Looking into the Chrysotile Ball, the Future of Asbestos Litigation

It was commonplace for those involved in asbestos litigation 10 or 15 years ago to hear from the veteran attorneys that the litigation would only last another 10 or 15 years. Some may even have stretched this time out to 20 years. After that time lapse, there would be no more litigation involving exposure to asbestos…..or so it was thought. This belief was premised on several things: the age of the workers and the timing of asbestos generally being acknowledged as hazardous; the removal of asbestos from many products; and safe guards that were put into place, such as asbestos abatement. Despite this past view, asbestos litigation is still going strong. While filings of asbestos cases might be down some, there is no signs of the litigation being close to over. The types of asbestos claims might slowly be changing, but it is safe to say that the litigation will be around for quite some time to come.

KCIC puts out an annual review of asbestos litigation. Pursuant to the 2017 industry report, there has been a downward trend of total filings, from 5,336 in 2015 to 4,812 in 2016 and 4,450 in 2017. Of those numbers, mesothelioma cases went from 2,292 in 2015 to 2,190 in 2017. Lung cancer cases went from 1,158 in 2015 to 1,101 in 2017. It should be noted that at the time the 2017 KCIC report came out, they were still gathering information on 2017 end of the year filings. This means the drop off in filings, if any, between 2016 and 2017 could be significantly less than what is shown in the report. (At the time these written materials were prepared, the 2018 KCIC report had not been published. The 2018 report will have the final filing numbers for 2017 and a better comparison can be made once the report is published)

Looking at the KCIC report on asbestos cases filed by jurisdiction, the top three jurisdictions for cases filed are Madison County, IL (1,303 for 2016 / 1,128 for 2017), Baltimore City, MD (548 for 2016 / 495 for 2017) and New York, NY (369 for 2016 / 346 for 2017). It is
interesting to note that Madison County appears to be maintaining its title of one of the judicial “hellholes” for asbestos cases as the filings in that jurisdiction total more than the next three jurisdictions on the KCIC report put together. Additionally, 62% of the cases filed in IL, most of which were filed in Madison County, were for non-residents of the state. However, as the KCIC report points out, in September 2017 the IL Supreme Court released an opinion in the case of Aspen American Insurance Co. v. Interstate Warehousing, Inc., 2017 IL 121281 that followed the rulings in Bristol-Myers Squibb v. Supreme Court of California, 137 S.Ct. 1773 (2017) and Daimler AG v. Bauman, 134 S.Ct. 746 (2014). As set forth in Bristol, non-residents of a state can sue a defendant company within the state only if the company was either incorporated or headquartered in the state or the plaintiff’s injury occurred in the state. (The decisions in Aspen, Bristol and Daimler are included below). Since the IL Supreme Court ruling was later in 2017, it will be interesting to see if non-resident filings have dropped off for IL, specifically Madison County, in the upcoming 2018 report.

According to KCIC, of the 1,128 cases filed in Madison County in 2017, 1,017 were for mesothelioma and 98 were for lung cancer. In New York, of the total 346 cases filed in 2017, 74 were for mesothelioma and 34 were for lung cancer. Baltimore did not make the top 10 list for mesothelioma filings for 2017, but had 98 cases filed for lung cancer. Looking at these numbers, the majority of cases filed in New York and Baltimore were for other types of cancer or non-cancer cases, like asbestosis.

The 2017 report shows the continued trend of males making up the majority, 84.5%, of the primary exposure plaintiffs. Primary exposure plaintiffs have direct or hands on exposure and comprise of plaintiffs such as factory workers, auto mechanics or carpenters. Given the past dynamic of men making up the majority of the workforce for these types of jobs, it is not
surprising that men continue to be the majority of primary exposed plaintiffs each year with little variation of total numbers.

