JOINING FORCES: PREPARING CLIENTS FOR LITIGATION

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JOINING FORCES: PREPARING CLIENTS FOR LITIGATION

I. INTRODUCTION

Rule 1 of the Federal Rules of Civil Procedure provides that the rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."\(^1\) Despite the admirable purpose of that rule, in-house and outside counsel routinely confront a common problem: the rules do not protect against the sizable transaction costs associated with even the most ordinary litigation. These costs (particularly as they relate to pretrial discovery) often threaten to exceed the amount in controversy such that the effectiveness of using litigation as a dispute resolution tool is all but eliminated. This is as endemic in franchise litigation as any other kind of dispute.

This paper is targeted at the joint role in-house and outside counsel have in managing litigation—before it commences and after. It is designed to get the reader thinking. Thinking about how to handle the vexing problem of litigation management when costs only continue to rise. Thinking about alternative (e.g., non-litigation) ways to solve problems at their inception rather than several years down the litigation road after extensive investments in time and money have been made. Thinking about confronting issues early in litigation in order to be out in front of those issues as a means to manage litigation in a way where its efficacy leaves the participant feeling as if the system did its job when all is said and done.

In the hustle and bustle of modern day commercial life, lawyers in private practice and those on the inside often do not have the luxury to slow down, think, and ask themselves at the start of a dispute (and certainly not in the middle of it): what is the right path forward? And if that path is litigation, how can we implement controls early on to manage our participation to make the litigation experience an effective one?

It’s critical that practitioners evolve in the way they approach problem-solving for their clients, be it in-house or outside. Data do not lie. A 2010 survey analyzing the cost of litigation to major companies (e.g., Fortune 100) made several key findings:

- The average outside litigation cost per respondent was approximately $115 million in 2008, which constituted a 73 percent bump from the $66 million invested by those companies in 2000.\(^2\)

- For the 20 companies providing data for the full survey period, average outside litigation costs were $140 million in 2008, an increase of 112 percent from $66 million in 2000.\(^3\)

\(^1\) Fed. R. Civ. P. 1.


\(^3\) Id.
• Between 2000 and 2008, average annual litigation costs as a percent of revenues increased 78 percent for the 14 companies providing data over the span of the survey period.\(^4\)

• Increases in hourly rates do not appear to be driving the increase in litigation costs as the data submitted showed very little change in outside counsel legal fees over the survey’s span.\(^5\)

• The U.S. litigation system imposes a much greater cost burden on companies than do dispute resolution systems outside the United States.\(^6\)

• Inefficient and expensive discovery does not aid the fact-finder where in 2008 the ratio of pages discovered to pages entered as exhibits was 1000/1.\(^7\)

• Companies spend billions on litigation (actually litigating or arbitrating, paying settlements, or otherwise funding the litigation machine) each year and there is little room to argue that litigation as a concept constitutes a significant business expense each year.\(^8\)

A more recent study conducted in 2014 makes it painfully clear that most of the mounting cost can be attributed to discovery and the expanded burdens associated with e-Discovery. While the fixed costs of discovery for a larger company hover at around two million dollars a year, a study conducted by the Civil Justice Reform Group illuminates the hidden cost associated with production that has transformed into a wildly out-of-control expense: worker time.\(^9\) Though not easy to document, the cost of employee time dedicated to discovery production averaged $12,000 annually for smaller businesses, and for the largest businesses, over $38 million annually per company—a staggering amount.\(^10\) In short, the economic proposition of the U.S. legal system simply requires that outside and in-house counsel engage before and during the pendency of any lawsuit to manage the dispute before (and as) it gets out of control.

This paper is designed to help the reader on this path.

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\(^4\) Id. at 3.

\(^5\) Id.

\(^6\) Id. An updated study conducted in 2013 by the U.S. Chamber Institute For Legal Reform confirmed that liability costs, a term encompassing both claims resolved in litigation and in settlement, were 2.6 times higher on average as a percentage of GDP in the United States than in Eurozone economies. The United States also maintained its position as the costliest liability system in the world. David L. McKnight and Paul J. Hinton, *International Comparisons of Litigation Costs: Europe, the United States and Canada*, (U.S.CILR 2013).

\(^7\) *Litigation Cost Survey of Major Companies*, supra at 3.

\(^8\) Id.


\(^10\) Id.
II. LITIGATION STRATEGY – IS THERE AN ALTERNATIVE PATH FORWARD?

