6 (b)(3) would allow the lawyer to withdraw the certification:

> A lawyer may reveal . . . confidential information to the extent the lawyer reasonably believes necessary . . . to withdraw a written or oral . . . representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the . . . representation was based on materially inaccurate information or is being used to further a crime or fraud.

Because withdrawing the certification or representation is likely to trigger follow-up action by the tribunal or by the former spouse, it is likely to satisfy the "reasonable remedial measure" requirement of Rule 3.3(a)(3) and (b). It could also result in another exception to confidentiality under Rule 1.6(b)(6), which is disclosure to comply with a court order.

19. Similarly, the lawyer might withdraw the SNW or state that it should not be relied upon, which also should lead the court or former spouse to request further explanation. See N.Y. State 781 (2004) (where divorce proceeding apparently had not yet ended, withdrawing a false financial statement would be sufficient under the Code predecessor to Rule 3.3).

20. Because identification of remedial measures depends on the facts and circumstances of the case, we cannot set out a definitive roadmap in this opinion. We believe the inquirer is in the best position to determine what steps are "reasonable" and "necessary."

CONCLUSION

21. A divorce lawyer who learns that a client omitted a material asset in a sworn Statement of Net Worth has a duty to take reasonable remedial measures that are available, even after the conclusion of the proceeding. What measures are reasonable will depend on the facts and

circumstances. They will begin with remonstrating with the former client to correct the Statement. If the client refuses, they may include withdrawing the lawyer's certification of the incomplete statement and withdrawing the statement. Disclosure of client confidences is required only "if necessary."

(4-17)

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Association of the Bar of the CNY - Opinion 1123 (5/15/17)

Association of the Bar of the City of New York, Formal Opinion 2013-2

Formal Opinion 2013-2: Lawyer's obligation to take action if, after the conclusion of a proceeding, the lawyer comes to know that material evidence offered by the lawyer, the lawyer's client or a witness called by the lawyer during the proceeding was false

May 30, 2013

TOPIC: A lawyer's obligation to take action if, after the conclusion of a proceeding, the lawyer comes to know that material evidence offered by the lawyer, the lawyer's client or a witness called by the lawyer during the proceeding was false.

DIGEST: When counsel learns that material evidence offered by the lawyer, the lawyer's client or a witness called by a lawyer during a now-concluded civil or criminal proceeding was false, whether intentionally or due to mistake, the lawyer is obligated, under Rule 3.3(a)(3), to take "reasonable remedial measures," which includes disclosing the false evidence to the tribunal to which the evidence was presented as long as it is still possible to reopen the proceeding based on this disclosure, or disclosing the false evidence to opposing counsel where another tribunal could amend, modify or vacate the prior judgment.

RULES: 1.6, 3.3

QUESTION:

If a lawyer, a lawyer's client or a witness called by the lawyer offered material, false evidence in a proceeding before a tribunal, and the lawyer comes to know of the falsity after the proceeding has concluded, is the lawyer obligated to take action and, if so, what action must the lawyer take?

OPINION

Rule 1.6 of the New York Rules of Professional Conduct (the "Rules"), with limited specified exceptions, prohibits a lawyer from revealing "confidential information," which the rule defines as "information gained during or relating to the representation of a client, whatever its source" that is protected by the attorney client privilege, or that is likely to embarrass or harm the client if disclosed, or that

the client has asked to be kept confidential. Rule 3.3(a)(3) creates a disclosure obligation: "If a lawyer, a lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." (Emphasis added.)[1] Rule 3.3(c) makes clear that this obligation trumps a lawyer's duty of confidentiality. Specifically, Rule 3.3(c) states that the remedial obligation in Rule 3.3(a) applies "even if compliance requires disclosure of information otherwise protected by Rule 1.6." To "know" of the falsity of proffered evidence, the lawyer must have "actual knowledge of the fact in question," but such knowledge "may be inferred from circumstances." Rule 1.0(k).

Rather than imposing a duty to remedy every possible falsity that might later be discovered after the close of a proceeding, Rule 3.3(a)(3) imposes a duty to act only when evidence that was "material" to the underlying proceeding is later discovered to be false. Determining whether the evidence is material is fact specific, depending on the factors relevant to the ruling in the particular matter, and particularly whether the evidence is of a kind that could have changed the result. If the false evidence is material, it makes no difference if the falsity was intentional or inadvertent – in either instance, the lawyer who discovers the falsity has a duty to act under the Rule.

Rule 3.3 represents a significant change from the predecessor rule in the Code of Professional Responsibility, which provided that the lawyer was required to "reveal the fraud to the ... tribunal, except when the information is protected as a confidence or secret."[2] Before April 1, 2009, when New York adopted the Model Rules format and amended a number of its rules, a lawyer's obligation to make disclosure to the tribunal was subordinate to the lawyer's duty of confidentiality to the client. Since April 1, 2009, when the courts promulgated Rule 3.3(c), under certain narrow circumstances the lawyer's duty to protect the integrity of the adjudicative process trumps the lawyer's duties of confidentiality and loyalty to the client. Indeed, Rule 1.1(c)(2) acknowledges that a lawyer has a duty not to harm the client "except as permitted or required by these Rules," and Rule 1.6(b)(6) expressly allows a lawyer to reveal confidential information 'when permitted or required under these Rules or to comply with other law or court order."

Moreover, unlike in other jurisdictions, Rule 3.3 is the only mandatory exception in New York to the obligation of confidentiality contained in Rule 1.6.[3] As the unique nature of Rule 3.3 suggests, the obligation to take reasonable remedial measures is premised on "the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence." Rule 3.3, cmt. [5] (emphasis added.) This

exception to the lawyers' obligation of confidentiality, which is one of a lawyer's bedrock obligations, is intended to protect the integrity of the adjudicative process. Significantly, the adjudicative process is not limited to proceedings before courts. Instead, Rule 1.0(w) defines a "tribunal" as including not only courts, but also arbitral panels, and legislative, administrative and other bodies acting in an adjudicative capacity. Indeed, the adjudicative process includes proceedings before the tribunals listed in Rule 1.0(w) as well as ancillary proceedings conducted pursuant to the tribunal's adjudicative authority, such as depositions. Rule 3.3, cmt. [1]. The obligation to make disclosure set forth in Rule 3.3, therefore, applies across a broad spectrum of settings and should be parsed carefully.

Finally, Rule 3.3 is silent on when the obligation to take remedial action ends. ABA Model Rule 3.3(c) states that the obligation to take remedial action required by Rule 3.3(a)(3) only continues "to the conclusion of the proceeding,"[4] but that phrase is absent from New York's formulation. Although the rules of professional conduct for lawyers that have been adopted in most states include the ABA endpoint language in their version of Rule 3.3, a few (Florida, Illinois and Texas[5]) explicitly extend the obligation beyond the conclusion of a proceeding. Only Virginia and Wisconsin have, like New York, adopted versions of Rule 3.3 that are silent on whether the obligation survives beyond the proceeding.[6]

Analysis

1. How Long Does the Obligation Under Rule 3.3(a)(3) Last?

As a preliminary matter, we conclude that the obligations under Rule 3.3(a)(3) survive the "conclusion of a proceeding" where the false evidence was presented. ABA Rule 3.3, cmt. [13] clarifies that the phrase "conclusion of a proceeding" means "when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed." We believe that the courts' rejection of an explicit statement that the obligation ends when the proceeding ends, makes this evident. The State Bar ethics committee has reached the same conclusion. *See* N.Y. State 831 n. 4(2009) (obligation continues "for as long as the effect of the fraudulent conduct on the proceeding can be remedied, which may extend beyond the end of the proceeding – but not forever.") and N.Y. State 837 at ¶16 (2010) ("the endpoint of the obligation nevertheless cannot sensibly or logically be viewed as extending beyond the point at which remedial measures are available, since a disclosure which exposes the client to jeopardy without serving any remedial purpose is not authorized under Rule 3.3."). We agree with the State Bar and conclude that the obligations under Rule 3.3 do not continue forever. Instead,

because the rule only requires an attorney to take reasonable remedial measures, the duties imposed by Rule 3.3(a)(3) should end when a reasonable "remedial" measure is no longer available.

To determine when "reasonable remedial measures" are no longer available, and thus to determine when the obligation under Rule 3.3 ends, we begin with the purpose of Rule 3.3(a)(3). The rule is intended to protect the integrity of the adjudicative process by preventing the trier of fact from being misled by false evidence. Because of the limited purpose of the rule, we believe that for a measure to be remedial, it must have a reasonable prospect of protecting the integrity of the adjudicative process. Rule 3.3(a)(3) thus does not impose a duty of disclosure unless at the time of disclosure: (1) it is still possible to make disclosure of the new evidence either to the tribunal to which the false evidence was presented, or to a tribunal that did or could review the decisions of the tribunal to which the false evidence was submitted,[7] and (2) the tribunal is still in a position to consider the new evidence and provide a basis for reopening the matter and/or amending, modifying or vacating the prior judgment. As we note in the footnote below,[8] a thorough understanding of the law and related court procedures is paramount in determining the availability of a reasonable remedial measure. Action that either cannot result or is highly unlikely to result in at least the amendment, modification or vacatur of the judgment in question cannot be said to be "remedial" in the sense intended by Rule 3.3(a)(3). It would not be remedial because disclosure will not correct the threat to the adjudicative process caused by the false evidence. Merely compromising or improving the reputation of a party or witness does not directly address the process itself, which the rule is designed to protect. Thus, the obligations of a lawyer under Rule 3.3 end only when it is no longer possible for the tribunal to which the evidence was presented to reopen the proceedings based on the new evidence, and it is no longer possible for another tribunal to amend, modify or vacate the final judgment based on the new evidence.

2. What Measures Should a Lawyer Take Upon Discovering that Material False Evidence was Presented?

We now turn to specific measures that a lawyer should consider upon discovering that false material evidence was presented by the lawyer, the lawyer's client, or the lawyer's witness, at a proceeding in which the lawyer was involved. Before making any disclosure pursuant to Rule 3.3(a)(3), the lawyer should first remonstrate with the client and seek the client's cooperation in making a disclosure that will correct the record. *See* Rule 3.3, cmt. [10] (upon learning of the falsity of material evidence, the "proper course is to remonstrate with the client confidentially, advise the client

of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action.").

Disclosure to the tribunal under Rule 3.3(a)(3) is only appropriate "if necessary." *See* N.Y. State 837 at ¶20 (2010) (affirming lawyer's withdrawal of false evidence where practical so that explicit disclosure is not necessary). Once a proceeding is concluded, it is too late for an attorney to withdraw the material evidence or make clear that the evidence is not being relied upon. In other contexts, such as in criminal matters, once a proceeding has concluded, the tribunal that entered the final judgment may be powerless to take action, although another tribunal may have the power to amend, modify or vacate the judgment. Further, although disclosure may have grave adverse consequences for the client (in some instances including prosecution for perjury), the alternative – for the lawyer to become a willing participant in "deceiving the court [and] thereby subverting the truth-finding process" – is untenable. *See* Rule 3.3, cmt. [11]. Accordingly, disclosure to the tribunal is the ultimate step that the rule requires an attorney to take, but must be narrowly-tailored to limit the disclosure to that information "reasonably necessary to remedy" the fraud on the tribunal created by the tribunal's reliance on false evidence. Rule 3.3, cmt. [10].

If the client will not cooperate in making the remedial disclosure, or the client cannot be located despite the lawyer's reasonable efforts, then the lawyer should make the disclosure based upon the following guidance.

In cases where a proceeding is concluded and the original tribunal is empowered by law, under defined circumstances, to consider new evidence and reopen a matter after the proceedings have concluded, the only reasonable remedial measure that will comply with Rule 3.3(a)(3) may be disclosure to the tribunal to which the false evidence originally was submitted originally that the evidence was false. Disclosure should be made simultaneously to opposing counsel, but disclosure to opposing counsel will not, by itself, be considered a reasonable remedial measure unless it remedies the threat to the integrity of the adjudicative process. Cf. Texas Ethics Opinion 482 (1994) (disclosure to opposing parties impermissible unless necessary to prevent a client's proposed criminal or fraudulent act). In some instances, however, disclosure to opposing counsel will be a reasonable remedial measure if, for example, the fraud on the tribunal can be corrected by opposing counsel's agreement to vacate the judgment.

Where the original tribunal is not empowered to consider the new evidence and modify, amend or vacate the prior judgment, but a different tribunal can consider the new evidence and modify, amend or vacate the prior judgment, the attorney may disclose the false evidence to the opposing counsel in the original proceeding, or if opposing counsel no longer represents the opposing party and there is no successor counsel, to the opposing party, and this disclosure will constitute a reasonable remedial measure. The attorney who learns of the false evidence is not usually required to start a new proceeding before a new tribunal. Rather, the opposing counsel or party to whom disclosure is made should determine whether it is appropriate to commence a new proceeding based on the new information.

The obligation to take "reasonable" measures may require more than just appearing before the tribunal to make the disclosure or submitting a letter to the tribunal. In certain instances, upon discovering that evidence offered in a proceeding was false, fulfilling the lawyer's duty under Rule 3.3 may require the lawyer to locate and review old case files, locate and communicate with a former client, and draft submissions to a tribunal making disclosure that certain evidence was false. The amount of work required to fulfill the obligation under Rule 3.3(a)(3) should be that which is considered reasonable in the circumstances. The amount of work involved in fulfilling the 3.3 obligation should neither force the lawyer into insolvency or jeopardize the lawyer's ability to continue to diligently and competently perform legal services on behalf of the lawyer's other clients. *See* Rules 1.1, 1.3.

Conclusion

When a lawyer discovers after the close of a proceeding that material evidence offered by the lawyer, the lawyer's client or witness called by the lawyer during the underlying civil or criminal proceeding was false, the lawyer must comply with Rule 3.3(a)(3). If it is still possible to amend, modify or vacate the prior judgment, then compliance with Rule 3.3(a)(3) requires disclosure of the false evidence to the tribunal, to opposing counsel, or to the opposing party if opposing counsel is no longer practicing law. If it is still possible to reopen the proceeding based on this disclosure, then the lawyer must disclose to the tribunal to which the evidence was presented that the specified evidence was false. If it is no longer possible to reopen the proceeding but another tribunal could amend, modify or vacate the prior judgment, then the lawyer must disclose the falsity to the opposing counsel, or the opposing party if opposing counsel no longer represents the opposing party and there is no successor counsel.

1 "A lawyer's duty to take reasonable remedial measures . . . does not apply to another lawyer who is retained to represent a person in an investigation or proceeding concerning that person's conduct in the prior proceeding." Rule 3.3, cmt. [12A]. Although Comment [12A] expressly refers only to Rule 3.3(b), we believe it is equally applicable to Rule 3.3(a)(3).

2 DR 7-102(B)(1) (emphasis added). The Code defined what is now referred to as "confidential information" as "confidences and secrets," which in turn were defined in DR 4-101(A) in terms generally parallel to the definition of "confidential information" in Rule 1.6(a).

3 Rule 1.6 allows that under certain circumstances confidentiality may be breached without the client's consent, but the exceptions contained in Rule 1.6 are permissive, not mandatory. By comparison, Arizona, Connecticut, Florida, New Jersey, Texas, and Vermont require disclosure of information necessary to prevent the client from committing a criminal act that will result in death or substantial bodily harm; Illinois, Iowa, and North Dakota require disclosure to prevent death or substantial bodily harm; Hawaii requires disclosure where the client has used the lawyer's service to further a crime or fraud; and Virginia requires disclosure of a client's intent to commit a crime.

4 ABA Model Rule 3.3, cmt. [13] notes that "[a] practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed."

5 Florida Rule 4-3.3(d) (duties "continue beyond the conclusion of the proceeding"); Illinois Rule 3.3(b) (duties are "continuing duties"); Texas Rule 3.03 (duties "continue until remedial legal measures are no longer reasonably possible").

6 Virginia Opinion 1777 (2003) concluded that Virginia's rule did not apply if a lawyer learned material information after the representation was concluded. Virginia Opinion 1777 (2003). Wisconsin Opinion E-94-1 concluded that

the duty ceases when disclosure "would no longer be useful to the tribunal" and that the question of whether relief would be available from a court's judgment or order under state law is a factor in that determination.

7 Rule 1.0(w) defines "tribunal" to include an "administrative body or other body acting in an adjudicative capacity." Given the broad definition of "tribunal," Rule 3.3 may apply where the only reasonable remedial measure available for a conviction obtained bead on the presentation of false evidence is a gubernatorial pardon or similar executive action.

8 Although we lack jurisdiction to interpret matters of law, we think it useful to discuss briefly some of the statutes and court rules a lawyer should consider to determine if a remedial measure is still possible under Rule 3.3. NY CPLR 5015(a)(2), in relevant part, states that a court may vacate a judgment or order on the basis of "newly-discovered evidence." In *390 West End Assocs. v Baron*, 274 AD 2d 330, 333 (1st Dep't 2000), the court held that (with one exception not relevant here) there is no time limit for filing a motion under CPLR 5015. The standard applied for newly-discovered evidence has been whether evidence "is material, not merely cumulative, not of a kind as would merely impeach an adverse witness's credibility," and that it would "probably have changed the result and ... could not have been previously discovered by the exercise of due diligence." *Prote Contracting Co., Inc. v Bd. of Educ. of the City of N.Y.*, 230 A.D.2d 32, 39 (1st Dep't 1997). NY CPLR 5015(a)(3) allows a court to open a judgment based on "fraud, misrepresentation, or other misconduct of an adverse party," so long as the motion is made within a reasonable period of time, *see Mark v. H.F. Lenfest*, 80 A.D.3d 426 (1st Dep't 2011), and the fraud, misrepresentation or misconduct is committed by "an adverse party," not a third person or co-party. In federal court, a party may seek relief from a judgment on the ground of newly discovered evidence under Fed. R. Civ. P. 59(a) if a motion is filed within 28 days from the entry of judgment, or under Rule 60(b)(2) if the evidence comes to light after the expiration of the 28-day period but within one year of the judgment. Rule 60(b)(3) explains that a motion to set aside a judgment due to fraud, misrepresentation, or misconduct by an opposing party must be made within a reasonable time and not more than a year after judgment. Rule 60(d)(3) imposes no time limit on a party's ability to vacate a judgment for fraud on the court, but the fraud must "seriously" impact the integrity of the adjudicative process. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944).

A party seeking federal habeas relief for a sentence imposed under federal law may move "to vacate, set aside or correct the sentence" within 1-year from the latest of the date on which: (1) the conviction becomes final; (2) the impediment to making a

motion created by an unlawful government action is removed; (3) the right asserted was originally recognized by the Supreme Court if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or (4) on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence. 28 U.S. C. § 2255 (a,f). Further, a successive motion must be certified as provided in § 2244 to contain newly discovered evidence or a new rule of constitutional law as described in 28 U.S.C. § 2255 (h). For a party seeking federal habeas relief from a state court decision, 28 U.S.C. § 2244(d)(1) provides that a "1-year period of limitation shall . . . run from the latest of . . . (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence."

- Author(s): Professional Ethics Committee

COSAC Proposed Amendments to RPC 1.6, 3.3, 3.4 and 3.6

(7/19/18)

Rule 3.3
Conduct Before a Tribunal

Rule 3.3(a)(3) and Rule 3.3(b) both obligate lawyers, in specified narrow circumstances, to reveal information to remedy misconduct by a client or other person, even if the revelation would otherwise be prohibited by Rule 1.6. If a lawyer comes to know that the client or another witness called by the lawyer "has offered material evidence" and "the lawyer comes to know of its falsity," *see* Rule 3.3(a)(3), or if a lawyer who represents a client before a tribunal "knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding," *see* Rule 3.3(b), then the lawyer "shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal," *see* Rule 3.3(a) and (b). Disclosure to the tribunal is a momentous step, fraught with serious consequences for both lawyer and client, and even less drastic remedial measures can telegraph problems with a case. Therefore, it is important for lawyers to know when the duty to make disclosure or take other remedial measures ends.

ABA Model Rule 3.3(c) addresses the end point by providing that the duties in paragraphs (a) and (b) "continue to the conclusion of the proceeding." COSAC recommended that language to the Courts in 2008, but the Courts declined to adopt that recommendation, and did not substitute any alternative end point. Thus, New York Rule 3.3 does not specify when a lawyer's duty to take reasonable remedial measures under Rules 3.3(a) and 3.3(b) terminates. Rather, New York Rule 3.3(c) says only that the duties stated in paragraphs (a) and (b) of Rule 3.3 "apply even if compliance requires disclosure of information otherwise protected by Rule 1.6" (New York's basic confidentiality rule).

Various New York ethics opinions have attempted to interpret Rule 3.3 to articulate a workable and practical time limit under Rule 3.3(c). These opinions have done so by limiting the phrase "remedial measures" to situations where disclosure or other measures will actually remedy the problem of false evidence. In N.Y. State 831 n.4 (2009), for example, the Committee said:

> We believe the obligation extends for as long as the effect of the fraudulent conduct on the proceeding can be remedied, which may extend beyond the end of the proceeding — but not forever. If disclosure could not remedy the effect of the conduct on the proceeding, we do not believe the Rule 3.3 disclosure duty applies.

N.Y. State 837 (2010) revisited this issue and said:

> 16. ... [T]he duration of counsel's obligation under New York Rule 3.3(c) as adopted may continue even after the conclusion of the proceeding in which the false material was used. ... *[T]he endpoint of the obligation nevertheless cannot sensibly or logically be viewed as extending beyond the point at which remedial measures are available*, since a disclosure which exposes the client to jeopardy without serving any remedial purpose is not authorized under Rule 3.3. [Emphasis added; citations omitted.]

N.Y. City 2013-2 (2013) reached a similar conclusion, saying:

> [T]he obligations under Rule 3.3(a)(3) survive the "conclusion of a proceeding" where the false evidence was presented. ABA Rule 3.3, cmt. [13] clarifies that the phrase "conclusion of a proceeding" means "when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed." We believe that the courts' rejection of an explicit statement that the obligation ends when the proceeding ends, makes this evident.

N.Y. City 2013-2 thus concluded that Rule 3.3(c) requires a lawyer to disclose false evidence (i) to the tribunal to which the evidence was presented "as long as it is still possible to reopen the proceeding based on this disclosure," or (ii) "to opposing counsel where another tribunal could amend, modify or vacate the prior judgment."

COSAC believes that these tests inject too much uncertainty into determining whether disclosing false testimony to a tribunal or to opposing counsel, or taking other remedial measures, is still required after the conclusion of a proceeding. For the same reason, COSAC rejected the Texas version of Rule 3.3(c), which provides that a lawyer's duties continue until remedial legal measures are "no longer reasonably possible." *See* Texas Rule 3.03(c) ("The duties stated in paragraphs (a) and (b) continue until remedial legal measures are no longer reasonably possible"). Comment [14] to Texas Rule 3.04 elaborates on this test by saying: "The time limit on the obligation to rectify the presentation of false testimony or other evidence varies from case to case but continues as long as there is a reasonable possibility of taking corrective legal actions before a tribunal."

In COSAC's view, Rule 3.3(c) should articulate a bright line to mark the end point of the duty to take remedial measures under Rule 3.3(a) and (b). The certainty of a bright line is necessary both (i) to protect clients against belated accusations of perjury that may have no appreciable effect beyond damaging a client's reputation, and (ii) to protect lawyers against discipline for failing to attempt remedial measures when a lawyer believes in good faith that remedial measures are no longer possible. COSAC therefore recommends that New York amend Rule 3.3(c) to match ABA Model Rule 3.3(c), which ends the lawyer's obligation upon the "conclusion of the proceeding." On balance, COSAC believes this bright line termination of the duty – at the conclusion of the proceeding – is preferable to New York's current open-ended formulation, and is preferable to alternative formulations based on when remedial measures are no longer possible.

COSAC recognizes that, under the proposed formulation, some fraud on tribunals may go unremedied because the false evidence or other impropriety will not be discovered until after the conclusion of a proceeding. New York has a long tradition of a strong duty of confidentiality. Indeed, DR 7-102(B) in the old New York Code of Professional Responsibility did not ordinarily allow disclosure even to remedy a client's fraud on a court if the information to be disclosed was protected as a confidence or secret.[1] New York did not appear to suffer from frequent unremedied fraud on tribunals under the Code. Nevertheless, COSAC is separately considering whether Rule 1.6 should include a discretionary exception to the duty of confidentiality that would permit (but not require) a lawyer to disclose confidential information to the extent the lawyer reasonably believes necessary to remedy a fraud on a tribunal or a wrongful conviction based upon such a fraud.

In any event, COSAC believes that a lawyer who has offered false evidence will most often come to know of its falsity per Rule 3.3(a)(3) before the conclusion of the proceeding (perhaps when an opposing party's cross-examination exposes the false evidence). Likewise, COSAC believes that a lawyer usually will learn before the conclusion of a proceeding that a person has engaged in criminal or fraudulent conduct related to the proceeding. Although no empirical evidence is available on these points, COSAC believes that the potential damage to confidentiality by *requiring* disclosure (or other remedial measures) after the conclusion of a proceeding outweighs the potential gain to the system of justice by retaining New York's current version of Rule 3.3(c). Trust is the fundamental bedrock of a strong attorney-client relationship, and the broader the exceptions to the duty of confidentiality, the more difficult it will be for attorneys to gain and maintain the trust of their clients.

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[1] DR 7-102(B) provided as follows:

> B. A lawyer who receives information clearly establishing that:
>
> 1. The *client* has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer *shall reveal the fraud* to the affected person or tribunal, *except when the information is protected as a confidence or secret.*
>
> 2. A person *other than the client* has perpetrated a fraud upon a tribunal *shall reveal the fraud* to the tribunal. [Emphasis added.]

Thus, although there are arguments that requiring a lawyer to take remedial measures beyond the conclusion of the proceeding furthers the interests of justice, COSAC believes that adopting the ABA version of Rule 3.3(c) and the related Comments strikes a better balance and will provide needed clarity and certainty in this important area. In reviewing the Rules of Professional Conduct adopted by other states, COSAC noted that only three other states (Florida, Texas, and Wisconsin) require remedial measures after the close of proceedings. In contrast, more than thirty jurisdictions terminate Rule 3.3 remedial duties under Rule 3.3(a) and (b) at the conclusion of the proceeding, in line with ABA Model Rule 3.3(c) – *see https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_3.authcheckdam.pdf* or *https://bit.ly/2kfYBpx* .

Accordingly, COSAC recommends amending Rule 3.3(c) as follows:

> (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

COSAC also recommends adopting ABA Comment [13] as new Comment [13] to New York Rule 3.3, with revisions to refer not only to "when a final judgment in the proceeding has been affirmed on appeal," as in the ABA Comment, but also more broadly to "when a final judgment or order in the proceeding has been entered after appeal." Thus, new Comment [13] would explain the time limit in Rule 3.3(c) as follows:

> [13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment or order in the proceeding has been entered after appeal or the time for review has passed.

(Existing New York Comment [13] to Rule 3.3, which is on a different topic and has no equivalent in the ABA Model Rules, would be renumbered as New York Comment [13B]. That renumbering would maintain consistency with ABA numbering and would continue New York's convention of using capital letters to mark Comments adopted by New York but not by the ABA.)

Plenary Three:
Candor Before the Tribunal

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THE REQUIREMENT OF CANDOR, AND OTHER LIMITATIONS ON THE DUTY OF CONFIDENTIALITY, UNDER THE NEW YORK RULES OF PROFESSIONAL CONDUCT

I. BACKGROUND

The Rules of Professional Conduct ("Rules") were implemented in New York in 2009. These Rules were the culmination of a comprehensive review of New York's Code of Professional Responsibility ("Code") which began in 2003. These Rules are significant both for some of the changes that were made to the prior Code as well as for some of the changes that were not made.

The first professional conduct rules for lawyers were adopted in Alabama in 1887. These rules provided the foundation for the American Bar Association's ("ABA") initial Canons of Ethics adopted in 1908. In 1969, the ABA issued the Model Code of Professional Responsibility ("Model Code"), providing more detailed guidance to lawyers. By the early 1970's, virtually every state had adopted the Model Code, albeit sometimes with variations, with New York's Code adoption effective January 1, 1970.

In 1983 the ABA moved away from the Model Code and adopted the Model Rules of Professional Conduct ("Model Rules"), reflecting both significant substantive and format changes. New York was poised to be one of the first states to adopt the new Model Rules when they were narrowly voted down by the New York State Bar Association's House of Delegates. As of 2008, 47 states and the District of Columbia had adopted the Model Rules, although sometimes with variations, with California, Maine, and New York as the only holdouts.

In 2002, as a result of "Ethics 2000," the ABA published significant modifications to the Model Rules. Again, while a number of states adopted many of those changes, New York did not.

While there had been modifications to New York's Code over the years, with the most significant coming in 1990, 1999, and with the addition of a comprehensive set of advertising guidelines in 2007, the basic format and many of the substantive provisions of the original Code remained in place, until 2009.

In 2003, the New York State Bar Association empaneled the Committee on Standards of Attorney Conduct (COSAC) to look at a substantial reworking of the Code, both from a substantive and a formatting perspective, to determine whether it could be brought more into line with the Model Rules and the rest of the country. The Committee completed its work in 2005 and throughout much of 2006 and 2007 COSAC presented its recommendations to the Bar Association's House of Delegates for review. Ultimately these proposals were endorsed by the House and submitted to the Appellate Divisions with the recommendation that they be adopted as the Courts' rules.

The former Code consisted of Disciplinary Rules (DRs) and Ethical Considerations (ECs). The DRs were mandatory standards of conduct which existed as court rules (found in 22 NYCRR Part 1200 and jointly adopted by the four Appellate Divisions), while the ECs were aspirational

standards established by the Bar Association. The submission to the Appellate Divisions included both new Rules to replace the DRs, and supporting and explanatory Comments to take the place of the ECs. The Bar Association recommended that the Courts adopt both.

On December 17, 2008, the Courts announced adoption of new "Rules of Professional Conduct" based (mostly) upon the Bar Association's recommendations. While the Courts' version reflects the formatting changes proposed by the Bar Association and many of the substantive changes, it does not reflect all of the proposed changes. And unfortunately, the Courts did not explain (and still have not explained) why some changes were adopted and some were not, so lawyers are left to guess as to the Courts' thinking. For example, the Courts completely ignored the Bar Association's recommendation to include provisions dealing with multijurisdictional practice. (This was actually the second time in the past few years that the Courts refused to entertain such a recommendation from the Bar Association. The Courts just recently adopted MJP rules, see Part 523 of the Rules of the Court of Appeals.)

In addition, the Courts neither adopted nor even commented on the supplementary Comments proposed by the Bar Association, leaving them for the Bar Association to separately implement as "non-mandatory" guidance, in the same vein as the prior ECs.

The Rules have undergone some modifications since 2009 and the latest version can be found on the New York State Bar Association's website, www.nysba.org, under "Resources on Professional Standards for Lawyers."

The focus of this paper is on exploring the balance between a lawyer's obligation to maintain client confidentiality and the duty of candor owed to a tribunal and/or third parties under these the Rules of Professional Conduct. One of the hallmarks of New York's former Code was the primacy afforded to client confidentiality, calling for its preservation in almost all circumstances. That, however, is no longer the case in a number of contexts under the Rules.

II. THE SCOPE OF THE CONFIDENTIALITY OBLIGATION

The Rules' basic confidentiality provision is found in Rule 1.6. Subsection (a) states that "[a] lawyer shall not knowingly *reveal* confidential information . . . or *use* such information to the *disadvantage* of a client or for the *advantage* of the lawyer or a third person." (emphasis added). This prohibition against revealing or using confidential information is subject to a number of exceptions, including when the client gives informed consent, as defined in Rule 1.0(j), or when the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community. Rule 1.6(b) also gives the lawyer the *discretion* to reveal or use confidential information to the extent that the lawyer reasonably believes necessary:

1. to prevent reasonably certain death or substantial bodily harm;

2. to prevent the client from committing a crime;

3. to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by

a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;

4. to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;

5. (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or (ii) to establish or collect a fee; or

6. when permitted or required under these Rules or to comply with other law or court order.

A. "Confidential Information"

Previously, the Code's DR 4-101 defined two types of information ("confidences" and "secrets") which a lawyer was required to keep confidential. A "confidence" referred to information protected by the attorney-client privilege, while a "secret" referred to other information "gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." Rule 1.6 abandons the dichotomy between "confidence" and "secret" and instead defines a single concept of "confidential information." Confidential information consists of information *gained during or relating to* the representation of a client, whatever its source, that is:

1. protected by the attorney-client privilege,

2. likely to be embarrassing or detrimental to the client if disclosed, or

3. information that the client has requested be kept confidential.

See also New York State Bar Association Formal Opinion 831 (2009). In substance, the core definition of "confidential information" mirrors that found in DR 4-101. Rule 1.6, however, then narrows this definition of confidential information by expressly excluding two categories of information: (1) "a lawyer's legal knowledge or legal research" and (2) "information that is generally known in the local community or in the trade, field or profession to which the information relates." As to the latter exclusion, the comments note that "information is not 'generally known' simply because it is in the public domain or available in a public file." Rule 1.6, Comment [4A]; *see* NYSBA Formal Opinion 991, at ¶¶ 19 and 20 (The "legislative history" of Comment 4[A] "strongly suggests that information in the public domain may be protected as confidential information even if the information is not "difficult or expensive to discover" and even if it could be obtained without "great effort.... In our view, information is generally known only if it is known to a sizeable percentage of people in "the local community or in the trade, field or profession to which the information relates."); cf. ABA Formal Opinion 479 (2017) (interpreting similar language under the Model Rules to refer to information that is "widely recognized by members of the public...or in the [client's] industry, profession or trade"). No similar explicit exclusions existed under the former Code.

In addition, the scope of confidentiality obligation under New York's Rules differs from that under the Model Rules. Model Rule 1.6 prohibits revealing (with no explicit mention of "using") information "relating to the representation of the client," unless falling within an exception, without regard to whether that information is protected by the attorney-client privilege, its disclosure would be embarrassing or detrimental to that client, or the client has asked that it be kept confidential.

B. "Gained During or Relating to the Representation"

Disciplinary Rule 4-101 made information confidential if it was "gained in the professional relationship." Rule 1.6 replaces the phrase "gained *in* the professional relationship" with the phrase "gained *during or relating to* the representation of a client, whatever its source." This change adds clarity to the definition, including making it explicit that confidential information includes information obtained from the client as well as information obtained from other sources, such as witnesses or documents. Comment [4A] to Rule 1.6 defines "relates to" as "has any possible relevance to the representation or is received because of the representation." (An earlier version of Comment [4A] provided that "gained during or relating to the representation" does *not* include information gained before a representation begins or after it ends," but that portion of Comment [4A] has since been deleted.)

The New York State Bar Association's Committee on Professional Ethics, in Formal Opinions 866 (2011) and 998 (2014), indicated that the "during" requirement is not purely temporal but rather "implies some connection between the lawyer's activities on behalf of the client and the lawyer's acquisition of the information."

The basic confidentiality rule applicable to prospective clients and former clients differs somewhat from the foregoing rule which is applicable to current clients. With respect to prospective clients, Rule 1.18(b) provides, "[e]ven when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client." With respect to former clients, Rule 1.9(c) states that a lawyer who has formerly represented a client in a matter shall not thereafter:

1. *use* confidential information of the former client protected by Rule 1.6 to the *disadvantage* of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or

2. *reveal* confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

Thus, while the Rules protect the confidential information of current clients from disclosure, use to the disadvantage of the client *or* use to the advantage of the lawyer or a third person, a prospective or former client's confidential information is, at least literally, only protected from disclosure and use that is disadvantageous to the former/prospective client. No explicit restriction is placed on the use of this information for the benefit of the lawyer or another person.

III. PERMISSIVE DISCLOSURE TO PREVENT REASONABLY CERTAIN DEATH/SUBSTANTIAL BODILY HARM

In one of the more significant changes from the former Code, Rule 1.6 now *permits* a lawyer to reveal or use confidential information to prevent reasonably certain death or substantial bodily harm to anyone. According to Comment [6B], this new exception to the duty of confidentiality "recognizes the overriding value of life and physical integrity."

While this provision has been a part of the Model Rules for years, a comparable exception has never been a part of the New York Code. The closest equivalent was DR 4-101(C)(3), which permitted a lawyer to reveal the "intention of a client to commit a crime and the information necessary to prevent the crime."[1] Rule 1.6(b)(1) is much broader in that it permits a lawyer to disclose confidential information to prevent reasonably certain death or substantial bodily harm, even if the client is not involved and even if the conduct in question is not criminal.

But even this new basis for permissive disclosure is very limited. As explained in Comment [6B], harm is "reasonably certain" to occur only if (1) "it will be suffered imminently" or (2) if "there is a present and substantial risk that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat." The Comments provide a number of illustrations to demonstrate the scope of this provision. For example, if a client has accidentally discharged toxic waste into a town's water supply, the lawyer *may* reveal confidential information to protect against harm if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease *and* the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims. Another example given is that the wrongful execution of a person is a life-threatening and imminent harm permitting disclosure *but only* once the person has been convicted and sentenced to death.

In contrast, if the harm the lawyer seeks to protect against is merely a "remote possibility" or carries a "small statistical likelihood that something is expected to cause some injuries to unspecified persons over a period of years," there is no present and substantial risk justifying disclosure. Furthermore, the fact that an event will cause property damage but is unlikely to cause substantial bodily harm does not provide a basis for disclosure. *Id.*

The ABA's Model Rules are broader still in that they permit disclosure to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from a client's commission of a crime or fraud, if the client has used the lawyer's services to further that crime or fraud. ABA Model Rule 1.6(b)(2). New York's Rule 1.6 does not similarly permit disclosure "merely" to protect property or financial interests (unless the "future crime" exception otherwise applies).

In the case of permissive disclosure to prevent reasonably certain death or substantial bodily harm or to prevent the client from committing a crime, Comment [6A] sets out a number of factors for the lawyer to consider in deciding whether to disclose or use confidential information:

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[1] The New York Rules also explicitly continue this Code exception allowing a lawyer to reveal confidential information to the extent that the lawyer reasonably believes necessary "to prevent the client from committing a crime." Rule 1.6(b)(2).

1. the seriousness of the potential injury to others if the prospective harm or crime occurs;

2. the likelihood that it will occur and its imminence;

3. the apparent absence of any other feasible way to prevent the potential injury;

4. the extent to which the client may be using the lawyer's services in bringing about the harm or crime;

5. the circumstances under which the lawyer acquired the information of the client's intent or prospective course of action; and

6. any other aggravating or extenuating circumstances.[2]

Comment [6A] further cautions that disclosure adverse to the client's interest should only be the minimum disclosure the lawyer reasonably believes is necessary to prevent the threatened harm or crime. Where disclosure would be permitted under Rule 1.6, the lawyer's initial duty, where practicable, is to remonstrate with the client. Only when the lawyer reasonably believes that that client nonetheless will carry out the threatened harm or crime may the lawyer disclose confidential information.

A. Related Impact – Representing an Organization

Former DR 5-109 set out an attorney's special obligations when representing an organizational client. One of those obligations was that when the lawyer knew that someone associated with the organization was engaged in action, intended to act, or refused to act in a matter related to that representation which involved a violation of a legal obligation to the organization or a violation of law and it was likely to result in substantial injury to the organization, the lawyer had to proceed as was "reasonably necessary in the best interests of organization." This explicitly included, in appropriate circumstances, reporting that action or inaction up the organizational chain of command, even to the Board of Directors if necessary. Under the Code, reporting outside the organization was not permitted unless the report fell within the "future crimes" exception of DR 4-101's confidentiality requirements.

Rule 1.13 follows DR 5-109. However, because Rule 1.6 (the analog to DR 4-101) permits the disclosure or use of confidential information to prevent reasonably certain death or substantial bodily harm (as well as to prevent the client from committing a future crime), the effect of this scheme is to now allow reporting outside the organization to prevent reasonably certain death or substantial bodily harm.

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[2] These same factors apply in the context of a lawyer withdrawing a representation based on materially inaccurate information or being used to further a crime or fraud, which is discussed in Part IV, *infra*.

IV. PERMISSIVE DISCLOSURE TO WITHDRAW THE LAWYER'S PRIOR REPRESENTATIONS BASED ON MATERIALLY INACCURATE INFORMATION OR WHEN BEING USED TO FURTHER A CRIME OR FRAUD

Rule 1.6(b)(3) contains another exception to the lawyer's duty to maintain confidentiality. It permits the lawyer to reveal or use confidential information to the extent that the lawyer reasonably believes necessary "to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person (including opposing counsel), where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud." The scope of Rule 1.6(b)(3) is not limited to representations made to a tribunal. Thus, for example, the Rule applies with equal force in a transactional setting.

Disciplinary Rule 4-101(C)(5), which was the predecessor to Rule 1.6(b)(3), provided that "[a] lawyer may reveal . . . [c]onfidences or secrets *to the extent implicit* in withdrawing a written or oral opinion or representation previously given by the lawyer and believed by the lawyer still to be relied upon by a third person where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud." While on its face, Rule 1.6(b)(3) may appear broader than its predecessor, in that it explicitly permits revealing or using confidential information "to withdraw" a representation (without expressly limiting that disclosure to only that "implicit" in the withdrawal itself), Comment [6E] to Rule 1.6 states that "[p]aragraph (b)(3) permits the lawyer to give *only the limited notice that is implicit in withdrawing an opinion or representation*, which may have the collateral effect of inferentially revealing confidential information." Comment [6E] goes on to explain that the "lawyer's withdrawal of the tainted opinion or representation allows the lawyer to prevent further harm to third persons and to protect the lawyer's own interest when the client has abused the professional relationship, *but paragraph (b)(3) does not permit explicit disclosure of the client's past acts*" unless such disclosure is permitted to prevent the client from committing a crime. Based on these Comments, Rule 1.6(b)(3) apparently is no broader than the former DR 4-101(C)(5). That is, in most circumstances, only a bare-bones withdrawal of an opinion or representation will be permitted. For example, "I hereby withdraw my opinion letter relating to this matter dated November 20, 2009" is permitted even though by doing so, the lawyer is implicitly revealing that the opinion was "based on materially inaccurate information or is being used to further a crime or fraud." The lawyer may not, however, disclose that that is in fact the case, nor may the lawyer disclose the underlying facts or how the lawyer came to know that the opinion was based on materially inaccurate information or is being used to further a crime or fraud.

V. PERMISSIVE DISCLOSURE TO PREVENT A CLIENT FROM COMMITTING A FUTURE CRIME

Rule 1.6(b)(2) contains another exception to the duty of confidentiality, which allows the lawyer to "reveal or use confidential information to the extent that the lawyer reasonably believes necessary . . . to prevent the client from committing a crime." This provision is nearly identical to its counterpart in the former Code, DR 4-101(C)(3), which permitted the lawyer to reveal the "intention of a client to commit a crime and the information necessary to prevent the crime." This exception is limited to instances in which the client's conduct, and not someone else's, will constitute an actual crime. In exercising her discretion under Rule 1.6(b)(2), a lawyer should consider those factors set out in Comment [6A] to Rule 1.6, as discussed in Part III above.

While this Rule generally does not permit disclosure of past crimes, the Rules recognize that past conduct (*e.g.*, prior fraud) which has a continuing effect (*e.g.*, deceiving new victims), can constitute a continuing crime to which this disclosure rule applies. The Comments to Rule 1.6 state that a "lawyer whose services were involved in the criminal acts that constitute a continuing crime may reveal the client's refusal to bring an end to a continuing crime, even though that disclosure may also reveal the client's past wrongful acts." Rule 1.6, Comment [6D].

VI. REQUIRED DISCLOSURE IN THE FACE OF FALSE STATEMENTS/EVIDENCE BY A LAWYER, THE LAWYER'S CLIENT AND/OR THE LAWYER'S WITNESS TO A TRIBUNAL

Rule 3.3, regarding conduct before a tribunal, represents one of the most significant shifts between the former Code and the new Rules. Perhaps the most important part of Rule 3.3 concerns a lawyer's obligation if the lawyer learns that the lawyer's client, a witness called by that lawyer, or the lawyer himself has spoken or written a falsehood to a tribunal. Rule 3.3 states in pertinent part:

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; [or]
>
> (3) offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

A. "Tribunal"

Rule 1.0(w) provides that a "tribunal denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity." The definition goes on to provide that "[a] legislative body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter." Furthermore, Comment [1] to Rule 3.3 indicates that the Rule "also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition." This application of Rule 3.3 to discovery proceedings has been confirmed in several ethics opinions. *See* ABA Formal Opinion 93-376 (1993); New York County Bar Association Opinion 741 (2010); Association of the Bar of the City of New York, Formal Opinion 2013-2.

In NYSBA Formal Opinion 838 (2010), the Committee on Professional Ethics offered the following guidelines in analyzing whether a particular administrative proceeding is sufficiently adjudicatory to qualify as a tribunal:

> (a) are specific parties affected by the decision;
>
> (b) do the parties have the opportunity to present evidence, and cross examine other providers of evidence; and
>
> (c) will the ultimate determination be made by a person in a policy-making role or by an independent trier of fact, such as an administrative law judge.

In NYSBA Formal Opinion 1011 (2014), the Committee on Professional Ethics determined that the filing of employment based immigration visa petitions with the Department of Labor and related petitions with the Department of Homeland Security did not qualify as proceedings before a "tribunal." This determination was based on, among other things, the unilateral nature of these proceedings, and the absence of "legal argument," an adverse party, cross examination, and any "trier of fact." Similarly, in NYSBA Formal Opinion 1045 (2015), arising under a different context (the lawyer-witness provisions of Rule 3.7), the Committee concluded that an agency investigatory proceeding that could lead to either a decision not to pursue charges or a decision to pursue charges which would then result in an administrative hearing, was not itself a proceeding before a tribunal.

If a lawyer is not actually counsel appearing before the tribunal on behalf of a client, she has no obligation under Rule 3.3. NYSBA Formal Opinions 963 and 982.

B. "False" Statements/Evidence

Rule 3.3(a)(1) prohibits the lawyer from making a "false" statement to a tribunal or from failing to correct a "false" statement previously made by the lawyer.[3] Rule 3.3(a)(3) prohibits the offer or use of "false" evidence and requires the lawyer to take reasonable remedial measures if the lawyer, the lawyer's client or the lawyer's witness offers false material evidence. Much like its nearly identical counterpart in the ABA Model Rules, the term "false" is a critical but undefined term. Two very different meanings can be given to this term. The first is that evidence is "false" if it is objectively erroneous or untrue. The second is that evidence is "false" only if it is a deliberate falsehood known to be such by the person making the statement or offering the evidence. The Rule would apply quite differently under each variant of the term. If the former were the appropriate meaning, then the remedial measures of Rule 3.3 would be required even if the lawyer making the statement or the witness/client giving the testimony believed it to be true at the time it was made or offered. However, if the latter meaning were appropriate, the Rule's coverage would be far less expansive and essentially limited to cases where a lawyer discovered a client or witness engaged in deliberate perjury or fabricated exhibits for the lawyer to offer in court.

There are substantial indicators that the broader meaning of the term was intended for both the Model Rules and the New York Rules. First, both the Model Rules and the New York Rules, elsewhere, separately reference "fraudulent" conduct (*see*, *e.g.*, Rule 3.3(b)) and define "fraud" or "fraudulent conduct" as something that has a "purpose to deceive" and has an element of "scienter deceit, intent to mislead." Rule 1.0(i). On the other hand, as defined by Black's Law Dictionary, "false" simply means "untrue." Thus, the plain meaning of these terms suggests a different, and broad, meaning for "false." Second, if only deliberate falsehoods could invoke the duty to disclose or rectify under Rule 3.3(a)(3), that Rule would be superfluous because such conduct is already covered in Rule 3.3(b). Rule 3.3(b) states that "[a] lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures." Thus, a client's or a witness's deliberate falsehood would constitute criminal or fraudulent conduct which is treated in Rule 3.3(b). *See* New York State Bar Association Formal Opinion 837 (2010) (noting that while Rule 3.3(b) applies in the case of fraud, Rule 3.3(a) "requires a lawyer to remedy false evidence even if it was innocently offered."); Association of the Bar of the City of New York, Formal Opinion 2013-2 ("it makes no difference if the falsity was intentional or inadvertent").

In addition, the broader interpretation makes the most sense in light of the lawyer's duty in Rule 3.3(a)(1) to correct his or her own previous false statement. If "false" were to mean only deliberately false statements, it would not make much sense to separately prohibit both the making of such a statement and then the failure to correct that same misstatement. However, if "false" means inaccurate or untrue, then the duty to correct is more understandable (and significant).

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[3] Rule 4.1 also prohibits a lawyer from knowingly making a false statement of fact or law to anyone. Misrepresentations, for this purpose, can occur by "partially true but misleading statements or omissions that are the equivalent of affirmative false statements." *See* NY Rule 4.1, Comment [1]; *In Re Filosa*, 976 F. Supp. 2d 460 (S.D.N.Y. 2013).

Another clue comes from the original Comment to ABA Model Rule 3.3, in which the drafters discussed the duty to take remedial steps in cases of perjured testimony *or* false evidence, suggesting that the drafters recognized perjury and false evidence as two separate categories of evidence and meant the Rule to apply equally to both. Geoffrey C. Hazard, W. William Hodes, *The Law of Lawyering*, 29-20 (Aspen Publishers 2009).

The Restatement of the Law Governing Lawyers also resolves this question in favor of the broader reading. Restatement § 120(1)(c), much like the Model Rules and the New York Rules, provides that "[a] lawyer may not . . . offer testimony or other evidence as to an issue of fact known by the lawyer to be false" and, if the lawyer has offered evidence of a material issue of fact and comes to know of its falsity, the lawyer must take reasonable remedial measures, including disclosure. Comment d to §120 states:

> False testimony includes testimony that a lawyer knows to be false and testimony from a witness who the lawyer knows is only guessing or reciting what the witness had been instructed to say. . . . *[A]lthough a witness who testifies in good faith but contrary to fact lacks the mental state necessary for the crime of perjury, the rule of the Section nevertheless applies to a lawyer who knows that such testimony is false.* (emphasis added).

Thus, under the Restatement, "false" refers not only to deliberate falsehoods, but also to erroneous or untrue statements.

Case law and ethics opinions from other jurisdictions have interpreted similar language as encompassing the broader reading of the term "false" as well. *See, e.g., Morton Bldg., Inc. v. Redeeming Word of Life Church*, 835 So.2d 685, 691 (La. App. 1st Cir. 2002) (citing *Washington v. Lee Tractor Co, Inc.*, 526 So.2d 447, 449 (La. App. 5th Cir.), *writ denied*, 532 So.2d 131 (La. 1998)) ("[F]ailure to correct false evidence, even if originally offered in good faith, violates Rule 3.3 of the Rules of Professional Conduct."); Washington State Bar Opinion 1173 (1988) (if the proceeding was still pending, the lawyer would have had to disclose his client's mistaken, but not fraudulent, failure to provide certain dates and medical treatments in answers to interrogatories). *See also* Mehta, *What Remedial Measures Can A Lawyer Take to Correct False Statements Under New York's Ethical Rules?* 12th Annual AILA New York Chapter Immigration Law Symposium Handbook (2009 ed.); Hazard and Hodes, *The Law of Lawyering*, 29-20.

Finally, the broader reading is probably more consistent with Rule 3.3's underlying objective. As illustrated in the Comments to the Rule, the purpose of imposing the duty of candor toward the tribunal is to keep the tribunal from going astray when the lawyer is in a position to prevent it. *See* Rule 3.3, Comments [2] and [5]. Thus, only the knowledge of the lawyer and the actual incorrectness of the information should be relevant. If a lawyer knows her witness is mistaken, the lawyer should not allow the witness's mistake to lead the tribunal astray.

In sum, although the term "false" is not explicitly defined, it appears that the drafters of the New York Rules likely meant "false" to mean untrue, encompassing more than just deliberate falsehoods.

C. Materiality

While Rule 3.3(a)(1) and (3) prohibit a lawyer from making any false statement or offering/using any false evidence, those sections only require a lawyer to take affirmative corrective action in the event "material" false statements are made or material false evidence is offered. Determining whether this materiality threshold is met is fact specific, "depending on the factors relevant to the ruling in the particular matter, and particularly whether the evidence is of a kind that could have changed the result." Association of the Bar of the City of New York, Formal Opinion 2013-2. *See also* NYSBA Formal Opinions 837 and 732.

D. Lawyer's Duty to Correct His Own False Statements/Evidence

Rule 3.3(a)(1) reads: "[a] lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." The first clause of this rule imposes essentially the same obligation as its predecessor, DR 7-102(A)(5), requiring that a lawyer not knowingly make a false statement of law or fact. Its application is narrower, however, in that Rule 3.3(a) is limited to statements "to a tribunal." Disciplinary Rule 7-102(A)(5) was not limited to a tribunal setting. While Rule 4.1 more generally prohibits false statements of material facts to a third person, Rule 4.1 does not contain the "correction" provision of Rule 3.3(a)(1).

The second clause of Rule 3.3(a)(1) explicitly imposes a new duty. It requires the lawyer to affirmatively *correct* a false statement of material fact[4] or law previously made to the tribunal by the lawyer. This mandatory duty to correct a false statement made by the lawyer to a tribunal is not an entirely new concept, but it has not previously been explicit or quite this broad.

As previously discussed, DR 4-101(C)(5) had *permitted* a lawyer to withdraw a representation made by the lawyer where that representation was based on materially inaccurate information or was being used to further a crime or fraud, and that representation was believed to still be relied upon by third parties. In New York State Bar Formal Opinions 781 (2004) and 797 (2006), the Committee on Professional Ethics concluded that where the lawyer's representation is the product of a client's fraud upon a tribunal, then the combined effect of DR 7-102(B)(1) (which otherwise required the disclosure of the client's fraud upon the tribunal *unless* it constituted a confidence or secret) and DR 4-101(C)(5) (which *permitted* the lawyer to reveal confidences or secrets of the client to the extent implicit in withdrawing a previously given written or oral opinion or representation, provided it was still being relied upon by others) was to *require* withdrawal of the lawyer's representation. However, the obligation was simply to withdraw the lawyer's representation. Disclosure of client confidences and secrets beyond that implicit in the act of withdrawal were not permitted. Under Rule 3.3(a)(1), if the lawyer made a statement of material fact which is false (inaccurate), the obligation is not simply to "withdraw" it but rather to *correct* it, which may require the explicit disclosure of confidential information. *See* Simon, *Roy Simon on the New Rules – Part VII Rule 2.1 through Rule 3.3(a)(1)*, 4-5 (New York Professional Responsibility Report, September 2009).

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[4] While 3.3(a)(1) prohibits a lawyer from making any false statement of fact or law to a tribunal, it only imposes upon a lawyer an affirmative obligation to correct a "material" false statement.

In addition, this duty to correct under Rule 3.3(a)(1) applies even when no one is continuing to rely on the false statement.[5] *Compare* Rule 1.6(b)(3) (permitting a lawyer to "reveal or use confidential information to the extent that the lawyer reasonably believes necessary . . . to withdraw a written or oral opinion or representation previously given by the lawyer and *reasonably believed by the lawyer still to be relied upon by a third person*, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud."). (emphasis added).

Comment [3] to Rule 3.3 also recognizes that there "are circumstances where the failure to make a disclosure is the equivalent of an affirmative misrepresentation."

E. Lawyer's Duty In Light of False Evidence by the Lawyer's Client or Witness

Rule 3.3(a)(3) prohibits a lawyer from knowingly offering or using evidence that the lawyer knows to be false. In another of the more significant changes in the New York Rules, Rule 3.3(a)(3) goes on to require that if a lawyer's client or a witness called by the lawyer has offered *material* evidence and the lawyer comes to know of its falsity, the lawyer must take reasonable remedial measures, *including, if necessary, disclosure to the tribunal*. In other words, disclosure may be required to remedy false evidence by the lawyer's client or witness, as a last resort, even if the information to be disclosed is otherwise "protected" client confidential information.

As close as we came to this requirement under the former Code was DR 7-102(B)(1) which provided that if a lawyer received information clearly establishing that a client (but only a client), in the course of representation, had perpetrated fraud upon a person or tribunal, the lawyer was required to call upon the client to rectify it.[6] If the client refused or was unable to do so, then the lawyer might be required to withdraw from the representation pursuant to DR 2-110(B) if the lawyer could not continue without maintaining or advancing the earlier misrepresentation. Nassau County Bar Association Opinion 05-3 (2005). Disciplinary Rule 2-110(B) mandated withdrawal where the continued employment would result in violation of a disciplinary rule. A lawyer would have violated the disciplinary rules by maintaining or advancing the earlier misrepresentation because DR 1-102(A)(4) prohibited a lawyer from engaging in conduct that involved dishonesty, fraud, deceit, or misrepresentation and DR 7-102(A)(7) prohibited a lawyer from counseling or assisting a client in conduct that the lawyer knew to be illegal or fraudulent.

If the client refused or was unable to rectify the fraud, the lawyer was required under DR 7-102(B)(1) to reveal the fraud to the person or the tribunal, *except* to the extent that the information was protected as a client confidence or secret, in which case confidentiality was the order of the day. However, in most instances, this exception – disclosure unless the information was a client confidence or secret – swallowed the rule because this information was almost always protected as a confidence or secret.

For example, if a lawyer came to learn that a client had committed perjury (an obvious fraud upon the tribunal), that information was almost by definition a client confidence or secret which

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[5] *See* the discussion on the duration of the obligation to disclose under Rule 3.3 at Part VIII, *infra*.

[6] Disciplinary Rule 7-102(B)(1) was only triggered by a client fraud, but it could be a fraud upon either a tribunal or a third party.

could not be disclosed. *See* New York State Bar Association Formal Opinions 674 (1995) and 523 (1980); New York County Bar Association Opinion 706 (1995); Association of the Bar of the City of New York Opinion 1994-8 (1994). In such a case, and assuming the client did not rectify the perjury, the lawyer's choices were to nonetheless continue the representation without disclosure to the tribunal – but only if continued representation could be accomplished without reliance on that perjured testimony – or, in most cases, to withdraw from the representation. *See* New York County Bar Association Opinion 712 (1996); *People v. Andrades*, 4 N.Y.3d 355 (2005). Disclosure under the former Code was not permitted; the duty of confidentiality trumped the duty of candor to the court.

DR 7-102(B)(2) provided that if a lawyer learned that someone *other than a client* (*e.g.*, the lawyer's non-client witness) had perpetrated a fraud on the tribunal (but not on a third party), the lawyer should reveal the fraud. DR 7-102(B)(2) contained no explicit exception for protecting client confidences and secrets in that circumstance. However, in NYSBA Formal Opinion 523 (1980), the Committee on Professional Ethics held that the explicit exception to the disclosure obligation for client confidential information found in DR 7-102(B)(1) applied by implication in circumstances covered by DR 7-102(B)(2).

Marking a dramatic shift in this area, Rule 3.3(a)(3) now provides that if either a lawyer's client or a witness called by the lawyer has offered material evidence to a tribunal and the lawyer comes to know of its falsity, the lawyer must take reasonable remedial measures, including if necessary disclosure to the tribunal. There is no caveat for confidential information. In other words, the Rule may require disclosing client/witness falsity, as a last resort, even if that knowledge is otherwise protected as client confidential information. So Rule 3.3(a)(3) differs from DR 7-102(B) in that (1) Rule 3.3(a)(3) applies equally to the lawyer's client and witnesses (but not to others); (2) is triggered by false material evidence and not necessarily fraud; (3) does not extend to false statements (or frauds) to third parties; and (4) can ultimately require disclosure of even client confidential information.

As detailed in Comment [10] to Rule 3.3, the first remedial measure – calling upon the client to correct the false testimony – is the same as it was under DR 7-102(B)(1) and in the case of intentionally false testimony is not likely to be successful in many cases. *See also* NYSBA Formal Opinion 837 (must bring issue of false evidence to client's attention before taking unilateral action). If that course of action fails, the lawyer is required to take further remedial action. One possibility is to withdraw from the representation.[7] However, as Comment [10] explains, at times withdrawal is not permitted or will not undo the effect of the false evidence. On the latter point, at least one noted commentator has expressed the view that withdrawal in and of itself is not sufficient since the record is not corrected and the problem of the false evidence is simply transferred to another lawyer. Simon, *Roy Simon on the New Rules – Part VII Rule 3.3(a)(3) through Rule 3.3(d)*, 4-5 (New York Professional Responsibility Report, October 2009). *See also* New York County Bar Association Opinion 741; New York State Bar Association Form Opinion 837. Under the New York Rule, then, the lawyer must "make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal confidential information that otherwise would be protected by Rule

[7] Of course, even in a withdrawal from representation, a lawyer has to be careful about what information is communicated to the Court. See NYSBA 1057 (2015).

1.6." Rule 3.3, Comment [10]; *see also* Rule 3.3(c) ("The duties stated in paragraph (a) and (b) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6"); NYSBA Formal Opinion 837 (disclosure only required if "necessary" and if not necessary, disclosure is not permitted). Depending on the circumstances, however, full disclosure might not be required and something less, in the form of a "noisy withdrawal" of the false evidence, might be sufficient. NYSBA Formal Opinion 837; *see also* NYSBA Formal Opinions 980, 982 and 998 (even when disclosure of confidential information is permitted, that disclosure should be no broader than reasonably necessary to achieve that permissible end).[8]

While disclosure may have grave consequences for the client, "the alternative is for the lawyer to cooperate in deceiving the court, thereby subverting the truth-finding process, which the adversary system is designed to implement." Rule 3.3, Comment [11]. Thus, under the new Rule 3.3, the duty of candor toward the tribunal rises above the duty of confidentiality, in stark contrast to the Code.

Rule 3.3(a)(3) is broader than former DR 7-102(B)(1) and (2) not only because the exception for client confidences and secrets has been eliminated, but also because it is triggered by "false" material evidence and not just fraudulent conduct. Thus, for example, helpful but inaccurate testimony offered by the lawyer's witness must be remedied, even if that testimony was provided in good faith and was not fraudulent or perjured. Under DR 7-102(A)(4), a lawyer was precluded from using perjured or false evidence, but had no explicit duty to remedy the introduction of false evidence. Now that obligation exists.

On the other hand, Rule 3.3(a)(3) is limited to false statements by the lawyer's client or a witness called by the lawyer, and does not extend to false statements provided by the other side's witnesses. In other words, a lawyer is not required to disclose to the tribunal merely "false" information provided by opposing counsel, the adverse party, or its witnesses. However, under Rule 3.3(a)(3) (as was the case under DR 7-102(A)(4)), the lawyer may not "use" this false evidence (regardless of its source), which means that the lawyer cannot maintain or advance the falsity, including referencing the false but favorable evidence or otherwise using it to advance her client's cause.

The obligations of Rule 3.3(a)(3) are triggered by the lawyer's "knowledge" that evidence is false. The definition section of the Rules make it clear that the terms "knowingly," "known" and "know" require "actual knowledge," although it is recognized that knowledge can be inferred from the circumstances. Rule 1.0(k). New York County Bar Association Opinion 741 looks to *In re Doe*, 847 F.2d 57 (2d Cir. 1988) for guidance on this issue, indicating that while mere suspicion or belief is not adequate, "proof beyond a moral certainty" is not required either. *See also* NYSBA Formal Opinion 1034 (mere suspicion not enough to trigger disclosure obligation, but may be grounds for withdrawal from representation).

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[8] A lawyer confronted with this remedial obligation must also keep in mind CPLR § 4503(a)(1), the legislatively-enacted attorney-client privilege. The interplay between Rule 3.3 and CPLR § 4503 is not entirely clear. However, there is some commentary that suggests that the impact of CPLR § 4503 is to preclude the lawyer from testifying or otherwise presenting "evidence" to remedy false evidence under Rule 3.3 if not otherwise covered by an exception to the attorney-client privilege (*e.g.*, crime-fraud exception). Under this view, the privilege might not otherwise prevent a lawyer from providing remediation in a non-evidentiary way. *See* NYSBA Formal Opinions 837 and 980.

If a lawyer knows that a client or witness intends to offer false testimony, the lawyer may not offer that testimony or evidence. If a lawyer does not know that his client's or witness' testimony is false, he *may* nonetheless *refuse* to offer it if he "reasonably believes" it will be false.[9] However, "[a] lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact." Rule 3.3, Comment [8].

VII. DUTY TO DISCLOSE ADVERSE AUTHORITY

Pursuant to section 3.3(a)(2) of the Rules of Professional Conduct, attorneys cannot knowingly "fail to disclose to [a] tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." Unfortunately, the Rules of Professional Conduct do not explain when legal authority is controlling or directly adverse. It is important to remember that in New York, lower courts are bound to apply precedent from other departments when there is no contrary precedent established by its own department.[10] Accordingly, if an attorney is before a Supreme Court within the Fourth Department, and the Fourth Department has not ruled on a particular issue that he or she is briefing, the attorney cannot ignore an unfavorable decision from the First, Second or Third Departments because such a decision would be controlling on the Supreme Court in that instance.

Additionally, attorneys should not fail to cite adverse authority merely because they believe that it is distinguishable. The American Bar Association's Committee on Ethics and Professional Responsibility has stated that it is an attorney's duty to disclose a decision of a controlling court "which may be interpreted as adverse to his client's position."[11] While attorneys are required to disclose the adverse authority, they are free to challenge the reasoning of the decision, to distinguish it from the case at bar, or to present any other reason why it should not be followed. In a prior opinion, the Committee stated the test for determining whether disclosure is required as follows:

1. Is the decision one which the court should clearly consider in deciding the case?

2. Would a reasonable judge properly feel that a lawyer who advanced, as the law, a proposition adverse to the undisclosed decision was lacking in candor and fairness? And;

3. Might the judge consider himself or herself misled by an implied representation that the lawyer knew of no adverse authority?[12]

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[9] A lawyer may not refuse to offer his client's testimony in a criminal proceeding unless he knows it to be false. Even a reasonable belief that the client may lie in that setting does not override the client's constitutional right to be heard. *See* Rule 3.3(a)(3).

[10] *See Phelps v. Phelps*, 128 A.D.3d 1545, 1547 (4th Dep't 2015). Decisions and opinions referred to are attached as Exhibit 1.

[11] ABA Informal Opinion No. 84-1505 (1984).

[12] ABA Formal Opinion No. 280 (1949).

In one case, the New York County Supreme Court issued a warning to an attorney who made an assertion contrary to controlling adverse authority, even though the attorney did disclose that authority to the court. The judge warned the attorney that if he was seeking to protect his right to challenge that law on appeal, "it would be advisable for counsel to avoid such unqualified assertions . . . and expressly state that intention in setting forth their arguments against that authority, rather than risk any claims of unethical conduct."[13]

In most reported decisions in New York's state and federal courts, violations or possible violations of Rule 3.3(a)(2) have merely resulted in warnings to the attorneys; however it is possible that a violation can result in sanctions. A magistrate judge in the Western District of New York caught attorneys who advised a different court of a recent decision by the Second Circuit in one matter, but failed to advise the magistrate in a different matter where the recent decision was adverse to their position. In his decision, the magistrate judge ordered the attorneys to show cause as to why they should not be sanctioned pursuant to Rule 11 for their conduct.[14] Similarly, in Queens County Supreme Court, a judge ordered a hearing to determine whether sanctions were appropriate where an attorney failed to disclose adverse controlling authority, which the attorney was expressly aware of, to the Court. Clearly it is better to be safe than sorry as even a warning from a court would be extremely embarrassing; however sanctions remain a possibility for attorneys who fail to disclose adverse controlling authority.

VIII. DISCLOSURE IN THE FACE OF CRIMINAL OR FRAUDULENT CONDUCT BY ANY PERSON

Rule 3.3(b) provides that if a lawyer represents a client before a tribunal and that lawyer knows that *anyone* intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding, he must take reasonable remedial measures, including if necessary disclosure to the tribunal, even if this requires disclosure of information otherwise protected by Rule 1.6 as confidential information.

Rule 3.3(b) requires a lawyer to take reasonable remedial measures regarding the criminal or fraudulent conduct (including perjury) of *any* person. Unlike Rule 3.3(a)(3), it is not limited to conduct by the lawyer's client or witness, and extends to conduct of the other side. On the other hand, it is not triggered by "false evidence," but rather requires criminal or fraudulent conduct. Furthermore, as evidenced by the phrase "intends to engage, is engaging, or has engaged," Rule 3.3(b) covers past, present and future events. But like Rule 3.3(a)(3), once triggered, remedial action is required, including disclosure of confidential information if need be.

In this regard, the closest provision to Rule 3.3(b) in the former Code was DR 7-102(B)(2), which required the lawyer to reveal to the tribunal the fraud of a person, other than the client, committed upon the tribunal, subject to an implicit exception for client confidences and secrets. Rule 3.3(b) differs from DR 7-102(B)(2) in that it (1) applies to criminal or fraudulent conduct (not just fraud); (2) which relates to the proceeding (and not just fraud upon the tribunal); (3) which is occurring, has occurred or will occur in the future; (4) extends to client as well as non-

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[13] *Denehy v. Copperman*, Index No. 800349/11, 2013 N.Y. Misc. LEXIS 6099 at fn. 1 (Sup. Ct. N.Y. Cty. Dec. 12, 2013).

[14] *Felix v. Northstar Location Servs.*, 290 F.R.D. 397 (W.D.N.Y. 2013).

client conduct; and (5) can ultimately require the disclosure of even client confidential information.

Rule 3.3(b) actually goes beyond issues of client/witness perjury and false evidence and extends to any criminal or fraudulent conduct by any person related to a proceeding. Thus, for example, it extends to intimidating witnesses, bribing a witness or juror, illegal communications with a court officer, destroying or concealing documents, and failing to disclose information to the tribunal when required to do so. *See* Rule 3.3, Comment [12]. The duty to take remedial action, including disclosure, applies in these circumstances as well.

IX. DURATION OF THE OBLIGATION TO REMEDIATE

Both Model Rule 3.3 and the Bar Association's proposal to the Courts explicitly provided that the remediation (including disclosure) obligation "continue to the conclusion of the proceeding," defined by Comment [13] to mean "when a final judgment has been affirmed on appeal or the time for review has passed."[15] However, the final version of Rule 3.3 as adopted by the New York Courts contains no such temporal limitation. The Courts gave no indication as to whether this omission was intended to signal that the obligation to remediate continues forever. However, one possible limitation to the duration of a lawyer's remediation obligation may be found in the term "reasonable" as Rule 3.3 only requires the lawyer to take "reasonable remedial measures." Yet without further explanation, this ambiguous term offers little guidance.

The obligation to remedy false statements or criminal/fraudulent conduct related to a proceeding before a tribunal extends as long as the fraudulent conduct can be remedied, which may extend beyond the proceeding – but not forever. NYSBA Formal Opinions 831, 837 and 980; *see also* Association of the Bar of the City of New York Formal Opinion 2013-2 (obligation ends "only when it is no longer possible for the tribunal to which the evidence was presented to reopen the proceedings based on new evidence, and it is no longer possible for another tribunal to amend, modify or vacate the final judgment based on the new evidence").

X. REQUIRED DISCLOSURE IN THE CONTEXT OF EX PARTE PROCEEDINGS

Rule 3.3(d), governing a lawyer's conduct during ex parte proceedings, adds an entirely new obligation; it had no equivalent at all in the old Code. Rule 3.3(d) fills a void by explaining how a lawyer is to behave when appearing before a tribunal in a legitimate ex parte proceeding. It provides:

> In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

The policy behind the new provision is explained in Comment [14]. Typically in our adversary system an advocate has the limited responsibility of presenting one side of the matter to the tribunal since the opposing position will be presented by the adverse party. In an ex parte

[15] New York State Bar Association Proposed Rules of Professional Conduct 160 (Feb. 1, 2008) (available at www.nysba.org/proposedrulesofconduct020108).

proceeding, however, there may be no presentation by the opposing side. Nevertheless, the object of an ex parte proceeding is to yield a substantially just result. Because the judge must accord the opposing party, if absent, "just consideration," the lawyer for the represented party "has the correlative duty to make disclosures of material facts known to the lawyer that the lawyer reasonably believes are necessary to an informed decision." Rule 3.3, Comment [14].

Accordingly, a lawyer in an ex parte proceeding before a tribunal – whether before a court, an arbitrator, or a legislative or administrative agency acting in an adjudicative capacity – has the duty to present adverse facts favorable to the opposition. However, Rule 3.3(d) does not require the lawyer to "present" her adversary's case. For example, a lawyer does not have to draw inferences favorable to the adversary or present adverse facts in the most persuasive manner to persuade the court. Furthermore, Rule 3.3(d) only requires the lawyer to disclose adverse facts, not adverse law. A lawyer must only advise the tribunal about unfavorable cases if they are "controlling" pursuant to Rule 3.3(a)(2).

More importantly, the language of this portion of the Rule itself may be subject to the interpretation that it requires the lawyer to disclose all material facts, regardless of whether they constitute client confidential information. The mandatory words used in Rule 3.3(d) – "a lawyer *shall* inform the tribunal of *all* material facts" –suggests that the disclosure obligation is unconditional. *See* Jill M. Dennis, *The Model Rules and the Search for the Truth: The Origins and Applications of Model Rule 3.3(d)*, 8 Geo. J. Legal Ethics 157 (1994) (discussing ABA Model Rule 3.3(d)); *see also Restatement (Third) of the Law Governing Lawyers* §112, cmt. B(2000) ("To the extent the rule of this Section requires a lawyer to disclose confidential client information, disclosure is required by law…"). However, this Rule may not require the disclosure of privileged information. *See* n.7, *supra; Restatement (Third) of the Law Governing Lawyers* §112, cmt b; *compare* Texas Disciplinary Rules of Professional Conduct Rule 3.03(a)(3) ("A lawyer shall not knowingly . . . in an ex parte proceeding, fail to disclose to the tribunal an *unprivileged* fact which the lawyer reasonably believes should be known by that entity for it to make an informed decision.") (emphasis added). On the other hand, Rule 3.3 (c) expressly provides that the duty of candor found in 3.3(a) and 3.3(b) applies even if it requires disclosure of confidential information, but makes no mention of 3.3(d). Compare Florida Rule 4-3.3(d) (expressly extending the exception to client confidentiality to all provisions of Rule 4-3.3, including the ex parte communications provision). Final resolution of this issue will likely have to await the issuance of individual ethics opinions; however – given the straightforward requirement on the face of the Rule – lawyers should be cautious that the tradeoff for participation in an ex parte proceeding may be the sacrifice of client confidences.

XI. CANDOR IN INVESTIGATIONS

Issues of candor, in the sense of deceit and misrepresentation, often arise in the context of workplace investigations. Rule 8.4 provides:

> A lawyer or law firm shall not:
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> ***

> (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; [or]

From time to time, in assisting clients with investigations, it may be necessary to seek information through means other than overt interviews, and may even entail the use of outside private investigators. One common investigatory technique is pretexting – pretending to be someone you are not in order to secure that information. Pretexting may entail impersonating another, real individual, or it may involve pretending to be a fictional person. An example of the latter is the use of testers in employment or housing discrimination cases – someone creating and using an entirely false identity to assist in ferreting out discrimination. Both involve deceit and both implicate Rule 8.4 (c). Of course, pretexting can take a variety of forms in between.

Whether the pretexting is done directly by a lawyer or indirectly by a private investigator or staff member working under the lawyer's direction, the ethical issues generally are the same. While the Rules of Professional Conduct apply only to lawyers, Rule 8.4 (a) provides that a lawyer or law firm shall not "violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." In addition, Rule 5.3 (b) provides:

> A lawyer shall be responsible for conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer, if :
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> (1) the lawyer orders or directs the specific conduct, or with knowledge of the specific conduct, ratifies it; or
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> (2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the nonlawyer is employed or is a lawyer who has supervisory authority over the nonlawyer; and
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> (i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or
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> (ii) in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time the consequences of the conduct could have been avoided or mitigated.

Despite the unequivocal language of these ethics rules, the response of courts and disciplinary authorities to various forms of pretexting has been mixed, although pretexting in the extreme – impersonating another to obtain information about that other person – is likely to always be viewed as a violation.

There has been some recognition that pretexting in furtherance of some greater societal benefit, such as in the discrimination tester context, is permissible. Courts generally have recognized the value of testers in the fight against discrimination, providing some condonation for them. *See, e.g., Village of Bellwood v. Dewired*; 895 F.2d 1521 (7th Cir. 1990); *Lea v. Cone Mills Corp.*, 438 F.2d 86 (4th Cir. 1971). So have some bar authorities. For example, in Arizona Opinion No. 99-11 (1999), the Committee on the Rules of Professional Conduct of the State Bar of Arizona condoned use of the limited deceit associated with testers to "protect society from discrimination based upon disability, race, age, national origin, and gender." *See also*, Isbell and Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under the Model Rules of Professional Conduct*, 8 Georgetown Journal of Legal Ethics 791 (1995). A recent amendment to the rules of professional conduct in Oregon also explicitly permits such activity. *See* Oregon DR 1-102(D) ("[I]t shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these disciplinary rules. "Covert activity"...means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" maybe commenced by a lawyer or involve a lawyer as an advisor or supervisory only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.")

An "exception" to the general ethical prohibition against deceit also has been recognized by some authorities when the pretexting occurs in the context of law enforcement or other lawful governmental operations. *See, e.g.*, Utah Ethics Opinion 02-05 (2002) ("A governmental lawyer who participates in a lawful covert governmental operation that entails conduct employing dishonesty, fraud, misrepresentation or deceit for the purpose of gathering relevant information does not, without more, violate the Rules of Professional Conduct."); D.C. Bar Legal Ethics Comm., Op. 323 (2004) ("Lawyers employed by government agencies who act in a non - representational official capacity in a manner they reasonably believe to be authorized by law do not violation [the ethics rules] if, in the course of their employment, they make misrepresentations that are reasonably intended to further the conduct of their official duties."); *United States v. Parker*, 165 F. Supp. 2d 431 (W.D.N.Y. 2001) (same).

Some courts have gone further, permitting "incidental deceit" to promote more private interests. In *Gidatex v. Campaniello Imports, Ltd.*, 82 F. Supp. 2d 119 (S.D.N.Y. 1999), a trademark owner sent private investigators posing as customers to a retail store operated by the defendant to determine whether infringement was occurring. The investigators posed as "typical customers" and engaged the defendant's sales people in conversation regarding items sold by the defendant. The conversations were "typical" of the interaction between a customer and salesperson and, apparently, were not intended to trick any salespeople into making any specific admissions. In response to a claim that the plaintiff's lawyer's involvement in this activity violated the proscription against lawyer deceit, the court observed:

> As for DR 1-102 (A)(4)'s prohibition against attorney "misrepresentations,"[16] hiring investigators to pose as consumers is an accepted investigative technique, not a misrepresentation. The policy interests behind forbidding misrepresentations by attorneys are to protect parties from being tricked into making statements in the absence of their counsel and to protect clients from misrepresentations by their own attorneys. The presence of investigators posing as interior decorators did not cause the sales clerks to make any statements they otherwise would not have made. There is no evidence to indicate that the sales clerks were tricked or duped by the investigators' simple questions such as "is the quality the same?" or "so there is no place to get their furniture?"
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> * * * *
>
> These ethical rules should not govern situations where a party is legitimately investigating potential unfair business practices by use of an undercover posing as a member of the general public engaging in ordinary business transactions with the target. To prevent this use of investigators might permit targets to freely engage in unfair business practices which are harmful to both trademark owners and consumers in general. Furthermore, excluding evidence obtained by such investigators would not promote the purpose of the rule, namely preservation of the attorney/client privilege.

82 F.Supp.2d at 122.

In *Apple Corps. Ltd. v. International Collectors Soc.*, 15 F. Supp. 2d 456 (D.N.J. 1998), a lawyer for Apple had instructed her secretary, private investigators, and others to contact the defendant posing as interested customers in an effort to buy certain items that the defendant was not authorized to sell. In concluding that this conduct did not violate New Jersey's prohibition on deceit, the court held that "misrepresentations solely as to identify or purpose and solely for evidence gathering purposes," are not prohibited.[17] 15 F.Supp.2d at 475.

Relying explicitly on the decisions in *Gidatex* and *Apple*, the District Court for the Southern District of New York has concluded that

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[16] Like former Disciplinary Rule 1-102(A)(4), current Rule 8.4(c) states that a lawyer or law firm shall not "[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

[17] While understanding the court's conclusion in the context of these particular facts, it seems unlikely that the court truly intended this sweeping language to apply in all contexts. For example, it seems clear that it would be inappropriate for a lawyer, or his agent, to misrepresent an association with an adverse party for the purpose of inducing a recalcitrant witness to share information, even when doing so involved "merely" a misrepresentation as to identity and purpose. *See, e.g.*, Kansas Bar Association Opinion 94-15 (1995) (inappropriate for lawyer to have staff member contact third party posing as a "friend" of an adverse party for purpose of securing information from that person.)

> the prevailing understanding in the legal profession is that a public or private lawyer's use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed, especially where it would be difficult to discover the violations by other means.

Cartier v. Symbolix, Inc., 386 F. Supp. 2d 354, 362 (S.D.N.Y. 2005).

Notwithstanding these views, there are still other authorities which have been far more literal in their application of the deceit rules, even when the lawyer's conduct was arguably serving some greater societal good. For example, *In re Malone*, 105 A.D. 2d 455 (3d. Dept. 1984), involved an attorney serving as the Inspector General of the New York State Department of Correctional Services. In the course of an investigation into prisoner abuse, Malone took a "private statement" from a corrections officer who had witnessed such abuse. The statement was taken under oath and recorded. This private statement was taken the day before a number of officers, including this individual, were scheduled for formal investigatory interviews. In conjunction with the private statement, Malone instructed the corrections officer to give a false statement that next day (denying any knowledge of abuse), to protect the individual and avert suspicion from him as the informer. The individual did as instructed. In sustaining discipline subsequently imposed on Malone for his role in this ruse of the false second statement, the Appellate Division explicitly rejected the notion that the "ends" (protection of the informer) can justify the "means" (deceit).

A similar result was reached in *Matter of Mark Pautler*, 47 P.3d 1175 (Colo. 2002). Pautler was a Deputy District Attorney. He arrived at a particularly gruesome crime scene in which three women had been murdered with a wood splitting maul. While there, he learned that three other individuals had called the Sheriff's office with information about the murderer. One of those three was someone the murderer had kidnapped and attempted to kill. Eventually, the Sheriff and Pautler made phone contact with the murderer (who by that time had already confessed to the murders and threatened to kill again), although they did not know his location. The murderer made it clear that he would not surrender without legal representation. After a failed attempt to locate the murderer's requested lawyer, the Sheriff agreed with the murderer to locate a public defender. Instead, however, Pautler pretended to be a public defender and eventually secured the murderer's surrender to the Sheriff. The murderer was ultimately convicted and sentenced to death. Subsequently, misconduct charges were brought against Pautler for his deceitful conduct and his misrepresentations. Refusing to create an exception to Colorado's rules against attorney deception even in this context, the Supreme Court upheld Pautler's three month suspension (due to the mitigating circumstances involved, however, it stayed the suspension during a twelve month probation period). However, on September 28, 2017, the Colorado Supreme Court amended Rule 8.4 to include an exception allowing a lawyer to "advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities." *See* Colorado Rules of Prof. Cond., Rule 8.4(c).

Other courts also have been reluctant to create exceptions to the deceit rules. *See Sequa Corp. v. Lititech, Inc.*, 807 F.Supp. 653 (D. Colo. 1992) (recognizing, in context of surreptitious tape recordings, that attorney's interest in ferreting out misconduct does not justify deceptive practices); *In re the Complaint as to the Conduct of Daniel J. Gatti*, 8 P.3d 966 (Or. 2000)

(lawyer posing as someone else as part of an investigation into suspected fraudulent conduct violated ethical rules); *In re Ositis*, 333 Ore. 366 (2002) (lawyer reprimanded for giving direction to private investigator falsely posing as journalist to interview opposing party in litigation); *In the Matter of the disciplinary proceedings against James C. Wood*, 190 Wisc.2d 502 (1995) (pretending to be someone else violates ethics rules).

Consistent with this more stringent view, the Eighth Circuit, on facts similar to those in *Gidatex* and *Apple*, has suggested that the use of investigators posing as customers and engaging salespersons in discussion violates these rules. *Midwest Motor Sports v. Arctic Cat Sales, Inc.*, 347 F. 3d 693 (8th Cir. 2003).

On May 23, 2007, the New York County Bar Association issued Opinion 737 addressing this issue. While recognizing that it is generally unethical for non-governmental lawyers to knowingly utilize and/or supervise an investigator who will employ "dissemblance" in an investigation, it nonetheless recognized a limited exception to this proscription. Specifically, it concluded that non-governmental lawyers may ethically supervise non-attorney investigators employing a limited amount of dissemblance in some strictly limited circumstances where " (1) either (a) the investigation is of a violation of civil rights or intellectual property rights and the lawyer believes in good faith that such violation is taken place or will take place imminently or (b) the dissemblance is expressly authorized by law; and (ii) the evidence sought is not reasonably available through other lawful means; (iii) the lawyer's conduct and the investigator's conduct that the lawyer is supervising do not otherwise violate the Code (including the "no contact" rules of DR 7-104)[18] or applicable law; and (iv) the dissemblance does not unlawfully or unethically violate the rights of their parties. The investigator must be instructed, however, not to elicit information protected by the attorney-client privilege. In this context, the Committee distinguished dissemblance from dishonest, fraud, misrepresentation and deceit by the degree and purpose of dissemblance, defining dissemblance as "misstatements as to identify and purpose made solely for gathering evidence."