In direct contrast, females make up the majority, 87.3%, of secondary exposure plaintiffs. Secondary exposure plaintiffs involve “take-home” exposure. This is exposure to asbestos that generally occurred when a spouse, parent or sibling brought asbestos home on their dirty work clothes. Secondary exposure usually involves the exposed individual laundering the dirty work clothes. However, there are also cases of secondary exposure that involve children playing with a parent who was wearing their dirty work clothes. Some secondary exposure cases even involve plaintiffs who were just in the same house or car on a regular bases as someone who wore their dirty work clothes in the home or driving from work. Again, given the past dynamic of women being the primary homemakers, it is not surprising that they make up the majority of plaintiffs in this category.

There have been more cases filed involving exposure to asbestos from contaminated talcum powder. Claims by females in this litigation is on the rise. KCIC reports that in 2014 females made up 20% of the plaintiffs in asbestos claims against talcum suppliers. In 2017 the number of female plaintiffs in asbestos talcum cases increased to 37%. Given the increased publicity in the asbestos talcum cases, it is expected that the number of cases involving this litigation will continue to rise.

While there has been an overall decrease in asbestos cases over the years, the litigation is still going very strong and shows no signs of stopping any time soon. It cannot be ignored that the population that has historically made up the driving force of the litigation, factory workers, auto mechanics and laborers, are eventually going to age out. As we get further away from the time that asbestos was used freely in many products, the workers during that time are becoming
older and passing away. As time goes on, this change in that generation will most assuredly lower the number of asbestos cases. However, asbestos cases dealing with other forms of exposure, while perhaps not as prevalent, will keep the litigation going for some time to come.

At the present time, two types of cases that are anticipated to drive the litigation into the foreseeable future are the take-home exposure cases, dealing with the children who were helping to launder their parent’s dirty work clothes, and the long-term users of baby powder that contained asbestos contaminated talc. Other exposure cases might also pop up along the way, such as cases involving pizza ovens. In those cases, plaintiffs are claiming exposure to asbestos from working in restaurants and cleaning the asbestos-containing decks of pizza ovens. Asbestos litigation may well dwindle over time, or be in such small numbers as to almost be non-existent. However, there will be thousands of cases brought and litigated before that time comes.
CYBERCRIME & INSURANCE IMPLICATIONS

Also in This Issue:
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Toxic Cabin Air Litigation
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CLIMATE CHANGE LITIGATION

By Ronald G. Peresich
Global warming/climate change issues are front and center in today's world of politics and have been, and probably will continue to be, matters for litigation of one kind or another. Global warming is the narrower of the two concepts, because it deals mostly with surface temperatures around the globe. Climate change, on the other hand, deals with the changes in weather conditions that include not only surface temperatures but also changes in other types of weather conditions, such as decreases in temperatures as well as increases and changes in wind patterns, snow, rain, droughts, etc.

Climate changes have become a very divisive political issue. While scientific and political opinions certainly vary, a significant majority of the studies that have been conducted (and there have been many) are of the opinion that climate change is real and that human activity is contributing to excess amounts of greenhouse gas (GHG) emissions into the atmosphere. Much of today's litigation surrounds regulatory matters, governmental action, Environmental Protection Agency (EPA) regulations, and certain standards enacted by various states. What could perhaps be termed "regulatory" litigation is almost certain to continue. However, the main scope of this article is to consider the likelihood of serious tort type litigation against GHG emitters for personal injury and/or property damage recoveries.

 Probably the most expansive climate change-related tort claims that have been reported were filed in 2005 and 2011 by two mostly related groups of plaintiffs in two separate cases that will be referred to herein as Comer I and Comer II.

Comer v. Murphy Oil USA (Comer I)
A group of residents and landowners on the Mississippi Gulf Coast filed a putative class action complaint in the United States District Court for the Southern District of Mississippi claiming damages as a result of global warming. After a number of amendments, the case proceeded against approximately 60 of the largest companies in the United States that were involved in the energy, fossil fuel, and chemical industries. The plaintiffs claimed that the defendants' emission of GHGs contributed to global warming, which caused an increase in global surface, air, and water temperatures, triggering a rise in sea levels and adding to the strength of Hurricane Katrina, thereby leading to widespread property damage. The court's subject matter jurisdiction was based on diversity.