Whether you represent a franchisor considering terminating a noncompliant franchisee, a franchisee or a franchisor served with process late on a Friday afternoon without meaningful notice of a dispute, a franchise system under assault for a common business practice facing a putative class action, or any of the myriad of scenarios we franchise lawyers confront, it is fundamental to set goals for the dispute early. Preferably, you want to manage the problem before a lawsuit is commenced—by you or your adversary. After all, your greatest ability to maximize the “value” of litigation is to have the opportunity to consider with your client the goals associated with litigation before it begins. The value of considering whether to litigate and on what terms is fundamental to your ability to harness advantage out of the system. Maybe pre-litigation settlement and mediation is a better path. Maybe not. Only by adopting a thorough process to evaluate the potential paths to resolution can any well-meaning lawyer help a client determine the appropriate path under the circumstances.

A. The Distinct Roles of In-House and Outside Counsel

The complex evaluation of the multiple routes to resolution necessarily begins with an understanding of the roles in-house and outside counsel play in the process. Not all companies are created equal. Some have legions of in-house lawyers who play active roles in business litigation. Some have no in-house legal department. Still others have a lawyer or two whose job it is to manage both litigation and other legal issues confronted by the business. A typical franchisee may have no lawyer at all—in-house or otherwise. They may also be a more sophisticated multi-unit franchisee, whose legal issues only become more complex as their business expands, carving a niche for specialist attorneys that can dedicate time and unique resources to particularly complex legal issues. This paper assumes a relationship between an outside lawyer and an in-house counsel, because its focus is on that relationship and how to work together to maximize the value of any litigation proposition.

Whatever the situation, the primary role of the in-house lawyer (if one exists) is to focus outside counsel on the attendant client goals of the particular litigation and to determine early on the viability of achieving those goals and at what cost. In-house lawyers have multiple constituents up and down the corporate hierarchy; management of expectations on the business side is thus critical to success. The in-house lawyer is best served by addressing system problems early before they get out of hand. This means being diligent in understanding system issues and providing honest counsel to business constituents about ways to avoid small issues from becoming big ones. In many franchise systems, the best cure is open dialogue between the franchisor and franchisee where the parties work to solve a problem together. While not suited to every problem, too often there is a failure of communication and lack of open dialogue between the franchisor and franchisee, which only exacerbates a problem that theoretically could be solved with frank discussion and some movement from both sides.

Part of forecasting problems in a franchise system involves making procurement decisions about the use of outside counsel at the appropriate time. Budgeting concerns loom large in every company, and the approach to using outside counsel varies between businesses. The success of the in-house lawyer is driven by early problem recognition and knowing when to elevate and address problems with outside lawyers. The old phrase “penny wise and pound foolish” is a phrase for a reason.

The outside lawyer—whether a “go to” lawyer used frequently by the business or one new to the client—has a radically different job at the outset. To wit—the outside lawyer’s obligation is
to learn the business model in front of them, discuss the goals articulated by the in-house lawyer or other client representative, provide realistic expectations on the ability to achieve those goals, and lay down parameters on costs. Providing this advice at the outset and having a meaningful dialogue with the in-house lawyer and other company constituents manages expectations and ensures fewer surprises in the long run. This is not to say that surprises cannot occur. Litigation is inherently a risk-filled venture and the ability to manage expectations is only as good as the data before the attorney seeking to manage them. Litigation prognostication is limited by the fact that no outside attorney—no matter how talented—can discern precisely what an adversary will do during the litigation or how a court will react to your, or your adversary’s, chosen path.

Goal setting requires the in-house and outside counsel to understand the problem being confronted and begin a candid assessment. Regarding brand conformity, is every rule violation worthy of elevation to a point of default or subsequent litigation? If a franchisee refuses to abide by system requirements, does the franchisor have an obligation to act for the benefit of the system as a whole? Does the situation require the franchisor to take action? There are numerous business and legal issues that must be considered at the start of any dispute, and the role of in-house and outside counsel is to communicate openly and candidly about those issues in order to manage expectations, save money, and solve problems efficiently and meaningfully.

Part of the dialogue requires determining what constitutes a “win” and what potential pitfalls may result if litigation is the option on the table. Section VIII of this paper addresses the public relations impact of litigation in franchise disputes. “Bet the company” cases or challenges to system-wide behavior can become very public and lead to brand disparagement, which must be a concern in assessing how to approach such an issue. The last thing any brand desires is to have a system-wide dispute make the front page of the New York Times. Even if a franchisor is in the right, allegations of mistreatment of franchisees has a brand-wide impact beyond the immediate problems associated with a lawsuit.