An added layer of concern in the pretexting context arises when the party contacted by the pretextor is a "represented" person. As discussed earlier, a lawyer is prohibited from communicating, or causing another to communicate, with a represented person whose interests may be adverse to those of her client. Thus not only is a lawyer prohibited from directly communicating with a represented adversary, but a lawyer breaches the Rules if a private investigator working for or under the supervision of that lawyer does so.

Application of this prohibition becomes even more complicated when the individual contacted by the pretextor is an employee of a represented corporation, raising the issue of whether that employee is deemed "represented" by virtue of the company's representation. Generally in New York, employees of a represented employer (1) whose acts or omissions in the matter under inquiry are binding on the corporation or are imputed to the corporation for liability purposes or (2) who are involved in implementing the advice of counsel, are deemed represented if the corporation is represented. *See Niesig v. Team I*, 76 N.Y. 2d 363 (1990). Other employees and, generally all former employees, fall outside this scope, are not considered represented by virtue of the corporate employer's representation, and are fair game for direct communications. *See*

[18] Now codified at Rule 4.2 of the Rules of Professional Conduct.

Muriel Siebert & Co., Inc. v. Intuit, Inc., 8 N.Y.3d 506 (2007); *Polycast Technology Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621 (S.D.N.Y. 1990); ABA Formal Opinion 95-393.

Applying these rules in the pretexting context, a lawyer must be careful to not allow private investigators, posing as someone they are not, to have contact with anyone who might be considered a represented person. *See Allen v. International Truck and Engine*, 2006 U.S. Dist. LEXIS 63720 (S.D. In. 2006) (ethical rules violated when investigators, with knowledge and under at least some degree of supervision of lawyers, sent into plant posing as employees and engaged in discussions with other employees regarding possible workplace harassment where some of the employees contacted were represented claimants); *Midwest Motor Sports v. Arctic Cat Sales, Inc.*, 144 F. Supp. 2d 1147 (ethical breach when investigators, under lawyer's supervision, posing as customers engaged in discussions with employees of adverse party in effort to solicit damaging information); *Scranton Prods., Inc. v. Bobrick Washroom Equip., Inc.*, 190 F.Supp.3d 419, 430-32 (M.D. Pa. 2016) (ethical violation when attorney listened and took notes on a phone call with an adversary, known to be represented by counsel, without disclosing his presence).[19]

However, as is the case in the use of deceit generally, not all courts are in agreement that all contact with a represented person is off limits. In *Gidatex*, the court not only found that the use of investigators to pose as customers was not a violation of the rules against deceit, it also found that the investigators' conversations with employees of a represented adverse party (who were deemed to be represented themselves) was not a violation of the no contact rules. In that case, although the court concluded that the investigator's communications with the other party's salespeople literally ran counter to former DR 7-104 (a)(1)[20], it nonetheless observed that it

> did not violate the rules because [these] actions simply do not represent the type of conduct prohibited by the rules. The use of private investigators, posing as consumers and speaking to nominal parties who are not involved in any aspect of the litigation, does not constitute an end-run around the attorney/client privilege. Gidatex's investigators did not interview the sales clerks or trick them into making statements they otherwise would not have made. Rather, the investigators merely recorded the normal business routine in the [other side's] showroom and warehouse.

82 F.Supp.2d at 126. And in *Apple*, the court similarly noted:

> RPC 4.2 [prohibiting contact with represented persons] cannot apply where lawyers and/or their investigators, seeking to learn about current corporate misconduct, act as members of the general

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[19] Simply because evidence is obtained in violation of ethical rules does not mean it is inadmissible. Both the Second Circuit and New York courts have recognized that the means by which evidence is obtained is not necessarily a barrier to admissibility. *See United States v. Hammad*, 858 F. 2d 834 (2d Cir. 1988); *Gidatex v. Campaniello Imports, Ltd.*, 82 F. Supp. 2d 119 (S.D.N.Y. 1999); *Stagg v. New York City Health & Hosp. Corp.*, 162 A.D. 2d 595 (2d Dept. 1990).

[20] Now Rule 4.2(a).

> public to engage in ordinary business transactions with low-level employees of a represented corporation. To apply the rule to the investigation which took place here would serve merely to immunize corporations from liability for unlawful activity, while not effectuating any of the purposes behind the rule. *See, e.g., Weider*, 912 F. Supp. 502. Accordingly, Ms. Weber's and Plaintiffs' investigators' communications with Defendants' sales representatives did not violate RPC 4.2.

15 F.Supp.2d at 474-75.

It is difficult to generalize too much from these few authorities. Nonetheless, it would appear that conduct which employs some minor deceit or covert activity designed to obtain information that the opposing party seems otherwise willing to make generally available – such as that obtained by posing as a customer and asking nothing more than what a normal customer would ask – might pass muster. However, once an investigator begins to probe below the surface – pushing and pulling as investigators are quick to do -- to acquire more information than would normally be provided to "just anyone," or if the investigator pretends to be a specific person in an effort to acquire private information about that person, the line likely has been crossed.

Social networking sites present almost limitless opportunities as investigatory tools, and almost as many ethical traps for the unwary. If a lawyer is able to access an individual's information on social networking sites (e.g, Facebook, Twitter, etc.) because that information is publicly available, then there is no ethical prohibition to doing so. The New York State Bar Association Committee on Professional Ethics, in Formal Opinion 843, has issued an opinion reaching this conclusion. The Committee found that acquiring information in this manner is no different than acquiring information through some publicly accessible online or print media, or through a subscription research service such as Nexis or Factiva. See West Virginia Legal Ethics Opinion No. 2015-02 (2015) ("WV LEO 2015-02"); Pennsylvania Bar Association Formal Opinion 2014-300 (2014) ("Pa Formal Opinion 2014-300"); Massachusetts Bar Ass'n, Comm. On Prof. Ethics Op. 2014-5 (2014) ("MBA 2014-5"); Kentucky Bar Ass'n Ethics Opinion KBA E-434 (2014) ("KBA E-434"); New Hampshire Ethics Committee Advisory Opinion 2012-13/05 (2013); ("NH Opinion 2012-13/05") San Diego County Bar Legal Ethics Opinion (hereafter "SDCB Legal Ethics Opinion") 2011-2 (2011); New York State Bar Association, Comm. On Prof'l Ethics, Formal Opinion 843 (2010) ("NYSBA Formal Opinion 843") (2010); Oregon State Bar Formal Ethics Op. No. 2005-164 ("OSB 2005-164). Generally, this public viewing is simply not considered a "communication" with the individual (thus avoiding any application of Rule 4.2, prohibiting "communications" with represented individuals) and it does not matter if the individual is represented or not. Commentators have expressed the same view. NYSBA Commercial and Federal Litigation Section, Social Media Ethics Guidelines at p. 18 (2017); Witnov, *Investigating Facebook, supra*, at 61-63; Seidenberg, *Seduced: For Lawyers, the Appeal of Social Media is Obvious. It is Also Dangerous*, www.abajournal.com/magazine/article (February 1, 2011); Bennett, *Ethics of "Pretexting" in a Cyber World*, 41 McGeorge L. Rev. 271 (2010).

However, a lawyer may run afoul of New York's Rules of Professional Conduct if she tries to access sites that are not open to the public. On many social networking sites access is limited to

those granted access rights by the page creator. In some cases, access is limited to those who "friend" the creator. While NYSBA Formal Opinion 843 declined to address that situation, because it was not the case presented to it for an opinion, it did note a recent opinion issued by the Philadelphia Bar Association. In Opinion 2009-02, the Philadelphia Bar was confronted with a situation in which a lawyer inquired about using a third party to access the social networking site of an unrepresented adverse witness in a pending lawsuit for the purpose of obtaining information that might be useful for impeachment purposes at trial. Access could only be gained by the third party "friending" the adverse witness. The inquiring lawyer was proposing that the third party would friend the witness, using only truthful information but concealing the connection between the third party and the lawyer. The Philadelphia Bar Association concluded that such conduct would violate the Pennsylvania Rules of Professional Conduct. Specifically, the Philadelphia Opinion concluded that the third party's failure to reveal the connection with the lawyer would constitute deception in violation of the Rules and since the third party was acting under the supervision of the lawyer, the lawyer would be responsible for that deception.

While NYSBA Formal Opinion 843 declined to formally opine on the "friending" situation presented in the Philadelphia Opinion, it seems likely that the NYSBA Committee on Professional Ethics would reach a similar conclusion, given its comments. Other bar associations have reached this same conclusion. . See DC Bar Opinion 371 (2016); WV LEO 2015-02 (based on Rule 4.3); Pa Formal Opinion 2014-300 (based on Rule 4.3); MBA Opinion 2014-5 (based on Rules 4.1 and 8.4); NH Bar Opinion 2012-13/05 (based on Rules 4.1 and 8.4); SDCBA Opinion 2011-2 (California does not have Rules comparable to Rule 4.1 or Rule 8.4 and the San Diego Bar reached this conclusion based upon, among other things, a common law duty not to deceive.); see also Social Media Ethics Guidelines 18 (NYSBA/Commercial and Federal Litigation Section, May 2017)(in "communicating" with an unrepresented person via social media, a lawyer must use his/her full name and accurate profile; if the unrepresented person askes for additional information from the lawyer, the lawyer must accurately provide the information requested or otherwise cease all further communications and withdraw the request).

However, at least two opinions provide that so long as the information that is provided is truthful, even though it may not indicate the lawyer's connection to the matter, friending is permissible. Association of the Bar of the City of New York, Opinion 2010-2; Oregon Formal Ethics Opinion 2013-189.

Also, if the party to be friended is represented, Rule 4.2 is also likely implicated. That Rule prohibits communication by a lawyer (or another at the direction of a lawyer) with any represented party without the consent of that party's counsel.

XII. CONCLUSION

The adoption of the Rules of Professional Conduct marked a new chapter in professional responsibility in New York. On the one hand, these Rules bring New York practice into greater conformity with the rest of the country. In other respects, however, these Rules retain a special "New York flavor," which continues to mean lawyers practicing in New York cannot not simply assume that our rules are like those which govern everyone else (or govern even them when their practice takes them to other jurisdictions).

Unfortunately, the Courts' adoption of these Rules – most identical to those proposed by the Bar Association, but some not, and without any explanation as to why – leaves New York lawyers in the dark about the meaning of a number of these provisions, even years later.

EXCERPTS REGARDING PROPOSED REVISIONS TO RULE 3.3(c)

FROM THE

COMMITTEE ON STANDARDS OF ATTORNEY CONDUCT'S SEPTEMBER 30, 2018 REPORT TO THE NYSBA HOUSE OF DELEGATES

Rule 3.3
Conduct Before a Tribunal

Rule 3.3(a)(3) and Rule 3.3(b) both obligate lawyers, in specified narrow circumstances, to reveal information to remedy misconduct by a client or other person, even if the revelation would otherwise be prohibited by Rule 1.6. If a lawyer comes to know that the client or another witness called by the lawyer "has offered material evidence" and "the lawyer comes to know of its falsity," *see* Rule 3.3(a)(3), or if a lawyer who represents a client before a tribunal "knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding," *see* Rule 3.3(b), then the lawyer "shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal," *see* Rule 3.3(a) and (b). Disclosure to the tribunal is a momentous step, fraught with serious consequences for both lawyer and client, and even less drastic remedial measures can telegraph problems with a case. Therefore, it is important for lawyers to know when the duty to make disclosure or take other remedial measures ends.

ABA Model Rule 3.3(c) addresses the end point by providing that the duties in paragraphs (a) and (b) "continue to the conclusion of the proceeding." COSAC recommended that language to the Courts in 2008, but the Courts declined to adopt that recommendation, and did not substitute any alternative end point. Thus, New York Rule 3.3 does not specify when a lawyer's duty to take reasonable remedial measures under Rules 3.3(a) and 3.3(b) terminates. Rather, New York Rule 3.3(c) says only that the duties stated in paragraphs (a) and (b) of Rule 3.3 "apply even if compliance requires disclosure of information otherwise protected by Rule 1.6" (New York's basic confidentiality rule).

Various New York ethics opinions have attempted to interpret Rule 3.3 to articulate a workable and practical time limit under Rule 3.3(c). These opinions have done so by limiting the phrase "remedial measures" to situations where disclosure or other measures will actually remedy the problem of false evidence. In N.Y. State 831 n.4 (2009), for example, the Committee said:

> We believe the obligation extends for as long as the effect of the fraudulent conduct on the proceeding can be remedied, which may extend beyond the end of the proceeding — but not forever. If disclosure could not remedy the effect of the conduct on the proceeding, we do not believe the Rule 3.3 disclosure duty applies.

N.Y. State 837 (2010) revisited this issue and said:

> 16. ... [T]he duration of counsel's obligation under New York Rule 3.3(c) as adopted may continue even after the conclusion of the proceeding in which the false material was used. ... *[T]he endpoint of the obligation nevertheless cannot sensibly or logically be viewed as extending beyond the point at which remedial measures are available*, since a disclosure which exposes the client to jeopardy without serving any remedial purpose is not authorized under Rule 3.3. [Emphasis added; citations omitted.]

N.Y. City 2013-2 (2013) reached a similar conclusion, saying:

> [T]he obligations under Rule 3.3(a)(3) survive the "conclusion of a proceeding" where the false evidence was presented. ABA Rule 3.3, cmt. [13] clarifies that the phrase "conclusion of a proceeding" means "when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed." We believe that the courts' rejection of an explicit statement that the obligation ends when the proceeding ends, makes this evident.

N.Y. City 2013-2 thus concluded that Rule 3.3(c) requires a lawyer to disclose false evidence (i) to the tribunal to which the evidence was presented "as long as it is still possible to reopen the proceeding based on this disclosure," or (ii) "to opposing counsel where another tribunal could amend, modify or vacate the prior judgment."

COSAC believes that these tests inject too much uncertainty into determining whether disclosing false testimony to a tribunal or to opposing counsel, or taking other remedial measures, is still required after the conclusion of a proceeding. For the same reason, COSAC rejected the Texas version of Rule 3.3(c), which provides that a lawyer's duties continue until remedial legal measures are "no longer reasonably possible." *See* Texas Rule 3.03(c) ("The duties stated in paragraphs (a) and (b) continue until remedial legal measures are no longer reasonably possible"). Comment [14] to Texas Rule 3.04 elaborates on this test by saying: "The time limit on the obligation to rectify the presentation of false testimony or other evidence varies from case to case but continues as long as there is a reasonable possibility of taking corrective legal actions before a tribunal."

In COSAC's view, Rule 3.3(c) should articulate a bright line to mark the end point of the duty to take remedial measures under Rule 3.3(a) and (b). The certainty of a bright line is necessary both (i) to protect clients against belated accusations of perjury that may have no appreciable effect beyond damaging a client's reputation, and (ii) to protect lawyers against discipline for failing to attempt remedial measures when a lawyer believes in good faith that remedial measures are no longer possible. COSAC therefore recommends that New York amend Rule 3.3(c) to match ABA Model Rule 3.3(c), which ends the lawyer's obligation upon the "conclusion of the proceeding." On balance, COSAC believes this bright line termination of the duty – at the conclusion of the proceeding – is preferable to New York's current open-ended formulation, and is preferable to alternative formulations based on when remedial measures are no longer possible.

COSAC recognizes that, under the proposed formulation, some fraud on tribunals may go unremedied because the false evidence or other impropriety will not be discovered until after the conclusion of a proceeding. New York has a long tradition of a strong duty of confidentiality. Indeed, DR 7-102(B) in the old New York Code of Professional Responsibility did not ordinarily allow disclosure even to remedy a client's fraud on a court if the information to be disclosed was protected as a confidence or secret.[1] New York did not appear to suffer from frequent unremedied fraud on tribunals under the Code. Nevertheless, COSAC is separately considering whether Rule 1.6 should include a discretionary exception to the duty of confidentiality that would permit (but not require) a lawyer to disclose confidential information to the extent the lawyer reasonably believes necessary to remedy a fraud on a tribunal or a wrongful conviction based upon such a fraud.

In any event, COSAC believes that a lawyer who has offered false evidence will most often come to know of its falsity per Rule 3.3(a)(3) before the conclusion of the proceeding (perhaps when an opposing party's cross-examination exposes the false evidence). Likewise, COSAC believes that a lawyer usually will learn before the conclusion of a proceeding that a person has engaged in criminal or fraudulent conduct related to the proceeding. Although no empirical evidence is available on these points, COSAC believes that the potential damage to confidentiality by *requiring* disclosure (or other remedial measures) after the conclusion of a proceeding outweighs the potential gain to the system of justice by retaining New York's current version of Rule 3.3(c). Trust is the fundamental bedrock of a strong attorney-client relationship, and the broader the exceptions to the duty of confidentiality, the more difficult it will be for attorneys to gain and maintain the trust of their clients.

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[1] DR 7-102(B) provided as follows:

> B. A lawyer who receives information clearly establishing that:
>
> 1. The *client* has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer *shall reveal the fraud* to the affected person or tribunal, *except when the information is protected as a confidence or secret.*
>
> 2. A person *other than the client* has perpetrated a fraud upon a tribunal *shall reveal the fraud* to the tribunal. [Emphasis added.]

Thus, although there are arguments that requiring a lawyer to take remedial measures beyond the conclusion of the proceeding furthers the interests of justice, COSAC believes that adopting the ABA version of Rule 3.3(c) and the related Comments strikes a better balance and will provide needed clarity and certainty in this important area. In reviewing the Rules of Professional Conduct adopted by other states, COSAC noted that only three other states (Florida, Texas, and Wisconsin) require remedial measures after the close of proceedings. In contrast, more than thirty jurisdictions terminate Rule 3.3 remedial duties under Rule 3.3(a) and (b) at the conclusion of the proceeding, in line with ABA Model Rule 3.3(c) – *see* *https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_3.authcheckdam.pdf* or *https://bit.ly/2kfYBpx* .

Accordingly, COSAC recommends amending Rule 3.3(c) as follows:

> (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

COSAC also recommends adopting ABA Comment [13] as new Comment [13] to New York Rule 3.3, with revisions to refer not only to "when a final judgment in the proceeding has been affirmed on appeal," as in the ABA Comment, but also more broadly to "when a final judgment or order in the proceeding has been entered after appeal." Thus, new Comment [13] would explain the time limit in Rule 3.3(c) as follows:

> [13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment or order in the proceeding has been entered after appeal or the time for review has passed.

(Existing New York Comment [13] to Rule 3.3, which is on a different topic and has no equivalent in the ABA Model Rules, would be renumbered as New York Comment [13B]. That renumbering would maintain consistency with ABA numbering and would continue New York's convention of using capital letters to mark Comments adopted by New York but not by the ABA.)

Candor Before The Tribunal

Hypotheticals

Hypothetical 1: Direct Representation By Lawyer

You are representing a client in a harassment case brought by a former employee. In your early interviews with your client's HR representative, she has mentioned to you that she doubts there is any merit to the plaintiff's claims because, among other things, in response to the former employee's internal complaint, a "thorough" investigation had been conducted and "at least a dozen individuals must have been interviewed," with no one supporting the former employee's version of events. Because it is early in the case and discovery hasn't even started, you have not had a chance to review the full details of the investigation. Despite this early stage, you recently started settlement discussions with plaintiff's counsel. You made some progress, but you were still apart on a settlement amount, in part because plaintiff's counsel apparently didn't think that an adequate internal investigation occurred when his client first complained internally. Up to this point there had been no reason to reveal the scope of the investigation but sensing that now it might push the settlement discussions into a more acceptable range, you blurt out that of course there was a thorough investigation with "at least a dozen" individuals interviewed. With that information, there is a noted change in the plaintiff's position and he reduces the settlement demand enough that you are now confident that you will be able to complete a settlement.

When you explain to your client where things stand, and how disclosing the scope of the investigation has made a significant difference in the tenor of the settlement discussions, your client reluctantly tells you that while she did in fact do an investigation at the time of the internal complaint, due to time constraints caused by the Company preparing for massive layoffs, it was a pretty perfunctory review. While she said she remembers early on that she may have casually indicated to you that she talked to a number of people as part of that internal investigation, she in fact only spoke to the former employee and the alleged harasser. When you tell her that you need to correct your statement to opposing counsel, she insists that you not do so, because she sees how close you are to settlement and how important that piece was in getting there.

Just as you finish up with the client, plaintiff's counsel calls to see where things stand regarding settlement discussions and to see if "we have a deal."

What do you do now?

Would it matter if you had made the representation to the court itself, perhaps in the context of a settlement conference?

Hypothetical 2: False Testimony By The Lawyer's Client

During the course of an arbitration over a subcontracting dispute with the union, your client's HR Director testifies, based on his review of Company records, to the Company's history of subcontracting, providing numerous examples of instances in which subcontracting had happened in the past with the union's knowledge and acquiescence, albeit a number of years ago (predating the personal involvement of your HR director/witness or any of the union's witnesses).

About two weeks after you have submitted your brief, but before the arbitrator has reached any decision, your client calls you. He tells you that in the course of a Company effort to clean out old files, he just came upon a file which makes it clear that his testimony, to the effect that the union acquiesced in this prior subcontracting, was simply wrong. Apparently, the union had disputed it when it occurred years ago, and a resolution had been agreed to as to how subcontracting would be handled, which apparently everyone simply forgot about. The fact that the Company had in fact been operating in accord with that resolution (for many years) until this most recent dispute arose probably explains how this agreed upon resolution had been forgotten about. Your client contact is clear that he was previously unaware of this resolution agreement until just now. Of course, his first reaction (because the case otherwise seemed to go so well) was that he was glad he only uncovered this information now and not before he had testified.

What do you do with this information?

Hypothetical 3: Learning Client's Position Is False

You are representing a union in an arbitration on behalf of a member who was fired for allegedly submitting a forged note to his employer. The note in question states that the member could not stay at work to provide overnight coverage during a snowstorm because the member had to pick up his child from school, which was closing early on account of the snow. The note is on the school's letterhead but contains several typos that make the employer suspect it is forged.

The union, employer and member met several times pre-arbitration to attempt to resolve the grievance. You were not present at these meetings, but understand that the member maintained at these meetings that the note was not forged. When you met with the union and the member pre-arbitration, the member insisted to you that the note was not forged, but was unable to provide you with the name or description of the employee of the school who wrote it.

The morning of the arbitration, you learn from the employer's counsel that the employer intends to call as a witness an employee of the school who will testify that the member did not pick up his son from school on the day in question. You also learn that the member's spouse works for the school in a position where she has access to the school's letterhead, but is not authorized to provide such a note on behalf of the school.

When you relay this to the union and member, the member tells you that he forged the note. The union advises the member that it is in his best interests to try to negotiate a settlement agreement so he does not have to testify. You tell the employer's counsel and arbitrator that the union wants to pursue settlement. The arbitrator insists that first he wants to hear opening statements on the record.

During its opening statement, the employer says that the member forged the note and then lied about it. You make an opening statement without saying anything about the origin of the note. As soon as you're finished, the arbitrator turns to you and asks who wrote the note.

What do you do?

Hypothetical 4: False Testimony By The Other Side

In the course of a trial, one of the witnesses called by your opponent incorrectly testifies that she personally observed your client's Supervisor at a very specific time and place engage in some harassing conduct. The fact is that she is wrong about the time and place. However, that testimony is very helpful to your position, because it actually undermines other evidence of a far more serious nature offered by your opponent. From your own investigation (including interviews with other disinterested witnesses, now known to the other side) you know that the incident which this witness described she observed did in fact happen, but three days earlier than she indicated in her testimony. But by placing the Supervisor where she did, when she did, this witness' testimony is extremely helpful to you.

Do you have to advise the court of the witness's mistake?

202 A.D. 477, 195 N.Y.S. 810

MAX C. DEGEN, Appellant, Respondent,
v.
MEIER STEINBRINK and MARCELLA T. MCKINNEY, as Executrix, etc., of ALEXANDER MCKINNEY, Deceased, Respondents, Appellants.

Supreme Court of New York,
Appellate Division, First Department.
July 14, 1922.

CITE TITLE AS: Degen v Steinbrink

***477 Attorney and client**

Duty of attorney engaged to prepare chattel mortgages on property in foreign State --- Attorney liable to client if mortgages prepared are not valid liens --- Bankruptcy of mortgagor --- Amount received from sale by receiver of property agreed to be covered by mortgages less dividend as general creditor is amount of damages --- Burden on attorney to show any deduction from said amount

It is the duty of an attorney who undertakes for a client to draw chattel mortgages on property located in another State, to so prepare the documents that they are valid and effective liens upon the property where located, and if by reason of his lack of compliance with the simple statutory requirements of the foreign jurisdiction, the documents have no legal potency, there is such a negligent discharge of his duty to his client as renders him liable for loss sustained by reason of such negligence; the attorney cannot defend on the theory that he is not supposed to know the law of a foreign State.

Accordingly, where an attorney was engaged to prepare chattel mortgages covering property located in another State, and thereafter the mortgagor went into bankruptcy and it was then determined that the mortgages were invalid, the attorney is liable to his client who had guaranteed a loan and credit made to the mortgagor, for the difference between the amount received as a general creditor and the amount secured by the alleged mortgages. Where, after the intervention of bankruptcy and before it was determined that the mortgages were invalid, it was agreed between the parties interested that the property should be sold and that the proceeds realized from certain of the properties thus sold was subject to the mortgages, such amount, less the dividend received as a general creditor, reduced by the proportionate amount of the dividend produced by the sale of assets not covered by the mortgages, *prima facie,* is sufficient proof of the damage, and, if there is anything that would legally reduce that amount, the burden of going forward with the evidence is upon the defendants.

CROSS-APPEALS by the plaintiff, Max C. Degen, and by the defendants, Meier Steinbrink and another, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 13th day of September, 1920, upon the report of a referee appointed to hear and determine the issues.

The grievance of the plaintiff is that the judgment was for a less amount than it should have been, and the grievance of the defendants is that any judgment should have been entered against them.

Eidlitz & Hulse [*Frederick Hulse* of counsel], for the plaintiff.
Frank E. Johnson [*William D. Guthrie* of counsel], for the defendants.

***478** PAGE, J.:

The action was originally against the members of a firm of attorneys with offices in the borough of Brooklyn. One of the members of the firm has since died and his executrix has been substituted as a party defendant. For convenience we will in this opinion refer to the original parties as defendants. The action was brought by the assignee of a client of the firm, one Silas W. Stein, an uncle of the surviving member of the firm. The facts of the case briefly stated were as follows: Stein was a dealer in horses and for many years had sold horses to the Fuller Express Company. The Fuller Express Company desired to borrow $15,000. Stein asked Levy Brothers, who were hay and feed dealers, to make the loan and they agreed to do so on condition that the Fuller Express Company would agree to buy hay and feed from them, and that Stein would guarantee the payment of the $15,000 loan and a credit of $5,000 which Levy Brothers were to extend to the Fuller Express Company. Stein was willing to guarantee the loan providing it was secured by chattel mortgages covering all their horses, wagons, harnesses, stable equipment, etc. The property was in three States, New York, New Jersey and Connecticut. Stein called on the defendants and explained the transaction and employed them to act as his attorneys at law in

connection therewith, for fees which were duly paid. The parties to the transaction met at the defendants' office with their attorneys, the defendants representing Stein, and the defendants prepared the papers which consisted of three chattel mortgages, one covering the property in New York which was to be filed in New York county, one in New Jersey covering the property in that State, and one in Connecticut; agreement between the Fuller Express Company and Levy Brothers, whereby the express company agreed to purchase its grain and feed from Levy Brothers for two months; and the instrument whereby Stein guaranteed the payment of the $15,000 loan and the $5,000 credit; and the various instruments were subsequently signed, and the chattel mortgages were filed in the proper offices by the defendants. Of these instruments, the three chattel mortgages were of the greatest importance to Stein, as a security for the loan that he had guaranteed. The note evidencing the loan was payable in sixty days and was renewed from time to time, during which the Levys telephoned to the now surviving member of the firm, who had various interviews with Stein, and the matter of extensions was arranged. Stein was very angry at the continuance of the loan, but his nephew explained to him the legal effect of his obligation. When the year was about to expire, the defendants prepared three copies of the chattel ***479** mortgages with the statement required by section 235 of the Lien Law, which were sent to Levy Brothers to be executed, and were received by the defendants, and the copies of the New Jersey and Connecticut mortgages were sent to the proper officers, who returned the same to defendants, informing them that it was not necessary to file such copies and statement under the laws of those States. There was some controversy as to who filed the copy in New York county. The referee, however, has held that the defendants did. In the early part of December, 1915, Stein informed the surviving member of the defendants' firm that the Fuller Express Company had been petitioned into bankruptcy, and consulted him with reference to the protection of Stein's interest. The defendants then took up the matter of a speedy sale of the horses with the receiver in bankruptcy of the company and a Federal judge, as a result of which an agreement was entered into between the said receiver, Levy Brothers, Stein and the express company, whereby it was agreed that the several Federal courts might make orders directing the sale of the mortgaged property, and that the proceeds of the sale be substituted in the place of the said property, and the lien, if any, of said chattel mortgages attach to said proceeds and be kept as a special fund, separate and apart from the other funds of the estate, pending a judicial determination of the validity of said mortgage and the extent of the lien and priority thereof, if any. This agreement was prepared by the defendants and was carried into effect by judicial decrees. The sales were had and one of the defendants, or a representative from their office, attended the sale and made notes thereof. The total amount realized upon the sales was $19,576.65. After a consultation between the trustee in bankruptcy of the express company and counsel representing the defendants, in which certain deductions were made, it was agreed that the sum of $15,037.68 was the amount to which Levy Brothers were entitled as representing the property on which the chattel mortgages were a lien. The counsel went over these figures with the defendants and they agreed that the matter should be consummated as had been arranged. A hearing was had before the referee in bankruptcy and this amount was allowed and the referee announced that an order might be made to pay that sum over to Levy Brothers. Before the order could be prepared, the trustee sent word that he had discovered that the chattel mortgages were invalid, a further hearing was had before the referee, and an order was made declaring the mortgages invalid upon the following grounds: '1. That the New York mortgage is invalid as against this estate because the first renewal thereof, filed in the office of ***480** the Register of the County of New York on the 30th day of October, 1914, did not have endorsed thereon the number and date of filing of the original mortgage. 2. That the New Jersey mortgage is invalid as against this estate because the acknowledgment of the execution thereof was defective. 3. That the New Haven mortgage is invalid against this estate because the Laws of Connecticut did not permit the mortgaging of the chattels therein set forth.' Thereupon the fund which had been agreed upon to be set aside as a substitute for the property went into the general estate of the bankrupt, and Levy Brothers received as a general creditor a dividend of $6,852.42. The difference between this sum and $15,037.68, together with $750 paid to the defendants as counsel fees in the bankruptcy proceeding, is claimed by the plaintiff as damages in this action. The issues in the action were sent to a referee to hear and determine.

The referee found that the defendants were not responsible for any failure of the acknowledgment of the New Jersey mortgage; that their duty was fully discharged by sending the mortgage, as prepared and executed, to the proper officers in New Jersey for recording therein, nor were they responsible for the failure of the Connecticut mortgage

to create a lien upon any property in that State, because of the fact that by the laws of Connecticut no lien could be created upon property of the nature covered by the chattel mortgage, without a delivery of the property to the mortgagee. He did find, however, that it was the duty of the defendants to continue the New York mortgage, by filing a copy thereof with the proper indorsements and the statement required by the statutes of this State, and that the document filed by them was insufficient for that purpose, and that plaintiff's assignor sustained damages by such failure; but that the plaintiff was only entitled to nominal damages, as no competent evidence was offered that any of the property covered by the chattel mortgage upon the New York property was received by the receiver or the trustee in bankruptcy. He gave judgment for the $750 paid as counsel fee in the bankruptcy proceeding.

The basis of the decision of the learned referee in his opinion and findings, exonerating the defendants for the loss sustained by their failure to draw mortgages that upon filing would give Levy Brothers a valid lien on the property in the foreign States, was that a New York lawyer was not presumed to know the statute law of another State, and so long as the officials accepted the instruments for filing, that relieved the defendants from any imputation of negligence.

The defendants were employed to draw these chattel mortgages ***481** and to do whatever was necessary to give a valid and subsisting lien upon the property of the express company. These mortgages were the only security by which their client was protected for his guaranty.

The law governing the creation of liens on personal property by chattel mortgages is statute law. This every lawyer should know, and further, that the statute law of one State usually differs from the statute law of another, as to form of the instrument, as to the form of acknowledgment, and as to other requirements. When a lawyer undertakes to prepare papers to be filed in a State foreign to his place of practice, it is his duty, if he has not knowledge of the statutes, to inform himself, for, like any artisan, by undertaking the work, he represents that he is capable of performing it in a skillful manner. Not to do so and to prepare documents that have no legal potency, by reason of their lack of compliance with simple statutory requirements, is such a negligent discharge of his duty to his client as should render him liable for loss sustained by reason of such negligence. (*Byrnes v. Palmer,* 18 App. Div. 1; affd., 160 N. Y. 699.) It would be a very dangerous precedent to adopt in this State, where by reason of its being the financial center of the Union, members of the bar are called upon to advise as to large loans, and to draft instruments securing such loans, that must be filed or recorded in other States, that attorneys could escape liability for unskillful and negligent work, which had rendered the securities worthless, and could shield themselves behind the plea, 'I am a New York lawyer; I am not presumed to know the law of any other State.' If the attorney is not competent to skillfully and properly perform the work, he should not undertake the service. The defendants were not employed to prepare instruments that might be filed with officials, but such instruments that when so filed would be legally binding and effective for the purpose contemplated.

In regard to alleged lack of proof of damage, the plaintiff proved that in the bankruptcy proceeding it was agreed by and with the counsel and consent of the defendants that of the assets of the bankrupt which were sold, property which realized $15,037.68 was subject to the chattel mortgages, and if the mortgages had been valid that sum would have been paid over to Levy Brothers, and the debt for which Stein was guarantor would have been reduced by that amount. This sum, less the dividend which Levy Brothers received as a general creditor, reduced by the proportionate amount of the dividend produced by the sale of the assets that were not covered by the mortgages, *prima facie,* is sufficient proof of the ***482** damage, and in the absence of other proof would be sufficient to sustain a judgment for that amount. If there was anything that would legally reduce that amount, the burden of going forward with the proof was upon the defendants. It was not necessary for the plaintiff to prove that each horse, wagon, strap of harness or currycomb that was in existence at the time the mortgages were made and filed were in existence and sold in the bankruptcy proceeding.

The judgment and findings should be reversed and a new trial granted before another referee (Civil Practice Act, § 464), with costs to the plaintiff to abide the event. Settle order in which may be included the name of the referee, if the parties by stipulation can agree.

CLARKE, P. J., LAUGHLIN, DOWLING and MERRELL, JJ., concur.

Judgment reversed and new trial ordered before another referee, with costs to plaintiff to abide event. Settle order on notice.

195 N.Y.S. 810

86 A.D.3d 169, 924 N.Y.S.2d
484, 2011 N.Y. Slip Op. 04408

**1 Madeline Dempster, Respondent-Appellant
v
Thomas F. Liotti, Appellant-Respondent.

Supreme Court, Appellate Division,
Second Department, New York
14703/07, 2009-04859, 2009-08810
May 24, 2011

CITE TITLE AS: Dempster v Liotti

SUMMARY

Cross appeals from (1) an order of the Supreme Court, Nassau County (Randy Sue Marber, J.) entered March 31, 2009, and (2) an order of that court, entered August 14, 2009. The March 31 order, to the extent cross appealed from, denied those branches of defendant's motion which were to dismiss the cause of action to recover damages for legal malpractice, or, in the alternative, for summary judgment dismissing that cause of action, denied that branch of plaintiff's cross motion for summary judgment on her breach of contract cause of action, and, upon searching the record, awarded summary judgment to defendant dismissing the breach of contract cause of action. The August 14 order denied that branch of defendant's motion for leave to reargue that portion of his prior motion for summary judgment dismissing the legal malpractice cause of action.

Dempster v Liotti, 23 Misc 3d 1112(A), 2009 NY Slip Op 50720(U), modified.

HEADNOTES

Attorney and Client
Malpractice
Merits of Underlying Action

() Defendant was entitled to summary judgment dismissing plaintiff's legal malpractice cause of action where plaintiff could not prove that, but for defendant's negligence, she would have prevailed in her underlying federal action. Although defendant inexcusably failed to file timely opposition papers to the federal defendants' motion to dismiss and to file a timely notice of appeal from the order granting that dismissal motion, the United States District Court correctly dismissed the federal action as time-barred. Consequently, the negligence of defendant attorney in prosecuting the federal action did not cause that action to be dismissed since, as a matter of law, it was time-barred, and a plaintiff in a legal malpractice action must show that he or she would have succeeded on the merits in the underlying action but for the negligence of the attorney. Defendant's handling of the federal action clearly fell below the ordinary and reasonable skill and knowledge commonly possessed by a member of the legal profession; however, defendant was entitled to summary judgment in light of plaintiff's failure to raise a triable issue of fact that she would have prevailed in the federal action.

Limitation of Actions
Four-Year Statute of Limitations
Federal RICO Cause of Action

() A federal action alleging that defendants' efforts to put marital assets out of the reach of plaintiff wife constituted a violation of the Racketeering Influenced and Corrupt Organizations Act (RICO) was untimely since it was *170 commenced more than four years after the cause of action accrued. The Court of Appeals for the Second Circuit has adopted an injury-discovery rule under which a RICO claim is deemed to accrue when the plaintiff knew or should have known of his or her injury, regardless of when the underlying fraud was actually discovered. Moreover, a "separate accrual rule" has also been adopted in the Second Circuit under which a new claim accrues, triggering a new limitations period, each time a plaintiff discovers or should have discovered a new injury; however, that rule may not be used to relate back to the original injury to toll the accrual period. Inasmuch as the alleged injury that gave rise to the accrual period for plaintiff's RICO claim—the fraudulent transfer of plaintiff's interest in the marital assets by her husband—was discovered no later than 1997, when she brought a state court action seeking to nullify the transfer of her interests to corporations controlled by her husband, and the RICO action was not commenced until 2003, it was time barred. The husband's 1999 bankruptcy action was merely a continuing effort on the part of the RICO defendants to retain the benefits of their previous

fraudulent transfer and, thus, not a new and independent injury triggering the separate accrual rule.

Attorney and Client
Malpractice
Duplicative Breach of Contract Cause of Action

() In an action arising out of defendant attorney's representation of plaintiff, the Supreme Court, upon searching the record, correctly awarded summary judgment to defendant dismissing plaintiff's cause of action to recover damages for breach of contract, as that cause of action arose from the same facts as the legal malpractice cause of action, and was thereby duplicative of that cause of action.

RESEARCH REFERENCES

Am Jur 2d, Attorneys at Law §§ 201, 203, 222, 223; Am Jur 2d, Contracts §§ 699, 712; Am Jur 2d, Dismissal, Discontinuance, and Nonsuit § 16; Am Jur 2d, Extortion, Blackmail, and Threats § 189; Am Jur 2d, Limitation of Actions §§ 148, 179, 180.

Carmody-Wait 2d, Officers of Court §§ 3:453–3:455; Carmody-Wait 2d, Limitation of Actions § 13:361.

NY Jur 2d, Contracts §§ 435, 438; NY Jur 2d, Limitations and Laches §§ 53, 94, 95; NY Jur 2d, Malpractice §§ 43, 46, 56; NY Jur 2d, Summary Judgment and Pretrial Motions to Dismiss §§ 133–135.

Prosser and Keeton, Torts (5th ed) §§ 32, 42.

ANNOTATION REFERENCE

See ALR Index under Contracts; Dismissal, Discontinuance, and Nonsuit; Limitation of Actions; Malpractice By Attorney; Racketeer Influenced and Corrupt Organizations Act.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

***171** Query: legal /2 malpractice /s negligen! /s caus! /p time-barred

APPEARANCES OF COUNSEL

Thomas F. Liotti, Garden City, pro se, and *Thomas F. Liotti* (*Jennifer L. McCann* of counsel), for Thomas F. Liotti, appellant-respondent.
Lester D. Janoff, Melville, for respondent-appellant.

OPINION OF THE COURT

Belen, J.

We are asked to consider whether an attorney who failed to oppose a motion to dismiss the complaint in an action underlying a legal malpractice action, and thereafter failed to file a timely notice of appeal from the order that granted the motion to dismiss, is entitled, under the facts of this case, to summary judgment dismissing the legal malpractice cause of action on the ground that such negligence did not proximately cause the dismissal of the underlying action. Here, we conclude that, since the underlying action was time-barred as a matter of law, the attorney's negligence, although clearly inexcusable, was not a proximate cause of the plaintiff's alleged injuries, and accordingly this malpractice action must be dismissed.

The plaintiff, Madeline Dempster, was involved in a contentious divorce proceeding with her former husband, George Dempster. On or about May 22, 1992, after five years of litigation in the Supreme Court, Nassau County, Mrs. Dempster obtained a judgment of divorce. In the 10 years that followed, however, Mr. Dempster frustrated her ability to enforce the money judgments representing her equitable share of the marital assets—an amount that eventually totaled over ****2** $3,500,000—through a series of alleged fraudulent conveyances in which he was represented by his attorneys Shaw, Licitra, Bohner, Esernio, Schwartz & Pfluger, P.C. (hereinafter the Shaw Firm).

As an example, on June 27, 1995, Mr. Dempster created a corporation named Overview Equities, Inc. (hereinafter Overview). Two days later, on June 29, 1995, Mr. Dempster transferred title of a marital residence to Overview for no consideration. Subsequently, in August 1995, Mr. Dempster executed confessed judgments in favor of two other closely held corporations under his control, Island Helicopter Leasing Corp. (hereinafter Island) and Rio Manufacturing (hereinafter Rio), for amounts collectively totaling approximately $1,500,000.

***172** On August 15, 1997, Mrs. Dempster commenced an action in the Supreme Court, Nassau County, against Mr. Dempster, Overview, Island, and Rio seeking, inter alia, to set aside Mr. Dempster's conveyance of the subject residence to Overview as fraudulent pursuant to the Debtor and Creditor Law (hereinafter the fraudulent conveyance action). On April 14, 1999, five days before the trial in the fraudulent conveyance action was scheduled to begin, Overview filed for bankruptcy in the United States Bankruptcy Court for the Eastern District of New York (hereinafter the Bankruptcy Court), listing the Dempsters' marital residence as an asset of Overview, and Island and Rio as Overview's creditors. The subject residence was sold, and the net proceeds of such sale, totaling over $1,000,000, were placed in escrow. Mrs. Dempster subsequently filed a claim against Overview's bankruptcy estate and moved to vacate an automatic stay of the bankruptcy proceedings. The Bankruptcy Court determined that Mrs. Dempster had standing as a "party in interest" to the bankruptcy proceedings, and granted her motion to vacate the automatic stay as it related to her fraudulent conveyance action.

In the fraudulent conveyance action, Mrs. Dempster moved for summary judgment in her favor on her causes of action to recover damages based on the alleged fraudulent conveyance of the marital residence to Overview pursuant to Debtor and Creditor Law §§ 273-a and 276. In an order dated August 15, 2002, the Supreme Court granted Mrs. Dempster's motion. Rio and Island appealed from the order, and this Court affirmed (*see Dempster v Overview Equities*, 4 AD3d 495 [2004]). This Court concluded that the plaintiff established, prima facie, her entitlement to judgment as a matter of law on her cause of action pursuant to Debtor and Creditor Law § 273-a by proving that Mr. Dempster's conveyance of the marital residence to Overview was made without fair consideration, that a judgment was docketed against Mr. Dempster, and that Mr. Dempster failed to satisfy the judgment (*id.* at 497). We also agreed with the Supreme Court that Rio and Island, in opposition, failed to raise a triable issue of fact since, even if the confessed judgments that Overview executed in favor of Rio and Island were valid, they did not constitute fair consideration for the transfer because the confessed judgments had expired by that time and, thus, were unenforceable (*id.*).

This Court also determined that Mrs. Dempster established, prima facie, her entitlement to judgment as a matter of law on ***173** her causes of action pursuant to Debtor and Creditor Law § 276, by submitting evidence demonstrating that Mr. Dempster's conduct in transferring the marital residence to Overview "[was] replete with 'badges of fraud,' " namely, that Overview was created only two days before the transfer, the transfer was made just before the trial was scheduled to begin, the trial could have rendered the residence a valid target of equitable distribution, and Overview operated out of the same address as Mr. Dempster's other business concerns (*Dempster v Overview Equities*, 4 AD3d at 498). In opposition, Rio and Island failed to raise a triable issue of fact (*id.*).

Sometime in 2002, while the appeal in the fraudulent conveyance action was pending before this Court, Mrs. Dempster's attorneys in the fraudulent conveyance action referred her to Thomas F. Liotti, the defendant herein. At the time, Mrs. Dempster's attempts to enforce the judgments she had obtained against Mr. Dempster in the divorce action had been unsuccessful. According to Mrs. Dempster, Liotti advised her that she had a strong case for recovering damages based on violations of the federal Racketeering Influenced and Corrupt Organizations Act (hereinafter RICO) (*see* 18 USC § 1962 *et seq.*) by Mr. Dempster and the Shaw Firm (hereinafter together the RICO defendants). Pursuant to a retainer agreement executed by both Liotti and Mrs. Dempster, on May 7, 2003, Liotti commenced an action (hereinafter the RICO action), on Mrs. Dempster's behalf, against the RICO defendants in the United States District Court for the Eastern District of New York (hereinafter the District Court). The complaint alleged that the RICO defendants committed fraud, aided and abetted fraud, and committed civil RICO violations predicated upon multiple acts of mail and wire fraud. Soon after, the RICO defendants moved to ****3** dismiss the complaint pursuant to Federal Rules of Civil Procedure rule 12 (b) (1), (6) and rule 9 (a).

The District Court, in a decision dated March 31, 2004, granted the RICO defendants' motion to dismiss the complaint in the RICO action without prejudice. The District Court held that (1) the complaint failed to establish the existence of a RICO enterprise because it did not support the claim that the RICO defendants conspired toward a "common purpose or mutual course of conduct"; (2) even if a RICO enterprise were established, the complaint failed to establish that the Shaw firm actually participated in the alleged racketeering activity,

rather than merely providing professional legal services to Mr. Dempster; ***174** and (3) the RICO defendants' acts of alleged mail and wire fraud were not pleaded with sufficient specificity to adequately establish "racketeering activity."

Subsequently, on May 12, 2004, Liotti filed an amended complaint on Mrs. Dempster's behalf, which purported to cure the defects that led to the dismissal of the original complaint. The RICO defendants moved to dismiss the amended complaint pursuant to Federal Rules of Civil Procedure rule 12 (b) (1), (6) and rule 9 (a). This time, despite receiving two extensions of time to submit the opposition to the motion, Liotti failed to file timely opposition on Mrs. Dempster's behalf to the RICO defendants' motion to dismiss. Ultimately, Liotti made a motion pursuant to Federal Rules of Civil Procedure rule 6 (b) to compel the RICO defendants to accept Mrs. Dempster's late opposition papers, asserting that he had been unable to timely submit the opposition papers because of, inter alia, a strong cold, other trial obligations, and a young former associate's failure to handle the matter as instructed. The District Court denied the motion, ruling that Liotti had failed to set forth a reasonable excuse for failing to timely file opposition papers.

Consequently, the District Court deemed Mrs. Dempster to have not opposed the RICO defendants' motion to dismiss the amended complaint, and granted the motion, noting that, among the "many deficiencies" raised by the RICO defendants in their motion to dismiss, the RICO defendants were correct that the RICO complaint was barred by the applicable four-year statute of limitations. The District Court determined that Mrs. Dempster's RICO action accrued between 1995, when Mr. Dempster allegedly fraudulently conveyed the marital residence to Overview, and 1997, when it was undisputed that Mrs. Dempster had discovered Mr. Dempster's allegedly fraudulent transference of her interest in marital assets, as was evidenced by her commencement of the fraudulent conveyance action at that time. Accordingly, in a decision and order dated March 30, 2005, the District Court dismissed the amended complaint, with prejudice, on the ground that the amended complaint was time-barred.

Liotti thereafter failed to file a timely notice of appeal from the District Court's order dismissing the amended complaint in the RICO action. Liotti contends that he did not learn that the order had been entered until Mrs. Dempster contacted him in August 2005, informing him of that fact. Liotti then filed a motion with the District Court pursuant to ***175** Federal Rules of Appellate Procedure rule 4 (a) (5) and (6), seeking to enlarge his time to file a notice of appeal on Mrs. Dempster's behalf, contending that his office never received electronic notification from the District Court regarding the entry of the order dismissing the amended complaint in the RICO action. After a two-day evidentiary hearing, the District Court denied the motion, concluding that Liotti failed to present sufficient evidence to rebut the presumption that the District Court had notified his office by e-mail of the entry of the subject order, and accordingly, denied the motion to enlarge the time to file the notice of appeal.

Thereafter, Mrs. Dempster discharged Liotti as her attorney. Nonetheless, she granted him permission to appeal, on her behalf, the order denying the motion to enlarge the time to file a notice of appeal. The United States Court of Appeals for the Second Circuit (hereinafter the Second Circuit) affirmed (*Dempster v Dempster*, 273 Fed Appx 67 [2008]). Liotti then filed a petition for a writ of certiorari with the Supreme Court of the United States on September 17, 2008, which was denied (555 US —, 129 S Ct 901 [2009]).

On January 15, 2008, while Liotti was still attempting to appeal the order dismissing the amended complaint in the RICO action, Mrs. Dempster (hereinafter the plaintiff) commenced the instant action against him in the Supreme Court, Nassau County, seeking to recover damages for legal malpractice and breach of contract. The complaint alleged that Liotti failed to prosecute the plaintiff's RICO action in a professional, proper, and skillful manner due to his failure to file timely opposition to the RICO defendants' motion to dismiss the amended complaint and his failure to file a timely notice of appeal from the District Court's order granting the RICO defendants' motion to dismiss the amended complaint. The complaint in the instant action alleged that, as a result of Liotti's negligence, the RICO action was dismissed, thereby preventing the plaintiff from obtaining treble damages in the RICO action in the principal sum of $15,000,000. ****4**

By notice dated September 16, 2008, Liotti moved pursuant to CPLR 3211 (a) (7) to dismiss the complaint in the instant action for failure to state a cause of action and, alternatively, pursuant to CPLR 3212 for summary

judgment dismissing the complaint. The plaintiff opposed Liotti's motion and cross-moved for summary judgment on her breach of contract cause of action. In a decision and order dated March 31, 2009, the Supreme Court denied both Liotti's motion and the plaintiff's ***176** cross motion, but, upon searching the record, awarded Liotti summary judgment dismissing the breach of contract cause of action as duplicative of the legal malpractice cause of action (23 Misc 3d 1112[A], 2009 NY Slip Op 50720[U] [2009]). The Supreme Court determined that Liotti could have successfully argued that the RICO complaint was timely, thus preventing dismissal of the amended complaint in the RICO action if, in response to the RICO defendants' motion to dismiss the amended complaint, he had connected the fraudulent bankruptcy proceedings to the overall RICO scheme by submitting opposition papers with supporting affidavits. The Supreme Court reasoned that the "separate accrual rule" for RICO injuries, which is the rule followed by the Second Circuit, would have rendered the RICO complaint timely and that the District Court, therefore, would not have granted the RICO defendants' motion to dismiss the amended complaint on the ground that it was time-barred.

Liotti subsequently moved for leave to reargue his prior motion, which the Supreme Court denied in an order dated August 14, 2009. Liotti appeals from so much of the order dated March 31, 2009, as denied his motion pursuant to CPLR 3211 (a) (7) to dismiss the complaint or, alternatively, for summary judgment dismissing the complaint, and from the order dated August 14, 2009, denying his motion for leave to reargue. The plaintiff cross-appeals from so much of the order dated March 31, 2009, as denied her motion for summary judgment on her breach of contract cause of action, and, upon searching the record, awarded summary judgment to Liotti dismissing the breach of contract cause of action pursuant to CPLR 3212 (b).

To state a cause of action to recover damages for legal malpractice, a plaintiff must allege: (1) that the attorney "failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession"; and (2) that the attorney's breach of the duty proximately caused the plaintiff actual and ascertainable damages (*Leder v Spiegel*, 9 NY3d 836, 837 [2007] [internal quotation marks omitted], *cert denied sub nom. Spiegel v Rowland*, 552 US 1257 [2008]; *see Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007]).

As to the first prong, "[a]n attorney may be liable for ignorance of the rules of practice, for failure to comply with conditions precedent to suit, for neglect to prosecute or defend an action, or for failure to conduct adequate legal research" (*Conklin v Owen*, 72 AD3d 1006, 1007 [2010]). However, even if a plaintiff establishes the first prong, the plaintiff must still ***177** demonstrate that he or she would have succeeded on the merits of the action but for the attorney's negligence (*see Hamoudeh v Mandel*, 62 AD3d 948, 949 [2009]; *McCluskey v Gabor & Gabor*, 61 AD3d 646, 648 [2009]; *Peak v Bartlett, Pontiff, Stewart & Rhodes, P.C.*, 28 AD3d 1028, 1030-1031 [2006]; *see also Brodeur v Hayes*, 18 AD3d 979 [2005]; *Raphael v Clune, White & Nelson*, 201 AD2d 549, 550 [1994]). Further, as to the second prong, the plaintiff must plead and prove actual, ascertainable damages as a result of an attorney's negligence (*see Barnett v Schwartz*, 47 AD3d 197, 211 [2007]). "[M]ere speculation about a loss resulting from an attorney's alleged omission is insufficient to sustain a prima facie case of legal malpractice" (*Siciliano v Forchelli & Forchelli*, 17 AD3d 343, 345 [2005]; *see Dupree v Voorhees*, 68 AD3d 810, 812-813 [2009]; *Plymouth Org., Inc. v Silverman, Collura & Chernis, P.C.*, 21 AD3d 464 [2005]; *Giambrone v Bank of N. Y.*, 253 AD2d 786 [1998]).

In the instant action, the plaintiff alleges that Liotti failed to exercise the ordinary skill and knowledge commonly possessed by a member of the legal profession when he failed to file timely opposition papers in response to the RICO defendants' motion to dismiss her amended complaint in the RICO action, and when he failed to timely appeal from the District Court's subsequent order granting such motion. Liotti does not contest these allegations, and we conclude they are factually substantiated by the record.

() Liotti instead focuses on the second prong of a legal malpractice cause of action, and argues that the plaintiff cannot prove that, but for his negligence, she would have prevailed in her RICO action. In pertinent part, he argues that, regardless of his negligence, the District Court correctly dismissed the RICO action as time-barred. Consequently, Liotti argues, his negligence in prosecuting the RICO action did not cause the RICO action to be dismissed since, as a matter of law, the plaintiff's RICO claim was time-barred. We agree.

The relevant facts regarding the RICO action are well-documented in the record and are not disputed by the

parties. Thus, the issue of whether the plaintiff's amended complaint was time-barred presents a question of law that is readily determinable by this Court upon that branch **5 of Liotti's motion which was for summary judgment (*see* Raphael v Clune, White & Nelson, 201 AD2d at 550).

To state a cause of action for damages based on a civil RICO violation, a plaintiff must plead (1) the defendant's violation of *178 18 USC § 1962 *et seq.*, (2) an injury to the plaintiff's business or property, and (3) that the defendant's violation of the statute caused the plaintiff's injury (*see* Commercial Cleaning Servs., L.L.C. v Colin Serv. Sys., Inc., 271 F3d 374, 380 [2001]; First Nationwide Bank v Gelt Funding Corp., 27 F3d 763, 767 [1994], *cert denied* 513 US 1079 [1995]).

Even where a plaintiff properly pleads the basic elements of a civil RICO claim, federal courts often must determine when the claim accrued for the purposes of calculating the applicable statute of limitations. In Agency Holding Corp. v Malley-Duff & Assoc., Inc. (483 US 143, 156 [1987]), the Supreme Court of the United States held that the statute of limitations for civil RICO claims is four years, but expressly declined to decide when such claims accrue (*see* Rotella v Wood, 528 US 549, 552 [2000]). The Second Circuit follows the injury-discovery accrual rule, under which a RICO claim is deemed to accrue when the plaintiff knew or should have known of his or her injury, regardless of when he or she discovered the underlying fraud (*id.* at 553).

The Second Circuit also recognizes a "separate accrual rule," under which "a new claim accrues, triggering a new four-year limitations period, each time plaintiff discovers, or should have discovered, a new injury caused by . . . predicate RICO violations" (Bingham v Zolt, 66 F3d 553, 559 [1995], *cert denied* 517 US 1134 [1996]; *see* In re Merrill Lynch Ltd. Partnerships Litig., 154 F3d 56, 59 [1998]; Bankers Trust Co. v Rhoades, 859 F2d 1096, 1104-1105 [1988], *cert denied* 490 US 1007 [1989]). Notably, the separate accrual rule only applies if the alleged RICO violation results in a new injury independent of the original injury (*see* In re Merrill Lynch Ltd. Partnerships Litig., 154 F3d at 59; Bankers Trust Co. v Rhoades, 859 F2d at 1103). Moreover, a plaintiff cannot use the separate accrual rule to relate the new injury back to the original injury, in effect, tolling the accrual period through the discovery of the new injury (*see* Bankers Trust Co., 859 F2d at 1103). In other words, a "plaintiff cannot use an independent, new predicate act as a bootstrap to recover for injuries caused by other earlier predicate acts that took place outside the limitations period" (Klehr v A. O. Smith Corp., 521 US 179, 190 [1997]).

Here, in dismissing the amended complaint in the RICO action, the District Court held that the plaintiff's alleged injury—the fraudulent transfer of marital assets to which she was entitled—was discovered by the plaintiff at the latest in 1997, when she commenced the fraudulent conveyance action in the Supreme Court, Nassau County.

> *179 "Plaintiff was well aware of any injury arising from these transactions in 1997, as evidenced by the fraudulent conveyance action she commenced in New York Supreme Court. Indeed, the only instance of conduct that could conceivably render Plaintiff's action timely is the April 1999 bankruptcy petition of Overview. However, Plaintiff does not, even under the most liberal reading of the Amended Complaint, allege how the bankruptcy proceeding relates to the scheme to deprive her of marital assets—the purpose of the alleged RICO enterprise."

() We agree with the District Court's determination that the alleged injury that gave rise to the accrual period for the plaintiff's RICO claim—the fraudulent transfer of the plaintiff's interest in the marital assets by Mr. Dempster —was discovered by the plaintiff no later than 1997. Accordingly, as the plaintiff did not commence the RICO action until May 7, 2003, the RICO action was time-barred (*see* Agency Holding Corp. v Malley-Duff & Assoc., Inc., 483 US at 156; Rotella v Wood, 528 US at 553).

Moreover, the record supports the conclusion that Overview's bankruptcy filing was merely a continuing effort on the part of the RICO defendants to retain the benefits of their previous fraudulent transfer and, thus, not a new and independent injury triggering the separate accrual rule (*see* In re Merrill Lynch Ltd. Partnerships Litig., 154 F3d at 59-60). Accordingly, even if Liotti had set forth in the amended complaint in the RICO action, or in any opposition he could have submitted to the RICO defendants' motion to dismiss the amended complaint, that Overview's April 1999 bankruptcy filing constituted an additional RICO violation, such allegation would not have triggered the separate accrual rule because the injury resulting from such bankruptcy filing, i.e., an attempt by Mr. Dempster to retain the benefits of the allegedly

fraudulent transfer, was not a new and **6 independent RICO injury (*id.* at 59).

Accordingly, the Supreme Court erred when it determined that, if Liotti had submitted, in opposition to the RICO defendants' motion to dismiss the amended complaint, timely papers with supporting affidavits, and had therein attempted to relate Overview's April 1999 bankruptcy filing to the underlying RICO scheme, "the separate accrual rule for RICO claims adopted by the Second Circuit Court of Appeals governs and would have saved the Plaintiff's RICO claim from dismissal based upon the statute of limitations." (2009 NY Slip Op 50720[U], *5 [2009].) *180 In short, the untimeliness of the plaintiff's RICO claim was not a remediable defect. No timely opposition or supporting affidavit submitted by Liotti in opposition to the RICO defendants' motion to dismiss the amended complaint would have altered the fact that the alleged injuries caused by the RICO defendants' alleged predicate RICO violations were discovered by the plaintiff, and therefore accrued, no later than the commencement of her fraudulent conveyance action in 1997. In any event, the plaintiff's conclusory claims that her complaint would have survived the RICO defendants' motion to dismiss the amended complaint if Liotti had advanced new injuries, separate and apart from the fraudulent transfer of marital assets, are speculative and, thus, not sufficient to support a cause of action alleging legal malpractice (*see* *Dupree v Voorhees*, 68 AD3d at 813; *Hashmi v Messiha*, 65 AD3d 1193, 1195 [2009]; *Vlahakis v Mendelson & Assoc.*, 54 AD3d 670 [2008]; *Holschauer v Fisher*, 5 AD3d 553, 554 [2004]).

Notably, although, as a matter of law, the RICO action was time-barred, in reviewing the amended complaint therein, Liotti did allege in paragraphs 57, 62 (f) (vii); 66, 88, 162-168, 172, 173 and 176 that Overview's 1999 bankruptcy proceeding was part of the underlying RICO scheme. Liotti did, therefore, plead facts in the amended complaint in an effort to relate Overview's April 1999 bankruptcy petition to the underlying RICO scheme. Ultimately, however, the degree to which Liotti attempted to establish this link is irrelevant since, regardless of how Overview's bankruptcy proceeding fit into the underlying RICO scheme, as a matter of law, any injury sustained by the plaintiff as a result of the RICO defendants' alleged RICO violations accrued outside the four-year statute of limitations. Consequently, Liotti's negligent failure to oppose the RICO defendants' motion to dismiss the amended complaint and to timely appeal the order granting such motion had no causal effect on the final disposition of the plaintiff's RICO claims.

Generally, "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). On a motion for summary judgment in the legal malpractice context, the defendant must "demonstrate that the plaintiff is unable to prove at least one of the essential elements of a legal malpractice cause of action" (*Greene v Sager*, 78 AD3d 777, 779 [2010]; *see* *181 *Eisenberger v Septimus*, 44 AD3d 994 [2007]; *Kotzian v McCarthy*, 36 AD3d 863 [2007]). Once a defendant makes this prima facie showing, the burden shifts to the plaintiff to raise an issue of fact requiring a trial (*see* *Siciliano v Forchelli & Forchelli*, 17 AD3d at 345; *Schadoff v Russ*, 278 AD2d 222 [2000]).

() Here, Liotti's inexcusable failure to file timely opposition papers to the RICO defendants' motion to dismiss the amended complaint and to file a timely notice of appeal from the District Court's order granting such motion, clearly falls below the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession (*see* *Conklin v Owen*, 72 AD3d at 1007; *McCoy v Tepper*, 261 AD2d 592, 593 [1999]). However, as previously discussed, despite such negligence, Liotti is entitled to summary judgment inasmuch as the plaintiff's civil RICO claim was time-barred as a matter of law. Consequently, Liotti has established that the plaintiff is unable to prove that she would have prevailed in the RICO action but for his negligence. In opposition, the plaintiff failed to raise a triable issue of fact (*see* *Hamoudeh v Mandel*, 62 AD3d at 949).

() Turning to the plaintiff's cross appeal, upon searching the record, the Supreme Court correctly awarded summary judgment to Liotti dismissing the cause of action to recover damages for breach of contract, as that cause of action arose "from the same facts as [the] legal malpractice cause of action" and is thereby "duplicative of that cause of action" (*Conklin v Owen*, 72 AD3d at 1007; *see* *Feldman v Finkelstein & Partners, LLP*, 76 AD3d 703 [2010]; *Mahler v Campagna*, 60 AD3d 1009, 1012 [2009]; *Kvetnaya v Tylo*, 49 AD3d 608, 609 [2008]).

The parties' remaining contentions are without merit.

The appeal from the order entered August 14, 2009, is dismissed, as no appeal lies from an order denying reargument, and the order dated March 31, 2009, is modified, on the law, by deleting the provision thereof denying that branch of the defendant's motion which was for summary judgment dismissing the cause of action to recover damages for legal malpractice, and substituting **7 therefor a provision granting that branch of the motion; as so modified, the order dated March 31, 2009, is affirmed insofar as appealed and cross-appealed from.

Mastro, J.P., Rivera and Leventhal, JJ., concur.

Ordered that the appeal from the order entered August 14, 2009 is dismissed, without costs or disbursements, as no appeal lies from an order denying reargument; and it is further,

*182 Ordered that the order dated March 31, 2009 is modified, on the law, by deleting the provision thereof denying that branch of the defendant's motion which was for summary judgment dismissing the cause of action to recover damages for legal malpractice, and substituting therefor a provision granting that branch of the motion; as so modified, the order dated March 31, 2009 is affirmed insofar as appealed and cross-appealed from, without costs or disbursements.

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49 A.D.2d 645, 370 N.Y.S.2d 255

Morrow Grago, Appellant-Respondent,
v.
John T. Robertson, Respondent-Appellant

Supreme Court, Appellate Division,
Third Department, New York
July 10, 1975

CITE TITLE AS: Grago v Robertson

SUMMARY

Cross appeals from an order of the Supreme Court at Special Term, entered March 12, 1973 in Madison County, which granted a motion by the defendant for summary judgment dismissing six out of eight causes of action. The plaintiff, Morrow Grago, is a subcontractor who entered into an agreement with Brydon Construction Corporation (hereinafter Brydon) in April of 1965 to perform certain site work and masonry work. Mr. Grago posted a performance bond issued by Transamerica Insurance Company. Following a dispute with Brydon, the plaintiff walked off the job. Brydon subsequently commenced a lawsuit in New York City against Mr. Grago for breach of contract. Mr. Grago then hired an attorney, the defendant John T. Robertson, for the alleged purpose of defending the suit commenced by Brydon and prosecuting Mr. Grago's claim for breach of contract. Mr. Robertson served an answer on behalf of Mr. Grago in the New York City lawsuit and included a counterclaim for breach of contract. He also commenced a lawsuit for breach of contract against Brydon in the Supreme Court of Madison County. That lawsuit was subsequently consolidated with the case in New York City. When the cases were reached for trial on April 6, 1970, Mr. Robertson, because of lack of notice, failed to appear on behalf of Mr. Grago and Brydon obtained a default judgment for $271,896 against Mr. Grago and for $51,814.54 against Transamerica Insurance Company, both judgments being entered on December 7, 1970. These default judgments were set aside on April 7, 1971. In November of 1971 Brydon's complaint against Mr. Grago was dismissed and Mr. Grago received a judgment of $37,162.75 against Brydon. The judgment remains unsatisfied since it is alleged that Brydon had become insolvent. On September 14, 1972 Mr. Grago commenced a malpractice action against Mr. Robertson alleging the following improper conduct: (1) Mr. Robertson failed to appear and thereby improperly allowed the default judgment to be taken; (2) Mr. Robertson failed to commence legal action against Brydon's bonding company; (3) Mr. Robertson failed to file a lien against the owner of the construction site; (4) Mr. Robertson failed to preserve Mr. Grago's interest pursuant to the Lien Law; (5) due to Mr. Robertson's omission, Mr. Grago was required to hire additional counsel and incurred superfluous legal expenses; (6) due to Mr. Robertson's omission with regard to Transamerica Insurance Company's legal interests, Mr. Grago incurred additional legal expenses on behalf of Transamerica; (7) Mr. Robertson breached his contract of legal representation; and (8) Mr. Robertson breached other contractual obligations to preserve a variety of Mr. Grago's legal interests. The defendant asserted that the plaintiff had not made out a prima facie case of malpractice or of breach of contract, that he had never been paid for any services rendered, that he had never been advised to file a lien, and that the Statute of Limitations barred the plaintiff's claims. The plaintiff moved for summary judgment, while the defendant sought to have all of the causes of action dismissed. The court held that the first and fifth causes of action should not be dismissed since factual determinations had to be made concerning whether the defendant's neglect constituted malpractice. He dismissed causes of action labeled two, three and four as being time-barred since the alleged malpractice occurred in 1965 and the court did not believe that the doctrine of continuous representation should be applied. The court also dismissed the sixth, seventh and eighth causes of action. Both parties have appealed from the court's determination. There are three central ***646** issues in this case: (1) does cause of action No. 1 properly allege an action in malpractice, and do causes of action numbered 5 and 6 properly complement the first cause of action; (2) should causes of action labeled two, three and four be barred by the Statute of Limitations; and (3) were the seventh and eighth causes of action properly dismissed. It is clear that an attorney is liable in a malpractice action if it can be proved that his conduct fell below the ordinary and reasonable skill and knowledge commonly possessed by a member of his profession *(Rapuzzi v Stetson*, 160 App Div 150; Prosser, Torts [3d ed], p 162). However, the attorney is

not held to the rule of infallibility and is not liable for an honest mistake of judgment where the proper course is open to reasonable doubt *(id.)*. Such determinations require factual findings. Thus, in *Siegel v Kranis* (29 AD2d 477, 479), it was acknowledged that an attorney may be liable for his ignorance of the rules of practice *(Von Wallhoffen v Newcombe*, 10 Hun 236), for his failure to comply with conditions precedent to suit (cf. *Sikora v Steinberg*, 40 Misc 2d 649, affd 20 AD2d 852), or for his neglect to prosecute or defend an action *(Hamilton v Dannenberg*, 239 App Div 155). It is, therefore, evident that the issue of whether specific conduct constitutes malpractice normally requires a factual determination to be made by the jury. In the present case, the court held that the issue of whether the defendant's "neglect could be construed as malpractice is a question of fact for the jury to determine". We agree. The court's failure to apply the doctrine of continuous representation regarding the second, third and fourth causes of action, however, appears to be improper. It is clear that the concept of continuous treatment concerning medical malpractice cases has been properly incorporated into the attorney malpractice area *(Gilbert Props. v Millstein*, 33 NY2d 857). Thus, the cause of action in an attorney malpractice case should not accrue until the attorney's representation concerning a particular transaction is terminated. In the present case, the plaintiff asserts three causes of action concerning alleged malpractice occurring in 1965. All of those causes of action concern the preservation of the plaintiff's legal interest with regard to his relationship with Brydon. Consequently, the causes of action should not be deemed to accrue until 1971 when the defendant's representation of the plaintiff with regard to the Brydon matter terminated. Since the malpractice cause of action was commenced in 1972, it should be held to be timely. Thus, the court's determination with respect to the second, third and fourth causes of action should be reversed. In the present case, the plaintiff's final two causes of action allege that a contract was executed by the parties and was breached by the defendant. It is clear from the pleadings that the alleged contract was made in 1965. Since there is no legal barrier to pleading both contract causes of action along with the malpractice causes of action *(Glens Falls Ins. Co. v Reynolds*, 3 AD2d 686), the court should not have dismissed the seventh and eighth causes of action. The defendant asserted, however, that even if there were a contract, a suit based on its breach would be untimely since the alleged breach occurred more than six years before the commencement of the present action. Such argument, though, lacks merit due to the application of the continuous representation doctrine (see *Gilbert Props. v Millstein, supra; Siegel v Kranis, supra)*. The logic of the doctrine discussed previously is equally applicable to a cause of action alleging a breach of contract by an attorney. Consequently, the seventh and eighth causes of action similarly should not be deemed to accrue until the attorney-client relationship terminated in 1971. In that event, the final two causes of action are timely and should not have been dismissed. This court is not implying that the negligence of the defendant or his breach of the representation ***647** contract has been established or that the plaintiff is entitled to recover. Rather, this court is holding that the plaintiff has pleaded causes of action in malpractice and contract, and that the actions are not barred by the Statute of Limitations.

HEADNOTE

ATTORNEY AND CLIENT
MALPRACTICE

() Limitations of action --- Continuous representation doctrine --- Issue of whether specific conduct constitutes malpractice normally requires factual determination to be made by jury --- Court properly held that issue of whether defendant's neglect could be construed as malpractice is question of fact for jury to determine --- However, court's failure to apply doctrine of continuous representation appears to be improper --- Concept of continuous treatment concerning medical malpractice cases has been properly incorporated into attorney malpractice area --- Thus, cause of action in attorney malpractice case should not accrue until attorney's representation concerning particular transaction is terminated --- In present case, malpractice cause of action should be held to be timely --- Logic of continuous representation doctrine is equally applicable to cause of action alleging breach of contract by attorney: consequently, causes of action alleging contract breach similarly should not be deemed to accrue until attorney-client relationship terminated, are timely and should not have been dismissed --- Pleaded causes of action in malpractice and contract are not barred by Statute of Limitations.

Order modified, on the law and the facts, by reversing so much thereof as granted defendant's motion to dismiss the second, third, fourth, sixth, seventh and eighth causes

of action; by striking so much of the fourth ordering paragraph as pertains to the measure of damages on the first cause of action, and, as so modified, affirmed, without costs.

Herlihy, P. J., Greenblott, Sweeney, Main and Reynolds, JJ., concur.

37 A.D.3d 763, 832 N.Y.S.2d
47, 2007 N.Y. Slip Op. 01685

**1 Michael Kempf et al.,
Appellants, et al., Plaintiff
v
Kenneth S. Magida, Respondent.

Supreme Court, Appellate Division,
Second Department, New York
2005-10411, 2643/05
February 27, 2007

CITE TITLE AS: Kempf v Magida

HEADNOTES

Attorney and Client
Malpractice

It was error to dismiss cause of action alleging legal malpractice arising from civil forfeiture proceeding—plaintiffs alleged that defendant was negligent for failing to become familiar with forfeiture law and agreeing to settlement terms without attempting to negotiate, and that his negligence was proximate cause of their damages—while legal malpractice action is unlikely to succeed where attorney erred because issue of law was unsettled or debatable, attorney may be liable for failure to conduct adequate legal research—plaintiffs were not obligated to show, upon motion to dismiss for failure to state cause of action, that they actually sustained damages; they need only plead allegations from which damages attributable to defendant's malpractice might be reasonably inferred; in any *764 event, plaintiffs pleaded actual damages.

Motions and Orders
Motion to Dismiss

Plaintiffs were not required to submit "affidavit" in opposition to motion to dismiss pursuant to CPLR 3211 (a) (7).

Motions and Orders
Treating Motion to Dismiss as One for Summary Judgment

Steven L. Kessler, New York, N.Y. (Eric M. Wagner of counsel), for appellants.
Kaufman Borgeest & Ryan, LLP, New York, N.Y. (A. Michael Furman of counsel), for respondent.

In an action to recover damages for legal malpractice, the plaintiffs Michael Kempf and Suffolk Systems, Inc., appeal from so much of an order of the Supreme Court, Nassau County (Dunne, J.), entered September 1, 2005, as granted that branch of the defendant's motion pursuant to CPLR 3211 (a) (7) which was to dismiss the cause of action alleging legal malpractice arising from a civil forfeiture proceeding.

Ordered that the order is reversed insofar as appealed from, on the law, with costs, and that branch of the defendant's motion which was to dismiss the cause of action alleging legal malpractice arising from the civil forfeiture proceeding is denied.

The Supreme Court erred in dismissing the cause of action alleging legal malpractice arising from a civil forfeiture proceeding. On a motion to dismiss pursuant to CPLR 3211 (a) (7), the pleading is to be afforded a liberal construction. The court must accept the facts alleged in the complaint as true, accord the plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner*, 96 NY2d 300, 303 [2001]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

Accepting all the facts alleged in the complaint as true, the plaintiffs stated a cause of action alleging legal malpractice in the forfeiture proceeding. The plaintiffs alleged in their complaint, inter alia, that the defendant was negligent for failing to become familiar with the **2 forfeiture law and agreeing to the settlement terms without attempting to negotiate, and that his negligence was a proximate cause of their damages. While a legal malpractice action is unlikely to succeed where an attorney erred because an issue of law was unsettled or debatable (*see Darby & Darby v VSI Intl.*, 95 NY2d 308, 315 [2000]), an attorney may be liable for a failure to conduct adequate legal research (*see McCoy v Tepper*, 261 AD2d 592 [1999]; *Gardner v Jacon*, 148 AD2d 794 [1989]).

The defendant's contention regarding damages is also without merit. The plaintiffs are not obligated to show, at this stage of the pleadings, that they actually sustained damages. They need only plead allegations from which damages attributable to the defendant's malpractice might be reasonably inferred (*see* *InKine Pharm. Co. v Coleman*, 305 AD2d 151 [2003]). In any event, the plaintiffs have pleaded actual damages. ***765**

The plaintiffs correctly contend that they were not required to submit an "affidavit" in opposition to the defendant's motion to dismiss pursuant to CPLR 3211 (a) (7). CPLR 3211 allows a plaintiff to submit affidavits, but it does not obligate the plaintiff to do so on penalty of dismissal, as under CPLR 3212. If a plaintiff chooses to stand on the pleading alone, confident that the allegations therein are sufficient to state all of the necessary elements of a cognizable cause of action, he or she is at liberty to do so and, unless the motion is converted by the court to one for summary judgment, the plaintiff will not be penalized for not making an evidentiary showing in support of the complaint (*see* *Rich v Lefkovits*, 56 NY2d 276, 282 [1982]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]). Furthermore, a verified pleading may be utilized as an affidavit whenever the latter is required (*see* CPLR 105 [u]).

The plaintiffs also correctly contend that the court excessively credited the defendant's affidavit. The defendant's affidavit did not conclusively establish that the plaintiffs had no cause of action. It merely disputed some of the factual allegations of the complaint (*see* *Skillgames, LLC v Brody*, 1 AD3d 247, 251 [2003]).

Finally, the plaintiffs correctly contend that the court improperly used a summary judgment standard in deciding the motion to dismiss. By focusing on the proof in the plaintiffs' submission in opposition, the court effectively treated the motion as one for summary judgment, which requires disclosure of all of the evidence on the disputed issues. The mere fact that a plaintiff cannot withstand a motion for summary judgment under CPLR 3212 is not controlling on a motion under CPLR 3211 (*see Rovello v Orofino Realty Co., supra*). If a court decides to treat a CPLR 3211 motion as a motion for summary judgment, it must first provide adequate notice to the parties, which it did not do here (*id.*). Schmidt, J.P., Rivera, Covello and Balkin, JJ., concur.

185 A.D.2d 690, 586 N.Y.S.2d 80

Dona M. Kenney et al., Respondents,
v.
Aaron M. Zimmerman et al., Appellants.

Supreme Court, Appellate Division,
Fourth Department, New York
743
(July 14, 1992)

CITE TITLE AS: Kenney v Zimmerman

HEADNOTE

ATTORNEY AND CLIENT
MALPRACTICE

() Following jury trial in personal injury action, plaintiff was awarded judgment for $30,000; Appellate Division reversed and granted new trial on ground testimony of plaintiff's treating physician that plaintiff suffered permanent neck injury should have been precluded because plaintiff did not mention this specific injury in her bill of particulars and did not timely disclose doctor's findings as required by court rules; second trial ended with verdict of no cause of action, based upon jury's finding plaintiff failed to establish 'serious injury' under Insurance Law --- In this legal malpractice action, summary judgment was properly granted on issue of liability against plaintiffs' counsel at first trial; failure to comply with well-established disclosure rules fell below level of skill and knowledge possessed by other members of profession in community; if attorney had not been negligent, moreover, plaintiff would not have lost $30,000 verdict or been exposed to uncertainties of new trial --- With respect to plaintiffs' counsel at second trial, at most, failure to call one of plaintiff's treating physicians, was error of judgment by attorney, which does not rise to level of malpractice; record contains conflicting evidence concerning whether this attorney was negligent in her preparation and investigation of case and whether negligence on her part was proximate cause of plaintiff's loss; summary judgment, therefore, was improperly granted against second attorney.

Order unanimously modified on the law and as modified affirmed without costs in accordance with the following Memorandum: This legal malpractice action arises from defendants' representation of plaintiffs in a personal injury action. Following a jury trial, plaintiff Dona Kenney was awarded judgment for $30,000. This court reversed the judgment and granted a new trial on the ground that the testimony of plaintiff's treating physician that plaintiff suffered a permanent neck injury should have been precluded "because plaintiff did not mention this specific injury in her bill of particulars (CPLR 3042 [c]), and did not timely disclose the doctor's findings as required by this department's rules (22 NYCRR 1024.25 [c], [e]; *Cramer v Toledo Scale Co.*, 89 AD2d 1059, 1060)" *(Kenney v Amodei,* 119 AD2d 1006). The second trial ended with a verdict of no cause of action, based upon the jury's finding that plaintiff failed to establish a ***691** "serious injury" under the Insurance Law *(see,* Insurance Law § 5102 [d] [former § 671 (4)]).

Summary judgment was properly granted on the issue of liability against defendant Zimmerman, plaintiffs' counsel at the first trial. "Though an attorney may not be liable for errors of judgment ... he may be liable for his ignorance of the rules of practice *(Von Wallhoffen v. Newcombe,* 10 Hun 236, 240)" *(Siegel v Kranis,* 29 AD2d 477, 479). The failure to comply with well-established disclosure rules fell below the level of skill and knowledge possessed by other members of the profession in the community *(see, Logalbo v Plishkin, Rubano & Baum,* 163 AD2d 511, 513, *lv dismissed* 77 NY2d 940). If Zimmerman had not been negligent, moreover, plaintiff would not have lost a $30,000 verdict or been exposed to the uncertainties of a new trial. Thus, the record establishes "not only that the attorney was negligent, but also that 'but for' the attorney's negligence plaintiff would have prevailed in the underlying action" *(Pacesetter Communications Corp. v Solin & Breindel,* 150 AD2d 232, 234, *lv dismissed* 74 NY2d 892).

We reach a different conclusion with respect to defendant Rojas, plaintiffs' counsel at the second trial. At most, the failure to call Dr. Delahanty, one of plaintiff's treating physicians, was "an error of judgment by [Rojas], which does not rise to the level of malpractice" *(Rosner v Paley,* 65 NY2d 736, 738). The record contains conflicting evidence concerning whether Rojas was negligent in her

preparation and investigation of the case and whether any negligence on her part was the proximate cause of plaintiff's loss. Summary judgment, therefore, was improperly granted against Rojas. (Appeals from Order of Supreme Court, Onondaga County, Mordue, J.--Summary Judgment.)

Present--Boomer, J. P., Green, Balio, Boehm and Fallon, JJ.

62 A.D.3d 414, 880 N.Y.S.2d
229, 2009 N.Y. Slip Op. 03611

**1 Joseph Mortenson, Appellant
v
Robert C. Shea, Esq., et al., Respondents.

Supreme Court, Appellate Division,
First Department, New York
May 5, 2009

CITE TITLE AS: Mortenson v Shea

HEADNOTE

Attorney and Client
Malpractice

Robbins & Associates, P.C., New York (James A. Robbins of counsel), for appellant.
White Fleischner & Fino, LLP, New York (Janet P. Ford of counsel), for respondents.

Order, Supreme Court, New York County (Judith J. Gische, J.), entered April 1, 2008, which denied plaintiff's motion for summary judgment and granted defendants' cross motion for summary judgment dismissing the complaint, unanimously modified, on the law, the cross motion denied, the complaint reinstated, and otherwise affirmed, without costs.

This action was dismissed on the erroneous grounds that the New Jersey defendants were not and could not be retained to actually commence a legal malpractice action against an attorney in New York State, and that the limited services provided by defendant law firm in attempting to settle the underlying claim did not include a duty to advise plaintiff about the applicable New York statute of limitations. A legal malpractice claim may arise out of the giving of faulty advice to a client (*see* *Scheller v Martabano*, 177 AD2d 690 [1991]). Furthermore, an attorney may be liable for his ignorance of the rules of practice, his failure to comply with conditions precedent to suit, his neglect to prosecute an action, or his failure to conduct adequate *415 legal research (*see* *McCoy v Tepper*, 261 AD2d 592 [1999]). Here, the documentary evidence—in particular, an October 26, 2004 letter agreement—established plaintiff's authorization for defendants "to proceed with any potential malpractice claim against Melisande Hill as it relates to the October 7, 2000 motor vehicle accident," and defendants apparently continued to pursue such a claim even after allegedly referring plaintiff to New York counsel, thus creating the impression that the underlying malpractice claim remained viable. By virtue of that conduct, defendants had a duty, at a minimum, to expressly advise plaintiff that a limitations period existed, and of the need to contact New York counsel immediately to insure that an action was timely filed (*see id.*). However, a question of fact exists as to whether plaintiff would have succeeded in the underlying action "but for" the attorney's negligence (*Leder v Spiegel*, 9 NY3d 836 [2007], *cert denied sub nom.* *Spiegel v Rowland*, 552 US —, 128 S Ct 1696 [2008]), which warrants the denial of all summary judgment motions. Concur—Tom, J.P., Andrias, Saxe, Moskowitz and DeGrasse, JJ. [*See* 2008 NY Slip Op 30915(U).]

149 A.D.3d 224, 49 N.Y.S.3d
684, 2017 N.Y. Slip Op. 02008

**1 In the Matter of Mark D. Bogard (Admitted as Mark Daryl Bogard), an Attorney, Respondent. Attorney Grievance Committee for the First Judicial Department, Petitioner.

Supreme Court, Appellate Division,
First Department, New York
M-6099
March 21, 2017

CITE TITLE AS: Matter of Bogard

SUMMARY

Disciplinary proceedings instituted by the Attorney Grievance Committee for the First Judicial Department. Respondent was admitted to the bar on June 23, 2009 at a term of the Appellate Division of the Supreme Court in the Third Judicial Department as Mark Daryl Bogard.