The plaintiffs claimed compensatory and punitive damages based on the following Mississippi common-law causes of action:
- public nuisance;
- private nuisance;
- trespass;
- negligence;
- unjust enrichment;
- fraudulent misrepresentation; and
- civil conspiracy.

The defendants filed several motions to dismiss claiming that the plaintiffs lacked standing and that their claims presented nonjusticiable political questions. After a hearing, the district court dismissed the case without issuing a written opinion. Ruling from the bench, the district court said the suit was actually a debate about global warming that has no place in the court, until such time as Congress enacts legislation which sets appropriate standards by which this court can measure conduct . . . . Adjudication of Plaintiffs' claims in this case would necessitate the formulation of standards dictating, for example, the amount of greenhouse gas emissions that would be excessive and the scientific and policy reasons behind those standards. These policy decisions are best left to the executive and legislative branches of the government, who are not only in the best position to make those decisions but are constitutionally empowered to do so.

The plaintiffs appealed to the Fifth Circuit Court of Appeals. A panel of Fifth Circuit judges reversed in part, finding that the plaintiffs had standing to bring certain claims but not others. For discussion, the court divided the plaintiffs' claims into two categories. The first category included the plaintiffs' claims of public and private nuisance, trespass, and negligence, all of which relied on allegations that there was a causal link between GHGs, global warming, and the destruction of their property by raising sea levels and adding to the strength of Katrina. The second category included the plaintiffs' claims of unjust enrichment, civil conspiracy, and fraudulent misrepresentation. The court found that the first category of claims met the standing requirement but the second category did not and affirmed the dismissal of those claims.

With respect to standing, and because this was a diversity case, the court found that the plaintiffs had to establish standing to bring their common-law claims under both state and federal standing requirements. Mississippi has a liberal standing requirement, which presented no problem. However, the federal standard arose as a result of Article III of the United States Constitution, which limits federal court jurisdiction to actual "cases or controversies." To meet this standing requirement, the plaintiffs had to demonstrate that they suffered an injury in fact, that the injury was "fairly traceable" to the defendants' actions, and that the injury would be redressed by a favorable
decision. To meet the fairly traceable test, the plaintiffs had to show that it was "substantially probable" that the acts of the defendants, and not the acts of absent third parties, caused the plaintiffs' injuries.

The defendants argued that traceability was not present because (1) the causal link between emissions, sea level rise, and Hurricane Katrina was too attenuated; and (2) the defendants' actions were only one of many contributions to GHG emissions. However, the panel found that these arguments had been rejected by the U.S. Supreme Court in Massachusetts v. EPA when it held that Massachusetts had standing to challenge the EPAs decision not to regulate GHG emissions that allegedly caused sea levels to cover large portions of Massachusetts's coastal land. The panel noted the Supreme Court held that:

- potential damages from climate change are serious and well recognized;
- rising ocean temperatures may contribute to the strength of hurricanes; and
- unchallenged affidavits showed that global sea levels had risen during the twentih century as a result of global warming.

The panel went on to observe that, in addition to the language in the Supreme Court's opinion in Massachusetts, there were many other authorities from federal courts to treatises finding that traceability, for standing purposes, is not absent simply because the plaintiffs' harm was caused by a number of potential offenders, and that traceability only requires that there be a showing that the defendants' pollutants were a contributing cause. The panel held:

[S]tanding is not defeated merely because the alleged injury can be fairly traced to the actions of both parties and non-parties. . . . Rather than pinpointing the origins of particular molecules, a plaintiff must merely show that a defendant discharges a pollutant that causes or contributes to the kinds of injuries alleged in the specific geographic area of concern.

The panel determined that at this stage of the litigation the plaintiffs' claims of injuries could be traced to the defendants' conduct; therefore, traceability was present and the plaintiffs had standing to bring claims of nuisance, trespass, and negligence.