Costs are also a huge component of any pre-litigation analysis. Frankly, is litigation worth it? In addition, in any franchise system, conscious deliberation is required about setting precedent for future fights. A smart litigant should always ask: what if we lose? Does that set the bar for future fights on this issue with the rest of our franchisees? Finally, transactional counsel responsible for compliance with the FTC’s disclosure requirements prescribed in 16 C.F.R. Part 436 (“Rule 436”) should always be consulted in the context of brewing disputes and the path toward resolution, because how and when you settle a franchise case may require disclosure in Item 3 of the Franchise Disclosure Document (“FDD”). Under the rule, franchisors will need to assess (1) what types of litigation must be disclosed in the FDD; and (2) whose litigation must be disclosed.11 Rule 436 obligates franchisors to identify pending lawsuits, lawsuits involving the franchise relationship, prior lawsuits, and current government injunctive or restrictive actions, including arbitrations, in their FDD.12 This reality needs to be considered early on when assessing the issue. In sum, assessment of the goals early on informs in-house and outside counsel of the path forward. Do you settle, fight, or ignore the issue? Litigants can only answer this question with the clarity of understanding where you are, where you want to go, and the effect your pursuit will have on the operation.

11 16 C.F.R. Part 436.5.

12 Id.
While this paper is directed at the roles of in-house and outside counsel, another critical component of analyzing the path forward is identifying the key stakeholders involved—both those with personal knowledge of the matter (what the outside lawyer needs to assess the case facts and issues) and those in the business hierarchy whose job it is to “green light” the pursuit or costs structures surrounding it. If a franchisor decides to engage in litigation—be it with a franchisee, a vendor, or a competitor—buy-in is key. The lawyers must assess who the natural allies are for the dispute and who might serve as an obstacle. The lawyers must further think rationally about the obstacles and consider the alternatives. Maybe the obstacles exist for very legitimate reasons. Or maybe not. A difference of opinion in the C-Suite is likely good for pre-litigation analysis. But the last thing an in-house lawyer wants to fend off throughout a protracted piece of litigation is an internal agitator. This problem is best solved—like most things—with effective communication. Using outside counsel to provide the “pros” and “cons” of a particular litigation strategy can be a useful way to create consensus on a particular litigation path.

External stakeholders must also be considered. Assume a dispute over vendor pricing for the cost of bread in a restaurant chain. What if the vendor knows the pricing is an issue and can reasonably appreciate franchisee complaints about it? Are they brought into the suit? What effect does that have on the vendor-franchisor relationship? What if the vendor is the party engaging in price gouging? What if the franchisor doesn’t appreciate that price gouging is occurring? Or what if the franchisor is complicit? These types of issues are common in any complex distribution model and require analysis when deciding how to approach the problem.

Another consideration that in-house and outside counsel must analyze when setting a path toward litigation is whether pre-suit requirements have been met. For example, it is commonplace today to see pre-suit mediation requirements placed into franchise agreements as an earnest (if not improbable) way to enable management of litigation costs. Before an outside attorney advocates an aggressive surprise attack on a party by filing suit without notice, is that approach undermined by pre-suit mediation obligations? What happens if you are a franchisee who just received a termination notice from the franchisor and you need immediate injunctive relief to avoid irreparable harm? Does the pre-suit mediation clause serve as a procedural or substantive check on the ability to do so? Similar questions abound over the impact on the statute of limitations. Could a pre-suit mediation clause hinder a party’s ability to file suit such that it might lose the right to sue altogether if the mediation process takes the parties past the running of the applicable statute of limitations or contractually shortened limitations period? Prudent counsel suggests advocating for a tolling agreement to protect against that harm, which is consistent with such a mediation provision if the parties truly intended to have a good faith mechanism to resolve the dispute without filing suit.


Part of any litigation analysis requires consideration of the applicable forum. Counsel must determine whether the dispute is subject to arbitration and what effect an arbitration clause may have on the cost of litigation and the ability to obtain the relief sought. Arbitration started as a means to allow commercial parties the ability to quickly and effectively resolve monetary disputes and has been in practice since the days of George Washington. But it has limitations—both substantive and financial—inasmuch as the participants have to pay for the adjudicator (or adjudicators in the context of larger panels) and have limited appellate remedies in the face of an adverse decision.