HEADNOTE

Attorney and Client
Disciplinary Proceedings
Censure

Pursuant to the reciprocal disciplinary provisions of 22 NYCRR 1240.13, respondent was publicly censured based upon an order of reprimand imposed upon him in New Jersey for gross neglect of a foreclosure matter, which resulted in his clients' house being sold at a sheriff's sale.

RESEARCH REFERENCES

Am Jur 2d Attorneys at Law §§ 38, 66, 113.

Carmody-Wait 2d Officers of Court §§ 3:260, 3:280, 3:281, 3:325.

22 NYCRR 1240.13.

NY Jur 2d Attorneys at Law §§ 348, 383, 475–478, 480.

ANNOTATION REFERENCE

See ALR Index under Attorneys; Discipline and Disciplinary Actions.

FIND SIMILAR CASES ON THOMSON REUTERS WESTLAW

Path: Home > Cases > New York State & Federal Cases > New York Official Reports

Query: censured /s reciprocal & neglect! /s foreclos!

APPEARANCES OF COUNSEL

Jorge Dopico, *Chief Attorney*, *Attorney Grievance Committee*, New York City (*Kevin P. Culley* of counsel), for petitioner.

*225 OPINION OF THE COURT

Per Curiam.

Respondent Mark D. Bogard was admitted to the practice of law in the State of New York by the Third Judicial Department on June 23, 2009, under the name Mark Daryl Bogard. At all times relevant to this proceeding, respondent maintained an office for the practice of law within the First Judicial Department.

By motion dated November 21, 2016, the Attorney Grievance Committee (Committee) moves, pursuant to Rules for Attorney Disciplinary Matters (22 NYCRR) § 1240.13 (a) and (b), for an order finding that respondent has been disciplined by a foreign jurisdiction and directing him to demonstrate why discipline should not be imposed in New York for the **2 underlying professional misconduct. The Committee properly served its petition on respondent, pro se, and by way of a December 21, 2016 email, respondent confirmed that he does not intend to submit a response.

By order filed November 20, 2014 (220 NJ 44, 102 A3d 380 [2014]), the Supreme Court of New Jersey reprimanded respondent for, inter alia, gross neglect of a foreclosure matter, which resulted in his clients' house being sold at a sheriff's sale. A New Jersey District Ethics Committee (DEC) charged respondent with violating New Jersey Rules of Professional Conduct (RPC) rules 1.1 (a) (gross neglect), 1.3 (lack of diligence), 1.4 (b) and (c) (failure to communicate), and 5.1 (b) and 5.3 (a) and (b) (failure to

properly supervise). The charges arose from respondent's representation of a husband and wife (the complainants), who retained his law firm (the firm), to represent them in connection with a loan modification and a foreclosure matter.

In March 2010, the complainants retained the firm to help them obtain a loan modification in hopes of lowering the mortgage payments for their home in New Jersey, which was in arrears. At the DEC hearing, respondent testified that he executed the firm's retainer agreement with the complainants because he was physically present in the firm's New York office when they came in; but he was not specifically assigned to their loan modification, which was handled by the staff in the main office in Florida over whom he had no supervisory authority.

The complainants' loan modification was not completed for various reasons. The DEC found that the firm appeared to ***226** have mishandled the loan modification, but it found no professional misconduct on respondent's part because he had no control over the Florida staff that was handling the matter.

In July 2012, a final judgment of foreclosure was entered against the complainants. On August 31, 2012, the complainants met with respondent to discuss the loan modification and informed him that a sheriff's sale had been scheduled for September 12, 2012. On or about September 4, 2012, the complainants executed a second retainer agreement with the firm to represent them in the foreclosure matter for which they paid an additional fee of $2,135.

Respondent admitted that it was his responsibility to stop the sheriff's sale. However, he took no action on the matter until September 11, 2012, the day before the sale, when he purportedly called the Union County Sheriff's Office and was informed that only the homeowners could apply for an adjournment of the sale, and not even his personal appearance as their attorney would suffice. Respondent admitted that he did not ask to speak to a supervisor or to the Union County Sheriff, nor did he submit anything in writing to the sheriff's office. Respondent did not memorialize this purported telephone conversation. Neither respondent nor anyone from the firm attended the sale because the sheriff's office purportedly told respondent that it would not help.

Respondent's hearing testimony was contradicted by a representative from the Union County Sheriff's Office who testified that a homeowner's attorney could request an adjournment of a sale by submitting either a retainer agreement or written instructions from the homeowner authorizing the attorney to request an adjournment, and that two-week adjournments were routinely granted. [*]

Respondent testified that the day prior to the sale, he tried to reach the complainants at three different telephone numbers to no avail. He also sent his client an email informing her that she had to go in person to the sheriff's sale the next day in order to stop it. In his email, respondent stated that by waiting to the last minute to request an adjournment, the client would maximize her time to delay the sale. Notably, the Disciplinary Review Board (DRB) found that the email seemed more designed to diminish the impact of respondent's failure to act in a timely manner rather than to give advice to his client.

***227** Unbeknownst to respondent, the complainants were on vacation in Mexico. Upon receipt of the email, the client tried to call him on his direct line, but he neither answered nor returned ****3** her calls. She admitted that she never gave respondent advance notice of their vacation, but stated that she tried to call him approximately six times before she left. She also purportedly tried to call the firm's Florida office to inquire about the status of the sheriff's sale and whether it was all right to leave for vacation. Respondent did not reply to the complainant's messages.

As no one appeared at the sheriff's sale on the complainants' behalf their house was sold. On September 14, 2012, after he learned of the sale, respondent called the complainants' daughter, who was their emergency contact, and left her a message stating that he would be in contact once he had more information about the sale. Respondent learned that day that the complainants had 10 days to redeem their property.

When the complainant returned from vacation, she tried to call respondent to no avail. She then went to the sheriff's office and learned that no one had entered an appearance on her behalf. On September 19, 2012, respondent informed her about the sale and told her that her only options were to redeem the property or wait to be evicted.

The DEC found that respondent should have made more of an effort to stop the sheriff's sale. Specifically, it concluded that he should have: (1) insisted on speaking with a supervisor or even the sheriff himself to explain that he was not familiar with the type of procedure they employed; (2) informed the person with whom he spoke that he was authorized by the terms of his firm's retainer agreement with the complainants to take all necessary legal steps to represent their interests; (3) submitted a fax or email to plead his clients' case for an adjournment of the sale; or (4) appeared at the sale to try to stop it.

The DEC concluded that by failing to take any of the above steps, respondent had violated New Jersey RPC rules 1.1 (a) (gross negligence) and 1.3 (lack of diligence). The DEC rejected respondent's asserted defense of "impossibility" based on the complainants' failure to inform him of their planned vacation because it was respondent's admitted responsibility to stop the sheriff's sale; and he failed to ascertain, prior to his clients' vacation, whether they had to be available. As to sanction, the DEC noted that respondent had no prior disciplinary history ***228** and there were no aggravating factors, and it recommended a reprimand.

The DRB confirmed the DEC's finding that the charges related to the loan modification (RPC rules 1.1 [a]; 1.3, 1.4, 5.1 [b]; 5.3) should not be sustained since there was no evidence that respondent supervised the staff handling the process. It also agreed with the DEC's finding that respondent did commit professional misconduct in the foreclosure matter, "find[ing] that his failure to take even minimally appropriate action with regard to the sheriff's sale amounted to gross neglect and lack of diligence" in violation of RPC rules 1.1 (a) and 1.3. Finally, the DRB also found that respondent's failure to return the calls his client made to him before and after her vacation constituted failure to communicate in violation of RPC rule 1.4 (b).

As to sanction, the DRB noted that the misconduct at issue, gross neglect, lack of diligence and failure to communicate with clients, ordinarily resulted in either an admonition or a reprimand, depending on, inter alia, the harm to the clients. Given the significant harm to the complainants, namely, the sale of their house, the DRB agreed with the DEC that a reprimand was warranted. By order filed November 20, 2014 (220 NJ 44, 102 A3d 380 [2014]), the New Jersey Supreme Court agreed with the DRB and reprimanded respondent for his misconduct.

As stated above the Committee requests that, pursuant to 22 NYCRR 1240.13 (a) and (b), this Court find respondent has been disciplined by a foreign jurisdiction and order him to demonstrate why discipline should not be imposed based on his discipline in New Jersey.

The only defenses to reciprocal discipline are enumerated at 22 NYCRR 1240.13 (b), to wit: a lack of notice and opportunity to be heard in the foreign jurisdiction; an infirmity of proof establishing the misconduct; or the misconduct at issue in the foreign jurisdiction would not constitute misconduct in New York (*Matter of Hoffman*, 34 AD3d 1 [1st Dept 2006]).

Even though respondent has not asserted a defense under 22 NYCRR 1240.13 (b), none apply. Respondent received notice of the charges against him, testified at the DEC hearing, and waived his right to appear before the DRB for oral argument (*see* 22 NYCRR 1240.13 [b] [1]). In addition, the record, which includes respondent's admissions, amply supports the DRB's and the New Jersey Supreme Court's misconduct findings (*see* 22 NYCRR 1240.13 [b] [2]). Lastly, respondent's misconduct in ***229** New Jersey would also violate the New York Rules of Professional ****4** Conduct (22 NYCRR 1200.0), namely, rules 1.3 (a), 1.3 (b) and 1.4 (a) (*see* 22 NYCRR 1240.13 [b] [3]).

As a general rule, in reciprocal disciplinary matters, this Court gives significant weight to the sanction imposed by the jurisdiction in which the charges were initially brought (*see Matter of Peters*, 127 AD3d 103, 109 [1st Dept 2015]; *Matter of Cardillo*, 123 AD3d 147, 150 [1st Dept 2014]; *Matter of Jaffe*, 78 AD3d 152, 158 [1st Dept 2010]).

In this matter, a public censure, the equivalent of a reprimand in New Jersey, is in accord with this Court's precedent involving similar misconduct (*see e.g. Matter of Dwyer*, 142 AD3d 88 [1st Dept 2016]; *Matter of Weichsel*, 135 AD3d 156 [1st Dept 2015]; *Matter of Finkelstein*, 118 AD3d 51 [1st Dept 2014]).

Accordingly, the Committee's petition for reciprocal discipline should be granted, and respondent is censured pursuant to 22 NYCRR 1240.13.

Acosta, J.P., Mazzarelli, Manzanet-Daniels, Webber and Gesmer, JJ., concur.

Respondent publicly censured.

FOOTNOTES

[*] The Union County Sheriff's website confirmed that two-week adjournments could be obtained.

18 A.D.3d 73, 793 N.Y.S.2d
441, 2005 N.Y. Slip Op. 02851

**1 In the Matter of James G. Kalpakis, an Attorney, Respondent. Grievance Committee for the Tenth Judicial District, Petitioner

Supreme Court, Appellate Division,
Second Department, New York
2003-05781, 2276053
April 11, 2005

CITE TITLE AS: Matter of Kalpakis

SUMMARY

Disciplinary proceedings instituted by the Grievance Committee for the Tenth Judicial District. Respondent was admitted to the bar on July 19, 1989 at a term of the Appellate Division of the Supreme Court in the Second Judicial Department. By decision and order on motion of this Court dated November 25, 2003 the Grievance Committee was authorized to institute and prosecute a disciplinary proceeding against him and the issues raised were referred to John P. Clarke, Esq., as Special Referee, to hear and report.

HEADNOTE

Attorney and Client
Disciplinary Proceedings

Respondent attorney, who failed to preserve client funds, converted client funds to a use other than that for which they were intended, failed to maintain all required bank and bookkeeping records for his attorney escrow account, and neglected a legal matter entrusted to him, was guilty of professional misconduct. Under the totality of circumstances, including respondent's allocation of pro bono time as well as his expressed remorse, and his prior disciplinary history, respondent was suspended from the practice of law for a period of two years.

TOTAL CLIENT-SERVICE LIBRARY REFERENCES

Am Jur 2d, Attorneys at Law §§ 38, 64, 66, 67, 70, 114.

Carmody-Wait 2d, Officers of Court §§ 3:250, 3:255, 3:258, 3:277, 3:279, 3:287.

NY Jur 2d, Attorneys at Law §§ 327, 355–357, 400, 401, 403.

ANNOTATION REFERENCE

See ALR Index under Attorney or Assistance of Attorney; Discipline and Disciplinary Actions.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: suspen! /s two /2 year /s escrow /s neglect! *74

APPEARANCES OF COUNSEL

Faith Lorenzo, Hauppauge (*Mitchell T. Borkowsky* of counsel), for petitioner.

OPINION OF THE COURT

Per Curiam.

The Grievance Committee served the respondent with a petition dated December 18, 2003, containing six charges of professional misconduct. After a pretrial conference on February 25, 2004, and a hearing on April 27, 2004, the Special Referee sustained all six charges. The Grievance Committee now moves to confirm the Special Referee's report and impose such discipline upon the respondent and restitution, if any, as the Court deems just and proper. The respondent has neither cross-moved, replied to the Grievance Committee's motion, nor sought additional time in which to do so.

The petition alleges that prior to and as of June 1, 2000, the respondent maintained an IOLA checking account at the Bank of New York. From approximately June 1, 2000, through May 31, 2002, the respondent used that account incident to his law practice and deposited client funds therein. **2

Charge One alleges that the respondent breached his fiduciary obligations to a client by failing to preserve client funds entrusted to him, in violation of Code of Professional Responsibility DR 9-102 (22 NYCRR 1200.46) and DR 1-102 (a) (7) (22 NYCRR 1200.3 [a] [7]).

On or before October 12, 2000, the respondent was retained by Fred Adelman on a one-third contingency fee basis, to represent him, as plaintiff, in a personal injury action (hereinafter the Adelman matter). The respondent settled that matter for $25,000 on or about October 12, 2000.

On or about October 12, 2000, the respondent received $16,667 from one of the defendants in the Adelman matter and deposited it into his escrow account. On or about October 31, 2000, he received $8,333 from a second defendant and deposited that into his escrow account. Between October 12, 2000, and December 28, 2000, the respondent withdrew $7,333 from his escrow account due to the contingent fee to which he was entitled.

On or about December 5, 2000, the respondent drew a check for $16,666.67 against the escrow account, payable to Fred Adelman as his share of the settlement. The check was not presented for payment until on or about January 17, 2001. ***75**

From approximately December 5, 2000, through January 17, 2001, the respondent should have maintained and preserved at least $16,666.67 in the escrow account for his client's benefit. During that interval, the balance in his escrow account fell below that amount on three occasions, falling to a low of $-4,003.77 on January 4, 2001.

Charge Two alleges that the respondent breached his fiduciary duty by converting client funds entrusted to him to a use other than that for which they were intended, in violation of Code of Professional Responsibility DR 9-102 (22 NYCRR 1200.46) and DR 1-102 (a) (7) (22 NYCRR 1200.3 [a] [7]).

On or about January 4, 2001, the respondent's escrow account was overdrawn, resulting in a balance of $ −4,003.77. Between that date and January 17, 2001, the respondent made four deposits totalling $63,338 into the escrow account, which represented funds entrusted to him for specific clients. Between January 4, 2001, and January 17, 2001, the respondent did not draw any checks or otherwise disburse any funds from that account on behalf of those four clients. On or about January 17, 2001, the respondent's check payable to Fred Adelman, which had been outstanding since December 5, 2000, was presented for payment and debited against the funds then on deposit and being held by the respondent for the benefit of other clients.

Charge Three alleges that the respondent breached his fiduciary obligations to a client by failing to preserve client funds entrusted to him, in violation of Code of Professional Responsibility DR 9-102 (22 NYCRR 1200.46) and DR 1-102 (a) (7) (22 NYCRR 1200.3 [a] [7]).

On or before November 9, 2000, the respondent was retained by Edna Gordon, on a one-third contingency fee basis, to represent her as a plaintiff in a personal injury action. The respondent settled that matter for $35,000 on or about November 9, 2000.

On or about December 1, 2000, the respondent received the settlement check from the defendant in the Gordon matter and deposited it into his escrow account. On or about December 6, 2000, the respondent drew a check for $23,133.33 payable to Edna Gordon as her share of the settlement. That check was not presented for payment against the escrow account until January 4, 2001, four weeks later. From approximately December 1, 2000, through January 4, 2001, the respondent should have maintained and preserved at least $23,133.33 in the escrow account for the benefit of his client. On or about December 18, 2000, the balance in the escrow account was only $18,629.22. ***76**

Charge Four alleges that the respondent breached his fiduciary responsibility by converting client funds to his own use and benefit, in violation of Code of Professional ****3** Responsibility DR 9-102 (22 NYCRR 1200.46) and DR 1-102 (a) (7) (22 NYCRR 1200.3 [a] [7]).

Between August 2000 and January 2001, the respondent engaged in a pattern of wrongfully paying himself from the escrow account, purportedly on account of legal fees, before actually receiving and depositing the funds against which such fees should have been properly drawn.

The Paladino Matter

On or about August 24, 2000, the respondent was retained by Jean Paladino on a one-third contingency fee basis to represent her as plaintiff in a personal injury action. The respondent settled that matter for $27,000 on or about August 24, 2000.

On or about August 24, 2000, and August 25, 2000, the respondent withdrew $9,000 from the escrow account on account of the contingent fee to which he was entitled in the Paladino matter. As of the date the respondent withdrew those fees, he had not yet received or deposited settlement proceeds from the defendant and no funds related to the Paladino matter were otherwise on deposit in the escrow account. The funds against which the respondent should have drawn his fee were actually deposited into the escrow account on September 5, 2000.

The Quinonez Matter

On or before September 7, 2000, the respondent was retained by Louis Quinonez on a one-third contingency fee basis to represent him as plaintiff in a personal injury action. The respondent settled that matter on or about September 7, 2000.

On or about September 7, 2000, the respondent withdrew $3,000 from the escrow account on account of the contingent fee to which he was entitled in the Quinonez matter. As of that date, the respondent had not yet received or deposited settlement proceeds from the defendant and no funds related to the Quinonez matter were otherwise on deposit in the escrow account. The funds against which the respondent should have drawn his fee in the Quinonez matter were actually deposited into the escrow account on October 27, 2000.

The Ramos Matter

On or before October 6, 2000, the respondent was retained by Jose Ramos on a one-third contingency fee basis, to represent him as plaintiff in a personal injury action. The respondent settled that matter for $13,000 on or about October 6, 2000. ***77**

On or about October 6, 2000, the respondent withdrew $4,238 from the escrow account on account of the contingent fee to which he was entitled in the Ramos matter. As of that date, he had not yet received or deposited settlement proceeds from the defendant and no funds related to the Ramos matter were otherwise on deposit in the escrow account. The funds against which the respondent should have drawn his fee were actually deposited into the escrow account on November 6, 2000.

The Cromer Matter

On or before October 12, 2000, the respondent was retained by Michelle Cromer and Linda Cromer on a one-third contingency fee basis to represent them as plaintiffs in a personal injury action. The respondent settled that matter for $28,500 on or about October 12, 2000.

On that day, he withdrew $9,000 from the escrow account on account of the contingent fee to which he was entitled in the Cromer matter. As of that date, the respondent had not yet received or deposited settlement proceeds from the defendant and no funds related to the Cromer matter were otherwise on deposit in the escrow account. The funds against which the respondent should have drawn his fee were actually deposited into the escrow account on October 27, 2000, and October 30, 2000.

The Politis Matter ****4**

On or before November 9, 2000, the respondent was retained by Nicky Politis on a one-third contingency fee basis to represent her as plaintiff in a personal injury action. The respondent settled that matter for $6,000 on or about November 9, 2000.

On that date, the respondent withdrew $2,000 from the escrow account on account of the contingent fee to which he was entitled in the Politis matter. As of that date, the respondent had not yet received or deposited settlement proceeds from the defendant and no funds related to the Politis matter were otherwise on deposit in the escrow account. The funds against which the respondent should have drawn his fee were actually deposited into the escrow account on November 17, 2000.

The Gordon Matter

As previously mentioned, on or before November 9, 2000, the respondent was retained by Edna Gordon on a one-third contingency fee basis in a personal injury action. The Gordon matter was settled for $35,000.

Between November 9, 2000, and November 24, 2000, the respondent withdrew $11,666.67 from the escrow account on account ***78** of the contingent fee to which he was entitled in the Gordon matter. As of that time, the respondent had not yet received or deposited settlement proceeds from the defendant and no funds relating to the Gordon matter were otherwise on deposit in the escrow account. The funds against which the respondent should have drawn this fee were actually deposited on December 1, 2000.

Charge Five alleges that the respondent failed to maintain all required bank and bookkeeping records for the escrow account, in violation of Code of Professional Responsibility DR 9-102 (d) (2), (8) and (9) (22 NYCRR 1200.46 [d] [2], [8], [9]).

The respondent failed to maintain a record or ledger book for the escrow account showing the source of all funds deposited therein, the names of all persons for whom funds were held, the amount of such funds, and the descriptions, amounts, and names of all persons to whom such funds were disbursed. The respondent failed to maintain all checkbooks and check stubs, bank statements, canceled checks, and duplicate deposit slips for the escrow account. He failed to make accurate entries in his ledger book of all deposits into, and disbursements from the escrow account at or near the time of the act, condition, or event recorded. The respondent failed to maintain required bank and bookkeeping records for seven years after the events which they were to record.

Charge Six alleges that the respondent neglected a legal matter entrusted to him, in violation of Code of Professional Responsibility DR 6-101 (a) (3) (22 NYCRR 1200.30 [a] [3]).

On or about April 14, 1998, Dorothy Smith retained the respondent to represent her in a personal injury action against Trans World Airlines arising out of a slip and fall accident which occurred on or about August 9, 1997. From approximately April 14, 1998 through August 9, 2000, the respondent failed to prosecute Dorothy Smith's claim in a diligent manner. From approximately April 14, 1998 through March 4, 2001, the respondent failed to respond to Dorothy Smith's repeated inquiries in a diligent manner. The statute of limitations for commencing a personal injury action on behalf of Dorothy Smith expired on or about August 9, 2000. The respondent failed to commence an action on her behalf within the three-year statute of limitations.

Based on the respondent's admissions and the evidence adduced, the Special Referee properly sustained all six charges. The Grievance Committee's motion to confirm the Special Referee's report is granted. ***79**

In determining an appropriate measure of discipline to impose, the Grievance Committee points out that the respondent was issued a letter of caution on June 24, 1999, for failing to represent his client in a zealous manner and for failing to keep his client fully informed. At the hearing the respondent sought favorable consideration on the basis of his general background as an individual devoted to his family, active in religious and civic communities, and his allocation of pro ****5** bono time to the elderly, the needy and the indigent, as well as his expressed remorse in determining the appropriate measure of discipline to impose.

The Special Referee noted that with respect to Charge Four, there is no question that the withdrawal of fees before the deposit of settlement checks was not an accounting error but rather, was deliberate. The fact that clients' shares of settlements were not issued until after the settlement checks were deposited and cleared undermines the respondent's position attributing his conduct to a mistake. As to Charge Six, where the respondent admits neglecting a legal matter and allowing the statute of limitations to run, there was no testimony advanced by way of explanation or mitigation, other than his hectic schedule.

Under the totality of circumstances, whereby the respondent admittedly engaged in serious misconduct with respect to his handling of his escrow account and client funds entrusted to him as a fiduciary, notwithstanding that the clients were paid, and neglected a client matter resulting in claims being time-barred, the respondent is suspended from the practice of law for two years.

Prudenti, P.J., H. Miller, S. Miller, Ritter and Santucci, JJ., concur.

Ordered that the petitioner's motion to confirm the report of the Special Referee is granted; and it is further,

Ordered that the respondent, James G. Kalpakis, is suspended from the practice of law for a period of two years, commencing May 11, 2005, and continuing until the further order of this Court, with leave to the respondent to apply for reinstatement no sooner than six months before the expiration of the period of two years, upon furnishing satisfactory proof that during that period he (1) refrained from practicing or attempting to practice law, (2) fully complied with this order and with the terms and provisions of the written rules governing the conduct of disbarred, suspended, and resigned attorneys (*see* ***80** 22

NYCRR 691.10), and (3) otherwise properly conducted himself; and it is further,

Ordered that pursuant to Judiciary Law § 90, during the period of suspension and until the further order of this Court, the respondent, James G. Kalpakis, shall desist and refrain from (1) practicing law in any form, either as principal or agent, clerk, or employee of another, (2) appearing as an attorney or counselor-at-law before any court, judge, justice, board, commission, or other public authority, (3) giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) holding himself out in any way as an attorney and counselor-at-law; and it is further,

Ordered that if the respondent, James G. Kalpakis, has been issued a secure pass by the Office of Court Administration, it shall be returned forthwith to the issuing agency and the respondent shall certify to the same in his affidavit of compliance pursuant to 22 NYCRR 691.10 (f).

NEW YORK STATE BAR ASSOCIATION
Serving the legal profession and the community since 1876

ETHICS OPINION 1037

New York State Bar Association
Committee on Professional Ethics

Opinion 1037 (12/6/14)

Topic: Limiting means used to pursue client's objectives; conduct prejudicial to administration of justice; status hearing

Digest: Government attorneys who handle matters before the Immigration Court may, with the informed consent of the client as well as the consent of the Immigration Court, provide the Immigration Court with a position paper and decline to attend in person Immigration Court status hearings at which no substantive or procedural issues can or will be addressed, as long as the government attorneys are not thereby impeded from competently and diligently representing their client.

Rules: 1.1(a) & (c), 1.2(a), 1.4(a); 3.4(c), 8.4(d)

FACTS

1. The New York Office of the Chief Counsel (OCC) of Immigration and Customs Enforcement (ICE) represents ICE in litigating removal proceedings before the Immigration Court.[1] Litigation before the Immigration Court—particularly litigation regarding the removal of unaccompanied alien children—often takes years to resolve because many respondent aliens make external applications to other administrative bodies (such as the U.S. Citizenship and Immigration Service) or courts (such as New York Family Court), and the Immigration Court often cannot decide individual cases until those other administrative bodies or courts issue their decisions.

2. While these external applications are pending, cases pending before the Immigration Court are listed on a master calendar and scheduled for periodic status hearings (each a "Status Hearing"). The purpose of a Status Hearing is to update the Immigration Court on the status of the external applications, but Status Hearings are repeatedly adjourned because there is nothing to report while the external applications remain pending. The ICE attorney generally

does not oppose adjournments, changes of venue, or, in certain circumstances, administrative closure or dismissal of the Immigration Court proceedings. Once a respondent-alien has exhausted the external applications, the Immigration Court schedules the case for a merits hearing (the "Merits Hearing"). Under current practice, ICE attorneys appear in person before the Immigration Court for every Status Hearing and Merits Hearing.

3. The OCC is considering altering current practice regarding its representation of ICE before the Immigration Court during the Status Hearing stage. In order to increase efficiency, the OCC would like to have its attorneys submit position papers in lieu of in-person appearances at the Status Hearings. The OCC has requested an opinion as to the ethical implications of this proposed practice (assuming the Immigration Court would permit it).

QUESTION

4. May OCC lawyers decline to attend the Immigration Court's Status Hearings at which no substantive or procedural issues can or will be addressed?

OPINION

5. The New York Rules of Professional Conduct (the "Rules") prohibit an attorney from engaging in "conduct that is prejudicial to the administration of justice." Rule 8.4(d). The phrase "prejudicial to the administration of justice" is explained in Comment [3] to Rule 8.4:

The prohibition on conduct prejudicial to the administration of justice is generally invoked to punish conduct, whether or not it violates another ethics rule, that results in substantial harm to the justice system comparable to those caused by obstruction of justice, such as advising a client to testify falsely, paying a witness to be unavailable, altering documents, repeatedly disrupting a proceeding, or failing to cooperate in an attorney disciplinary investigation or proceeding. . . . The conduct must be seriously inconsistent with a lawyer's responsibility as an officer of the court.

6. Rule 3.4(c) prohibits a lawyer from disregarding, or advising the client to disregard, a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, with exceptions not relevant here. Thus, if the Immigration Court required personal attendance by OCC attorneys, the attorneys could not ethically refuse to attend. See N.Y. State 719 (1999) (a lawyer's retainer agreement may not vary a requirement of a court rule because doing so would constitute a violation of DR 7-106(A) [the predecessor to Rule 3.4(c)]); N.Y. State 613 (1990) (whether a lawyer may help a "pro se" client to draft a pleading depends on whether the lawyer would be disregarding a standing rule of the tribunal that requires disclosing the drafter of the pleadings). The purpose of the prohibition in Rule 3.4(c) is similar to the purpose of the legal

doctrine of contempt of court, i.e. engaging in contemptuous behavior tending to impair the respect due to the authority of the court or intentional disobedience to a mandate of the court. See NY Penal Law § 215.50.

7. Attorneys who fail to attend court ordered hearings in New York are subject to discipline under Rule 8.4(d). Matter of Cronk, 52 A.D.3d 54, 58 (2d Dept 2008) (respondent disciplined for failure to attend scheduled court conferences). Other states' disciplinary authorities have reached similar conclusions. See, e.g., Oklahoma Bar Association v. Benefield, 125 P.3d 1191, 1194 (2005); Attorney Grievance Com'n of Maryland v. Monfried, 368 Md. 373 (2002); In re Davidsion, 761 N.E.2d 854 (2002); Florida Bar Association v. Ossinsky, 255 So.2d 526 (1971). Attorneys who disregard the ruling of a tribunal in New York also are subject to discipline. See, e.g. Matter of Goll, 27 A.D.3d 131 (2d Dept 2006) (violation of 7-106(A) for failing to prepared and submit documents when court directed lawyer to do so, among other violations, results in a 2-year suspension); Matter of Fretz, 88 A.D.3d 470 (4th Dept 2011)(violation of DR 7-106(A), among other violations, results in a 3-year suspension).

8. None of the cited decisions involve situations where the client and the court consented to the non-appearance (or appearance through a position paper in lieu of a personal appearance).

9. As long as the tribunal permits the lawyer to submit a position paper rather than appearing in person at a Status Hearing, the decision whether to forego the opportunity to make an in-person presentation before the judge is for the lawyer to make, in consultation with the client. Rule 1.2(a) requires a lawyer to abide by a client's decisions concerning the "objectives" of a representation, and to consult with the client as to the "means" by which those objectives are to be pursued. Rule 1.4(a)(2) reinforces that provision by providing that a lawyer shall reasonably consult with the client about the means by which the client's objectives are to be accomplished. In this case, appearing at a Status Hearing by submitting a position paper rather than appearing in person would be a decision as to "means," not "objectives." Nevertheless, we have warned that a client may not limit the representation in a manner that will compel the lawyer to neglect the matter, to prepare inadequately, or otherwise to represent the client incompetently. Cf. N.Y. State 751 (2002) (government agency may not require its lawyers to undertake more matters than the lawyers can competently handle, on the grounds that the agency does not have the funding to hire an adequate number of lawyers). Furthermore, while client consent is sufficient under Rule 1.2(a), the lawyer also needs the concurrence of the court under Rules 3.4(c) and 8.4(d).

10. Other provisions of the Rules also have a bearing on the questions posed here. For example, Rule 1.1(c)(2) prohibits a lawyer from intentionally prejudicing or damaging the client during the course of the representation, except as permitted or required by the rules. This

provision demonstrates the importance of having the court approve the proposal to appear at Status Hearings through a position paper. Similarly, Rule 1.1(a) states that the lawyer should provide competent representation to a client.

11. According to the OCC, the submission of position papers in lieu of personal appearance would not undercut their ability to competently and diligently represent their client under Rule 1.1. Memoranda submitted to the Immigration Court would provide it with the same information as would the physical presence of an OCC attorney, and the absence of an OCC attorney would not prejudice the OCC attorney's client (which is ICE). Whether an OCC attorney's failure to attend Status Hearings delays the administration of justice rests ultimately with the Immigration Court. If that court permits OCC attorneys to send a position paper rather than attending a Status Hearing in person, we see no reason why the Rules would prohibit the practice.

CONCLUSION

12. An OCC attorney may, with the informed consent of both the Immigration Court and the client, provide the Immigration Court with a position paper and decline to attend in person an Immigration Court Status Hearing at which no substantive or procedural issues can or will be addressed, as long as OCC attorneys are not thereby impeded from competently and diligently representing their client.

(26-14)

[1] A removal proceeding is an administrative proceeding in Immigration Court to determine if an individual is removable under U.S. immigration law. Such proceedings formerly were known as deportation proceedings.

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ETHICS OPINION 1045

New York State Bar Association
Committee on Professional Ethics

Opinion 1045 (1/8/15)

Topic: Lawyer as witness

Digest: In-house counsel for a corporation may submit to an interview with an administrative agency that is investigating alleged wrongdoing by the client, where the facts to be disclosed by the lawyer will not constitute confidential information. However, if the agency's investigation results in a proceeding before a tribunal, and if the lawyer is likely to be a witness on a significant issue of fact, the lawyer may not also act as an advocate before the tribunal in such proceeding, absent an exception to the advocate-witness rule.

Rules: 1.0(w), 1.1(c), 1.6(a), 3.7(a)

FACTS

1. In-house counsel for a corporation has been asked to submit voluntarily to an interview with an administrative agency that is investigating a charge by a third party of wrongdoing by the client. The interview will involve what occurred at a meeting between the corporation and the third party, at which the lawyer was a participant. The lawyer's interview may help to avert a formal complaint against the client, and therefore may be beneficial to the client. The corporation has no objection to its lawyer appearing for such interview. The facts the lawyer would discuss during the interview are not subject to the attorney-client privilege and do not otherwise constitute confidential information of the client (e.g. will not be embarrassing or detrimental to the client and will not reveal information the client has requested be kept confidential). If, after its investigation, the agency believes the charge against the client has merit, it could file charges, in which case a hearing would be held before a tribunal.

QUESTION

2. May in-house counsel for a corporation voluntarily submit to an interview with an administrative agency that is investigating a charge by a third party of wrongdoing by the client, where the facts disclosed by the lawyer will not constitute confidential information?

OPINION

3. Rule 1.6 of the New York Rules of Professional Conduct (the "Rules") prohibits a lawyer from knowingly revealing confidential information (as defined in that Rule) unless the client gives informed consent, as defined in Rule 1.0(j). Confidential information includes information gained during the representation that (a) is protected by the attorney-client privilege, (b) is likely to be embarrassing or detrimental to the client if disclosed, or (c) the client has requested be kept confidential. We have been told, and we assume for purposes of this opinion, that the information the lawyer would relate to the agency concerns the conduct of the client at a meeting at which the adversary was present (and thus would not be protected by the attorney-client privilege), and that the information related by the lawyer will not be embarrassing or detrimental to the client, and that the client has not requested that it be kept confidential. Consequently, we see no issue under Rule 1.6. If the information might be embarrassing or detrimental to the client, or if the client had requested that the lawyer not disclose it, the lawyer could not voluntarily disclose it without the informed consent of the client.

4. Rule 3.7(a) prohibits a lawyer from acting as an advocate before a "tribunal" in a matter in which the lawyer is likely to be a witness on a significant issue of fact. The term "tribunal" is defined in the Rules to include not only a court or arbitrator but also an administrative agency "acting in an adjudicative capacity," meaning that a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter. Rule 1.0(w).

5. Although the interview here is with an administrative agency, the agency at this stage is exercising its investigative functions, rather than acting in an "adjudicative capacity." Consequently, Rule 3.7(a) is not currently implicated.

6. If the agency determines to bring a formal complaint against the client following the interview, then the agency will be acting in its "adjudicative capacity." At that point, if the lawyer is "likely" to be a witness on a significant issue of fact, Rule 3.7(c) will come into play, and the lawyer will not be able to act "as advocate before" the tribunal unless one of the exceptions in Rule 3.7(a) applies. See N.Y. State 642 (1993) (lawyer may not serve as both lawyer for a union and as a witness in an arbitration concerning a collective bargaining agreement the lawyer negotiated).[1]

7. If the agency determines to bring charges against the client, the lawyer will need to determine if he is likely to be a witness on a significant issue of fact. This requires evaluating other available testimony. As the court stated in MacArthur v. Bank of New York, 524 F. Supp.

1205, 1208 (S.D.N.Y. 1981), "An additional corroborative witness would almost always be of some use to a party, but might nevertheless be essentially cumulative. At some point, the utility of additional corroboration is de minimus [sic] and does not require the attorney's disqualification." In that case, the court found that an independent lawyer would likely call the lawyer, both to supply his own account of the events in question (even if corroborative) and to prevent the jury from speculating about his absence. It therefore found the lawyer's testimony would be far from cumulative, because his role was pivotal, and his conduct had been brought into question by the adversary. Determining whether the lawyer is likely to be a witness on a significant issue of fact is a factual question beyond the jurisdiction of this Committee.

8. If the lawyer is likely to be a witness on a significant issue of fact, Rule 3.7(a) does not authorize the lawyer to choose whether to be a lawyer or a witness. The lawyer must not act as an advocate before the tribunal. The rule applies whether the lawyer would be called as a witness by the lawyer's client or the client's adversary, and whether or not the lawyer's testimony would be favorable to the client. Under the former Code of Professional Responsibility, EC 5-10 elaborated on the predecessor to Rule 3.7 as follows: "Where the question [of whether to be a witness or an advocate] arises, doubts should be resolved in favor of the lawyer testifying and against the lawyer's becoming or continuing as an advocate." See MacArthur v. Bank of New York, supra ("[T]he stricture is mandatory: the party cannot choose between the attorney's testimony and his representation. The rule embodies a conclusive preference for testimony . . . . A party can be represented by other attorneys, but cannot obtain substitute testimony for a counsel's relevant, personal knowledge.") This obligation is not eliminated by client consent. Id. at 1209. Although the language of EC 5-10 was not carried over into the comments to Rule 3.7, we believe it is implicit in the language of the rule itself.

9. Similarly, Rule 1.1(c) prohibits a lawyer from intentionally prejudicing or damaging the client during the course of the representation, except as permitted or required by the Rules. Such prejudice might arise if the lawyer withheld material testimony on a significant issue of fact, either in the investigatory stage of the matter or at a later hearing before a tribunal.

CONCLUSION

10. In-house counsel for a corporation may submit to an interview with an administrative agency that is investigating alleged wrongdoing by the client, where the facts to be disclosed by the lawyer will not constitute confidential information. However, if the agency's investigation results in a proceeding before a tribunal, and if the lawyer is likely to be a witness on a significant issue of fact, the lawyer could not also act as an advocate before the tribunal in such proceeding, absent an exception to the advocate-witness rule.

(44-14)

[1] While the lawyer could not appear before the tribunal as counsel in the matter, he or she could participate in the case outside the courtroom, for example, by directing outside counsel. Rule 3.7(a) (lawyer shall not act as advocate before a tribunal); see ABA Inf. 89-1529 (1989). But that is not the issue at this stage.

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ETHICS OPINION 1092

New York State Bar Association
Committee on Professional Ethics

Opinion 1092 (5/11/2016)

Topic: Duty to Disclose Malpractice of Co-Counsel

Digest: A lawyer must disclose to the client information that the lawyer reasonably believes reveals that another lawyer, also representing the client, has committed a significant error or omission that may give rise to a malpractice claim.

Rules: 1.4(a) & (b), 1.7(a), 1.16(b), 8.4(c)

FACTS

1. The inquirer was engaged to represent a client on the eve of trial. The client's prior counsel is serving as co-counsel. In preparing the case, the inquirer has learned that co-counsel conducted virtually no discovery and made no document requests, although the inquirer believes correspondence and emails between the parties could be critical to the case. The inquirer believes this was a significant error or omission that may give rise to a malpractice claim against co-counsel. The outcome of the case, however, has yet to be decided. The inquirer is concerned about disclosing this situation to the client because it would undermine inquirer's relationship with co-counsel, but the inquirer also believes it is in the client's best interests to disclose the facts as soon as possible.

QUESTION

2. Is a lawyer ethically obligated to disclose to a current client the lawyer's belief that a current co-counsel to the client has engaged in a significant error or omission in representing the client?

OPINION

3. Our opinions have consistently held that a lawyer must report to a client a significant error or omission by the lawyer in his or her rendition of legal services. See N.Y. State 734 (2000), N.Y. State 295 (1973), N.Y. State 275 (1972). See also ABA Informal Op. 1010 (1967).

4. Most of these opinions are based on two principles in the former Code of Professional Responsibility – the lawyer's obligation to keep the client fully informed, and the lawyer's obligation to withdraw from representation where the lawyer has a personal conflict of interest. Those two principles are now embodied in Rule 1.4 and Rule 1.7. [1]

5. Rule 1.4 governs the ethical obligations of a lawyer regarding communication with the client:

> (a) A lawyer shall (1) promptly inform the client of... (iii) any material developments in the matter...; (3) keep the client reasonably informed about the status of the matter; and
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

[Emphasis added.]

6. Comment [1] to Rule 1.4 reveals the touchstone for the lawyer's obligation: client autonomy in decision-making. Comment [1] says: "Reasonable communication between the lawyer and the client is necessary for the client to participate effectively in the representation." See also Comment [3] ("paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation").

7. The second principle reflected in our opinions on the lawyer's own malpractice is whether the significant error or omission results in an inherent conflict between the interest of the client and the lawyer's own interest. In that case, Rule 1.16(b) may require the lawyer to withdraw. Rule 1.7(a)(2) provides:

> Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that . . . there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.[2]

8. Although the personal conflict of interest may be more obvious in the case of a lawyer dealing with his or her own malpractice, here there may be a personal conflict concern because the inquirer notes that "exposing counsel's malpractice would undermine our relationship with co-counsel." The inquirer does not state whether the inquirer was brought into the case by the client or by co-counsel, or whether co-counsel has referred matters to the inquirer in the past, or the inquirer expects co-counsel to be a potential source of referrals in the future. The desire to maintain a good relationship with co-counsel would only implicate a personal conflict of interest under Rule 1.7(a) if a reasonable lawyer would conclude that "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected" by the lawyer's financial or personal interests. For example, if the desire for harmony with co-counsel is

motivated by the goal of avoiding harm to this client's case, such desire would clearly not be a "personal interest" within the meaning of Rule 1.7(a)(2). That is an issue that the inquirer must determine in the first instance.

9. In N.Y. State 734 (2000), this Committee opined that a lawyer "must report to the client a significant error or omission by the lawyer that may give rise to a possible malpractice claim...." We cited N.Y. State 275 (1972), which said that a lawyer who failed to file a claim within the statute of limitations period "had a professional duty to notify the client promptly that the lawyer had committed a serious and irremediable error, and of the possible claim the client may have against the lawyer for damages." Opinion 734 also pointed out, however, that not every possible error creates a possible claim for malpractice:

> Some errors can be corrected during the course of the representation. Others are not particularly harmful to the client's cause. In some cases, it may be questionable whether the lawyer acted erroneously at all. Therefore, when a lawyer makes a mistake in the representation of a client, the likelihood that the lawyer's representation will be affected adversely because of the lawyer's interest in avoiding civil liability will depend upon all the relevant facts.

10. Several bar association ethics opinions have opined that lawyers have an ethical obligation to disclose their own malpractice.[3] Numerous court cases and disciplinary opinions concur.[4] Legal writers have also discussed the obligation.[5] Finally, a lawyer's duty to inform the client of his or her own malpractice is also supported by the Restatement (Third) of The Law Governing Lawyers § 20 cmt. c (2000) (Am. Law Inst. 1998) ("If the lawyer's conduct of the matter gives the client a substantial malpractice claim against the lawyer, the lawyer must disclose that to the client," citing In re Tallon, 447 N.Y.S.2d 50 (App. Div. 1982)).

11. The lawyer's obligation to keep the client fully informed under Rule 1.4(a) applies equally to a significant error or omission by co-counsel that may give rise to a malpractice claim. See Estate of Spencer v. Gavin, 946 A.2d 1051 (N.J. Super. A.D. 2008). In Estate of Spencer the New Jersey court held that a lawyer who did not report co-counsel's theft of client funds could be liable for malpractice. The court in Estate of Spencer based its decision in part on New Jersey Rule 1.4(a).

12. As in the case of the lawyer's own malpractice, the inquirer has a duty to inform the client of co-counsel's malpractice if the inquirer concludes that co-counsel's error or omission was significant. It is not clear from the inquiry whether the inquirer has spoken to the co-counsel to determine his or her strategy for the matter (i.e., why co-counsel took "virtually no" discovery and made no document requests). Co-counsel's decision may have been negligent, but it may have been strategic. In any event, determining whether co-counsel's actions indicate a significant error or omission that may give rise to a malpractice claim involves questions of fact and law that are beyond the jurisdiction of this Committee.

13. If the inquirer determines that co-counsel has engaged in a significant error or omission that may give rise to a malpractice claim, then the lawyer must inform the client. This is particularly so because the client needs the information when the lawyer who has committed the significant error or omission is continuing to represent the client. As one writer has described it:

> Among the most critical decisions that the client has to make regarding the representation in that situation are (1) whether the client has a viable malpractice claim arising out of the representation, and, if so, whether to pursue it now or later, and (2) whether to continue the current representation.[6]

14. Here, if co-counsel has committed a significant error or omission that may give rise to a malpractice claim, the client may choose among many options, such as (i) continuing the attorney-client relationship with co-counsel and reserving any possible malpractice claim for later, (ii) terminating co-counsel while keeping the inquirer (or hiring a different lawyer), or (iii) bringing a malpractice action against co-counsel now. The client may want to seek independent advice regarding these options. Rule 1.4(b) requires a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." However, the client can only make an informed choice among those options if the lawyer gives the client the relevant information about co-counsel's past conduct. Accordingly, Rule 1.4(b) requires that the lawyer disclose to the client the facts that the lawyer has learned about co-counsel.

15. The Bar has traditionally been leery of situations where the client seeks to replace one lawyer with another (sometimes referred to as "encroaching on professional employment of other lawyers"). See N.Y. State 305 (1973) ("A prospective substitute lawyer should . . . take special care to avoid suspicion that he may be using improper means to have himself substituted for the previously retained attorney. Thus he must not wrongfully or improperly disparage the other lawyer in an endeavor to supplant him ...."); N.Y. State 310 (1973) (lawyer retained to review work of another lawyer must have sufficient information respecting the work being evaluated to give a good faith opinion which will be completely fair to the other lawyer"). The source of this reticence may have been a concern over "solicitation" of employment, which does not apply with the same force to co-counsel whom the client has already employed. Nevertheless, the overriding concern of these opinions is fairness to other lawyers, including co-counsel, so Rule 1.4's concern with the best interests of the client indicates that the inquirer should not report misgivings about co-counsel to the client unless the inquirer reasonably believes co-counsel has committed a significant error or omission that may give rise to a malpractice claim. This standard is lower than the "knowledge" standard that triggers a lawyer's duty under Rule 8.3(a) to report another lawyer's disciplinary violation, but we do not think a lawyer should report co-counsel's shortcomings absent a well-grounded belief that the client needs the information to make informed decisions about the representation.

16. In N.Y. State 275 (1972), the error was not only significant, but irremediable, since the statute of limitations had passed. We do not believe the action of co-counsel must be irremediable before the inquirer should report it to the client.

CONCLUSION

17. A lawyer must disclose to the client information that the lawyer reasonably believes reveals that another lawyer, who is currently co-counsel to the client, has committed a significant error or omission that may give rise to a malpractice claim.

[1]In re Tallon, 447 N.Y.S.2d 50 (App. Div. 1982), a case often cited for the principle that a lawyer must disclose the lawyer's errors and omissions to the client, also cites the predecessor to Rule 8.4(c), which provided that "a lawyer must not engage in conduct involving dishonesty, fraud, deceit or misrepresentation." However, in Tallon, the lawyer had not only failed to disclose to the client the fact that he had let the statute of limitations run on her claim, but also obtained a general release from the client without advising the client of the claim against him. Other courts and ethics committees that have addressed the issue have also based their conclusions on the two principles cited here. See the authorities cited in notes accompanying ¶ 10 infra.

[2]For a discussion of personal conflicts of interest arising from a lawyer's possible malpractice, see Cooper, infra n. 6, at 182. See also Vincent R. Johnson, Absolute and Perfect Candor to Clients, 34 St. Mary's L.J. 737, 773 (2003). When a lawyer confronts the issue whether to disclose his or her own potential malpractice, it gives rise to personal conflict of interest issues under Rule 1.7. See Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 24:5 (ThomsonWest 2008); In re Hoffman, 700 N.E.2d 1138, 1139 (Ill. 1998); Circle Chevrolet Co. v. Giordano, Halleran & Ciesla, 662 A.2d 509, 514 (N.J. 1995) (under New Jersey Rules 1.4 and 1.7, an attorney has an ethical obligation to advise a client that the client might have a claim against that attorney, even if such advice flies in the face of that attorney's own interests).

[3]See, e.g., New Jersey Supreme Court Advisory Committee on Professional Ethics Opinion 684, 7 N.J.L. 544, 151 N.J.L.J. 994, 1998 WL 111131 *1 (March 9, 1998) ("Clearly RPC 1.4 requires prompt disclosure in the interest of allowing the client to make informed decisions. Disclosure should therefore occur when the attorney ascertains malpractice may have occurred, even though no damage may yet have resulted"); Colo. Bar Ass'n, Ethics Comm. Formal Op. 113 (2005) (concluding that Colorado Rule 1.4 requires a lawyer to tell the client if the lawyer makes an error).

[4]See, e.g., People v. Greene, 276 P.3d 94, 99 (Colo. 2011); Beal Bank v. Arter & Hadden, 167 P.3d 666, 672 (Cal. 2007) (stating in dicta that attorneys have a fiduciary obligation to disclose material facts to their clients, an obligation that includes disclosure of acts of malpractice); DeLuna v. Burciaga, 223 Ill.2d 49 (Ill., 2006) (lawyer improperly concealed facts resulting in the running of the statute of limitations on the client's malpractice claim against the lawyer, in violation of Illinois Rule 1.4); Attorney Grievance Comm'n of Maryland v. Pennington, 387 Md. 565, 876 A.2d 642, 650 (Md. 2005) (lawyer violated Rule 1.4 by failing to disclose a mistake and concealing it); Olds v. Donnelly, 150 N.J. 424 (N.J., 1997) (New Jersey Rules of Professional Conduct "require an attorney to notify the client that he or she may have a legal-malpractice claim even if notification is against the attorney's own interest"); Circle Chevrolet Co. v. Giordano, Halleran & Ciesla, 662 A.2d 509, 514 (N.J. 1995) (under New Jersey Rules 1.4 and 1.7, an attorney has an ethical obligation to advise a client that he or she might have a claim against that attorney.

[5]For additional discussion of a lawyer's duty to disclose malpractice, see 2 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 15:22 (2008 ed.); Dolores Dorsainvil, et al., My Bad: Creating a Culture of Owning Up to Lawyer Missteps and Resisting the Temptation to Bury Professional Error, Report to Annual Conference of the Litigation Section of the American Bar Association, April 16, 2015, available at http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2015-sac/written_materials/18_1_my_bad_creating_a_culture_of_owning_up_to_lawyer_missteps.authcheckdam.pdf; Thomas P. McGarry and Thomas P. Sukowicz, Ethics: Disclosing Malpractice to Clients, CHICAGO LAWYER, Dec. 2011, available at http://www.chicagolawyermagazine.com/Archives/2011/12/McGarry-Sukowicz-

Ethics.aspx; David D. Dodge, Front Eye On Ethics, Owning Up To Your Own Mistakes, ARIZONA ATTORNEY, 46 Ariz. Att'y 10 (May 2010); Timothy J. Pierce & Sally E. Anderson, What To Do After Making A Serious Error, WISCONSIN LAWYER, 83-FEB Wis. Law. 6, 7-8 (February 2010); Brian Pollock, Second Chance Surviving A Screwup, 34 No. 2 Litigation 19, 20 (Winter 2008); Charles E. Lundberg, Self-Reporting Malpractice or Ethics Problems, 60 Bench & B. Minn. 24 (Sept. 2003); Lazar Emanuel, Duty to Disclose Error That May Constitute Malpractice, N.Y. Prof. Resp. Rep. (Feb 1, 2001).

[6]Benjamin Cooper, The Lawyer's Duty to Inform His Client of His Own Malpractice, 61 Baylor L. Rev. 174, 184 (2009), citing Frances Patricia Solari, Malpractice and Ethical Considerations, 19 N.C. Cent. L.J. 165, 175 (1991).

(36-15)

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McKinney's New York Rules of Court
State Rules of Court
Court of Appeals
Part 500. Rules of Practice
General Matters

N.Y.Ct.Rules, § 500.4

§ 500.4. Pro Hac Vice Admission.

Currentness

An attorney or the equivalent who is a member of the bar of another state, territory, district or foreign country may apply to appear pro hac vice with respect to a particular matter pending in this Court (see 22 NYCRR 520.11[a] [Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law--Admission Pro Hac Vice]). The application shall consist of a letter request to the Clerk of the Court, with proof of service on each other party, and shall include current certificates of good standing from each jurisdiction in which the applicant is admitted and any orders of the courts below granting such relief in the matter for which pro hac vice status is sought.

N. Y. Ct. Rules, § 500.4, NY R A CT § 500.4
Current with amendments received through April 15, 2019.

End of Document

Compilation of Codes, Rules and Regulations of the State of New York Currentness
Title 22. Judiciary
Subtitle B. Courts.
Chapter I. Court of Appeals
Subchapter C. Rules for Admission of Attorneys and Counselors-at-Law
Part 520. Rules of the Court of Appeals for the Admission of Attorneys and Counselors-at-Law (Refs & Annos)

22 NYCRR 520.11

Section 520.11. Admission pro hac vice

(a) *General.* An attorney and counselor-at-law or the equivalent who is a member in good standing of the bar of another state, territory, district or foreign country may be admitted *pro hac vice:*

(1) in the discretion of any court of record, to participate in any matter in which the attorney is employed; or

(2) in the discretion of the Appellate Division, provided applicant is a graduate of an approved law school, to advise and represent clients and participate in any matter during the continuance of applicant's employment or association with an organization described in subdivision 7 of section 495 of the Judiciary Law or during employment with a District Attorney, Corporation Counsel or the Attorney General, but in no event for longer than 18 months.

(b) *New York Law students.* A graduate student or graduate assistant at an approved law school in New York State may be admitted *pro hac vice* in the discretion of the Appellate Division, to advise and represent clients or participate in any matter during the continuance of applicant's enrollment in an approved law school in New York State as a graduate student or graduate assistant, or during applicant's employment as a law school teacher in an approved law school in New York State, if applicant is in good standing as an attorney and counselor-at-law or the equivalent of the bar of another state, territory, district or foreign country and is engaged to advise or represent the client through participation in an organization described in subdivision 7 of section 495 of the Judiciary Law or during employment with a District Attorney, corporation counsel or the Attorney General, but in no event for longer than 18 months.

(c) *Association of New York counsel.* No attorney may be admitted *pro hac vice* pursuant to paragraph (a)(1) of this section to participate in pre-trial or trial proceedings unless he or she is associated with an attorney who is a member in good standing of the New York bar, who shall be the attorney of record in the matter.

(d) *Provision of legal services following determination of major disaster.*

(1) Determination of existence of major disaster. Upon the declaration of a state of disaster or emergency by the Governor of New York or of another jurisdiction, for purposes of this subdivision, this court shall determine whether an emergency exists affecting the justice system.

(2) Temporary pro bono practice following the determination of a major disaster. Following a determination by this court that persons residing in New York are:

(i) affected by a state of disaster or emergency in the entirety or a part of New York; or

(ii) displaced by a declared state of disaster or emergency in another jurisdiction, and such persons are in need of pro bono services and the assistance of attorneys from outside of New York is required to help provide such services, an attorney authorized to practice law in another United States jurisdiction may provide legal services in New York on a temporary basis. Such legal services must be provided on a pro bono basis without compensation from the client, or expectation of compensation or other direct or indirect pecuniary gain to the attorney from the client. Such legal services shall be assigned and supervised through an established not-for-profit bar association in New York or an organization described in subdivision 7 of section 495 of the Judiciary Law.

(3) Other temporary practice following the determination of a major disaster. Following the determination of a major disaster in another United States jurisdiction - after such a declaration of a state of disaster or emergency and its geographical scope have been made by the Governor and a determination of the highest court of that jurisdiction that an emergency exists affecting the justice system - an attorney who has been authorized to practice law and is in good standing in that jurisdiction and who principally practices in that affected jurisdiction may provide legal services in New York on a temporary basis in association with an attorney admitted and in good standing in New York. The authority to engage in the temporary practice of law in New York pursuant to this paragraph shall extend only to attorneys who principally practice in the area of such other jurisdiction determined to have suffered a major disaster causing an emergency affecting the justice system and the provision of legal services. Those legal services shall be limited to:

(i) representing clients with respect to matters that the attorney was handling prior to the disaster; and

(ii) new matters in the area affected by the disaster that the attorney could have handled but is unable to do so because:

(*a*) the attorney's ability to practice in the jurisdiction affected by the disaster has been limited by the disaster; and/or

(*b*) the client has temporarily relocated from the disaster area to another jurisdiction because of the disaster.

(4) Duration of authority for temporary practice. The authority to practice law in New York granted by paragraph (2) of this subdivision shall end when this court determines that the conditions caused by the major disaster in New York have ended except that an attorney then representing clients in New York pursuant to paragraph (2) of this subdivision is authorized to continue the provision of legal services for such time as is reasonably necessary to complete the representation, but the attorney shall not thereafter accept new clients. The authority to practice law in New York granted by paragraph (3) of this subdivision shall end 60 days after either the Governor or this court declares that the conditions caused by the major disaster in the affected jurisdiction have ended.

(5) Court appearances. The authority granted by this subdivision does not include appearances in court except pursuant to subdivision (a) of this section.

(6) Admission and registration requirement. An attorney may be admitted pro hac vice in the discretion of the Appellate Division, provided the applicant is a graduate of an approved law school and is not disbarred, suspended from practice or otherwise restricted from practice in any jurisdiction, to provide legal services in New York pursuant to paragraph (2) or (3) of this subdivision. Such applicant must file a registration statement with the Office of Court Administration before the commencement of the provision of legal services. The application shall be in a form prescribed by the Appellate Division and the registration statement shall be in a form prescribed by the Office of Court Administration.

(7) Notification to clients. Attorneys authorized to practice law in another United States jurisdiction who provide legal services pursuant to this subdivision shall inform clients in New York of the jurisdiction in which they are authorized to practice law, any limits of that authorization, and the limitations on their authorization to practice law in New York as permitted by this subdivision. They shall not state or imply to any person that they are otherwise authorized to practice law in New York.

(e) *Professional Responsibility Requirements.*

An attorney admitted pro hac vice pursuant to this section:

(1) shall be familiar with and shall comply with the standards of professional conduct imposed upon members of the New York bar, including the rules of court governing the conduct of attorneys and the Rules of Professional Conduct; and

(2) shall be subject to the jurisdiction of the courts of this State with respect to any acts occurring during the course of the attorney's participation in the matter.

Credits

Sec. added by renum. 520.9, filed Sept. 21, 1981; renum 520.12, new added by renum. and amd. 520.10, filed Oct. 21, 1984; renum. 520.12; new filed Jan. 18, 1995; amds. filed: May 7, 1998; March 30, 2000; Jan. 19, 2011 eff. Feb. 9, 2011. Relettered (d) to (e), added new (d).

Current with amendments included in the New York State Register, Volume XXLI, Issue 18 dated May 1, 2019. Court rules under Title 22 may be more current.

22 NYCRR 520.11, 22 NY ADC 520.11

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Rules of Professional Conduct [eff. April 1, 2009, As Amended to March 15, 2019.] (Refs & Annos)
Advocate

Rules of Prof. Con., Rule 3.3 McK.Consol.Laws, Book 29 App.

Rule 3.3. Conduct Before a Tribunal

Currentness

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(e) In presenting a matter to a tribunal, a lawyer shall disclose, unless privileged or irrelevant, the identities of the clients the lawyer represents and of the persons who employed the lawyer.

(f) In appearing as a lawyer before a tribunal, a lawyer shall not:

(1) fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of the intent not to comply;

(2) engage in undignified or discourteous conduct;

(3) intentionally or habitually violate any established rule of procedure or of evidence; or

(4) engage in conduct intended to disrupt the tribunal.

Comment

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. *See* Rule 1.0(w) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client has offered false evidence in a deposition.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law and may not vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or by evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein because litigation documents ordinarily present assertions by the client or by someone on the client's behalf and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be based on the lawyer's own knowledge, as in an affidavit or declaration by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. *See also* Rule 8.4(b), Comments [2]-[3].

Legal Argument

[4] Although a lawyer is not required to make a disinterested exposition of the law, legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. Paragraph (a)(2) requires an advocate to disclose directly adverse and controlling legal authority that is known to the lawyer and that has not been disclosed by the opposing party. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it.

Offering or Using False Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer or use evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce or use false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not (i) elicit or otherwise permit the witness to present testimony that the lawyer knows is false or (ii) base arguments to the trier of fact on evidence known to be false.

[6A] The duties stated in paragraphs (a) and (b) -- including the prohibitions against offering and using false evidence -- apply to all lawyers, including lawyers for plaintiffs and defendants in civil matters, and to both prosecutors and defense counsel in criminal cases. In criminal matters, therefore, Rule 3.3(a)(3) requires a prosecutor to refrain from offering or using false evidence, and to take reasonable remedial measures to correct any false evidence that the government has already offered. For example, when a prosecutor comes to know that a prosecution witness has testified falsely, the prosecutor should either recall the witness to give truthful testimony or should inform the tribunal about the false evidence. At the sentencing stage, a prosecutor should correct any material errors in a presentence report. In addition, prosecutors are subject to special duties and prohibitions that are set out in Rule 3.8.

[7] If a criminal defendant insists on testifying and the lawyer knows that the testimony will be false, the lawyer may have the option of offering the testimony in a narrative form, though this option may require advance notice to the court or court approval. The lawyer's ethical duties under paragraphs (a) and (b) may be qualified by judicial decisions interpreting the constitutional rights to due process and to counsel in criminal cases. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements.

[8] The prohibition against offering or using false evidence applies only if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. *See* Rule 1.0(k) for the definition of "knowledge." Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) prohibits a lawyer from offering or using evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes to be false. Offering such proof may impair the integrity of an adjudicatory proceeding. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of a criminal defense client where the lawyer reasonably believes, but does not know, that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the criminal defendant's decision to testify.

Remedial Measures

[10] A lawyer who has offered or used material evidence in the belief that it was true may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client or another witness called by the lawyer offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations, or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. The advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false

evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal confidential information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done, such as making a statement about the matter to the trier of fact, ordering a mistrial, taking other appropriate steps or doing nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is for the lawyer to cooperate in deceiving the court, thereby subverting the truth finding process, which the adversary system is designed to implement. *See* Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. The client could therefore in effect coerce the lawyer into being a party to a fraud on the court.

Preserving Integrity of the Adjudicative Process

[12] Lawyers have a special obligation as officers of the court to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process. Accordingly, paragraph (b) requires a lawyer who represents a client in an adjudicative proceeding to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding. Such conduct includes, among other things, bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding; unlawfully destroying or concealing documents or other evidence related to the proceeding; and failing to disclose information to the tribunal when required by law to do so. For example, under some circumstances a person's omission of a material fact may constitute a crime or fraud on the tribunal.

[12A] A lawyer's duty to take reasonable remedial measures under paragraph (b) does not apply to another lawyer who is retained to represent a person in an investigation or proceeding concerning that person's conduct in the prior proceeding.

[13] Judicial hearings ought to be conducted through dignified and orderly procedures designed to protect the rights of all parties. A lawyer should not engage in conduct that offends the dignity and decorum of proceedings or that is intended to disrupt the tribunal. While maintaining independence, a lawyer should be respectful and courteous in relations with a judge or hearing officer before whom the lawyer appears. In adversary proceedings, ill feeling may exist between clients, but such ill feeling should not influence a lawyer's conduct, attitude, and demeanor toward opposing lawyers. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the opposing position is expected to be presented by the adverse party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there may be no presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the opposing party, if absent, just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[15] A lawyer's compliance with the duty of candor imposed by this Rule does not automatically require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's

disclosure. The lawyer, however, may be required by Rule 1.16(d) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. *See also* Rule 1.16(c) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

Notes of Decisions (70)

Rules of Prof. Con., Rule 3.3 McK. Consol. Laws, Book 29 App., NY ST RPC Rule 3.3
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Maintaining the Integrity of the Profession

Rules of Prof. Con., Rule 8.4 McK.Consol.Laws, Book 29 App.

Rule 8.4. Misconduct

Currentness

A lawyer or law firm shall not:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability:

(1) to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official; or

(2) to achieve results using means that violate these Rules or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status, sexual orientation, gender identity, or gender expression. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding; or

(h) engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another, as when they request or instruct an agent to do so on their behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law. Illegal conduct involving violence, dishonesty, fraud, breach of trust, or serious interference with the administration of justice is illustrative of conduct that reflects adversely on fitness to practice law. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] The prohibition on conduct prejudicial to the administration of justice is generally invoked to punish conduct, whether or not it violates another ethics rule, that results in substantial harm to the justice system comparable to those caused by obstruction of justice, such as advising a client to testify falsely, paying a witness to be unavailable, altering documents, repeatedly disrupting a proceeding, or failing to cooperate in an attorney disciplinary investigation or proceeding. The assertion of the lawyer's constitutional rights consistent with Rule 8.1, Comment [2] does not constitute failure to cooperate. The conduct must be seriously inconsistent with a lawyer's responsibility as an officer of the court.

[4] A lawyer may refuse to comply with an obligation imposed by law if such refusal is based upon a reasonable good-faith belief that no valid obligation exists because, for example, the law is unconstitutional, conflicts with other legal or professional obligations, or is otherwise invalid. As set forth in Rule 3.4(c), a lawyer may not disregard a specific ruling or standing rule of a tribunal, but can take appropriate steps to test the validity of such a rule or ruling.

[4A] A lawyer harms the integrity of the law and the legal profession when the lawyer states or implies an ability to influence improperly any officer or agency of the executive, legislative or judicial branches of government.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

[5A] Unlawful discrimination in the practice of law on the basis of age, race, creed, color, national origin, sex, disability, marital status, or sexual orientation is governed by paragraph (g).

Notes of Decisions (834)

Rules of Prof. Con., Rule 8.4 McK. Consol. Laws, Book 29 App., NY ST RPC Rule 8.4
Current with amendments through March 15, 2019.

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Client-Lawyer Relationship

Rules of Prof. Con., Rule 1.1 McK.Consol.Laws, Book 29 App.

Rule 1.1. Competence

Currentness

(a) A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

(b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.

(c) A lawyer shall not intentionally:

(1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or

(2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules.

Comment

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to associate with a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances. One such circumstance would be where the lawyer, by representations made to the client, has led the client reasonably to expect a special level of expertise in the matter undertaken by the lawyer.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kinds of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] [Omitted.]

[4] A lawyer may accept representation where the requisite level of competence can be achieved by adequate preparation before handling the legal matter. This applies as well to a lawyer who is appointed as counsel for an unrepresented person.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client may limit the scope of the representation if the agreement complies with Rule 1.2(c).

Retaining or Contracting with Lawyers Outside the Firm

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and should reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. *See also* Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(g) (fee sharing with lawyers outside the firm), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the needs of the client; the education, experience and reputation of the outside lawyers; the nature of the services assigned to the outside lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[6A] Client consent to contract with a lawyer outside the lawyer's own firm may not be necessary for discrete and limited tasks supervised closely by a lawyer in the firm. However, a lawyer should ordinarily obtain client consent before contracting with an outside lawyer to perform substantive or strategic legal work on which the lawyer will exercise independent judgment without close supervision or review by the referring lawyer. For example, on one hand, a lawyer who hires an outside lawyer on a per diem basis to cover a single court call or a routing calendar call ordinarily would not need to obtain the client's prior informed consent. On the other hand, a lawyer who hires an outside lawyer to argue a summary judgment motion or negotiate key points in a transaction ordinarily should seek to obtain the client's prior informed consent.

[7] When lawyer from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other about the scope of their respective roles and the allocation of responsibility among them. *See* Rule 1.2(a). When allocating responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations (*e.g.*, under local court rules, the CPLR, or the Federal Rules of Civil Procedure) that are a matter of law beyond the scope of these Rules.

[7A] Whether a lawyer who contracts with a lawyer outside the firm needs to obtain informed consent from the client about the roles and responsibilities of the retaining and outside lawyers will depend on the circumstances. On one hand, of a lawyer retains an outside lawyer or law firm to work under the lawyer's close direction and supervision, and the retaining lawyer closely reviews the outside lawyer's work, the retaining lawyer usually will not need to consult with the client about the outside lawyer's role and level of responsibility. On the other hand, if the outside lawyer will have a more material role and will exercise more autonomy and responsibility, then the retaining lawyer usually should consult with the client. In any event, whenever a retaining lawyer discloses a client's confidential information to lawyers outside the firm, the retaining lawyer should comply with Rule 1.6(a).

[8] To maintain the requisite knowledge and skill, a lawyer should (i) keep abreast of changes in substantive and procedural law relevant to the lawyer's practice, (ii) keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information, and (iii) engage in continuing study and education and comply with all applicable continuing legal education requirements under 22 N.Y.C.R.R. Part 1500.

Editors' Notes

PRACTICE COMMENTARIES

by Professor Patrick M. Connors

Subdivision (a)

C1.1:1 The Rule of Competence

C1.1:2 Examples of Incompetent Representation

C1.1:3 Competence Compared with Standard of Care in Legal Malpractice Action

C1.1:4 "Should" vs. "Shall"

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C1.1:9 Failure to Seek Objectives of the Client

C1.1:10 Prejudicing or Damaging the Client During the Course of the Representation

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Subdivision (a)

C1.1:1 The Rule of Competence

Rule 1.1(a) states that "[a] lawyer should provide competent representation to a client." "Competent representation" is, in turn, defined to require "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Rule 1.1(a). The competence requirement is appropriately housed at the outset of the Rules, as it is central to the practice of law. The legal profession must ensure that the services it offers to the public are provided in a competent fashion. As noted by the First Department, "an attorney is

obligated to know the law relating to the matter for which he/she is representing a client and it is the attorney's duty, 'if he has not knowledge of the statutes, to inform himself, for, like any artisan, by undertaking the work, he represents that he is capable of performing it in a skillful manner.' " *Reibman v. Senie*, 302 A.D.2d 290, 291, 756 N.Y.S.2d 164, 165 (1st Dep't 2003).

Comment 1 to Rule 1.1 acknowledges that the required level of skill is normally that of a general practitioner. This is similar to the standard of care applicable to a lawyer in a legal malpractice action, which requires that the client demonstrate "that an attorney failed to exercise 'the ordinary reasonable skill and knowledge' commonly possessed by a member of the legal profession." *Darby & Darby, P.C. v. VSI Int'l, Inc.*, 95 N.Y.2d 308, 313, 716 N.Y.S.2d 378, 380 (2000); *see* Practice Commentary C1.1:3, below. In sum, competence does not require excellence. Rather, it requires a reasonable level of knowledge, skill and preparation for the representation at issue.

There are several factors that are considered in measuring whether a lawyer has provided competent representation. These include the complexity of the matter, whether the matter requires specialized knowledge in a particular area of the law, the lawyer's practice experience and training in the general subject matter of the representation, the preparation the lawyer can devote to the matter under the time constraints imposed by the client, and whether the lawyer can associate with another lawyer who is competent in the relevant field. *See* Comment 1 to Rule 1.1; *see also* Rule 1.1(b). While Rule 1.1(a) states a uniform standard of competence, the application of these factors will sometimes yield different results when applied to different lawyers. For example, if a lawyer has a broad range of experience and training in the area in question, and has communicated this expertise to the client, it may be appropriate to hold the lawyer to a higher level of competence in the matter in question. *See* Comment 1 to Rule 1.1; Restatement (Third) of Law Governing Lawyers § 52 cmt. d ("a lawyer who represents to a client that the lawyer has greater competence or will exercise greater diligence than that normally demonstrated by lawyers in good standing undertaking similar matters is held to that higher standard, on which such a client is entitled to rely").

The effort required to achieve competence will also vary depending on the nature of the subject matter of the representation. As noted in Comment 5 to Rule 1.1, "[c]ompetent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem." The scope of the necessary inquiry and analysis can vary widely depending upon the nature of the legal issues that are at the heart of the representation. The preparation necessary to achieve competence will also depend on the stakes involved. Obviously, "major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence." Rule 1.1, Comment 5.

The lawyer may limit the scope of the representation of the client provided, among other things, that the client gives an informed consent. Rule 1.2(c); *see* Practice Commentary Rule 1.2, C1.2:6. "Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Rule 1.2, Comment 7.

As in the legal malpractice context, competence should be measured at the time of the representation, and not at some future moment when once debatable and questionable points are settled. *See Darby & Darby, P.C.*, 95 N.Y.2d at 313, 716 N.Y.S.2d at 381 ("What constitutes ordinary and reasonable skill and knowledge cannot be fixed with precision, but should be measured at the time of representation."). Attorneys should, however, keep abreast of the law and "familiarize themselves with current legal developments so that they can make informed judgments and effectively counsel their clients." *Id.* at 314, 716 N.Y.S.2d at 382; *see* Rule 1.1, Comment 6. The continuing legal education requirements imposed by 22 N.Y.C.R.R. Part 1500 ("Mandatory Continuing Legal Education Program for Attorneys in the State of New York") do not guarantee that a lawyer

will act competently in all representations, but the failure to satisfy these requirements for several years might be relevant to whether the lawyer has acted competently in a particular matter.

C1.1:2 Examples of Incompetent Representation

The failure to provide competent representation arises in a broad array of situations. It is helpful to note a few of the more common instances in which a competence problem arises. For example, a lawyer who agrees to bring an action on behalf of a client, but fails to satisfy the statute of limitations, violates the hortatory provisions in Rule 1.1(a). *See also* NYSBA Op. 275 (1972) (concluding that lawyer has affirmative obligation to inform client of failure to act competently in these circumstances). While the lawyer will not be subject to discipline under Rule 1.1(a), she can certainly be liable for legal malpractice. *See* Practice Commentary C1.1: 3, below.

If a lawyer represents a client in a matrimonial matter, she should discuss with the client matters relating to equitable distribution, support, visitation, and custody and emphasize their significance. "Where the lawyer has obtained only a divorce decree without attempting to resolve these other problems, a serious question arises as to whether he has represented his client competently." NYSBA Op. 425 (1975).

The obligation to provide competent representation requires the lawyer "to avoid accepting more matters than the lawyer can competently handle, and a duty to reduce one's workload if it has become unmanageable." NYSBA Op. 751 (2002). This long standing problem arises in a broad array of practice areas including those involving legal services lawyers, prosecutors, governmental lawyers and litigators. "[T]he lawyer may not justify neglecting a matter, preparing inadequately, or otherwise performing incompetently on the ground that the lawyer had too many matters to handle." *Id.*, n.1. Furthermore, while it may present many practical difficulties, a subordinate lawyer has an independent obligation to determine whether particular conduct comports with the duty of competence in Rule 1.1 and whether the lawyer is competent to handle matters the lawyer has been assigned. *Id.*; *see* Rule 5.2(a) ("A lawyer is bound by these Rules notwithstanding that the lawyer acted at the direction of another person").

C1.1:3 Competence Compared with Standard of Care in Legal Malpractice Action

Rule 1.1(a)'s pronouncements on competence dovetail with the standard of care applicable in a legal malpractice action, which measures whether a lawyer's conduct can result in civil liability. The New York State pattern jury instruction on legal malpractice provides:

> An attorney who undertakes to represent a client impliedly represents that (he, she) possesses a reasonable degree of skill, that (he, she) is familiar with the rules regulating practice in actions of the type which (he, she) undertakes to bring or defend and with such principles of law in relation to such actions as are well settled in the practice of law, and that (he, she) will exercise reasonable care. Reasonable care means that degree of skill commonly used by an ordinary member of the legal profession.

NY PJI 2:152 Malpractice-Attorney.

The courts have repeatedly stated that the violation of a Rule of Professional Conduct, standing alone, will not "create a duty that gives rise to a cause of action that would otherwise not exist at law." *Shapiro v. McNeill*, 92 N.Y.2d 91, 97, 677 N.Y.S.2d 48, 50 (1998). As noted in the "Preamble" section of the New York Rules of Professional Conduct, the "[v]iolation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached." Preamble: Scope, para. 12. Therefore, while the violation of a Rule of Professional Conduct is some relevant evidence of legal malpractice, it does not necessarily constitute legal malpractice. *See Swift v. Choe*, 242 A.D.2d 188, 194, 674 N.Y.S.2d 17, 21 (1st Dep't 1998) ("it is not an alleged violation of the disciplinary rules that forms the basis

of the malpractice claim, although some of the conduct constituting a violation of a disciplinary rule may also constitute evidence of malpractice").

Oddly, Rule 1.1(a)'s duty of competence is not expressed in mandatory terms. *See* Practice Commentary C1.1: 4, below. If an attorney does not comply with this aspirational ethical rule, however, she almost certainly has violated the standard of care owed to the client in the legal malpractice realm, and may be subject to damages if the other elements of a legal malpractice claim are established. *See* NY PJI 2:152 Malpractice-Attorney, Comment, sections C and D. Despite the fact that Rule 1.1 states the duty of competence in aspirational terms, a lawyer can still be subject to civil liability for even a single act of incompetence. *See* NY PJI 2:152 Malpractice-Attorney.

C1.1:4 "Should" vs. "Shall"

ABA Model Rule 1.1, which is the genesis for the New York Rule, states that a lawyer "*shall* provide competent representation." (emphasis added). The New York courts opted to make the "competent representation" rule aspirational, rather than mandatory. This change was recommended by the New York State Bar Association ("NYSBA") to reflect the "practice of disciplinary authorities," which rarely prosecute isolated and careless instances of incompetence, lack of zeal, or damage to a client. *See* NYSBA Proposed Rules of Professional Conduct, February 1, 2008 ("NYSBA Report"), p. 12.

It is important to note, however, that the rule proposed by the NYSBA was accompanied by a provision that did make incompetent representation a disciplinable offense if it was provided "intentionally, recklessly or repeatedly." NYSBA Report, p. 10. Unfortunately, that language was not ultimately adopted by the courts. The absence of this explanatory language in Rule 1.1(a) will doubtless make it more difficult to discipline lawyers who repeatedly fail to provide competent representation, one of the most common complaints registered by clients. It is possible that a lawyer who has failed to provide competent representation has violated Rule 1.1(b). *See* Practice Commentary C1.1: 6 & 7, below. Furthermore, in appropriate circumstances, Rule 8.4(h), which states that "a lawyer or law firm shall not ... engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer," could provide grounds to impose discipline on a lawyer who fails to provide competent representation.

Subdivision (b)

C1.1:5 Must a Lawyer "Associate" With Another Lawyer?

Rule 1.1(b) requires a lawyer to associate herself with another lawyer if "the lawyer knows or should know that the lawyer is not competent to handle [the matter]." This provision applies an objective standard of competence. Therefore, even if the lawyer is not personally aware that she is incompetent to handle a matter, she can be disciplined under Rule 1.1(b) if she should have known of the incompetence.

On its face, this subdivision appears to be quite expansive, requiring the lawyer to associate herself with another lawyer in any instance in which she has no prior experience in the subject matter of the representation. In actual practice, however, the subdivision will likely have a limited application.

As the Comments reflect, competence can be achieved in many different ways short of actually associating with a lawyer who is competent in the field. For example, it is well recognized that lawyers can achieve competence through research and self study in a particular discipline within the law. As noted in Comment 4 to Rule 1.1, "[a] lawyer may accept representation where the requisite level of competence can be achieved by adequate preparation before handling the legal matter."

For those newly admitted to the bar, or those with a limited practice area, the Comments thankfully acknowledge that

A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience .... A lawyer can provide adequate representation in a wholly novel field through necessary study.

Rule 1.1, Comment 2.

If a lawyer intends to achieve competence in a matter through research and study, the client should be placed on notice of that fact. The preparation required cannot result in an unreasonable charge to the client, or the fee would likely be deemed excessive. *See* Rule 1.5(a) (prohibiting excessive fees and expenses). If the lawyer plans to become competent in the matter at the outset of the representation, it may be appropriate to charge a reduced fee in recognition of the fact that the lawyer will likely expend more time on the matter than a lawyer who is already competent within the field. This may be desirable to a client who wishes to retain her regular lawyer on a new matter, rather than forming a new relationship with another lawyer.

Any preparation necessary to achieve competence must be performed diligently, thoroughly, and within the time frames required by the particular matter. *See* Rule 1.3(a) (mandating that the lawyer act with reasonable diligence and competence in representing a client). Therefore, if the client's matter requires prompt action in an area of the law in which the lawyer is not competent, it is unlikely that the lawyer could achieve competence through substantial self study. *See* Rule 1.1, Comment 5 ("Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation.").

C1.1:6 "Associating" With a Competent Lawyer

If a lawyer is not competent to handle a matter, and does not cure the incompetence through preparation and study, *see* Practice Commentary C1.1:5, above, Rule 1.1(b) requires the lawyer to associate herself with another lawyer who is competent to handle the matter. This can be accomplished in several ways.

If the lawyer handling the matter is in a firm in which a partner or associate is competent in the particular field, that can satisfy the dictates of Rule 1.1(b). Additionally, if the competent lawyer has an "of counsel" relationship with the firm, or is a part-time lawyer at the firm, Rule 1.1(b) can be satisfied. In these instances, client consent to associate with the competent lawyer would generally not be necessary because the client is hiring the law firm and confidential information can normally be shared among lawyers working at the firm. Rule 1.6, Comment 5 ("lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers").

The lawyer handling the matter could also satisfy Rule 1.1(b) by associating with a competent lawyer outside her firm. In that instance, however, the lawyer will normally be required to obtain the client's consent to share the client's confidential information with the competent lawyer. *See* Rule 1.6(a)(1) (requiring lawyer to obtain client consent to reveal confidential information); *see also* Rule 7.3(a)(2)(v) (prohibiting a lawyer from engaging in solicitation "if the lawyer intends or expects, but does not disclose, that the legal services necessary to handle the matter competently will be performed primarily by another lawyer who is not affiliated with the soliciting lawyer as a partner, associate or of counsel"). Furthermore, if the lawyer handling the matter plans to split fees with the competent lawyer, the requirements of Rule 1.5(g) must be satisfied. These include, among other things, that "the client agrees to the employment of the other lawyer after a full disclosure that a division of fees will be made." Rule 1.5(g)(2).

In either of the above instances, the lawyer handling the matter must work closely with the competent lawyer to satisfy the requirements of Rule 1.1. In this regard, the term "associating" in Rule 1.1(b) is somewhat misleading. A mere casual association will not do. For example, a lawyer could not seriously contend that she satisfied Rule 1.1(b) simply because a partner in her firm, quite possibly in a distant satellite office, was competent to handle the matter. Rather, the competent lawyer must work closely with the lawyer handling the matter to ensure that competent representation of the client is achieved. As noted in NYSBA Op. 762 (2003),

The presence of another lawyer in the firm competent to handle the matter does not absolve the first lawyer of the obligation under DR 6-101[predecessor to Rule 1.1(b)] unless he or she actually consults with the second lawyer. Therefore, a New York firm should assure itself that all lawyers (including lawyers licensed only in foreign countries) working in the New York office are competent to handle matters undertaken by them, and if not, to have in place a procedure for consultation with a lawyer who has competence in the area.

Finally, necessary preparation may require the lawyer handling the matter to associate with professionals in other disciplines, such as accountants. Similarly, in a medical malpractice action, "competent representation includes the lawyer's duty to render the customary services in selecting and working with appropriate expert witnesses." NYSBA Op. 572 (1985).

C1.1:7 Rule 1.1(a) vs. Rule 1.1(b): Failure to Provide Competent Representation vs. Failure to Associate with a Competent Lawyer

It is difficult to make sense of the dichotomy between the hortatory instructions in the competence provision in Rule 1.1(a) and the mandatory dictates in Rule 1.1(b). Although not entirely satisfactory, one possible way to reconcile the provisions is as follows. Rule 1.1(a) applies to the lawyer who is generally competent to handle the client's matter, but who fails to provide competent representation. For example, a lawyer competent in medical malpractice actions might fail to thoroughly prepare the client's medical malpractice action, resulting in its dismissal. That would constitute a failure to adhere to Rule 1.1(a), but because of the hortatory nature of that provision, the lawyer would not be subject to discipline. If, however, a lawyer handling such a matter knew or should have known that she was not competent in medical malpractice actions, failed to become competent through necessary study, and failed to properly associate with a lawyer who was competent to handle the matter, the lawyer would be in violation of Rule 1.1(b), which is mandatory in nature. The latter lawyer would, therefore, be subject to discipline.

It should be noted that in either instance above, the lawyer can be subject to civil liability for legal malpractice. *See* Practice Commentary C1.1:3 ("Competence Compared with Standard of Care in Legal Malpractice Action"), above.

C1.1:8 The Emergency Exception to Competence

It is 2 A.M. on a cold Sunday morning and a lawyer awakes to the sound of her phone ringing. She initially believes the call is from one of her antitrust clients, or from a beleaguered associate at her firm working around the clock on an antitrust matter. Instead, the call is from a neighbor who has just been arrested for drunk driving. The neighbor notes that he has tried to contact several criminal defense lawyers with no success, and beseeches the neighbor to agree to represent her and come to the jail to assist her in dealing with the police. Assuming that the antitrust lawyer has never handled a criminal matter and is incompetent in that realm, can she assist her neighbor who cannot find another lawyer?