The panel then discussed whether these three claims presented a nonjusticiable political question and determined that they did not because they did not present issues that the law exclusively provides to the legislative or executive branches. Contrary to the district court's bench opinion, the panel found:

Common-law tort claims are rarely thought to present nonjusticiable political questions. [The Second, Ninth, and Eleventh] Circuits have stated, in the political question context, that "the common law of tort provides clear and well-settled rules on which the district court can easily rely." The Fifth Circuit has similarly observed that, "when faced with an 'ordinary tort suit,' the textual commitment factor actually weighs in favor of resolution by the judiciary." And the Tenth Circuit, in a case governed by state negligence law, stated that "the political question theory . . . do[es] not ordinarily prevent individual tort recoveries."

The defendants filed a petition for a rehearing en banc. After several recusals, a rehearing en banc was granted. However, thereafter another judge recused, resulting in a loss of a quorum before the en banc panel. The Fifth Circuit then held that it could not transact business without a quorum, but because it had a quorum when it ordered a rehearing en banc, that action had the effect of vacating the panel's decision. The court noted that because the panel's opinion had been vacated, there was no Fifth Circuit judgment and therefore a mandate could not issue. The court pointed out, however, that the parties had the right to petition the Supreme Court.

The plaintiffs chose to file a petition for writ of mandamus to the Supreme Court rather than to petition for writ of certiorari. The Supreme Court denied the plaintiffs' petition for writ of mandamus in 2011.

Comer II
Later in 2011, many of the same plaintiffs filed a new complaint alleging similar claims against an even larger group of industrial companies, complaining again that the emission of excessive levels of GHG resulted in global warming, which led to high sea surface temperatures and sea levels, which fueled Hurricane Katrina and caused excessive damages to the plaintiffs' property. The plaintiffs also sought class action designation and a declaratory judgment that their state law tort claims arose from the defendants' emissions and were not preempted by federal law. The plaintiffs' new complaint asserted only the state law claims that the Fifth Circuit panel in

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Comer I had agreed they had standing to present.

The defendants filed similar motions to dismiss as they had in Comer I, and also included the defenses of res judicata and collateral estoppel. The district court again agreed with the defendants and dismissed the case, finding that these plaintiffs’ claims were barred by res judicata, collateral estoppel, lack of standing, preemption, and the political question doctrine.

Despite the plaintiffs’ inclusion of only claims the Comer I panel agreed that they had standing to pursue, the district court, in Comer II, went into a lengthy analysis of the standing issue, and concluded that the plaintiffs did not have standing to assert any of their claims. Causation, meaning traceability, was once again found to be lacking. In support of its finding, the district court referred to the following authorities:

- Center for Biological Diversity v. U.S. Department of the Interior: To show traceability, the plaintiff must make a claim “that it is substantially probable that the challenged acts of the defendant, not of some absent third party, will cause the particularized injury of the plaintiff.”
- Allen v. Wright: A plaintiff’s claim becomes weaker when it involves a number of third parties.
- Massachusetts v. EPA: The plaintiff’s alleged particularized injury—rising sea levels that had already begun to swallow its coastal land—was fairly traceable to the defendant’s refusal to regulate emissions where the defendant did not dispute the causal connection between GHG emissions and global warming. Moreover, the fact that the plaintiff was a quasi-sovereign entitled it to “special solicitude” in the

The Supreme Court’s standing analysis.

- American Electric Power Co. v. Connecticut: States may (4-4 decision) have standing to seek injunctive relief requiring electric power corporations to cap and reduce their GHG emissions. The Supreme Court had not yet determined whether private citizens, environmental groups, or political subdivisions could file lawsuits seeking to abate out-of-state pollution.

The claims in Comer II were dismissed as barred by res judicata, collateral estoppel, lack of standing, preemption, and the political question doctrine.

- Friends of the Earth, Inc. v. Crown Central Petroleum Corp.: Water pollution is not assumed to be fairly traceable to a defendant’s conduct solely because the waterway is downstream from the defendant’s discharge. Rather, the plaintiff must demonstrate a “more specific geographical nexus” to satisfy the causation element of standing.
- Native Village of Kivalina v. ExxonMobil Corp.: Although in statutory water pollution cases it is presumed for the purposes of standing that there is a substantial likelihood that the defendant’s unlawful discharge caused the plaintiff’s harm even if other parties have also made similar discharges, no such presumption arises in global warming claims because no federal standards limit the emission of GHGs. “Plaintiffs essentially concede that the genesis of global warming is attributable to numerous entities which individually and cumulatively over the span of centuries created the effects they are now experiencing.” Unless the plaintiff can show that a specific defendant’s conduct caused its injuries, it lacks standing.