In the same vein, when considering the path forward, serious thought must be given to forum and choice of law clauses in the absence of an arbitration provision. A franchisee claiming
that a franchisor’s business practices damaged them may be hard-pressed financially to litigate in the franchisor’s chosen forum. And both the chosen forum, choice of law provisions, and the rules governing conflicts of law in the chosen forum all impact the strategic considerations that counsel must engage in at the start.

As the Supreme Court made clear in Atlantic Marine, forum selection clauses are to be enforced except in “extraordinary circumstances.” Even then, it is the burden of the party challenging the forum clause to establish their case under the balance-of-interests standard. A twist is applied to the traditional approach of weighing the conveniences of the parties in forum selection clause cases, because the Supreme Court adopted a modified test allowing only public interest considerations to be evaluated. This severely slants the analysis against the party attempting to challenge the forum clause. This deference to contractually mandated forum clauses simplifies some aspects of litigation decision-making—and vastly complicates others.

These concerns all force an early question: is settlement possible and desired over having to implement the agreed upon rules for dispute resolution? So much of this is fact dependent. But that is fundamentally the point: learn the facts, understand the client’s goals, recognize the scope of the problems, determine how the law may play out in relation to the facts, assess leverage-making opportunities, and go from there.

III. DEVELOPING EFFECTIVE LITIGATION HOLDS IN AN AGE OF DISPERSED DIGITAL INFORMATION AND COMPETING DOCUMENT RETENTION POLICIES

Since the landmark rulings on the preservation of electronically stored information (“ESI”) in Zubulake v. UBS Warburg and its progeny, there is a clear obligation to preserve electronic evidence: when the party has notice that the evidence is relevant to litigation or when a party reasonably should have known that the evidence may be relevant to future litigation.

In light of the increasingly decentralized nature of data and the ability of a single employee to produce massive quantities of information in a variety of locations and formats in a single day, creating an effective litigation hold that complies with the duty of preservation has become an increasingly difficult, often tedious task. Fortunately, amendments to Fed. R. Civ. P. 37(e) implemented on December 1, 2015 make it quite clear that a party may only be punished for lost data if that party failed to take reasonable steps to ensure that the data would be preserved in the face of an actual legal duty to preserve.

Outside and in-house counsel must work together in developing a litigation hold to ensure that the client’s efforts can be seen as nothing less than the reasonable steps an attorney would have taken. However time-consuming and broad this obligation to preserve data might seem,

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14 Id.
15 Id.
18 Though the new 37(e) rule involves other factors that might save an attorney or their client from sanctions, evaluating factors like the replicability of the lost data and the prejudice suffered from the loss, a thorough litigation hold is the best
the courts have provided guidance on the key elements of a litigation hold in order to avoid the looming threat of discovery-based sanctions. It is particularly important to follow this guidance because negligent and unintentional failure to prevent data loss can be treated by the courts harshly, leading to sanctions or fines. Courts are not satisfied with attorneys merely notifying employees that a litigation hold is in place, or expecting a company’s current policies and common sense to work it out. Counsel must be very focused on ensuring that ESI compliance is carried out to the exacting standards of the courts.

In Zubulake V, the court established a three-step process to ensure compliance with the duty to preserve evidence:

First, counsel must issue a “litigation hold” at the outset of litigation or whenever litigation is reasonably anticipated. The litigation hold should be periodically re-issued so that new employees are aware of it, and so that it is fresh in the minds of all employees. Second, counsel should communicate directly with the “key players” in the litigation, i.e., the people identified in a party’s initial disclosures and any subsequent supplementation thereto. Finally, counsel should instruct all employees to produce electronic copies of their relevant active files. Counsel must also make sure that all backup media which the party is required to retain is identified and stored in a safe place.

A. Identify Key Custodians

One of the principles outlined in Zubulake V—the identification of the “key players” or “custodians”—is the best place to start in order to implement an effective litigation hold. Counsel must balance the fear of letting crucial data slip through the cracks (by under-collecting) with overseeing too much data (by over-collecting). The standard is reasonableness: an all-employee preservation demand might make sense in a ‘bet the company’ case where the plaintiffs claim $200 million in antitrust damages. But in run-of-the-mill disputes, focus on a narrower group of custodians.