Comment 3 to ABA Model Rule 1.1 notes that:

In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

Despite her incompetence in criminal matters, this emergency exception would permit the antitrust lawyer to provide some sort of limited representation to the neighbor during the scope of the emergency. Therefore, if the antitrust lawyer did assist the neighbor in the wee hours of the morning, shortly thereafter she would need to cure her incompetence in criminal matters through research and study, or by associating with a lawyer who is competent to handle the matter. In lieu of these alternatives, the lawyer could attempt to withdraw from the matter, which might require the permission of a tribunal. *See* Rule 1.16(d).

Although a Comment 3 was initially included in the NYSBA Report, it is now designated as "Reserved." Does that mean that the emergency exception is not available under New York's Rule 1.1? While not spelled out clearly, the exception can likely be invoked under the Rule. The relevant factors to be considered in determining competence include "the preparation and study the lawyer is able to give the matter, and whether it is feasible to associate with a lawyer of established competence in the field in question." Rule 1.1, Comment 1. In an emergency, the lawyer will have little time to prepare the matter and may be unable to associate with another competent lawyer on short notice. Those factors should be considered in determining if the lawyer responding to a client's emergency acted in conformance with Rule 1.1's competence standards.

Subdivision (c)

C1.1:9 Failure to Seek Objectives of the Client

Rule 1.1(c)(1) provides that "[a] lawyer shall not intentionally fail to seek the objectives of the client through reasonably available means permitted by law and these Rules." This subdivision has limited application. It applies only where: 1) the lawyer is aware of the objectives of the client, *see* Rule 1.4(a)(2) (requiring a lawyer to "reasonably consult with the client about the means by which the client's objectives are to be accomplished"), 2) there are reasonably available means to achieve these objectives that are permitted by law and the Rules of Professional Conduct, and 3) the lawyer intentionally fails to seek those objectives.

Therefore, a lawyer who carelessly or negligently fails to seek the client's objectives does not violate this provision. In addition, if the objectives of the client are not achievable through reasonably available means, the lawyer need not pursue them. A lawyer need not, for example, pursue a scorched earth strategy in discovery, even if the client agreed to pay for it and the demands would not be frivolous. This type of strategy is not a "reasonably available means" to pursue the client's objectives. If accomplishing the client's objectives require the lawyer to violate the law or the Rules of Professional Conduct, that provides an independent basis for the lawyer to refuse to pursue them. *See also* Rule 1.4(a)(5) (requiring a lawyer to "consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law").

C1.1:10 Prejudicing or Damaging the Client During the Course of the Representation

Rule 1.1(c)(2) states the obvious: a lawyer cannot intentionally prejudice or damage the client during the course of the representation. While this provision does not apply to a lawyer who negligently harms the client, that type of conduct may lead to a violation of other Rules. *See, e.g.*, Rule 1.3 (requiring, among other things, that a lawyer act with reasonable diligence and promptness in representing a client and refrain from neglecting a client's matter). Furthermore, if the lawyer intentionally prejudices or damages the client during the course of the representation, she is subject to liability in a civil action for legal malpractice and/or breach of fiduciary

duty. *See also* Judiciary Law § 487 (permitting an injured person to recover treble damages against an attorney who "[i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party" or who "[w]ilfully delays his [or her] client's suit with a view to his [or her] own gain").

The Rule contains an important caveat that permits the lawyer to prejudice or damage the client if it is "permitted or required" by the Rules of Professional Conduct. There are many instances in which such conduct is authorized. For example, a lawyer is permitted to reveal or use confidential information to the extent necessary to prevent the client from committing a crime or to comply with a law or court order. Rule 1.6(b)(2), (6). If a lawyer operates under one of these exceptions to the duty of confidentiality, she will often simultaneously prejudice the client. Additionally, if a lawyer is required to disclose a client's fraudulent conduct to a tribunal under Rule 3.3(b), she will no doubt cause damage to the client's case. If the acts that prejudice or damage the client are authorized under some other provision in the Rules, the lawyer can proceed without fear of violating Rule 1.1(c)(2).

The restrictions in Rule 1.1(c)(2) only apply "during the course of the representation." If representation of the client has concluded, a lawyer may damage or prejudice the former client as long as the requirements in Rule 1.6 pertaining to confidentiality and the duties to former clients outlined in Rule 1.9 are honored.

Notes of Decisions (40)

Rules of Prof. Con., Rule 1.1 McK. Consol. Laws, Book 29 App., NY ST RPC Rule 1.1
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Straight & Narrow

By James B. Kobak, Jr. and Ignatius A. Grande[1]

Social Media Ethics: Keeping Up with Changing Obligations

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Social media continues to impact the legal world in ways that could not have been foreseen only 10 years ago. Bankruptcy attorneys in particular are finding themselves using social media more often and are utilizing it for a variety of purposes, with the rise of bankruptcy blogs and the active use of applications such as LinkedIn. Many active users undoubtedly have a mix of motives: staying in touch with colleagues; commenting about and keeping up-to-date with legal developments; letting people know of important events in their personal or professional lives; and, in the back of some minds but undoubtedly in the forefront of others, using it as a tool to cultivate name recognition and develop business.

Social media and the ease with which one can store and post information and communicate with large groups of people continue to create challenges for all attorneys, including bankruptcy attorneys. An attorney must think before he/she tweets, posts on Facebook, Snapchats[2] — or puts anything on the Internet, for that matter.[3] An attorney also has an obligation — or at least a professional interest — to advise clients on how to manage their social media accounts consistently with legal positions, but an attorney must abide by professional responsibility rules and obligations when doing so.

Over the past year, ethics committees and bar associations have continued to issue opinions and guidance on how attorneys can use social media, and attorneys and their clients have demonstrated how these platforms can be misused in ways that create ethical issues. It is more important than ever before for attorneys to be aware of the pitfalls, as well as the opportunities, that have been created by changing technology.

A bankruptcy attorney who uses any form of social media — or has clients who do — needs to understand how different social media platforms work and needs to be aware of the existence of any ethics rules or opinions that may affect the attorney's use or their client's use of social media. In other words, developments in this area affect virtually every bankruptcy professional, both technophobe and technophile alike.

This article alerts insolvency practitioners to recent developments in three areas: the duty to advise clients on social media use without running afoul of spoliation rules; the possible need to conform online communication to a number of disparate state advertising and solicitation rules; and the duty to protect confidential information in electronic, as well as physical, form. The case law, professional responsibility rules, and ethics opinions and comments are rapidly evolving and can vary by state.

1 Mr. Kobak is a member of the New York County Lawyers Association Ethics Committee, whose opinions are referenced in this article, and the Committee on Standards for Attorney Conduct, which recommended the changes to the comments to the New York Rules of Professional Conduct. Mr. Grande teaches a course on e-discovery at St. John's University School of Law and co-chairs the Social Media Committee of the New York State Bar Association's Commercial and Federal Litigation Section, whose guidelines are referenced in this article.

2 Although he is not an attorney, Royal Bank of Scotland Chairman Rory Cullinan recently resigned after his daughter took screenshots of Snapchat posts of Cullinan being bored at work and posted them online, where they were found by reporters. Snapchat puts a time limit on how long recipients can view and download photos, videos or messages, but Cullinan's daughter took screenshots on her phone and proceeded to upload them to the photo-sharing social media platform Instagram. While it is not clear whether Cullinan resigned due to the Snapchat issue, the media has alleged that it was the reason for his departure. *See* Lianna Brinded, "RBS Boss Leaves Weeks After These Snapchat Pictures Were Put on Instagram by His Daughter," *Business Insider*, March 31, 2015, *available at* uk.businessinsider.com/rbs-boss-rory-cullinan-leaves-just-weeks-after-snapchat-pictures-were-unveiled-on-instagram-2015-3#ixzz3i6BkhiYT (unless otherwise indicated, all links in this article were last visited on Aug. 18, 2015).

3 In recent years, attorneys have posted inappropriate information about their clients on social media, have tweeted profane comments to large audiences when childishly debating Supreme Court holdings on social media, and have misrepresented their attorney admission status and work experience on social media. *See* Erin Fuchs,"A Facebook Photo of Leopard-Print Underwear Caused a Murder Mistrial in Miami," *Business Insider*, Sept. 13, 2012, *available at* www.businessinsider.com/facebook-photo-and-murder-mistrial-2012-9; Debra Cassens Weiss, "BigLaw Partner's Twitter F-Bomb Is Aimed at SCOTUSblog Snark," *ABA Journal*, Oct. 21, 2013, *available at* www.abajournal.com/news/article/biglaw_partners_twitter_f-bomb_is_aimed_at_scotusblog_snark/; Eric Turkewitz, "NJ Files Ethics Complaint Against Rakofsky (And Why It's Important to You)," *New York Personal Injury Law Blog*, March 26, 2014, *available at* www.newyorkpersonalinjuryattorneyblog.com/2014/03/nj-files-ethics-complaint-against-rakofsky-and-why-its-important-to-you.html.

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Social Media Use and Privacy Settings

Clients may post information or remarks on social media that might be inconsistent with later legal positions that they may wish to adopt in insolvency proceedings or other contexts. Such postings may inadvertently divulge information that they would have preferred that creditors or a trustee not know. Social media postings may also serve as fodder for endless and embarrassing discovery or cross-examination, as well as unwittingly violate the rights of third parties. An attorney may consider it good practice, and even part of diligent representation, to advise about what should or should not appear on a client's website, social media feeds and even blogs.

Although content on a social media platform may seem to be different from emails or electronic files, the information stored on social media platforms is subject to the same preservation requirements as other forms of data. (Since social media can provide a treasure trove of information in many cases, it is becoming more and more important for attorneys to advise clients on the proper use of social media as it relates to their cases.) It has been clear for several years that an attorney cannot advise a client to delete a social media account or delete content when the information found on the social media account is subject to a litigation hold.[4] More recently, ethics opinions have focused on the related issue of how a lawyer can — and may have a duty to — advise a client regarding changing social media privacy settings.

The Philadelphia Bar Association recently issued an ethics opinion that stated that a lawyer may advise a client to change the privacy settings on his/her social media page, as long as the lawyer does not instruct or permit a client to delete or destroy any "relevant" content "so that it no longer exists."[5] The committee found that changing the privacy settings was acceptable; even though a change would restrict immediate access to the content of the site, a change in privacy settings does not prevent the opposing party from being able to obtain such information through discovery or by a subpoena.

Florida also has issued guidance on this point. In January 2015, the Florida State Bar Association's Ethics Advisory Committee issued a proposed advisory opinion, noting that "a lawyer may advise a client to use the highest level of privacy setting[s] on the client's social media [accounts]."[6] The committee also concluded that, "[p]rovided that there is no violation of the rules or substantive law pertaining to the preservation and/or spoliation of evidence, a lawyer also may advise that a client remove information relevant to the foreseeable proceeding from social media pages as long as an appropriate record of the social media information or data is preserved."[7]

4 *Lester v. Allied Concrete Co.*, Nos. CL.08-150, CL.09-223 (Va. Cir. Ct. Sept. 1, 2011); *Painter v. Atwood*, 2014 WL 1089694 (D. Nev. March 18, 2014); *Gatto v. United Air Lines Inc.*, 2013 WL 1285285 (D.N.J. March 25, 2013).

5 The Philadelphia Bar Association Professional Guidance Committee, Opinion 2014-5 (July 2014).

6 Professional Ethics Committee of the Florida Bar, Proposed Advisory Opinion 14-1 (Jan. 23, 2015). The Professional Ethics Committee has since affirmed Proposed Advisory Opinion 14-1, with slight modifications after receiving comments. The Florida Bar Board of Governors will review the proposed advisory opinion in October 2015.

7 Other states have echoed this finding, including New York. The updated Social Media Guidelines issued by the New York State Bar Association's Commercial and Federal Litigation Section conclude that "[a] lawyer may advise a client as to what content may be maintained or made private on her social media account, including advising on changing her privacy and/or security settings." NYSBA Social Media Ethics Guideline 5.A (June 2015), *available at* www.nysba.org/socialmediaguidelines/.

What Makes Social Media Communications Advertising?

For several years, bar associations and ethics opinions have found that attorneys who advertise on social media should be subject to the same requirements that are otherwise in place. In 2012, a California Ethics Opinion held that "[t]he restrictions imposed by the professional responsibility rules and standards governing attorney advertising are not relaxed merely because such compliance might be more difficult or awkward in a social media setting."[8] New York attorneys were also recently provided with specific guidance on what usage may constitute advertising.

On March 10, 2015, the New York County Lawyers Association (NYCLA) Professional Ethics Committee weighed in on the ethical implications for lawyers who use social media websites to promote their services when it issued Formal Opinion 748. The opinion focused solely on the use of LinkedIn by attorneys. The committee determined that attorneys may maintain profiles on LinkedIn "containing information such as education, work history, areas of practice, skills and recommendations written by other users."[9] However, if a lawyer wants to include information other than education and employment history, such as a detailed description of practice areas and work done in previous employment positions, that attorney may need to use the words "attorney advertising" if the purpose of the profile could reasonably be deemed to be seeking to be retained by clients and the audience included was not limited to lawyers and present or former clients. A LinkedIn profile in New York should also have the disclaimer, "[p]rior results do not guarantee a similar outcome" if it includes "(1) statements that are reasonably likely to create an expectation about results the lawyer can achieve, (2) statements that compare the lawyer's services with the services of other lawyers, (3) testimonials and endorsements of clients, or (4) statements describing or characterizing the quality of the lawyer's or law firm's services."[10]

This opinion is the first to provide such detailed information on attorney advertising. The New York State Bar Association (NYSBA) Social Media Guidelines had previously stated that social media posts used "primarily" for business purposes are subject to the attorney advertising and solicitation rules. The NYCLA opinion and others have not addressed how to deal with other forms of social media, such as Twitter and Facebook. Attorneys, especially those in New York, must now be cognizant that advertising activity on social media will likely be treated similarly to advertising activity that is in print or on the Internet. In some states, this treatment could entail storing copies of social media profiles or even filing with disciplinary authorities.

Another notable requirement of Formal Opinion 748 is the requirement that attorneys should "periodically" check their LinkedIn profiles in order to monitor what is posted on their profiles by others, by way of endorsements or recommendations that originate from other users. The

8 The State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 2012-186 (Dec. 21, 2012).

9 New York County Lawyers Association, Professional Ethics Committee, Formal Opinion 748 (March 10, 2015).

10 *Id.*

NYCLA opinion states that "[w]hile we do not believe that attorneys are ethically obligated to review, monitor and revise their LinkedIn sites on a daily or even weekly basis, there is a duty to review social networking sites and confirm their accuracy periodically, at reasonable intervals."[11] This requirement is another example that attorneys can no longer glide by with an ignorance of what social media is; once they set up profiles, they may need to actually monitor them in some way and keep track of what people might be posting on their sites. Some may well evaluate whether participation in too many forms of social media is worth the effort.

Duty of Competence in Technological Matters

Times have changed in the practice of law, and many governing bodies are now indicating that attorneys should have some expectation or duty of competence as it relates to technology. In 2012, the American Bar Association's (ABA) House of Delegates voted to amend Comment 8 to Model Rule 1.1, which pertains to competence, to revise the section that requires lawyers to "keep abreast of changes in the law and its practice" to include keeping up with "the benefits and risks associated with relevant technology." In January 2015, New York State adopted a version of the ABA Comment that similarly imposes a duty to keep abreast "of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information."[12]

In addition, some ethics committees have directly tied this duty of competence to the social media world. In September 2014, the Pennsylvania Bar Association interpreted Rule 1.1 of the Model Rules of Professional Conduct to require that lawyers have "a basic knowledge of how social media websites work," as well as the ability to advise clients about the legal ramifications of using these sites.[13] In June 2015, the updated Social Media Ethics Guidelines from the Commercial and Federal Litigation Section of the New York State Bar Association suggest that an attorney possess an understanding, at a minimum, of the most basic functions of how each system works, what information (particularly client confidences) might be exposed, to whom and how, and the ethical impact of the usage.[14]

The practice of law and the manner in which professionals and nonprofessionals alike function and communicate have changed dramatically in recent years. Understanding how social media and technology works and will impact one's practice is becoming more of a necessity, both practically and as a matter of professional responsibility. Some large companies are now insisting on strict guidelines for communication protocols and protection of sensitive data, and a market for cyber insurance has even developed. Ethics rules and opinions have not yet opted to require specific measures such as encryption, but some ethics committees and bar associations are beginning to consider such measures. Good bankruptcy lawyers devote time to staying up to date with developments relevant to their chosen field, which now includes developments in the new and changing technologies that they use to interact with colleagues, adversaries and clients. abi

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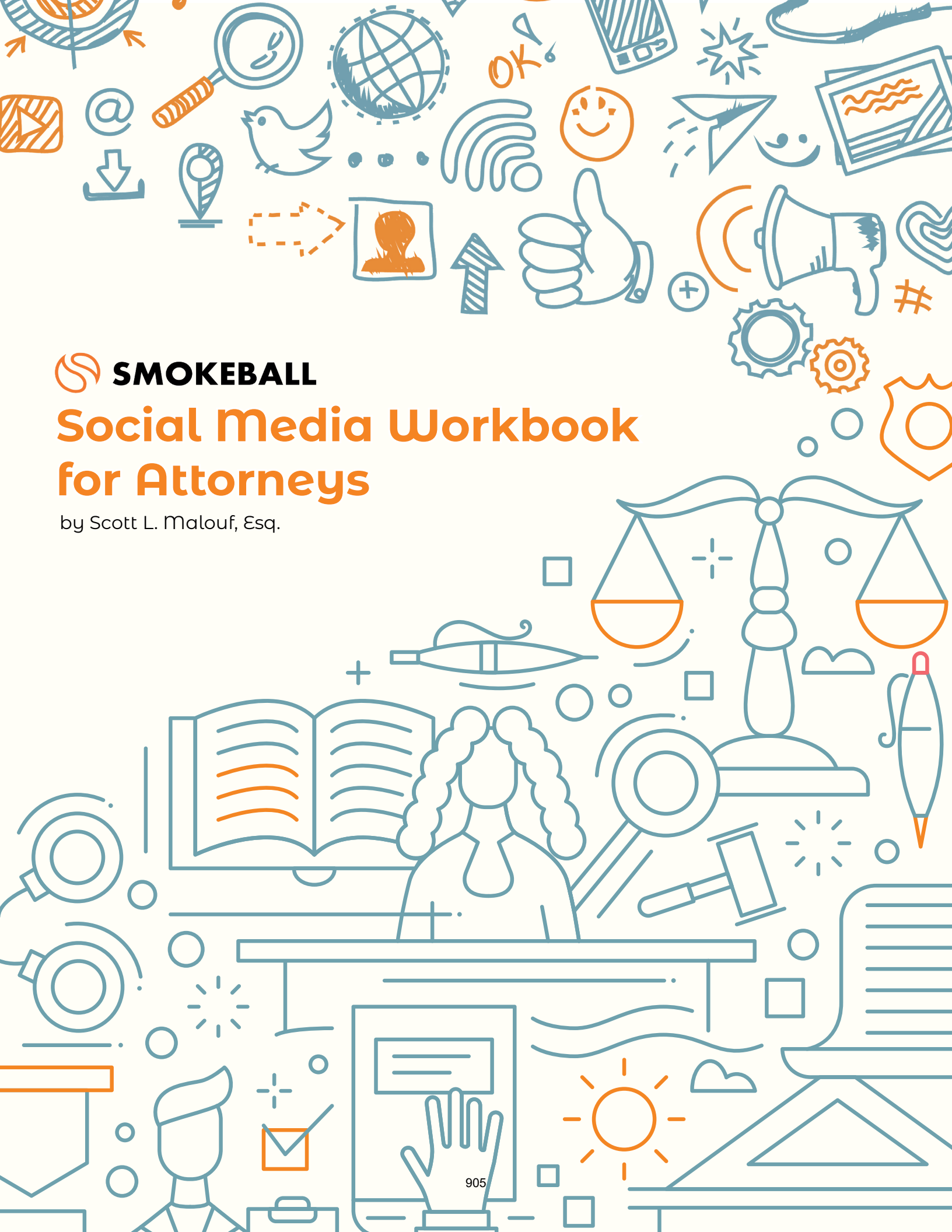
11 *Id.*
12 New York Rules of Professional Conduct, Rule 1.1, Comment 8.
13 Pennsylvania Bar Association, Formal Opinion 2014-300 (September 2014).
14 Social Media Ethics Guidelines, New York State Bar Association, Commercial and Federal Litigation Section (May 2015).



SMOKEBALL

Social Media Workbook for Attorneys

by Scott L. Malouf, Esq.

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Introduction

So, you want to be an artisanal book-binder? Sorry, this workbook is for lawyers who want to use social media well (Man, book-binders get no love!).

If you are an attorney doing great work, have developed a unique focus, have built a really great team or just want to move forward professionally, this book is for you.

This short, integrated workbook will help you create and sustain a professional online presence, particularly on social media. Read the materials, answer the questions, and do the exercises to create a simple online plan. If you don't have time for this process give this book to a team member to draft a plan for you.

Although this book is a good place to start, it does not cover all the nuances of creating a successful presence. Also, although we discuss legal ethics, this work does not address all the ethical issues you may face. Thus, we've linked to external resources on ethics.

We assume a very basic familiarity with social media that most will possess. If you find yourself a bit beyond your depth just ask a social-savvy friend for help.

A quick note about terminology. To avoid wordy phrases, we refer to social media sites, such as Facebook or LinkedIn, as "platforms" and we call individuals or businesses using those platforms "users."

So, let's create some great social media for you.

What Is Social Media Success?

Let's jump into a question. (By the way, you'll notice the questions are designed to focus your thoughts while exercises give you specific tools to carry out your plan. You may wish to save your responses as one document that can become your first online plan).

Question: Assume social media is a huge success for you. What does that success look like a year from today?

As you may have just experienced, it can be hard to define success – particularly social media success. Of course, you want other users to see and share your content and that may be enough. But if that online activity does not result in benefits in real life (aka "IRL") the online activity may not be a success.

Go back to your answer(s). Did you pick a particular platform or type of user? Did you identify a specific number of likes on Facebook or new LinkedIn connections? Or, did you define success by an offline activity like increased business, better clients, media interviews or something else?

Questions: Revisit your definition of success:

1. Can you make your goal(s) quantifiable, such as a specific number of followers or an amount of new business in a set period?
2. How will you measure your progress toward achieving that success?

We will now discuss some unique aspects social media, but we will revisit your definition of success later.

What Is Social Media and Why Is It Unique?

We won't spend much time defining social media. Not only has it been discussed ad nauseam, but there are so many platforms and user cultures that comprehensive definitions are difficult. From a practical standpoint, the tips below are useful on any large platform (Facebook, LinkedIn, Twitter, Instagram, Pinterest, YouTube, Snapchat etc.), blog, discussion forum (Reddit, Quora, comment sections, etc.) or the many other online communities.

Regardless of the platform, you should be aware of some key differences between online communities and offline activity.

Voluminous

The number of users and posts per day is mind-boggling. In one day, on average, over 500 million tweets are posted to Twitter. In 2017, Facebook had approximately 2.2 billion monthly active users.

Informal

Users often want to interact with "real" people or see behind the scenes. The very buttoned-down, one-way communication normal for the legal industry is at odds with these user expectations. Additionally, the Internet and social media often reward hyperbolic, aggressive or emotional posts with more attention, consider the last news headline that tempted you to click the story.

Visual

Content with a visual component (an image, video, live video, infographic, sticker, GIF, etc.) is more attractive than mere text. If you can add a visual component you will likely generate more engagement. Interesting, brief stories are also a good way to demonstrate a point and engage.

These elements should inform your approach to social media. They should not deter you or change who you are. Which is an excellent segue to our next topic, defining your online personality.

Know Who You Are Before You Go Online

Quiz:

Set a timer for ten seconds. Then hit “start,” advance the page and complete the exercise.

In each blank fill in the LAST name that comes to mind:

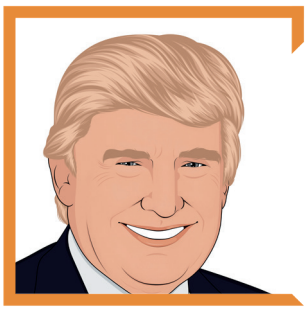
i. Kim _____
ii. Donald J. _____
iii. J.K. _____

Turn the page to see answers.

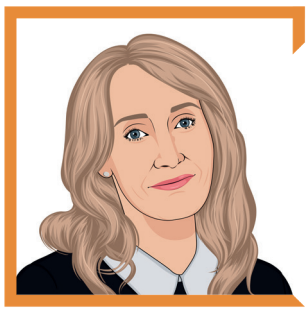
The Answers Are:

i. Kim Kardashian

ii. Donald J. Trump



iii. J.K. Rowling



Although these public figures were known without an Internet presence their online activities extended their personal brands and changed how people perceived them. They are also a good example of how an Internet persona can be a brand.

Of course, you're probably not seeking larger-than-life Internet fame. Rather, you should focus on creating a niche that highlights your unique abilities and speaks to the community you want to engage.

Questions: Define who you are online. Your online persona need not mirror who you are in real life, but it must be something you're comfortable with and not deceptive. Answer the following:

1. What is your personality? For example, are you humorous, serious, intellectual, artistic, insightful, spiritual, curt, straight-talking, boisterous?
2. Is there an online figure whom you admire? Is there someone whom you find distasteful? What aspects of these individuals account for your views?
3. What image do you want to present?
4. How would your clients or employer feel about that image?
5. What are you unwilling to share? Some things you may wish to keep private are information about your family, medical issues, financial matters, where you live, bad habits, political or religious affiliations, etc.
6. Is this account for purely business purposes or is it a mix of business and personal use? A hybrid account (personal and professional) may need to comply with ethical requirements. See Guideline No. 2.A, discussed in the ***Relevant Ethics*** section below.

Most platforms offer a biography section. Here are suggestions to optimize your bio:

- Use a professional picture
- Say what you do – "Joe Jones, Criminal Defense Attorney"
- Social media may be considered attorney advertising and require certain disclaimers. We will revisit this in the Relevant Ethics section. Here is the disclaimer your author uses on LinkedIn. Feel free to use or modify it:

  This profile and its contents are Attorney Advertising. Prior results do not guarantee a similar outcome.

- Your author also added the following to his LinkedIn bio to limit potential communications from non clients:

  *Communications Rules: *DO NOT* send or post time-sensitive or confidential information. Anything you send or post will NOT be treated as confidential and sending/posting will NOT create an attorney-client relationship or prevent me from representing someone else.*

Now that you've got some more basics, let's revisit your definition of success from the *What is Social Media Success* section.

The Benefits of Social Media

Attorneys can get many benefits from social media, including:

- Securing new clients or generating client reviews
- Building a reputation or expertise
- Connecting with local or specialty media
- Following legal and business developments
- Understanding evolving technology

Questions: Look at the bullet points above and ask:

1. If you could have one person (or person holding a certain job) read your posts consistently, whom would that be?
2. If you could consistently receive one benefit from social media what would that be?
3. Revisit your answer(s) from the last part of the *What is Social Media Success* section. Based on the multiple ways attorneys can use social media, do your goals change?

Now we turn to selecting a platform.

What Platform Is Best for You?

Determining the “right” platform to use can be hard. Different platforms have different users and cultures, strengths and weaknesses.

Some of the key points for you to consider when picking a platform are:

- How many people use it?
- Who uses it? For example, LinkedIn is popular among professionals.
- How do people use it? Each platform has a different feel. LinkedIn is generally considered a business platform. Pinterest is well known for recipes, party planning, home and decorating ideas and expressing one’s style.
- Is it popular with your target audience(s)? For instance, most professional journalists use Twitter as a place to link to news as well as follow and debate developments.
- What kind of content does the platform allow? Facebook features long posts, videos, user groups and lots of user data if you advertise. If you prefer shorter posts, Twitter’s 280-character limit may work for you.

There are some quick ways to identify your target audience and their interests:

- **Review your KPIs.** What kinds of matters are driving your success? If you use practice management software look at matter tags or run practice reports. Smokeball clients can look to the *Law Firm Insight* Dashboard.

- **Whom did you email or bill most in the last six months?** Should you be connecting with them on social media? Smokeball’s *Automatic Time and Activity Tracking* captures your time automatically and provides daily and custom profitability and activity reports.

Start small. It is better to use one platform consistently and well than to start on several but lose steam. An account that does not have recent posts will not encourage users to engage with you. We address how often you should post next.

How Frequently Should You Post?

There is no exact science on how often to post. Some have suggested that blogs should be updated once or twice a week while Pinterest may need to be updated up to five times a day.

How often you post depends upon you, your target audience(s), the platform(s) and how much time you have. Your author likes to post 1 to 3 times per weekday per account.

Also consider when you don't want to be online. Social media can be all-consuming. Set times when you can be offline, such as nights, weekends and periods during working hours when you don't want to be disturbed.

Let's take a break from the mechanics and talk about the ethics of social media.

Relevant Ethics

The following discussion highlights important social media ethical issues. You may also find the following resources, and your state's rules, helpful background materials:

- The Social Media Ethics Guidelines of the Commercial and Federal Litigation Section of the New York State Bar Association (updated May 11, 2017 and hereinafter the "Guidelines") are a thorough, free and easy-to-use resource for attorneys. The Guidelines are organized by activity (advertising, communicating with clients, finding evidence, researching jurors, etc.) so you can quickly find guidance for your situation. This workbook cites to the sections of the Guidelines. Your author was one of the contributors to the Guidelines.

- The ABA Center for Professional Responsibility has numerous resources and publications on attorney ethics, including evolving technology.

- The ABA/BNA Lawyers' Manual on Professional Conduct is an authoritative source on legal ethics. Your author is on the editorial board of the Manual.

Ethical concerns are frequently cited as a barrier to attorneys using social media. Attorneys must comply with legal ethics when using technology but shouldn't let uncertainty keep them from using social media. The better practice is to start slowly and understand how a tool or platform works (e.g. is a post available to the whole world, friends or just the account owner) before using it for highly sensitive functions. Some basic ethical issues to consider when using social media:

- **Confidentiality.** You must maintain client confidences. Although it may be tempting to tell war stories about clients or vent online after a bad day, resist. For example, merely eliding the client's name from a post may not be sufficient to protect confidences. The client may follow your posts and identify him or herself or other users may be able to complete the story with additional information you did not post. See Guideline No. 5.E.

- **Competence.** Know how to use the tools. As of this writing, 31 states have adopted the Duty of Technological Competence. Here is a list of states who have adopted this duty, via Bob Ambrogi's Law Sites blog. At base, this duty requires attorneys to understand the benefits, risks and ethical implications of modern technology. See Guideline No. 1.A.

- **Attorney Advertising.** Any post you make may fall under your state's definition of attorney advertising. As such, the post may need ethical disclaimers. If a platform does not provide the room or ability to post such disclaimers, you may be better off posting materials that don't qualify as attorney advertising. See generally, Guideline No. 2. Also see the *Know Who You Are Before You Go Online* section above.

Exercise: Follow individual attorneys active online to see the character of their posts and how they are received.

Now you have a general idea of how to protect your ticket when going online. Review the resources above for more details and citations.

Moreover, if you've done the questions and exercises above, you know yourself, your audience(s) and your platform. Next, you must determine what to say.

What Should You Post?

It is tempting to talk all about yourself – don't. Many law firms use social media merely to trumpet achievements. Would you want to follow such accounts?

Moreover, talking about yourself will bore your audience(s) and probably not achieve your goals. Many advise following the "80/20" rule. Only 20% of your posts should be about you or your endeavors. Eighty percent of your content should educate, engage or entertain your audience(s). Potential topics might include:

- **Current news, especially related to your practice area.** Beware hot button topics like politics, religion and similar issues. Also, be careful of humor. It can be hard to be funny and it is easy to offend.

- **Legal developments that may affect your audience(s) or potential clients.**

- **Content posted by others.** Follow people you want to connect with and reshare or thoughtfully comment on their posts.

- **Awards, media appearances or volunteer work.** A post recognizing a colleague's or friend's accomplishment is a great way to help another and engage your followers. Don't forget to tag* everyone involved and all relevant organizations. All of them will be more likely to share your post.

Whenever useful, your posts should include hyperlinks to relevant material. For example, if a blog post discusses a rule change link to the blog post so those seeking more information can get it. Certain programs allow you to track link clicks, giving you another way to see what interests your audience(s). Also, you can tag the blog's author and he or she may reshare your post.

**"Tagging" means a user employing your user name in a post so you receive notice of the postand the tag links back to your profile. Usually, a tag is indicated or initiated by using the aspersand (the "at sign" or "@"). For example, you tag Smokeball on Twitter by writing "@SmokeballNews".*

Question & Exercise:

1. What online sources do you read that your audience(s) may find interesting? As you read consider sharing through your social media. You can add your own thoughts to demonstrate your expertise.
2. Ask your friends and colleagues if they blog or use social media. Follow them and reshare their content. You can ask them to share your posts as well.

Additionally, here are some basic suggestions that will help:

- ***Hashtags*** (the pound sign or "#") – A hashtag identifies a concept so users can easily find posts about the concept. For example, a post about electronic discovery might use "#eDiscovery" as in "NY High Court overturns 4th Department's controversial Smith v. Jones decision. #eDiscovery." Using hashtags expands your potential audience(s) as users who don't follow you may be interested certain hashtags.

- ***Repurpose Whenever You Can.*** See the *How to Consistently Post* section below for a detailed discussion.

PRO TIP

Remember, anything posted online may be seen by clients, potential clients, colleagues, coworkers, neighbors and beyond. People have lost jobs because of foolish social media posts.

Images and other visual materials also can be excellent content and we address them next.

Images, Useful but the Devil Is in the Details

Even for word lovers, endless streams of text can be boring. Use images, emojis, stickers, GIFs or recorded video to garner greater engagement. Unfortunately, images are much harder to create and present a host of legal issues such as copyright, the right of publicity, expectations of privacy and ethical concerns. Watch how interesting accounts use images and then consider how to generate your own.

Here are some potential sources of visual content:

- **The platform may provide images such as emojis, GIFs, stickers, etc.** Although conveniently placed on the platform, you may find these resources hard to search, not particularly professional and not creative when used excessively.
- **The platform may also automatically embed images** from sources you link to such as an article.
- **Stock image providers may be helpful** but confirm any restrictions on how such images may be used and all costs for intended uses.
- **Other social media users** may license their images to you. Again, confirm terms and costs.
- **Creating your own images can be useful and fun.** Take pictures of things that interest you and access your photo gallery when posting. You may also find that the image helps you be more creative because you innately want your text to relate to the image. Additionally, if you have taken the image you own the copyright and know the image's provenance.

Now you have all the tools to create great posts. The following sections tell you how to put it all together and consistently post and interact with your audience(s).

How to Consistently Post

As mentioned above, there is little point in starting a social media account and not maintaining it. The following tips will help you post consistently and interact with other users.

- **Make time each day.** Set aside 5 to 20 minutes for your social media. You can use a social media manager to schedule all your posts, see the *Posting Tools and Times* section below.

- **Take a break.** Social media can easily become a time drain. You may want to take evenings and/or weekends off.

- **Repurpose, Repurpose, Repurpose.** Almost anything you create may be repurposed. If you draft an article or blog consider reusing it in the following ways:

    1. Discuss the blog/article on your social media and link to it.
    2. Create a variety of social media posts describing different aspects of the blog/article. You should allow one or more days between these posts.
    3. Ask a friend to discuss the blog/article on his/her social media and tag you.
    4. Talk about the issue on a podcast or other interview.
    5. A recorded video can be edited to capture portions of the video and those smaller portions can be posted as stand-alone content.
    6. If you retain the rights to the blog/article you can revise it, such as with new developments, and renew the cycle.

Exercises:

1. Delete “junk food apps” that waste time but deliver no benefit.
2. Drop newsletters, feeds or blogs that you no longer want.
3. Download relevant social media app(s) on your phone. Sign in immediately. Use the apps during downtime.
4. Waiting in line is a good time for social media posts. As you read consider sharing the content. As a side benefit – posts from your phone tend to be shorter and mobile-friendly.

As you can see, there are many options. Fortunately, social media management tools, which we discuss next, can help you save time.

Posting Tools and Times

You can't, and shouldn't, drop everything to post multiple times a day. Social media management software solves this problem by posting for you. Some social media users create a queue of posts to be sent out later that day, week or while they are on vacation. Management software may also give you additional tools, such as posting to multiple platforms at once, tracking the popularity of a post or allowing multiple people to post to social media accounts. Examples of social media management software offerings are: Hootsuite, Buffer, Sprout Social and many others.

Even if you have the time, determining when to post can be difficult. A social media manager may suggest posting times. Also, you may find it convenient to post in the morning to get the attention of followers who are early risers. Change your practices over time and see what works.

Don't forget time zones. If your intended audience(s) is in a different time zone, you may wish to post accordingly.

If all goes well you will start connecting with others. What should you do when your phone buzzes or computer beeps with a connection?

Responding to Others and Online Criticism

Negative posts frequently dominate the news and attorney worries about social media. So, although most of your interactions will be positive, here are suggestions on how to minimize interactions that may create problems. We end with practices to maximize positive interactions.

BAD PRACTICES TO AVOID:

- **You need not respond to every message, tag or mention of you.** This is true even if the message is negative or critical of you.
- **Don't answer individual or specific legal questions;** it may put you at risk of forming an attorney-client relationship. See Guideline No. 3.A.
- **Post wisely.** Posts can get you fired. Your boss, your client or the guy whose parking space you bogarted may find the post objectionable and cause you offline problems.
- **Online battles are not productive.** Lawyer & legal innovator Cat Moon (@InspiredCat) said it best:

> **I have a note in @Evernote called "tweets I didn't send."**
>
> **It's very cathartic.**
>
> **Cat Moon (@InspiredCat)**
>
> *https://twitter.com/inspiredcat/status/979405385932173317*

If an account sends/posts spam or wasteful messages/posts you may wish to unfollow/unfriend, mute or block the account; see what options the platform offers. If the interactions are abusive or otherwise violate the platform's rules you may wish to report the incident. As an example, here is a link to "How to Report Things" on Facebook's Help Center.

GOOD HABITS TO CULTIVATE:

- **Whatever platfom(s) you use, be prepared to connect with potential clients or contacts on that platform.** Don't expect someone who finds you on Facebook to contact you via email.
- **If a user contacting you is a potential client, move the conversation to your established systems when practical.** You don't want a client sending you messages on a social platform you are not monitoring.
- **Remember to check for conflicts and ask for full, real names.** Running a conflict check against "@MegaAwesome57" won't be helpful and will haunt you at firm at cocktail parties.
- **Track how clients find you** to determine if your social media or other online activities are generating clients or otherwise meeting your goals.

Be aware of your state's rules on client record keeping. A social media communication with a client may need to be retained. See Guideline No. 3.C.

Enjoy It

That's it. We hope you learned a bit and had fun. Use your answers to questions and the exercises as a basic social media plan. Revisit and revise as necessary.

You've probably noticed there are no screenshots or technical instructions in this book. Too often social media advice focuses on *how* to post and *how* to chase likes. That misses the real goal. Your social media activity should assist, not supplant, your offline goals. We will leave you with some exercises to keep you on track. Add these questions to your calendar (the dates below are just suggestions):

Exercises:

1. In two weeks, ask yourself "Have I consistently posted? If not, why not?"
2. In two months ask yourself "Am I enjoying my online interactions? If not, why not?"
3. In six to nine months, ask yourself "Have I realized some of my goals? If not, why not? And, am I my basing my conclusions on measurable facts or just my gut?"
4. If needed, revisit your answers, exercise responses and this workbook.

Author & Publisher Notes and Contact Information

Social media involves a doting-grandma-sized-dollop of self-promotion. In that spirit, if you want to follow your author on social media here links to my main accounts:

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ii. LinkedIn: https://www.linkedin.com/in/socialmediaattorney/
iii. Facebook: http://tiny.cc/ScottMaloufEsqFB
iv. Website: www.scottmalouf.com

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iii. Facebook: https://www.facebook.com/SmokeballUS/
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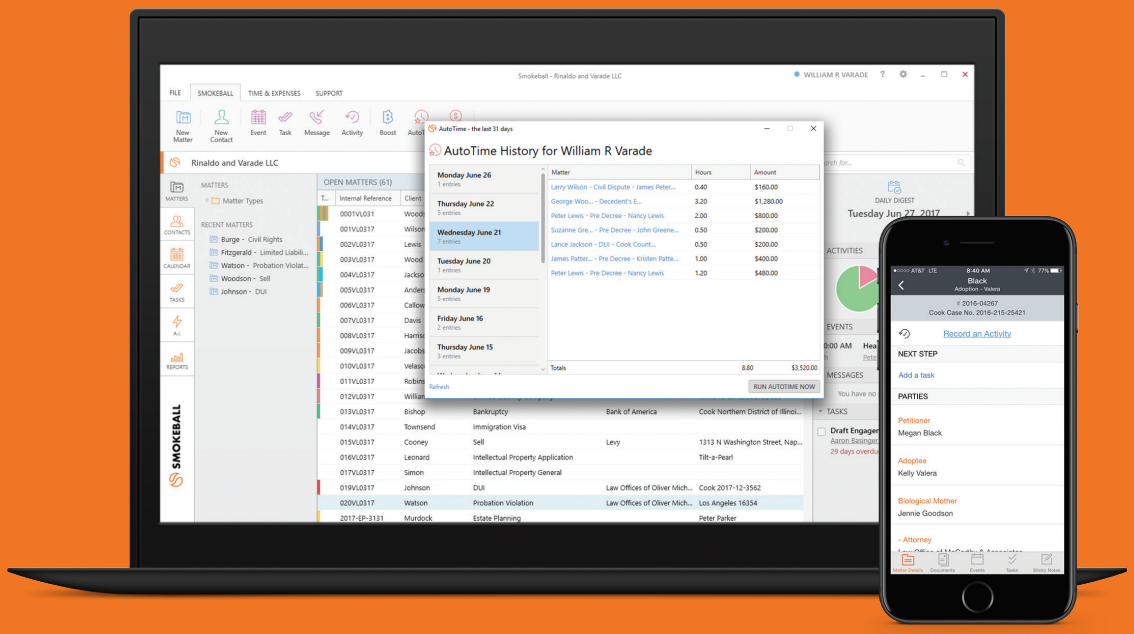

Snapchat | Daniel E. Lust

> What is Snapchat?
> Snapchat Facts
> Snapchat vs. Other Social Media Platforms
> Three Ways Attorneys Can Face Snapchat Ethics Issues

LinkedIn | Adam Durst

> Why Use LinkedIn?
> Find Your Connections
> An Ethics Review
> Social Media for Professionals

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> About Facebook
> A Brief History
> A Few Features
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YouTube | Claire Hankin-Wray

> About YouTube
> Why Lawyers May Want to View It
> Ethical Issues Faced by Attorneys
> Demographics and Fun Facts

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Social Media Law

A Good Second Impression: Legal Ethics and Making Public Social Media Private

A number of recent ethics opinions discuss whether a litigant may change the privacy settings on a social media account to make previously-public social media information private.[i] The most recent is the Florida Bar Association's Proposed Advisory Opinion 14-1 (2015).

Although the opinions are cautious and caveats abound, they generally hold that a party, whether in litigation or before litigation has begun, may change privacy settings on a social media account to make public information private. However, a party may not spoliate relevant, or potentially relevant, evidence or violate any statutory, regulatory or other obligation regarding preservation of information.

Unfortunately, this considered guidance is being muddled by suggestions that making public content private may be "concealing" evidence or "obstructing" access thereto in violation of Rule of Professional Conduct 3.4(a). This position is not well-founded. It implies disclosure duties not found in Rule 3.4(a), ignores social media practicalities and defies common sense.

What does Rule 3.4 require?

The relevant portion of New York's version [ii] of Rule 3.4(a) states that a lawyer shall not:

(1) suppress any evidence that the lawyer or the client has a *legal obligation* to reveal or produce;

(3) conceal or knowingly fail to disclose that which the lawyer *is required by law to reveal;*

[Emphasis added]

By SCOTT MALOUF
Daily Record Columnist

Rule 3.4(a) does not impose an independent duty to volunteer all relevant information; it merely prohibits concealing potential evidence a lawyer has a legal obligation to disclose, see *Sherman v. State,* 905 P.2d 355 (Wash. 1995).

New York's comment's on Rule 3.4(a) further clarifies the limits of the rule:

The Rule applies to any conduct that falls within its general terms (for example, "obstruct another party's access to evidence") that is a *crime, an intentional tort or prohibited by rules or a ruling of a tribunal.* An example is "advis[ing] or caus[ing] a person to hide or leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness therein."

Comment 1. [Emphasis added]

The rule is not violated because now-private social media information is harder for an opposing party to obtain or identify. Social media information still can be obtained through a document request or a subpoena. A violation occurs when a specific statute, case, rule, order, etc. requires all public social media information to remain publicly-accessible and a litigant makes the subject information or account(s) private.

The likelihood that sweeping public access is required seems remote based upon current case law. Requiring unlimited and unchangeable access to all public social media is similar to making a document request for "all" of a litigant's social media found behind a privacy wall. In each scenario, no limits have been placed upon the breadth of the material covered/sought. The mere existence, and possible utility, of the information is the rationale for the request.

Yet courts generally reject document requests seeking "all" of a litigant's private social media information. Courts require the party seeking private social media information to make a predicate showing of relevance. If that showing is made, then only relevant material need be disclosed. Substituting an unrestricted access standard would upend current case law requiring a showing of relevance.

Unique aspects of social media suggest no violation

An implicit criticism of making social media information private is that any public social media information a litigant makes private necessarily hurts the litigant's case and thus is likely relevant. This argument ignores many innocuous reasons for making a social media account private:

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• Unlike static records, social media accounts are living. Data may be created well after suit is filed. Thus, a litigant may wish to change privacy settings to limit exposure of future irrelevant or potentially embarrassing statements (especially those posted by others).

• A user may not have made a conscious, informed choice regarding privacy when signing up for a service. For example, a Facebook user can create an account at age 13.[iii] It is unlikely a 13 year-old will fully consider, or even understand, the implications his privacy settings may have in the future. Further, even seasoned, privacy-minded social media users can be surprised at how much data is public, despite their best efforts to keep it private. A changed privacy setting may merely reflect a better understanding of what data is being shared.

• An individual may wish to change settings to shield information from potential employers or colleges.

• To protect customer lists, an employer may require employees to shield their LinkedIn connections, see *Cellular Accessories For Less, Inc. v. Trinitas, LLC,* 2014 U.S. Dist. LEXIS 130518 (C.D. Cal. September 16, 2014)(LinkedIn settings relevant to whether customer list was a trade secret).

• A student being harassed by others may wish to change settings to prevent cyberbullying. Should counsel representing a harassed student in a school disciplinary matter fear ethical charges related to some ill-defined, potential discovery violation because the harassed student went private?

Additionally, how do we define the scope of the supposed obligation to keep social media accounts public? A litigant may have multiple social media accounts, such as Facebook, LinkedIn, Twitter, Google+, etc. Should all of these accounts remain publicly-available, unchanged, indefinitely? This might make the accounts practically useless, especially for business users who may have invested extensive resources in developing their digital assets.

Common sense suggests no violation

Attorneys routinely issue instructions regarding potential evidentiary issues. We tell a client not to discuss the matter with others. We might instruct a criminal defendant to close the drapes so others cannot observe his activities. It seems incongruous that changing social media privacy settings somehow differs from these common practices.

Takeaways

Despite the arguments above, your best bets in this area are caution and consideration. Understand your client's social media use and how it relates to the case. Review opinions issued by the bar association(s) relevant to your jurisdiction and stay abreast of new opinions and social media practices. Make your second impression count.

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i New York County Lawyers Association Formal Ethics Opinion 745 (2013), North Carolina State Bar Association Formal Ethics Opinion 5 (2014), Pennsylvania Bar Association Opinion 2014-300, Philadelphia Bar Association Professional Guidance Committee Opinion 2014-5, New York State Bar Association Commercial and Federal Litigation Section Social Media Ethics Guidelines (2014), Guideline No. 4.A.

ii The relevant portion of ABA Model Rule 3.4(a) states that a lawyer shall not: unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value …

iii www.facebook.com/help/210644045634222

Social Media: What Every Litigator Needs to Know

NORMAN C. SIMON AND SAMANTHA V. ETTARI, KRAMER LEVIN NAFTALIS & FRANKEL LLP, WITH PRACTICAL LAW LITIGATION

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This Practice Note discusses key issues about social media in various stages of litigation, including in the context of litigation holds, pre-litigation investigation, service of process, discovery, jury selection, and trial.

As technology progresses and sources of electronically stored information (ESI) proliferate, social media content is a part of the litigation equation that counsel and courts increasingly cannot ignore. From the pre-litigation stage through discovery and trial, social media content often is critical to a party's claim or defense. It can also pose significant challenges. Counsel must be aware of the potential impact of social media on all phases of litigation, as well as some ethical minefields concerning its use.

This Practice Note highlights key issues surrounding social media in litigation, including:

- The use of social media in the early stages of litigation.
- Special considerations for discovery and authentication of social media content.
- The role of social media in a jury trial.

For more resources to assist counsel and companies in identifying the legal risks of social media use, see Practical Law's Social Media Usage Toolkit. For a description of common categories of social media and a list of currently popular social media services, with non-legal, non-technical descriptions for each, see Practice Note, Social Media: A Quick Guide (0-501-1442). For resources on ESI generally, see E-Discovery Toolkit (8-503-1078).

EARLY STAGES OF LITIGATION

Even before a complaint has been drafted or filed, counsel should consider the potential applications of social media. In particular, social media may be a factor in:

- The parties' obligations to preserve and collect relevant evidence as part of a litigation hold (see Preservation; see also, for example, 2015 Advisory Committee Notes to Federal Rule of Civil Procedure (FRCP) 37(e) (noting the importance of counsel becoming familiar with clients' social media use to address preservation issues)).
- The pre-litigation investigation of potential adverse parties, witnesses, and opposing counsel (see Pre-Litigation Investigation).
- The parties' ability to locate and serve adverse parties (see Service of Process and Service of Other Documents).

PRESERVATION

The duty to preserve potentially relevant evidence arises when a party reasonably anticipates litigation, and may arise before an action is filed (see Practice Notes, Implementing a Litigation Hold: When to Implement a Litigation Hold (8-502-9481) and Reasonable Anticipation of Litigation Under FRCP 37(e): Triggers and Limits (W-008-2708)). This duty applies equally to social media content (see *Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona*, 138 F.Supp.3d 352, 387-88 (S.D.N.Y. 2015); *Howell v. Buckeye Ranch, Inc.*, 2012 WL 5265170, at *2 (S.D. Ohio Oct. 1, 2012)).

In federal court, once litigation commences, the court's scheduling order may specifically provide for preservation of ESI, which could include social media content (FRCP 16(b)(3)(B)(iii)). The parties' discovery plan under the FRCP must include any issues regarding preservation of these materials (FRCP 26(f)(3)(C)).

Litigation Holds and Collection

As with other potentially relevant ESI, counsel should not overlook social media content in preservation or collection efforts (see *Caputi v. Topper Realty Corp.*, 2015 WL 893663, at *8 (E.D.N.Y. Feb. 25, 2015) (directing plaintiff to preserve all of her Facebook activity through the litigation's duration); *EEOC v. Original Honeybaked Ham Co. of Ga.*, 2012 WL 5430974, at *1 (D. Colo. Nov. 7, 2012) (likening certain social media content to an "Everything About Me" folder that is voluntarily shared with others); see also *Petion v. 1 Burr Rd. Operating Co. II, LLC*, 2017 WL 6453398, at *3 (D. Conn. Dec. 15, 2017); *Hawkins v. Coll. of Charleston*, 2013 WL 6050324, at *3 (D.S.C. Nov. 15, 2013)).

Counsel drafting a litigation hold should consider specifically referencing social media platforms, including any associated and

collectable metadata, among the potential sources of information that custodians should preserve. Similarly, counsel should consider identifying social media platforms as potential sources of relevant information in any demand letter sent to an adversary requesting preservation of relevant ESI.

Counsel may use printouts, screenshots, or web crawlers to capture, gather, and store static images of social media content. However, counsel should bear in mind that these formats may be inconsistent with the format sought in a request for production (document request) or subpoena, do not typically capture metadata, and may be insufficient for authentication (see Document Requests for Social Media Content and Authenticating Social Media).

Therefore, to collect social media content in preparation for a dispute, litigants should consider engaging an e-discovery vendor with appropriate expertise to harness the full range of content and metadata associated with the ESI. For resources on engaging an e-discovery vendor, see E-Discovery Toolkit (8-503-1078).

For more on key issues that companies and their counsel must consider to ensure compliance with their obligations to preserve and produce ESI, see Practice Notes, E-Discovery in the US: Overview (1-503-3009) and Practical Tips for Preserving ESI (8-500-3688). For more on document retention policies and implementing a litigation hold generally, see Litigation Hold Toolkit (2-545-9105). For a sample letter requesting that an opposing or third party preserve relevant evidence and information, see Standard Document, Document Preservation Letter (Demand) (6-535-8425).

Spoliation and Exposure to Sanctions

Digital realities increase the risk that a party or its counsel may be accused of spoliation by destroying or altering evidence. This is in part because not all clients appreciate the potential exposure to spoliation sanctions, given how easy it can be to delete, alter, or eliminate a digital file or social media post. Counsel should specifically instruct clients not to destroy or alter social media content where it may be relevant to an anticipated or ongoing litigation.

In federal court, absent an independent tort claim for spoliation under state law, FRCP 37(e) governs the imposition of sanctions or curative measures on a party who fails to take reasonable steps to preserve ESI that should have been preserved and over which the party has control (FRCP 37(e) and 2015 Advisory Committee Notes to FRCP 37(e)). If the lost ESI cannot be restored or replaced through additional discovery, the court may:

- Order measures no greater than necessary to cure any prejudice to another party from the loss of the ESI.
- Upon finding that the party who lost the ESI intended to deprive another party of the ESI's use in the litigation:
  - presume the lost information was unfavorable to the party;
  - instruct the jury that it may or must presume the information was unfavorable to the party; or
  - dismiss the action or enter a default judgment.

(FRCP 37(e)(1), (2). For more information on sanctions under FRCP 37(e), see Practice Note, Sanctions for ESI Spoliation Under FRCP 37(e): Overview (W-004-8150)).

Counsel therefore should not instruct or suggest to their clients that they intentionally alter, destroy, or disable social media content, because it puts both counsel and the client at risk for severe sanctions.

PRE-LITIGATION INVESTIGATION

The investigation of social media content can be highly effective to:

- Help develop a case.
- Frame potential causes of action.
- Resolve a dispute before reaching full-blown discovery.
- Create leverage for settlement.

When preparing a complaint or conducting due diligence in anticipation of litigation, counsel should, at a minimum, conduct internet and social media research on:

- The subject matter of the case.
- Potential parties.
- Opposing counsel.
- Potential witnesses.

However, before searching the social media content of a potential adversary or witness, counsel must understand:

- The applicable ethics rules for conducting pre-litigation investigation.
- How a user's privacy settings may impact the mechanics or ethics of pre-litigation investigation.

Ethical Considerations for Social Media Investigation

Many ethical guidelines and rules now require attorneys to learn and understand the basics of social media networks as part of their practice (see, for example, New York State Bar Ass'n (NYSBA) Social Media Ethics Guidelines (2017 NYSBA Guidelines), No. 1.A). These ethical guidelines and rules also often address how to handle social media content before and during litigation.

For example, many state and city bar ethical guidelines place limits on how counsel may access the social media content of opposing parties or witnesses for investigation purposes. These guidelines and opinions generally stem from the basic prohibition on directly or indirectly contacting a represented party without consent from that party's lawyer under the American Bar Association (ABA) Model Rules of Professional Conduct (ABA Model Rule 4.2).

A lawyer investigating a case generally:

- May access the public portions of a party's or witness's social media account, regardless of whether the party or witness is represented.
- May **not** access private or non-public portions of a **represented** party's or witness's social media account if the lawyer is required to "friend" or "follow" the account or account user.
- May "friend" or "follow" an unrepresented party or a witness on social media if the lawyer does not engage in deceptive behavior.

Using deception to "friend" or "follow" an unrepresented individual is uniformly deemed unethical, based on either or both:

- ABA Model Rule 4.1, which prohibits a lawyer from making a false statement of (or failing to disclose a) material fact to a third person.
- ABA Model Rule 8.4(c), which states that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

However, the interpretation of deception differs across jurisdictions. In some jurisdictions, including New York, a lawyer can join a social network and connect with or "friend" an unrepresented individual without disclosing the reasons for the request if it does not involve any type of trickery. The lawyer cannot, for example, create a different or false name or profile to mask his identity (see, for example, 2017 NYSBA Guidelines, No. 4.B; New York City Bar Ass'n (NYCBA) Committee on Professional Ethics Formal Op. 2010-2, Obtaining Evidence from Social Networking Websites)). The lawyer must use her full name and an accurate profile.

Other states require a lawyer to affirmatively disclose her role in a dispute or litigation and identify the client and matter, reasoning that the failure to do so is an omission of a material fact and thereby amounts to deceptive conduct (see N.H. Bar Ass'n Ethics Committee Advisory Op. No. 2012-13/05 BA, Social Media Contact with Witnesses in the Course of Litigation; San Diego County Bar Ass'n Legal Ethics Op. 2011-2).

Some bar associations go further, requiring attorneys to inform the social media account holder of the intended use of the information, whether generally for litigation or specifically to impeach a witness (see Philadelphia Bar Ass'n Professional Guidance Committee, Op. 2009-02 (Mar. 2009), at 3)).

For more on ethical issues for lawyers in the context of social media generally, see Practice Note, Social Media Ethics for Attorneys (W-013-1896).

Privacy Settings

Privacy settings are crucial if a potential party or witness seeks to limit pre-discovery access to ESI. A user's privacy settings often dictate how much information a search may reveal. Therefore, counsel should try to protect a client's social media content from an adversary by maximizing the client's privacy settings. Conversely, an investigating lawyer should seek out as much relevant, public social media content as possible, in part because it can form the basis for requiring an adversary to disclose non-public information (see Relevance Considerations).

When advising a client to maximize privacy settings on any social media account, counsel should caution the client against deleting, altering, or disabling content on the account without also adequately preserving the content, or risk sanctions (see Spoliation and Exposure to Sanctions).

The investigating lawyer's own privacy settings are also important in certain circumstances. For example, some social media platforms, such as LinkedIn, do not allow a lawyer to surreptitiously view social media content without first selecting privacy options to make the lawyer anonymous. Without that setting adjustment, LinkedIn will notify the accountholder that his or her profile was viewed. In addition to alerting an adversary or witness to the lawyer's investigative efforts, these notifications may also be considered inappropriate and unethical contact when researching a potential jury pool or sitting juror, depending on the jurisdiction (see Researching Jurors on Social Media).

SERVICE OF PROCESS

Service is an area in which technological advances, including the proliferation of social media platforms, are reshaping procedural law. Over the past decade, many courts have embraced service of process via email, where due process is satisfied and the relevant state or international statutes or treaties allow for it (see, for example, *Advanced Access Content Sys. Licensing Adm'r, LLC v. Shen*, 2018 WL 4757939, at *6 (S.D.N.Y. Sept. 30, 2018); *Fraserside IP LLC v. Letyagin*, 280 F.R.D. 630, 631 (N.D. Iowa 2012); *U.S. Commodity Futures Trading Comm'n v. Rubio*, 2012 WL 3614360, at *3 (S.D. Fla. Aug. 21, 2012); but see *Joe Hand Promotions, Inc. v. Shepard*, 2013 WL 4058745, at *1-2 (E.D. Mo. Aug. 12, 2013)).

Some plaintiffs, when unable to perfect service through traditional means, have sought court approval to serve process using social media platforms such as Facebook and LinkedIn. Under this type of proposal, a plaintiff would send a message via the social media platform, attaching the summons and complaint, which the account holder could access upon logging into the site. Courts have denied these requests to serve process through social media sites for a number of reasons, including:

- Uncertainty surrounding the authenticity of social media accounts, given the potential for duplicate and false accounts (see, for example, *Fortunato v. Chase Bank USA, N.A.*, 2012 WL 2086950, at *2-3 (S.D.N.Y. June 7, 2012)).
- A lack of confidence that a message posted to a social media account is highly likely to reach defendants or satisfy due process requirements, particularly given users' ability to alter or dismantle their alert settings and notification methods (see, for example, *Miller v. Native Link Constr., L.L.C.*, 2016 WL 247008 (W.D. Pa. Jan. 21, 2016) (denying motion to serve process through LinkedIn); see also *FTC v. Pecon Software Ltd.*, 2013 WL 4016272, at *8 (S.D.N.Y. Aug. 7, 2013)).
- Where state law prohibits substitute service by electronic means on domestic defendants, and thus FRCP 4(e)(1) would prohibit service through Facebook in that state (see *Joe Hand Promotions*, 2013 WL 4058745, at *1-2).

However, some courts have allowed service of process via social media as an alternative method of service, particularly where defendants appear to have recently accessed and updated their social media accounts (see, for example, *Juicero, Inc. v. Itaste Co.*, 2017 WL 3996196, at *3 (N.D. Cal. June 5, 2017); *St. Francis Assisi v. Kuwait Finance House*, 2016 WL 5725002 (N.D. Cal. Sept. 30, 2016); *Ferrarese v. Shaw*, 164 F. Supp. 3d 361 (E.D.N.Y. 2016); *Lipenga v. Kambalame*, 2015 WL 9484473 (D. Md. Dec. 28, 2015); *WhosHere, Inc. v. Orun*, 2014 WL 670817 (E.D. Va. Feb. 20, 2014)).

In light of these cases, litigators seeking to serve via a social media platform should be prepared to:

- Prove the authenticity of related or associated email accounts.
- Demonstrate that the proposed service:
  - is not prohibited by applicable statutes or rules;
  - strictly complies with due process standards; and

- is highly likely to reach the defendant (for example, by showing that the defendant regularly views and maintains the social media account).

- Serve through email or another method in addition to social media.

SERVICE OF OTHER DOCUMENTS

Courts have allowed the service of motions and other post-summons documents through Facebook, where Facebook served as a secondary or "backstop" means of service, in addition to email (see, for example, *MetroPCS v. Devor*, 256 F. Supp. 3d 807, 808 (N.D. Ill. 2017)).

Courts have also permitted widespread notice of class action claims and settlements through social media, although typically counsel must accompany that with another form of notice (see, for example, *Allen v. Similasan Corp.*, 2017 WL 1346404, at *2 (S.D. Cal. Apr. 12, 2017); *In re Nat'l Collegiate Athletic Ass'n Student-Athlete Concussion Injury Litig.*, 314 F.R.D. 580, 603 (N.D. Ill. 2016); see also Practice Note, Settling Class Actions: Process and Procedure (3-541-8765)).

SOCIAL MEDIA IN DISCOVERY

Once litigation begins, counsel should ensure that discovery efforts cover social media content. Common issues that lawyers must address include:

- Determining whether the user (typically the adversary or a witness) or the social media provider is the right source of the desired ESI.
- Drafting appropriate document requests and interrogatories to reach relevant social media content through party discovery.
- Demonstrating the relevance and appropriate proportionality of discovery requests for social media content under FRCP 26(b)(1).
- Responding to discovery requests for social media content.
- Assessing how to authenticate social media content for use in summary judgment motions or at trial.

SUBPOENAS TO NON-PARTY SOCIAL MEDIA PROVIDERS

Securing social media content directly from a provider can be difficult. Some social media providers indicate on their websites or in other official documents that they may produce only limited user or account data or public content, but not private content, pursuant to a valid federal or state subpoena. These restrictions are driven in part by providers' concerns of running afoul of the Stored Communications Act (SCA), which prevents providers of electronic communication services from divulging private communications, and creates a set of statutory "Fourth Amendment-like privacy protections" (18 U.S.C. §§ 2701-2712; *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965, 971-72 (C.D. Cal. 2010)).

The SCA has been interpreted to cover certain private social media content, such as private messages and non-public posts or comments (see *Sines v. Kessler*, 2018 WL 3730434, at *2, *10 (N.D. Cal. Aug. 6, 2018) (quashing the portion of a subpoena seeking communications from a private, invite-only social networking and instant messaging platform because disclosure from the provider would violate the SCA); see also *Ehling v. Monmouth-Ocean Hosp. Serv. Corp.*, 961 F. Supp. 2d 659, 667-68 (D.N.J. 2013) (holding that the SCA protected non-public wall posts on Facebook); *In re Facebook, Inc.*, 923 F. Supp. 2d 1204, 1206 (N.D. Cal. 2012) (quashing a subpoena to Facebook for records from a deceased individual's Facebook account)).

Despite SCA-based objections to third-party subpoenas that sought production of a party's social media content because of concerns about the SCA, social network providers have provided alternatives. For example, Facebook has suggested that parties download the contents of their own accounts as an alternative method for producing the information through a tool available on Facebook. (See *Gatto v. United Air Lines, Inc.*, 2013 WL 1285285, at *2 (D.N.J. Mar. 25, 2013); *In re White Tail Oilfield Servs., L.L.C.*, 2012 WL 4857777, at *2-3 (E.D. La. 2012).) Other social media platforms also enable users to download account contents in a similar manner. Some courts have directly ordered parties to use this type of download tool and provide a copy of the report to their opponents in response to document requests (see, for example, *Rhone v. Schneider Nat'l Carriers, Inc.*, 2016 WL 1594453, at *3 (E.D. Mo. Apr. 21, 2016)).

For resources on using and responding to subpoenas in federal court generally, see Document Requests and Subpoenas in Federal Court Toolkit (3-590-9706).

DOCUMENT REQUESTS FOR SOCIAL MEDIA CONTENT

Discovery of social media content may be more successful through party discovery. As a best practice, counsel should craft document requests to reach social media content and related metadata by:

- Specifying that the definitions of "document" and "ESI" include social media content. For example:
  - "The term 'document' includes all information published at any time on any site or mobile application, including but not limited to all social networking or social media sites such as Facebook, LinkedIn, Twitter, Instagram, YouTube, or other social media providers."
  - "The term 'ESI' includes all content from social media providers and profiles and all related metadata."
- Including a separate document request that specifically seeks social media content. For example, "All social media postings, comments, messages, or other content relating to the allegations in the Complaint, including but not limited to content from Facebook, LinkedIn, Twitter, Instagram, YouTube, or other social media providers."
- Specifying in the instructions that documents and ESI must be produced with all available metadata. For example, "Electronically stored information ('ESI'), including but not limited to social media content, must be produced and continue to be preserved in its original native format with all relevant metadata, including but not limited to any author, creation date and time, modified date and time, native file path, native file name, and file type."
- Dictating the desired method of production for social media content, whether in native format, paper printouts, or PDF or TIFF formats.

Some courts have required parties to provide log-in and password access to an agent of the court for a pre-production in camera inspection of social media content (see, for example, *Original Honeybaked Ham Co.*, 2012 WL 5430974, at *3; *Offenback v. L.M. Bowman, Inc.*, 2011 WL 2491371, at *1 (M.D. Pa. June 22, 2011)). Other courts have relied on user authorizations requesting that the social media provider produce the information (see, for example, *Gatto*, 2013 WL 1285285, at *1).

For a collection of resources on obtaining electronic discovery generally, see E-Discovery Toolkit (8-503-1078) and Document Discovery Toolkit (7-529-3645).

INTERROGATORIES CONCERNING SOCIAL MEDIA

Some US district courts have local rules restricting the scope of interrogatory requests so that a party may be limited from requesting specific social media platform and account information early in discovery. These rules also may require a party to use document requests or depositions to uncover social media platform and account information, or obtain a court order, before serving interrogatories seeking this type of information (for example, S.D.N.Y. L. Civ. R. 33.3).

If those limitations are not present, however, counsel may use interrogatories to identify:

- Social media platforms or accounts that the responding party established, used, or maintained.
- Email accounts or addresses and networks that are related to or associated with the responding party's social media accounts.
- All names, usernames, or pseudonyms, commonly referred to as "handles," associated with the responding party's social media accounts (because social media sites typically do not require an account holder to use his legal name).

The sworn responses to these interrogatories may be particularly important if the opposing party does not produce social media content or ESI and a motion to compel is required to reach that information, as that may enable sanctions against the opposing party (FRCP 37(a); see also Practice Note, Sanctions in Federal Civil Litigation: Sanctions Relating to Motions to Compel Disclosure or Discovery (W-001-1365)).

For more on using and responding to interrogatories in federal court generally, see Interrogatories in Federal Court Toolkit (9-555-3345).

RELEVANCE CONSIDERATIONS

Once formal discovery begins, relevant social media content is fair game. However, courts are sensitive to fishing expeditions, particularly as to social media content, which can be voluminous, burdensome, and costly to gather, review, and produce. Counsel should carefully tailor discovery demands to defend against objections, such as those based on relevance and proportionality under FRCP 26(b)(1).

For example, courts routinely:

- Refuse to grant unfettered access to social media (see, for example, *Terrell v. Memphis Zoo, Inc.*, 2018 WL 3520139, at *4 (W.D. Tenn. July 20, 2018); *In re Cook Med., Inc., IVC Filters Mktg., Sales Practices & Prod. Liab. Litig.*, 2017 WL 4099209, at *5 (S.D. Ind. Sept. 15, 2017); *Ehrenberg v. State Farm Mut. Auto. Ins. Co.*, 2017 WL 3582487, at *2 (E.D. La. Aug. 18, 2017); *Gordon v. T.G.R. Logistics, Inc.*, 321 F.R.D. 401, 405 (D. Wyo. 2017); *Roberts v. Clark Cty. Sch. Dist.*, 312 F.R.D. 594, 608 (D. Nev. 2016); *Lewis v. Bellows Falls Congregation of Jehovah's Witnesses, Bellows Falls, Vermont, Inc.*, 2016 WL 589867, at *2 (D. Vt. Feb. 11, 2016)).
- Limit access to a sampling of a party's activity on social media over a defined time period (see, for example, *Dewidar v. Nat'l R.R. Passenger Corp.*, 2018 WL 280023, at *5 (S.D. Cal. Jan. 3, 2018); *T.C on Behalf of S.C. v. Metro. Gov't of Nashville & Davidson Cty., Tennessee*, 2018 WL 3348728, at *15 (M.D. Tenn. July 9, 2018); *Gordon*, 321 F.R.D. at 406).

Many courts carefully analyze the allegations and requested social media content to tailor the production to only content that is relevant and proportional to the needs of the case, particularly in response to motions to compel discovery. Courts have narrowed the scope of the proposed discovery by, for example:

- Requiring the party seeking social media content, which the user has limited from public view, to make a threshold showing that the requested information is relevant, which may be supported by the user's publicly available social media content (see, for example, *Doe v. Rutherford Cty., Tenn., Bd. of Educ.*, 2014 WL 4080159, at *3 (M.D. Tenn. Aug. 18, 2014) (ordering plaintiffs' counsel to review restricted, nonpublic portions of only one of the plaintiffs' social media accounts and produce relevant information because, based on publicly available social media content, the evidentiary threshold was satisfied only as to that plaintiff); *Keller v. Nat'l Farmers Union Prop. & Cas., Co.*, 2013 WL 27731, at *4-5 (D. Mont. Jan. 2, 2013) (denying a motion to compel absent a threshold showing of relevance, but granting a request for a list of all social networking sites to which the plaintiffs belonged); see also *Potts v. Dollar Tree Stores, Inc.* 2013 WL 1176504, at *3 (M.D. Tenn. Mar. 20, 2013)).
- Providing detailed guidance on what social media content is relevant to the case and must be produced (see, for example, *Ehrenberg*, 2017 WL 3582487, at *3; *Gordon*, 321 F.R.D. at 406), including:
  - instructions about the relevance of a party's verbal communications, third-party communications, and photographs and videos to be produced (see, for example, *EEOC v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430, 436 (S.D. Ind. 2010)); and
  - protocols to resolve any disputes on relevance or production (see, for example, *Thompson v. Autoliv ASP, Inc.*, 2012 WL 2342928, at *4-5 (D. Nev. June 20, 2012)).
- Ordering an *in camera* inspection, sometimes in connection with the appointment of a forensic expert special master, to identify relevant social media content from the plaintiffs' accounts (see, for example, *Connolly v. Alderman*, 2018 WL 4462368, at *6 (D. Vt. Sept. 18, 2018); *Original Honeybaked Ham Co.*, 2012 WL 5430974, at *2-3; *Offenback*, 2011 WL 2491371, at *1-2).
- Ordering a party's counsel, and not the party, to review the social media content and determine the relevance of the postings (see, for example, *Hinostroza v. Denny's Inc.*, 2018 WL 3212014, at *6-7 (D. Nev. June 29, 2018); *Lewis*, 2016 WL 589867, at *3; *Giacchetto*, 293 F.R.D. at 116-17; *Simply Storage*, 270 F.R.D. at 436; *Rutherford Cty. Tenn. Bd. of Educ.*, 2014 WL 4080159, at *3).
- Instructing the requesting party's counsel to review all social media content and inform opposing counsel of relevant information that was not produced, where the existing discovery record suggests that the producing party may have withheld information relevant to the litigation (see, for example, *Thompson*, 2012 WL 2342928, at *5).

PRIVACY CONSIDERATIONS

In addition to common objections like relevance or undue burden, parties facing discovery requests for social media content often have

invoked privacy as a reason to resist disclosure. However, courts generally are dismissive of privacy claims over the public content of social media accounts. The same is usually true for non-public social media content, even where a user has set his privacy settings to shield certain information. Because non-public content is available to select third parties, who may do with it what they wish, courts often reject privacy claims over relevant information. (See *Lewis*, 2016 WL 589867, at *2; *Chaney v. Fayette Cty. Pub. Sch. Dist.*, 977 F. Supp. 2d 1308, 1315-16 (N.D. Ga. 2013); see also *Hinostroza,* 2018 WL 3212014, at *6; *In re Cook Med.*, 2017 WL 4099209, at *5; *United States v. Meregildo*, 883 F. Supp. 2d 523, 525-26 (S.D.N.Y. 2012).)

Moreover, where an opponent discovers relevant information from public portions of a party's social media account, a court may be more likely to grant access to non-public content (see, for example, *Rhone*, 2016 WL 1594453, at *2-3 (requiring a plaintiff to provide a "Download Your Information" report from her Facebook account after the defendant discovered relevant information on public portions of her account page)).

However, counsel may attempt to shield non-public social media content through protective orders (see *Finkle v. Howard Cty., Md.*, 2015 WL 3744336, at *8 (D. Md. June 12, 2015), aff'd 640 F. App'x 245 (4th Cir. 2016); *Connolly*, 2018 WL 4462368, at *6; *Simply Storage,* 270 F.R.D. at 437*; Ledbetter v. Wal-Mart Stores, Inc.*, 2009 WL 1067018, at *2 (D. Colo. Apr. 21, 2009)).

For more on how to respond to document requests and subpoenas generally, see Practice Notes, Document Responses: Considerations in Preparing to Produce Documents (6-540-1711) and Subpoenas: Responding to a Subpoena (Federal) (1-503-1741).

AUTHENTICATING SOCIAL MEDIA

Social media evidence may be tangible (such as static screenshots) or consist of ESI. As with any other type of evidence, social media evidence generally must be authenticated under FRE 901 or self-authenticating under FRE 902 to be admissible (see Authenticating Social Media Under FRE 901 and Self-Authenticating Social Media Evidence Under FRE 902).

Counsel should carefully consider authentication issues during discovery, and whether a forensic expert may be needed to authenticate social media evidence. Counsel also should minimize the risk of authentication challenges at the outset of discovery by proper collection and production of:

- The devices utilized during the creation or use of the social media content.
- Social media metadata (which can be done with the assistance of a vendor or collection software).

(See Preservation.)

Authenticating Social Media Under FRE 901

Because evidence may be authenticated in many ways, federal courts have followed varying approaches to authentication challenges in the context of social media under FRE 901(b) (*United States v. Vayner*, 769 F.3d 125, 126-33 (2d Cir. 2014) (reversing a conviction based on an unauthenticated page of the defendant's alleged profile on a Russian social networking site akin to Facebook)). For example:

- The US Court of Appeals for the Third Circuit held that a defendant's Facebook chat messages, which Facebook gave to the government directly, were authenticated under FRE 901 in part because each of the four witnesses who participated in the chats testified about them, some of the witnesses had met the defendant in person as a result of the chats and could identify him in court, the defendant's testimony showed he owned the Facebook account in question, and biographical information on the page matched that of the defendant (*United States v. Browne*, 834 F.3d 403, 439-442 (3d Cir. 2016); see also *United States v. Barnes*, 803 F.3d 209 (5th Cir. 2015) (Facebook messages were authenticated in part because a witness testified that she had seen the defendant using Facebook and she recognized the account and his style of communicating from the messages)).
- The US Court of Appeals for the Fifth Circuit held that photographs on a defendant's Facebook page were not properly authenticated because a "photograph's appearance on a personal webpage does not by itself establish that the owner of the page possessed or controlled the items pictured" (*United States v. Winters,* 530 F. Appx. 390, 395-96 (5th Cir. 2013); see also *Vayner*, 769 F.3d at 131 (the defendant's name, photograph, and some details about his life on a printed profile page was insufficient to establish that he had actually created the profile or was responsible for its contents)).
- The US Court of Appeals for the Tenth Circuit held that Facebook messages were authenticated because the defendant failed to adequately challenge the authenticity of the messages, and the district court had properly admitted the messages as statements of a party opponent at trial (*United States v. Brinson,* 772 F.3d 1314, 1320-21 (10th Cir. 2014)).
- The US Court of Appeals for the Eleventh Circuit held that the district court had properly admitted a YouTube video into evidence because the government presented ample circumstantial evidence through the testimony of various witnesses identifying the individual in the video as the defendant, establishing where and when the video was recorded, and identifying the specific rifle and ammunition in question in the video. Because the government did not make the video, but merely found it on YouTube, it was not required to authenticate the video by offering evidence regarding the integrity of the recording equipment, the competence of the person taking the video, or whether the video was edited. (*United States v. Broomfield*, 591 Fed. App. 847, 851-52 (11th Cir. Dec. 3, 2014).)
- The Eleventh Circuit also held that Facebook comments were sufficiently authenticated where the defendants admitted that they controlled the account and made posts that were ascribed to them (*Stout by Stout v. Jefferson Cty. Bd. of Educ.*, 882 F.3d 988, 1008 (11th Cir. 2018)).
- A US district court held that a plaintiff's testimony about photographs posted on an Instagram account and the name associated with the account could authenticate the account, because the plaintiff knew the alleged account holder (*Diperna v. Chicago Sch. of Prof'l Psychology,* 222 F.Supp.3d 716, 723 (N.D. Ill. 2016)).
- A US district court held that statements made by a plaintiff on her Facebook page were authenticated by her deposition testimony and admissible as a party admission under Federal Rules of

Evidence (FRE) 801(d)(2), 901(a), and 901(b)(1) (*Targonski v. City of Oak Ridge*, 2012 WL 2930813, at *10 (E.D. Tenn. July 18, 2012)).

Self-Authenticating Social Media Evidence Under FRE 902

Social media evidence also may be self-authenticating under FRE 902. For example, the US Court of Appeals for the Fourth Circuit held that screenshots of Facebook pages and YouTube videos retrieved from a Google server were self-authenticating business records under FRE 902(11) where they were accompanied by appropriate certifications from Facebook and YouTube records custodians (*United States v. Hassan,* 742 F.3d 104, 132-34 (4th Cir. 2014); but see *Browne*, 834 F.3d at 433-6 (Facebook messages were not business records and therefore not self-authenticating under FRE 902(11)).

Additionally, depending on the circumstances and the collection method, some social media evidence may be self-authenticating under either:

- FRE 902(13), which applies to records generated by an electronic process or system.
- FRE 902(14), which applies to data copied from an electronic device, storage medium, or file.

To be self-authenticating under these rules, social media evidence must meet certain requirements and be accompanied by the appropriate certification. For more information, see Practice Note, E-Discovery: Authenticating Electronically Stored Information (W-002-6960). For sample certifications under these rules, see Standard Documents, FRE 902(13) Certification of Authenticity for Records Generated by an Electronic Process or System (W-012-7919) and FRE 902(14) Certification of Authenticity by Process of Digital Identification (W-015-0933).

Although FRE 902(13) and FRE 902(14) are intended to reduce the expense and inconvenience of establishing authenticity through the testimony of a foundation witness, the rules do not restrict a party from establishing authenticity of social media evidence on other grounds (see 2017 Advisory Committee Notes to FRE 902(13) and FRE 902(14)).

For more examples of authentication methods for social media, see E-Discovery: Authenticating Common Types of ESI Chart (W-003-7939).

SOCIAL MEDIA AT TRIAL

Social media can play a large role at trial. As with the investigation of parties, witnesses, and claims, counsel should explore the use of social media when selecting a jury panel. Counsel also should pay attention to the jurors' use of social media during trial and deliberations.

RESEARCHING JURORS ON SOCIAL MEDIA

Counsel can learn important information about prospective jurors, including any potential biases, by examining their:

- Educational and professional backgrounds on sites like LinkedIn.
- "Likes" and followed pages on sites such as Facebook.
- General social media activity, which may indicate whether prospective jurors are likely to seek information about the case outside of the trial record.

However, the parameters for social media investigation are more narrowly applied with respect to jurors and potential jurors than to adverse parties and witnesses (see Pre-Litigation Investigation). For example, the American Bar Association (ABA) issued an opinion:

- Restricting lawyers to searching only the public content of prospective jurors' social media accounts.
- Prohibiting lawyers from connecting with or following a juror or potential juror under any circumstances.

(See ABA Standing Committee on Ethics & Professional Responsibility, Formal Op. 466, Lawyer Reviewing Jurors' Internet Presence (Apr. 24, 2014).)

Lawyers should be cautious with social media platforms like LinkedIn, which may alert jurors that their profile and public content have been viewed. In some jurisdictions, this may be interpreted as inappropriate, unethical, and impermissible juror contact. (See 2017 NYSBA Social Media Ethics Guidelines, No. 6.B and cmt., at 30-32).

Counsel also should ensure compliance with any specific local or judge's rules or orders applicable to social media research on jurors. At least one court has expressed concern that allowing counsel to conduct social media research on potential and empaneled jurors could facilitate improper personal appeals to particular jurors, compromise the jury verdict, and compromise the jurors' privacy. That court therefore considered exercising its discretion to impose a ban against all internet research on the venire or the empaneled jury until the end of trial, a ban to which the parties ultimately agreed. (See *Oracle Am., Inc. v. Google Inc.*, 172 F.Supp.3d 1100, 1101-04 (N.D. Cal. 2016).)

MONITORING JURORS' USE OF SOCIAL MEDIA

Jurors' misuse of social media during trial is a growing problem that has the potential to undo extensive trial preparation work by resulting in a mistrial or forming the basis for an appeal (see, for example, *United States v. Villalobos,* 601 Fed.Appx. 274, 275 (5th Cir. 2015); *United States v. Fields*, 2016 WL 215267, at *11-12 (D. Mass. Jan. 19, 2016); *United States v. Juror Number One*, 866 F. Supp. 2d 442, 452 n.14 (E.D. Pa. 2011); *In re Methyl Tertiary Butyl Ether (MTBE) Products Liab. Litig.*, 739 F. Supp. 2d 576, 610 n. 215 (S.D.N.Y. 2010) (discussing the "recurring problem" and consequences of social media and internet use by jurors)).

Given the potentially severe consequences, counsel should consider monitoring jurors' use of social media by regularly (and ethically) checking the jurors' social media accounts throughout a trial and deliberations. Although a lawyer who becomes aware of a juror's improper use of social media may be tempted to stay quiet if the juror favors the lawyer's client, some bar associations, including the ABA, require lawyers who observe a juror's misconduct in public social media posts to report it to the court (see ABA Standing Committee on Ethics & Professional Responsibility, Formal Op. 466, Lawyer Reviewing Jurors' Internet Presence (Apr. 24, 2014)).

If jurors' social media use and abuse is a concern or a case is particularly high-profile, counsel may consider asking the court to:

- Instruct the jurors, at multiple points before and during trial, to avoid social media use, and explain the consequences of violating the instruction, such as being held in contempt.

- Require the jurors to take an oath to refrain from social media use during the pendency of the trial.

For examples of jury instructions warning jurors about their use of social media, see *United States v. Fumo*, 655 F.3d 288, 304-06 (3d Cir. 2011), as amended (Sept. 15, 2011); *United States v. Feng Ling Liu,* 69 F.Supp.3d 374, 377 (S.D.N.Y. 2014); *OneBeacon Ins. Co. v. T. Wade Welch & Associates,* 2014 WL 5335362, at *1-11 (S.D. Tex. Oct. 17, 2014); and *Toshiba Corp. v. Imation Corp.*, 2013 WL 7157854, at *10 (W.D. Wis. Apr. 5, 2013).

04-19

Bloomberg BNA

Digital Discovery & e-Evidence®

Social Media

Social Media Provides Variety of Information, As eDiscovery Tools Aid Lawyers in New Ways

Social media tells unique stories, written by its users. Those stories—told on platforms like Facebook, Instagram, Snapchat and WhatsApp—have been picked through and dissected as part of criminal investigations for awhile.