The district court in Comer II also found that the claims should be dismissed because of the political question doctrine—i.e., the plaintiffs’ claims were nonjusticiable. In making this finding, the district court relied on language in the Supreme Court opinions in Massachusetts and Connecticut, as well as Baker v. Carr. The court agreed with the defendants’ argument that if the plaintiffs’ claims were tried on the merits, a jury would be asked to make a decision based on its own policy preferences and predictions, to determine standards of emissions in terms of reasonableness and/or regulatory compliance, and would not be able to base a decision on a rule or a standard as in other cases. No matter how well tried the case would be, neither the jurors nor the trial judge would have the resources and understanding available to them that the executive and legislative branches of government could call upon:

It is altogether fitting that Congress designated an expert agency [the EPA] as best suited to serve as primary regulator of greenhouse gas emissions.... Federal judges lack the scientific, economic, and technological
resources an agency can utilize in coping with issues of this order.

... Judges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators in the States where the defendants are located.\textsuperscript{17}

The district court therefore concluded that the plaintiffs' claims involved nonjusticiable political questions “because there are no judicially discoverable and manageable standards for resolving the issues presented, and because the possibilities flowing from the defendants' negligent act.”\textsuperscript{19}

While the plaintiffs appealed the district court's decision, the Fifth Circuit held that the plaintiffs' suit was barred by res judicata and that the district court's judgment in Comer I was both final and on the merits.\textsuperscript{20} Specifically, the Fifth Circuit held that the Comer I district court's judgment was final because it was never modified or abandoned on appeal and was on the merits because the district court adjudicated the jurisdictional issues of standing and justiciability, and res judicata applies to jurisdictional determinations.\textsuperscript{21}

So, what we are left with from States, for a limited period of time, can be done with reasonable accuracy because the EPA requires that certain businesses report their emissions. Nevertheless, proving that emissions from a particular site, or group of sites, actually made their way into the atmosphere, and once there contributed to climate change, which then caused a specific event (e.g., stronger hurricanes, rising sea levels, polluted lakes and streams, etc.), and that provable damages ensued, will remain a challenge.

Also adding to a tort plaintiff's problems of proof is the fact that not all GHGs are the same. They have different chemical compositions, and some are thought to effect climate changes more than others. Emissions of carbon dioxide are believed to have the most impact, but there are others that are also thought to contribute, based on current science.

For causation purposes, the law in most jurisdictions requires that a plaintiff prove that a defendant's product, toxic substance, etc., was a substantial contributing factor to the plaintiff's damages. On a plant-by-plant basis such burden would seem difficult, if not impossible.

One potential means of overcoming the causation issues would be the establishment of a market share theory similar to that in Sindell v. Abbott Laboratories.\textsuperscript{22} However, even under that theory, the fact that there are worldwide sources of GHG emissions involving different standards (if any), and different reporting requirements (if any), may present an insurmountable challenge, at least on the basis of today's technology and traditional legal theories of liability.

Even if there could be sufficient proof of specific GHGs having been emitted, the plaintiffs would still have to prove that these emissions contributed to climate change in some meaningful way. Specifically, the plaintiffs would have the

\textbf{Even those plaintiffs who are able to get beyond the political question and standing defenses will face enormous difficulties proving causation.}

case would require the Court to make initial policy determinations that have been entrusted to the EPA by Congress.\textsuperscript{18}

At the end of its opinion, the district court addressed other issues and found that the plaintiffs' claims had been preempted by the Clean Air Act and that neither Mississippi's savings statute (which can sometimes toll the statute of limitations) nor classifying the plaintiffs' claims as continuing torts could save the claims in the second action from the running of the statute of limitations. Even if all of that was not enough, the district court went on to determine that there was a lack of possible proximate cause, not in the sense of traceability, but in the overall sense of proximate cause being an element of any tort: "A defendant is not liable for damages which are remote or collateral, or which result from a remote, improbable, or extraordinary occurrence, although such occurrence is within the range of Comer I and II is a lot of good research material and analysis done by very competent judges, but no decisions by any appellate judges other than the two judges who comprised the Fifth Circuit panel that found the Comer I plaintiffs had alleged a sufficient case on at least some of their state law tort claims.