An indiscriminately broad litigation hold can be a logistical and practical challenge, particularly when working with a large company. You may have started by narrowing your search of company employees to the key custodians of litigation-applicable data, however it is important to be liberal in scope in determining who to label as key custodians. Some of this can be curtailed preventative practice towards guaranteeing a hassle-free discovery period, and leaves less to chance and the equitable discretion of the court.

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19 For example, in Montgomery v. Iron Rooster-Annapolis, LLC, No. 16-cv-3760, 2017 WL 1902699, at *2 (D. Md. May 9, 2017), ECF No. 53, adopted by ECF No. 62 (Iron Rooster), though data was lost unintentionally, sanctions were still deemed necessary to cure the prejudice suffered from the valuable ESI being lost; but see Erhart v. Boll Holding, Inc., No. 15-cv-02287-BAS(NLS), 2016 WL 5110453 (S.D. Cal. Sept. 21, 2016) (finding that when unintentionally deleted files were easily recoverable or duplicated, sanctions were not appropriate). Where data is unintentionally deleted, these cases establish that it may be the luck of the draw whether the data were important enough or exclusive enough to constitute prejudice against the other party, warranting sanctions. Though Rule 37(e)’s amendments are designed to prevent egregious sanctions in cases lacking intentional spoliation, serious prejudice to the party seeking the lost information can still result. An effective litigation hold will help to insulate against the fury of the court.


21 Zubulake IV, 220 F.R.D. at 218.
by a properly negotiated ESI Agreement, which limits the number of custodians whose data must be collected and reviewed. While the scope of retention can always be narrowed, being too focused and letting a crucial employee go uninformed of discovery and data management requirements could spell disaster. The specific facts of the case should always drive what is appropriate in terms of a litigation hold.

Consider whether you should require written verification by each employee that they have received and understand their data preservation instructions, and use electronic stamps if you can. This approach is effective in collecting proof of compliance in cases with huge numbers of affected employees, but could be a waste of resources in others. However you approach compliance, the litigation hold should provide a brief explanation of the non-confidential material facts and key issues of the potential dispute, a detailed description of the types of ESI that should be preserved, and a clear instruction to employees to produce (and certainly not destroy) electronic copies of all relevant ESI and ensure that all applicable backup media is identified and stored in a safe place. The communication should be periodically reissued to the recipients, ensuring that the attorney's duties are fulfilled and refreshing the memories of busy minds.22

B. Coordinate with IT and Company Policy Makers

Developing an effective litigation hold requires coordinating with IT personnel over the established methods and processes being used to store ESI, and any document or electronic preservation and destruction policies that are in place. Work to determine an exhaustive list of ESI uses with to ensure that nothing is inadvertently destroyed, and implement an updated company document retention policy to align with the newly issued litigation hold.24

Outside counsel should drive the process; but in-house must help ensure compliance with the company's constituents. Both should work with internal IT personnel to come up with a checklist for preserving and collecting ESI. (How the data collected is managed is discussed in Section IV below.)

Finally, if possible, ensure that an automatic email retention policy is put into place to ensure that all new data generated is automatically kept, and any old emails slated for deletion are preserved. This can be accomplished by updating and halting any automatic email deletion settings that the company may have previously had in place as a part of its standard procedures. This will ensure that crucial data remains safe. It is difficult to predict sanctions due to faulty litigation holds but you can be assured that anything that can be cast as willful behavior is risky.25

Significantly, Zubulake IV holds that inaccessible backup tapes, those typically maintained solely for recovery in the case of an emergency, are not under the scope of a litigation hold, and

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23 Id.

24 Id.

25 In Re: Pradaxa (Dabigatran Etxilate) Products Liability Litigation, No. 3:12-MD-02385 DRH-SCW, 2013 WL 6486621 (S.D. Ill. Dec. 9, 2013), order rescinded sub nom., 745 F.3d 216 (7th Cir. 2014) (imposing $950,000 in sanctions for the failure to halt auto-delete functions, which resulted in the loss of critical data).
may be continued to be recycled on a regular schedule.\textsuperscript{26} However, these are distinguishable from “accessible” backup tapes, which are actively used for information retrieval and would be subject to a litigation hold.\textsuperscript{27} A further exception is outlined: if a company can differentiate between employees and their saved documents in backup tapes, then any tapes containing documents of the key players of the case should be preserved if it is the only source of the information.\textsuperscript{28} This exception applies to both “accessible” and “inaccessible” backup tapes.\textsuperscript{29}