But now, the process of unearthing those stories—known as social discovery—is proving useful beyond providing incriminating information to law enforcement, particularly for attorneys.

Lawyers, their firms and their clients can leverage social discovery tools to capture large amounts of publicly available information and gain insights into how juries operate (including evidence of misconduct), and even corroborate or impeach witnesses.

Social Discovery Origins. Law enforcement and law firms often use social discovery tools either in house or through vendors to preserve social media websites or app information, in anticipation of litigation.

''But in addition to just using those tools for preservation purposes, we can also do searches and analysis of publicly available social media and social media content,'' Ignatius Grande, Hughes, Hubbard and Reed in New York City, told Bloomberg BNA Aug. 12.

Grande is senior discovery attorney at his firm, where he advises on how to best leverage the latest technologies and eDiscovery practices. He's also co-chair of the Social Media Committee of Commercial & Federal Litigation Section of the New York State Bar Association.

Grande pointed to one tool in particular, X1 Social Discovery, which provides more than just the ability to preserve social media content.

''Social discovery tools allow you to do searches based on location,'' Grande explained. ''You can geostream tweets from a specific area, and then you can search through that content.''

A lot of people may not be aware that these tools and capabilities exist, Grande said, noting the tools aren't prohibitively expensive.

Geostreaming. Howard Williamson, senior vice president and executive director of X1 Social Discovery in Pasadena, Calif., told Bloomberg BNA Aug. 16 that a lot of customers use the social discovery products beyond traditional discovery applications.

''Some clients use it for brand analysis,'' Williamson said.

For example, the tool can be used to follow the social media postings or tweets about a specific product, to see what type of attention it has garnered. While companies can use the tool to follow chatter about their products, the tool can also be useful in this capacity for product liability, consumer or class action attorneys who are researching a product at issue.

In addition, Grande said the tool is useful for monitoring online protest chatter by law enforcement.

And then there are those customers who are using the tool to monitor jury misconduct. The tool's geostream function can be used to investigate and collect tweets that are emanating from near or inside of a courthouse. The tool has been used to discover jurors who are ''live-streaming'' their jury experience, in violation of the court's instructions.

Trial Disruptions. The use of social media by jurors has been a hot button topic for awhile because of its ability to disrupt trials. Jury instructions often say that the use of social media to research and discuss a case is prohibited.

The issue of trial disruption is even moving officials to craft methods for managing and discouraging social media use.

In February 2016, a bill was introduced in to the California state legislature that would authorize a pilot program allowing judges to impose reasonable monetary sanctions on a juror for misconduct. The introducing assembly member said to Bloomberg BNA in April 2016 that the ''almost ubiquitous use of social media is leaking into courtrooms.''

Both houses in the California legislature amended the bill this summer. The amended bill highlights the growing concern about the effect of social media use on the justice system (16 DDEE 195, 4/28/16).

X1 did its own search in January 2016 to see just how many improper juror tweets could be found in a single day. On Jan. 13, the tool uncovered several hundred tweets, including posts commenting on whether the defendant was guilty.

A month later, the tool found a tweet from a juror that said ''at jury duty. bout to decide somebodys fate. if theyre white, theyre guilty.''

X1 warns attorneys, however, to heed ethical duties.

''Do not fire up Twitter.com and start following jurors,'' X1 says in a February 2016 blog post. ''They will receive a notice that they're being followed, which is improper under various legal ethics rules.''

Social Media Addiction. Grande told Bloomberg BNA in April 2016 that jury service requires a willingness to sacrifice the use of social media. His committee published a Social Media Jury Instruction Report in Janu-

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ary 2016, which explains the importance of providing social media guidance to jurors (16 DDEE 61, 2/4/16).

But tweets that come from courthouses demonstrate the difficulty that many people find with actually giving up social media while serving on a jury. Finding those jurors who stay plugged in during a trial is important to determine if a person is actually getting a fair trial.

''Capturing these tweets is ethical, because they are public postings,'' Grande told Bloomberg BNA Sept. 19.

However, if a tweet is captured and there's reason to believe the posting is disruptive to the case, the attorney has an ethical obligation to disclose that to the court.

In 2014, the X1 team used the tool during a routine product pitch to home in on a courthouse in Seattle. They identified a semi-pro wrestler named Jack Stewart, who was doing jury service that day. Stewart provided the team with a wealth of tweets that qualified as ''live-streaming,'' as he discussed his jury experience online and broadcasted it to his followers.

Intelligence Purposes. Geostreaming and other developments in social discovery are changing how law enforcement—once the pioneers of using social media in investigations—uses the information it finds.

As for intelligence purposes, attorneys and law enforcement can use the tool to follow the ''social networks of gangsters or terrorists,'' Williamson said.

''A lot of gang members like to post videos of the contraband or guns they are using or have stolen,'' Williamson told Bloomberg BNA.

Witness Corroboration. The geostreaming function is useful in incidences involving eye-witnesses, as well.

Williamson used the tool to geostream both Twitter and Instagram in the 2015 Paris terrorist attack, as well as the 2009 mass shooting at Fort Hood, Tex.

''I geostreamed that area and collected all the tweets and grams that were on site, and collected the information from the Facebook accounts of the shooter, his wife and his two oldest daughters,'' Williamson said.

He offered the data to friends at the base, providing a collection of real-time social media content.

BY TERA BROSTOFF

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SOCIAL MEDIA ETHICS GUIDELINES

OF THE

COMMERCIAL AND FEDERAL LITIGATION SECTION

OF THE

NEW YORK STATE BAR ASSOCIATION

UPDATED APRIL 29, 2019

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Opinions expressed are those of the Section preparing these Guidelines and do not represent those of the New York State Bar Association unless and until the report has been adopted by the Association's House of Delegates or Executive Committee.

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INTRODUCTION

Social media networks, such as LinkedIn, Twitter, Instagram and Facebook, are indispensable tools for legal professionals and the people with whom they communicate. As use of social media by lawyers and clients continues to grow and as social media networks proliferate and become more sophisticated, so too do the ethics issues facing lawyers. Accordingly, the Commercial and Federal Litigation Section of the New York State Bar Association ("NYSBA") is updating these social media guidelines – which were first issued in 2014[1] – to include new ethics opinions as well as additional guidelines where the Section believes ethical guidance is needed (the "Guidelines"). In particular, these Guidelines add new content on lawyers' duty of technological competence, attorney advertising, anonymous postings by attorneys regarding pending trials, online research of juror social media use, juror misconduct, and the treatment of social media connections between attorneys and judges.

These Guidelines should be read as guiding principles rather than as "best practices." The world of social media is rapidly changing and "best practices" will continue to evolve to keep pace with such developments. Since there are multiple ethics codes that govern attorney conduct throughout the United States, these Guidelines do not attempt to define a universal set of "best practices" that will apply in every jurisdiction. In fact, even where different jurisdictions have enacted nearly-identical ethics rules, their individual ethics opinions on the same topic may differ due to different social mores, the priorities of different demographic populations, and the historical approaches to ethics rules and opinions in different localities.

In New York State, ethics opinions are issued by the New York State Bar Association and also by local bar associations located throughout the State.[2] These Guidelines are predicated upon the New York Rules of Professional Conduct ("NYRPC")[3] and ethics opinions interpreting those rules that have been issued by New York bar associations. In addition, illustrative ethics opinions from other jurisdictions are referenced throughout where, for example, a New York ethics opinion has not addressed a certain situation or where another jurisdiction's ethics opinion differs from the interpretation of the NYRPC by New York ethics authorities.

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1 The Social Media Ethics Guidelines were most recently updated in May 2017.

2 A breach of an ethics rule is not enforced by a bar association, but by an appropriate disciplinary bodies. Ethics opinions are not binding in disciplinary proceedings, but they may be used as a defense in certain circumstances.

3 NY RULES OF PROF'L CONDUCT (22 NYCRR 1200.0) ("NYRPC") (NY STATE UNIFIED CT. SYS. 2017). These Rules of Professional Conduct were promulgated as Joint Rules of the Appellate Divisions of the Supreme Court. In addition, the New York State Bar Association has promulgated comments regarding particular rules, but these comments, which are referenced in these Guidelines, have not been adopted by the Appellate Divisions of the Supreme Court.

Social media communications that reach across multiple jurisdictions may implicate other states' ethics rules. Those rules may differ from the NYRPC. Lawyers should consider the controlling ethical requirements in the jurisdictions in which they practice.

The ethical issues discussed in the NYRPC frequently arise in the information gathering phase prior to, or during, litigation. One of the best ways for lawyers to investigate and obtain information about a party, witness, juror or another person, without having to engage in formal discovery, is to review that person's social media account, profile, or posts. Lawyers must remember, however, that ethics rules and opinions govern whether and how a lawyer may view such social media. For example, when a lawyer conducts research, unintended social media communications or electronic notifications received by the user of a social media account revealing such lawyer's research may have ethical consequences.

Further, because social media communications are often not just directed at a single person but at a large group of people, or even the entire Internet "community," attorney advertising rules and other ethical rules must be considered when a lawyer uses social media.[4] Similarly, privileged or confidential information can be unintentionally divulged beyond the intended recipient if a lawyer communicates to a group using social media. In addition, lawyers must be careful to avoid creating an unintended attorney-client relationship when communicating through social media. Finally, certain ethical obligations arise when a lawyer counsels a client about the client's own social media posts and the removal or deletion of those posts, especially if such posts are subject to litigation or regulatory preservation obligations.

Throughout these Guidelines, the terms "website," "account," "profile," and "post" are referenced in order to highlight sources of electronic data that might be viewed by a lawyer. The definition of these terms no doubt will change and new ones will be created as technology advances. However, for purposes of complying with these Guidelines, these terms are interchangeable, and a reference to one should be viewed as a reference to all for ethical considerations.

References to the applicable provisions of the NYRPC and references to relevant ethics opinions are noted after each Guideline, and definitions of important terms used in the Guidelines are set forth in the Appendix.

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4 It may not always be readily apparent whether a lawyer's social media communications constitute regulated "attorney advertising." For example, recently-updated American Bar Association Model Rules of Professional Conduct ("ABA Model Rules") have redefined the scope of attorney advertising to include "communications concerning a lawyer's services" on social media platforms. MODEL RULES OF PROF'L CONDUCT R. 7.1 (AM. BAR. ASS'N 2018).)

1. ATTORNEY COMPETENCE

Guideline No. 1.A: Attorneys' Social Media Competence

A lawyer has a duty to understand the benefits, risks and ethical implications associated with social media, including its use for communication, advertising, research and investigation.

NYRPC 1.1(a) and (b).

Comment: NYRPC 1.1(a) provides: "[a] lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

As Guideline No. 1 recognizes – and the Guidelines discuss throughout – a lawyer may choose to use social media for a multitude of reasons.[5] Lawyers, however, need to be conversant with, at a minimum, the basics of each social media network that a lawyer uses in connection with the practice of law or that his or her client may use if it is relevant to the purpose or purposes for which the lawyer was retained.

Maintaining this level of understanding is a serious challenge that lawyers need to appreciate and cannot take lightly. As American Bar Association ("ABA") Formal Op. 466 (2014)[6] states:

> As indicated by [ABA Rule of Professional Conduct] Rule 1.1, Comment 8, it is important for a lawyer to be current with technology. While many people simply click their agreement to the terms and conditions for use of an [electronic social media] network, a lawyer who uses an [electronic social media] network in his practice should review the terms and conditions, including privacy features – which change frequently – prior to using such a network.[7]

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5 Prof'l Ethics Comm. for State Bar of Texas, Op. 673 (2018) (discussing ethical restrictions on attorneys' ability to seek advice for benefit of client from other lawyers in an online discussion group).

6 ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 466 (2014).

7 *Id.* Competence may require understanding the often lengthy and unclear "terms of service" of a social media platform and ascertaining whether the platform's features raise ethical issues. It also may require reviewing other materials, such as articles, comments, and blogs posted about how such social media platform functions.

A lawyer must "understand the functionality and privacy settings of any [social media] service she wishes to utilize for research, and to be aware of any changes in the platforms' settings or policies."[8] The ethics opinion also holds that "[i]f an attorney cannot ascertain the functionality of a website, the attorney must proceed with great caution in conducting research on that particular site...."[9]

Indeed, a lawyer cannot be competent absent a working knowledge of the benefits and risks associated with the lawyer's use of social media. In fact, Comment 8 to Rule 1.1 of the Model Rules of Professional Conduct of the ABA was amended to provide:

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology,[10] engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.[11]

Commentary to Rule 1.1 of the NYRPC, which is offered by the New York State Bar Association as informal guidance to practitioners, has also been amended to provide:

> To maintain the requisite knowledge and skill, a lawyer should (i) keep abreast of changes in substantive and procedural law relevant to the lawyer's practice, (ii) keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information, and (iii) engage in

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8 NY City Bar Ass'n Comm. on Prof'l Ethics ("NYCBA"), Formal Op. 2012-2 (2012). *Accord* D.C. Bar Legal Ethics Comm., Ethics Op. 370 (2016) ("The guiding principle for lawyers with regard to the use of any social network site is that they must be conversant in how the site works. Lawyers must understand the functionality of the social networking site, including its privacy policies.").

9 NYCBA, Formal Op. 2012-2.

10 *See* L.A. County Bar Ass'n Prof'l Responsibility and Ethics Comm., Op. 529 (2017) (ethical implications of disclosure of client-related information by attorney to unknown person on social media who, unbeknownst to attorney, was "catfishing," *i.e.*, assuming a false online identity to get information by pretext, and actually was working for opposing party in pending case involving attorney's client); Nebraska Ethics Advisory Opinion for Lawyers, No. 17-03 (2017) (circumstances under which attorney may receive bitcoin or other digital currencies as payment for legal services, and may hold digital currencies in trust or escrow for client, without violating rules of professional conduct); *see also* Jason Tashea, *Lawyers Have an Ethical Duty to Safeguard Confidential Information in the Cloud* (2018).

11 *See* ABA Formal Op. 477R (2018) (discussing the "technology amendments" made to the Model Rules of Professional Conduct in 2012, including to Model Rule 1.1).

> continuing study and education and comply with all applicable continuing legal education requirements under 22 N.Y.C.R.R. Part 1500.[12]

Many other states have also adopted a duty of competence in technology in their ethical codes. [13] Although a lawyer may not delegate his or her obligation to be competent, he or she may rely, as appropriate, on other lawyers or professionals in the field of electronic discovery and social media to assist in obtaining such competence. As NYRPC 1.1 (b) requires, "[a] lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it."

The New York County Lawyers Association ("NYCLA") Professional Ethics Committee has set forth guidance regarding a "lawyer's ethical duty of technological competence" with respect to cybersecurity risk and the handling of eDiscovery. [14] The NYCLA opinion notes that "[t]he duty of competence expands as technological developments become integrated into the practice of law" and that lawyers "… should possess the technological knowledge necessary to exercise reasonable care with respect to maintaining client confidentiality …."[15]

As the use of social media in cases becomes more and more common, the duty of technological competence is expanding to require attorneys to understand the benefits, risks and ethical implications associated with social media.[16]

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12 NYRPC 1.1 cmt. 8.

13 As of this writing, 34 states have adopted a duty of technological competence. https://www.lawsitesblog.com/2018/12/two-states-adopted-duty-tech-competence-total-now-34.html.

14 New York Cty. Lawyers Ass'n Prof'l Ethics Comm., Formal Op. 749 (2017).

15 *Id.*

16 California has also issued an ethics opinion finding that an attorney's obligations under the ethical duty of competence evolve as new technologies develop and become integrated with the practice of law. Formal Op. 2015-193 described in detail the ethical duties of an attorney in dealing with electronically stored information during discovery. *See* Cal. State Bar Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. 2015-193 (2015).

2. ATTORNEY ADVERTISING AND COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

Guideline No. 2.A: Applicability of Advertising Rules

A lawyer's social media profile – whether its purpose is for business, personal or both – may be subject to attorney advertising and solicitation rules. If the lawyer communicates concerning her services using her social media profile, she must comply with rules pertaining to attorney advertising and solicitation.

NYRPC 1.0, 7.1, 7.3, 7.4, 7.5, 8.4(c).

Comment: A social media profile that is used by a lawyer may be subject to attorney advertising[17] and solicitation rules.[18] Attorneys should be aware that if they advertise and provide their services in multiple states, they need to comply with the attorney advertising and solicitation rules in each of those states.

The ABA *Model Rules of Professional Conduct* (hereinafter "ABA Model Rules") were updated in 2018 to simplify and modernize the guidelines for lawyers who advertise their services in the internet era. The revised ABA Model Rules state that, "[a] lawyer may communicate information regarding the lawyer's services through any media."[19] Therefore, any communications about a lawyer's services could be considered advertising whether or not these communications are made via traditional advertising methods or communications on social media networks and whether the social media accounts are primarily used for business, personal or hybrid purposes. The ABA Model Rules, in and of themselves, have no force and effect to govern an attorney's conduct. The ABA Model Rules are a resource for states to consider and, potentially, adopt. New York has not yet revised the NYRPC to adopt the content of the ABA Model Rules advertising guidelines.

New York legal ethics opinions have provided guidance on attorney advertising on LinkedIn. The nature of the information posted on a lawyer's LinkedIn profile may require that the profile be deemed "attorney advertising." In

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17 NYRPC 1.0(a) defines "Advertisement" as "any public or private communication made by or on behalf of a lawyer or law firm about that lawyer's or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers."

18 *See also* Va. State Bar, *Quick Facts about Legal Ethics and Social Networking* (last updated Feb. 22, 2011); Cal. State Bar Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. No. 2012-186 (2012).

19 *Supra*, Note 4 at 7.3(a).

general, a profile that contains basic biographical information, such as "only one's education and a list of one's current and past employment" does not constitute attorney advertising.[20] According to NYCLA Formal Op. 748, a lawyer's LinkedIn profile that "includes subjective statements regarding an attorney's skills, areas of practice, endorsements, or testimonials from clients or colleagues, however, is likely to be considered advertising."[21]

The NYCLA ethics opinion states that if an attorney's LinkedIn profile includes a detailed description of practice areas and types of work performed in prior employment, the user should include the words "Attorney Advertising" on the lawyer's LinkedIn profile. If an attorney also includes: (1) statements that are reasonably likely to create an expectation about results the lawyer can achieve; (2) statements that compare the lawyer's services with the services of other lawyers; (3) testimonials or endorsements of clients; or (4) statements describing or characterizing the quality of the lawyer's or law firm's services, the attorney should also include the disclaimer "Prior results do not guarantee a similar outcome."[22]

The NYCLA opinion provides that attorneys who allow "Endorsements" from other users and "Recommendations" to appear on their profiles fall within Rule 7.1(d), and therefore must include the disclaimer set forth in Rule 7.1(e).[23] Also, the NYCLA opinion noted that if an attorney claims to have certain skills, they must also include this disclaimer because a description of one's skills – even where those skills are chosen from fields created by LinkedIn – constitutes a statement "characterizing the quality of the lawyer's services" under Rule 7.1(d).[24]

After NYCLA Formal Op. 748 was issued, the Association of the Bar of the City of New York ("City Bar") issued Opinion 2015-7 addressing attorney advertising. The City Bar opinion addressed attorney advertising in a different manner and provides that an attorney's LinkedIn profile may constitute attorney advertising only if it meets the following five criteria:

> (a) it is a communication made by or on behalf of the lawyer; (b) the primary purpose of the LinkedIn content is

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20 New York County Lawyers' Association ("NYCLA"), Formal Op. 748 (2015); *see also* Andrew Strickler, *Many Atty LinkedIn Profiles Don't Count as Ads, NYC Bar Says*, LAW360 (Jan. 5, 2016)

21 NYCLA, Formal Op. 748 (2015).

22 *Id.*

23 NYRPC 7.1(e)(3) provides: "[p]rior results do not guarantee a similar outcome."

24 NYCLA, Formal Op. 748.

> to attract new clients to retain the lawyer for pecuniary gain; (c) the LinkedIn content relates to the legal services offered by the lawyer; (d) the LinkedIn content is intended to be viewed by potential new clients; and (e) the LinkedIn content does not fall within any recognized exception to the definition of attorney advertising.[25]

The City Bar opinion notes that it should not be presumed that an attorney who posts information about herself on LinkedIn is doing so for the primary purpose of attracting paying clients.[26] If attorneys merely include a list of "Skills," a description of practice areas, or displays "Endorsements" or "Recommendations," without more on their LinkedIn account, this does not, by itself, constitute attorney advertising.[27]

City Bar Formal Op. 2015-7 also notes that if an attorney's LinkedIn profile meets the five-pronged attorney advertising definition, he or she must comply with requirements of Article 7 of the NYRPC, which include, but are not limited to:

> (1) labeling the LinkedIn content "Attorney Advertising"; (2) including the name, principal law office address and telephone number of the lawyer; (3) pre-approving any content posted on LinkedIn; (4) preserving a copy for at least one year; and (5) refraining from false, deceptive or misleading statements. These are only some of the requirements associated with attorney advertising.[28]

Attorneys practicing in New York should be aware of both opinions when complying with New York's attorney advertising rules. An attorney's ethical obligations apply to all forms of covered communications, including social media. If a post on Twitter (a "tweet") is deemed attorney advertising, the rules require that a lawyer include disclaimers similar to those described in NYCLA Formal Op. 748.[29]

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25 NYCBA, Formal Op. 2015-7 (2015).

26 NYRPC 7.1(k).

27 NYRPC 1.0(c).

28 NYCBA, Formal Op. 2015-7; *see also* Peter Geraghty, *Social Media Endorsements: Undue Flattery Will Get You Nowhere*, YOURABA (July 2016); Strickler, *supra*, note 20

29 NYSBA Comm. on Prof'l Ethics ("NYSBA"), Op. 1009 (2014).

Utilizing the disclaimer "Attorney Advertising" given the confines of Twitter's character limit may be impractical or not possible. Yet, such structural limitation does not provide a justification for not complying with the ethical rules governing attorney advertising. Thus, attorneys should consider only posting tweets that would not be categorized as attorney advertising to avoid having to comply with the attorney advertising rules within the Twitter environment.[30]

Rule 7.1(k) of the NYRPC provides that all advertisements "shall be pre-approved by the lawyer or law firm." It requires that a copy of an advertisement "shall be retained for a period of not less than three years following its initial dissemination," but specifies a one-year retention period for advertisements contained in a "computer-accessed communication" and yet another retention scheme for websites.[31] Rule 1.0(c) of the NYRPC defines ''computer-accessed communication'' as any communication made by or on behalf of a lawyer or law firm that is disseminated through "the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto."[32] Thus, social media posts that are deemed "advertisements," are "computer-accessed communications, and their retention is required only for one year."[33]

In accordance with NYSBA Op. 1009, to the extent that a social media post is found to be a "solicitation," it is subject to filing requirements if directed to recipients in New York. Social media posts, like tweets, may or may not be prohibited "real-time or interactive" communications. This would depend on whether they are broadly distributed and/or whether the communications are more akin to asynchronous email or website postings or in functionality closer to prohibited instant messaging or chat rooms involving "real-time" or "live" responses. Practitioners are advised that both the social media platforms and ethical guidance in this area are evolving and care should be used when using any potentially "live" or real-time tools.

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30 NYSBA, Op. 1009.

31 *Id.*

32 *Id.*

33 *Id.*

Guideline No. 2.B: Prohibited Use of Term "Specialists" on Social Media

Lawyers shall not advertise areas of practice under headings in social media platforms that include the terms "specialist," unless the lawyer is certified by the appropriate accrediting body in the particular area.[34]

NYRPC 7.1, 7.4.

Comment: Although LinkedIn's headings no longer include the term "Specialties," lawyers still need to be cognizant of the prohibition on claiming to be a "specialist" when creating a social media profile.[35] To avoid making prohibited statements about a lawyer's qualifications under a specific heading or otherwise, a lawyer should use objective information and language to convey the lawyer's experience. Examples of such information include the number of years in practice and the number of cases handled in a particular field or area.[36]

A lawyer shall not list information under the ethically prohibited heading of "specialist" in any social media network unless appropriately certified as such. Skills or practice areas listed on a lawyer's profile under the headings "Experience" or "Skills" do not constitute a claim by a lawyer to be a specialist under NYRPC Rule 7.4.[37] A lawyer may include information about the lawyer's experience elsewhere, such as under another heading or in an untitled field that permits the inclusion of such biographical information. Certain states have issued ethics opinions prohibiting lawyers from listing their practice areas not only under "specialist," but also under headings such as "expert."

A limited exception to identification as a specialist may exist for lawyers who are certified "by a private organization approved for that purpose by the American Bar Association" or by an "authority having jurisdiction over specialization under the laws of another state or territory." For example,

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34 *See* NYSBA, Op. 972 (2013).

35 One court has found that the prohibition on the words "expertise" and "specialty" in relation to attorney advertising is unconstitutional; see Searcy v. Florida Bar, 140 F. Supp. 3d 1290, 1293 (N.D. Fla. 2015).

36 *See also* Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2012-8 (2012) (citing Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Formal Op. 85-170 (1985)).

37 NYCLA, Formal Op. 748.

identification of such traditional titles as "Patent Attorney" or "Proctor in Admiralty" are permitted for lawyers entitled to use them.[38]

Guideline No. 2.C: Lawyer's Responsibility to Monitor or Remove Social Media Content by Others on a Lawyer's Social Media Page

A lawyer who maintains a social media profile must be mindful of the ethical restrictions relating to solicitation by her and the recommendations of her by others, especially when inviting others to view her social media account, blog or profile.[39]

A lawyer is responsible for all content that the lawyer posts on her social media website or profile. A lawyer also has a duty to periodically monitor her social media profile(s) or blog(s) for comments, endorsements and recommendations to ensure that such third-party posts do not violate ethics rules. If a person who is not an agent of the lawyer unilaterally posts content to the lawyer's social media, profile or blog that violates the ethics rules, the lawyer must remove or hide such content if such removal is within the lawyer's control and, if not within the lawyer's control, she may wish to ask that person to remove it.[40]

NYRPC 7.1, 7.2, 7.3, 7.4.

Comment: While a lawyer is not responsible for a post made by a person who is not his agent, a lawyer's obligation not to disseminate, use or participate in the dissemination or use of advertisements containing misleading, false or deceptive statements includes a duty to remove information from the lawyer's social media profile where that information does not comply with applicable ethics rules. If a post cannot be removed, consideration must be given as to whether a curative post needs to be made. Although social media communications tend to be far less formal than traditional forms of communication to which the ethics rules apply, these rules apply with the same force and effect to social media postings.

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38 *See* NYRPC 7.4.

39 *See* Fla. Bar Standing Comm. on Advertising, *Guidelines for Networking Sites* (revised May 9, 2016); *see also* Geraghty, supra. note 28.

40 *See* NYCLA, Formal Op. 748; see also Phila. Bar Assn. Prof'l Guidance Comm., Op. 2012-8; Va. State Bar, *Quick Facts about Legal Ethics and Social Networking.*

Guideline No. 2.D: Attorney Endorsements

A lawyer must ensure the accuracy of third-party legal endorsements, recommendations, or online reviews posted to the lawyer's social media profile. To that end, a lawyer must periodically monitor and review such posts for accuracy and must correct misleading or incorrect information posted by clients or other third-parties.

NYRPC 7.1, 7.2, 7.3, 7.4.

Comment: Although lawyers are not responsible for content that third-parties and non-agents of the lawyer post on social media, lawyers must monitor and verify that posts about them made to profiles they control[41] are accurate. "Attorneys should periodically monitor their LinkedIn pages at reasonable intervals to ensure that others are not endorsing them as specialists," as well as to confirm the accuracy of any endorsements or recommendations.[42] A lawyer may not passively allow misleading endorsements as to her skills and expertise to remain on a profile that she controls, as that is tantamount to accepting the endorsement. Rather, a lawyer needs to remain conscientious in avoiding the publication of false or misleading statements about the lawyer and her services.[43] Certain social media websites, such as LinkedIn, allow users to approve endorsements, thereby providing lawyers with a mechanism to promptly review, and then reject or approve, endorsements. A lawyer may also hide or delete endorsements, which, under those circumstances, may obviate the ethical obligation to periodically monitor and review such posts.

When an attorney provides information on social media related to successful results she has achieved for a client, she should be careful to avoid disclosing confidential information about her client and the matter. The risk of disclosure of confidential information can also arise when a lawyer deems it necessary to correct adverse comments made by clients or former clients about the lawyer's legal skills made on social media (known as "reverse advertising"). New York has not addressed the issue, but the Texas Center for Legal Ethics recently opined that in such a situation, a lawyer may post a "proportional and restrained

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41 Lawyers should also be cognizant of such websites as Yelp, Google and Avvo, where third parties may post public comments about lawyers.

42 NYCLA, Formal Op. 748.

43 *See* NYCLA, Formal Op. 748; Pa. Bar Ass'n. Comm. on Legal Ethics and Prof'l Responsibility, Formal Op. 2014-300 (2014); N.C.State Bar Ethics Comm., Formal Op. 8 (2012); *see also* Mary Pat Benz, *New Guidance for Lawyers on the Ethics of Social Media Use*, ATTORNEYATWORK (Oct. 23, 2014) (https://www.attorneyatwork.com/ethics-of-social-media-use/) (last visited Mar. 28, 2019).

response that does not reveal any confidential information or otherwise violate the Texas Disciplinary Rules of Professional Conduct."[44]

Guideline No. 2.E: Positional Conflicts in Attorney Advertising

When communicating and stating positions on issues and legal developments, via social media or traditional media, a lawyer should avoid situations where her communicated positions on issues and legal developments are inconsistent with those advanced on behalf of her clients and the clients of her firm.

NYRPC 1.7, 1.8.

Comment: While commenting on issues and legal developments can certainly assist in advertising a lawyer's particular knowledge and strengths, a position stated by a lawyer on a social media site in an attempt to market her legal services could inadvertently create a business conflict with a client. A lawyer needs to be cognizant of the fact that conflicts are imputed to the lawyer's firm.

While no New York ethics opinion has addressed the issue, the D.C. Bar Legal Ethics Committee recently provided guidance on this subject stating, "Consideration must also be given to avoid the acquisition of uninvited information through social media sites that could create actual or perceived conflicts of interest for the lawyer or the lawyer's firm. Caution should be exercised when stating positions on issues, as those stated positions could be adverse to an interest of a client, thus inadvertently creating a conflict. [D.C. Rule of Professional Conduct] 1.7(b)(4) states that an attorney shall not represent a client with respect to a matter if 'the lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by ... the lawyer's own financial, business, property or personal interests,' unless the conflict is resolved in accordance with [D.C. Rule of Professional Conduct] 1.7(c). Content of social media posts made by attorneys may contain evidence of such conflicts."[45]

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44 Tex. Ctr. for Legal Ethics Op. 662 (2016); *see also* Kurt Orzeck, *Texas Attys Can Use Rivals in Ad Keywords, Ethics Panel Says*, LAW360 (Aug. 1, 2016) (discussing the Panel's decision to allow use of competing attorneys or firms in a lawyer's online advertising).

45 D.C. Bar Ethics Op. 370.

3. FURNISHING OF LEGAL ADVICE THROUGH SOCIAL MEDIA

Guideline No. 3.A: Provision of General Information

A lawyer may provide general answers to legal questions asked on social media. A lawyer, however, cannot provide specific legal advice on a social media network because a lawyer's responsive communications may be found to have created an attorney-client relationship, and legal advice also may impermissibly disclose information protected by the attorney-client privilege.

NYRPC 1.0, 1.4, 1.6, 7.1, 7.3.

> *Comment*: A client and lawyer must knowingly enter into an attorney-client relationship. Informal communications over social media may unintentionally result in a client believing that such a relationship exists. If an attorney-client relationship exists, then ethics rules concerning, among other things, the disclosure over social media of information protected by the attorney-client privilege to individuals other than to the client would apply.

Guideline No. 3.B: Public Solicitation is Prohibited through "Live" Communications

Due to the "live" nature of real-time or interactive computer-accessed communications,[46] which includes, among other things, instant messaging and communications transmitted through a chat room, a lawyer may not "solicit"[47] business from the public through such means.[48]

If a potential client[49] initiates a specific request seeking to retain a lawyer during real-time social media communications, a lawyer may respond to such request. However, such response must be sent through non-public means and must be kept confidential,

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46 "Computer-accessed communication" as defined by NYRPC 1.0(c) means "any communication made by or on behalf of a lawyer or law firm that is disseminated through the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto." Comment 9 to NYRPC 7.3 advises: "Ordinarily, email communications and websites are not considered to be real-time or interactive communication. Similarly, automated pop-up advertisements on a website that are not a live response are not considered to be real-time or interactive communication. However, Instant messaging ("IM"), chat rooms, and other similar types of conversational computer-accessed communication are considered to be real-time or interactive communication."

47 "Solicitation" as defined by NYRPC 7.3(b) means "any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request" of a prospective client.

48 *See* NYSBA, Op. 899 (2011). Ethics opinions in a number of states have addressed chat room communications; *see also* Ill. State Bar Ass'n, Op. 96-10 (1997); Mich. Standing Comm. on Prof'l and Jud. Ethics, Op. RI-276 (1996); Utah State Bar Ethics Advisory Opinion Comm., Op. 97-10 (1997); Va. Bar Ass'n Standing Comm. on Advertising, Op. A-0110 (1998); W. Va. Lawyer Disciplinary Bd., Legal Ethics Inquiry 98-03 (1998).

The Philadelphia Bar Ass'n, however, has opined that, under the Pennsylvania Rules of Professional Conduct, which are different from the NYRPC, solicitation through a chat room is permissible, because it is more akin to targeted direct mail advertisements, which are allowed under Pennsylvania's ethics rules. *See* Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2010-6 (2010).

49 Individuals attempting to defraud a lawyer by posing as potential clients are not owed a duty of confidentiality. *See* NYCBA, Formal Op. 2015-3 ("An attorney who discovers that he is the target of an Internet-based trust account scam does not have a duty of confidentiality towards the individual attempting to defraud him, and is free to report the individual to law enforcement authorities, because that person does not qualify as a prospective or actual client of the attorney. However, before concluding that an individual is attempting to defraud the attorney and is not owed the duties normally owed to a prospective or actual client, the attorney must exercise reasonable diligence to investigate whether the person is engaged in fraud.").

whether the communication is electronic or in some other format.[50] Emails and attorney communications via a website or over social media platforms, such as Twitter,[51] may not be considered real-time or interactive communications. This Guideline does not apply if the recipient is a close friend, relative, former client, or existing client.[52]

NYRPC 1.0, 1.4, 1.6, 1.7, 1.8, 7.1, 7.3.

> *Comment*: Answering general questions[53] on the Internet is analogous to writing for any publication on a legal topic.[54] "Standing alone, a legal question posted by a member of the public on real-time interactive Internet or social media sites cannot be construed as a 'specific request' to retain the lawyer."[55] In responding to questions,[56] a lawyer may not provide answers that appear applicable to all apparently similar individual problems because variations in underlying facts might result in a different answer.[57]

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50 "If a lawyer subject to the D.C. Rules of Professional Conduct engages in chat room communications of sufficient particularity and specificity to give rise to an attorney-client relationship under the substantive law of a state with jurisdiction to regulate the communication, that lawyer must comply with the full array of D.C. Rules governing attorney-client relationships." D.C. Ethics Op. 316.

51 Whether a Twitter or Reddit communication is a "real-time or interactive" computer-accessed communication is dependent on whether the communication becomes akin to a prohibited blog or chat room communication. *See* NYSBA, Op. 1009.

52 NYRPC 7.3(a)(1).

53 Where "the inquiring attorney has 'become aware of a potential case, and wants to find plaintiffs,' and the message the attorney intends to post will be directed to, or intended to be of interest only to, individuals who have experienced the specified problem. If the post referred to a particular incident, it would constitute a solicitation under the Rules, and the attorney would be required to follow the Rules regarding attorney advertising and solicitation, *see* Rules 7.1 & 7.3. In addition, depending on the nature of the potential case, the inquirer's post might be subject to the blackout period (i.e., cooling off period) on solicitations relating to 'a specific incident involving potential claims for personal injury or wrongful death ….'" NYSBA, Op. 1049 (2015).

54 *See* NYSBA, Op. 899.

55 *See id*.

56 *See* NYSBA, Op. 1049 ("We further conclude that a communication that merely discussed the client's legal problem would not constitute advertising either. However, a communication by the lawyer that went on to describe the services of the lawyer or his or her law firm for the purposes of securing retention would constitute "advertising." In that case, the lawyer would need to comply with Rule 7.1, including the requirements for labeling as "advertising" on the "first page" of the post or in the subject line, retention for one-year (in the case of a computer-accessed communication) and inclusion of the law office address and phone number. *See* Rule 7.1(f), (h), (k).").

57 *Id*.

Moreover, a lawyer should be careful in responding to an individual question on social media as it might establish an attorney-client relationship, probably one created without a conflict check, and, if the response over social media is viewed by others beyond the intended recipient, it may disclose privileged or confidential information.[58]

A lawyer is permitted to accept employment that results from participating in "activities designed to educate the public to recognize legal problems."[59] As such, if a potential client initiates a specific request to retain the lawyer resulting from real-time Internet communication, the lawyer may respond to such request as noted above.[60] However, such communications should be sent solely to that potential client. If, however, the requester does not provide his or her personal contact information when seeking to retain the lawyer or law firm, consideration should be given by the lawyer to respond in two steps: first, ask the requester to contact the lawyer directly, not through a real-time communication, but instead by email, telephone, etc., and second, the lawyer's actual response should not be made through a real-time communication.[61]

Guideline No. 3.C: Retention of Social Media Communications with Clients

If an attorney utilizes social media to communicate with a client relating to legal representation, the attorney should retain records of those communications, just as she would if the communications were memorialized on paper.

NYRPC 1.1, 1.15.

Comment: A lawyer's file relating to client representation includes both paper and electronic documents. The ABA Model Rules of Professional Conduct defines a "writing" as "a tangible or electronic record of a communication or

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58 In addition, when "answering general questions on the Internet, specific answers or legal advice can lead to … the unauthorized practice of law in a forum where the lawyer is not licensed." Paul Ragusa & Stephanie Diehl, *Social Media and Legal Ethics—Practical Guidance for Prudent Use*, BAKER BOTTS LLP (Nov. 1, 2016).

59 *See* NYRPC 7.1(f), (h), (k).

60 *See* NYSBA, Op. 1049 ("When a potential client requests contact by a lawyer, either by contacting a particular lawyer or by broadcasting a more general request to unknown persons who may include lawyers, any ensuing communication by a lawyer that complies with the terms of the invitation was not initiated by the lawyer within the meaning of Rule 7.3(b). Thus, if the potential client invites contact by Twitter or email, the lawyer may respond by Twitter or email. But the lawyer could not respond by telephone, since such contact would not have been initiated by the potential client. *See* NYSBA, Op. 1014 (2014). If the potential client invites contact by telephone or in person, the lawyer's response in the manner invited by the potential client would not constitute 'solicitation.').

61 *Id*.

representation ...."[62] NYRPC 1.0(x), the definition of "writing," was expanded in late 2016 to specifically include a range of electronic communications.[63]

The NYRPC "does not explicitly identify the full panoply of documents that a lawyer should retain relating to a representation."[64] The only NYRPC provision requiring maintenance of client documents is NYRPC 1.15(i). The NYRPC, however, implicitly imposes on lawyers an obligation to retain documents. For example, NYRPC 1.1 requires that "A lawyer should provide competent representation to a client." NYRPC 1.1(a) requires "skill, thoroughness and preparation."

The lawyer must take affirmative steps to preserve those emails and social media communications, which the lawyer believes need to be saved.[65] However, due to the ephemeral nature of social media communications, "saving" such communications in electronic form may pose technical issues, especially where, under certain circumstances, the entire social media communication may not be saved, may be deleted automatically or after a period of time, or may be deleted by the counterparty to the communication without the knowledge of the lawyer.[66] Casual communications may be deleted without impacting ethical rules.[67]

NYCBA, Formal Op. 2008-1 sets out certain considerations for preserving electronic materials:

> As is the case with paper documents, which e-mails and other electronic documents a lawyer has a duty to retain will depend on the facts and circumstances of each representation. Many e-mails generated during a representation are formal, carefully drafted

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62 NYRPC 1.0(n), Terminology.

63 NYRPC 1.0(x): "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photocopying, photography, audio or video recording, email or other electronic communication or any other form of recorded communication or recorded representation. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

64 *See* NYCBA, Formal Op. 2008-1 (2008).

65 *Id.*

66 *Id.*; *see also* Pa. Bar Ass'n, Ethics Comm., Formal Op. 2014-300 (the Pennsylvania Bar Assn. has opined that, under the Pennsylvania Rules of Professional Conduct, which are different from the NYRPC, an attorney "should retain records of those communications containing legal advice.")

67 *Id.*

> communications intended to transmit information, or other electronic documents, necessary to effectively represent a client, or are otherwise documents that the client may reasonably expect the lawyer to preserve. These e-mails and other electronic documents should be retained. On the other hand, in many representations a lawyer will send or receive casual e-mails that fall well outside the guidelines in [ABCNY Formal Op. 1986-4]. No ethical rule prevents a lawyer from deleting those e-mails.
>
> We also expect that many lawyers may retain e-mails and other electronic documents beyond those required to be retained under [ABCNY Formal Op. 1986-4]. For example, some lawyers and law firms may retain all paper and electronic documents, including e-mails, relating in any way to a representation, as a measure to protect against a malpractice claim. Such a broad approach to document retention may at times be prudent, but it is not required by the Code.[68]

A lawyer shall not deactivate a social media account, which contains communications with clients, unless those communications have been appropriately preserved.

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68 Formal Op. 623 states that "all documents belonging to the lawyer may be destroyed without consultation or notice to the client in the absence of extraordinary circumstances manifesting a client's clear and present need for such documents" and that "[a]bsent a legal requirement or extraordinary circumstances, the lawyer's only obligation with respect to such documents is to preserve confidentiality." NYSBA, Op. 623 (1991).

4. REVIEW AND USE OF EVIDENCE FROM SOCIAL MEDIA

Guideline No. 4.A: Viewing a Public Portion of a Social Media Website

A lawyer may view the public portion of a person's social media profile or view public posts even if such person is represented by another lawyer.

NYRPC 4.1, 4.2, 4.3, 5.3, 8.4.

Comment: A lawyer is ethically permitted to view the public portion of a party's social media website,[69] profile or posts, whether that party is represented or not, for the purpose of obtaining information about the party, including impeachment material for use in litigation.[70]

This allowance is based, in part, on case law that holds that a litigant is said to have a lesser expectation of privacy with respect to social media content relevant to claims or defenses, let alone content that is specifically designated as "public."[71]

Guideline No. 4.B: Contacting an Unrepresented Party and/or Requesting to View a Restricted Social Media Website

A lawyer may communicate with an unrepresented party and also request permission to view a non-public portion of the unrepresented party's social media profile.[72] However, the lawyer must use her full name and an accurate profile, and may not create a false profile to mask her identity. If the unrepresented party asks for additional information from the lawyer in response to the communication or access request, the lawyer must accurately provide the information requested by the unrepresented party or otherwise cease all further communications and withdraw the request if applicable.

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69 A lawyer should be aware that certain social media networks may send an automatic message to the party whose account is being viewed which identifies the person viewing the account as well as other information about the viewer.

70 *See* NYSBA, Op. 843 (2010); *see also* Colo. Bar Ass'n Ethics Comm., Formal Op. 127 (2015); Me. Prof'l Ethics Comm'n, Op. 217 (2017).

71 *Romano v. Steelcase Inc.*, 30 Misc. 3d 426, 434 (Sup. Ct. Suffolk Cty. 2010) ("She consented to the fact that her personal information would be shared with others, notwithstanding her privacy setting. Indeed that is the very nature and purpose of these social networking sites else they would cease to exist."). *See also Forman v. Henkin*, 30 N.Y.3d 656, 666 (2018) (court assumed some Facebook materials may be characterized as private, but held that some private Facebook materials may be subject to discovery if relevant).

72 For example, this may include: (1) sending a "friend" request on Facebook or (2) requesting to be connected to someone on LinkedIn.

NYRPC 4.1, 4.3, 8.4.

Comment: It is permissible for a lawyer to join a social media network solely for the purpose of obtaining information concerning a witness.[73] The New York City Bar Association has opined, however, that a lawyer shall not "friend" an unrepresented individual using any form of "deception."[74] Nor may a lawyer or lawyer's agent anonymously use trickery to gain access to an otherwise secure social networking page and the information that it holds.[75]

In New York, no "deception" occurs when a lawyer utilizes his or her "real name and profile" to contact an unrepresented party via a "friend" request in order to obtain information from the party's account.[76] In New York, the lawyer is **not** required to initially disclose the reasons for the communication or "friend" request.[77]

However, other states require that a lawyer's initial "friend" request must contain additional information to fully apprise the witness of the lawyer's identity and intention. For example, the New Hampshire Bar Association, holds that an attorney must "inform the witness of the lawyer's involvement in the disputed or litigated matter," the disclosure of the "lawyer by name as a lawyer" and the identification of "the client and the matter in litigation."[78] The Massachusetts and San Diego Bar Associations simply require disclosure of the lawyer's "affiliation and the purpose for the request."[79] The Philadelphia Bar Association notes that failure to disclose the attorney's true intention constitutes an impermissible omission of a "highly material fact."[80]

In Oregon, there is an opinion that if the person being sought on social media "asks for additional information to identify [the l]awyer, or if [the l]awyer

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73 *See* N.H. Bar Ass'n Ethics Advisory Comm., Op. 2012-13/05 (2012).

74 NYCBA, Formal Op. 2010-02 (2010).

75 Tex. State Bar, Op. 671, (2018).

76 NYCBA, Formal Op. 2010-02.

77 *See id*.

78. N.H. Bar Ass'n Ethics Advisory Comm., Op. 2012-13/05.

79. Mass. Bar Ass'n Comm. On Prof'l Ethics, Op. 2014-5 (2014); San Diego Cty. Bar Ass'n Legal Ethics Comm., Op. 2011-2 (2011); *see* Tom Gantert, *Facebook 'Friending' Can Have Ethical Implications*, LEGALNEWS (Sept. 27, 2012).

80 Phila. Bar Ass'n Prof'l Guidance Comm., Op. Bar 2009-2 (2009); *see* Me. Prof'l Ethics Comm'n, Op. 217.

has some other reason to believe that the person misunderstands her role, [the l]awyer must provide the additional information or withdraw the request."[81]

Guideline No. 4.C: Contacting a Represented Party and/or Viewing a Non-Public Social Media Website

A lawyer shall not contact a represented party or request access to review the non-public portion of a represented party's social media profile unless express consent has been furnished by the represented party's counsel.

NYRPC 4.1, 4.2.

Comment: It is significant to note that, unlike an unrepresented party, the ethics rules are different when the party being contacted in order to obtain private social media content is "represented" by a lawyer, and such a communication is categorically prohibited.

The Oregon State Bar Committee has noted that "[a]bsent actual knowledge that the person is represented by counsel, a direct request for access to the person's non-public personal information is permissible."[82]

There is an apparent gap in authority with respect to whether a represented party's receipt of an automatic notification from a social media platform constitutes an impermissible communication with an attorney, as opposed to within the juror context, which has been covered by several jurisdictions.

Nevertheless, in New York, drawing upon those opinions addressing jurors, receipt of an automatic notification can be considered an improper communication with someone who is represented by counsel, particularly where "the attorney is aware that her actions would cause the juror to receive such message or notification." [83]

Conversely, ABA Formal Op. 466 opined that, at least within the juror context, an automatically-generated notification does not constitute an impermissible communication since "… the ESM [electronic social media] service is communicating with the juror based on a technical feature of the ESM,"

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81 Or. State Bar Comm. on Legal Ethics, Formal Op. 2013-189 (2013).

82 *Id.* See San Diego Cty. Bar Ass'n Legal Ethics Comm., Op. 2011-2.

83 *See* NYCBA, Formal Op. 2012-2; NYCLA, Formal Op. 743 (2011).

and the lawyer is not involved.[84] This view has also been adopted by the District of Columbia and Colorado Bar Associations.[85]

Guideline No. 4.D: Lawyer's Use of Agents to Contact a Represented Party

As it relates to viewing a party's social media account, a lawyer shall not order or direct an agent to engage in specific conduct, where such conduct if engaged in by the lawyer would violate any ethics rules.

NYRPC 5.3, 8.4.

Comment: This would include, *inter alia*, a lawyer's investigator, trial preparation staff, legal assistant, secretary, or agent[86] and could, as well, apply to the lawyer's client.[87]

84 *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 466 (2014).

85 *See* D.C. Bar Legal Ethics Comm., Formal Op. 371 (2016); Colo. Bar Ass'n Ethics Comm., Formal Op. 127.

86 *See* NYCBA, Formal Op. 2010-02.

87 *See* N.H Bar Ass'n Ethics Advisory Comm., Op. 2012-13/05.

5. COMMUNICATING WITH CLIENTS

Guideline No. 5.A: Removing Existing Social Media Information

A lawyer may advise a client as to what content[88] may be maintained or made non-public on her social media account, including advising on changing her privacy and/or security settings.[89] A lawyer may also advise a client as to what content may be "taken down" or removed, whether posted by the client or someone else. However, the lawyer must be cognizant of preservation obligations applicable to the client and/or matter, such as a statute, rule, regulation, or common law duty relating to the preservation of information, including legal hold obligations.[90] Unless an appropriate record of the social media content is preserved, a party or nonparty may not delete information from a social media account that is subject to a duty to preserve.

NYRPC 3.1, 3.3, 3.4, 4.1, 4.2, 8.4.

> *Comment*: A lawyer must ensure that potentially relevant information is not destroyed "once a party reasonably anticipates litigation"[91] or where preservation is required by common law, statute, rule, regulation or other requirement. Failure to do so may result in sanctions or other penalties. "[W]here litigation is anticipated, a duty to preserve evidence may arise under substantive law. But provided that such removal does not violate the substantive law regarding the destruction or spoliation of evidence,[92] there is no ethical bar to 'taking down' such material from social media publications, or prohibiting a client's lawyer from advising the client to do so, particularly inasmuch as the substance of the posting is generally preserved in cyberspace or on the user's computer."[93] When litigation is not pending or "reasonably anticipated," a lawyer may more freely advise a client on what to maintain or remove from her social media profile. Nor is there any ethical bar to advising a client to change her privacy or security settings to be more restrictive, whether before or after litigation has commenced,

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88 "Content" may, as appropriate, include metadata.

89 Mark A. Berman, *Counseling a Client to Change Her Privacy Settings on Her Social Media Account*, NEW YORK LEGAL ETHICS REPORTER (Feb. 2015).

90 NYCLA, Formal Op. 745 (2013); *see also* Phila. Bar Ass'n. Guidance Comm. Op. 2014-5 (2014).

91 *VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.*, 93 A.D.3d 33,36 (1st Dept. 2012).

92 *See* Phila. Bar Ass'n. Prof'l Guidance Comm. Op. 2014-5 (noting that, a lawyer "must make reasonable efforts to obtain a photograph, link or other content about which the lawyer is aware *if the lawyer knows or reasonably believes it has not been produced by the client.*").

93 NYCLA, Formal Op. 745.

as long as social media is appropriately preserved in the proper format and such is not a violation of law or a court order.[94]

A lawyer should be aware that the act of deleting electronically stored information does not mean that such information cannot be recovered through the use of forensic technology or other means. Similarly, a post or other data shared with others may have been copied by another user or in other online accounts not controlled by the client.

Guideline No. 5.B: Adding New Social Media Content

A lawyer may advise a client with regard to posting new content on social media, as long as the proposed content is not known to be false by the lawyer. A lawyer also may not "direct or facilitate the client's publishing of false or misleading information that may be relevant to a claim."[95]

NYRPC 3.1, 3.3, 3.4, 4.1, 4.2, 8.4.

Comment: A lawyer may review what a client plans to publish on social media in advance of posting[96] and guide the client, including formulating a policy on social media usage. Subject to ethics rules, a lawyer may, for example, counsel the client to publish truthful information favorable to the client; discuss the significance and implications of social media posts (including their content and advisability); review how the posts may be perceived; and discuss how such posts might be used in a litigation, including cross-examination. A lawyer may advise a client that social media content or data that the client considers highly private or personal, even if not shared with other social media users, may be reviewed by opposing parties, judges and others due to court order, compulsory process, government searches, data breach, sharing by others or unethical conduct. A

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94 *See* N.C. State Bar Ass'n 2014 Formal Ethics Op. 5 (2014); Phila. Bar Ass'n Prof'l Guidance Comm. Op. 2014-5 (2014); Fla. Bar Ass'n Prof'l Ethics Comm., Opinion 14-1 (2015) (online version revised September 21, 2016).

95 NYCLA, Formal Op. 745.

96 A lawyer may consider periodically following or checking her client's social media activities, especially in matters where posts may be relevant to her client's claims or defenses. Monitoring a client's social media posts could provide the lawyer with the opportunity, among other things, to advise on the impact of the client's posts on existing or future litigation or on their implication(s) for other issues relating to the lawyer's representation of the client. An attorney may wish to notify a client if he or she plans to closely monitor a client's social media postings.

Pa. Bar Ass'n Ethics Comm., Formal Op. 2014-300 (2014) (noting that "tracking a client's activity on social media may be appropriate for an attorney to remain informed about the developments bearing on the client's legal dispute" and "an attorney can reasonably expect that opposing counsel will monitor a client's social media account.").

lawyer may advise a client to refrain from or limit social media posts, including during the course of a litigation or investigation.

Guideline No. 5.C: <u>False Social Media Statements</u>

A lawyer is prohibited from proffering, supporting, or using false statements if she learns from a client's social media posting that a client's lawsuit involves the assertion of material false factual statements or evidence supporting such a conclusion and if proper inquiry of the client does not negate that conclusion.[97]

NYRPC 3.1, 3.3, 3.4, 4.1, 8.4.

Comment: A lawyer has an ethical obligation not to "bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous."[98] Frivolous conduct includes the knowing assertion of "material factual statements that are false."[99]

Guideline No. 5.D: <u>A Lawyer's Use of Client-Provided Social Media Information</u>

A lawyer may review a represented person's non-public social media information provided to the lawyer by her client, as long as the lawyer did not cause or assist the client to: (i) inappropriately obtain non-public information from the represented person; (ii) invite the represented person to take action without the advice of his or her lawyer; or (iii) otherwise overreach with respect to the represented person.

NYRPC 4.2.

Comment: One party may always seek to communicate with another party. Where a "client conceives the idea to communicate with a represented party," a lawyer is not precluded "from advising the client concerning the substance of the communication" and the "lawyer may freely advise the client so long as the lawyer does not assist the client inappropriately to seek confidential information or invite the nonclient to take action without the advice of counsel or otherwise to overreach the nonclient."[100] New York interprets "overreaching" as prohibiting "the lawyer from converting a communication initiated or conceived by the client into a vehicle for the lawyer to communicate directly with the nonclient."[101]

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97 *See* NYCLA, Formal Op. 745.

98 NYRPC 3.1(a).

99 NYRPC 3.1(B)(3).

100 NYCBA, Formal Op. 2002-3 (2002).

101 *Id.*

NYRPC Rule 4.2(b) provides that, notwithstanding the prohibition under Rule 4.2(a) that a lawyer shall not "cause another to communicate about the subject of the representation with a party the lawyer knows to be represented,"

> a lawyer may cause a client to communicate with a represented person … and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

Thus, lawyers need to use caution when communicating with a client about her connecting to or "friending" a represented person and obtaining private information from that represented person's social media site.

A New Hampshire opinion states that a lawyer's client may, for instance, send a friend request or request to follow a private Twitter feed of a person, and then provide the information to the lawyer, but the ethical propriety "depends on the extent to which the lawyer directs the client who is sending the [social media] request," and whether the lawyer has complied with all other ethical obligations.[102] In addition, the client's profile needs to "reasonably reveal[] the client's identity" to the other person.[103]

The American Bar Association opines that a "lawyer may give substantial assistance to a client regarding a substantive communication with a represented adversary. That advice could include, for example, the subjects or topics to be addressed, issues to be raised and strategies to be used. Such advice may be given regardless of who – the lawyer or the client – conceives of the idea of having the communication … . [T]he lawyer may review, redraft and approve a letter or a set of talking points that the client has drafted and wishes to use in her communications with her represented adversary."[104]

Guideline No. 5.E: <u>Maintaining Client Confidences and Confidential Information</u>

Subject to the attorney-client privilege rules, a lawyer is prohibited from disclosing client confidences and confidential information relating to the legal representation of a

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102 N.H. Bar Ass'n Ethics Advisory Comm., Op. 2012-13/05.

103 *Id.*

104 ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 11-461 (2011).

client, unless the client has provided informed consent.[105] Social media activities and a lawyer's website or blog must comply with these limitations.[106]

A lawyer should also be aware of potential risks created by social media services, tools or practices that seek to create new user connections by importing contacts or connecting platforms. A lawyer should understand how the service, tool or practice operates before using it and consider whether any activity places client information and confidences at risk.[107]

Where a client has posted an online review of the lawyer or her services, the lawyer's response, if any, shall not reveal confidential information relating to the representation of the client. Where a lawyer uses a social media account to communicate with a client or otherwise store client confidences, the lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, such an account.[108]

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105 ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 480 (2018).

106 *See* NYRPC 1.6.

107 D.C. Bar Legal Ethics Comm., Op. 370 explains one risk of services that import email contacts to generate connections: "For attorneys, these connection services could potentially identify clients or divulge other information that a lawyer might not want an adversary or a member of the judiciary to see or information that the lawyer is obligated to protect from disclosure."

Similarly, a lawyer's request to connect to a person who is represented by opposing counsel may be embarrassing or raise questions regarding NYRPC 4.2 (Communication with Persons Represented by Counsel).

108 NYRPC 1.6(c). The NYRPC were amended on November 10, 2016 and Rule 1.6(c) was modified to address a lawyer's use of technology. *See* Davis, Anthony, *Changes to NY RPCs and an Ethics Opinion On Withdrawing for Non-Payment of Fees*, NEW YORK LAW JOURNAL (January 9, 2017).

NYSBA Comment 16 to NYRPC 1.6 provides:

Paragraph (c) imposes three related obligations. It requires a lawyer to make reasonable efforts to safeguard confidential information against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are otherwise subject to the lawyer's supervision. *See* Rules 1.1, 5.1 and 5.3. Confidential information includes not only information protected by Rule 1.6(a) with respect to current clients but also information protected by Rule 1.9(c) with respect to former clients and information protected by Rule 1.18(b) with respect to prospective clients. Unauthorized access to, or the inadvertent or unauthorized disclosure of, information protected by Rules 1.6, 1.9, or 1.18, does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the unauthorized access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to: (i) the sensitivity of the information; (ii) the likelihood of disclosure if additional safeguards are not employed; (iii) the cost of employing additional safeguards; (iv) the difficulty of implementing the safeguards; and (v) the extent to which the safeguards adversely affect the lawyer's ability to represent clients (*e.g.*, by making a device or software excessively difficult to use). A client may require the lawyer to implement special security

NYRPC 1.1, 1.6, 1.9(c), 1.18.

Comment: A lawyer is prohibited, absent a recognized exception, from disclosing client confidential information. Moreover, a lawyer should be aware that "information distributed electronically has a continuing life, and it might be possible for recipients to aggregate, mine, and analyze electronic communications made to different people at different times and through different social media."[109]

Attorneys should be aware of issues related to anonymously posting online during trial. In *In re Perricone*, 2018-1233 (La. 2018), the Supreme Court of Louisiana concluded that "[t]he only appropriate sanction under the[] facts" was disbarring an attorney who had anonymously posted online critical comments that concerned, among other things, pending cases in which he or colleagues were assigned as prosecutors. The attorney had "stated that he made the anonymous online comments to relieve stress, not for the purpose of influencing the outcome of a defendant's trial." But the court opined that its decision "must send a strong message to respondent and to all the members of the bar that a lawyer's ethical obligations are not diminished by the mask of anonymity provided by the Internet."

Under NYRPC Rule 1.9(c), a lawyer is generally prohibited from using or revealing confidential information of a former client. There is, however, a "self-defense" exception to the duty of confidentiality set forth in Rule 1.6, which, as to former clients, is incorporated by Rule 1.9(c). Rule 1.6(b)(5)(i) provides that a lawyer "may reveal or use confidential information to the extent that the lawyer reasonably believes necessary … to defend the lawyer or the lawyer's employees

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measures not required by this Rule, or may give informed consent to forgo security measures that would otherwise be required by this Rule. For a lawyer's duties when sharing information with nonlawyers inside or outside the lawyer's own firm, *see* Rule 5.3, Comment [2].

Comment 17 further provides:

When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. Paragraph (c) does not ordinarily require that the lawyer use special security measures if the method of communication affords a reasonable expectation of confidentiality. However, a lawyer may be required to take specific steps to safeguard a client's information to comply with a court order (such as a protective order) or to comply with other law (such as state and federal laws or court rules that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information). For example, a protective order may extend a high level of protection to documents marked "Confidential" or "Confidential – Attorneys' Eyes Only"; the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") may require a lawyer to take specific precautions with respect to a client's or adversary's medical records; and court rules may require a lawyer to block out a client's Social Security number or a minor's name when electronically filing papers with the court. The specific requirements of court orders, court rules, and other laws are beyond the scope of these Rules.

109 L.A. Cnty Bar Ass'n Prof'l Responsibility and Ethics Comm., Op. No. 529 (2017).

and associates against an accusation of wrongful conduct."[110] NYSBA Ethics Opinion 1032 indicates that the self-defense exception applies to "claims" and "charges" in formal proceedings or a "material threat of a proceeding," which "typically suggest the beginning of a lawsuit, criminal inquiry, disciplinary complaint, or other procedure that can result in a sanction" but not to a "negative web posting."[111] As such, a lawyer cannot disclose confidential information about a client when responding to a negative post concerning herself on platforms such as Avvo, Yelp or Facebook.[112]

A lawyer is permitted to respond to online reviews, but such replies must be accurate and truthful and shall not contain confidential information or client confidences. Pennsylvania Bar Association Ethics Committee Opinion 2014-300 (2014) opined that "[w]hile there are certain circumstances that would allow a lawyer to reveal confidential client information, a negative online client review is not a circumstance that invokes the self-defense exception."[113] Pennsylvania Bar Association Ethics Committee Opinion 2014-200 (2014) provides a suggested response for a lawyer replying to negative online reviews: "A lawyer's duty to keep client confidences has few exceptions and in an abundance of caution I do not feel at liberty to respond in a point-by-point fashion in this forum. Suffice it to say that I do not believe that the post represents a fair and accurate picture of events."[114]

If a lawyer chooses to respond to a former client's online review, a lawyer should consult the relevant definition of "confidential information" as the definition may be quite broad. For instance, pursuant to NYRPC 1.6(a), "confidential information" includes, but is not limited to "information gained during or relating to the representation of a client, whatever its source, that is ... likely to be embarrassing or detrimental to the client if disclosed." Similarly, Texas Disciplinary Rule of Professional Conduct 1.05(a) defines "confidential information" as including "… all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client." *See also* DC Bar Ethics Opinion 370 which states a "confidence" is "information protected by the attorney-client privilege" and a "secret" is "… other information gained in the professional relationship that the client has requested be held inviolate, or the

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110 N.Y. City Bar Ass'n Comm. on Prof'l Ethics, Op. 1032 (2014).

111 *Id*.

112 *See* Susan Michmerhuizen, *Client reviews: Your Thumbs Down May Come Back Around*, AMERICAN BAR ASSOCIATION (Mar. 3, 2015).

113 Pa. Bar Ass'n Ethics Comm., Formal Op. 2014-300 (2014).

114 Pa. Bar Ass'n Ethics Comm., Op. 2014-200.

disclosure of which would be embarrassing, or would be likely to be detrimental, to the client."

Moreover, any response should be limited and tailored to the circumstances. Texas State Bar Ethics Opinion 662. *See also* DC Bar Ethics Opinion 370 (even self-defense exception for "specific" allegations by client against lawyer only allows disclosures no greater than the lawyer reasonably believes are necessary).

6. RESEARCHING JURORS AND REPORTING JUROR MISCONDUCT

Guideline No. 6.A: Lawyers May Conduct Social Media Research of Jurors

A lawyer may research a prospective or sitting juror's public social media profile and public posts as long as it does not violate any local rules or court order.

NYRPC 3.5, 4.1, 5.3, 8.4.

> *Comment*: "Just as the internet and social media appear to facilitate juror misconduct, the same tools have expanded an attorney's ability to conduct research on potential and sitting jurors, and clients now often expect that attorneys will conduct such research. Indeed, standards of competence and diligence may require doing everything reasonably possible to learn about the jurors who will sit in judgment on a case."[115] At this juncture, it is "not only permissible for trial counsel to conduct Internet research on prospective jurors, but [] it may even be expected."[116]
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> The ABA issued Formal Op. 466 noting that "[u]nless limited by law or court order, a lawyer may review a juror's or potential juror's Internet presence, which may include postings by the juror or potential juror in advance of and during a trial."[117] "There is a strong public interest in identifying jurors who might be tainted by improper bias or prejudice."[118] Opinion 466, however, does not address "whether the standard of care for competent lawyer performance requires using Internet research to locate information about jurors."[119]

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115 NYCBA, Formal Op. 2012-2 (2012).

116 *See* SOCIAL MEDIA JURY INSTRUCTIONS REPORT, NYSBA COMMERCIAL AND FEDERAL LITIGATION SECTION (2015).

117 *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 466. Attorneys should be mindful of court orders concerning online research in jurisdictions in which they practice. *See, e.g.*, Standing Order Regarding Research as to Potential Jurors in All Cases Assigned to U.S. District Judge Rodney Gilstrap (E.D. Tex. 2017).

118 *Id.*

119 *Id.*

Guideline No. 6.B: A Juror's Social Media Profile May Be Viewed as Long as There Is No Communication with the Juror

A lawyer may view the social media profile of a prospective juror or sitting juror provided that there is no communication (whether initiated by the lawyer or her agent or automatically generated by the social media network) with the juror.[120]

NYRPC 1.1, 3.5, 4.1, 5.3, 8.4.

Comment: Lawyers need to "always use caution when conducting [jury] research" to ensure that no communication with the prospective or sitting jury takes place.[121]

"Without express authorization from the court, any form of communication with a prospective or sitting juror during the course of a legal proceeding would be an improper *ex parte* communication."[122] For example, ABA Formal Op. 466 opines that it would be a prohibited *ex parte* communication for a lawyer, or the lawyer's agent, to send an "access request" to view the private portion of a juror's or potential juror's Internet presence.[123] This type of communication would be "akin to driving down the juror's street, stopping the car, getting out, and asking the juror for permission to look inside the juror's house because the lawyer cannot see enough when just driving past."[124]

NYCLA Formal Op. 743 and NYCBA Formal Op. 2012-2 have opined that even inadvertent contact with a prospective juror or sitting juror caused by an automatic notice generated by a social media network may be considered a technical ethical violation.[125] New York ethics opinions also draw a distinction between public and private juror information.[126] They opine that viewing the public portion of a social media profile is ethical as long as there is no automatic

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120 *See* NYCLA, Formal Op. 743; NYCBA, Formal Op. 2012-2 (2012); *see also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 466 (2014).

121 *See* Vincent J. Syracuse & Matthew R. Maron, *Attorney Professionalism Forum*, 85 N.Y. ST. B.A.J. 50 (2013).

122 Colo. Bar Ass'n Ethics Comm., Formal Op. 127.

123 *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 466.

124 *Id*.

125 NYCLA, Formal Op. 743; NYCBA, Formal Op. 2012-2 (2012).

126 *Id*.

message sent to the account owner of such viewing (assuming other ethics rules are not implicated by such viewing).[127]

In contrast to the above New York opinions, ABA Formal Op. 466, opined that "[t]he fact that a juror or a potential juror may become aware that a lawyer is reviewing his Internet presence when an [electronic social media ("ESM")] network setting notifies the juror of such review does *not* constitute a communication from the lawyer in violation" of the Rules of Professional Conduct.[128] The ABA concluded that, as a general rule, an automatic notification represents a communication between the juror and a given ESM platform, instead of an impermissible communication between the juror and the attorney. The Colorado Bar Association and DC Bar have since adopted the ABA's position, i.e., "such notification does not constitute a communication between the lawyer and the juror or prospective juror" as opposed to a "friend" request, which would be impermissible.[129]

According to ABA Formal Op. 466, this type of notice is "akin to a neighbor's recognizing a lawyer's car driving down the juror's street and telling the juror that the lawyer had been seen driving down the street."[130] Yet, this view has been criticized on the basis of the possible impact such communication might have on a juror's state of mind and has been deemed more analogous to the improper communication where, for instance, "[a] lawyer purposefully drives down a juror's street, observes the juror's property (and perhaps the juror herself), and has a sign that says he is a lawyer and is engaged in researching the juror for the pending trial, knowing that a neighbor will see the lawyer and will advise the juror of this drive-by and the signage."[131]

Under ABA Formal Op. 466, a lawyer must: (1) "be aware of these automatic, subscriber-notification features" and (2) make sure "that their review is

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127 If a lawyer logs into LinkedIn and clicks on a link to a LinkedIn profile of a juror, an automatic message may be sent by LinkedIn to the juror whose profile was viewed, advising of the identity of the LinkedIn subscriber who viewed the juror's profile. For that reviewer's profile not to be identified through LinkedIn, that person must change his or her settings so that he or she is anonymous or, alternatively, be fully logged out of his or her LinkedIn account.

128 ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 466 (emphasis added).

129 D.C. Bar Legal Ethics Comm., Formal Op. 371; *see also* Colo. Bar Ass'n Ethics Comm., Formal Op. 127.

130 ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 466 (2014); *see also* Pa. Bar Ass'n Ethics Comm., Formal Op. 2014-300 (2014) ("There is no *ex parte* communication if the social networking website independently notifies users when the page has been viewed.").

131 *See* Mark A. Berman, Ignatius A. Grande, & Ronald J. Hedges, *Why American Bar Association Opinion on Jurors and Social Media Falls Short*, NEW YORK LAW JOURNAL (May 5, 2014).

purposeful and not crafted to embarrass, delay, or burden the juror or the proceeding."[132] Moreover, ABA Formal Op. 466 suggests that "judges should consider advising jurors during the orientation process that their backgrounds will be of interest to the litigants and that the lawyers in the case may investigate their backgrounds," including a juror's or potential juror's social media presence.[133]

New York guidance similarly holds that, when reviewing social media to perform juror research, a lawyer needs to perform such research in a way that does not leave any "footprint" or notify the juror that the lawyer or her agent has been viewing the juror's social media profile.[134]

The New York opinions cited above draw a distinction between public and private juror information.[135] They opine that viewing the public portion of a social media profile is ethical as long as there is no notice sent to the account holder indicating that a lawyer or her law firm viewed the juror's profile, assuming other ethics rules are not implicated. Such opinions, however, have not taken a definitive position that such unintended automatic contact is subject to discipline.

The American Bar Association and New York opinions, however, have not directly addressed whether a lawyer may non-deceptively view a social media account that, from a prospective or sitting juror's view, is putatively private, which the lawyer has a right to view, such as through an alumni social network in which both the lawyer and juror are members or where access can be obtained by being a "friend" of a "friend" of a juror on Facebook.

Guideline No. 6.C: Deceit Shall Not Be Used to View a Juror's Social Media

A lawyer may not make misrepresentations or engage in deceit in order to be able to view the social media profile of a prospective juror or sitting juror, nor may a lawyer direct others to do so.

NYRPC 3.5, 4.1, 5.3, 8.4.

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132 ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 466 (2014).

133 *Id.*

134 *See* NYCBA, Formal Op. 2012-2; NYCLA, Formal Op. 743; SOCIAL MEDIA JURY INSTRUCTIONS REPORT, NYSBA COMMERCIAL AND FEDERAL LITIGATION SECTION (2015).

135 *Id.*

Comment: An "attorney must not use deception—such as pretending to be someone else—to gain access to information about a juror that would otherwise be unavailable."[136]

"Subordinate lawyers and nonlawyers performing services for the lawyer must be instructed that they are prohibited from using deception to gain access" to portions of social media accounts not otherwise accessible to the lawyer.[137]

Guideline No. 6.D: Juror Contact During Trial

After a juror has been sworn in and throughout the trial, a lawyer may view or monitor the social media profile and posts of a juror provided that there is no communication (whether initiated by the lawyer or her agent or automatically generated by the social media network) with the juror.

NYRPC 1.1, 3.5, 4.1, 5.3, 8.4.

Comment: The concerns and issues identified in the comments to Guideline No. 6.B are also applicable during the evidentiary and deliberative phases of a trial.

Yet, these later litigation phases present additional issues, such as a lawyer wishing to monitor juror social media profiles or posts in order to determine whether a juror is failing to follow court instructions or engaging in other improper behavior. However, the risks posed at this stage of litigation are greater than during the jury selection process and could result in a mistrial.[138]

> [W]hile an inadvertent communication with a venire member may result in an embarrassing revelation to a court and a disqualified panelist, a communication with a juror during trial can cause a mistrial. The Committee therefore re-emphasizes that it is the attorney's duty to understand the functionality of any social media service she chooses to utilize and to act with the utmost caution.[139]

ABA Formal Op. 466 permits passive review of juror social media postings, even when an automated response of a reviewer's Internet "presence" is sent to the

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136 *See* NYCBA, Formal Op. 2012-2.

137 Colo. Bar Ass'n Ethics Comm., Formal Op. 127.

138 Rather than risk inadvertent contact with a juror, a lawyer wanting to monitor juror social media behavior might consider seeking a court order clarifying what social media may be accessed.

139 *See* NYCBA, Formal Op. 2012-2 (2012).

juror during trial, absent court instructions prohibiting such conduct.[140] In one New York case, a lawyer's review of a juror's LinkedIn profile during a trial almost led to a mistrial. During the trial, a juror became aware that an attorney from a firm representing one of the parties had looked at the juror's LinkedIn profile. The juror brought this information to the attention of the court, stating "the defense was checking on me on social media" and also asserted, "I feel intimidated and don't feel I can be objective."[141] This case demonstrates that a lawyer must use caution in conducting social media research of a juror because even inadvertent communications with a juror presents risks.[142]

It might be appropriate for counsel to ask the court to advise both prospective and sitting jurors that their social media activity may be researched by attorneys representing the parties. Such instruction might include a statement that it is not inappropriate for an attorney to view jurors' public social media. As noted in ABA Formal Op. 466, "[d]iscussion by the trial judge of the likely practice of trial lawyers reviewing juror ESM during the jury orientation process will dispel any juror misperception that a lawyer is acting improperly merely by viewing what the juror has revealed to all others on the same network."[143]

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140 *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 466; D.C. Bar Legal Ethics Comm., Formal Op. 371.

141 *See* Richard Vanderford, *LinkedIn Search Nearly Upends BofA Mortgage Fraud Trial*, LAW360 (Sept. 27, 2013).

142 *See id.*

143 ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 466.

Guideline No. 6.E: Juror Misconduct

If a lawyer learns of possible juror misconduct, whether as a result of reviewing a sitting juror's social media profile or posts, or otherwise, she must promptly bring it to the court's attention.[144]

NYRPC 3.5, 8.4.

Comments: An attorney faced with potential juror misconduct is advised to review the ethics opinions issued by her controlling jurisdiction, as the extent of the duty to report juror misconduct varies among jurisdictions. For example, ABA Formal Op. 466 pertains only to criminal or fraudulent conduct by a juror, rather than the broader concept of improper conduct. Opinion 466 discusses a lawyer's obligation to take remedial steps, "including, if necessary, informing the tribunal when the lawyer discovers that a juror has engaged in criminal or fraudulent conduct related to the proceeding."[145]

New York, however, provides that "[a] lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror, or by another toward a member of the venire or a juror or a member of his or her family of which the lawyer has knowledge."[146] If a lawyer learns of "juror misconduct" due to social media research, he or she "must" promptly notify the court.[147] "Attorneys must use their best judgment and good faith in determining whether a juror has acted improperly; the attorney cannot consider whether the juror's improper conduct benefits the attorney."[148]

In *People v. Jimenez*, 159 A.D.3d 574 (1st Dept. 2018), "[a]fter a jury note revealed that a juror had conducted online research on false confessions and

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144 *See* NYCLA, Formal Op. 743; NYCBA, Formal Op. 2012-2; SOCIAL MEDIA JURY INSTRUCTIONS REPORT, NYSBA COMMERCIAL AND FEDERAL LITIGATION SECTION (2015).

145 ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 466; *see also* D.C. Bar Legal Ethics Comm., Formal Op. 371 (the determination of "[w]hether and how such misconduct must or should be disclosed to a court is beyond the scope" of the ethical rules, except in instances "clearly establishing that a fraud has been perpetrated upon the tribunal.")

146 NYRPC 3.5(d).

147 NYCBA, Formal Op. 2012-2; *see also* SOCIAL MEDIA JURY INSTRUCTIONS REPORT, NYSBA COMMERCIAL AND FEDERAL LITIGATION SECTION (2015).

148 NYCBA, Formal Op. 2012-2; *see* Pa. Bar Assn, Ethics Comm., Formal Op. 2014-300 ("[A] lawyer may be required to notify the court of any evidence of juror misconduct discovered on a social networking website.").

shared it with the rest of the jury," the Appellate Division concluded that the lower court had "providently exercised its discretion in denying defendant's request to discharge the offending juror and concomitantly declare a mistrial." The Appellate Division also found that the lower court had taken "adequate curative measures by thoroughly admonishing the jury to disregard the information obtained by a juror, not to conduct any outside research, and to decide the case solely based on the evidence presented at trial."[149]

149 *See*, with regard to juror misconduct that led to reversal of a conviction and a new trial, *People v. Neulander*, 162 A.D.3d 1763 (4th Dept. 2018), *appeal pending*.

7. USING SOCIAL MEDIA TO COMMUNICATE WITH A JUDICIAL OFFICER

A lawyer shall not communicate with a judicial officer over social media if the lawyer intends to influence the judicial officer in the performance of his or her official duties.

NYRPC 3.5, 8.2 and 8.4.

Comment: There are few New York ethical opinions addressing lawyers' communication with judicial officers over social media, and ethical bodies throughout the country are not consistent when opining on this issue. However, lawyers should consider that any such communication can be problematic because the "intent" of such communication by a lawyer will be judged under a subjective standard, including whether reposting a judge's posts would be improper.

A lawyer may connect or communicate with a judicial officer on "social media websites provided the purpose is not to influence the judge, and reasonable efforts are taken to ensure that there is no ex parte or other prohibited communication,"[150] which is consistent with NYRPC 3.5(a)(1) which forbids a lawyer from "seek[ing] to or caus[ing] another person to influence a judge, official or employee of a tribunal."[151]

It should be noted that New York Advisory Committee on Judicial Ethics Opinion 08-176 provides that a judge who otherwise complies with the Rules Governing Judicial Conduct "may join and make use of an Internet-based social network. A judge choosing to do so should exercise an appropriate degree of discretion in how he/she uses the social network and should stay abreast of the features of any such service he/she uses as new developments may impact his/her duties under the Rules."[152] New York Advisory Committee on Judicial Ethics Opinion 08-176 further opines that:

> [A] judge also should be mindful of the appearance created when he/she establishes a connection with an attorney or anyone else appearing in the judge's court through a social network. In some ways, this is no different from adding the person's contact information into the judge's Rolodex or address book or speaking to them in a public setting. But, the public nature of such a link (i.e., other users can normally see the judge's friends or connections) and the increased access that the person would have to any personal

150 Pa. Bar Ass'n Ethics Comm., Formal Op. 2014-300.

151 NYRPC 3.5(A)(1).

152 N.Y. Advisory Comm. on Judicial Ethics, Op. 08-176 (2009).

> information the judge chooses to post on his/her own profile page establish, at least, the appearance of a stronger bond. A judge must, therefore, consider whether any such online connections, alone or in combination with other facts, rise to the level of a "close social relationship" requiring disclosure and/or recusal.

Furthermore, New York Advisory Committee on Judicial Ethics Opinion 13-39 concludes that "the mere status of being a 'Facebook friend,' without more, is an insufficient basis to require recusal. Nor does the committee believe that a judge's impartiality may reasonably be questioned (*see* 22 NYCRR 100.3[E][1]) or that there is an appearance of impropriety (*see* 22 NYCRR 100.2[A]) based solely on having previously 'friended' certain individuals who are now involved in some manner in a pending action."[153]

The New York Advisory Committee on Judicial Ethics opinion is consistent with the Florida Supreme Court's recent holding that a "judge [who] is a Facebook 'friend' with an attorney appearing before the judge, standing alone, does not constitute a legally sufficient basis for disqualification."[154] For state judicial ethics commissions that have considered this issue, the "minority view" is that "Facebook 'friendship' between a judge and an attorney appearing before the judge, standing alone, creates the appearance of impropriety because it reasonably conveys or permits others to convey the impression that they are in a special position to influence the judge in violation of the applicable code of judicial conduct."

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153 N.Y. Advisory Comm. on Judicial Ethics, Op. 13-39 (2013).

154 *See Law Offices of Herssein & Herssein, P.A. v. United Servs. Auto. Ass'n*, No. SC17-1848, 2018 WL 5994243, at *2, 2018 Fla. LEXIS 2209, at *2 (Fla. Nov. 15, 2018) (collecting cases consistent with N.Y. Advisory Comm. on Judicial Ethics Op. 13-39).

APPENDIX – Social Media Definitions

This appendix contains a collection of popular social technologies and terminology, both general and platform-specific, and is designed for attorneys seeking a basic understanding of the social media landscape.

A. Social Technologies

Facebook: an all-purpose platform that connects users with friends, family, and businesses from all over the world and enables them to post, share, and engage with a variety of content such as photos and status updates. Founded in 2004, the site now has in excess of 1.5 billion active monthly users.

Instagram: a visually-focused platform that allows users to post photos and videos. Created in 2010, and later purchased by Facebook, it has approximately 500 million active monthly users.

LinkedIn: an employment-based networking platform which focuses on engagement with individuals in their respective professional capacities. Launched in 2002, it now boasts roughly 100 million active monthly users.

Periscope: a video-streaming mobile application that allows users to broadcast live video. Created in 2014, and purchased by Twitter shortly thereafter, it has in excess of 10 million active monthly users.

Pinterest: a platform that essentially functions as a social scrapbook, allowing users to save and collect links to share with other users. Started in 2010, it has in excess of 100 million active monthly users, majority of whom are female.

Reddit: a social news and entertainment website where all content is user-submitted and the popularity of each post is voted upon by the user base itself. Created in 2005, it has more than 240 million active monthly visitors.

Snapchat: an image messaging application that allows users to send and receive photos and videos known as "snaps," which are hidden from the recipients once the time limit expires. Officially released in September 2011, it has in excess of 200 million active monthly users.

Tumblr: a microblogging platform that allows users to post text, images, video, audio, links, and quotes to their blogs. It was created in 2007 and has more than 500 million active monthly users.

Twitter: a real-time social network that allows users to share updates that are limited to 140 characters. Founded in 2006, it has more than 315 million active monthly users.

Venmo: a peer-to-peer payment system where users send money from their bank or credit/debit card to another member. Introduced in 2009, and acquired by PayPal in 2013, it handles approximately 10 billion dollars of social transactions per year.

Waze: a social-based GPS platform that is based upon crowd sourcing of events such as accidents and traffic jams from its user base. Founded in 2008, and purchased by Google in 2013, it has 50 million active users.

WhatsApp: a cross-platform instant messaging service that allows users to exchange text, images, video, and audio messages for free. Launched in January 2010, and acquired by Facebook in 2014, it now has more than 1 billion users.

B. Social Terminologies

Add: Process on Snapchat of subscribing to another user's account in order to receive access to their content. This is a "unilateral connection" that does not provide dual-access to both users' content or require the second user to expressly approve or deny the first user's access.

Automatic Notification: An automatic message sent by the social media platform to the person whose account is being viewed by another. This message may indicate the identity of the person viewing the account as well as other information about such person.

Bilateral Connection: A two-way connection between users. That is, for one user to connect with a second, the second user must expressly accept or deny the first user's access.

Block: Refers to a user's option to restrict another's ability to interact with the user and/or the user's content on a given platform.

Connections: Term used on LinkedIn to describe the relationship between two users, indicated by varying degrees.

- **1st Degree Connection**: Those who have bilaterally agreed to share and receive exclusive content from one another beyond those available to the LinkedIn community at large.
- **2nd Degree Connection**: Those who share a mutual 1st degree connection but are not themselves directly connected.
- **3rd Degree Connection**: Those who share a mutual 2nd degree connection but are not themselves directly connected.

Cover Photo: A large, horizontal image at the top of a user's Facebook profile. Similar to a profile photo, a cover photo is public.

Direct Message: Private conversations that occur on Twitter. Both parties must be following one another in order to send or receive messages.

Facebook Live: A feature on Facebook that allows users to stream live video and interact with viewers in real-time.

Fan: A user who follows and receives updates from a particular Facebook page. The user must "like" the page in order to become a fan of it.

Favorite: An indication that someone "likes" a user's post on Twitter, given by clicking the star icon.

Filter: An aesthetic overlay that can be applied to a photo or video.

Follow: Process of subscribing to another user in order to receive access to their content. This is a unilateral connection as it does not provide access to one's own content.