\textbf{Ultimately, Causation Will Be the Issue}

A variety of global warming/climate change litigation has been filed since the Comer cases, most relating to regulatory issues, with only a few involving state law tort claims and none requesting the expansive basis for potential liability and damages alleged in Comer I and II. Even those plaintiffs who are able to get beyond the political question and standing defenses will face enormous difficulties proving causation. Proving the level of emissions from a particular plant, or group of plants, in the United

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The potentially positive effects of new regulations in the United States and around the world, such as those discussed at the Paris conference in 2015, have the potential to reduce emissions, but not for many years. For instance, in Paris last year, there were agreements for the reduction of emissions beginning in 10–20 years. Such agreements, while important, have no worldwide enforcement mechanism. “[L]ittle that we do to reduce GHG emissions will have much effect on global temperatures in the next 25 years or so; the warming during that period is already locked in as a result of historical emissions already stored in the atmosphere and the oceans.”\(^\text{20}\) Therefore, the alleged damaging effects of climate change are certain to continue for at least the next several decades. This means that regulatory and penalty assessment litigation will likely continue, which may bring future opportunities for the loosening of evidentiary standards that could be applied to tort claims in an effort to address problems that may still remain.

Even if the plaintiffs can prove that a defendant’s conduct was in fact a cause of the plaintiffs’ harm, meeting the traditional substantial factor test (applicable in many jurisdictions in one way or another) will be difficult.\(^\text{21}\) In the typical case, such as Comer and others like it, where GHGs are generically alleged to have caused damages from climate change, the numbers of potentially liable actors or natural causes are enormous. In such circumstances, proving that any defendant’s conduct, even though it may have combined with others to cause harm, was in fact a substantial factor is likely to be difficult, if not impossible, standard to meet. Therefore, unless there are significant changes in theories of tort liability and factual and scientific basis for presenting credible proof to meet a substantial factor test, plaintiffs will continue to have their hands full proving legal fault.

**Notes**

2. Comer I, 585 F.3d at 860 n.2.
4. Comer I, 585 F.3d at 867 (alteration in original) (citations omitted) (internal quotation marks omitted).
5. Id. at 873–74 (second alteration in original) (citations omitted).
6. Comer v. Murphy Oil USA, 598 F.3d 208 (5th Cir. 2010).
7. Comer v. Murphy Oil USA, 607 F.3d 1049, 1054–55 (5th Cir. 2010).
10. 563 F.3d 466, 478 (D.C. Cir. 2009).
14. 95 F.3d 358, 360–61 (5th Cir. 1996).
18. Id. at 865.
19. Id. at 867–68.
20. Comer v. Murphy Oil USA, Inc., 718 F.3d 460, 469 (5th Cir. 2013).
21. Id. at 467–69.
22. 607 F.2d 924 (Cal. 1980).
24. See id. at ch. 8 (discussing remedies and potential defenses and pointing out difficulties in meeting the standard for proving causation in a tort suit).
The In-House Edge

1. Introduction

This panel is comprised of in-house toxic tort and environmental law counsel and carrier representatives who will discuss expectations of outside counsel, getting hired, and the dreaded what might get you fired. You will hear their perspectives on how best they team with lawyers from across the country in defending claims to achieve the desired results.

2. Key Concepts for the Presentation

The panel will discuss important issues in effectively marketing to, working with, and maintaining lasting relationships in delivering high-quality legal services in the toxic tort and environmental law arena. Important themes that will be addressed during the presentation include:

- The need for clear, concise communication throughout the legal process;
- Managing expectations regarding cost; and
- Effective marketing strategies.