C. Defining a “Document” and its Potential Storage Locations

An effective litigation hold must target the right kind of documents. In the digital era, there are seemingly endless varieties of ESI that likely need to be collected in a case, depending on the technology employed by the corporation, and the types of proprietary software they might have created to meet the company’s technology needs. Beyond working with IT departments to identify the different types of ESI that might be applicable, the definition of “document” in a litigation hold must be broad, including not only obvious formats like emails, word documents, spreadsheets, and slide decks, but also less traditional and generally more complicated formats: databases, instant messaging, voicemails, texts, and even hand-written notes.\textsuperscript{30} All of these applicable formats should be included in the litigation hold notices, along with targeted follow-ups if the type of data storage is so particularly complicated or specialized that employees might have difficulty with them.

In communicating the broad scope of the request for documents, it is important to have each custodian identify any and all areas where ESI might be stored. Consider almost any type of on-line or off-line storage method, including hard drives, shared drives, mobile phones, flash drives, backup tapes, and files specially encrypted to hold sensitive information. Cloud storage should be treated in the same manner as regular storage types (such as hard body servers), and it is particularly important with potentially shared storage methods like cloud storage or shared drives that a person or persons be designated to ensure that the data is preserved and available.\textsuperscript{31} This avoids the odd reality inherent in human nature, that when everyone has the ability and shared responsibility in completing a task, every person assumes that every other person is taking care of it, leaving the issue completely unresolved. The old guard of document production cannot be overlooked either; ensure that warehouse documents are covered, as well as documents in offices, or shared office spaces. Even work documents taken home, or documents in the possession of ex-employees are under the scope of a diligent litigation hold and should be communicated as such.

Text messages are sometimes the appropriate target of a litigation hold. Courts consider them to be within the reach of ESI demands and will not hesitate to dole out sanctions to

\textsuperscript{26} 
\textsuperscript{26} Zubulake IV, 220 F.R.D. at 218.

\textsuperscript{27} 
\textsuperscript{27} Id.

\textsuperscript{28} 
\textsuperscript{28} Id.

\textsuperscript{29} 
\textsuperscript{29} Id.

\textsuperscript{30} 
\textsuperscript{30} Goode & Joblove, supra, at 11-12.

\textsuperscript{31} 
\textsuperscript{31} Id. at 4.
companies who fail to consider them as such.\textsuperscript{32} If you want to avoid this, simply reach an agreement with your adversary that certain mediums need not be collected.

As a rule, information maintained on corporate-issued cell phones is almost always subject to discovery. Personal cell phones, however, have had a more complicated time in the courts. In \textit{Cotton v. Costco Wholesale Corp.}, for example, the court declined to require Costco to produce text messages from its employees’ personal cellular devices because the text messages were not within Costco’s “possession, custody, or control.”\textsuperscript{33} By contrast, in \textit{Alter v. Rocky Point Sch. Dist.}, a New York court held that relevant documents should have been preserved on whatever devices they were stored on, personal or not.\textsuperscript{34} Regardless, employees who use their personal cell phones for work are more likely to be required by the courts to produce the relevant ESI, though specific knowledge of the applicable documents and their locations on the cell phone would probably be required before the court would allow this type of production.\textsuperscript{35}

Instant messages are another important consideration, particularly given that apart from dedicated instant messaging applications, there are instant messaging features on a variety of applications that might be involved in business use such as WhatsApp, Skype, or Gmail. Though there is support for the argument that the preservation of these messages is unnecessary in a standard ESI scenario, if a company is aware that crucial and litigation related instant messaging occurs on these messaging platforms, the willingness of courts to punish the failure to preserve known critical data suggests that these communications should be preserved.\textsuperscript{36} A California court recently held that as direct messages between employees via Twitter were not communications that the company required them to make as a part of their duties, they could easily be separated from business communications, protecting employee’s private chat information.\textsuperscript{37} While required business messages should be preserved to be safe, this step need not be taken for instant messages or texts sent outside of the scope of the workplace unless the employee in question is a specifically named party.

A failure to properly preserve social media data and information may lead to claims of spoliation.\textsuperscript{38} Though often perceived as a personal item, despite being stored and hosted by third party servers, the applicability of social media to ESI is heavily dependent on the party that


\textsuperscript{33} Impacts on in-house Counsel, E-Discovery for Corporate Counsel § 1:10 (citing \textit{Cotton v. Costco Wholesale Corp.}, 2013 WL 3819974, at *6 (D. Kan. July 24, 2013)).