Follower: Refers to a user who subscribes to another user's account and thereby receives access to the latter's content.

Following: Refers to those accounts that a particular user has subscribed to in order to view and/or receive updates about the content of those accounts.

Friend: Refers to those users on Facebook who bilaterally agreed to provide access to each other's account beyond those privileges afforded to the Facebook community at large. "Friend" may also create a publicly viewable identification of the relationship between the two users. "Friending" is the term used by Facebook, but other social media networks use analogous concepts such as "Follower" on Twitter or "Connections" on LinkedIn.

Friending: The process through which the member of a social media network designates another person as a "friend" in response to a request to access Restricted Information. "Friending" may enable a member's "friends" to view the member's restricted content.

Geofilter: A type of Snapchat filter that is specific to a certain location or event and is only available to users within a certain proximity to said location or event.

Handle: A unique name used to refer to a user's account on a given platform.

Hashtag: Mechanism used to group posts under the same topic by using a specific word preceded by the # symbol.

Home Page: Section of Instagram users' accounts where they can see all the latest updates from those who they are following.

Lenses: Used on Snapchat to allow users to add animated masks to their postings and stories.

Like: An understood expression of support for content. The amount of likes received is generally tied to the popularity of a given post.

News Feed: Section of Facebook users' accounts where they can see all the latest updates from those accounts which they are subscribed to, *e.g.*, their friends.

Notification: A message sent by a given platform to a user to indicate the presence of new social media activity.

Pinboard: The term used on Pinterest for a collection of "pins" that can be organized by any theme of a user's choosing.

Posting or Post: Uploading content to a social media network. A post contains information provided by the person, and specific social media networks may use their own term equivalent to a post (*e.g.*, "Tweets" on Twitter).

Privacy Settings: Allow a user to determine what content other users are able to view and who is able to contact them.

Private: State of a social media account (or a particular post) that, because of heightened privacy settings, is hidden from the general public.

Profile: Accessible information about a specific social media member. Some social media networks restrict access to members while other networks permit a member to restrict, in varying degrees, a person's ability to view specified aspects of a member's account or profile. A profile

contains, among other things, biographical and personal information about the member. Depending on the social media network, a profile may include information provided by the member, other members of the social media network, the social media network, or third-party databases.

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Status: The term for a user posting to the user's own page which is simultaneously published on the home page of a particular site, *e.g.*, Facebook's News Feed.

Story: The term used on Snapchat and Instagram for a designated string of images or videos that only are accessible for a period of 24 hours.

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SOCIAL MEDIA JURY INSTRUCTIONS REPORT

OF THE

COMMERCIAL AND FEDERAL LITIGATION SECTION

OF THE

NEW YORK STATE BAR ASSOCIATION

DECEMBER 8, 2015

James M. Wicks, Section Chair
Mark A. Berman, Co-Chair of the Social Media Committee
Ignatius A. Grande, Co-Chair of the Social Media Committee

Opinions expressed are those of the Section and do not represent those of the New York State Bar Association unless and until the report has been adopted by the Association's House of Delegates or Executive Committee.

PREPARED BY

THE SOCIAL MEDIA COMMITTEE OF THE COMMERCIAL AND FEDERAL LITIGATION SECTION

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I. INTRODUCTION

> Technology is so ubiquitous. For many people, it's their way of life. They tweet, they blog, they look up things online. It's literally in their pocket. It's their routine. You can't just tell people they can't do this and that. You have to tell them why and the consequences.[1]

Social media has revolutionized how we communicate. It routinely serves as both a means of communication and a source of information for jurors and counsel. Its use must be anticipated and its impact addressed during jury selection, at trial, prior to and during jury deliberations, and after trial.[2] This report examines how jurors and attorneys use social media and its possible impact on jury trials and on our judicial system.

The use of social media by jurors and attorneys has been addressed in a 2014 Federal Judicial Center Report, entitled "*Jurors' and Attorneys' Use of Social Media During Voir Dire, Trials, and Deliberations*," A Report to the Judicial Conference Committee on Court Administration and Case Management (the "FJC Report"). In addition, in 2014-15, the Commercial and Federal Litigation Section (the "Section") of the New York State Bar Association surveyed its members concerning the use of social media at trial. Prior to developing its recommendations relating to social media jury admonitions, the Section analyzed the results of its survey and reviewed the analyses contained in the FJC Report, which sets out some of the measures used by federal judges to deal with the use of social media by jurors.

A. Jurors' Use of Social Media

During trial and deliberations, jurors have been found to have: (1) performed their own Internet research concerning the case; (2) communicated with parties, witnesses, experts and/or counsel using social media; (3) used emails, blogs, texts, tweets, and chat rooms, among other electronic media, to communicate their opinions and prejudices about the case on which they are sitting; (4) not followed jury instructions as evidenced by their social media communications; (5) intentionally or unwittingly failed to disclose "prejudicial" connections to parties, witnesses, counsel or others as evidenced by jurors' social media communications; and (6) otherwise engaged in misconduct through the use of social media technology. Such conduct, which is now often easily discoverable, may make its way to trial counsel who then may question the integrity

[1] Eric Robinson, Deputy Director of the Reynolds Center for Courts and Media, University of Nevada, Reno, *Juror's Research Led to Murder Mistrial*, STANDARDSPEAKER.COM (Jan. 17, 2011). http://standardspeaker.com/news/juror-s-research-led-to-murder-mistrial-1.1091278

[2] *See United States v. Fumo*, 655 F.3d 288, 305, 331 (3d Cir. 2011) (Nygaard, J., concurring) ("The availability of the Internet and the abiding presence of social networking now dwarf the previously held concern that a juror may be exposed to a newspaper article or television program."); *United States v. Juror No. One*, 866 F. Supp. 2d 442, 451 (E.D. Pa. 2011) ("the extensive use of social networking sites, such as Twitter and Facebook, have exponentially increased the risk of prejudicial communication amongst jurors and opportunities to exercise persuasion and influence upon jurors.").

of jury verdicts.[3] As such, the use of the Internet and social media by jurors has increasingly resulted in mistrials and jurors being held in contempt.

Given that jurors use electronic devices and social media in their daily lives, explicit rules concerning jurors' social media usage are required to ensure that social media is not misused during trial.[4] Such rules are needed as it is just too easy and too convenient for even conscientious and careful jurors to misuse social media perhaps on the way to the courthouse, while waiting for the trial to begin, during breaks, and during deliberations. The risk that improper social media communications may occur can be reduced through frequent admonitions during *voir dire* and trial,[5] and appropriate jury instructions using plain language.[6]

[3] Even lawyers fail to observe court admonitions. Notwithstanding that there was a four-foot sign posted outside the courtroom warning that "photographing, recording or broadcasting is prohibited," an attorney from the spectator's gallery took pictures of evidence which he then tweeted, and may face possible sanctions for violating the ban on photography and cellphone use in the courtroom. *See* Debra Cassens Weiss, BigLaw Partner Faces Possible Sanction for Tweeting Photos During Trial, ABA JOURNAL (Nov. 10, 2015 7:49 AM). http://www.abajournal.com/news/article/biglaw_partner_faces_possible_sanction_for_tweeting_photos_during_trial/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email.

[4] As courts have become increasingly aware – and wary – of jurors using social media and other Internet tools to communicate to or from the courthouse or do research into cases during trial or deliberations, several jurisdictions have adopted or proposed model jury instructions which explicitly tell jurors not to access information about cases on the Internet, or discuss the case on the Internet or social media.

Eric P. Robinson, *Jury Instructions for the Modern Age: A 50-State Survey of Jury Instructions on Internet and Social Media*, 1 Reynolds Courts & L.J., 307, 310 (Sept., 2011). http://issuu.com/rnccm/docs/jury_instructions_for_the_modern_age.

[5] Here, while the district court gave an appropriate instruction at the start of the jury's deliberations, it does not appear that it did so earlier. As demonstrated by this case, instructions at the beginning of deliberations may not be enough. We think it would be wise for trial judges to give the Committee's proposed instructions both at the start of trial and as deliberations begin, and to issue similar reminders throughout the trial before dismissing the jury each day. While situations like the one in this case will not always require a new trial, it is the better practice for trial judges to be proactive in warning jurors about the risks attending their use of social media.

United States v. Ganias, 755 F.3d 125, 133 (2d Cir. 2014), *reh'g granted en banc*, 791 F.3d 290 (June 29, 2015).

As explained below, the results show a small but significant number of jurors who were tempted to communicate about the case through social media. Almost all of these jurors ultimately decided not to do so because of the court's social-media instruction. Even jurors who were not tempted to communicate about the case through social media indicated that the court's instruction was effective in keeping their temptation at bay.

Hon. Amy J. St. Eve, Hon. Charles P. Burns, & Michael A. Zuckerman, *More From The #Jury Box: The Latest On Juries And Social Media*, 12 Duke L. & Tech. Rev. 64, 78 (2014). http://dltr.law.duke.edu/2014/02/24/the-jury-box/.

[6] United States Courts, *Revised Jury Instructions Hope to Deter Juror Use of Social Media During Trial* (Aug. 21, 2012)("[J]udges recommended that jurors frequently be reminded about the prohibition on social media before the trial, at the close of a case, at the end of each day before jurors return home, and other times, as appropriate."). http://www.uscourts.gov/news/2012/08/21/revised-jury-instructions-hope-deter-juror-use-social-media-during-trial.

It has been argued that advising jurors that attorneys or their agents may have investigated juror backgrounds and/or may monitor their "public" social media posts throughout the trial and deliberations may upset jurors or cause them to think that their privacy is being invaded, both of which, in turn, may discourage jury service. There is a fine line which needs to be considered in how to appropriately instruct jurors about the social cost to the efficacy of the jury system resulting from improper social media communications relating to a trial and jurors' right to freely communicate in a manner that they do every day. We note in this regard that the American Bar Association Standing Committee on Ethics and Responsibility stated:

> **[J]udges should consider advising jurors during the orientation process that their backgrounds will be of interest to the litigants and that the lawyers in the case may investigate their backgrounds, including review of their [electronic social media] and websites**.[7]

(emphasis added).

Some have also argued that instructing jurors that their social media communications may not be "public" may have the opposite of the desired effect of decreasing such communications and may actually increase the likelihood that certain jurors may instead make their previously "public" social communications "private," and thus not easily discoverable, or cause jurors to potentially engage in "undetectable" misconduct that they may not have otherwise considered.

Further research and data is needed in this relatively unexplored area before the Section takes a position on whether the above issues need to be specifically addressed with the jury, and, if so, what form such admonitions should take. However, the Section believes that these issues should at least be addressed with counsel at the beginning of the trial and prior to the jury being charged.

Putting aside issues relating to notifying jurors of potential attorney monitoring of their social media communications and the implications of communicating "publicly" as opposed to "privately" over social media, the Section believes that the increasing pervasive usage of social media by jurors requires affirmative and proactive intervention by reminding jurors not to engage in improper electronic communications. Without such proactive intervention, social media usage will threaten the integrity of the jury system.[8]

[7] ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 466 (2014). http://www.americanbar.org/content/dam/aba/publications/YourABA/fo466.authcheckdam.pdf.

[8] To tackle the rising tide of jury misconduct related to oversharing on the Web, a recently published report urged the judiciary to "hit social media on its head" by insisting on online silence during jury instructions. Roughly one in 12 jurors in Illinois surveyed about their attitudes regarding using social media tools like Twitter in the course of a trial were "tempted" to publicize their thoughts on the proceedings, according to the report by U.S. District Judge Amy St. Eve of the Northern District of Illinois.

Real risks are associated with juror misuse of social media during a trial. Relying on jurors to assume that a general jury instruction applies to all aspects of social media communications seems ineffective. Jurors should be provided with a detailed explanation of the dangers of using social media during the trial. Among the reasons for a ban on social media during the trial is the need to exclude information not properly admitted as evidence for the jury's consideration. Social media communications are external influences that can both consciously and unconsciously influence a juror's ability to evaluate the evidence in a particular case. If the significance of inappropriate social media communications is not sufficiently explained to jurors, admonitions and jury instructions – no matter how often a judge gives them – may not have their desired effect. Without personalizing the consequences[9] of a juror's improper usage of social media too much by, for instance, affirmatively advising of the possibility of contempt or sanctions and thereby potentially discouraging jury service, jurors must be made aware in admonitions of the seriousness of such conduct and that denying parties their right to be tried based on admitted evidence creates the risk of a mistrial.

B. Use of Social Media by Attorneys to Investigate and Monitor Jurors

The issue of whether jurors should be made aware that attorneys may have investigated their backgrounds or may monitor their "public" use of social media during trial or deliberations needs to be continued to be reviewed.

It is well known that jurors often regard their social media communications as "private" even when they are "public," as users may not understand the privacy setting of their social media services or that posts may be shared in ways that make their "private" posts "public," and that such communications are increasingly becoming known to counsel, their agents and the court. Even in the absence of detailed juror research on the issue of whether such an instruction should be given as a matter of course, the Section believes that consideration should be given to apprising jurors, on a case-by-case basis, of the reality that many social media communications are "publicly" viewable.

Concomitantly, consideration also must be given whether to advise jurors that counsel may have researched them and that during trial and/or jury deliberations counsel may continue to view, monitor or "follow" juror "public" social media communications.[10]

Andrew Strickler, *Jurors Must Be Warned About Social Media Use, Study Says*, LAW360, (March 18, 2014, 6:42 PM). http://www.law360.com/articles/519752/jurors-must-be-warned-about-social-media-use-study-says.

[9] *See supra* note 6, "A [Federal] Judicial Conference Committee has updated the model set of jury instructions federal judges use to deter jurors from using social media to research or communicate about cases on which they serve. The new guidelines provide detailed explanations of the consequences of social media use during a trial, along with recommendations for repeated reminders of the ban on social media usage."

[10] Ass'n of the Bar of the City of New York Comm. on Prof'l Ethics Formal Op. 2012-2 (2012)("[i]t is conceivable that even jurors who understand that many of their social networking posts and pages are public may be discouraged from jury service by the knowledge that attorneys and judges can and will conduct active research on them or learn of their online - albeit public - social lives."). http://www.nycbar.org/ethics/ethics-opinions-local/2012opinions/1479-formal-opinion-2012-02.

A social media site also may enable an account user to see who has viewed their social media profile or may automatically send a notification noting the viewer's identity to the account holder.[11] While such notifications to jurors during trial and/or deliberations do not appear to be widespread, the Section believes that consideration should be given to advising jurors, on a case-by-case basis, of such potential to attempt to minimize the surprise a juror might feel if she learns that an attorney sitting nearby in the courtroom has reviewed her "public" social media posts.

Regardless of whether or to what extent a jury admonition or instruction is given to the jury concerning the potential for lawyers to review or monitor juror "public" social media, consistent with the judicial survey results reported in the FJC Report discussed below, the Section believes that, at a minimum, judges should consult with and address these issues with counsel prior to jury selection and determine whether or not any such instructions or admonitions are appropriate on a case-by-case basis concerning whether counsel will review and/or monitor "public" juror social media communications during jury selection, trial and/or deliberations, and, if so, discuss, for instance, such potential issues as: (i) what social media services will be reviewed; (ii) whether counsel or her reviewing agent is a member of each such social media service, and will they be logged in when such monitoring takes place; and (iii) whether, other than evidence of jury misconduct, the results of such monitoring will be shared with opposing counsel and/or the court during the various stages of the trial.

C. Section Recommendations

To reduce the potential impact of improper social media communications on jury trials, the Section recommends that courts, as discussed above, should: (1) consult with counsel prior to jury selection concerning the potential review and/or monitoring of "public" juror social media communications during jury selection, trial and/or deliberations; (2) consider the Section's revised model New York's Pattern Jury Instructions; and (3) consider displaying in the jury deliberation room a social media usage poster warning of the consequences of improper social media communications.

The objective of the Section's proposed model admonitions to New York's Pattern Jury Instructions is to better inform jurors about the dangers of discussing the trial on social media and to remove social media influences from deliberations.

Accordingly, the Section proposes that courts should consider amending their jury instructions to be more specific about the problems associated with the use of social media at trial. And without taking a position on whether such instructions must be given, the Section provides a proposed model instruction for consideration and use in the event that the court decides to advise jurors that: (i) their social media profiles, even though they might appear to be "private," may actually be "publically" reviewable by others, or (ii) their "public" social media communications may have been or will be viewed and/or may be or will be monitored or

[11] LinkedIn is the primary social media platform that currently has this feature. If a viewer is logged in and her account is left to the LinkedIn default settings, the viewing of a LinkedIn profile may cause the person whose page has been viewed to receive a notification that her profile had been viewed by the viewer, who may be an attorney or an agent of the attorney.

"followed" by counsel during trial and afterwards.[12] We note that the Section's proposed model language in this regard, if adopted, may be one of the first of its kind in the country. The bracketed language in the Section's model instructions seeks to address the above.

The desired effect of the Section's model language is in part to cause jurors to be as forthright as possible when answering questions during *voir dire* about personal or sensitive areas that counsel should be informed about that would otherwise be prejudicial to the trial, but which may have already been revealed to some degree in jurors' extant "public" social media postings. More candid juror responses may also have the salutary effect of educating counsel whether certain jurors should not be chosen given their manner and usage of social media. In addition, such suggested admonitions would hopefully discourage jurors from engaging in inappropriate social media communications that might taint jury deliberations. The Section does appreciate, however, that such admonitions may provide some degree of pause for people wanting to avoid serving as a juror.

The suggested revisions would need to be tailored to the mores of the region of New York where the trial is being held and to the particular idiosyncrasies of the trial. The Section appreciates and acknowledges that judges are generally comfortable with the "tried and true" New York Pattern Jury Instructions which have been honed over the years by experienced judges, who then customize such jury instructions based on personal experience.

However, the Section believes that with the ubiquity of juror and attorney social media and mobile device usage and where the judiciary may not be as knowledgeable as counsel and jurors with respect to the use of social media and similar tools, such as blogging, standard jury instructions must deal with this reality. As such, the Section's proposed revisions are suggested additions to the extant model Pattern Jury Instructions and should be used as a framework when crafting jury instructions in this new electronic era.

In addition to the suggested changes to the language of New York's Pattern Jury Instructions, the Section recommends that a poster regarding social media usage be prominently displayed in jury deliberation rooms. The purpose of this poster is to further remind jurors of the potential risks – and ensuing consequences – of unauthorized social media use related to the trial.

The suggested changes to the standard jury instructions, along with the poster, would hopefully provide appropriate reminders to jurors while they are in the courtroom concerning the proper and improper use of social media.

The objective of the Section's recommendations is to ensure the integrity of our jury system.

[12] *See* Colorado Bar Ass'n, Formal Ethics Op. 127 (2015)("[e]ven if communication with a discharged juror is not otherwise prohibited, lawyers and those acting on their behalf must respect the desire of the juror not to talk with the lawyer and may not engage in improper conduct during any communications through social media."). https://www.cobar.org/repository/Ethics/FormalEthicsOpion/FormalEthicsOpinion_127.pdf.

II. A SYNOPSIS OF THE FEDERAL JUDICIAL CENTER'S REPORT: "JURORS' AND ATTORNEYS' USE OF SOCIAL MEDIA DURING VOIR DIRE, TRIALS, AND DELIBERATIONS"

The Federal Judicial Center issued a May 1, 2014 report entitled "*Jurors' and Attorneys' Use of Social Media During Voir Dire, Trials, and Deliberations*," A Report to the Judicial Conference Committee on Court Administration and Case Management (FJC Report).[13]

The FJC Report summarized its conclusions by stating that "detected social media use by jurors is infrequent and that most judges have taken steps to ensure jurors do not use social media in the courtroom."[14]

All active and senior federal district judges were sent a survey addressing the use of social media. Questions in the survey addressed judicial practices used to control juror social media usage, judicial views on the utility and extent of social media investigation of jurors during *voir dire*, and whether such investigations raised concerns or genuine difficulties. Four hundred and ninety-four federal district court judges responded to the survey.

A. Jurors' Use of Social Media During Trial

The FJC Report acknowledges that it is difficult for judges to police juror social media usage. The most common strategies that judges applied were preventive: explaining the reasons behind the ban on improper social media use in plain language, and incorporating directions on social media usage into jury instructions.

In total, 33 judges reported instances of detected social media usage by jurors during trial or deliberations, with the majority taking place during criminal trials. The detected prohibited uses of social media took several forms:[15]

- 6 judges reported that a juror divulged confidential information about the case;
- 5 judges reported a juror performing case-related research;
- 3 judges reported a juror sharing general jury service information;
- 3 judges reported that a juror communicated or attempted to communicate directly with case participants;

[13] Megan Dunn, Federal Judicial Center. http://www.fjc.gov/public/pdf.nsf/lookup/jurors-attorneys-social-media-trial-dunn-fjc-2014.pdf/$file/jurors-attorneys-social-media-trial-dunn-fjc-2014.pdf.

[14] *Id.* at 3.

[15] Surveyed judges could select more than one behavior in many questions, thus, the number of behaviors/incidents/issues identified exceeded number of respondents.

- 2 judges reported that a juror revealed aspects of the deliberation process;

- 1 judge reported a juror "friending" or an attempt to "friend" participants in the case; and

- 1 judge reported a juror texting.

Twenty-seven judges indicated how they had learned of the inappropriate use of social media by jurors: 12 reported that other jurors had alerted the court; 8 reported that attorneys had advised the court; 6 reported that the court was advised by court staff; 1 reported that the court was advised by a party; 1 observed the social media use through personal observation in court; and 3 learned of the behavior through post-trial motions.

The FJC Report indicated that, when a judge became aware of a juror's use of social media in his or her courtroom, 70% of the judges cautioned the juror, but allowed him or her to remain on the jury, and 30% percent of the judges removed the juror.

The most common measures used by judges to prevent inappropriate social media usage were (in descending order):

- explain in plain language the reason behind the ban of social media (74%);

- instruct jurors at multiple points throughout the trial (70%);

- remind jurors at *voir dire* to refrain from using social media while serving as a juror (54%);

- use the Committee's model jury instructions before trial (53%);

- use other jury instructions before trial (46%);

- use the Committee's model jury instructions before deliberations (45%);

- use other jury instructions before deliberations (35%);

- confiscate phones and other electronic devices during deliberation (30%);

- confiscate phones and other electronic devices at the start of each day of trial (22%); and

- require jurors to sign a statement of compliance or written pledge agreeing to refrain from using social media while serving as a juror (2%).

In addition, some judges reported that they posted a notice in the jury assembly or deliberation room regarding the use of social media.

B. Judicial Knowledge of Attorneys' Use of Social Media During Trial

The FJC Report asked judges about whether and how attorneys used social media to investigate jurors during *voir dire*. Seventy-three percent of responding judges answered that they did not know how many of their trials during the relevant period involved attorneys performing social media investigations of jurors. Further, approximately 91% of the 329 responding judges indicated that they were unaware of what type(s) of juror social media that attorneys reviewed, if any. The remaining judges indicated that attorneys reviewed prospective jurors' Facebook pages (5%), LinkedIn profiles (2%), personal blogs/websites (2%), or ran prospective jurors' names through a search engine such as Google or Bing (5%).

Approximately 26% of judges surveyed forbade attorneys from using social media to investigate prospective jurors. Overall, judges who did not permit social media investigations cited both juror privacy concerns and logistical considerations. Specifically, 20% indicated they did not allow attorneys to research prospective jurors during *voir dire* in order to protect the jurors' privacy, 4% were worried about intimidating potential jurors, 17% thought such activity would be distracting, and 16% believed that this type of research would prolong *voir dire*. Moreover, one-third of the responding judges indicated that attorneys' use of social media to research jurors during *voir dire* was unnecessary because attorneys can conduct research before they arrive at court or because the information provided during *voir dire* is sufficient.

In addition to privacy and logistical issues, a small number of judges also noted that allowing attorneys to research potential jurors during *voir dire* may create an unfair advantage for one side, and that there is no way to evaluate the accuracy of the information gathered. In contrast to judges who forbade social media usage, of the judges who permitted social media research of potential jurors during *voir dire*: 62% did not require the attorneys to share results with the court or other attorneys; 2% reported that they required attorneys to share results with both the court and other attorneys; and one judge required that the results be shared only with the court. Over one-third of the responding judges, however, did not know whether such information was shared with other attorneys. Judges did not report many problems with attorneys using social media. When asked about attorneys' conduct during *voir dire*, 5% of the 64 responding judges indicated experience with an attorney who followed a prospective juror on Twitter. No judges reported attorneys "friending" or attempting to "friend" a prospective juror on Facebook or "subscribing" to a prospective juror's personal blog.

C. Notifying Jurors of Potential Social Media Investigations by Attorneys

The FJC Report also asked judges "whether they disclosed to the venire panel that attorneys may be looking at their social media accounts."[16] Ninety-four percent reported that they do not disclose such information to potential jurors versus 2% who did make such disclosure. The FJC Report further stated that four judges "admitted that their focus is more on the use of social media by jurors and less on attorneys' actions concerning social media."[17]

[16] FJC Report at 14.

[17] *Id.* at 15.

III. ANALYSIS OF SURVEY OF COMMERCIAL AND FEDERAL LITIGATION SECTION MEMBERS CONCERNING SOCIAL MEDIA USAGE AS IT RELATES TO JURORS

The Section surveyed its members in 2015 concerning attorneys' use of social media as it relates to jurors. The survey was sent electronically to members of the Section and provided to attendees of the Section's 2015 Annual and Spring Meetings.

A limited group of 61 attorneys responded to the survey and, to the extent respondents' cases went to a jury, approximately two-thirds were state court jury trials and approximately one-third was federal court jury trials.

Of those who indicated that their cases went to the jury, the following approximate percentages of respondents indicated "*no*" when asked whether admonitions concerning the use of social media by jurors were given by the court at the below stages of trial:

No admonition given during:	
jury selection or prior to the commencement of trial	37%
the course of the trial, but prior to the case being presented to the jury	42%
jury deliberations	50%

Over 85% of those respondents who indicated that their cases had gone to trial, stated "no" when asked if they were "aware that a member of the jury utilized social media during the course of the trial or during jury deliberations to discuss any aspect of the trial." Of those few who reported the use of social media by a juror, one respondent responded that he or she found such communication by searching Facebook and the other two respondents indicated that such usage was reported to the court by fellow jurors and it concerned the use of Facebook and Twitter. In each case, the court was alerted to such usage and it was dealt with through a *voir dire* of the individual juror and then the jury panel. In addition, in the second case, it was further addressed by an admonition to the jury. In the third instance, the court was only first advised of such usage post-trial.

Over two-thirds of those who responded to the question indicated "no," when asked whether counsel or his or her agent used social media to investigate jurors prior to their being empaneled or to monitor sitting jurors' communications during trial or jury deliberations.

Further, almost all indicated "no" when then asked if their client had engaged in such monitoring of juror social media. When monitoring by an attorney's agent took place, the amount of such monitoring was equally divided among paralegals, investigators and jury consultants. The most common social media platforms used to monitor jurors were Facebook and LinkedIn, followed by Twitter. Every respondent indicated "no" when asked whether any juror had become aware that counsel had monitored his or her social media account(s).

While the survey pool was not very large, certain general preliminary observations can be made from the above. First, courts do not appear to be sufficiently instructing jurors concerning their use of social media and, when admonitions are given to the jury, counsel believe that such admonitions are insufficient.

It is also apparent that trial counsel are not often monitoring jurors' "public" social media and, as recent authority noted herein is making clearer, there is a risk that jurors may improperly use social media during trial and deliberations, and thereby infect jury deliberations. Knowledge of such "public" social media communications could, among other things, affect how an attorney may conduct her trial and/or reveal juror misconduct that might lead to a mistrial. Given existing technology enabling counsel to anonymously monitor jurors' "public" social media, it may be prudent for counsel to consider the benefits, risks and costs of same and discuss juror monitoring with one's clients.

Last, the survey suggests that it may not be necessary to provide an instruction to jurors that trial counsel may be monitoring their "public" social media. In deciding whether to provide such an instruction, a court should consider the potential that a juror may become sufficiently upset upon learning of such monitoring (even though social media users, including jurors, always have the ability to make their posts "private") to discourage jury service or cause potentially improper "public" social media posts to be made "private" and thus not "non-monitorable."

IV. COMMENTARY TO PROPOSED REVISIONS TO NEW YORK'S PATTERN JURY INSTRUCTIONS

A. Proposed Amendments Addressing Technological Changes

There is an ever-growing universe of devices and services that prospective jurors may use on a daily basis to obtain information and communicate with others. Jury instructions must provide guidance concerning these devices and services. However, due to constant changes in technology and the changing popularity of certain devices or services, it would not be practical to address every device or service by name in jury instructions, and listing too many of them would make jury instructions too difficult to absorb. Nevertheless, specific examples should be provided to offer guidance to jurors as to what is impermissible. We address below the general categories of devices and services, referring to certain examples.

Generally, there are three areas of concern: (i) electronic devices, (ii) software or applications, and (iii) social media platforms, blogging and Internet use in general. Examples of electronic devices are computers, tablets (iPad, Surface), cell phones (iPhone, Galaxy, etc.) and wearable devices (Apple Watch). Some devices, like laptops and computers, may be easily seen when used. Others, however, are small enough to be inconspicuous to a judge or to the lawyers, and improving technology will make it even harder for judges or lawyers to notice such devices.

Each device contains an operating system which itself runs software known as applications or "apps" (for example, there are web browser applications, messaging and email applications, word processing software applications, and mapping applications). An application is a type of software designed to allow the user to perform specific tasks. Applications run services, including social media platforms, through which jurors may communicate. Most mobile devices also contain web browsers, from which websites may be accessed and also from which social media platforms can be accessed.

Examples of social media platforms or services are Facebook, Twitter, Google+, Instagram, LinkedIn, and Vine, located respectively at www.facebook.com, www.twitter.com, www.google.com/plus, www.instagram.com, www.linkedin.com and www.vine.co. These social media platforms, whether web-browser based or application-based, are more than mere tools for communication. They may be used to research witnesses and facts concerning a litigation. There are many other forms of Internet-based communication as well, such as blogs.

To adequately communicate the scope of what a prospective juror may or may not do and what is expected of them, it is necessary to instruct jurors using examples from the technology jurors are likely to use. For example, it may be difficult for some jurors to understand that a general instruction not to use the Internet or social media is also a specific instruction not to use common services and websites such as Google, Bing, Twitter, Facebook, YouTube, Snapchat, Wikipedia, Google Maps or MapQuest to perform "research" on a case.[18]

[18] For instance, in *Quilez-Velar v. Ox Bodies, Inc.*, 2015 U.S. Dist. LEXIS 20817, *36 (D.P.R. Feb. 19, 2015), the court explicitly instructed jurors that:

To this end, we propose that jury instructions address generally the various types of devices and search engines, social media platforms and applications available without listing the names of all such devices or services.

Because jurors should not be engaging in communications that may invite others to communicate with them about jury duty, the court should consider advising the jury that, if a juror feels the need to communicate over social media for personal reasons, she should post a communication that simply says "I am on jury duty. I cannot communicate or speak about the case or my service, so please do not ask or contact me about it."

Of course, a juror advising a family member over social media that she will be running late due to jury service is a permissible social media communication, and it would not be violation of a court instruction. Similarly, there is nothing improper with a juror tweeting that he is "proud to be discharging my duty by serving on a jury this week" or that jury duty is a "rewarding experience." Admonitions should not prohibit such communications over social media.[19]

B. Proposed Amendments Explaining the Risks of Engaging in Improper Social Media Usage

The popularity of social media calls for more robust restrictions and clearer explanations to jurors of the risks inherent in engaging in improper social media communications during trial and deliberations. Jury instructions should be supplemented in order to clearly address these risks.

First, jury instructions should include detailed and specific explanations of the legal and practical reasons why jurors must not use social media to discuss or research any aspect of a trial. Jury instructions should explain that any discussion of the trial on social media constitutes premature deliberation which is prejudicial to the jury process.

Second, where possible, jury instructions should include examples of specific improper use of social media by jurors and how such actions may lead to a mistrial.[20] One possible

> [d]uring your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry, or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, or website such as Facebook, MySpace, LinkedIn, YouTube, or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict.

[19] The State of Washington's Pattern Jury Instruction, however, provides that a juror shall not "even mention being on a jury when using social media, such as updating your status on Facebook or sending a message on Twitter." Washington Pattern Jury Instructions 1.01 Advance Oral Instruction – Beginning of Proceedings.

[20] Martha Neil, *Juror is fined $1K for Posting on Facebook and Causing Mistrial*, ABA JOURNAL (Nov. 4, 2015 4:30 PM) (noting "'Dying from boredom' while serving as a juror in a New York City robbery case in September, Kimberly Ellis couldn't resist posting on her emotional state and details of the jury's deliberations, the New York Daily News reports. The result was a mistrial in the Queens case, because no alternate juror was available to take her place. Held in contempt and fined $1,000, Ellis was apologetic and regretful about her mistake. 'I

example is where a juror conducted Internet research regarding the symptoms of ODD, a psychological disorder, one symptom of which was a propensity to lie, and which disorder allegedly affected a critical witness in a criminal prosecution. The juror shared this information with other jurors and, on review, the appeals court granted a mistrial. See Wardlaw v. State, 971 A.2d 331 (Md. 2009).

In another instance, concerning the sexual assault of a minor, the court discovered that a juror had done Internet research about the defendant's culture and religion and that the juror shared some of this research with the other jurors. In the court's view, even if only one juror reported the research, suggesting that the information did not affect the verdict of the other 11 jurors, the defendant was entitled to be tried by 12 impartial jurors and since the information related directly to a subject that pervaded the trial from start to finish, it was impossible to conclude that outside information used by at least 1 juror to interpret the witnesses' testimony and credibility could have had no impact on the jury verdict. See State v. Abdi, 45 A.3d 29 (Vt. 2012).

We suggest that courts should advise jurors that a single juror's Internet or social media research could improperly infect the entirety of jury deliberations and could result in prolonged proceedings, evidentiary hearings and/or potentially a mistrial. For these reasons, jurors should be advised of the importance to take care to heed to the court's admonitions.

Third, the jury instructions should specifically list the range of prohibited activity. Given the prevalence of social media in our lives and the numerous ways in which social media can now be accessed, there is a need to specifically mention multiple ways of engaging in improper social media communications. As a consequence, instructions should clarify that jurors must not, among other things, conduct any Internet research related to the trial, send "friend" requests to or otherwise connect with any trial participant, post messages, photos or videos online, or blog or tweet anything related to the trial. The Section believes that it would be helpful to specifically reference examples of seemingly innocuous acts which could lead to a possible mistrial, like looking up the dictionary definition of a term or expressing sympathy for the alleged crime victim in a case on a social media platform via an emoticon.[21]

continued my personal life as if I was not there to judge a trial,' she told the newspaper. 'It was my first time as a juror, and I was naive.' The forbidden postings came to light because a Facebook friend of Ellis, a former federal and state prosecutor, blew the whistle."
http://www.abajournal.com/news/article/juror_is_fined_1k_for_posting_on_facebook_and_causing_mistrial/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email.

[21] When the embrace of social media is ubiquitous, it cannot be surprising that examples of jurors using platforms like Facebook and Twitter 'are legion. And because of the risks inherent in such activity, "vigilance on the part of trial judges is warranted." On this record, however, Defendants' claim must fail. Juror 2 was an attentive juror who, while engaging in banter with fellow Twitter users about her experience, was nonetheless careful never to discuss the substance of the case, as instructed by the Court. The record is devoid of any evidence that she was either dishonest or biased, or that Defendants were prejudiced by her tweets in any way.

United States v. Liu, 69 F. Supp. 3d 374, 386 (S.D.N.Y. 2014)(internal citations and quotations omitted).

Because juror misconduct has become more likely given the prevalence of social media and the corresponding ease with which it may be used, jury instructions need to include detailed and specific explanations of the reasons certain activities are prohibited, examples of violations drawn from existing case law, and the range of the activity prohibited.

C. Model Instructions Relating to Attorneys' Review of Juror "Public" Social Media

As noted above, although the Section believes that courts should give due consideration to them, the Section takes no position at this time as to whether instructions or admonitions regarding attorney research, "following" or monitoring of jurors' social media accounts and/or advising jurors that their social media communication may be "public" and reviewable by others, including trial counsel, should be given.

Nevertheless, in the event that a court, after consulting with counsel, determines that either or both of these instructions are warranted by the facts of the case or is otherwise appropriate, the Section provides suggested revisions to the Pattern Jury Instructions in order to provide judges with "model" language they can choose to use when instructing jurors in connection with these issues.

1. Advising Jurors That Their Social Media Communications May Not Be "Public"

The Section suggests that consideration be given to generally informing jurors, without going into the issue of the security settings in any particular social media platform, that their social media communications may be "publicly" viewable or that juror posts may be shared in ways that make "private" posts "public," even if it means that such admonition may increase the likelihood that certain jurors may make their previously "public" social communications "private," and thus not easily discoverable or "monitorable," or potentially cause them to engage in now "undetectable" misconduct they may not have otherwise considered.

As such, courts should consider an instruction that jurors be "advised that what you may view as a private social media communication made by you or someone you know may or may not be private and can be viewed or followed by the public, including the lawyers in this case."

2. Monitoring Jurors' "Public" Social Media Communications

Case law is developing that shows that it is not only permissible for trial counsel to conduct Internet research on prospective jurors, but that it may even be expected. In Carino v. Muenzen, 2010 N.J. Super. Unpub. LEXIS 2154 (N.J. Super. Ct. App. Div. Aug. 30, 2010), an appellate court held that a trial judge "acted unreasonably" by preventing plaintiff's counsel from using the Internet to research potential jurors during *voir dire*. During jury selection in a medical malpractice case, plaintiff's counsel used a laptop computer to obtain information on prospective jurors. Defense counsel objected, and the trial judge held that plaintiff's attorney could not use his laptop during jury selection because he gave no notice of his intent to conduct Internet research during jury selection. Although the appellate court found that the trial court's ruling

was not prejudicial, the appellate court stated that "there was no suggestion that counsel's use of the computer was in any way disruptive. That he had the foresight to bring his laptop computer to court, and defense counsel did not, simply cannot serve as a basis for judicial intervention in the name of 'fairness' or maintaining 'a level playing field.' The 'playing field' was, in fact, already 'level' because Internet access was open to both counsel."[22] See Cannedy v. Adams, 706 F.3d 1148, 1164-66 (9th Cir. 2013) (grant of *habeas corpus* petition affirmed where a lawyer's failure to locate and use an abuse victim's recantation on her social networking account constituted ineffective assistance of counsel).

In Johnson v. McCullough, 306 S.W.3d 551 (Mo. 2010), a jury verdict was vacated where a juror had denied falsely any prior jury service. In holding that the juror had acted improperly, the court observed that a more thorough investigation of the juror's background would have obviated the need to set aside the jury verdict and conduct a retrial. The trial court chided the attorney for failing to perform Internet research on the juror, and granted a new trial, observing that a party should use reasonable efforts to examine the litigation history of potential jurors.

Given the new realities of juror social media communication, the American Bar Association Standing Committee on Ethics and Responsibility in Formal Opinion 466 stated in April 2015[23] that:

> judges should consider advising jurors during the orientation process that their backgrounds will be of interest to the litigants and that the lawyers in the case may investigate their backgrounds, including review of their [electronic social media] and websites. If a judge believes it to be necessary, under the circumstances of a particular matter, to limit lawyers' review of juror websites and [electronic social media], including on [electronic social media] networks where it is possible or likely that the jurors will be notified that their [electronic social media], is being viewed, the judge should formally instruct the lawyers in the case concerning the court's expectations.

[22] In *Khoury v. Conagra Foods, Inc.*, 368 S.W.3d 189 (Mo. Ct. App. 2012), the court and counsel for both parties agreed to conduct a search on Case.net prior to *voir dire* to ascertain whether potential jurors might be disqualified based upon discrepancies between their responses during *voir dire* and Case.net's report on the jurors' history of litigation. However, the following day after the jury had been empaneled, defense counsel moved to strike one of the jurors based upon information that counsel had found on a juror's Facebook page that allegedly indicated prejudicial bias and the failure to disclose that bias. The trial court granted a motion to strike the juror. The appellate court affirmed, noting that the trial court had not abused its discretion and commented further "Neither Johnson nor any subsequently promulgated Supreme Court rules on the topic of juror nondisclosure require that any and all research - Internet based or otherwise - into a juror's alleged material nondisclosure must be performed and brought to the attention of the trial court before the jury is empanelled or the complaining party waives the right to seek relief from the trial court. *While the day may come that technological advances may compel our Supreme Court to rethink the scope of required "reasonable investigation" into the background of jurors that may impact challenges to the veracity of responses given in voir dire* before *the jury is empanelled - that day has not arrived as of yet.*" *Id.* at 193, 202-03 (emphasis added). *See also Dubois v. Butler*, 901 So. 2d 1029, 1031 (Fla. Dist. Ct. App. 2005) (noting that "the widespread use of the Internet ha[s] sent the investigative technique of a call to directory assistance the way of the horse and buggy and the eight track stereo").

[23] *See supra* note 7.

The Association of the Bar of the City of New York Committee on Professional Ethics in Formal Opinion 2012-2[24] further noted that:

> Just as the Internet and social media appear to facilitate juror misconduct, the same tools have expanded an attorney's ability to conduct research on potential and sitting jurors**, and clients now often expect that attorneys will conduct such research.**
>
> * * * *
>
> It is the duty of the attorney to understand the functionality and privacy settings of any service she wishes to utilize for research, and to be aware of any changes in the platforms' settings or policies to ensure that no communication is received by a juror or venire member.

(emphasis added).

However, lawyers should use caution when conducting jury research or monitoring to ensure that no communication occurs in any manner with the prospective or sitting juror. Association of the Bar of the City of New York Committee on Professional Ethics Formal Opinion 2012-2 makes clear that even inadvertent contact with a prospective juror or sitting juror caused by an automatic notice sent by a social media service (and not directly by counsel) may be considered a technical ethical violation of the ethical rule prohibiting contacting a juror.[25]

In addition to trial counsel's ability to research jurors by performing search engine searches, and viewing individual jurors' "publicly" accessible Facebook or LinkedIn accounts,[26] counsel now can track and monitor social media in "real-time" originating from a certain designated geolocation or neighborhood, including around a courthouse. Relatively inexpensive software can permit counsel to identify and monitor all "public" tweets and other "public" social media posts made, for instance, within a two block radius of the courthouse, and cull them down to identify potentially improper social media communications made by jurors and then, through identifying metadata, "follow" the social media communications sent or received for instance, on such juror's way home from jury service concerning the trial.

[24] *See supra* note 10.

[25] Such inadvertent contact can occur by an attorney by merely clicking on the results of a Google search and viewing a juror's LinkedIn profile if the attorney is at the same time logged into his or her LinkedIn account utilizing normal security settings.

[26] For instance, during the trial of George Zimmerman for the death of Trayvon Martin, although one of the potential jurors questioned during *voir dire* stated that he had little knowledge of the Zimmerman case, that same juror posted on Facebook exclaiming, "I CAN tell you THIS. 'Justice' … IS Coming." That individual was dismissed. *See* Elicia Dover, *Did Potential Zimmerman Juror Lie to Court?*, ABC NEWS BLOG (June 13, 2013, 10:09 AM). http://gma.yahoo.com/blogs/abc-blogs/did-potential-zimmerman-juror-lie-court-034710693.html.

To this end, the Section has included a "model" jury instruction and admonition addressing the above in the event that a court concludes that such an instruction is warranted.[27]

3. Alerting the Court to Juror Misconduct Resulting from Social Media Communications

Motions for mistrials have been occurring with more frequency as jurors increasingly use social media during trial in ways that potentially adversely interfere with a party's right to receive a fair trial. It is incumbent upon counsel to promptly alert the court to such possible juror misconduct.

The NYCLA Committee on Professional Ethics in addressing whether it is ethically proper for an attorney to review jurors' social media communications, stated:

> Any lawyer who learns of juror misconduct, such as substantial violations of the court's instructions, is ethically bound to report such misconduct to the court under RPC 3.5, and the lawyer would violate RPC 3.5 if he or she learned of such misconduct yet failed to notify the court.[28]

[27] Richard Vanderford, *LinkedIn Search Nearly Upends BofA Mortgage Fraud Trial*, LAW360 (Sept. 27, 2013 8:10 PM)("A first-year associate on Friday came close to derailing the high-profile Manhattan fraud trial over a Bank of America Corp. unit's mortgage lending practices, after a juror complained that the attorney had cyberstalked him on LinkedIn. U.S. District Judge Jed S. Rakoff admonished defense attorneys after a juror sent him a note complaining 'the defense was checking on me on social media.'"). http://www.law360.com/articles/476511/linkedin-search-nearly-upends-bofa-mortgage-fraud-trial.

[28] Formal Op. 743 (2011). https://www.nycla.org/siteFiles/Publications/Publications1450_0.pdf.

V. SUGGESTED REVISIONS TO NEW YORK'S PATTERN JURY INSTRUCTIONS

The Section does not seek to incorporate all of its suggestions into its proposed model New York Pattern Jury Instructions. Rather, respectfully, the Section first sparingly revised existing instructions and, only where it viewed it as necessary, did the Section make suggested revisions to the existing Pattern Jury Instructions to address some of the more important issues raised above. The Section suggests that courts consider all the issues raised in this report, and consider tailoring its instructions to address each of them. Below is the revised version of the existing Pattern Jury Instructions containing annotations, where applicable, to the sources of the revisions,[29] and the Section's revised version redlined to show changes to the existing Pattern Jury Instructions can be found at Appendix "A." The bracketed language in the Section's proposed model instructions seeks to address the issues of jurors' social media communications being "public" and the viewing and monitoring of such juror communications by attorneys.

PJI 1:10. Do Not Visit Scene

Since this case involves something that happened at a particular location, you may be tempted to visit the location yourself. Do not do so. Even if you happen to live near the location, avoid going to it or past it until the case is over. In addition, do not attempt to view the scene by conducting any Internet or social media research or using computer programs such as Google Earth. Viewing the scene either in person or through a computer program would be unfair to the parties, since the location as it looked today or at any time, including the time of the accident, and as it looks now may be very different. This case involves a location as it existed at the time of the accident, not as it exists today. Thus, you should rely on the evidence that is presented here in court to determine the circumstances and conditions under which the accident occurred. Also, in making a visit without the benefit of explanation, you might get a mistaken impression on matters not properly before you, leading to unfairness to the parties who need you to decide this case based solely upon the evidence that is relevant to this matter.

PJI 1:11. Discussion With Others - Independent Research

In fairness to the parties to this lawsuit, it is very important that you keep an open mind throughout the trial. Then, after you have heard both sides fully, you will reach your verdict only on the evidence as it is presented to you in this courtroom, and only in this courtroom, and then only after you have heard the summations of each of the attorneys and my instructions to you on the law. You will then have an opportunity to exchange views with each member of the jury during your deliberations to reach your verdict.

Do not discuss this case either among yourselves or with anyone else during the course of the trial. This prohibition is not limited to face-to-face conversations. It also extends to all forms of electronic communications. Do not use any electronic devices, such as a mobile phone or computer, text or instant messaging, or social networking sites, to send or receive any

[29] *See* Thaddeus Hoffmeister, *Google, Gadgets, And Guilt: Juror Misconduct In The Digital Age*, 8 Univ. of Colorado. L. Rev. 411 (2013). http://lawreview.colorado.edu/wp-content/uploads/2013/11/8.-Hoffmeister-FINAL_s.pdf

information about this case or your experience as a juror.[30]

Do not do any independent research on any topic you might hear about in the testimony or see in the exhibits, whether by consulting others, reading books or magazines or conducting an Internet search of any kind. All electronic devices including any cell phones, iPhones, Android-based devices, or other types of smartphones, iPads or other tablet devices, [update as appropriate] laptops or any other personal or wearable electronic devices must be turned off while you are in the courtroom and while you are deliberating after I have given you the law applicable to this case. [*In the event that the court requires the jurors to relinquish their devices, the charge should be modified to reflect the court's practice*]

It is important to remember that you may not use any Internet services, such as Google, Bing, Facebook, LinkedIn, Instagram, YouTube, Snapchat [insert any new major social media examples], Twitter or use any other electronic applications or tools[31] to individually or collectively research topics concerning the trial, which includes the law, information about any of the issues in contention, the parties, the lawyers, witnesses, experts or the judge. After you have rendered your verdict and have been discharged, you will be free to do any research you choose, or to share your experiences, either directly, or through your favorite electronic means. For now, and as long as you are a juror in this case, be careful to remember these rules whenever you use a computer or other personal electronic device anywhere.

While this instruction may seem unduly restrictive, it is vital that you carefully follow these directions. The reason is simple. The law requires that you consider only the testimony and evidence you hear and see in this courtroom. Not only does our law mandate it, but the parties depend on you to fairly and impartially consider only the admitted evidence. To do otherwise, by allowing outside information to affect your judgment, is unfair and prejudicial to the parties and could lead to this case having to be retried.

Many of you regularly use the Internet to do research or to examine matters of interest to you. You may have seen or read information in the media that suggests to you that the type or quality of information that you have heard or have been presented with in this particular case is not what you expected or what should be presented to you. This is not for you to determine. You must understand that any information you might access from sources, like the Internet or from social media outside of what is presented in this courtroom is not evidence that you can consider. One of the problems in accessing such information is that what you are examining electronically from the Internet or on social media may be wrong, incomplete, or inaccurate. That material may be outdated, or may simply not be applicable in this particular case. Indeed, there often is no way to determine whether the information that we obtain from other sources outside of the courtroom, such as the Internet, is correct or has any relevance to this case.[32] Accordingly, I expect that you will seriously and faithfully abide by these instructions.

[30] Judicial Council of California Civil Jury Instructions (2015), 100 Preliminary Admonitions.

[31] Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate about a Case, prepared by the Judicial Conference Committee on Court Administration and Case Management (June, 2012).

[32] New Jersey Model Civil Jury Charges - Civil 2d 1.11C Preliminary Charge.

Jury Admonitions In Preliminary Instructions
(Revised May 5, 2009)

(*Note: Statutory law requires that certain admonitions be given to the jury as part of the court's preliminary instructions. See CPL 270.40. This charge sets forth those admonitions and provides appropriate explanations.)*

Our law requires jurors to follow certain instructions in order to help assure a just and fair trial. I will now give you those instructions.

1. Do not converse, either among yourselves or with anyone else, about anything related to the case. You may tell the people with whom you live and your employer that you are a juror and give them information about when you will be required to be in court. But, you may not talk with them or anyone else about anything related to the case.

2. Do not, at any time during the trial, request, accept, agree to accept, or discuss with any person the receipt or acceptance of any payment or benefit in return for supplying any information concerning the trial.

3. You must promptly report directly to me any incident within your knowledge involving an attempt by any person improperly to influence you or any member of the jury.

4. Do not visit or view the premises or place where the charged crime was allegedly committed, or any other premises or place involved in the case. And you must not use the Internet, including maps, Google Earth, social media or any other program or device to search or research or look at the places involved, or at descriptions, pictures, videos or Internet maps related to the events, discussed in the testimony.[33]

5. Do not read, view or listen to any accounts or discussions of the case reported by newspapers, television, radio, the Internet, online reports, social media, blog posts or podcasts[34] or any other media.

6. In recent years, because of the growth in electronic communications, an increasing number of cases have had to be retried, at great expense, because of juror misconduct in obtaining outside information from the Internet, blogs, e-mail, electronic messaging, social networking sites, and other sources. I need to be assured that each of you will do everything you can to prevent such an unfortunate outcome from happening in this case.[35] Do not attempt to research any fact, issue, or law related to this case, whether by discussion with others, by research in a library or on the Internet, or by any other means or electronic source. In this age of

[33] Arkansas Supreme Court Committee on Jury Instructions, AMI 101 Cautionary Instructions (iv).

[34] *Id.*

[35] Alaska Criminal Pattern Jury Instruction 1.02.

instant electronic communication and research, I want to emphasize that in addition to not conversing face to face with anyone about the case, you must not communicate with anyone about the case by any other means, including by telephone, text messages, instant messaging, email, Internet chat or chat rooms, photographs, videos, blogs, or social websites, such as Facebook, YouTube, Snapchat, LinkedIn, or Twitter or any online service.

You must not provide any information about the case to anyone by any means whatsoever, and that includes the electronic or online posting of information about the case, or what you are doing in the case, on any device, or Internet site, including blogs, chat rooms, social websites or any other means.

If you feel a need to post on social media for personal reasons that you are on jury duty simply say "I am on jury duty. I cannot communicate or speak about the case or my service, so please do not ask or contact me about it." You do not want to do anything that will invite others to communicate with you about your jury duty.[36]

You must also not use search engines like[37] Google, Bing or sites such as Wikipedia[38] or otherwise search electronically, digitally or online for any information about the case, or the law which applies to the case, or the people involved in the case, including any party, the witnesses, the lawyers, the experts or the judge. You must not try to find the definition of any word or phrase or concept by looking it up in any book, dictionary, encyclopedia, or on the Internet, or through social media or any other source. It would be highly improper for you to do so.[39]

Now, ladies and gentlemen, I want you to understand why these rules are so important:

Our law does not permit jurors to converse among themselves about the case until the Court tells them to begin deliberations because premature discussions can lead to a premature final decision.

Our law also does not permit you to visit a place discussed in the testimony either in person or via the Internet or over social media or virtually using, for instance, Internet mapping tools. First, you cannot always be sure that the place is in the same condition as it was on the day in question. Second, even if it were in the same condition, once you go to a place discussed in the testimony to evaluate the evidence in light of what you see, you become a witness, not a juror. As a witness, you may now have an erroneous view of the scene that may not be subject to correction by either party. That is not fair.

Our law does not permit jurors to communicate with anyone about the case, or to permit anyone to communicate with jurors about the case, because only jurors are authorized to render a

[36] Washington Pattern Jury Instructions 1.01 Advance Oral Instruction – Beginning of Proceedings.

[37] Alaska Criminal Pattern Jury Instruction 1.02.

[38] Arkansas Supreme Court Committee on Jury Instructions, AMI 101 Cautionary Instructions (iv).

[39] Alabama Pattern Jury Instructions 2d. 1.22 Jurors Must Not Refer to Outside Materials.

verdict. Only you have been found to be fair and only you have promised to be fair – no one else has been so qualified.

Just as the Internet has affected many aspects of life, it has brought changes to the jury process.

[Be advised that what you may view as a private social media communication made by you or someone you know may or may not be private and can be viewed or followed by the public, including the lawyers in this case.]

[The attorneys involved in this case, or people working with them on this case may conduct research on or monitor you. Specifically, attorneys may look at a juror's public website, public social media posts or blogs that you may maintain, or a social media profile of yours that is publicly accessible. Such monitoring of public social media communications about you may have occurred during jury selection and during the course of this trial, and also may occur during deliberations, and after the trial has ended.

There is nothing at all improper about attorneys researching or monitoring jurors or potential jurors in connection with a case.]

As I mentioned, nobody involved in this case may communicate with you for any reason in any manner during the course of this trial, including during the time you are deliberating. However, some Internet or social media services may automatically notify you if a person has looked at your social media, and such notification may even provide a name of the person viewing your profile, even though the viewer did not attempt to communicate with you directly or want you to know his or her name.

If you are notified electronically that anyone involved in the case [including the attorneys involved in this case, any of their law firms, or anyone you believe that may be involved in the case] has viewed your online information or any of your social media profiles or content, or if anyone [including attorneys involved in this case, any of their law firms, or anyone you believe that may have been involved in the case,] has communicated with you, in any manner let me or court employees know as soon as possible.

Just as no one should be communicating orally, in writing or electronically with you about this case other than me or court personnel, you should not communicate orally, in writing or electronically with anyone other than me or court personnel about the case.

Some of you may use social media and the Internet to share many aspects of your lives. While you are a juror, do not share, publicly or privately, any information, facts or your thoughts about this case. [This prohibition applies regardless of how restrictively you set your privacy settings for your social media.]

I also expect you will inform me as soon as you become aware of another juror's violation of these instruction.[40] Let me know if there are any questions regarding these instructions.

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Finally, our law requires that you not read or listen to any news accounts of the case, and that you not attempt to research any fact, issue, or law related to the case. Your decision must be based solely on the testimony and other evidence presented in this courtroom. It would not be fair to the parties for you to base your decision on some reporter's view or opinion, or upon information you acquire outside the courtroom.

These rules are designed to help guarantee a fair trial, and, our law accordingly sets forth serious consequences if the rules are not followed.

I trust you understand and appreciate the importance of following these rules and, in accord with your oath and promise, I know you will do so.

[40] *See supra* note 31.

JURY SEPARATION DURING DELIBERATIONS
(Revised December 17, 2009)

Members of the jury, today's court session is drawing to a close and I am about to excuse you for the day. You must return [*specify time and place for jurors to reassemble*].

The law requires that, before I excuse you, I review with you the rules that you must follow over the course of this recess. These rules are designed to guarantee the parties a fair trial, and are generally the same ones you were required to follow prior to deliberations. But the law requires that I restate them at this stage in order to emphasize their importance.

The reason for the emphasis is that you are in a critical stage. You are in the process of deliberations and you are not being sequestered. That means you are not being kept together overnight where we can have greater assurance that you are following the rules.

You are being permitted to go home after deliberations have begun. There may now be a greater temptation, for example, to discuss the case with someone else, or to go to the scene. You must resist that temptation. To discuss the case with someone else, or to visit the scene, would not only violate my order, but would also violate the oath you took to follow the rules.

The rules are as follows:

1. Deliberations must be conducted only in the jury room when all jurors are present. Therefore, all deliberations must now cease and must not be resumed until all of you have returned and are together again in the jury room.

2. During the recess, do not converse, either among yourselves or with anyone else, about anything related to the case.

3. You remain under obligation not to request, accept, agree to accept, or discuss with any person the receiving or accepting of any payment or benefit in return for supplying any information concerning the trial.

4. You must promptly report directly to me any incident within your knowledge involving an attempt by any person to communicate with you in writing, orally or electronically or improperly to influence you or any member of the jury.

5. You must not visit or view the premises or place in person or electronically where the charged crime was allegedly committed, or any other premises or place involved in the case.

6. You must not read, view or listen to any accounts or discussions of the case reported in or on newspapers, television, radio, the Internet, social media or any other media.

7. You must not attempt to research any fact, issue, or law related to this case, whether by discussion with others, by research in a library or by using the Internet, social media or by any other means or source.

Again, in this age of instant electronic communication and research, I want to emphasize that in addition to not conversing face to face with anyone about the case, you must not communicate with anyone about the case by any other means, including by telephone, text messages, email, chat rooms, photograph, video, blog, or through social media websites, such as Facebook, YouTube, Snapchat, LinkedIn, or Twitter.

You must not provide any information about the case to anyone by any means whatsoever, and that includes the posting of information about the case, or what you are doing in the case other than being a juror, on any device, or Internet site, including blogs, chat rooms, social websites or in any other way.

You must also not use Google or Bing or search online or otherwise for any information about the case, or the law which applies to the case, or the people involved in the case, including any party, the witnesses, the lawyers, experts or the judge.

Now, ladies and gentlemen, I want you to understand why these rules are so important:

Our law does not permit jurors to converse with anyone else about the case, or to permit anyone to talk to them about the case, because only jurors are authorized to render a verdict. Only you have been found to be fair and only you have promised to be fair – no one else has been so qualified.

Our law also does not permit you to visit a place discussed in the testimony. First, you cannot always be sure that the place is in the same condition as it was on the day in question. Second, even if it were in the same condition, once you go to a place discussed in the testimony to evaluate the evidence in light of what you see, you become a witness, not a juror. As a witness, you may now have an erroneous view of the scene that may not be subject to correction by either party. That is not fair.

Many of you regularly use the Internet to do research or to examine matters of interest to you. You may have seen or read information in the media that suggests to you that the type or quality of information that you have heard or have been presented with in this particular case is not what you expected or what should be presented to you. This is not for you to determine. You must understand that any information you might access from sources, like the Internet or from social media, outside of what is presented in this courtroom is not evidence that you can consider. One of the problems in accessing such information is that what you are examining electronically from the Internet or on social media may be wrong, incomplete, or inaccurate. That material may be outdated, or may simply not be applicable in this particular case. Indeed, there often is no way to determine whether the information that we obtain from other sources outside of the courtroom, such as the Internet, is correct or has any relevance to this case.[41]

[41] New Jersey Model Civil Jury Charges - Civil 2d 1.11C Preliminary Charge.

Further, be advised that a single juror's Internet or social media search or research could improperly affect the entirety of jury deliberations and could result in prolonged proceedings, evidentiary hearings, and/or potentially a mistrial.

Our law requires that you not read or listen to any news accounts of the case, even in electronic or digital form, and that you not attempt to research any fact, issue, or law related to the case. Your decision must be based solely on the evidence presented in this courtroom. It would not be fair to the parties for you to base your decision on some reporter's view or opinion, or upon information you acquire outside the courtroom.

Finally, no one [including the attorneys involved in this case] may communicate with you in any manner for any reason during the course of this trial, including during the time you are deliberating concerning the case. Some Internet or social media services may automatically notify you if a person has looked at your information, and the notification may even provide a name of the person viewing your profile, even though the viewer did not attempt to communicate with you directly or want you to know his or her name.

If you are notified electronically that anyone involved in the case [including the attorneys involved in this case, any of their law firms, or anyone you believe that may be involved in the case] has viewed your online information or any of your social media profiles or content, or if any anyone [including attorneys involved in this case, any of their law firms, or anyone you believe that may have been involved in the case,] has communicated with you, in any manner let me or court employees know as soon as possible.

Violation of these instructions could cause a mistrial, meaning all of our efforts over the course of the trial would have been wasted and we would have to start all over again with a new trial before a new jury.[42]

Again, I trust you understand and appreciate the importance of following these rules and, in accord with your oath and promise to me, I know you will do so.

[42] Jury Instructions from U.S.D.J. Christine M. Arguello (D. Colo.).

VI. DISPLAY OF A MODERN SOCIAL MEDIA USAGE POSTER IN JURY ROOMS

We have reviewed three posters used by courts to advise jurors of the risks of using social media during trial: the Washington State Pattern Jury Instructions Committee Poster, which is also the United States Federal Court poster;[43] (the "Washington/Federal Poster"); the National Center for the State Courts (the "NCSC") poster (the "NCSC Poster"); and the Western Australia poster (the "Australian poster").

The Washington/Federal Poster is being used in state courts in Washington, Massachusetts, Minnesota and California as well as in the Federal Courts. Our understanding is that in states using that poster that it has found general adoption and is posted in many courthouses across each state. The NCSC sent its poster free copies to interested courts. These states have requested copies of such posters: Connecticut, Colorado, Kansas, Maryland, Minnesota, New Jersey, and Pennsylvania. Overall, NCSC has distributed approximately 3,500 copies of the poster. There is also a version of the NCSC poster in Spanish. The adoption of the NCSC poster and increasing incidents of juror misconduct resulting from the improper use of social media in New York demonstrate the need for a direct message to be sent to jurors in the jury deliberation room.

The Section suggests the adoption of a poster that we believe will significantly improve upon the existing posters. It focused on graphic design and images predominating over words as the current posters are not easily readable. Graphic images are well received by today's typical Internet user and follow the trend of ever more visual communication on the Internet. Displaying an ever-present poster is arguably more memorable than oral admonitions and instructions and a graphic poster would ameliorate some problems associated with language limitations. Thus, the Section, with the assistance of the graphic designers of the New York State Bar Association ("NYSBA"), designed the attached social media juror poster which the Section believes appropriately addresses the issues raised above. See Appendix at "B."

While the specific language used seeks to succinctly address the issues raised in this report, the Section appreciates that alternative language might accomplish the desired goals and that judges may differ on the specific wording used. The Section believes that the NYSBA's header on the poster, however, should be downplayed somewhat, as it makes the poster appear as if it is coming from the NYSBA and not from the court system, and thereby potentially lessening its effectiveness.

[43] *See supra* note 6. Federal trial judges have been "provided with a poster stressing the importance of jurors making decisions based on information presented only in the courtroom. The poster is designed to be displayed in the jury deliberation room or other areas where jurors congregate. . . . 'The Committee believes that the more frequently jurors are reminded of the prohibition on social media, whether the reminders are visually or orally given, the more likely they are to refrain from social media use during trial and deliberations,' said Judge Julie A. Robinson, Chairperson, Conference Committee on Court Administration and Case Management." http://www.uscourts.gov/news/2012/08/21/revised-jury-instructions-hope-deter-juror-use-social-media-during-trial.

APPENDIX A

Redlined Proposed Revisions
to New York's Pattern Jury Instructions

V. SUGGESTED REVISIONS TO NEW YORK'S PATTERN JURY INSTRUCTIONS

The Section does not seek to incorporate all of its suggestions into its proposed model New York Pattern Jury Instructions. Rather, respectfully, the Section first sparingly revised existing instructions and, only where it viewed it as necessary, did the Section make suggested revisions to the existing Pattern Jury Instructions to address some of the more important issues raised above. The Section suggests that courts consider all the issues raised in this report, and consider tailoring its instructions to address each of them. Below is the revised version of the existing Pattern Jury Instructions containing annotations, where applicable, to the sources of the revisions, and the Section's revised version redlined to show changes to the existing Pattern Jury Instructions can be found at Appendix "A." The bracketed language in the Section's proposed model instructions seeks to address the issues of jurors' social media communications being "public" and the viewing and monitoring of such juror communications by attorneys.

PJI 1:10. Do Not Visit Scene

Since this case involves something that happened at a particular location, you may be tempted to visit the location yourself. ~~Please~~ Do not do so. Even if you happen to live near the location, ~~please~~ avoid going to it or past it until the case is over. In addition, ~~please~~ do not attempt to view the scene by conducting any Internet or social media research or using computer programs such as Google Earth. Viewing the scene either in person or through a computer program would be unfair to the parties, since the location as it looked today or at any time, including at the time of the accident, and as it looks now may be very different. This case involves a location as it existed at the time of the accident, not as it exists today. Thus, you should rely on the evidence that is presented here in court to determine the circumstances and conditions under which the accident occurred. Also, in making a visit without the benefit of explanation, you might get a mistaken impression on matters not properly before you, leading to unfairness to the parties who need you to decide this case based solely upon the evidence that is relevant to this matter.

PJI 1:11. Discussion With Others - Independent Research

In fairness to the parties to this lawsuit, it is very important that you keep an open mind throughout the trial. Then, after you have heard both sides fully, you will reach your verdict only on the evidence as it is presented to you in this courtroom, and only in this courtroom, and then only after you have heard the summations of each of the attorneys and my instructions to you on the law. You will then have an opportunity to exchange views with each member of the jury during your deliberations to reach your verdict.

~~Please~~ Do not discuss this case either among yourselves or with anyone else during the course of the trial. This prohibition is not limited to face-to-face conversations. It also extends to all forms of electronic communications. Do not use any electronic devices, such as a mobile phone or computer, text or instant messaging, or social networking sites, to send or receive any information about this case or your experience as a juror.

Do not do any independent research on any topic you might hear about in the testimony

or see in the exhibits, whether by consulting others, reading books or magazines or conducting an Internet search of any kind. All electronic devices including any cell phones, ~~Blackberries, iphones,~~iPhones, Android-based devices, or other types of smartphones, iPads or other tablet devices, [update as appropriate] laptops or any other personal or wearable electronic devices must be turned off while you are in the courtroom and while you are deliberating after I have given you the law applicable to this case. [*In the event that the court requires the jurors to relinquish their devices, the charge should be modified to reflect the court's practice*]

It is important to remember that you may not use any Internet services, such as Google, Bing, Facebook, LinkedIn, Instagram, YouTube, Snapchat [insert any new major social media examples], Twitter or ~~any others~~use any other electronic applications or tools to individually or collectively research topics concerning the trial, which includes the law, information about any of the issues in contention, the parties, the lawyers, witnesses, experts or the ~~court.~~judge. After you have rendered your verdict and have been discharged, you will be free to do any research you choose, or to share your experiences, either directly, or through your favorite electronic means.

For now and as long as you are a juror in this case, be careful to remember these rules whenever you use a computer or other personal electronic device ~~during the time you are serving as a juror but you are not in the courtroom~~anywhere.

While this instruction may seem unduly restrictive, it is vital that you carefully follow these directions. The reason is simple. The law requires that you consider only the testimony and evidence you hear and see in this courtroom. Not only does our law mandate it, but the parties depend on you to fairly and impartially consider only the admitted evidence. To do otherwise, by allowing outside information to affect your judgment, is unfair and prejudicial to the parties and could lead to this ~~case's~~case having to be retried.

~~Accordingly, I expect that you will seriously and faithfully abide by this instruction.~~

Many of you regularly use the Internet to do research or to examine matters of interest to you. You may have seen or read information in the media that suggests to you that the type or quality of information that you have heard or have been presented with in this particular case is not what you expected or what should be presented to you. This is not for you to determine. You must understand that any information you might access from sources, like the Internet or from social media outside of what is presented in this courtroom is not evidence that you can consider. One of the problems in accessing such information is that what you are examining electronically from the Internet or on social media may be wrong, incomplete, or inaccurate. That material may be outdated, or may simply not be applicable in this particular case. Indeed, there often is no way to determine whether the information that we obtain from other sources outside of the courtroom, such as the Internet, is correct or has any relevance to this case. Accordingly, I expect that you will seriously and faithfully abide by these instructions.

Jury Admonitions In Preliminary Instructions
(Revised May 5, 2009)

(*Note: Statutory law requires that certain admonitions be given to the jury as part of the ~~court's~~court's preliminary instructions. See CPL 270.40. This charge sets forth those admonitions and provides appropriate explanations.)*

Our law requires jurors to follow certain instructions in order to help assure a just and fair trial. I will now give you those instructions.

1. Do not converse, either among yourselves or with anyone else, about anything related to the case. You may tell the people with whom you live and your employer that you are a juror and give them information about when you will be required to be in court. But, you may not talk with them or anyone else about anything related to the case.

2. Do not, at any time during the trial, request, accept, agree to accept, or discuss with any person the receipt or acceptance of any payment or benefit in return for supplying any information concerning the trial.

3. You must promptly report directly to me any incident within your knowledge involving an attempt by any person improperly to influence you or any member of the jury.

4. Do not visit or view the premises or place where the charged crime was allegedly committed, or any other premises or place involved in the case. And you must not use ~~internet~~the Internet, including maps ~~or~~, Google Earth, social media or any other program or device to search ~~for and view any location~~or research or look at the places involved, or at descriptions, pictures, videos or Internet maps related to the events, discussed in the testimony.

5. Do not read, view or listen to any accounts or discussions of the case reported by newspapers, television, radio, the ~~i~~Internet, online reports, social media, blog posts or podcasts or any other media.

6. In recent years, because of the growth in electronic communications, an increasing number of cases have had to be retried, at great expense, because of juror misconduct in obtaining outside information from the Internet, blogs, e-mail, electronic messaging, social networking sites, and other sources. I need to be assured that each of you will do everything you can to prevent such an unfortunate outcome from happening in this case. Do not attempt to research any fact, issue, or law related to this case, whether by discussion with others, by research in a library or on the Internet, or by any other means or electronic source. In this age of instant electronic communication and research, I want to emphasize that in addition to not conversing face to face with anyone about the case, you must not communicate with anyone about the case by any other means, including by telephone, text messages, instant messaging, email, ~~i~~Internet chat or chat rooms, photographs, videos, blogs, or social websites, such as Facebook, ~~MySpace~~, YouTube, Snapchat, LinkedIn, or Twitter or any online service.

You must not provide any information about the case to anyone by any means whatsoever, and that includes the electronic or online posting of information about the case, or what you are doing in the case, on any device, or Internet site, including blogs, chat rooms, social websites or any other means.

If you feel a need to post on social media for personal reasons that you are on jury duty simply say "I am on jury duty. I cannot communicate or speak about the case or my service, so please do not ask or contact me about it." You do not want to do anything that will invite others to communicate with you about your jury duty.

You must also not use search engines like Google, Bing or sites such as Wikipedia or otherwise search electronically, digitally or online for any information about the case, or the law which applies to the case, or the people involved in the case, including ~~the defendant~~any party, the witnesses, the lawyers, the experts or the judge. You must not try to find the definition of any word or phrase or concept by looking it up in any book, dictionary, encyclopedia, or on the Internet, or through social media or any other source. It would be highly improper for you to do so.

Now, ladies and gentlemen, I want you to understand why these rules are so important:

Our law does not permit jurors to converse ~~with anyone else about the case, or to permit anyone to talk to them about the case, because only jurors are authorized to render a verdict. Only you have been found to be fair and only you have promised to be fair – no one else has been so qualified~~.

a~~lso does not permit jurors to converse~~ mong themselves about the case until the Court tells them to begin deliberations because premature discussions can lead to a premature final decision.

Our law also does not permit you to visit a place discussed in the testimony~~.~~ either in person or via the Internet or over social media or virtually using, for instance, Internet mapping tools. First, you cannot always be sure that the place is in the same condition as it was on the day in question. Second, even if it were in the same condition, once you go to a place discussed in the testimony to evaluate the evidence in light of what you see, you become a witness, not a juror. As a witness, you may now have an erroneous view of the scene that may not be subject to correction by either party. That is not fair.

~~nally,~~ Our law ~~requires that you~~ does not ~~read or listen~~permit jurors to ~~any news accounts of~~ communicate with anyone about the case, or to permit anyone to communicate with jurors about the case, because only jurors are authorized to render a verdict. Only you have been found to be fair and only you have promised to be fair – no one else has been so qualified.~~and~~

Just as the Internet has affected many aspects of life, it has brought changes to the jury process.

[Be advised that what you may view as a private social media communication made by you or someone you know may or may not be private and can be viewed or followed by the public, including the lawyers in this case.]

[The attorneys involved in this case, or people working with them on this case may conduct research on or monitor you. Specifically, attorneys may look at a juror's public website, public social media posts or blogs that you may maintain, or a social media profile of yours that is publicly accessible. Such monitoring of public social media communications about you may have occurred during jury selection and during the course of this trial, and also may occur during deliberations, and after the trial has ended.

There is nothing at all improper about attorneys researching or monitoring jurors or potential jurors in connection with a case.]

As I mentioned, nobody involved in this case may communicate with you for any reason in any manner during the course of this trial, including during the time you are deliberating. However, some Internet or social media services may automatically notify you if a person has looked at your social media, and such notification may even provide a name of the person viewing your profile, even though the viewer did not attempt to ~~research any fact, issue, or~~ communicate with you directly or want you to know his or her name.

If you are notified electronically that anyone involved in the case [including the attorneys involved in this case, any of their law firms, or anyone you believe that may be involved in the case] has viewed your online information or any of your social media profiles or content, or if anyone [including attorneys involved in this case, any of their law firms, or anyone you believe that may have been involved in the case,] has communicated with you, in any manner let me or court employees know as soon as possible.

Just as no one should be communicating orally, in writing or electronically with you about this case other than me or court personnel, you should not communicate orally, in writing or electronically with anyone other than me or court personnel about the case.

Some of you may use social media and the Internet to share many aspects of your lives. While you are a juror, do not share, publicly or privately, any information, facts or your thoughts about this case. [This prohibition applies regardless of how restrictively you set your privacy settings for your social media.]

I also expect you will inform me as soon as you become aware of another juror's violation of these instructions. Let me know if there are any questions regarding these instructions.

Finally, our law requires that you not read or listen to any news accounts of the case, and that you not attempt to research any fact, issue, or law related to the case.~~related to the case.~~ Your decision must be based solely on the testimony and other evidence presented in this courtroom. It would not be fair to the parties for you to base your decision on some reporter's view or opinion, or upon information you acquire outside the courtroom.

These rules are designed to help guarantee a fair trial, and, our law accordingly sets forth serious consequences if the rules are not followed.

I trust you understand and appreciate the importance of following these rules and, in accord with your oath and promise, I know you will do so.

JURY SEPARATION DURING DELIBERATIONS
(Revised December 17, 2009)

Members of the jury, ~~today's~~today's court session is drawing to a close and I am about to excuse you for the day. You must return [*specify time and place for jurors to reassemble*].

The law requires that, before I excuse you, I review with you the rules that you must follow over the course of this recess. These rules are designed to guarantee the parties a fair trial, and are generally the same ones you were required to follow prior to deliberations. But the law requires that I restate them at this stage in order to emphasize their importance.

The reason for the emphasis is that you are in a critical stage. You are in the process of deliberations and you are not being sequestered. That means you are not being kept together overnight where we can have greater assurance that you are following the rules.

You are being permitted to go home after deliberations have begun. There may now be a greater temptation, for example, to discuss the case with someone else, or to go to the scene. You must resist that temptation. To discuss the case with someone else, or to visit the scene, would not only violate my order, but would also violate the oath you took to follow the rules.

The rules are as follows:

1. Deliberations must be conducted only in the jury room when all jurors are present. Therefore, all deliberations must now cease and must not be resumed until all of you have returned and are together again in the jury room.

2. During the recess, do not converse, either among yourselves or with anyone else, about anything related to the case.

3. You remain under obligation not to request, accept, agree to accept, or discuss with any person the receiving or accepting of any payment or benefit in return for supplying any information concerning the trial.

4. You must promptly report directly to me any incident within your knowledge involving an attempt by any person to communicate with you in writing, orally or electronically or improperly to influence you or any member of the jury.

5. You must not visit or view the premises or place in person or electronically where the charged crime was allegedly committed, or any other premises or place involved in the case.

6. You must not read, view or listen to any accounts or discussions of the case reported ~~by~~in or on newspapers, television, radio, the Internet, social media or any other media.

7. You must not attempt to research any fact, issue, or law related to this case, whether by discussion with others, by research in a library or ~~on~~by using the Internet, social media or by any other means or source.

Again, in this age of instant electronic communication and research, I want to emphasize that in addition to not conversing face to face with anyone about the case, you must not communicate with anyone about the case by any other means, including by telephone, text messages, email, ~~internet chat or~~ chat rooms, ~~blogs, or~~photograph, video, blog, or through social media websites, such as Facebook, ~~myspace~~YouTube, Snapchat, LinkedIn, or Twitter.

You must not provide any information about the case to anyone by any means whatsoever, and that includes the posting of information about the case, or what you are doing in the case other than being a juror, on any device, or Internet site, including blogs, chat rooms, social websites or in any other ~~means~~way.

You must also not use Google or Bing or search online or otherwise ~~search~~ for any information about the case, or the law which applies to the case, or the people involved in the case, including ~~the defendant~~any party, the witnesses, the lawyers, experts or the judge.

Now, ladies and gentlemen, I want you to understand why these rules are so important:

Our law does not permit jurors to converse with anyone else about the case, or to permit anyone to talk to them about the case, because only jurors are authorized to render a verdict. Only you have been found to be fair and only you have promised to be fair – no one else has been so qualified.

Our law also does not permit you to visit a place discussed in the testimony. First, you cannot always be sure that the place is in the same condition as it was on the day in question. Second, even if it were in the same condition, once you go to a place discussed in the testimony to evaluate the evidence in light of what you see, you become a witness, not a juror. As a witness, you may now have an erroneous view of the scene that may not be subject to correction by either party. That is not fair.

~~nally, our law requires that you not read or listen to any news accounts of the case, and that you not attempt to research any fact, issue, or law related to the case.~~ Many of you regularly use the Internet to do research or to examine matters of interest to you. You may have seen or read information in the media that suggests to you that the type or quality of information that you have heard or have been presented with in this particular case is not what you expected or what should be presented to you. This is not for you to determine. You must understand that any information you might access from sources, like the Internet or from social media, outside of what is presented in this courtroom is not evidence that you can consider. One of the problems in accessing such information is that what you are examining electronically from the Internet or on social media may be wrong, incomplete, or inaccurate. That material may be outdated, or may simply not be applicable in this particular case. Indeed, there often is no way to determine whether the information that we obtain from other sources outside of the courtroom, such as the Internet, is correct or has any relevance to this case.

Further, please be advised that a single juror's Internet or social media search or research could improperly affect the entirety of jury deliberations and could result in prolonged proceedings, evidentiary hearings, and/or potentially a mistrial.

Our law requires that you not read or listen to any news accounts of the case, even in electronic or digital form, and that you not attempt to research any fact, issue, or law related to the case. Your decision must be based solely on the evidence presented in this courtroom. It would not be fair to the parties for you to base your decision on some reporter's view or opinion, or upon information you acquire outside the courtroom.

Finally, no one [including the attorneys involved in this case] may communicate with you in any manner for any reason during the course of this trial, including during the time you are deliberating concerning the case. Some Internet or social media services may automatically notify you if a person has looked at your information, and the notification may even provide a name of the person viewing your profile, even though the viewer did not attempt to communicate with you directly or want you to know his or her name.

If you are notified electronically that anyone involved in the case [including the attorneys involved in this case, any of their law firms, or anyone you believe that may be involved in the case] has viewed your online information or any of your social media profiles or content, or if any anyone [including attorneys involved in this case, any of their law firms, or anyone you believe that may have been involved in the case,] has communicated with you, in any manner let me or court employees know as soon as possible.

Violation of these instructions could cause a mistrial, meaning all of our efforts over the course of the trial would have been wasted and we would have to start all over again with a new trial before a new jury.

Again, I trust you understand and appreciate the importance of following these rules and, in accord with your oath and promise to me, I know you will do so.

APPENDIX B

Proposed Social Media Usage Poster

NEW YORK STATE BAR ASSOCIATION

Jurors MUST NOT use the Internet or Social Media relating to this trial.

USE OF THE INTERNET OR SOCIAL MEDIA BY JURORS IS UNFAIR TO THE PARTIES AND CAN HURT FELLOW JURORS.

- **Don't research** the parties, witnesses, attorneys, judge or any case issues.
- If you would not say it in front of the judge, **don't share it or post it**.
- **Tell the judge or court personnel** if these, or any, rules are violated so they may address it.

SOCIAL MEDIA USE VIOLATIONS MAY RESULT IN SERIOUS PENALTIES FOR JURORS AND A LOSS OF JUROR PRIVACY.

ENSURE THE PARTIES RECEIVE A FAIR TRIAL!

This Poster is Provided by The Commercial and Federal Litigation Section of the New York State Bar Association

NYSBA

NYCLA COMMITTEE ON PROFESSIONAL ETHICS

FORMAL OPINION

No.: 743

Date Issued: May 18, 2011

TOPIC: Lawyer investigation of juror internet and social networking postings during conduct of trial.

DIGEST:

It is proper and ethical under RPC 3.5 for a lawyer to undertake a pretrial search of a prospective juror's social networking site, provided that there is no contact or communication with the prospective juror and the lawyer does not seek to "friend" jurors, subscribe to their Twitter accounts, send tweets to jurors or otherwise contact them. During the evidentiary or deliberation phases of a trial, a lawyer may visit the publicly available Twitter, Facebook or other social networking site of a juror, but must not "friend," email, send tweets to jurors or otherwise communicate in any way with the juror, or act in any way by which the juror becomes aware of the monitoring. Moreover, the lawyer may not make any misrepresentations or engage in deceit, directly or indirectly, in reviewing juror social networking sites. In the event the lawyer learns of juror misconduct, including deliberations that violate the court's instructions, the lawyer may not unilaterally act upon such knowledge to benefit the lawyer's client, but must promptly comply with Rule 3.5(d) and bring such misconduct to the attention of the court before engaging in any further significant activity in the case.

RULES:

RPC 3.5, 4.1, 8.4

QUESTION:

After voir dire is completed and the trial commences, may a lawyer routinely conduct ongoing research on a juror on Twitter, Facebook and other social networking sites? If so, what are the lawyer's duties to the court under Rule of Professional Conduct 3.5?

OPINION:

This opinion considers lawyer investigations of jurors during an ongoing trial. With the advent of internet-based social networking services, additional complexities are introduced to the traditional rules barring contact between lawyers and jurors during trials.

New York RPC 3.5(a)(4) and (a)(5) provide that a lawyer shall not:

> 4. communicate or cause another to communicate with a member of the jury venire from which the jury will be selected for the trial of a case, or, during the trial of a case with any member of the jury unless authorized to do so by law or court order;
>
> 5. communicate with a juror or prospective juror after discharge of the jury if (i) the communication is prohibited by law or court order; (ii) the juror has made known to the lawyer a desire not to communicate; (iii) the communication involves misrepresentation, coercion, duress or harassment; or (iv) the communication is an attempt to influence the juror's actions in future jury service . . . .

Thus, the rules proscribe any direct or indirect communication with a juror or potential juror during trial, and prohibit certain categories of communication after the jury service is complete. It should also be noted that the RPC prevent a lawyer from doing indirectly, such as through a proxy, that which is directly proscribed for the lawyer. (RPC 8.4(a); 3.5).

A. Impermissible Communication

The RPC explicitly draw a distinction between conduct during trial, which is governed by RPC 3.5(a)(4), and conduct after discharge of the jury, which is regulated less strictly under RPC 3.5(a)(5). In fact, a lawyer's contact with jurors is divided, at least in practice, into three distinct areas. These are voir dire or jury selection, actual conduct of the trial, and post-verdict contact with jurors. As mentioned, any contact, direct or indirect, is proscribed as a matter of attorney ethics during the conduct of the trial, but permitted with certain conditions after discharge pursuant to RPC 3.5(a)(5).