3. Communication is Critical

There are many aspects to maintaining client relationships that go beyond just being a “good lawyer.” Understanding your client’s business and litigation goals are essential to successful representation. That understanding is developed through clear, concise, and effective communication from both client and lawyer. Consequently, keeping a client abreast of the status of their case and potential future developments is critical in a productive attorney/client relationship. The motto of many successful legal teams is “no surprises.” And although it seems like an obvious component to a successful strategy, prompt communication is also required by the ethical rules.

For example, under the ABA Model Rules, Rule 1.4:

a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) 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 the Rules of Professional Conduct or other law.

b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Issues regarding effective communication should be addressed at the early stages of a lawyer’s retention. Attorneys can avoid violating requirements such as those outlined by the Model Rules by simply inquiring about the client’s expectations at the initial stage and developing practices around the client’s expectations. A few possible questions regarding the dissemination of information for a new client are:

- How do you prefer to receive reports (i.e. email, calls, letters, etc.)?
- How should sensitive data be transmitted (i.e. dropbox, password-protected email, etc.)?
- Do you have an expectation regarding from whom reports should be sent (i.e. partner, associate, paralegals)?
- Do you have guidelines I should consult in reporting?
- Are there specific litigation events or is there a timetable for reporting purposes?

Not only is understanding the timeline and manner in which a client seeks communication important, it also demonstrates that the attorney is committed to meeting a client’s needs from the start. Once the communication requirements are established, implementation such as calendaring updates and processes to ensure compliance should be put into place.

4. Managing Expectations regarding Cost

Budgeting and managing expectations regarding the cost of defense or prosecution are critical components to maintaining a long-lasting attorney-client relationship. Attorney’s fees, filing fees, transcript costs, travel, and other ancillary expenses associated with litigation can add
up quickly. As a result, it is important that costs associated with representation be thoroughly explored and conveyed to the client, allowing the client to budget accordingly. Even if your client does not have forms for budgeting purposes, preparing a general budget and providing it in a digestible format should be completed early in the process. Like reporting on the status of the case, there should be “no surprises” regarding the cost of representation.

The successful relationship involves not only disclosure regarding future expenses, but also recommendations on how to potentially reduce costs while maintaining effective service. Such measures may include ensuring the lawyer with the most expertise is handling the matter, that the matter is staffed with an associate with the commensurate level of experience, and that administrative and paralegal work are designated accordingly. In addition, it is important to ensure that steps taken throughout the representation “move the needle forward” and are purposely directed to obtain specific information or achieve a desired result.

5. Marketing Legal Services

An additional concept that the panel will address is how successful attorneys best market their services to establish new relationships with clients. Whether it’s providing targeted content, updating the latest litigation trends, speaking engagements, or social media, there are a myriad of ways that attorneys can market their services. Although many clients have personal preferences and internal rules regarding the content and manner in which they appreciate marketing material, an attorney should consult the jurisdiction’s ethical requirements before circulating. For example, ABA Model Rule 7.2 provides:

**Information About Legal Services**

a) A lawyer may communicate information regarding the lawyer’s services through any media.

b) A lawyer shall not compensate, give or promise anything of value to a person for recommending the lawyer’s services except that a lawyer may:

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service;

(3) pay for a law practice in accordance with Rule 1.17;

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under
these Rules that provides for the other person to refer clients or customers to the lawyer, if:

   i. the reciprocal referral agreement is not exclusive; and

   ii. the client is informed of the existence and nature of the agreement; and

(5) give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer’s services.

c) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

   (1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate authority of the state or the District of Columbia or a U.S. Territory or that has been accredited by the American Bar Association; and

   (2) the name of the certifying organization is clearly identified in the communication.

d) Any communication made under this Rule must include the name and contact information of at least one lawyer or law firm responsible for its content.

One of the best methods for delivering effective marketing information is to ask what current clients prefer and what they have seen other firms use successfully to secure business. In addition to understanding what methods work best, attorneys should consult ethical guidelines, like those set forth above, to deliver compliant marketing material.