\textsuperscript{34} No. 13 Civ. 1100, 2014 WL 4966119, at *10 (E.D.N.Y. Sept. 30, 2014).

\textsuperscript{35} Goode & Joblove, \textit{supra}, at p. 13.

\textsuperscript{36} The Sedona Conference, Commentary on Legal Holds: The Trigger & The Process, 11 Sedona Conf. J. 25, 281-82 (2010)).


\textsuperscript{38} \textit{Id.} at 513.
controls it. Company-run social media is discoverable and should be preserved, but employee social media is generally off limits.  

With the 2015 changes to proportionality in discovery, a party's ability to access information (and the costs associated with doing so) has become an additional factor to weigh in discovery deliberations—which helps support the protection of most employees' private social media accounts from production. Two recent cases illustrate how preservation obligations match up with the mandate on proportionality reflected in the 2015 amendments: Arthur J. Gallagher & Co. v. O'Neill and Stinson v. City of New York.  

In Gallagher, a case filed by an employer against an employee for misappropriation of trade secrets, a request for the search of the entirety of several employees' computers at a non-party rival insurance company was far too great a burden in proportion to the importance of the issues in the case. By not adopting specific language relating to the defendant or the issues in the case, the plaintiff's requests were deemed to be vastly overbroad.

On the other hand, in Stinson, a class action against the New York Police Department, a litigation hold was not implemented until three years after the action was filed. The department argued that it was too intrusive to do so, and that it was too large of an organization to be required to issue a sweeping hold. They also argued that the unreasonableness of the document requests should lead them to have no preservation duties at all. The court held that the reasonableness or unreasonableness of a discovery request has no bearing on the preservation duties of a party. As the failure to implement a hold led to serious prejudice against the other party and the deletion of crucial data, the department was slapped with an adverse inference sanction due to the bad faith and gross negligence of the NYPD.

Though the court might have found the plaintiffs' request in Stinson to be overly broad, it is a crucial reminder to attorneys that the proportionality of a document request has no bearing on the duty of preservation. The 2015 amendments to the Federal Rules of Civil Procedure also resulted in a change to Fed. R. Civ. P. 26(b), not just Rule 37(e). Now, Rule 26(b) requires the court to balance a variety of factors in determining the appropriateness of discovery: the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving

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39 It has been suggested that when an employer makes broad statements to employees notifying them that ESI generated on the company machine is company property, social media accessed on that machine might be subject to a litigation hold and discovery. Barring these extreme measures, social media is typically a safe haven for employee data. Minnesota e-Discovery Working Group 3, IT Technologies and How to Preserve ESI Cost Effectively, at 515 (citing The Sedona Conference Primer on Social Media, 14 Sedona Conf. J. at 196).


42 Id.


44 Id.

45 This class action resulted in a settlement that returned over $56 million to 900,000 individuals.
the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.46

In most cases, a failure to meet the proportionality standards in Rule 26(b) is more likely to result in a changed scope of discovery than the more extreme remedy of an adverse inference against a party. For example, in *Jos. A. Bank Clothiers, Inc. v. J.A.B.-Columbia, Inc.*, a franchise case centered around the right of franchise renewal, the court held that the burden involved in a series of deposition topics was "significantly disproportional" to the dispute in litigation, seeking testimony that even predated the execution of the franchise agreements between the parties, and not significantly limited in period or scope.47 As such, the court issued a protective order for several of the deposition topics, opting to tailor the proceedings rather than enact a punishment on the party refusing to answer the questions.48

These holdings underscore the importance of complying with the duty of preservation and implementing an effective litigation hold. Adopting the balancing strategy mentioned earlier is likely the most prudent approach: start intelligently with a broad litigation hold targeting key employees, until you can communicate with key custodians and IT and establish an understanding of the company’s environment and the requests of the litigation. This understanding will allow you to tailor the hold to the truly affected employees—saving both outside and in-house counsel time and the client the expense of a protracted spoliation fight.