Some authorities have examined a lawyer's use of internet resources to investigate potential jurors in the voir dire stage. For example, one recent Missouri decision considered and set aside a jury verdict in which a juror had specifically denied (falsely) any prior jury service. See Johnson v. McCullough, 306 S.W. 3d 551 (Mo. 2010). In holding that the juror had acted improperly, the Court observed that a more thorough investigation of the juror's background would have obviated the need to set aside the jury verdict and conduct a retrial. The trial court chided the attorney for failing to perform internet research on the juror, and granted a new trial, observing that a party should use reasonable efforts to examine the litigation history of potential jurors. 306 S.W. 3d at 559. A New Jersey appellate court similarly held that the plaintiff counsel's use of a laptop computer to google potential jurors was permissible and did not require judicial intervention for fairness concerns. See Carino v. Muenzen, No. A-5491-08T1, N.J. Super. Unpub. LEXIS 2154, at *26-27 (App. Div. Aug. 30, 2010); see also Jamila A. Johnson, "Voir Dire: to Google or Not to Google" (ABA Law Trends and News, GP/Solo & Small Firm Practice Area Newsletter, Fall 2008, Volume 5, No. 1).

In another context, the New York State Bar Association Committee on Professional Ethics, in Ethics Opinion 843, recently considered whether a lawyer could ethically access the publicly available social networking page of an unrepresented party or witness for use in litigation, including possible impeachment. The NYSBA concluded that the lawyer may ethically view and access the Facebook and MySpace profiles of a party other than the lawyer's client in litigation as long as the party's profile is available to all members in the network and the lawyer neither

"friends" the other party nor directs someone else to do so."[1] Drawing an analogy to jurors, we conclude that passive monitoring of jurors, such as viewing a publicly available blog or Facebook page, may be permissible.

During a trial, however, lawyers may not communicate with jurors outside the courtroom. Not only is direct or indirect juror contact during trial proscribed as a matter of attorney ethics, as a matter of law (which is outside the scope of this committee's jurisdiction), the courts proscribe any unauthorized contact between lawyers and sitting jurors.

Significant ethical concerns would be raised by sending a "friend request," attempting to connect via LinkedIn.com, signing up for an RSS feed for a juror's blog or "following" a juror's Twitter account. We believe that such contact would be impermissible communication with a juror.

Moreover, under some circumstances a juror may become aware of a lawyer's visit to the juror's website.[2] If a juror becomes aware of an attorney's efforts to see the juror's profiles on websites, the contact may well consist of an impermissible communication, as it might tend to influence the juror's conduct with respect to the trial.

B. Reporting Juror Misconduct

Lawyers who learn of impeachment or other useful material about an adverse party, assuming that they otherwise conform with the rules of the court, have no obligation to come forward affirmatively to inform the court of their findings. Such lawyers, absent other obligations under court rules or the RPC, may sit back confidently, waiting to spring their trap at trial.[3] On the other hand, a lawyer who learns of juror impropriety is bound by RPC 3.5 to promptly report such impropriety to the court. That rule provides that: "A lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror, or by another toward a member of the venire or a juror or a member of his or her family of which the lawyer has knowledge." RPC 3.5(d).

The standard jury charge in a civil or criminal case instructs jurors not to discuss the case with anyone outside the courtroom, not to conduct any independent investigation, not to view the scene of the incident through computer programs such as Google Earth, and not to perform any independent research on the internet. See PJI 1:10, 1:11. According to the New York pattern jury instruction:

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[1] See NYSBA Ethics Op. 843, http://www.nysba.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=43208 at 2-3

[2] For example, as of this writing, Twitter apparently conveys a message to the account holder when a new person starts to "follow" the account, and the social networking site LinkedIn provides a function that allows a user to see who has recently viewed the user's profile. This opinion is intended to apply to whatever technologies now exist or may be developed that enable the account holder to learn the identity of a visitor.

[3] Lawyers should keep in mind that RPC 3.4 provides that a lawyer shall not "disregard or advise the client to disregard a standing rule of a tribunal. . .."

> It is important to remember that you may not use any internet services such as Google, Facebook, Twitter or any others to individually or collectively research topics concerning the trial, which includes the law, information about any of the issues in contention, the parties or the lawyers or the court.

Jurors have sometimes ignored instructions. For example, a New York juror googled defense counsel during trial, and discussed it at a social dinner.[4] A prominent television newscaster was criticized for tweeting on his Twitter account about his own jury service.[5] In a recent South Dakota case, a jury verdict was set aside after a juror performed his own internet research, which he shared with the other jurors.[6]

Any lawyer who learns of juror misconduct, such as substantial violations of the court's instructions, is ethically bound to report such misconduct to the court under RPC 3.5, and the lawyer would violate RPC 3.5 if he or she learned of such misconduct yet failed to notify the court. This is so even should the client notify the lawyer that she does not wish the lawyer to comply with the requirements of RPC 3.5. Of course, the lawyer has no ethical duty to routinely monitor the web posting or Twitter musings of jurors, but merely to promptly notify the court of any impropriety of which the lawyer becomes aware.

Further, the lawyer who learns of improper juror deliberations may not use this information to benefit the lawyer's client in settlement negotiations, or even to inform the lawyer's settlement negotiations. The lawyer may not research a juror's social networking site, ascertain the status of improper juror deliberations and then accept a settlement offer based on that information, prior to notifying the court. Rather, the lawyer must "promptly" notify the court of the impropriety—*i.e.*, before taking any further significant action on the case.

CONCLUSION:

It is proper and ethical under RPC 3.5 for a lawyer to undertake a pretrial search of a prospective juror's social networking site, provided that there is no contact or communication with the prospective juror and the lawyer does not seek to "friend" jurors, subscribe to their Twitter accounts, send jurors tweets or otherwise contact them. During the evidentiary or deliberation phases of a trial, a lawyer may visit the publicly available Twitter, Facebook or other social networking site of a juror but must not "friend" the juror, email, send tweets to the juror or otherwise communicate in any way with the juror or act in any way by which the juror becomes aware of the monitoring. Moreover, the lawyer may not make any misrepresentations or engage in deceit, directly or indirectly, in reviewing juror social networking sites. In the event the lawyer learns of juror misconduct, including deliberations that violate the court's instructions, the lawyer may not unilaterally act upon such knowledge to benefit the lawyer's client, but must promptly

[4] People vs. Jamison, 24 Misc. 3d 1238A, 243 N.Y.L.J. 42 (2006).

[5] Michael Hoenig, Juror Misconduct on the Internet, N.Y.L.J. October 8, 2009.

[6] Russo vs. Takata Corp., 2009 S.D. 83, 2009 S.D. Lexis 155 (Sept. 16, 2009).

comply with RPC 3.5(d) and bring such misconduct to the attention of the court, before engaging in any further significant activity in the case.

NYCLA ETHICS OPINION 745
JULY 2, 2013

ADVISING A CLIENT REGARDING POSTS ON SOCIAL MEDIA SITES

TOPIC: What advice is appropriate to give a client with respect to existing or proposed postings on social media sites.

DIGEST: It is the Committee's opinion that New York attorneys may advise clients as to (1) what they should/should not post on social media, (2) what existing postings they may or may not remove, and (3) the particular implications of social media posts, subject to the same rules, concerns, and principles that apply to giving a client legal advice in other areas including RPC 3.1, 3.3 and 3.4.[1]

RPC: 4.1, 4.2, 3.1, 3.3, 3.4, 8.4.

OPINION:

This opinion provides guidance about how attorneys may advise clients concerning what may be posted or removed from social media websites. It has been estimated that Americans spend 20 percent of their free time on social media (Facebook, Twitter, Friendster, Flickr, LinkedIn, and the like). It is commonplace to post travel logs, photographs, streams of consciousness, rants, and all manner of things on websites so that family, friends, or even the public-at-large can peer into one's life. Social media enable users to publish information regionally, nationally, and even globally.

The personal nature of social media posts implicates considerable privacy concerns. Although all of the major social media outlets have password protections and various levels of privacy settings, many users are oblivious or indifferent to them, providing an opportunity for persons with adverse interests to learn even the most intimate information about them. For example, teenagers and college students commonly post photographs of themselves partying, binge drinking, indulging in illegal drugs or sexual poses, and the like. The posters may not be aware, or may not care, that these posts may find their way into the hands of family, potential employers, school admission officers, romantic contacts, and others. The content of a removed social media posting may continue to exist, on the poster's computer, or in cyberspace.

[1] This opinion is limited to conduct of attorneys in connection with civil matters. Attorneys involved in criminal cases may have different ethical responsibilities.

That information posted on social media may undermine a litigant's position has not been lost on attorneys. Rather than hire investigators to follow claimants with video cameras, personal injury defendants may seek to locate YouTube videos or Facebook photos that depict a "disabled" plaintiff engaging in activities that are inconsistent with the claimed injuries. It is now common for attorneys and their investigators to seek to scour litigants' social media pages for information and photographs. Demands for authorizations for access to password-protected portions of an opposing litigant's social media sites are becoming routine.

Recent ethics opinions have concluded that accessing a social media page open to all members of a public network is ethically permissible. New York State Bar Association Eth. Op. 843 (2010); Oregon State Bar Legal Ethics Comm., Op. 2005-164 (finding that accessing an opposing party's public website does not violate the ethics rules limiting communications with adverse parties). The reasoning behind these opinions is that accessing a public site is conceptually no different from reading a magazine article or purchasing a book written by that adverse party. Oregon Op. 2005-164 at 453.

But an attorney's ability to access social media information is not unlimited. Attorneys may not make misrepresentations to obtain information that would otherwise not be obtainable. In contact with victims, witnesses, or others involved in opposing counsel's case, attorneys should avoid misrepresentations, and, in the case of a represented party, obtain the prior consent of the party's counsel. New York Rules of Professional Conduct (RPC 4.2). See, NYCBA Eth. Op., 2010-2 (2012); NYSBA Eth. Op. 843. Using false or misleading representations to obtain evidence from a social network website is prohibited. RPC 4.1, 8.4(c).

Social media users may have some expectation of privacy in their posts, depending on the privacy settings available to them, and their use of those settings. All major social media allow members to set varying levels of security and "privacy" on their social media pages. There is no ethical constraint on advising a client to use the highest level of privacy/security settings that is available. Such settings will prevent adverse counsel from having direct access to the contents of the client's social media pages, requiring adverse counsel to request access through formal discovery channels.

A number of recent cases have considered the extent to which courts may direct litigants to authorize adverse counsel to access the "private" portions of their social media postings. While a comprehensive review of this evolving body of law is beyond the scope of this opinion, the premise behind such cases is that social media websites may contain materials inconsistent with a party's litigation posture, and thus may be used for impeachment. The newest cases turn on whether the party seeking such disclosure has laid a sufficient foundation that such impeachment material likely exists or whether the party is engaging in a "fishing expedition" and an invasion of privacy in the hopes of stumbling onto something that may be useful.[2]

[2] In Tapp v. N.Y.S. Urban Dev. Corp., 102 A.D.3d 620, 958 N.Y.S. 2d 392 (1st Dep't 2013), the First Department held that a defendant's contention that Facebook activities "may reveal daily activities that contradict or conflict with

Given the growing volume of litigation regarding social media discovery, the question arises whether an attorney may instruct a client who does not have a social media site not to create one: May an attorney pre-screen what a client posts on a social media site? May an attorney properly instruct a client to "take down" certain materials from an existing social media site?

Preliminarily, we note that an attorney's obligation to represent clients competently (RPC 1.1) could, in some circumstances, give rise to an obligation to advise clients, within legal and ethical requirements, concerning what steps to take to mitigate any adverse effects on the clients' position emanating from the clients' use of social media. Thus, an attorney may properly review a client's social media pages, and advise the client that certain materials posted on a social media page may be used against the client for impeachment or similar purposes. In advising a client, attorneys should be mindful of their ethical responsibilities under RPC 3.4. That rule provides that a lawyer shall not "(a)(1) suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce... [nor] (3) conceal or knowingly fail to disclose that which the lawyer is required by law to reveal."

Attorneys' duties not to suppress or conceal evidence involve questions of substantive law and are therefore outside the purview of an ethics opinion. We do note, however, that applicable state or federal law may make it an offense to destroy material for the purpose of defeating its availability in a pending or reasonably foreseeable proceeding, even if no specific request to reveal or produce evidence has been made. Under principles of substantive law, there may be a duty to preserve "potential evidence" in advance of any request for its discovery. VOOM HD Holdings LLC v. EchoStar Satellite L.L.C., 93 A.D.3d 33, 939 N.Y.S. 2d 331 (1st Dep't 2012) ("Once a party reasonably anticipates litigation, it must, at a minimum, institute an appropriate litigation hold to prevent the routine destruction of electronic data."); QK Healthcare, Inc., v. Forest Laboratories, Inc., 2013 N.Y. Misc. LEXIS 2008; 2013 N.Y. Slip Op. 31028(U) (Sup. Ct. N.Y. Co., May 8, 2013); RPC 3.4, Comment [2]. Under some circumstances, where litigation is anticipated, a duty to preserve evidence may arise under substantive law. But provided that such removal does not violate the substantive law regarding destruction or spoliation of evidence, there is no ethical bar to "taking down" such material from social media publications, or prohibiting a client's attorney from advising the client to do so, particularly inasmuch as the substance of the posting is generally preserved in cyberspace or on the user's computer.

An attorney also has an ethical obligation not to "bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous."

plaintiff's" claim isn't enough. "Mere possession and utilization of a Facebook account is an insufficient basis to compel plaintiff to provide access to the account or to have the court conduct an in camera inspection of the account's usage. To warrant discovery, defendants must establish a factual predicate for their request by identifying relevant information in plaintiff's Facebook account — that is, information that 'contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims.'" Also, see, Kregg v. Maldonado, 98 A.D.3d 1289, 951 N.Y.S. 2d 301 (4th Dep't 2012); Patterson v. Turner Constr. Co., 88 A.D.3d 617, 931 N.Y.S. 2d 311 (1st Dep't 2011); McCann v. Harleysville Ins. Co. of N.Y., 78 A.D.3d 1524, 910 N.Y.S. 2d 614 (4th Dep't 2010).

RPC 3.1(a). Frivolous conduct includes the knowing assertion of "material factual statements that are false." RPC 3.1(b)(3). Therefore, if a client's social media posting reveals to an attorney that the client's lawsuit involves the assertion of material false factual statements, and if proper inquiry of the client does not negate that conclusion, the attorney is ethically prohibited from proffering, supporting or using those false statements. See, also, RPC 3.3; 4.1 ("In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.")

Clients are required to testify truthfully at a hearing, deposition, trial, or the like, and a lawyer may not fail to correct a false statement of material fact or offer or use evidence the lawyer knows to be false. RPC 3.3(a)(1); 3.4(a)(4). Thus, a client must answer truthfully (subject to the rules of privilege or other evidentiary objections) if asked whether changes were ever made to a social media site, and the client's lawyer must take prompt remedial action in the case of any known material false testimony on this subject. RPC 3.3 (a)(3).

We further conclude that it is permissible for an attorney to review what a client plans to publish on a social media page in advance of publication, to guide the client appropriately, including formulating a corporate policy on social media usage. Again, the above ethical rules and principles apply: An attorney may not direct or facilitate the client's publishing of false or misleading information that may be relevant to a claim; an attorney may not participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false. RPC 3.4(a)(4).[3] However, a lawyer may counsel the witness to publish truthful information favorable to the lawyer's client; discuss the significance and implications of social media posts (including their content and advisability); advise the client how social media posts may be received and/or presented by the client's legal adversaries and advise the client to consider the posts in that light; discuss the possibility that the legal adversary may obtain access to "private" social media pages through court orders or compulsory process; review how the factual context of the posts may affect their perception; review the posts that may be published and those that have already been published; and discuss possible lines of cross-examination.

CONCLUSION:

Lawyers should comply with their ethical duties in dealing with clients' social media posts. The ethical rules and concepts of fairness to opposing counsel and the court, under RPC 3.3 and 3.4, all apply. An attorney may advise clients to keep their social media privacy settings turned on or maximized and may advise clients as to what should or should not be posted on public and/or private pages, consistent with the principles stated above. Provided that there is no violation of the rules or substantive law pertaining to the preservation and/or spoliation of evidence, an attorney may offer advice as to what may be kept on "private" social media pages, and what may be "taken down" or removed.

[3] We do not suggest that all information on Facebook pages would constitute admissible evidence; such determinations must be made as a matter of substantive law on a case by case basis.

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ETHICS OPINION 843

NEW YORK STATE BAR ASSOCIATION
Committee on Professional Ethics

Opinion # 843 (09/10/2010)

Topic: Lawyer's access to public pages of another party's social networking site for the purpose of gathering information for client in pending litigation.

Digest: A lawyer representing a client in pending litigation may access the public pages of another party's social networking website (such as Facebook or MySpace) for the purpose of obtaining possible impeachment material for use in the litigation.

Rules: 4.1; 4.2; 4.3; 5.3(b)(1); 8.4(c)

QUESTION

1. May a lawyer view and access the Facebook or MySpace pages of a party other than his or her client in pending litigation in order to secure information about that party for use in the lawsuit, including impeachment material, if the lawyer does not "friend" the party and instead relies on public pages posted by the party that are accessible to all members in the network?

OPINION

2. Social networking services such as Facebook and MySpace allow users to create an online profile that may be accessed by other network members. Facebook and MySpace are examples of external social networks that are available to all web users. An external social network may be generic (like MySpace and Facebook) or may be formed around a specific profession or area of interest. Users are able to upload pictures and create profiles of themselves. Users may also link with other users, which is called "friending." Typically, these social networks have privacy controls that allow users to choose who can view their profiles or contact them; both users must confirm that they wish to "friend" before they are linked and can view one another's profiles. However, some social networking sites and/or users do not require pre-approval to gain access to member profiles.

3. The question posed here has not been addressed previously by an ethics committee interpreting New York's Rules of Professional Conduct (the "Rules") or the former New York Lawyers Code of Professional Responsibility, but some guidance is available from outside New York. The Philadelphia Bar Association's Professional Guidance Committee recently analyzed the propriety of "friending" an

unrepresented adverse witness in a pending lawsuit to obtain potential impeachment material. See Philadelphia Bar Op. 2009-02 (March 2009). In that opinion, a lawyer asked whether she could cause a third party to access the Facebook and MySpace pages maintained by a witness to obtain information that might be useful for impeaching the witness at trial. The witness's Facebook and MySpace pages were not generally accessible to the public, but rather were accessible only with the witness's permission (*i.e.,* only when the witness allowed someone to "friend" her). The inquiring lawyer proposed to have the third party "friend" the witness to access the witness's Facebook and MySpace accounts and provide truthful information about the third party, but conceal the association with the lawyer and the real purpose behind "friending" the witness (obtaining potential impeachment material).

4. The Philadelphia Professional Guidance Committee, applying the Pennsylvania Rules of Professional Conduct, concluded that the inquiring lawyer could not ethically engage in the proposed conduct. The lawyer's intention to have a third party "friend" the unrepresented witness implicated Pennsylvania Rule 8.4(c) (which, like New York's Rule 8.4(c), prohibits a lawyer from engaging in conduct involving "dishonesty, fraud, deceit or misrepresentation"); Pennsylvania Rule 5.3(c)(1) (which, like New York's Rule 5.3(b)(1), holds a lawyer responsible for the conduct of a nonlawyer employed by the lawyer if the lawyer directs, or with knowledge ratifies, conduct that would violate the Rules if engaged in by the lawyer); and Pennsylvania Rule 4.1 (which, similar to New York's Rule 4.1, prohibits a lawyer from making a false statement of fact or law to a third person). Specifically, the Philadelphia Committee determined that the proposed "friending" by a third party would constitute deception in violation of Rules 8.4 and 4.1, and would constitute a supervisory violation under Rule 5.3 because the third party would omit a material fact (*i.e.,* that the third party would be seeking access to the witness's social networking pages solely to obtain information for the lawyer to use in the pending lawsuit).

5. Here, in contrast, the Facebook and MySpace sites the lawyer wishes to view are accessible to all members of the network. New York's Rule 8.4 would not be implicated because the lawyer is not engaging in deception by accessing a public website that is available to anyone in the network, provided that the lawyer does not employ deception in any other way (including, for example, employing deception to become a member of the network). Obtaining information about a party available in the Facebook or MySpace profile is similar to obtaining information that is available in publicly accessible online or print media, or through a subscription research service such as Nexis or Factiva, and that is plainly permitted.[1] Accordingly, we conclude that the lawyer may ethically view and access the Facebook and MySpace profiles of a party other than the lawyer's client in litigation as long as the party's profile is available to all members in the network and the lawyer neither "friends" the other party nor directs someone else to do so.

CONCLUSION

6. A lawyer who represents a client in a pending litigation, and who has access to the Facebook or MySpace network used by another party in litigation, may access and review the public social network pages of that party to search for potential impeachment material. As long as the lawyer does not "friend" the other party or direct a third person to do so, accessing the social network pages of the party will not violate Rule 8.4 (prohibiting deceptive or misleading conduct), Rule 4.1 (prohibiting false statements of fact or law), or Rule 5.3(b)(1) (imposing responsibility on lawyers for unethical conduct by nonlawyers acting at their direction).

(76-09)

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[1]One of several key distinctions between the scenario discussed in the Philadelphia opinion and this opinion is that the Philadelphia opinion concerned an unrepresented *witness*, whereas our opinion concerns a *party* - and this party may or may not be represented by counsel in the litigation. If a lawyer attempts to "friend" a *represented* party in a pending litigation, then the lawyer's conduct is governed by Rule 4.2 (the "no-contact" rule), which prohibits a lawyer from communicating with the represented party about the subject of the representation absent prior consent from the represented party's lawyer. If the lawyer attempts to "friend" an *unrepresented* party, then the lawyer's conduct is governed by Rule 4.3, which prohibits a lawyer from stating or implying that he or she is disinterested, requires the lawyer to correct any misunderstanding as to the lawyer's role, and prohibits the lawyer from giving legal advice other than the advice to secure counsel if the other party's interests are likely to conflict with those of the lawyer's client. Our opinion does not address these scenarios.

Related Files

Lawyers access to public pages of another partys social networking site for the purpose of gathering information for client in pending litigation.(PDF File)

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ETHICS OPINION 1009

New York State Bar Association
Committee on Professional Ethics

Opinion 1009 (5/21/2014)

Topic: Advertising; solicitation; press releases and tweets regarding shareholder litigation

Digest: Press releases and tweets directed to potential clients in shareholder suits constitute advertising and solicitation. They are thus subject to retention requirements, and, if directed to New York recipients, are also subject to filing requirements. The tweets must be labeled "attorney advertising" but are not prohibited by the rule against interactive solicitation.

Rules: 1.0(a) & (c); 7.1(f) & (k); 7.3; 8.5(b)

FACTS

1. Inquirer is a New York attorney who works for a firm based in a different state. The firm focuses its practice on shareholder litigation, and the companies and lawsuits in question are sited in various states.

2. The firm distributes press releases concerning new investigations or lawsuits, and potential clients sometimes contact the firm after seeing such releases. The inquiry states that the releases "are generally issued through an outlet such as Business Wire, PR Newswire or other electronic wire service." The firm also sends out "tweets" to alert recipients to the press releases.

3. According to the inquiry, the general purposes of the press releases are "to inform shareholders of the case or investigation" and to enable potential clients to contact the firm "for a potential attorney-client engagement." The inquiry attaches sample press releases, all of which are labeled "Attorney advertising," and some of which indicate that shareholders may contact the firm concerning their legal rights and remedies with respect to the specific cases described.

QUESTIONS

4. If a law firm issues press releases to inform potential clients of new investigations or actions, and sends "tweets" to alert recipients to the press releases, then are the press releases and tweets "advertisements" governed by Rule 7.1, and if so, (a) must copies be retained for one year or three years; and (b) must the tweets be labeled "attorney advertising"?

5. Are such press releases and tweets "solicitations" governed by Rule 7.3, and if so, (a) must copies be filed with the attorney disciplinary committee, and (b) are the tweets a permissible form of solicitation?

OPINION

A. Advertising issues under Rule 7.1

6. Lawyer conduct in using and disseminating advertisements is subject to Rule 7.1 of the New York Rules of Professional Conduct (the "Rules").[1] Under Rule 1.0(a), the term "advertisement" means (subject to exceptions not relevant here) "any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm." The communication is to be assessed in light of the circumstances of its circulation, and if its primary purpose is to obtain clients, then it is an advertisement for purposes of the Rules. *See, e.g.*, N.Y. State 873 (2011).

7. It seems clear from the nature of the press releases and the tweets that their primary purpose is to secure clients. Such communications are therefore advertisements under the Rules. As such, they can serve potential clients by educating them as to their need for legal advice and helping them obtain an appropriate lawyer, and can serve lawyers by enabling them to attract clients. *See* Rule 7.1, Cmt. [3] (indicating "principal purposes" of advertising).

8. Because press releases and tweets constitute lawyer advertising, they are subject to pre-approval and retention requirements. Rule 7.1(k) provides that all advertisements "shall be pre-approved by the lawyer or law firm." It also provides that a copy of an advertisement "shall be retained for a period of not less than three years following its initial dissemination," but specifies an alternate one-year retention period for advertisements contained in a "computer-accessed communication," and specifies another retention scheme for web sites. Rule 1.0(c) defines "computer-accessed communication" to mean any communication made by or on behalf of a lawyer or law firm that is disseminated through the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto.

9. The releases will be disseminated through wire services. We understand that such wire services typically distribute the releases to a wide variety of media, usually in full-text and without alteration. Even if the lawyers and wire services distribute the press releases by electronic means in the first instance, it does not follow that the alternative one-year retention period applies. Distribution by the wire services is merely the beginning of a pipeline of information that is intended to find its way into all kinds of mass

media, including not only web sites and social networks but also newspapers, magazines and trade journals. Accordingly, the press releases at issue do not appear to constitute "computer-accessed communication[s]" subject to the alternative one-year retention period.

10. We reach a different conclusion as to the tweets. These are disseminated by computer and resemble the examples in Rule 1.0(c). It is conceivable that the tweets could ultimately be reproduced in a newspaper or some other non-electronic format, but that is not their intended route of distribution. The tweets are therefore computer-accessed communications, and their retention is required only for one year.

11. Rule 7.1(f) provides that advertisements must be labeled as "Attorney Advertising" unless they appear in certain specified media such as newspapers, radio, television, or billboards, or are "made in person pursuant to Rule 7.3(a)(1)." We next consider the applicability of Rule 7.1(f) to the tweets described in the inquiry.[2]

12. The tweets do not appear in any of the media that are explicitly exempted from the labeling requirement in Rule 7.1(f). They would be exempt only if they constituted advertisements "made in person pursuant to Rule 7.3(a)(1)." That provision generally prohibits certain forms of interactive solicitation – those made in person, by telephone, or by "real-time or interactive computer-accessed communication" – but allows those otherwise prohibited forms when "the recipient is a close friend, relative, former client or existing client." For present purposes, we need not determine the precise scope of this exemption from the labeling requirement.[3] Even if the exemption can apply to real-time or interactive computer-accessed communication, the tweets in question do not appear to come within that category. See *infra* ¶22. And even if they did, the exemption would still not apply. The inquirer has not suggested that access to the tweets would be limited to existing or former clients, or friends and relatives, nor does such a limitation seem plausible given the goal of directing potential new clients to the press releases. Because the tweets would not be in any of the categories exempted from Rule 7.1(f), they would need to include the "Attorney Advertising" label.

B. Solicitation issues under Rule 7.3

13. The threshold question is whether the press releases and tweets are "solicitations," a term defined in relevant part as

> any advertisement [1] initiated by or on behalf of a lawyer or law firm [2] that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, [3] the primary purpose of which is the retention of the lawyer or law firm, and [4] a significant motive for which is pecuniary gain.

Rule 7.3(b) (numbering added); *see* Rule 7.3, Cmt. [2] (elaborating on the four elements).

14. We have already noted (*supra* ¶7) that the press releases and tweets are advertisements, the primary purpose of which is to obtain retention of the lawyer or firm. It is also clear from the inquiry and the context that the press releases and tweets are initiated by or on behalf of the lawyer or law firm, and are motivated by desire for pecuniary gain. Whether they are solicitations thus depends on whether they are "directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives."

15. The Comments to Rule 7.3 point out a few ways in which communications can be directed to, or targeted at, specific recipients. First, they can be directed to specific recipients by their mode of transmission (such as through telephone calls, mail, email, or in-person contact), which is not the case here. *See* Rule 7.3, Cmt. [3].

16. "Second, an advertisement in public media such as newspapers, television, billboards, web sites or the like is a solicitation if it makes reference to a specific person or group of people whose legal needs arise out of a specific incident to which the advertisement explicitly refers." Rule 7.3, Cmt. [3]. This is an exception to the general rule that "an advertisement in public media such as newspapers, television, billboards, web sites or the like is presumed not to be directed to or targeted at a specific recipient or recipients." Rule 7.3, Cmt. [4]. This exception is triggered by reference to people with legal needs arising from a "specific incident," which is "a particular identifiable event (or a sequence of related events occurring at approximately the same time and place) that causes harm to one or more people." Rule 7.3, Cmt. [5]. The harm caused by a "specific incident" to which a solicitation relates will often be physical but may also be economic.[4]

17. Third, an advertisement in a public medium that is aimed at a specific group of people, such as those injured by a defective medical device or medication, is a solicitation even if the potential claimants were injured "over a period of years." In such cases the claims arise "at disparate times and places" and do not relate to one specific incident so as to trigger the "blackout" provisions of Rule 7.3(e). Nonetheless, the advertisements are solicitations because they make reference to, and are "intended to be of interest only to," the potential claimants. Rule 7.3, Cmt. [6].

18. An advertisement in a public medium, seeking retention and pecuniary gain, *does not* become a solicitation "simply because it is intended to attract potential clients with needs in a specified area of law" such as shareholder litigation. *See* Rule 7.3, Cmt. [4]. But the advertisement *does* become a solicitation if it is directed to or targeted at the specific group of recipients who held shares in a particular company on particular dates. From the sample press releases submitted with the inquiry, it appears that at least some refer to a "specific incident" in the management of the companies in question, and to groups of shareholders whose legal needs, the advertisements suggest, arise out of that specific incident. But even if a shareholder suit alleges misconduct too extended in time and place as to constitute a single incident, it can nevertheless be described in a press release that makes reference to, and is "intended to be of interest only to," the potential claimants. Accordingly, the press releases and tweets at issue here are "solicitations" subject to the requirements of Rule 7.3.

19. A filing requirement applies to solicitations that are "directed to a recipient in this State." Rule 7.3(c); *see* Rule 7.3(c), Cmt. [8] ("Solicitations by a lawyer admitted in New York State directed to or targeted at a recipient or recipients outside of New York State are not subject to the filing and related requirements set

out in Rule 7.3(c).”). If a press release or tweet is targeted at the shareholders of a particular company, the lawyer may or may not know those shareholders’ identities and residences. A lawyer’s solicitation is not “directed” to a New York recipient if the lawyer has no reason to be aware that New York residents are in fact among the target audience. But Rule 7.3(c) would apply if the lawyer knows that the intended audience includes any New York residents, or if the existence of such persons would be apparent from the size or nature of the company. *Cf.* Rule 1.0(k) (“A person’s knowledge may be inferred from circumstances.”).

20. The remaining issue is whether the tweets violate the rule that prohibits solicitation through certain interactive forms of contact. A lawyer may not engage in solicitation “by in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or existing client.” Rule 7.3(a)(1). The policy is one of protecting potential clients:

> Paragraph (a) generally prohibits in-person solicitation, which has historically been disfavored by the bar because it poses serious dangers to potential clients. For example, in-person solicitation poses the risk that a lawyer, who is trained in the arts of advocacy and persuasion, may pressure a potential client to hire the lawyer without adequate consideration. These same risks are present in telephone contact or by real-time or interactive computer-accessed communication and are regulated in the same manner.

Rule 7.3, Cmt. [9].

21. As noted in ¶12 *supra*, it does not appear that the tweets would go only to close friends, relatives, former clients or existing clients. Accordingly, the tweets would be impermissible if they were to constitute “real-time or interactive computer-accessed communication.” The tweets do constitute computer-accessed communications, see ¶10 *supra*, but that leaves open the question whether those communications are also “real-time or interactive.” This concept is addressed in Comment [9] to Rule 7.3:

> Ordinary email and web sites are not considered to be real-time or interactive communication. Similarly, automated pop-up advertisements on a web site that are not a live response are not considered to be real-time or interactive communication. Instant messaging, chat rooms, and other similar types of conversational computer-accessed communication are considered to be real-time or interactive communication.

22. Our understanding is that the broadly distributed tweets contemplated here, as currently used and in contrast to instant messaging or chat rooms, generally do not involve live responses. In that sense the tweets are more like ordinary email or web site postings. Because the tweets should not be considered real-time or interactive communication, Rule 7.3 does not prohibit them.

CONCLUSION

23. The subject press releases and tweets constitute "advertisements" and are thus subject to retention requirements. Copies of the press releases must be retained for three years. The tweets must be labeled "attorney advertising" and copies must be retained for one year. The press releases and tweets also are "solicitations" and are thus subject to filing requirements if directed to recipients in New York. The tweets are not prohibited by the rule against interactive solicitation.

(14-14)

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[1] The inquiry notes that the proposed conduct has connections to jurisdictions other than New York: the inquirer's firm is based in another state, and the companies involved in the derivative suits, and the lawsuits themselves, may be in any state. Although the inquirer is admitted to practice only in New York, in some circumstances ethics rules from other jurisdictions could apply. If the advertising and solicitations in question are "in connection with" a proceeding that has already been filed in court in a jurisdiction other than New York, and the inquirer has been admitted to practice before that court for purposes of that proceeding, then that jurisdiction's ethical rules would govern unless the rules of the court provide otherwise. *See* Rule 8.5(b)(1). But when there is not yet any particular forum for a lawsuit, the New York rules will generally apply to the inquirer's conduct (no matter where the firm is based), because the inquirer is licensed to practice only in New York. *See* Rule 8.5(b)(2)(i). And of course New York rules will also apply to the inquirer's conduct as to any lawsuit that has been filed in New York. In this opinion we limit our analysis to the latter two situations and apply the New York rules of ethics. We also note that beyond the general provisions of Rule 8.5, one of the Rules at issue here includes more specific provisions as to its own applicability. *See* Rule 7.3(c) (discussed *infra* ¶19) and Rule 7.3(i).

[2] Whether *press releases* must be labeled as attorney advertising may depend on the circumstances. *See* Rule 7.1, Cmt. [5] (explaining that the label is not necessary for advertising in newspapers or on television or for "similar communications that are self-evidently advertisements," such as "press releases transmitted to news outlets" as to which there is no risk of confusion). The inquirer has already chosen to apply the label to the press releases in question, and has not asked us whether such labeling is required, so we do not opine on that issue.

[3] Read literally, the exemption could apply only to those solicitations that are permissible under Rule 7.3(a)(1) even though they are made "in person." However, the exemption has also been read more broadly to apply to *all* solicitations permitted under Rule 7.3(a)(1), including those by real-time or interactive computer-accessed communication. *See Simon's New York Rules of Professional Conduct Annotated* 1377 (2013 ed.).

[4] "Specific incidents *include* such events as traffic accidents, plane or train crashes, explosions, building collapses, and the like." Rule 7.3, Cmt. [5] (emphasis added). But as quoted above, this comment also includes more general language explaining that – for purposes of the definition of solicitation – a specific incident occurs when events closely connected in time and place cause "harm." Comment [5] also refers to

"a specific incident involving potential claims for personal injury or wrongful death," but that reference is for the different purpose of describing the scope of the 30- and 15-day "blackout" provisions of Rule 7.3(e), which are explicitly limited to such claims.

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2018 WL 2282883 (N.Y.Sup.) (Trial Order)
Supreme Court of New York.
New York County

Kemario CHRISTIAN, Plaintiff,
v.
846 6TH AVENUE PROPERTY OWNER, LLC, 846 6th Avenue Venture, LLC, Alchemy 6th Avenue LLC, Leeding Builders Group LLC, Defendants.

No. 157553/2017.
May 18, 2018.

Decision and Order

Present: Hon. Kathryn E. Freed, Justice.

MOTION SEQ. NO. *001*

***1** The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30 were read on this motion to/for *DISCOVERY*.

In this personal injury action under the Labor Law, defendants move, as limited by the compliance conference order of April 26, 2018 (Doc. No. 32), for access to the private portions of plaintiff's Facebook account. Plaintiff opposes to that extent. For the reasons that follow, the motion is granted, in part.

The resolution of this motion is governed by the recently-decided case of *Forman v Henkin* (30 NY3d 656 [2018]). Although the decision was handed down on February 13, 2018, while this motion was already pending, plaintiff's opposition was filed on March 6, 2018, giving him more than enough opportunity to find the decision and contemplate its impact on these issues. Furthermore, during the parties' last compliance conference on April 26, 2018, this Court's staff inquired whether additional briefing was necessary in light of the decision. Both parties answered in the negative and permitted this branch of the motion to be submitted without an objection as to the extent of the briefing. Thus, this Court finds it appropriate to turn to the merits.

The Court of Appeals has rejected an approach concerning social media that requires the party seeking disclosure to make a threshold showing that information contained in the public portion of an individual's account contains relevant information before access to the private portion may be granted. (*Forman v Henkin*, 30 NY3d at 664.) The Court counseled that, when faced with disclosure demands concerning social media, "courts should first consider the nature of the event giving rise to the litigation and the injuries claimed, as well as any other information specific to the case, to assess whether relevant material is likely to be found on the Facebook account." (*Id.* at 665.) Next, "balancing the potential utility of the information sought against any specific 'privacy' or other concerns raised by the account holder, the court should issue an order tailored to the particular controversy that identifies the types of materials that must be disclosed while avoiding disclosure of nonrelevant materials." (*Id.; see e.g. Doe v Bronx Prep. Charter Sch.*, ___ AD3d ___, 2018 NY Slip Op 02893 [1st Dept 2018]; *Paul v Witkoff Group*, 2018 WL 1697285 [Sup Ct, NY County 2018].)

Here, the accident is alleged to have occurred on January 12, 2017. (Doc. No. 17.) Plaintiff, who is currently 32 years old, contends in the bill of particulars that he sustained injuries to his cervical, thoracic, and lumbar spine as well as

both shoulders. *(Id.)* He also claims that he is "incapacitated from his employment from the date of the accident to the present time" and that he is "presently partially disabled." *(Id.)*

Despite these representations, defendants submit several photographs of plaintiff that they recovered from the public section of his Facebook account. In the first photograph, which was posted to Facebook on October 19, 2017, plaintiff is standing upright with a hardhat on his head, and is tying a strap around a stack of objects. (Doc. No. 21.) In the next photo, which was posted on "January 12" but does not specify the year, plaintiff is reaching up and holding the edge of a basketball hoop, looking into the camera. *(Id)* Finally, the last photograph was posted to Facebook on January 26, 2017, and shows plaintiff posing for the camera with a child who appears to be his son, and is captioned "always there for you."

***2** Assuming that the photographs were taken about when they were posted, they tend to belie plaintiff's claim that he is presently partially disabled and unable to work. For this reason, there is a basis to believe that additional relevant photographs are to be found on whatever portion of plaintiff's Facebook account he may have made private. While defendants did not have to make a predicate showing with respect to public portions of the account, they have nevertheless done so.

Contrary to defendants' Opposition, nothing in *Forman v Henkin* indicates that a party must wait until after a deposition before demanding disclosure of the private portions of an individual's social media account. Indeed, such a rule has the potential to needlessly delay disclosure of relevant information. Furthermore, since defendants have provided this Court with examples of plaintiff's Facebook posts showing that he uses it to share information about his activities with friends and family, there is already a basis to determine that additional relevant information may be found in the private section.

Accordingly, it is hereby

ORDERED that the motion is granted to the extent that, within 30 days from the date of service of a copy of this order with notice of entry, plaintiff is directed to turn over printouts of Facebook posts as well as the original photographs or videos for six months prior to the date of the accident that show him engaged in any work or social activities that he claims he is now unable to perform, as well as all posts from the date of the accident to present that tend to contradict his claim that he presently is unable to work and that he is partially disabled, excluding any images showing nudity or romantic encounters, and the motion is in all other respects denied.

5/16/2018

DATE

<<signature>>

KATHRYN E. FREED, J.S.C.

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160 A.D.3d 591, 76 N.Y.S.3d 126, 355 Ed. Law Rep. 1203, 2018 N.Y. Slip Op. 02898

**1 Jane Doe et al., Respondents,
v
The Bronx Preparatory Charter School, Appellant, et al., Defendant.

Supreme Court, Appellate Division, First Department, New York
306670/14, 6388N
April 26, 2018

CITE TITLE AS: Doe v Bronx Preparatory Charter Sch.

HEADNOTE

Disclosure
Penalty for Failure to Disclose
No Showing of Willful Failure to Comply with Discovery Order

Biedermann Hoenig Semprevivo, New York (Megan R. Siniscalchi of counsel), for appellant.
Segal & Lax, P.C., New York (Patrick D. Gatti of counsel), for respondents.

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered November 28, 2016, which, inter alia, denied defendant The Bronx Preparatory Charter School's motion for an order precluding plaintiffs from submitting evidence and testimony at trial and compelling plaintiffs to provide authorizations to obtain the infant plaintiff's social media records for five years prior to the incident and her cell phone records and accompanying authorizations for two years prior to the incident, unanimously affirmed, without costs.

The court providently exercised its discretion in declining to impose sanctions on plaintiffs or to compel further disclosure of the infant plaintiff's social media and cell phone history, since defendant failed to submit papers necessary to determine whether plaintiffs had not complied with a prior discovery order (*see Nyadzi v Ki Chul Lee*, 129 AD3d 645 [1st Dept 2015]; *Ventura v Ozone Park Holding Corp.*, 84 AD3d 516, 517-518 [1st Dept 2011]). Further, there was no showing that plaintiffs wilfully failed to comply with any discovery order, since they provided access to the infant plaintiff's social media accounts and cell phone records for a period of two months before the date on which she was allegedly attacked on defendant's premises to the present, which was a reasonable period of time. Defendant's demands for access to social media accounts for five years prior to the incident, and to cell phone records for two years prior to the incident, were overbroad and not reasonably tailored to obtain discovery relevant to the issues in the case (*see Forman v Henkin*, 30 NY3d 656, 665 [2018]). Concur—Renwick, J.P., Tom, Andrias, Oing, JJ. ***592**

2018 WL 828101

Court of Appeals of New York.

Kelly Forman, Respondent,
v.
Mark Henkin, Appellant.

No. 1
|
Decided February 13, 2018

Order insofar as appealed from reversed, with costs, order of Supreme Court, New York County, reinstated and certified question answered in the negative. Opinion by Chief Judge DiFiore.

Attorneys and Law Firms

Michael A. Bono, for appellant.

Kenneth J. Gorman, for respondent.

Defense Association of New York, Inc., amicus curiae.

Opinion

OPINION

DIFIORE, Chief Judge:

***1** In this personal injury action, we are asked to resolve a dispute concerning disclosure of materials from plaintiff's Facebook account.

Plaintiff alleges that she was injured when she fell from a horse owned by defendant, suffering spinal and traumatic brain injuries resulting in cognitive deficits, memory loss, difficulties with written and oral communication, and social isolation. At her deposition, plaintiff stated that she previously had a Facebook account on which she posted "a lot" of photographs showing her pre-accident active lifestyle but that she deactivated the account about six months after the accident and could not recall whether any post-accident photographs were posted. She maintained that she had become reclusive as a result of her injuries and also had difficulty using a computer and composing coherent messages. In that regard, plaintiff produced a document she wrote that contained misspelled words and faulty grammar in which she represented that she could no longer express herself the way she did before the accident. She contended, in particular, that a simple email could take hours to write because she had to go over written material several times to make sure it made sense.

Defendant sought an unlimited authorization to obtain plaintiff's entire "private" Facebook account, contending the photographs and written postings would be material and necessary to his defense of the action under CPLR 3101(a). When plaintiff failed to provide the authorization (among other outstanding discovery), defendant moved to compel, asserting that the Facebook material sought was relevant to the scope of plaintiff's injuries and her credibility. In support of the motion, defendant noted that plaintiff alleged that she was quite active before the accident and had posted photographs on Facebook reflective of that fact, thus affording a basis to conclude her Facebook account would contain evidence relating to her activities. Specifically, defendant cited the claims that plaintiff can no longer cook, travel, participate in sports, horseback ride, go to the movies, attend the theater, or go boating, contending that photographs and messages she posted on Facebook would likely be material to these allegations and her claim that the accident negatively impacted her ability to read, write, word-find, reason and use a computer.

Plaintiff opposed the motion arguing, as relevant here, that defendant failed to establish a basis for access to the "private" portion of her Facebook account because, among other things, the "public" portion contained only a single photograph that did not contradict plaintiff's claims or deposition testimony. Plaintiff's counsel did not affirm that she had reviewed plaintiff's Facebook account, nor allege that any specific material located therein, although potentially relevant, was privileged or should be shielded from disclosure on privacy grounds. At oral argument on the motion, defendant reiterated that the Facebook material was reasonably likely to provide evidence relevant to plaintiff's credibility, noting for example that the timestamps on Facebook messages would reveal the amount of time it takes plaintiff to write a post or respond to a message. Supreme Court inquired whether there is a way to produce data showing the timing and frequency of messages without revealing their contents and defendant acknowledged that it would

be possible for plaintiff to turn over data of that type, although he continued to seek the content of messages she posted on Facebook.

***2** Supreme Court granted the motion to compel to the limited extent of directing plaintiff to produce all photographs of herself privately posted on Facebook prior to the accident that she intends to introduce at trial, all photographs of herself privately posted on Facebook after the accident that do not depict nudity or romantic encounters, and an authorization for Facebook records showing each time plaintiff posted a private message after the accident and the number of characters or words in the messages. Supreme Court did not order disclosure of the content of any of plaintiff's written Facebook posts, whether authored before or after the accident.

Although defendant was denied much of the disclosure sought in the motion to compel, only plaintiff appealed to the Appellate Division. [1] On that appeal, the court modified by limiting disclosure to photographs posted on Facebook that plaintiff intended to introduce at trial (whether pre- or post-accident) and eliminating the authorization permitting defendant to obtain data relating to post-accident messages, and otherwise affirmed. Two Justices dissented, concluding defendant was entitled to broader access to plaintiff's Facebook account and calling for reconsideration of that court's recent precedent addressing disclosure of social media information as unduly restrictive and inconsistent with New York's policy of open discovery. The Appellate Division granted defendant leave to appeal to this Court, asking whether its order was properly made. We reverse, reinstate Supreme Court's order and answer that question in the negative.

Disclosure in civil actions is generally governed by CPLR 3101(a), which directs: "[t]here shall be full disclosure of all matter material and necessary to the prosecution or defense of an action, regardless of the burden of proof." We have emphasized that "[t]he words 'material and necessary,' ... are to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (Allen v Crowell-Collier Publ. Co., 21 NY2d 403, 406 [1968]; see also Andon v 302-304 Mott St. Assoc., 94 NY2d 740, 746 [2000]). A party seeking discovery must satisfy the threshold requirement that the request is reasonably calculated to yield information that is "material and necessary" –i.e., relevant – regardless of whether discovery is sought from another party (see CPLR 3101[a][1]) or a nonparty (CPLR 3101[a][4]; see e.g. Matter of Kapon v Koch, 23 NY3d 32 [2014]). The "statute embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise" (Spectrum Systems Intern. Corp. v Chemical Bank, 78 NY2d 371, 376 [1991]).

The right to disclosure, although broad, is not unlimited. CPLR 3101 itself "establishes three categories of protected materials, also supported by policy considerations: privileged matter, absolutely immune from discovery (CPLR 3101[b]); attorney's work product, also absolutely immune (CPLR 3101[c]); and trial preparation materials, which are subject to disclosure only on a showing of substantial need and undue hardship" (Spectrum, supra, at 377). The burden of establishing a right to protection under these provisions is with the party asserting it – "the protection claimed must be narrowly construed; and its application must be consistent with the purposes underlying the immunity" (id.).

***3** In addition to these restrictions, this Court has recognized that "litigants are not without protection against unnecessarily onerous application of the disclosure statutes. Under our discovery statutes and case law competing interests must always be balanced; the need for discovery must be weighed against any special burden to be borne by the opposing party" (Kavanaugh v Ogden Allied Maintenance Corp., 92 NY2d 952, 954 [1998] [citations and internal quotation marks omitted]; see CPLR 3103[a]). Thus, when courts are called upon to resolve a dispute, [2] discovery requests "must be evaluated on a case-by-case basis with due regard for the strong policy supporting open disclosure ... Absent an [error of law or an] abuse of discretion, this Court will not disturb such a determination (Andon, supra, 94 NY2d at 747; see Kavanaugh, supra, 92 NY2d at 954). [3]

Here, we apply these general principles in the context of a dispute over disclosure of social media materials. Facebook is a social networking website "where people can share information about their personal lives, including posting photographs and sharing information about what they are doing or thinking" (Romano v Steelcase, Inc., 30 Misc 3d 426 [Sup Ct Suffolk County 2010]). Users

create unique personal profiles, make connections with new and old "friends" and may "set privacy levels to control with whom they share their information" (id.). Portions of an account that are "public" can be accessed by anyone, regardless of whether the viewer has been accepted as a "friend" by the account holder – in fact, the viewer need not even be a fellow Facebook account holder (see Facebook Help: What audiences can I choose from when I share? https://www.facebook.com/help/211513702214269?helpref=faq_content [last accessed January 15, 2018]). However, if portions of an account are "private," this typically means that items are shared only with "friends" or a subset of "friends" identified by the account holder (id.). While Facebook – and sites like it –offer relatively new means of sharing information with others, there is nothing so novel about Facebook materials that precludes application of New York's long-standing disclosure rules to resolve this dispute.

***4** On appeal in this Court, invoking New York's history of liberal discovery, defendant argues that the Appellate Division erred in employing a heightened threshold for production of social media records that depends on what the account holder has chosen to share on the public portion of the account. We agree. Although it is unclear precisely what standard the Appellate Division applied, it cited its prior decision in Tapp v New York State Urban Dev. Corp. (102 AD3d 620 [1st Dept 2013]), which stated: "To warrant discovery, defendants must establish a factual predicate for their request by identifying relevant information in plaintiff's Facebook account – that is, information that 'contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims' " (id. at 620 [emphasis added]). Several courts applying this rule appear to have conditioned discovery of material on the "private" portion of a Facebook account on whether the party seeking disclosure demonstrated there was material in the "public" portion that tended to contradict the injured party's allegations in some respect (see e.g. Spearin v Linmar, 129 AD3d 528 [1st Dept 2015]; Nieves v 30 Ellwood Realty LLC, 39 Misc 3d 63 [App Term 2013]; Pereira v City of New York, 40 Misc 3d 1210[A] [Sup Ct Queens County 2013]; Romano, supra, 30 Misc 3d 426). Plaintiff invoked this precedent when arguing, in opposition to the motion to compel, that defendant failed to meet the minimum threshold permitting discovery of any Facebook materials.

Before discovery has occurred – and unless the parties are already Facebook "friends" – the party seeking disclosure may view only the materials the account holder happens to have posted on the public portion of the account. Thus, a threshold rule requiring that party to "identify relevant information in [the] Facebook account" effectively permits disclosure only in limited circumstances, allowing the account holder to unilaterally obstruct disclosure merely by manipulating "privacy" settings or curating the materials on the public portion of the account.[4] Under such an approach, disclosure turns on the extent to which some of the information sought is already accessible – and not, as it should, on whether it is "material and necessary to the prosecution or defense of an action" (see CPLR 3101[a]).

New York discovery rules do not condition a party's receipt of disclosure on a showing that the items the party seeks actually exist; rather, the request need only be appropriately tailored and reasonably calculated to yield relevant information. Indeed, as the name suggests, the purpose of discovery is to determine if material relevant to a claim or defense exists. In many if not most instances, a party seeking disclosure will not be able to demonstrate that items it has not yet obtained contain material evidence. Thus, we reject the notion that the account holder's so-called "privacy" settings govern the scope of disclosure of social media materials.

That being said, we agree with other courts that have rejected the notion that commencement of a personal injury action renders a party's entire Facebook account automatically discoverable (see e.g. Kregg v Maldonado, 98 AD3d 1289, 1290 [4th Dept 2012] [rejecting motion to compel disclosure of all social media accounts involving injured party without prejudice to narrowly-tailored request seeking only relevant information]; Giacchetto, supra, 293 FRD 112, 115; Kennedy v Contract Pharmacal Corp., 2013 WL 1966219, *2 [ED NY 2013]). Directing disclosure of a party's entire Facebook account is comparable to ordering discovery of every photograph or communication that party shared with any person on any topic prior to or since the incident giving rise to litigation – such an order would be likely to yield far more nonrelevant than relevant information. Even under our broad disclosure paradigm, litigants are protected from "unnecessarily onerous application of the discovery statutes" (Kavanaugh, supra, 92 NY2d at 954).

***5** Rather than applying a one-size-fits-all rule at either of these extremes, courts addressing disputes over the scope of social media discovery should employ our well-established rules – there is no need for a specialized or heightened factual predicate to avoid improper "fishing expeditions." In the event that judicial intervention becomes necessary, courts should first consider the nature of the event giving rise to the litigation and the injuries claimed, as well as any other information specific to the case, to assess whether relevant material is likely to be found on the Facebook account. Second, balancing the potential utility of the information sought against any specific "privacy" or other concerns raised by the account holder, the court should issue an order tailored to the particular controversy that identifies the types of materials that must be disclosed while avoiding disclosure of nonrelevant materials. In a personal injury case such as this it is appropriate to consider the nature of the underlying incident and the injuries claimed and to craft a rule for discovering information specific to each. Temporal limitations may also be appropriate – for example, the court should consider whether photographs or messages posted years before an accident are likely to be germane to the litigation. Moreover, to the extent the account may contain sensitive or embarrassing materials of marginal relevance, the account holder can seek protection from the court (see CPLR 3103[a]). Here, for example, Supreme Court exempted from disclosure any photographs of plaintiff depicting nudity or romantic encounters.

Plaintiff suggests that disclosure of social media materials necessarily constitutes an unjustified invasion of privacy. We assume for purposes of resolving the narrow issue before us that some materials on a Facebook account may fairly be characterized as private.[5] But even private materials may be subject to discovery if they are relevant. For example, medical records enjoy protection in many contexts under the physician-patient privilege (see CPLR 4504). But when a party commences an action, affirmatively placing a mental or physical condition in issue, certain privacy interests relating to relevant medical records – including the physician-patient privilege – are waived (see Arons v Jutkowitz, 9 NY3d 393, 409 [2007]; Dillenbeck v Hess, 73 NY2d 278, 287 [1989]). For purposes of disclosure, the threshold inquiry is not whether the materials sought are private but whether they are reasonably calculated to contain relevant information. Applying these principles here, the Appellate Division erred in modifying Supreme Court's order to further restrict disclosure of plaintiff's Facebook account, limiting discovery to only those photographs plaintiff intended to introduce at trial.[6] With respect to the items Supreme Court ordered to be disclosed (the only portion of the discovery request we may consider), defendant more than met his threshold burden of showing that plaintiff's Facebook account was reasonably likely to yield relevant evidence. At her deposition, plaintiff indicated that, during the period prior to the accident, she posted "a lot" of photographs showing her active lifestyle. Likewise, given plaintiff's acknowledged tendency to post photographs representative of her activities on Facebook, there was a basis to infer that photographs she posted after the accident might be reflective of her post-accident activities and/or limitations. The request for these photographs was reasonably calculated to yield evidence relevant to plaintiff's assertion that she could no longer engage in the activities she enjoyed before the accident and that she had become reclusive. It happens in this case that the order was naturally limited in temporal scope because plaintiff deactivated her Facebook account six months after the accident and Supreme Court further exercised its discretion to exclude photographs showing nudity or romantic encounters, if any, presumably to avoid undue embarrassment or invasion of privacy.

***6** In addition, it was reasonably likely that the data revealing the timing and number of characters in posted messages would be relevant to plaintiffs' claim that she suffered cognitive injuries that caused her to have difficulty writing and using the computer, particularly her claim that she is painstakingly slow in crafting messages. Because Supreme Court provided defendant no access to the content of any messages on the Facebook account (an aspect of the order we cannot review given defendant's failure to appeal to the Appellate Division), we have no occasion to further address whether defendant made a showing sufficient to obtain disclosure of such content and, if so, how the order could have been tailored, in light of the facts and circumstances of this case, to avoid discovery of nonrelevant materials.[7]

In sum, the Appellate Division erred in concluding that defendant had not met his threshold burden of showing that the materials from plaintiff's Facebook account that were ordered to be disclosed pursuant to Supreme Court's order were reasonably calculated to contain evidence

"material and necessary" to the litigation. A remittal is not necessary here because, in opposition to the motion, plaintiff neither made a claim of statutory privilege, nor offered any other specific reason – beyond the general assertion that defendant did not meet his threshold burden – why any of those materials should be shielded from disclosure.

Accordingly, the Appellate Division order insofar as appealed from should be reversed, with costs, the Supreme Court order reinstated and the certified question answered in the negative.

Judges Rivera, Stein, Fahey, Garcia, Wilson and Feinman concur.

All Citations

--- N.E.3d ----, 2018 WL 828101

Footnotes

1 Defendant's failure to appeal Supreme Court's order impacts the scope of his appeal in this Court. "Our review of [an] Appellate Division order is 'limited to those parts of the [order] that have been appealed and that aggrieve the appealing party' " (Hain v Jamison, 28 NY3d 524, 534 [2016], quoting Hecht v City of New York, 60 NY2d 57 [1983]). Because defendant did not cross-appeal and, thus, sought no affirmative relief from the Appellate Division, he is aggrieved by the Appellate Division order only to the extent it further limited Supreme Court's disclosure order.

2 While courts have the authority to oversee disclosure, by design the process often can be managed by the parties without judicial intervention. If the party seeking disclosure makes a targeted demand for relevant, non-privileged materials (see CPLR 3120[1][i], [2] [permitting a demand for items within the other party's "possession, custody or control," which "shall describe each item and category with reasonable particularity"]), counsel for the responding party – after examining any potentially responsive materials – should be able to identify and turn over items complying with the demand. Attorneys, while functioning as advocates for their clients' interests, are also officers of the court who are expected to make a bona fide effort to properly meet their obligations in the disclosure process. When the process is functioning as it should, there is little need for a court in the first instance to winnow the demand or exercise its in camera review power to cull through the universe of potentially responsive materials to determine which are subject to discovery.

3 Further, the Appellate Division has the power to exercise independent discretion – to substitute its discretion for that of Supreme Court, even when it concludes Supreme Court's order was merely improvident and not an abuse of discretion – and when it does so applying the proper legal principles, this Court will review the resulting Appellate Division order under the deferential "abuse of discretion" standard (see e.g. Andon, supra; Kavanaugh, supra; see generally Kapon, supra).

4 This rule has been appropriately criticized by other courts. As one federal court explained, "[t]his approach can lead to results that are both too broad and too narrow. On the one hand, a plaintiff should not be required to turn over the private section of his or her Facebook profile (which may or may not contain relevant information) merely because the public section undermines the plaintiff's claims. On the other hand, a plaintiff should be required to review the private section and produce any relevant information, regardless of what is reflected in the public section ... Furthermore, this approach shields from discovery the information of Facebook users who do not share any information publicly" (Giacchetto v Patchogue-Medford Union Free School Dist., 293 FRD 112, 114 [ED NY 2013]).

5 There is significant controversy on that question. Views range from the position taken by plaintiff that anything shielded by privacy settings is private, to the position taken by one commentator that "anything contained in a social media website is not 'private' ... [S]ocial media exists to facilitate social behavior and is not intended to serve as a personal journal shielded from others or a database for storing thoughts and photos" (McPeak, The Facebook Digital Footprint: Paving Fair and Consistent Pathways to Civil Discovery or Social Media Data, 48 Wake Forest L Rev 887, 929 [2013]).

6 Because plaintiff would be unlikely to offer at trial any photographs tending to contradict her claimed injuries or her version of the facts surrounding the accident, by limiting disclosure in this fashion the Appellate Division effectively denied disclosure of any evidence potentially relevant to the defense. To the extent the order may also contravene CPLR 3101(i), we note that neither party cited that provision in Supreme Court and we therefore have no occasion to further address its applicability, if any, to this dispute.

7 At oral argument, Supreme Court indicated that, depending on what the data ordered to be disclosed revealed concerning the frequency of plaintiff's post-accident messages, defendant could possibly pursue a follow-up request for disclosure of the content. We express no views with respect to any such future application.

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2019 WL 132527 (N.Y.Sup.), 2019 N.Y. Slip Op. 30070(U) (Trial Order)
Supreme Court of New York.
New York County

**1 Deborah H. ISRAELI and Avi Israeli, Plaintiffs,
v.
David P. RAPPAPORT, M.D., Facs, Defendant.

No. 805309/15.
January 8, 2019.

Trial Order

Joan A. Madden, J.

*1 Defendant moves for an order precluding plaintiffs from offering certain evidence at trial based on their failure to provide discovery or, in the alternative, compelling plaintiffs to produce discovery including plaintiffs' private Facebook and other social media account records. [1] Plaintiffs oppose the motion and cross move for various relief, including a protective order with regard to defendant's demands for their social media accounts, arguing that the demands are overly broad.

Background

This medical malpractice action arises out of allegations that defendant negligently performed a breast implant procedure on plaintiff Deborah Israeli on February 20, 2015. The supplemental bill of particulars dated September 5, 2018, alleges that Ms. Israeli suffered permanent injuries, including nerve damage, irregular breast size, deformity of breasts, decreased **2 range of motion, tingling/radiating pain down her neck and back, muscle damage, torn tendons and ligaments across the chest and armpit, inability to lift 10-15 lbs., mental anguish, and loss of confidence. With respect to Ms. Israeli's husband plaintiff Avi Israeli, plaintiffs assert claims for loss of services, including *inter alia*, loss of Ms. Israeli's care, affection, and companionship.

By compliance conference order dated May 25, 2017, plaintiffs were directed to respond to, *inter alia*, defendant's May 16, 2017 demand for social networking information. Plaintiffs provided defendant with authorizations signed by Ms. Israeli on September 2, 2017, for "social networking information/photos" for Linkedin, Instagram, MySpace, Facebook, and Twitter. By letter dated December 4, 2017, defense counsel wrote to plaintiffs' counsel that the authorizations for these social media accounts (with the exception of Twitter) were rejected as they were not originals and Ms. Israeli failed to initial section 9(a) of the form, and that Linkedin responded that it requires account holders to request their own information. By letter dated December 18, 2017, defense counsel informed plaintiffs' counsel that Facebook also rejected the authorization on the ground that account holders were required to release their own information.

Defense counsel sent letters to plaintiffs' counsel dated February 9, 2018, March 9, 2018, April 27, 2018, seeking social media information. By letter dated May 8, 2018, plaintiffs responded that they had provided authorizations for the requested social media accounts, and that Ms. Israeli is not a member of a Linkedin and therefore does not have any data from the site. In his letter dated May 15, 2018, defense counsel reiterated that as stated in his letter dated December 18, 2017, Facebook does not accept authorizations and requires the account holder to provide the information and therefore

plaintiffs should be directed "to download their Facebook account, including any and all photographs, postings, etc and provide same to our office."

***2** ****3** When plaintiffs did not provide the requested information, defendant made the instant motion, arguing that he is entitled to this discovery based on the Court of Appeals decision in *Forman v. Henkin*, 30 NY3d 656 (2018), which held that social media materials are subject to the same policies of broad disclosure as other materials.

Plaintiffs oppose the motion and cross move for a protective order, noting that in *Forman v. Henkin*, the Court of Appeals found that the commencement of a personal injury action did not make the entirety of a plaintiff's Facebook or other social media accounts discoverable. Plaintiffs further argue that as per the holding in *Forman v. Henkin*, discovery of social media information should be narrowly tailored and take into account plaintiffs' privacy concerns, and that in camera inspection may be appropriate for certain of the materials sought.

In defense counsel's letter dated September 21, 2018, [2] defendant clarifies that it is seeking an order directing plaintiffs to provide him "with a copy of [their] private Facebook account content and records, limited to all photographs, pictures, videos and other 'postings' such as status updates that Ms. and/or Mr. Israeli uploaded or 'shared' to their Facebook accounts or were 'tagged' in, as well as other private Facebook messages between the plaintiffs, ...from 2012 (three years before the malpractice) to the present." [3] At the court conferences held on October 25, 2018, defense counsel agreed that the time period would be limited to one year before the alleged malpractice, that is from February 2014 to the present.

In further support of his motion, defendant attaches copies of photographs that defense ****4** counsel found on plaintiffs' public Facebook account, including photographs which defendant argues call into question the permanent nature of Ms. Israeli's injuries and contradicts Mr. Israeli's claims of loss of services, companionship and affection of his wife. Defendant asserts that based on the relevancy of the content of plaintiffs' public Facebook accounts, "there is a reasonable likelihood that the private portions of plaintiffs' Facebook accounts may contain further evidence such as information regarding Ms. Israeli's pre and post surgical activities and limitations, the permanency of her injuries, her loss of confidence claim, and/or Mr. Israeli's claims for loss of services and companionship, all of which are material and relevant to the defense of this action." [4]

***3** In response, in their supplemental letter dated October 4, 2018, plaintiffs assert that the materials on their private Facebook accounts are not relevant including to Mr. Israeli's claim for loss of services, as photographs on a Facebook account "cannot accurately depict the affection, companionship, or state of [plaintiffs'] marital relationship," and note that there is no claim that ****5** Mr. Israeli does not love his wife but, rather, that Ms. Israeli is "permanently injured, deformed, suffering from pain and mental anguish due to the loss of her breasts ...[and this] cannot be portrayed in a photograph of a party." Plaintiffs also argue that their claims as to Ms. Israeli's physical and emotional injuries can be assessed through medical records and deposition testimony.

Discussion

CPLR 3101(a) provides that "[t]here shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action." The words "material and necessary" are "liberally interpreted to require disclosure, upon request, of any facts bearing on a controversy which will assist in sharpening the issue at trial." *Roman Catholic Church of Good Shepherd v. Tempco Systems*, 202 AD2d 257, 258 (1st Dept 1994). Disclosure is thus not limited to "evidence directly related to the issues in the pleadings." *Allen v. Crowell-Collier Publishing Co.*, 21 NY2d 403, 408 (1968). That said, however, "unlimited disclosure is not permitted" *(Harris v. Pathmark, Inc.*, 48 AD3d 631, 632 [2d Dept 2008]), and "under ... discovery statutes and case law, ... the need for discovery must be weighed against any special burden to be

bourne by the opposing party." *Kavanagh v Ogden Allied Maintenance Corp.*, 92 NY2d 952, 954 (1998)(citations omitted).

In *Forman v. Henkin*, the Court of Appeals held that these principles governing disclosure apply "in the context of a dispute over disclosure of social media materials," and thus found that the Appellate Division "erred in employing a heightened threshold for production of social media records that depends on what the account holder has chosen to share on the public portion of the account." 30 NY3d at 663-664. At the same time, the court "rejected the notion that ****6** commencement of a personal injury action renders a party's entire Facebook account automatically discoverable." Id at 664-665 (citations omitted).

With respect to the appropriate method for addressing disputes regarding discovery of social media information, the court wrote that:

> courts should first consider the nature of the event giving rise to the litigation and the injuries claimed, as well as any other information specific to the case, to assess whether relevant material is likely to be found on the Facebook account. Second, balancing the potential utility of the information sought against any specific "privacy" or other concerns raised by the account holder, the court should issue an order tailored to the particular controversy that identifies the types of materials that must be disclosed while avoiding disclosure of nonrelevant materials. In a personal injury case ... it is appropriate to consider the nature of the underlying incident and the injuries claimed and to craft a rule for discovering information specific to each. Temporal limitations may also be appropriate--for example, the court should consider whether photographs or messages posted years before an accident are likely to be germane to the litigation. Moreover, to the extent the account may contain sensitive or embarrassing materials of marginal relevance, the account holder can seek protection from the court (see CPLR 3103[a]).

Id. at 665.

In applying these principles here, it should be considered that this action involves a allegations that as a result of defendant's negligence in performing a breast implant procedure, Ms. Israeli suffered permanent physical injuries, including nerve damage and injuries which affected her ability to lift, decreased range of motion, as well as emotional injuries, and that her husband is seeking to recover for loss of Ms. Israeli's care, affection, and companionship.

***4** In light of these allegations and the nature of the action, the court finds that defendant is entitled to discovery of plaintiffs' private Facebook accounts from date of the alleged malpractice to date, limited to all photographs, pictures, videos and other "postings" such as status updates ****7** that Ms. and/or Mr. Israeli uploaded or "shared" to their Facebook accounts or were "tagged" which depict or illustrate (i) Ms. Israeli's physical activities and abilities which relate to her asserted injuries, including her claim of limited range of motion, injuries to her neck, back and chest area, and her inability to lift heavy objects, and (ii) Ms. Israeli's relationship or interactions with Mr. Israeli, as such discovery is reasonably calculated to yield evidence relevant to plaintiffs' allegations of physical injuries and loss of services and companionship. That said, however, as to those Facebook materials within the above categories that relate to communications between the plaintiffs which were not shared or made available to any third party, or any photographs depicting nudity or romantic encounters, plaintiffs shall produce these materials to the court for *in camera* inspection so it can be determined if the usefulness of such information is outweighed by any privacy concerns. *See Forman v. Henkin*, 30 NY3d at 665 (upholding the trial court's exercise of "its discretion to exclude photographs showing nudity or romantic encounters, if any, presumably to avoid undue embarrassment or invasion of privacy").

Next, the court finds that the utility of Facebook materials as a measure of mental or emotional anguish is not sufficiently useful to require plaintiffs to release private Facebook materials showing photographs of Ms. Israeli's demeanor and social interactions. *Id.* ("the potential utility of the information sought [must be balanced] against any specific 'privacy' or other concerns raised by the account holder") *See generally Doe v. The Bronx Preparatory Charter School*. 160 AD3d 591 (1st Dept 2018)(finding that it was within the trial court's discretion in personal injury action against school to limit disclosure of plaintiff's social media and cell phone history to a period of two months before the date when the plaintiff was allegedly attacked on the school premises).

****8** As for photographs and other postings made by plaintiffs before the alleged malpractice, defendant fails to provide a particularized basis for, or the relevance of, this request. Under these circumstances, the court finds that the probative value of such postings is outweighed by the potential invasion of privacy, unless plaintiffs intends to introduce such photographs or other postings from their Facebook accounts at trial, in which case defendant would be entitled to such material. *See* *Forman v. Henkin*, 2014 WL 1162201, *2 (Sup Ct NY Co. 2014), *aff'd as modified* 134 AD3d 529 (1st Dept 2015), *reinstated* 30 NY3d 656 (finding that photographs of personal injury plaintiff posted on Facebook prior to the subject accident were of "little probative value" and would not be required to be produced unless plaintiff intended to introduce the photographs at trial). Such determination is without prejudice to renewal of any request for such information in the event that further discovery indicates that the potential relevance of such information outweighs the privacy concerns arising from its production.

Conclusion

In view of the above, it is

ORDERED that with the exception of those materials which are subject to a protective order as specified below, defendant's motion is granted to the extent of directing that within 15 days of efiling this order, plaintiffs shall provide to defendant from their private Facebook accounts from date of the alleged malpractice to date, all photographs, pictures, videos and other "postings" such as status updates that plaintiffs uploaded or "shared" to their Facebook accounts or were "tagged" which depict or illustrate (I) Ms. Israeli's physical activities and abilities which relate to her asserted injuries, including her claim of limited range of motion, injuries to her neck, back and chest area, and her inability to lift heavy objects, and (ii) Ms. Israeli's relationship or ****9** interactions with Mr. Israeli; and it is further

ORDERED that plaintiffs' cross motion for a protective order is granted to the extent that (I) the materials to be provided from plaintiffs' private Facebook accounts is limited to that set forth in the immediately preceding paragraph, (ii) plaintiffs are not required to provide any materials from their private Facebook accounts preceding the date of the alleged medical malpractice, and (iii) any Facebook materials directed to be produced in the immediately preceding paragraph that involve communications between plaintiffs which were not shared or made available to any third party, or any photographs depicting nudity or romantic encounters, shall be provided to the court for *in camera* inspection within 20 days of efiling of this order; and it is further

***5** ORDERED that any further discovery issues shall be resolved at the status conference to be held on January 17, 2019 at 10:00 am in Part 11, room 351, 60 Centre Street, New York, NY.

Dated: January 8, 2019

<<signature>>

J.S.C.

Footnotes

1 Although the motion and cross motion raise discovery issues beyond those related to plaintiffs' social media accounts, these issues are either moot or will be resolved at the previously scheduled January 17, 2019 status conference. In this connection, the court notes that Ms. Israeli's deposition was taken while the motion and cross motion were pending, and any issues as to the necessity of her further deposition will be resolved at the January 17, 2019 status conference.

2 Defendant's supplemental letter and that of plaintiffs' counsel were submitted at the court's direction.

3 It thus appears that discovery from other social media sites is no longer at issue.

4 In *Forman v. Henkin*, 30 NY3d at 663, the Court of Appeals noted the difference between public and private portions of Facebook accounts. It wrote that:

Portions of an account that are "public" can be accessed by anyone, regardless of whether the viewer has been accepted as a "friend" by the account holder--in fact, the viewer need not even be a fellow Facebook account holder (see Facebook, Help Center, What audiences can I choose from when I share? *https://www.facebook.com/help/211513702214269?* helpref=faq content [last accessed Jan. 15, 2018]). However, if portions of an account are "private," this typically means that items are shared only with "friends" or a subset of "friends" identified by the account holder (id.).

Id at 662.

Notably, the court held that a defendant is not required to use materials from a social media site's public accounts as a predicate for obtaining private account information. *Id.* at 663-664.

End of Document

2019 WL 295232 (N.Y.Sup.), 2019 N.Y. Slip Op. 30182(U) (Trial Order)
Supreme Court of New York.
New York County

**1 George LOPEZ, Plaintiff,

v.

225 4TH AVENUE PROPERTY OWNER LLC, Piece Management LLC, Defendants.

No. 153044/2017.
January 23, 2019.

Decision and Order

Present: Hon. Arlene P. Bluth, Justice.

MOTION DATE *11/29/2018*

MOTION SEQ. NO. *002*

**1 The following e-filed documents, listed by NYSCEF document number (Motion 002) 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 61, 62, 63, 64, 65, 66, 67, 68, 69, 71 were read on this motion to/for *STRIKE PLEADINGS*.

Upon the foregoing documents,

Defendant 225 4th Avenue Property Owner LLC's motion to strike plaintiff's Summons and Verified Complaint dated March 29, 2017 pursuant to CPLR 3126 is granted.[1] Defendant's motion for the defendant's fees for opposing plaintiff's motion for default judgment and attending two discovery conferences, pursuant to the Unified Rules of the Trial Courts § 130-1.1 [a] is denied.

Background

The facts underlying this case concern the alleged injuries suffered by plaintiff because of a construction accident that took place on defendant's property. The current motion is in response **2 to plaintiff's delay in providing materials during the discovery process. The parties had a preliminary conference on August 1, 2017 in which they agreed that plaintiff would respond to several of defendant's discovery demands on or before September 8, 2017 (NYSCEF Doc. No. 18). At issue here is the May 25, 2017 "Demand for Social Media Information and Preservation of Same." Plaintiff failed to respond to said demand by the agreed upon date.

The parties had a compliance conference on December 5, 2017 in which this Court issued a second order requiring plaintiff to provide full and complete responses to defendant's discovery demands by January 5, 2018 (NYSCEF Doc. No. 20). Again, plaintiff ignored the order and failed to provide a response to the social media demands.

A status conference was held on February 8, 2018 in which the Court ordered, for the third time, that plaintiff provide full and complete responses to defendant's discovery demands by February 22, 2018, or else "be precluded (over objection) from offering evidence at trial of negligence or damages without further order of this court unless good cause

shown" (NYSCEF Doc. No. 21). Furthermore, the Court instructed plaintiff that all objections other than privilege had been waived because of plaintiff's failure to raise such objections over the course of the last eight months.

On or about February 22, 2018, defendant received plaintiff's initial discovery responses. Plaintiff responded to the social media demands by categorically denying all social media demands, stating, "there is a lack of factual predict of relevancy and such demand is a fishing expedition" (NYSCEF Doc. No. 53).

**3 On February 27, 2018, plaintiff filed for a default judgment against defendant. The Court denied plaintiff's motion, noting there was no basis for the motion and even though the error was brought to the attention of plaintiff's attorney several times, plaintiff's attorney ignored the defendant's pleas to withdraw the motion. Plaintiff admits this default judgment application was filed erroneously and that plaintiff failed to withdraw it in a timely manner.

*2 In the afternoon on March 22, 2018, the parties had another compliance conference in which the Court noted that discovery and depositions of all parties remained outstanding (NYSCEF Doc. No. 40). Defendant again raised the issue of the social media disclosures. Plaintiff expressed his concerns regarding the disclosures and stepped out of the courtroom to discuss the matter with his office. Upon plaintiff's return, the Court reminded plaintiff that, pursuant to the prior conference order, any objections to the discovery demands had been waived due to plaintiff's failure to assert timely objections.

After the conference, but on the same day, defendant received plaintiff's supplemental discovery responses, including the social media account information. Defendant attempted to log onto the Facebook account at 4:45 p.m. on March.22, 2018. Defendant claims that his attempt to log in failed, and a message appeared stating that the password had been changed two hours ago (NYSCEF Doc. No. 57). This would mean that the password was changed during the afternoon court conference while the exact matter was being discussed in front of the Court. Upon discovering this, defendant wrote a letter to the Court explaining the situation (NYSCEF Doc. No. 36).

**4 On April 26, 2018, defendant made this motion (NYSCEF Doc. No. 44). On August 7, 2018 the parties attempted to resolve the motion by entering into a stipulation in which plaintiff agreed to provide defendant with the Facebook disclosures as defendant requested within 20 days (NYSCEF Doc. No. 71). This stipulation was signed by both parties and "so ordered" by the Court. The balance of the motion, for sanctions, was adjourned to November 27, 2018; obviously, the hope was that plaintiff would respond and the penalty, if any, would be minor. Despite the fact that the stipulation was ordered by the Court and agreed upon by both parties, plaintiff still failed to provide the social media information. Plaintiff failed to produce the required discovery disclosures pertaining to the Facebook account by November 27, 2018, the date the sanctions motion was scheduled to be heard.

Discussion

CPLR 3126 provides that,
"If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:

1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or

2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or

3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party"

"[T]he drastic remedy of striking a party's pleading pursuant to CPLR 3126 for failure to comply with a discovery order or request is appropriate only where the moving party conclusively ****5** demonstrates that the non-disclosure was willful, contumacious or due to bad faith" (*McGilvery v New York City Transit Auth.*, 624 NYS2d 158, 160 [1st Dept 1995]). "Willful and contumacious behavior can be inferred by a failure to comply with court orders, in the absence of adequate excuses" (*Henderson-Jones v City of New York*, 928 NYS2d 536, 541 [1st Dept 2011]). For example, a plaintiff's "[u]nexplained noncompliance with a series of court-ordered disclosure mandates over a period of nearly two years sufficiently created an inference of willful and contumacious conduct" (*Brewster v FTM Servo, Corp.*, 844 NYS2d 5, 6-7 [1st Dept 2007]).

***3** The Unified Rules of the Trial Courts § 130-1.1 [a] allow the court to award "actual expenses reasonably incurred and reasonable attorneys' fees, resulting from frivolous conduct as defined in this Part." "Conduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false" *id.* at § 130-1.1[c][1]-[c][3].

Defendant claims that plaintiff engaged in willful and contumacious conduct by purposefully obstructing defendant's investigative efforts and by filing a frivolous motion for default judgment, and asks the court to impose sanctions including striking the plaintiff's Verified Summons and Complaint, or alternatively, preventing plaintiff from presenting any evidence or testimony at trial concerning the issues of liability and damages, and/or imposing monetary sanctions against the plaintiff in the form of awarding defendant reimbursement of costs and ****6** attorneys' fees reasonably incurred in opposing plaintiff's motion for default judgment and in attending the compliance conferences on February 8 and March 22, 2018.

Defendant's motion to strike plaintiff's Verified Summons and Complaint is granted. Plaintiff engaged in willful and contumacious behavior by continuously failing to respond to court orders. Plaintiff appeared in front of this Court on four different occasions to attend conferences. Plaintiff failed to fully abide by the orders stated in all four of the conferences despite agreeing to do so while present at the conferences. Furthermore, on August 7, 2018 defendant gave plaintiff another chance to provide the discovery disclosures by entering into a stipulation that was agreed upon and signed by both parties, stating "Within 20 days, plaintiff shall provide defendants with an appropriate authorization permitting the disclosure from Facebook..." (NYSCEF Doc. No. 71). Notwithstanding the four conference orders, defendant's motion, and the so-ordered stipulation between the plaintiff and defendant, plaintiff still failed to provide the necessary disclosures by the oral argument date for the motion. That means plaintiff had five chances to produce the Facebook information and, despite agreeing to do so, he willfully refused.

Additionally, plaintiff purposely thwarted the discovery process by changing his Facebook password while plaintiff's attorney was conferencing with the Court. Pre-accident and post-accident information posted on social media sites is discoverable information (*see Forman v Henkin*, 30 NY3d 656 [2018]). By purposefully blocking the defendant's ability to obtain discoverable information, plaintiff engaged in willful and contumacious behavior. Because plaintiff does not address the issues relating to the Facebook account in its opposition papers, he ****7** admits his egregious conduct. He has made no argument to explain his actions which greatly, and wrongfully, prejudice defendant's case.

In responding to defendant's motion, plaintiff alleges defendant also engaged in willful and contumacious behavior by not disclosing that defendant was the attorney of record for the general contractor in the case. This claim does not adequately respond to defendant's allegations regarding plaintiff's conduct and refusal to abide by court orders.

Defendant's motion for reimbursement of costs and attorneys' fees reasonably incurred in opposing Plaintiff's motion for default judgment and attending the February 8, 2018 and March 22, 2018 conferences is denied. While the plaintiff's conduct was willful and contumacious, the court finds that dismissing plaintiff's case is an adequate remedy under the circumstances.

***4** Accordingly, it is hereby

ORDERED that defendant's motion to strike plaintiff's Summons and Verified Complaint pursuant to CPLR 3126 is granted and this action is hereby dismissed with prejudice, and it is further

ORDERED that that portion of the defendant's motion that seeks the recovery of attorney's fees is denied

DATE ***January 22, 2019***

<<signature>>

ARLENE P. BLUTH, J.S.C.

Footnotes

1 The case against defendant Piece Management, Inc. has been discontinued pursuant to stipulation (NYSCEF Doc. No. 13).

2018 WL 1697285 (N.Y.Sup.) (Trial Order)
Supreme Court of New York.
Part 13
New York County

Jason PAUL, Plaintiff,
v.
THE WITKOFF GROUP, 150 Charles Street Holdings, LLC, and Plaza Construction Corp., Defendants.
THE WITKOFF GROUP, 150 Charles Street Holdings,
LLC, and Plaza Construction Corp., Third-Party Plaintiffs,
v.
UNIVERSAL BUILDERS, INC., Third-Party Defendant.

No. 151322/2014.
April 3, 2018.

Trial Order

Manuel J. Mendez, Judge.

***1** MOTION DATE *03/28/2018*

MOTION SEQ. NO. *002*

MOTION CAL. NO. _____

The following papers, numbered 1 to *7* were read on this motion to strike and/or compel.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	*1 -3*
Answerinq Affidavits — Exhibits	*4-6*
Replyinq Affidavits	*7*

Upon a reading of the foregoing cited papers, it is Ordered that Defendants' motion pursuant to CPLR §3126, §3124, and §6301, is granted to the extent that Plaintiff must fully respond to Defendants' June 7, 2017 Social Media Discovery Demands Numbered 1 3, 4, 5, 6 and 7, and for the duration of this action, Plaintiff is restrained from modifying, changing, or deleting any information from his social networking accounts that relate to this action. The remainder of the motion is denied.

Plaintiff alleges that on February 4, 2014 at around 8:45am, he was injured when he slipped and fell on a ramp covered with ice, snow and slush (Moving Papers Ex. C). Plaintiff, a second-year apprentice, was employed by non-party Ecker Windows Corporation. He was employed to work at a construction project located at 150 Charles Street, New York, New York. Plaintiff commenced this action on February 12, 2014 to recover for damages due to his alleged injuries.

Defendants served a Social Media Discovery Demands on June 7, 2017 ("Demands,' Moving Papers Ex. F). Plaintiff objected to the Demands via letter on July 5, 2017 (*Id* at Ex. G). This Court ordered Plaintiff to respond to the Demands in this Court's September 9, 2017 Status Conference Order, and allowed Defendants to reserve their right to make a mo:ion on these Demands in the event of Plaintiff's noncompliance (*Id* at Ex. I).

The Defendants now move for an Order to strike Plaintiff's Complaint, or preclude him from offering evidence at the time of trial regarding damages pursuant to CPLR §3126, or in the alternative, compel Plaintiff to respond to their June 7, 2017 Demands pursuant to CPLR §3124. Defendants further seek to compel Plaintiff to appear for another deposition on the theory that Plaintiff was initially untruthful when he denied having a social media account. Finally, Defendants seek for this Court to issue a temporary restraining order and preliminary injunction restraining Plaintiff from directly, or indirectly, modifying, changing or deleting any information from his social networking accounts pursuant to §6310. Plaintiff opposes the motion.

CPLR §3101 (a) allows for the "full disclosure of all evidence material and necessary in the prosecution or defense of an action regardless of the burden of proof (CPLR §3101 [a]). It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims (GS Plasticos Limitada v Bureau Veritas Consumer Prods. Servs., Inc., 112 AD3d 539, 977 NYS2d 245 [1st Dept. 2013]). These principles equally apply to demands for parties' social media accounts (Flowers v City of N.Y., 151 AD3d 590, 55 NYS3d 51 [1st Dept. 2017]). "There is nothing so novel about [social media] materials that precludes application of New York's longstanding disclosure rules," but the party moving to compel production needs to include scopes and temporal limitations and carefully draft the demands to seek specific information material that is necessary to the prosecution or defense of the action (Forman v Henkin, 2018 NY Slip Op 01015 [N.Y. Ct. App., Feb. 13, 2018]).

***2** CPLR §3126 grants the court the power to sanction a party that fails to comply with a court's discovery order. The nature and degree of the penalty to be imposed for a party's failure to comply with an order is a matter within the sound discretion of the court (CPLR §3126). To warrant dismissal of plaintiffs action, defendant must show that plaintiff has incurred in a long-standing pattern of default, lateness and failure to comply with court orders, which gives rise to an inference of willful and contumacious conduct (See Merchants T&F v Kase & Druker, 19 A.D.3d 134, 796 NYS2d 343 [1st Dept. 2005]).

Pursuant to CPLR §3124, the court may compel compliance upon failure of a party to provide discovery. It is within the court's discretion to determine whether the materials sought are "material and necessary" as a legitimate subject of inquiry or are being used for purposes of harassment to ascertain the existence of evidence (Roman Catholic Church of the Good Shepherd v Tempco Systems, 202 AD2d 257, 608 NYS2d 647 [1st Dept. 1994]. "The words 'material and necessary' as used in §3101 must be interpreted liberally to require disclosure" (Kapon v Koch, 23 NY3d 32, 11 NE3d 709, 988 NYS2d 559 [2014]).

Plaintiff has not engaged in willful and contumacious conduct to warrant any sanction. However, some of the discovery sought in Defendants' Demands are material and necessary to sufficiently defend this action. In Plaintiff's Bill of Particulars, he is claiming severe depression, anxiety, stress, anxiousness and suicidal thoughts (Moving Papers Ex. C).

Plaintiff allegedly posted suicidal comments on his Facebook page. Responding to the Demands Numbered 1, 3, 4, 5, 6 and 7 of Defendants' Social Media Discovery Demands will result in the disclosure of relevant evidence bearing on Plaintiff's claim. Demands Numbered 2 and 8 are over-broad and not sufficiently tailored with scopes and temporal limitations. The Plaintiff must fully respond to Defendants' Demands Numbered 1, 3, 4, 5, 6 and 7.

CPLR §6301 allows the court the power to issue an order directing a plaintiff to refrain from performing an act that would be injurious to the Defendants (CPLR §6301). The issuance of a preliminary injunction or a temporary retraining order is within the discretion of the trial court. A movant seeking a stay or injunction, is required to show: "(I) the likelihood of ultimate success on the merits; (ii) irreparable injury to him absent granting of the preliminary injunction; and (iii) that a balancing of the equities favors his position" (Nobu Next Door, LLC v Fine Arts Housing, Inc., 4 NY3d 839, 833 NE2d 191, 800 NYS2d 48 [2005]).

Defendants have shown the necessity for a temporary restraining order and preliminary injunction restraining Plaintiff from directly, or indirectly through other persons, modifying, changing or deleting any information from his social networking accounts relating to this action. Plaintiff originally denied possessing any social media accounts during his deposition (Moving Papers Ex. J). However, medical records relating to Plaintiff's hospitalization related to an alleged suicide attempt revealed Plaintiff made suicidal statements on his Facebook account (*Id* at Ex. K). Plaintiff then deleted/deactivated his Facebook account on the alleged advise from his legal counsel to aid him in this action. With Plaintiff's inclination to delete/deactivate his Facebook account (and potentially other social media accounts), Plaintiff must be temporarily retrained from modifying, changing or deleting any statements related to this action made on his social media accounts for the duration of this action.

***3** Accordingly, it is ORDERED, that Defendants motion pursuant to CPLR §3126, §3124, and §6301 is granted to the extent that Plaintiff must fully respond to Defendants' June 7, 2017 Social Media Discovery Demands Numbered 1, 3, 4, 5, 6 and 7, and for the duration of this action, Plaintiff is restrained from modifying, changing, or deleting any information from his social networking accounts that relate to this action, and it is further,

ORDERED, that within twenty (20) days from the date of service of a copy of this Order with Notice of Entry, Plaintiff is to fully respond to Defendants' June 7, 2017 Social Media Discovery Demands Numbered 1, 3, 4, 5, 6 and 7, and it is further,

ORDERED, that Plaintiff, and all other persons acting at the direction of Plaintiff, are enjoined and restrained, during the pendency of this action from modifying, changing or deleting any information from his social networking accounts that relate to this action, and it is further,

ORDERED, that the remainder of the motion is denied, and it is further,

ORDERED, that the parties appear for a Status Conference on May 23, 2018 at 51:30 a.m. in IAS Part 13 at 71 Thomas Street, New York, NY 10013.

Dated: April 2, 2018

ENTER:

<<signature>>

MANUEL J. MENDEZ J.S.C.

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2019 WL 302266
Supreme Court, Appellate Division,
First Department, New York.

Genaro VASQUEZ–SANTOS, Plaintiff–Respondent,
v.
Leena MATHEW, Defendant–Appellant.
[And A Third Party Action]

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ENTERED: JANUARY 24, 2019

Synopsis

Background: First driver, who allegedly sustained injury when rear-ended by second driver's vehicle, brought personal-injury action against second driver and owner of first driver's vehicle. Second driver filed motion to compel access by a third-party data mining company to first driver's devices, email accounts, and social medical account. The Supreme Court, New York County, Adam Silvera, J., 2018 WL 2943760, denied motion. Second driver appealed.

The Supreme Court, Appellate Division, held that post-accident photographs and evidence of first driver engaging in basketball or similar activity posted on or sent on devices, emails accounts, and social media were discoverable.

Reversed.

See also 2018 WL 2943756.

Procedural Posture(s): On Appeal; Motion to Compel Discovery; Motion for Costs.

Order, Supreme Court, New York County (Adam Silvera, J.), entered June 7, 2018, which, to the extent appealed from as limited by the briefs, denied defendant's motion to compel access by a third-party data mining company to plaintiff's devices, email accounts, and social media accounts, so as to obtain photographs and other evidence of plaintiff engaging in physical activities, unanimously reversed, on the law and the facts, without costs, and the motion granted to the extent indicated herein.

Attorneys and Law Firms

McDonald & Safranek, New York (Kenneth E. Pinczower of counsel), for appellant.

William Schwitzer & Associates, P.C., New York (Howard R. Cohen of counsel), for respondent.

Sweeny, J.P., Tom, Kahn, Oing, Singh, JJ.

Opinion

***1** Private social media information can be discoverable to the extent it "contradicts or conflicts with [a] plaintiff's alleged restrictions, disabilities, and losses, and other claims" (*Patterson v. Turner Const. Co.*, 88 A.D.3d 617, 618, 931 N.Y.S.2d 311 [1st Dept. 2011]). Here, plaintiff, who at one time was a semi-professional basketball player, claims that he has become disabled as the result of the automobile accident at issue, such that he can no longer play basketball. Although plaintiff testified that pictures depicting him playing basketball, which were posted on social media after the accident, were in games played before the accident, defendant is entitled to discovery to rebut such claims and defend against plaintiff's claims of injury. That plaintiff did not take the pictures himself is of no import. He was "tagged," thus allowing him access to them, and others were sent to his phone. Plaintiff's response to prior court orders, which consisted of a HIPAA authorization refused by Facebook, some obviously immaterial postings, and a vague affidavit claiming to no longer have the photographs, did not comply with his discovery obligations. The access to plaintiff's accounts and devices, however, is appropriately limited in time, i.e., only those items posted or sent after the accident, and in subject matter, i.e., those items discussing or showing defendant engaging in basketball or other similar physical activities (*see Forman v. Henkin*, 30 N.Y.3d 656, 665, 70 N.Y.S.3d 157, 93 N.E.3d 882 [2018]; *see also Abdur–Rahman v. Pollari*, 107 A.D.3d 452, 454, 967 N.Y.S.2d 31 [1st Dept. 2013]).

All Citations

--- N.Y.S.3d ----, 2019 WL 302266, 2019 N.Y. Slip Op. 00541

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Speaker Biographies

Hon. Ariel E. Belen (Ret.), FCIArb

Hon. Ariel E. Belen (Ret.), FCIArb joined JAMS in 2012 and serves as an arbitrator and mediator in complex domestic and international disputes spanning a wide array of practice areas. During his nearly eighteen-year tenure on the bench he served as an Associate Justice of the Appellate Division, Second Department and as Administrative Judge of the Supreme Court, Kings County (Brooklyn). Judge Belen also helped create and presided over the Commercial Division in Brooklyn. Judge Belen has earned a reputation as a calm, intelligent, fair, and hardworking professional while facing the many complicated issues that may arise in a dispute.

Judge Belen is a highly experienced international mediator and arbitrator. He can effectively communicate with Spanish speaking litigants and clients. Judge Belen is a popular international speaker and trainer for ADR. He has presented at ADR training programs for judges, attorneys, and business leaders in Guatemala, Puerto Rico and Mexico. Judge Belen is a fellow of the Chartered Institute of Arbitrators, a member of the Advisory Council of the CPR International Institute for Conflict Prevention and Resolution, a Distinguished Fellow of the International Academy of Mediators, and a member of the International Mediation Institute. Judge Belen is a member of the Board of Advisors of the Scheinman Institute on Conflict Resolution of the Cornell University School of Industrial and Labor Relations.

Judge Belen is often retained as a special master in complex commercial and civil matters. He was appointed as the Federal Facilitator to guide the Joint Remedial Process in the New York City stop and frisk and trespass enforcement class action settlements as described in the Remedies Opinion in *Floyd v. City of New York*, 959 F. Supp. 2d 668 (SDNY 2013). In this program, Judge Belen was charged with assisting the City of New York and its residents with developing sustainable reforms to the stop and frisk and trespass enforcement practices of the New York City Police Department through a community based civic engagement process. Judge Belen filed his Final Report and Recommendations with the Southern District of New York in May 2018. The Final Report and Recommendations may be accessed here.

Judge Belen co-authored *New York Trial Notebook*, (James Publishing, 2008), supplemented annually, an 850-page comprehensive practice treatise for the trial of a civil case in New York.

Justice Belen is fluent in Spanish. He can effectively communicate with Spanish speaking litigants and clients in all matters. Download Justice Belen's biography in Spanish.

Representative Matters

International

- Chaired an international arbitration concerning a breach of contract between major international telecommunication conglomerates
- Arbitrated executive compensation and deferred compensation claims upon the termination of a high level executive of a multinational corporation based in Europe
- Mediated a matter involving a joint venture with a Taiwanese firm along with the financial damages and partnership dissolution issues associated with the terminated venture
- Served as a Special Master in a matter involving agency and authority disputes in a business commercial case involving a Korean real estate contract breach
- Mediated a breach of contract and alleged fraud claims in a patent transaction between American and European parties
- Mediated a breach of contract and misrepresentation matter between American and Chinese parties engaged in a major joint venture concerning the purchase of a New York City landmark
- Mediated a dispute between a major Mexican chemicals manufacturing company and a North American based insulation manufacturer
- Mediated a case between U.S. based investors and a Latin American telecommunications venture
- Served as a Special Master on a matter related to authority issues in a business commercial case involving a Korean real estate contract
- Mediated a breach of contract and misrepresentation matter between American and Chinese parties engaged in a major joint venture concerning the purchase of a New York City landmark

Business/Commercial

- Mediated a class action lawsuit arising from Superstorm Sandy damages to waterfront property in lower Manhattan
- Arbitrated first party insurance claims resulting from catastrophic Superstorm Sandy damages to a graphics and printing plant
- Arbitrated a securities case arising from breach of fiduciary duty, negligent misrepresentation, negligent failure to supervise, and aiding and abetting fraud
- Arbitrated a dispute concerning ownership and operation of a medical facility
- Arbitrated a dispute over a broker commission on purchase of a property used to develop a major commercial mall
- Arbitrated a breach of contract case involving forensic expert consulting services

- Mediated a business commercial dispute involving a breach of contract between a major hotel conglomerate and a major supplier
- Mediated breach of contract dispute between business partners in an international joint venture in South America
- Mediated several disputes concerning legal malpractice lawsuits
- Mediated several dissolutions of legal and medical practices
- Mediated case involving a multinational corporation in a misrepresentation and breach of contract dispute
- Mediated breach of contract case involving alleged fraud claims brought by international party against American company
- Mediated breach of contract dispute concerning marketing services agreement
- Mediated a consumer class action lawsuit brought against major tobacco manufacturer for alleged fraudulent pricing scheme
- Mediated a dispute between master licensor and sub-licensee in the fashion industry
- Mediated a dispute between a bank managing an IRA, creditors, and heirs of the decedent
- Mediated a dispute after an arbitration award granted damages, attorneys' fees, and costs in trademark licensing matter
- Mediated a dispute pending arbitration involving distribution of the proceeds of an IRA account between widows, heirs, and estate creditors including the bank holding the IRA
- Mediated intra-family dispute related to the ownership, management, and operation of litigation finance companies

Insurance

- Mediated first party insured claims concerning the collapse of an iconic ride in a major American amusement park
- Mediated insurance coverage dispute between major national entertainment company and carrier over key person insurance policy on the life of events promoter and agent
- Mediated insurance coverage dispute between major national homeware manufacturer and carrier over product withdrawal/recall coverage
- Appointed as umpire in insurance coverage arbitration involving dispute between textile manufacturer and carrier
- Arbitrated first party insured claims resulting from devastating Superstorm Sandy damages to graphics and printing plant

Construction

- Mediated construction defect case involving the installation of a HVAC system with an alleged faulty functionality

- Arbitrated construction defect matter involving damages resulting from burst plumbing in a New York landmark hotel converted into luxury condominiums
- Chaired breach of contract arbitration involving independent contractor providing business consulting services to a general contractor
- Mediated case involving claims arising from a freeze-up and water leakage of a pipe located in an apartment building
- Mediated construction defect case involving a dispute between a major hotel conglomerate and the manufacturers and installers of heat pump units in guest rooms
- Mediated breach of contract claims in a condominium conversion
- Mediated the collapse of a commercial building during construction of an adjacent luxury hotel in lower Manhattan
- Mediated dispute between luxury high rise apartment developer, general contractor, and subcontractors relating to unfinished work, change orders, and claimed defects
- Med/Arb involving construction defects in a luxury Manhattan condominium building
- Mediated disputes between owner, construction manager, general contractor, subcontractors, and second tier subcontractors centered around the construction of a high rise luxury building
- Mediated dispute involving construction defects and zoning restrictions in a luxury condominium building converted from a commercial printing press building
- Mediated dispute between owner and construction manager involving delays in construction of a thirty-one unit ground-up luxury condominium development with parking garage
- Mediated dispute between owner, general contractor, and subcontractor concerning rust and corrosion on installed balconies and railings in high rise luxury development

Employment

- Arbitrated executive compensation and deferred compensation claims upon the termination of a high-level executive in a multinational corporation based in Europe
- Mediated breach of contract dispute between an employer and employee related to contractual bonus obligations
- Arbitrated age discrimination claim brought by an executive of a Fortune 100 company
- Mediated case arising from issues related to a separation agreement for law firm employees’ retirement and termination
- Arbitrated civil rights matter involving alleged racial discrimination against party in a restaurant
- Mediated several FLSA disputes

- Chaired breach of contract arbitration involving termination of chief executive officer and minority shareholder in a closely held corporation
- Mediated cases involving discrimination, unlawful retaliation, and hostile work environment claims
- Mediated dispute involving employees' failure to repay company issued loan
- Mediated case involving employees' termination due to disability caused by alleged work-related injuries
- Mediated a breach of contract and sexual harassment claims involving high level executive in a venture capital firm
- Mediated executive compensation, deferred compensation claims, and cross claims on a promissory note upon the termination of a high-level investment advisor in a Swiss bank

Entertainment & Sports

- Mediated matter alleging high profile professional athlete knowingly spread a sexually transmitted disease
- Mediated a dispute between a national concert producer and shooting victims during a rap concert performance
- Mediated dispute between high fashion model and nationally circulated digital and print magazines for alleged unauthorized use and reproduction of image

Personal Injury

- Mediated several medical and dental malpractice cases
- Mediated several cases involving auto accidents where parties negotiated settlement amounts ranging from two to twenty-eight million dollars
- Mediated personal injury and fatality cases in a 2008 crane collapse in New York City
- Mediated case involving plaintiff's catastrophic injuries due to a slip and fall into a New York City subway manhole
- Mediated personal injury case involving a bicyclist and a truck driver alleging catastrophic injuries that required multiple major surgeries
- Mediated personal injury/premises liability case involving injuries sustained allegedly from an attack on private property
- Mediated case involving injuries sustained for an allegedly faulty elevator
- Mediated several cases having to do with the results of knee, back, neck and shoulder surgeries
- Mediated several cases alleging violations of the New York Labor Law, scaffolding statutes, and regulations
- Mediated a wrongful death case involving food poisoning from contaminated fish

- Mediated an eight figure settlement of claims of catastrophic injuries pursuant to the New York Labor Law

Special Master

- Serving as Federal Facilitator to guide the Joint Remedial Process in the New York City stop and frisk and trespass enforcement class action settlements as described in the Remedies Opinion in *Floyd v. City of New York*, 959 F. Supp. 2d 668 (SDNY 2013)
- Serves as court appointed trustee to manage a multi-million dollar trust estate that requires financial oversight of assets, investments, and property pending litigation in the New York Commercial Division
- Served as court appointed Special Referee for damages in a legal malpractice matter
- Served as Court Appointed Mediator in federal bankruptcy case related to the construction of a luxury skyscraper in midtown Manhattan
- Served as Special Discovery Master in a securities arbitration
- Serving as a Special Discovery Master in a New York Commercial Division real estate litigation
- Served as Court Appointed Special Referee to conduct forensic examination of computer spyware

CARRIE H. COHEN

Partner, New York, +1 (212) 468-8049, CCohen@mofo.com

Carrie Cohen is a partner with Morrison & Foerster in its Investigations + White Collar Defense Group where she co-chairs the Workplace Misconduct Task Force. Ms. Cohen routinely advises and represents companies, Boards, and C-Suite executives in sensitive investigative and regulatory matters across numerous industries, including the finance, technology, healthcare, consulting, and accounting sectors. Ms. Cohen is an experienced trial attorney and former federal and state prosecutor, having served in the United States Attorney's Office for the Southern District of New York and the New York State Attorney General's Office where she tried public corruption, investment fraud, and securities cases, including securing the conviction of Sheldon Silver, the longtime Speaker of the New York State Assembly, on corruption and money laundering charges. In the New York State Attorney General's Office, Ms. Cohen served as Chief of the Public Integrity Unit in the Criminal Division, and as an Assistant Attorney General in the Civil Rights Bureau, receiving the Louis J. Lefkowitz Memorial Award for outstanding service.

Ms. Cohen's extensive trial experience includes both criminal and civil cases and she has vast experience conducting large and complex criminal and civil investigations involving federal, state, and local agencies and regulators. In addition to being the lead prosecutor in the Sheldon Silver case, Ms. Cohen has been lead or co-lead counsel on other significant public corruption cases, including the prosecution of then-state Comptroller Alan Hevesi for personal use of state employees' time, and on investment and securities fraud trials, including a significant multi-stock securities fraud case and an $80 million Ponzi scheme case. As a former federal and state prosecutor, Ms. Cohen focuses on white-collar criminal matters, internal investigations, securities and investment fraud cases, regulatory enforcement proceedings, and bribery,

EDUCATION

Cornell University (B.A., 1989)

University of Pennsylvania Law School (J.D., 1993)

RANKINGS

Benchmark Litigation
2018 "Top 250 Women in Litigation"

Global Investigations Review
2018 Top 100 "Women in Investigations"

procurement, money laundering, and enterprise corruption cases. Prior to her government service, Ms. Cohen spent six years in private practice.

SELECTED SIGNIFICANT REPRESENTATIONS

- **Cybersecurity.** Conduct investigations of cybersecurity incidents and represent companies in related government and regulatory matters concerning disclosure of data breaches, theft of intellectual property, and other issues.
- **Securities Fraud.** Represent corporations and individuals in a variety of criminal investigations and matters involving the federal securities laws.
- **Financial Regulation.** Represent banks and other financial institutions in investigations of regulatory and consumer fraud matters.
- **FCPA.** Represent corporations in FCPA investigations and appointed by the United States Department of Justice to the Monitorship team in the criminal prosecution of Odebrecht.
- **Public Corruption.** Represent elected and appointed public officials and corporations and individuals doing business with the government in a variety of public corruption matters.
- **RICO and Civil Fraud.** Represent corporations in RICO and civil fraud related matter including at trial.

PRESENTATIONS

- Panel Chair, "The Intersection of State and Federal Law Regarding Sentencing," Second Circuit Judicial Council and the New York State-Federal Judicial Council CLE Program (April 2019)
- Featured Speaker, " 'Speak Up'," Ms. JD's 11th Annual Conference on Women in Law (March 2019)
- Moderator, "The #MeToo Mandate: Redefining Respect and Trust in the Workplace Culture," 2019 Global Ethics Summit presented by Ethisphere (March 2019)
- Panelist, "Taking the Lead 2019: Winning Strategies and Techniques for Commercial Cases," New York State Bar Association CLE Program (March 2019)
- Panelist, "Significant Legal Developments in the Regions," the American Bar Association's 33rd Annual National Institute on White Collar Crime (March 2019)
- Panelist, "When Soldiers Speak: *Cortright v. Resor*," Federal Bar Council (February 2019)
- Program Coordinator, "Sexual Harassment and #MeToo," Federal Bar Council (February 2019)
- Panelist, "Public Corruption Trials in a Post-McDonnell World," Federal Bar Council (January 2019)

- Panelist, “Dealing with “Imperious” CEOs: What Boards Need to Do to Protect Enterprise Value,” Silicon Valley Directors’ Exchange (SVDX) Panel Discussion, Santa Clara University School of Law (January 2019)
- Panelist, “Litigating Sexual Harassment Cases in the “Me Too” Era,” NYSBA Annual Meeting 2019 (January 2019)
- Panelist, “The Risks of a ‘Fake It ‘Til You Make It’ Business Culture: The Rise and Fall of Theranos,” The 8th Annual Institute for Law & Policy, Creighton University (December 2018)
- Panelist, “Operating on the Edge of Compliance: Value Creator or Business Destroyer,” The 8th Annual Institute for Law & Policy, Creighton University (December 2018)
- Moderator, “Workplace Misconduct Investigations in the Age of #MeToo,” 2018 MoFo Summit for Women In-House Counsel (November 2018)
- Moderator, “Women on Boards,” 2018 MoFo Summit for Women In-House Counsel (November 2018)
- Panelist, “Due Process and Bias in Criminal Investigations,” Columbia University Law School Panel Discussion (November 2018)
- Lecturer, “Implicit Bias and Diversity in the Legal Profession,” First American Title Insurance Co. (October 2018)
- Guest Lecturer, “Public Corruption and the Law,” John Jay College of Criminal Justice (October 2018)
- Panelist, “Defending the Gatekeeper: When In-House Counsel and Compliance Professionals are Investigated,” PLI’s Storming the Gatekeepers: When Compliance Officers and In-House Lawyers Are at Risk 2018 (September 2018)
- Panelist, “Red Cards, Red Handed: FIFA Corruption and the Long Arm of U.S. Law Enforcement,” Woodrow Wilson International Center for Scholars Webcast (June 2018)
- Panelist, “Questioning Witnesses,” New York State Bar Association, Commercial & Federal Litigation Section, Trial Practice Webinar (May 2018)
- Moderator, “Privilege and Ethical Issues Encountered in Corporate Investigations,” New York State Bar Association, Criminal Justice Section, Spring Meeting (May 2018)
- Program Co-Chair and Moderator, “Plea Negotiations in White Collar Cases,” New York State Bar Association, Criminal Justice Section, Spring Meeting (May 2018)
- Panelist, “A Woman’s Place is in the Courtroom,” The Association of the Federal Bar of New Jersey (May 2018)
- Lecturer and Critique Faculty, “Direct Examinations,” New York State Bar Association, Young Lawyers Section, Trial Academy (April 2018 and April 2017)

- Guest Lecturer, “White Collar Criminal Law and Procedure: High Profile Trials and Corporate Resolutions,” Harvard Law School (March 2018 and March 2017)
- Panelist, “Special Problems for Prosecutors in Public Corruption Prosecutions,” Pace Law Symposium: Public Corruption Prosecution After McDonnell and Beyond (March 2018)
- Program Faculty, “Taking the Lead: Winning Strategies and Techniques for Commercial Cases,” New York State Bar Association, Commercial & Federal Litigation Section (March 2018)
- Panelist, “Significant Legal Developments in the Regions,” American Bar Institute, National Institute on White Collar Crime (March 2018)
- Program Leader, “Public Corruption Post-*McDonnell*,” Federal Bar Council (February 2018)
- Panelist, “Implicit Bias and Diversity in the Legal Profession: Exploring Best Practices for Lawyers and Judges,” New York State Bar Association Annual Meeting 2018 - Commercial & Federal Litigation Section (January 2018)
- Panelist, “Leveling the Playing Field: Addressing Institutional and Implicit Bias and Identifying Opportunities for Women’s Participation and Success,” New York State Bar Association, Fourteenth Annual Edith I. Spivack Symposium (January 2018)
- Teaching Faculty, “Advanced Trial Academy,” New York State Bar Association, Young Lawyers Section (October 2017)
- Speaker, “Are Plea Bargaining, Trial by Judge, and Acquittal by Judge Constitutional,” The Federalist Society (October 2017)
- Panelist, “Federal, State, and Local: Opportunities & Challenges in Different Jurisdictions,” National Attorneys General Training & Research Institute, Center for Ethics & Public Integrity, Anticorruption Academy (August 2017)
- Panelist, “Jury Addresses: Framing the Case and Bringing it Home,” National Attorneys General Training and Research Institute, Center for Ethics & Public Integrity, Anti-corruption Academy (August 2017)
- Moderator, “Trial Practice Skills: Presented Through a Mock Trial Team,” American Bar Association CLE in the City (August 2017)
- Panelist, “Too Big to Jail: Corporate Impunity from Wall Street to the White House,” ProPublica, New America (July 2017)
- Moderator, “Getting to Equal: Women in the Legal Profession,” Pan African Lawyers Union 8th Annual Conference & 5th General Assembly (July 2017)

- Moderator, “The Legal Profession: Re-capturing its Place in Society,” Pan African Lawyers Union 8th Annual Conference & 5th General Assembly (July 2017)
- Moderator, “State Constitutional Issues,” New York Federal-State Judicial Council, Symposium in Honor of Chief Judge Judith S. Kaye (May 2017)
- Panelist, “Internal Negotiation: Fostering Collaboration & Dialogue Within Teams, Divisions & Your Firms,” WIN Summit (May 2017)
- Moderator, “Public Relations Crises,” 2017 MoFo Summit for Women In-House Counsel (April 2017)
- Panelist, Women in the Profession Program: Annual Conference 2017, New York City Bar's Vance Center for International Justice (March 2017)
- Panelist, “Women in the Courtroom: The Impact of Women in the Judiciary and the Need For More Women Judges and Lead Trial Attorneys,” New York State Bar Association, Thirteenth Annual Edith I. Spivack Symposium, Committee on Women in the Law (January 2017)
- Presenter, “Trial Practice CLE: A Re-Enactment of a Commercial Trial,” New York State Bar Association, Commercial & Federal Litigation Section (November 2016)
- Guest Lecturer, “Ethics in Government: Investigation and Enforcement,” New York University Law School (November 2016)
- Speaker, “A Jill of All Trades: Female Attorneys in the Public and Private Sectors,” University of Pennsylvania Law School (October 2016)
- Speaker, “Public Corruption and the Law,” The Cornell Club New York (October 2016)
- Speaker, “The Current Wave of Public Corruption Cases: Hot Topics and Recent Developments,” American Bar Association, Criminal Justice Section: White Collar Crime Committee (May 2016)
- Moderator, “Social Media and Its Effect on the Jury System,” New York State Bar Association, Commercial & Federal Litigation Section 2016 Spring Meeting (May 2016)
- Panelist, “Lessons from Recent Trials,” New York City Bar Association's Fifth Annual White Collar Crime Institute (May 2016)

PUBLICATIONS

- “The New Imperative to Investigate Workplace Misconduct,” *New York Law Journal* (January 29, 2018)
- “Hearing the Need For More Women's Voices in the Courtroom,” *Law360* (December 20, 2017)

- "Challenging the Criticism of Federal Prosecutors in 'Chicken---- Club'," *New York Law Journal*, Vol. 258, No. 111 (December 11, 2017)
- "Recent Trials Show Importance Of Investigating Cooperating Witnesses," *New York Law Journal*, Vol. 258, No. 28 (August 10, 2017)
- "Digital Age Expands Communication but Creates Discovery, Litigation Pitfalls," *New York Law Journal*, Vol. 257, No. 107 (June 6, 2017)
- "Where Are the Women Litigators?" *NYSBA Journal* (May 2017)
- "The Section's Women's Initiative," *NYSBA Commercial and Federal Litigation Section Newsletter*, Vol. 23, No. 1 (Spring 2017)
- "Challenges to SEC Administrative Proceedings Echo Complaints Against Arbitration," *New York Law Journal*, Vol. 247, No. 47 (March 13, 2017)
- "Insider Trading Case Reminder of Long-Simmering Parent-Child Privilege Debate," *Wall Street Lawyer*, Vol. 20, Issue 12 (December 2016)

Tracee E. Davis, Esq.

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Ms. Davis is a Partner at Zeichner Ellman & Krause LLP in the firm's commercial litigation and cybersecurity/data privacy groups where she represents business clients in a wide variety of complex business disputes in New York and New Jersey state and federal courts and in arbitration. Focused on emerging risk of litigation, Ms. Davis is a certified information privacy professional (CIPP/US) servicing mid-market and institutional clients in performing internal risk and compliance assessments, developing comprehensive privacy programs, conducting third-party vendor audits and devising corporate governance protocols.

Prior to joining ZEK, Ms. Davis was Principal Court Attorney to Justice Charles Edward Ramos of the New York State Supreme Court, Commercial Division in Manhattan. She also worked with numerous other Manhattan Supreme Court Justices as a Senior Court Attorney in the Law Department of the New York State Supreme Court, Civil Term. She was an Adjunct Professor of Law at New York Law School.

Ms. Davis currently serves on the board of a large non-profit – the Association of the Bar of the City of New York Fund, Inc. and is one of five appointed Commissioners of the New York State Ethics Commission for the Unified Court System. She is a member of the New York State Court's Commercial Division Advisory Council; the New York State Bar Association's Committee on Technology in the Law and the New York City Bar Association's Committee on the Judiciary. Previously, she chaired the preeminent Commercial and Federal Litigation Section of the New York State Bar Association. She also served on the board of a non-profit, Literacy, Inc., where she chaired its governance committee.

Ms. Davis received her B.A. degree from Montclair State University (formerly Montclair State College) and J.D. degree from American University, Washington College of Law. She is admitted in New York, New Jersey, U.S. Court of Appeals, Second Circuit, U.S. District Court, Southern and Eastern Districts.

Ms. Davis is a co-author of the report "If Not Now, When: Achieving Equality for Women Attorneys in the Courtroom and In ADR**"** adopted by the American Bar Association and the New York State Bar Association.

Tracee is a frequent speaker on topics on New York trial practice and business dispute resolution, data security, privacy policies and technology in the courts.

HON. TIMOTHY SEAN DRISCOLL
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Timothy S. Driscoll is a Justice of the Supreme Court of the State of New York. Elected to a fourteen-year term in November 2007, Judge Driscoll serves in the Nassau County Commercial Division. He is also the co-chairman of the Chief Administrative Judge's working group on electronic discovery. He is a member of the Chief Judge's Advisory Council on Commercial Litigation in New York State, and serves as co-chair of the Subcommittee on Alternative Dispute Resolution. In addition to his judicial responsibilities, Judge Driscoll is an adjunct professor at Brooklyn Law School and Nassau Community College, and a teaching team member at the Harvard Law School's Trial Advocacy Workshop.

Prior to beginning his term on January 1, 2008, Judge Driscoll held a number of posts in the public and private sector. He served as Deputy Nassau County Executive for Law Enforcement and Public Safety from July 2004 to December 2007. In that position, Judge Driscoll oversaw all of the public safety and law enforcement agencies in the County, including the Police, Fire Marshal, Probation, Sheriff, Office of Consumer Affairs, Traffic and Parking Violations Agency, Medical Examiner, and Office of Emergency Management.

Judge Driscoll was an Assistant United States Attorney in the Eastern District of New York from November 2000 to July 2004. His case load included violent crime matters including racketeering, murder, gun possession and trafficking, and narcotics distribution, as well as white collar matters including mail fraud, wire fraud and health care fraud. His work as a federal prosecutor was recognized by the FBI, Nassau County Police Department, Old Brookville Police Department, and the Drug Enforcement Administration.

As an Assistant District Attorney in Nassau County from September 1996 through November 2000, Judge Driscoll's docket included cases involving burglary, robbery, narcotics and driving while intoxicated, as well as investigations into official corruption.

Prior to beginning his service as a prosecutor, Judge Driscoll was associated with Williams & Connolly in Washington D.C. from November 1992 through July 1996. Before joining the law firm, Judge Driscoll served as a law clerk to the Honorable Joseph M. McLaughlin, United States Court of Appeals for the Second Circuit.

Judge Driscoll is a graduate of Harvard Law School (cum laude 1991), Hofstra University (summa cum laude 1988) and Holy Trinity High School in Hicksville, which inducted him into its Hall of Fame in 2005. He is the Past President of the Irish Americans in Government of Nassau County, and the Past President of the Catholic Lawyers Guild of Nassau County.

Samantha V. Ettari

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Samantha V. Ettari is a trial lawyer who maintains a diverse litigation practice focusing on complex commercial litigation, with an emphasis on advertising litigation, contract and licensing disputes, business tort litigation, securities and regulatory defense, and bankruptcy litigation. Sam also serves as the firm's e-discovery counsel, guiding clients through their obligations in the rapidly evolving area of electronic discovery, including in establishing and complying with information governance; data retention; and e-mail, text and social media use policies, as well as effecting cost-efficient data collection and retention. She is also a member of the firm's interdisciplinary Cybersecurity, Privacy and Data Protection group.

Sam's litigation work has included second-chairing a federal jury trial in the Southern District of New York in which the jury completely rejected allegations against the client of false advertising and, despite a request for more than $20 million on claims of defamation, awarded less than $41,000. She also successfully defended against an appeal to the 2nd U.S. Circuit Court of Appeals, which affirmed the limited award. Sam also represented a number of the firm's bankruptcy clients as the lead litigation associate, including in the Residential Capital and Caesars Entertainment matters, in which she played key roles in investigations on behalf of creditor committees and bondholders, as well as in the Washington Mutual bankruptcy at trial on behalf of significant noteholders.

In the cybersecurity arena, Sam represented an international professional services firm in connection with incident response and notification plans following a breach of medical information, with responses to investigations by the Department of Justice and Department of Transportation. She also assists clients in drafting and implementing data retention, information security, incident response and breach communication plans.

Sam maintains an active pro bono practice, which includes representing

Education

J.D., magna cum laude, Brooklyn Law School, 2005

- Editorial Board, *Brooklyn Journal of International Law*
- CALI Award for Excellence (Copyright, Family Law)
- Brooklyn Law Students Against Domestic Violence
- Courtroom Advocates Project

B.A., magna cum laude, State University of New York at Geneseo, 2000

Oxford University, St. Edmund Hall, 1999

Bar Admissions

New York, 2006

New Jersey, 2005

Clerkships

Honorable Edward R. Korman, U.S.D.C., Eastern District of New York, 2007-2008

Honorable Joan M. Azrack, U.S.D.C., Eastern District of New York, 2005-2006

Court Admissions

U.S.C.A., 2nd Circuit

U.S.C.A., 3rd Circuit

U.S.C.A., 9th Circuit

U.S.D.C., District of New Jersey

U.S.D.C., Eastern District of New York

U.S.D.C., Southern District of New York

U.S.D.C., Western District of Michigan

indigent clients in contested divorce proceedings as part of her work with Her Justice and the New York Legal Assistance Group. Among her most notable work, she represented a disabled mother in three separate actions in Brooklyn Family Court. The client, suffering from a long-term physical disability, had endured years of physical and verbal abuse at the hands of her former partner. After filing amended petitions, conducting discovery and making multiple court appearances with the client, Sam negotiated settlement agreements awarding the client sole legal and physical custody of her 4-year-old daughter, a favorable child support award and a one-year final order of protection. In recognition of her commitment to pro bono work, Sam received the New York State Bar Association 2015 Empire State Counsel honor, the New York City Family Court 2014 Pro Bono Service Award and the Her Justice 2013 Commitment to Justice Award.

Jeremy R. Feinberg

Jeremy R. Feinberg is a Special Referee of the New York County Supreme Court, Civil Division. His docket includes referred matters from the Commercial Division, New York County, as well as matrimonial and general assignment cases. He issues reports and gives recommendations (or, in some instances, issues determinations) on referred matters ranging from attorneys' fees awards to e-discovery issues to personal jurisdiction challenges.

He worked at the Office of Court Administration from 2006-2013, serving on the staff of the Chief Administrative Judge, before becoming a Special Referee in 2013. Among other things, he was the Statewide Special Counsel for the Commercial Division, a role in which he coordinated issues regarding New York State's business court, providing support and assistance to the Justices assigned to that Court. He also served as counsel to the OCA's E-Discovery Working Group, and Statewide Special Counsel for Ethics.

Prior to joining the court system in 2006, Special Referee Feinberg was associated with Proskauer, where he served the firm and its clients on sports law, professional responsibility, and commercial litigation matters. He was law clerk to the Hon. Judith S. Kaye, former Chief Judge of New York State from 1996-1998. He is a 1995 graduate of Columbia Law School and a 1992 graduate of Columbia College.

Ignatius A. Grande

DIRECTOR

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Ignatius Grande has been advising clients on issues relating to information management, data privacy, and electronic discovery for more than 15 years. With his legal and technical expertise, Ignatius is able to bridge the gap that can exist between IT and legal/compliance personnel. He works with companies on their data privacy practices and advises companies on how they can comply with EU data privacy laws, including the General Data Protection Regulation. Ignatius has performed compliance risk assessments that addressed cybersecurity, records retention and data remediation compliance issues. He often works with companies to address complex information management issues, including the onboarding of new software and technologies and the privacy and security implications of Internet of Things devices and sensors. He also advises clients on the management of their social media presence and in the preservation of social media content. Ignatius works with companies to effectively implement information management practices and has drafted and revised a wide variety of policies, including Data Privacy, Records Retention, Legal Hold, Bring Your Own Device, Cybersecurity, Social Media, and Mobile Device Governance policies.

Ignatius is a frequent writer and speaker on topics relating to information governance and data privacy. He serves as co-chair of the Social Media and New Communications Technologies Committee of the New York State Bar Association's Commercial & Federal Litigation Section and teaches a course at St. John's University School of Law. Ignatius has worked for two global law firms and has also served as in-house counsel for a global commodities trading company. He graduated from Yale College in 1996 and Georgetown University Law Center in 1999.

Current Positions:
Director, Berkeley Research Group LLC
Adjunct Professor, St. John's University School of Law

The Honorable Deborah H. Karalunas obtained a Bachelor of Arts degree from Cornell University in 1978 and graduated cum laude from Syracuse University College of Law in 1982. At the College of Law, Karalunas was a member of the International Law Review, Moot Court and Justinian Honor Society. Following law school, Karalunas clerked for United States District Court Judge Howard G. Munson in the Northern District of New York. In 1983, Karalunas joined the law firm of Bond, Schoeneck & King in Syracuse, New York where she later became a partner. In 2002 Karalunas was elected to serve as a Supreme Court Justice in the 5th Judicial District. She presides over a panoply of civil cases including commercial, personal injury, medical malpractice, intellectual property, constitutional and environmental. In 2007 Karalunas was appointed Presiding Justice of the Supreme Court, Commercial Division, Onondaga County, and in 2017 she was appointed to the New York State Committee on Pattern Jury Instructions. She is Chair of the 5th Judicial District Women in the Courts Committee and the 5th Judicial District Library Board.

Justice Karalunas is a member of the New York State Bar Association, the Central New York Women's Bar Association, the Onondaga County Bar Association, and the Armenian Bar Association. In addition to leading various committees and sections, Karalunas served on the Board of Directors of the Onondaga County Bar Association and the Central New York Women's Bar Association. She was President of the Central New York Women's Bar Association, Presiding Member of the Judicial Section of the New York State Bar Association, Trustee of the Onondaga County Bar Foundation, and President of the Association of Justices of the Supreme Court of the State of New York.

Karalunas teaches New York Civil Practice at Syracuse University College of Law. She is Editor of the Judicial Dispatch and author of a chapter in the treatise *Commercial Litigation in New York State Courts.* Karalunas also lectures frequently on many substantive law and trial practice topics.

Justice Karalunas was the 2009 recipient of the Syracuse University College of Law Distinguished Alumni Achievement Award, the 2017 recipient of the Central New York Women's Bar Association's inaugural Karen DeCrow Award, and a 2018 Public Service Honoree of the Armenian Bar Association.

Karalunas lives in Jamesville, New York with her husband, George. They have three children, Sarah (Nick), Evan (Samantha) and Brian, and three grandchildren, Julian, Alina and Elliot.

LUPKIN PLLC

Jonathan D. Lupkin

Jonathan D. Lupkin is a litigator and trial lawyer with over 25 years of experience; he has been named by SuperLawyers® as one of the "Top 100" attorneys in the New York Metropolitan area for six years in a row, across all practice areas. He has tried complex jury and non-jury cases in state and federal court and has experience in various forms of alternate dispute resolution procedures. A leader of the organized bar in New York, Mr. Lupkin has served as Chair of the Commercial and Federal Litigation Section of the New York State Bar Association, a position held by two federal judges (one current and one former), the former general counsel of a major New York City performing arts institution, and senior partners at some of the nation's largest law firms. Additionally, New York State's former Chief Judge Jonathan Lippman appointed Mr. Lupkin to the Commercial Division Advisory Council, a permanent body created by the Chief Judge to advise on all matters, statewide, involving and surrounding the Commercial Division. Since his appointment, Mr. Lupkin has been the principal drafter for several of the amendments to the Statewide Rules of the Commercial Division. Mr. Lupkin also serves as a member of the Advisory Committee for the Commercial Division of the Supreme Court of the State of New York in New York County.

Mr. Lupkin has extensive experience litigating a diverse assortment of complex business disputes, including disputes involving attorney malpractice and other professional liability, commercial banking, real estate, partnership break-ups, securities, and financial

derivatives. Mr. Lupkin also handles the defense of white-collar professionals, corporate executives, and others in criminal and quasi-criminal investigations and prosecutions. He has also conducted internal investigations. His varied representations include:

- Defense at trial of a major New York City law firm in a multi-million-dollar suit alleging breach of the firm partnership agreement.
- Defense of a major New York City law firm in a legal malpractice action arising from alleged transactional advice rendered by one of the firm's European offices.
- Representation of several major international law firms in high-profile professional liability actions in New York, including claims arising out of a public securities offering by a Chinese energy company, work in connection with FINRA enforcement proceedings, and alleged transactional advice rendered by one of the firm's European offices.
- Defense of the former Chairman of the New York Stock Exchange in an action brought by the New York State Attorney General.
- Defense of former American Insurance Group ("AIG") director in an action by AIG alleging breach of fiduciary duty.
- Selected to serve as part of legal team to represent senior member of the Delaware judiciary against claims brought in the United States District Court in Manhattan.
- Representation of the former head of the international real estate group for a venerable investment banking house in connection with a partnership dispute arising from the investment in and construction of $450 million luxury towers in Miami, Florida.
- Representation of a PBS member-station and an owner of an iconic children's educational brand in litigation involving claims of trademark infringement and unfair competition against a former licensee.
- Representation of a high-profile hedge fund manager and philanthropist in connection with litigation arising from his investment in a theatrical production with runs both in London's East End and Greenwich Village.
- Prosecution on behalf of a successful real estate management company of a multi-million-dollar fraud action against a corrupt insurance brokerage firm and its principals.

- Representation of a member of the Duma, the Russian Federation's lower house of parliament, in a defamation action involving charges of anti-Semitism, embezzlement, and participation in war crimes.
- Defense, post 9/11, of a prominent insurance brokerage firm in a $42 million malpractice action stemming from the procurement of terrorism loss interruption.
- Defense at trial of a major New York industrial landlord in decade-long litigation of dispute with commercial tenant.
- Successful prosecution at trial of a fraudulent conveyance action arising from use of a bogus promissory note to procure an improper judgment lien and wrongfully interfere with conveyance of 100% interest in a luxury East-Side condominium. The Court concluded that our firm had established actual fraud by clear and convincing evidence and granted our request for attorney's fees.
- Prosecution at trial of an indemnity claim on behalf of a major plastics manufacturer against one of its suppliers.
- Successfully arbitrated claims brought by an investor in a Florida-based Native American casino venture against a fellow investor for non-payment of a monthly income stream; the arbitrator accelerated payment of income stream and awarded attorney's fees, leading to a total arbitral award of approximately $7.5 million. Secured affirmance of arbitral award before Appellate Division, First Department.
- Appeal to the Second Circuit of a complex antitrust action on behalf of a distributor of satellite television programming packages.
- Prosecution of a civil RICO action on behalf of a well-known pharmaceutical manufacturer against one of its distributors.
- Representation at trial of a former derivatives trader in an enforcement proceeding commenced by the Board of Governors of the Federal Reserve System.
- Representation of a major project management company executive in a corruption prosecution stemming from the renovation of the Post Office Building and Federal Courthouse in Brooklyn, New York.
- Representation of a prominent physician in prosecution stemming from the insider trading inquiry surrounding the IBM takeover of Lotus as well as before the Office of Professional Medical Conduct in connection with related licensure issues.

- Representation of foreign national in connection with high-profile prosecution for alleged illegal exportation of military equipment.

Mr. Lupkin has lectured extensively on trial and appellate practice. He has served as an instructor for the National Institute for Trial Advocacy and the New York State Bar Association's Commercial Litigation Academy. He has also served on numerous CLE panels, including: "The Trial of a Commercial Case: Successful Techniques and Tactics," "Trying Your First Non-Jury Case and Preserving Issues for Appeal: The Mechanics for Success," "CIVIL RICO: Legal Overview & Tactical Considerations," "Civil Appeals: Strategies and Process in the New York Court," "Recent Developments in Civil Practice: CPLR and Evidence," and "Trial of a Civil Case in Federal Court." In 2003 and again in 2008, Mr. Lupkin participated in presentations given to the Justices of the Commercial Division at the New York State Judicial Institute at Pace University. In 2016, at the request of the New York State Office of Court Administration, Mr. Lupkin served on a CLE panel regarding the recent amendments to the Statewide Rules of the Commercial Division; the 2-part program is available on OCA's intranet system.

Mr. Lupkin graduated from Columbia College in 1989 with a B.A. in comparative religion and from the Columbia University School of Law with his J.D. in 1992. He served as Notes and Comments Editor and a member of the Administrative Board for the *Columbia Law Review* and was named by the law school as a Harlan Fiske Stone Scholar.

Immediately after graduating from law school, Mr. Lupkin served as Law Clerk to the Honorable Edward R. Korman, United States District Judge for the Eastern District of New York.

EDUCATION:

Columbia University

- B.A. 1989, Columbia College, Member, Senior Society of Sachems
- J.D. 1992, Columbia Law School, Harlan Fiske Stone Scholar; Notes and Comments Editor and Member, Administrative Board, *Columbia Law Review*

BAR ADMISSIONS:

- New York, 1993
- U.S. Supreme Court
- U.S. Court of Appeals for the Second Circuit
- U.S. Court of Appeals for the District of Columbia Circuit
- U.S. District Court for the Southern District of New York
- U.S. District Court for the Eastern District of New York
- U.S. District Court for the Northern District of New York
- U.S. Tax Court

AWARDS & COMMENDATIONS:

- Recognized by SuperLawyers® as one of the "Top 100" attorneys in the New York Metropolitan Area, 2013 - 2018.
- AV Rated by Martindale-Hubbell®, 2011-2018.
- Selected as a Fellow in the Litigation Counsel of America, an honorary society for trial lawyers whose membership is comprised of less than one-half of one percent of all lawyers practicing in the United States, 2015.
- Selected for inclusion in Super Lawyers® in the field of Business Litigation from 2007 – 2018.
- Honored by the Commercial and Federal Litigation Section of the New York State Bar Association for contributions as Chair of the Section in 2011.
- Chairs' Award for Distinguished Service, Commercial and Federal Litigation Section, New York State Bar Association, 2006.

PUBLICATIONS:

- "Civil Justice Playbook: New York State's Commercial Division: The Ideal Forum for Resolving Complex Commercial Disputes," *Corporate Counsel Business Journal* (September-October 2018)

- Author of explanatory memoranda in support of Statewide Commercial Division Rules 11-b (Categorical Privilege Logs), 11-d (Limitations on Depositions), 11-e (Responses and Objections to Document Requests), 11-f (Depositions of Entities: Identification of Matters), 11-g (Proposed Form of Confidentiality Order and Privilege Clawback Protocol), 13 (Expert Disclosure) and 14-a (Rulings and Disclosure Conferences). Explanatory memoranda available on Unified Court System website at: http://www.nycourts.gov/rules/comments/index.shtml
- "Protecting the Sanctity of Silence: Client Confidences and Responding to a Grand Jury Subpoena Directed to Attorneys," *NY Litigator:* A Journal of the Commercial and Federal Litigation Section of the New York State Bar Association (Winter 2003)
- "5K1.1 and Substantial Assistance Departure: The Illusory Carrot of the Federal Sentencing Guidelines," 91 *Columbia Law Review* 1519 (1991)

ASSOCIATIONS & MEMBERSHIPS:

- Member, Chief Judge's Commercial Division Advisory Council, 2013-present
- Member, Advisory Committee, Commercial Division, Supreme Court of the State of New York, County of New York
- Member, New York County Independent Judicial Screening Panel for State Supreme Court Vacancies, 2014
- Fellow, Litigation Counsel of America, 2015-present
- New York State Bar Association (Committee on Court Structure and Operations, 2011-2012, Commercial and Federal Litigation Section, Chair, 2010-2011, Chair-Elect, 2009-2010, Vice-Chair, 2008-2009, Member, Executive Committee, 2000-present, Co-Chair, Nominations Committee (2018-Present), Co-Editor, Commercial Division Law Report (in cooperation with the New York State Office of Court Administration), 2006-2009, Editor, *NY Litigator*, 2000-2005, Co-Chair, Civil Prosecutions Committee, 2005-2006, Recipient, Chair's Award for Distinguished Service to the Section, 2006)
- Fellow, New York Bar Foundation

- Association of the Bar of the City of New York (Secretary, Committee on Criminal Advocacy; Member, Subcommittee on the Federal Sentencing Guidelines, 1995-1998; Committee on the Judiciary, 1998-2001 and Interim Member, 2002; Committee on Professional and Judicial Ethics, 2001-2003)
- Federal Bar Council

PRESENTATIONS & SEMINARS:

- Faculty Member, "Recent Amendments to the Commercial Division Rules," Office of Court Administration's Online Continuing Legal Education Programming
- Faculty Member, "Technology in the Courtroom," The Supreme Court of the State of New York Commercial Division Judicial Seminar
- Faculty Member, "Selecting a Commercial Forum," The Supreme Court of the State of New York Commercial Division Judicial Seminar
- Faculty Member, "Drafting a Comprehensive Arbitration Clause and Judicial Intervention in the Arbitral Process," sponsored by the New York State Bar Association, Commercial and Federal Litigation Section and NAM (National Arbitration and Mediation)
- Faculty Member, "Exploring Attorney-Client Privilege Among General Counsel," New York State Bar Association, Spring Meeting of the Section on Commercial and Federal Litigation
- Guest Lecturer, "Trying Cases in New York's Commercial Division," St. John's University School of Law
- Faculty Member, "E-Discovery: What New Attorneys Need to Know," City Bar Center for CLE, New York City Bar Association
- Faculty Member, "Ethical Issues in the Investigation of Commercial Lawsuits," New York State Bar Association, Spring Meeting of the Section on Commercial and Federal Litigation
- Faculty Member, Commercial Litigation Academy, sponsored by the New York State Bar Association, Commercial and Federal Litigation Section
- Faculty Member, National Institute for Trial Advocacy, "Building Trial Skills" Program

- Faculty Member, Young Lawyers' Trial Academy, Presentation Sponsored by New York State Bar Association, Young Lawyers' Section, Cornell Law School
- Faculty Member, "Trying Your First Non-Jury Case and Preserving Issues for Appeal: The Mechanics for Success," New York State Bar Association, Spring Meeting of the Section on Commercial and Federal Litigation
- Faculty Member, "CIVIL RICO: Legal Overview & Tactical Considerations," Presentation Sponsored By New York State Bar Association, Section on Commercial and Federal Litigation, Columbia University Club of New York
- Faculty Member, "Civil Appeals: Strategies and Process in the New York Court," New York State Bar Association, Spring Meeting of the Section on Commercial and Federal Litigation
- Faculty Member, "The Trial of a Commercial Case: Successful Techniques and Tactics," New York State Bar Association, Annual Meeting of the Section on Commercial and Federal Litigation
- Faculty Member, "Trial of a Civil Case in Federal Court," New York County Lawyers' Association Continuing Legal Education Institute
- Faculty Member, "The Ethics Game Show," City Bar Center for CLE, New York City Bar Association
- "Pleadings and Motion Practice in New York State Court," In-House Training Seminar
- Faculty Member, "Understanding the Attorney Disciplinary Process--And How To Avoid It," New York County Lawyers' Association Continuing Legal Education Institute
- Faculty Member, "Recent Developments in Civil Practice: CPLR and Evidence," City Bar Center for CLE, New York City Bar Association

Scott L. Malouf Biography

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Scott's LinkedIn profile

Scott L. Malouf is a social media attorney.

He helps other lawyers use social media and digital information in litigation. Scott identifies online and device evidence; seeks or opposes discovery of digital information; advises on evidentiary issues, discoverability, novel claims, ethics, and other legal issues; develops budgets; assesses new litigation technology and generally makes using digital evidence faster, easier and more predictable.

He also helps organizations use social media and online tools for business, advising on social media/tech guidelines, policies and practices. One of his particular interests is understanding what staff and stakeholders really do on digital platforms and how an organization can effectively respond.

Scott is a member of the *American Bar Association/BNA Lawyers Manual on Professional Conduct* Editorial Advisory Board. He is also a contributor to the ABA publication *Handbook on Global Social Media Laws for Business Lawyers* (Chapter 7: Defamation, Discovery of Sources, and Fake News). Scott's contribution focused on social media crisis communications and an attorney's role in a social media crisis.

Scott is also an active member of the New York State Bar Association's *Social Media Committee*, where he co-authored the *Social Media Ethics Guidelines*, an influential national ethics resource and contributed to the *Social Media Jury Instructions Report*. He also managed the Section's Twitter feed and chairs CLEs.

Scott writes and speaks extensively and has appeared on television, National Public Radio (NPR), before the National Advertising Division (part of the BBB), on behalf of the American Board of Trial Advocates, in podcasts, at CLEs and in many other forums.

Scott is a Rochester, New York native. He received his B.A. from Hamilton College and his law degree from Vanderbilt University. He is licensed to practice law in New York and Massachusetts.

He can be reached at info@scottmalouf.com or (585) 672-4922. See more at Scott's LinkedIn profile (linkedin.com/in/socialmediaattorney) or his Twitter account: (@ScottMalouf).

Carla M. Miller, Esq.

Carla M. Miller is Vice President of Business & Legal Affairs and Litigation Counsel for Universal Music Group, the world's largest group of record and music publishing companies. In that capacity, Ms. Miller oversees all aspects of litigation for the company and its foreign affiliates. Ms. Miller also provides pre-litigation advice and counseling on a wide variety of topics, including pre-publication clearance reviews, and artist contractual and intellectual property disputes. Prior to joining UMG, Ms. Miller served in-house litigation counsel for Siemens Corporation, the domestic holding company for all U.S.-based affiliates of the German electronics and engineering company, Siemens AG.

Ms. Miller is an experienced trial lawyer, having conducted all phases of litigation in state and federal court. Prior to transitioning to in-house practice, Ms. Miller was associated with the law firms Proskauer Rose LLP and Morrison & Foerster LLP. Ms. Miller's law firm practice focused on commercial litigation and entertainment law, with an emphasis on music and film industry-related issues and intellectual property litigation, including copyright and trademark infringement and other Lanham Act claims. Ms. Miller represented the major U.S. motion picture studios' interests in the landmark trial and appeal, *Universal City Studios v. Reimerdes*, involving DVD encryption copyright protection systems, which upheld the Digital Millennium Copyright Act of 1998 over a First Amendment challenge. She also second-chaired a federal jury trial involving claims of trademark infringement asserted against a global hair products manufacturer, which resulted in a complete defense victory and invalidation of the plaintiff's trademark. Ms. Miller was recognized as one of the top 15 New York lawyers under 40 by *New York Lawyer Magazine* for her trial work in the field of intellectual property.

Ms. Miller is a member of the Executive Committee of the Commercial &Federal Litigation Section of the New York State Bar Association (NYSBA). She was one of the founding co-chairs of the Section's Corporate Litigation Counsel Committee, and currently co-chairs the Section's Diversity Committee. Ms. Miller has served as a CLE lecturer for The Practising Law Institute (PLI), the American Bar Association-Forum on Entertainment and Sports Law, The New York State Bar Association, and the Association of the Bar of the City of New York on numerous intellectual property topics, as well as law practice management and issues concerning diversity in the legal profession.

Ms. Miller received her B.S. degree in Computer Science from Loma Linda University in Riverside, California. After a successful career as a consulting executive with Andersen Consulting (now known as Accenture), leading consulting projects in Europe and the United States, Ms. Miller received her J.D. degree from the University of California, Hastings College of the Law, where she served as a Senior Articles Editor for *The Hastings Law Journal*. Following law school, Ms. Miller was a federal judicial clerk for The Honorable Cecil F. Poole, Senior Circuit Judge for the United States Court of Appeals for the Ninth Circuit.

Charles J. Moxley, Jr.
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Charlie Moxley is an experienced arbitrator, mediator, litigator, and educator. The principal in MoxleyADR, he is an Adjunct Professor at Fordham Law School, teaching arbitration and international law, as well as the Distinguished ADR Practitioner in Residence at Cardozo Law School and a Fellow of the College of Commercial Arbitrators and of the Chartered Institute of Arbitrators.

Charlie has been a litigator handling large commercial, securities, insurance and other cases in federal and state courts throughout the United States for over 35 years. In recent years, Charlie has spent most of his time as an arbitrator and mediator. He has presided over more than 400 arbitrations, primarily in the commercial, securities, employment, insurance, technology, and international areas, with many of the cases involving substantial claims.

He is a member of arbitration and mediation panels of the International Institute for Conflict Prevention and Resolution ("CPR"), the American Arbitration Association (the "AAA"), the International Centre for Dispute Resolution (the "ICDR"), the U.S. Council of International Business ("USCIB") for the ICC International Court of Arbitration, and Supreme Court, New York County (Commercial Division and Part 137). He also serves as arbitrator and mediator in *ad hoc* cases.

Charlie has published widely in the arbitration area and regularly lectures at academic and professional functions on the subject, including at Fordham, Cardozo, and other law schools and at AAA, American Bar Association, New York State Bar Association ("NYSBA"), New York City Bar Association, and ARIAS-US functions and events, and trains arbitrators for CPR and the NYSBA. He has also written widely and teaches in the public international law area.

Charlie has been a bar leader for many years. He is currently Co-Chair of the Committee on Arbitration and ADR of the Commercial and Federal Litigation Section ("ComFed") of the NYSBA and a member of ComFed's Executive Committee. Charlie also serves as a member of the Executive Committee of the Dispute Resolution (DR) Section of the NYSBA and is a former Chair of that Section. Charlie also has served as a delegate to NYSBA's House of Delegates.

Charlie started out his career at Davis Polk & Wardwell, following his graduation from Columbia Law School and a clerkship in the United States District Court for the Southern District of New York, following which he practiced in a number of smaller litigation firms before opening his own ADR firm.

Rachel Silverman is a trusted advisor to attorneys, business leaders and entrepreneurs with more than two decades spent designing and executing programs in business development, leadership, communications, employee engagement and diversity. Her breadth of knowledge includes practicing as an attorney, leading business development and marketing for AmLaw 100 and boutique firms, and driving strategy and leading teams at both large media corporations and tech start-ups. She speaks and writes regularly on the dividends of strategic business development activities, individual coaching, and workplace cultural modifications, and collaborates with executives on integrating all aspects of business development and communications for a competitive edge and financial growth.

LISA MARGARET SMITH, UNITED STATES MAGISTRATE JUDGE, SDNY

The Honorable Lisa Margaret Smith is a United States Magistrate Judge for the Southern District of New York. She sits in the Charles L. Brieant Federal Building and United States Courthouse in White Plains. She was originally appointed in 1995 and is currently serving her fourth term as a Magistrate Judge. From 2006-2008 Judge Smith served as Chief Magistrate Judge for the SDNY.

Prior to being appointed to the bench, Judge Smith was an Assistant United States Attorney in the Criminal Division of the United States Attorney's Office for the Southern District of New York (1987-1995). Before becoming an AUSA she served as a Kings County (NY) Assistant District Attorney from 1980-1985, rising to Supervising Senior ADA in the Appeals Bureau, following service in several other bureaus. From 1985-1986 Judge Smith was an Assistant Attorney General in the Appeals and Opinions Division of the New York State Department of Law, located in Albany. She represented the State of New York on appeals in state and federal courts throughout New York, and she co-authored an *amicus curiae* brief on behalf of the National Association of State Attorneys General filed in the Supreme Court of the United States. In 1986 Judge Smith re-joined the Kings County District Attorney's Office as a Supervising Senior ADA. She remained there until 1987, when she became an AUSA for the Southern District of New York.

Judge Smith earned her BA degree, with honors in political science, from Earlham College in Richmond, Indiana in 1977, and her JD degree from Duke University School of Law in Durham, North Carolina in 1980, where she was a member of the Moot Court Board. She is a member of the Boards of Editors of the *Federal Courts Law Review*, an on-line and print journal of the Federal Magistrate Judges Association, and of the *Federal Bar Council Quarterly*. Judge Smith has served in various positions on the Board of the Westchester Women's Bar Association, and currently serves as a Vice President and member of the Executive Committee. She is active in the Federal Magistrate Judges Association, the Federal Bar Council, the Federal Bar Association, for which she has served as a Circuit Vice President, and JALBCA. In 2014 Judge Smith was honored to receive the Judith S. Kaye Access to Justice Award from the Women's Bar Association of the State of New York. In 2018 Judge Smith was also honored to receive the Kay Crawford Murray Award from the New York State Bar Association's Committee on Women in the Law.

Judge Smith has been an Adjunct Professor at the Elisabeth Haub School of Law at Pace University (formerly Pace Law School) since 2006, where she has taught Evidence and Federal Courts, and co-teaches Civil Procedure with Professor Michael B. Mushlin. Judge Smith frequently lectures at CLE and Bar Association programs, with a particular focus on e-discovery and evidence. She is a regular participant in events which educate children about the courts, including Take Your Children To Work Day, an annual program of the Westchester Women's Bar Association, as well as visits to the Courthouse by school and scout groups, and she advises the Rye Neck High School Mock Trial Team.

Judge Smith published an article, co-authored with Professor Mushlin, entitled "The Professor and the Judge: Introducing First-Year Students to the Law in Context." The article appears in the *Journal of Legal Education*, Volume 63, number 3 (February 2014). Judge Smith also wrote an article entitled "Top Ten Things You Probably Never Knew About Magistrate Judges," published in *The Federal Lawyer* in May, 2014. She has also contributed numerous articles to the *Federal Bar Council Quarterly*.

Honorable Norman St. George
Justice of the Supreme Court

On November 6, 2018, Judge St. George was elected as a ***Justice of the Supreme Court*** for the 10th Judicial Department. As of January 1, 2019, Chief Judge Janet DiFiore appointed Justice St. George to serve as the ***Administrative Judge of all courts in Nassau County***. In that capacity, Justice St. George oversees the Supreme Court, County Court, Family Court, Surrogate Court, District Court, and all City and Village Courts. From 2013 through 2018 Justice St. George served as the ***Supervising Judge of the Nassau County District Court.*** He was appointed to that position in February of 2013, by Chief Administrative Judge A. Gail Prudenti. The Nassau County District Court is comprised of both Criminal and Civil Courts. It is one of the busiest Courts in New York State, handling over One Hundred Thousand criminal and civil cases per year. Justice St. George supervised twenty-six Judges and a non-judicial staff of three hundred individuals. In addition to supervising the District Court, Judge St. George was an elected Nassau County Court Judge and an Acting Supreme Court Justice. In May of 2008, Judge St. George was appointed to the position of ***County Court Judge*** by then Governor David A. Paterson, and was elected to the same position later that year. Shortly thereafter, he was appointed as an ***Acting Supreme Court Justice*** for New York State. Judge St. George has presided over serious felony criminal cases, commercial cases, medical malpractice cases, and was in charge of the Integrated Domestic Violence Court, the Domestic Violence Court and the Sex Offense Court.

Prior to 2008, Judge St. George served as a District Court Judge. In 2004, he was appointed to the position of Nassau County ***District Court Judge,*** by County Executive Thomas Suozzi, and was elected to the same position later that year. In addition to presiding over criminal and civil cases, Judge St. George was charged with the responsibility of establishing Nassau County's first misdemeanor Domestic Violence Court. Judge St. George also established and presided over a Driving While Intoxicated Court. Over thirty of Judge St. George's written decisions have been published by the Official Court Reporter and the New York Law Journal. Judge St. George has presided over an astounding two hundred and fifty jury trials, including a number of high profile press cases. He lectures at the Judicial Institute to other judges and at various Bar Associations on criminal and civil trial practice.

Judge St. George was born in Bronx, New York. His father, now deceased, was born in Jamaica, West Indies, and immigrated to the United States for college in 1956 on a track scholarship. His father was a retired Psychiatrist and Professor from Adelphi, Hofstra and Columbia Universities. His mother, now deceased, was born and raised in St. Louis, Missouri. She was a school Psychologist. Judge St. George attended Long Island Lutheran Jr. and Sr. High School in Brookville, New York, where he graduated number two in his class as Salutatorian and as a member of the Honor Society. He attended Adelphi University in Garden City where he majored in Accounting and graduated on the Dean's List. Judge St. George attended Hofstra University School of Law on full academic scholarship and received his Juris Doctor in 1988. He was a member of the Hofstra trial team, and was privileged to be selected as a student member of the Nassau County Inns of Court.

Prior to ascending to the bench, Judge St. George practiced law for sixteen years as a Federal and State trial attorney. After graduating from law school, he worked as a Tax Attorney with Arthur Anderson and Company. He then began his litigation training at the Garden City law firm of Reisch, Simoni, Bythewood & Gleason. Judge St. George handled an extensive caseload of criminal and civil cases including major Federal criminal and civil R.I.C.O. actions.

After leaving Reisch, Simoni, Bythewood & Gleason, Judge St. George served as an Assistant District Attorney for the County of Nassau. He served in the District Court Bureau, Felony Screening Bureau, Grand Jury Bureau and County Court Bureau. As a Prosecutor, Judge St. George tried over thirty jury trials to verdict, and never lost a felony trial.

Judge St. George left the Nassau County District Attorney's Office to become a partner in the Wall Street firm of Jackson, Brown, Powell and St. George, LLP. In addition to being responsible for all of the firm's civil and criminal litigation, Judge St. George served as the managing partner. Thereafter, Judge St. George set up his own law firm with offices in Mineola and Manhattan. Judge St. George successfully tried numerous Federal and State criminal cases, Federal Copyright Infringement cases, commercial litigation cases, and personal injury cases. Two of Judge St. George's trial verdicts were reported by the Jury Verdict Reporter, which reports significant Jury trial verdicts. Judge St. George frequently appeared on Court Television as a trial commentator.

Nancy Thevenin

Nancy Thevenin supports the USCIB Arbitration Committee and coordinates the work of the U.S. Nominations Committee. She works closely with USCIB's Business Development team in ensuring a more comprehensive policy, legal and arbitration membership outreach to both law firms and corporations.

Thevenin previously served as deputy director of the ICC Court of Arbitration's North American marketing office. During her tenure, the group helped launch the ICC International Mediation Competition and developed USCIB Young Arbitrators Forum (YAF), with Thevenin drafting the proposal for the ICC to make YAF a global organization. Nancy then joined Baker & McKenzie as a special counsel in and global coordinator of their International Arbitration Practice Group. She left Baker in 2014 to start her own practice as arbitrator and mediator and continues to teach the spring semester international commercial arbitration course at St. John's Law School.

Lauren J. Wachtler is a partner in the law firm of Phillips Nizer LLP in New York and co- chair of its Litigation Department. Lauren focuses her practice on commercial and business litigation with extensive representation of clients in a wide range of jury and non-jury trials in New York State and Federal Courts, including cases involving the fashion industry, finance, retailers, manufacturers, designers, business torts, and labor and employment-related issues She is a former chair of the Commercial & Federal Litigation Section of the New York State Bar Association and currently a member of the Board of the New York Bar Foundation, the philanthropic arm of the State Bar. As a member of the Women's Leadership Board of the Harvard Kennedy School, the Council for the Sackler Center For Feminist Art of the Brooklyn Museum, and the lawyer for Same Sky, a trade initiative devoted to empowering HIV positive women who survived the genocide in Rwanda, Lauren continues to play an active role in charitable and not-for-profit organizations dedicated to advancing and empowering women and girls. Lauren spearheaded a Women's Initiative for that 3000 member Section of the Bar and is a co-author of the Report, "If Not Now, When? Achieving Equality for Women Attorneys in the Courtroom and in ADR," designed to advance women in the profession which was adopted by the New York State Bar Association and the American Bar Association. Lauren has been selected as a New York Times "Super Lawyer" in 2006—2018 by the New York Times, and "Best Lawyers In America" for commercial litigation in 2018-2019. She is a frequent contributor and author of articles on a wide range of topics including trial techniques and evidence, and is a frequent guest lecturer on numerous panels relating to New York practice and procedures, including an annual program entitled "Taking The Lead," designed to promote and provide junior woman attorneys with the tools they need to succeed in the courtroom . A recipient of its "Champion for Change" award, Lauren is a member of the Board of RiverSpring Health, Hebrew Home for the Aged in Riverdale, New York, and the founder of its pet therapy program, "Pets By Your Side." Ms. Wachtler is a graduate of Mount Holyoke College, cum laude, and St. Johns University School of Law.

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Stephen P. Younger, Past President of the New York State Bar Association, is a leading commercial litigator who is also well-known for his alternative dispute resolution work. Having been with Patterson Belknap since 1985, Mr. Younger has more than 30 years of experience as a business litigator. As a seasoned trial lawyer, he has tried many cases in federal and state courts and before arbitration panels. He also frequently argues appeals, particularly in the appellate courts of New York. Based on his significant ADR experience, he is often called on to serve as an arbitrator or mediator in high-stakes matters. Mr. Younger serves as Editor of the New York Commercial Division Practice Guide, which is part of Bloomberg Law's Litigation Practice Portfolio Series.

Mr. Younger's clients include financial institutions, mutual funds, hedge funds, pension funds and venture capital firms involved in commercial, securities and real estate disputes. He has also developed an extensive practice representing European and Latin American companies in U.S.-related matters.

In addition to his previous role as State Bar President, Mr. Younger has sat on numerous New York State Bar Association committees. He is Past Chair of the New York State Bar Association's Commercial and Federal Litigation Section, having previously served as Chair of its Securities Litigation Committee and of its ADR Committee. Mr. Younger served as Chair of the State Bar's Task Force on Nonlawyer Ownership of Law Firms. He also chairs the State Bar's Subcommittee on the Judiciary Article of its Constitutional Convention Committee.

Mr. Younger is the State Delegate for New York to the ABA's House of Delegates where he chairs the New York delegation. He is a member of the Steering Committee for the ABA's Nominating Committee. He serves on the ABA's Standing Committee on the American Judicial System. He is Past Chair of the ABA's International Mediation Committee and its Task Force on International Trade in Legal Services. He served as the ABA's representative to the United Nations Economic and Social Council. He is chairing the ABA's 2017 summer meeting in New York City.

Mr. Younger previously served on Governor Andrew M. Cuomo's Transition Committee and was the Transition Director for Mr. Cuomo when he was the New York State Attorney General. He also served on the Transition Committee for for New York County District Attorney Cyrus Vance. He was Counsel to the New York State Commission on Judicial Nomination, which nominates New York's Court of Appeals Judges, and is a member of the Governor's First Department Judicial Screening Committee.

Mr. Younger is Chair of the Board of the Historical Society of the New York Courts. He is a member of the Board of Directors of the Fund for Modern Courts and received the Fund's John J. McCloy Award. He served on the Chief Judge's Task Force on Commercial Litigation in the 21st Century, and currently serves on the Chief Judge's

Commercial Division Advisory Council. He was formerly a member of the Chief Judge's Advisory Committee on New York State Pro Bono Bar Admission Requirements. He is a co-editor of Patterson Belknap's Commercial Division Blog.

Mr. Younger serves on the Board of Directors of the CPR Institute for Dispute Resolution, and previously served as the Chair of its Executive Advisory Committee. He is a founding Board member and Vice Chair of the New York International Arbitration Center. He is also a member of the ADR Advisory Committee of the U.S. District Court for the Eastern District of New York.

A long-time Trustee of Albany Law School, Mr. Younger is Past President of its National Alumni Council. He is also Secretary of the Harvard Club of New York City and previously served on the Club's Audit Committee.

Mr. Younger is an Adjunct Professor of Law at Fordham University School of Law where he teaches commercial litigation.

Mr. Younger has spoken at more than 200 seminars and written over 30 articles in the fields of securities litigation, commercial arbitration and international dispute resolution.

Prior to joining Patterson Belknap, Mr. Younger served as Law Clerk to the Hon. Hugh R. Jones, Associate Judge for the New York Court of Appeals.

Education

- Albany Law School (J.D., 2011)
  - honoris causa
- Albany Law School (J.D., *magna cum laude*, 1982)
  - Editor-in-Chief, *Albany Law Review*
- Harvard University (B.A., *cum laude*, 1977)

Admissions

- U.S. Supreme Court
- U.S. Court of Appeals, Second Circuit
- U.S. District Court, Southern and Eastern Districts of New York
- U.S. Tax Court
- New York

Professional Activities

HONORS: The Citizens Union of the City of New York Civic Leadership Award; Volunteer Lawyers Project Dedication to Justice Award; Fund for Modern Courts John J. McCloy Award; Albany Law School Distinguished Alumni Award; Puerto Rican Bar's Advancement of Justice Award; Weinberg Center for Elder Abuse Prevention Champion for Change Award; Exodus Transitional Community Social Justice Award; Listed as a "Litigation Star" for New York in Euromoney Institutional Investor PLC's *Benchmark: America's Leading Litigation Firms and Attorneys*; Recognized in *The Best Lawyers in America*® in the areas of Alternate Dispute Resolution and Appellate Law; Named to Top 100 New York City attorneys in *Super Lawyers*.

MEMBERSHIPS: Past President, New York State Bar Association (Chair, Judiciary Article Subcommittee of the Constitutional Convention Committee; Past Chair, Nominating Committee; Past Chair, Court Operations Committee; Past Chair, Commercial and Federal Litigation Section; Past Chair, Task Force on Nonlawyer Ownership of Law Firms; Past Chair, ADR Committee; Past Chair, Securities Litigation Committee); Past Chair, Mid-Atlantic Bar Conference; N.Y.S. Delegate, ABA House of Delegates; Member, Steering Committee, ABA Nominating Committee; Member, ABA Standing Committee on the American Judicial System; Past Chair, ABA International Trade in Legal Services Committee; Past Chair, ABA International Mediation Committee; Member, Association of the Bar of the City of New York (Past Member, Committee on Arbitration; Past Secretary, Task Force on Civil Courts); Former Counsel, New York State Commission on Judicial Nomination; Member, Governor's Judicial Screening Committee, First Department; Member, Chief Judge's Commercial Division Advisory Council; Member, Task Force on Commercial Litigation in the 21st Century; Past Member, Chief Judge's Advisory Committee on New York State Pro Bono Bar Admission Requirements; Member, ADR Advisory Committee, Eastern District of New York; Mediator, United States District Court, Southern District of New York, Eastern District of New York; Advisory Board, Financial Markets Regulatory Institute; Board of Directors, CPR Institute for Dispute Resolution (Past Chair, Executive Advisory Committee); Board of Directors, Fund for Modern Courts; Founding Board Member and Vice Chair, New York International Arbitration Center; Advisory Council, Brooklyn Legal Services; Chair of the Board, Historical Society of the N.Y.S. Courts; Congress of Fellows, Center for International Legal Studies; Fellow, The New York Bar Foundation; Fellow, the American Bar Foundation; Trustee Emeritus, Albany Law School; Past President, National Alumni Council, Albany Law School; Member, Eastern District of New York ADR Advisory Council; Secretary, Harvard Club of New York City.

IN THE MEDIA: *New York Law Journal,* "Judge Lippman Named President of Historical Society" (February 1, 2019)

Publications

- Co-author, "INSIGHT: First Department Reverses Injunctions Against Fuji-Xerox Merger," *Bloomberg Law* (November 14, 2018)
- Co-author, "Daesang V. NutraSweet Reaffirms NY's Pro-Arbitration Attitude," *Law360* (October 11, 2018)
- Co-author, "Commercial Division Enjoins Xerox-Fujifilm Deal Resulting in Resignation of Xerox's CEO," *Bloomberg Law* (May 18, 2018)
- Co-Editor, "New York Commercial Division Practice Guide," *Bloomberg Law* (2017)
- Co-Author, "Bringing Cayman Derivative Claims In NY Just Got Easier," *Law360* (December 5, 2017)
- Co-Author, "A Constitutional Convention, Opportunities to Restructure and Modernize the New York Courts," *NYSBA Journal* (October 2017)
- Co-Author, "First Department Adds Two New Factors to New York's Standard of Review for Non-Monetary Settlements of Shareholder Class Actions," Bloomberg BNA's *Corporate Law & Accountability Report* (March 1, 2017)
- Co-Author, "Court Confirms Hedge Funds Did Not Act In Bad Faith, Affirms Large Judgment," *New York Law Journal* (February 7, 2017)
- Co-Author, "A New Tool For Obtaining Jurisdiction In New York Courts," *Law360* (February 2, 2017)
- Author, "Chapter 25: Use of Non-Binding Alternative Dispute Resolution Mechanisms to Foster Settlement," *Settlement Agreements in Commercial Disputes: Negotiating, Drafting & Enforcement* (2017)
- Author, "More Reasons to Arbitrate in the Big Apple," *New York Law Journal* (November 25, 2013)

- Author, "*New York Law as an International Standard for Business*," *Financier Worldwide* (2011)
- Author, "*Court Simplification in New York,*" N.Y. County Lawyer (2012)
- Author, "*Parallel Proceedings in Securities Enforcement Actions*," *Journal of Securities Law, Reg. & Compliance* (2010)
- Author, "*Effective Representation of Corporate Clients in Mediation*," *Albany Law Review* (1996)

Representative Matters

Complex Commercial Litigations

Represented a manufacturing company in a shareholder class action concerning non-disclosure of the impact of business developments on its stock price.

Defended a brokerage firm in a RICO and securities fraud litigation concerning alleged non-disclosures of information and manipulation of market in a major Eurobond offering.

Obtained dismissal of a $2 billion claim versus directors and officers of a foreign bank.

Defended a media company in a class action concerning the restructuring of a television station limited partnership.

Obtained dismissal on summary judgment of a securities class action against directors of a consumer products company.

Investigated a complex fraud scheme involving the privatization of state-owned enterprises in Azerbaijan, and launched cases around the world to freeze $80 million worth of assets and recover the funds for a major insurance company.

Prosecution for a brokerage firm of NASD arbitration involving complex securities market manipulation scheme.

Conducted investigations and prosecuted litigations of an unauthorized trading scheme for a state-owned mining company, including allegations of kickback payments and market manipulation of commodities trading.

Represented a foreign bank in complex litigation brought against the trustee that oversaw mortgage pools that were alleged to have been impacted by fraudulently induced condominium purchases.

Advising the board of a tech company on takeover defense issues.

Arbitrations and ADR

Successfully defended a brokerage firm in multi-day arbitration hearings against claims that CMO investments were unsuitable for an institutional client.

Prevailed in a major international arbitration liability hearing over the breach of an agreement to acquire a telecommunications company.

Chaired an arbitration panel in an international dispute over a merger and acquisition transaction.

Won a stock exchange arbitration involving failed securities trades on behalf of a brokerage firm.

Service as arbitrator in a dispute over the refurbishing of a private jet.

Mediated a dispute over liabilities assumed in a corporate takeover.

Successfully defended a publishing company in an arbitration seeking to enforce provisions of a shareholders agreement.

Served as the court-appointed mediator in a series of disputes over bond defaults by a Latin American country.

Represented a real estate developer in multi-day arbitration hearings in a complex construction dispute.

Represented a metals trading company in a multi-million dollar commodities arbitration involving aluminum and bauxite trading contracts.

Appeals

Obtained a reversal in a landmark Court of Appeals decision on attorney-client privilege in the context of mergers and acquisitions.

Successfully appealed a groundbreaking fiduciary duty decision concerning the liability of financial advisers in New York.

Won a case of first impression in New York's Appellate Division concerning the viability of a fraud claim for concealing evidence that was subpoenaed in a commercial arbitration.

Obtained reversal of an attachment order over a Miami hotel under novel jurisdictional theories.

Argued the appeal of collateral estoppel issues in a major commercial litigation before the New York Court of Appeals.

Handled an appeal to the New York Court of Appeals in a case of first impression involving the enforceability of preliminary agreements under New York law.

Handled a Second Circuit appeal regarding the scope of arbitration clauses as applied to a mutual fund adviser.

Argued an appeal before the New York Court of Appeals in a dispute over the dissolution of a hedge fund.

Handled an appeal in the New York Court of Appeals addressing whether the New York Attorney General is bound by arbitration clauses signed by alleged victims.

Won an appeal in the Second Circuit of a preliminary injunction against retaliation under the FLSA.

Trusts and Estates Litigation

Represented a high-profile individual in connection with his role as Executor of his late wife's estate including his right to discovery into questionable transactions.

Obtained a resolution of litigation for a high net worth individual client regarding his elective share rights to his late wife's estate.

Successfully resolved on behalf of the estate of a prominent physician a potential will contest.

Won a major victory at trial before the U.S. Tax Court on behalf of several members of a family regarding whether sales of the stock among shareholders of a major closely-held corporation constituted arms-length transactions to establish the value of the shares.

Service as special counsel to a husband in a divorce litigation and related appeals to address assets held in family trusts.

Law Firm Defense

Defended securities fraud suit against major law firm concerning bond issue of a United States commonwealth.

Defended disciplinary complaint brought against corporate attorney.

Defended multiple disqualification motions in major commercial litigation.

Advised law firm on compliance with ethics rules.

Service as expert witness in law firm-related issues.

Other High Profile Matters

Served as lead counsel in mediation of a dispute over a large bequest to Presidential Library.

Served as Special Counsel to the Mayor to investigate the New York City Commissioner of Cultural Affairs.

Represented well-known hip-hop producer in First Amendment challenge to New York's Lobbying Law.

Handled litigation challenging the constitutionality of aspects of New York's Workers Compensation Law.

Advised New York's then Chief Judge on legal issues surrounding the prolonged failure to grant pay raises to members of the Judiciary.

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JEFFREY T. ZAINO, ESQ.

Jeffrey T. Zaino, Esq. is the Vice President of the Commercial Division of the American Arbitration Association in New York. He oversees administration of the large, complex commercial caseload, user outreach, and panel of commercial neutrals in New York. He joined the Association in 1990. Mr. Zaino is dedicated to promoting ADR methods and services. His professional affiliations include the American Bar Association, Connecticut Bar Association, District of Columbia Bar Association, New York State Bar Association (Dispute Resolution Section - Executive Committee Member and Chair of the Blog Committee and Blog Administrator for the Section), New York City Bar Association (Member of the Arbitration Committee and Affiliate Member of the ADR Committee), Board of Advisors of the Scheinman Institute on Conflict Resolution, New York Law School Advisory Committee, and Westchester County Bar Association. He has also written and published extensively on the topics of election reform and ADR and has appeared on CNN, MSNBC, and Bloomberg to discuss national election reform efforts and the Help America Vote Act.