**IV. MAINTAINING THE ATTORNEY-CLIENT PRIVILEGE FOR INTERNAL AND EXTERNAL COMMUNICATIONS**

The attorney-client privilege in the business setting is a highly nuanced topic, and it is inevitable that without attorney guidance, business actors will either completely misconstrue the privilege, vastly overestimate its breadth, or do both. Too often, corporate actors feel as if they are somehow protecting information by simply copying an in-house lawyer on an email, which leads only to complications when reviewing documents for production once litigation has commenced. With in-house counsel handling both legal and business issues—which often overlap—it is critical that counsel ensure that the corporate understanding of the attorney-client privilege is crystal clear to prevent serious evidentiary issues in the future.

An employee being too open about a topic because they wrongly assume themselves to be under the protection of attorney-client privilege is an all too common occurrence. Taking a few practical steps in communicating these ideas with business constituents (particularly in advance of an issue that counsel believes will be litigated), refreshing guidelines for in-house counsel, and emphasizing the distinction between documents and forms of communication with attorneys can be invaluable in protecting a client’s interests and critical information.

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48 *Id.* The court’s modifications to allowable discovery can go beyond simply tailoring a request. *See, e.g.*, Younes v. 7-Eleven, Inc., No. CV 13-3500 (RMB/JS), 2015 WL 12843883, at *2 (D.N.J. Aug. 19, 2015) (quashing altogether (instead of narrowing) a franchisor’s request for discovery on third party suppliers due to its disproportionality in its failure to be limited in either scope, or in specificity of sales records requests.)
In *United States v. United Shoe Machinery Corp.*, the court laid out guidelines on the elements of attorney-client privilege that are still used today by courts in analyzing invocations of privilege. A reviewing court must consider the following elements:

(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or her subordinate; and (b) in connection with this communication is acting as a lawyer; (3) the communication relat[ed] to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.\(^{49}\)

Courts often simplify these elements for the sake of understanding exactly what is protected under the privilege to something like this: "a communication between counsel and client made confidentially and for the purpose of rendering legal advice."\(^{50}\) These factors are guidelines and as determined by the Federal Rules of Evidence: "the recognition of a privilege based on a confidential relationship . . . should be determined on a case-by-case basis."\(^{51}\) While determining what documents and relationships are governed by the attorney-client privilege, keep in mind that a formulaic application of rules or elements might not always hold up against a court’s scrutiny, and that the specifics of each situation must be taken into account. As a general guide, courts identify privileged persons as: clients, prospective clients, attorneys, or agents of the client and the attorney. Courts emphasize the particularities of the situation more than a formal factor-based analysis.\(^{52}\)

A. **The Upjohn Standard**

In *Upjohn Co. v. United States*, the United States Supreme Court provided in-depth guidance on attorney-client privilege in the corporate setting, identifying multiple factors for consideration:

1) Was the information necessary to supply the basis for legal advice to the corporation or was it ordered to be communicated by superior officers?

2) Was the information available from the "control group" management?

3) Did the communication concern information within the scope of the employee’s duties?


\(^{50}\) *In re: Teleglobe Communications Corp.*, 493 F.3d 345, 359 (3d Cir. 2007).

\(^{51}\) Fed. R. Evid. 501.

4) Was the employee aware that he was being questioned in order to secure legal advice for the corporation?

5) Were the communications considered confidential when made and kept confidential?\textsuperscript{53}

These factors enable a wider swath of employee communications to be covered under attorney-client privilege than under pre-\textit{Upjohn} standard, which almost exclusively covered a small group of upper-level employees. That more rigid test, as the Supreme Court put it, "frustrates the very purpose of the attorney-client privilege by discouraging the communication of relevant information by employees of the client corporation to attorneys seeking to render legal advice to the client."\textsuperscript{54} As the burden of establishing that a document is covered by attorney-client privilege falls on the party invoking it, it is crucial to keep these factors at the ready in both training efforts and in the subsequent review of communications.

B. \textbf{Working on Role Distinctions with Key Personnel}

Courts have applied different standards in examining the distinction between communications made to in-house and outside counsel. While external counsel communications by their nature almost exclusively cover privileged legal issues, in-house counsel's respective communications, often serving multiple roles in the business environment, are less easily defined.\textsuperscript{55} Courts often adopt a heightened scrutiny in analyzing privilege in the in-house context, some adopting requirements of a "clear showing" that communications were made for legal rather than business purposes.\textsuperscript{56}

As so much of the analysis surrounding the attorney-client privilege hinges on whether the communication between parties involved the rendering of legal advice, instead of exactly which parties are communicating, it is critical to pursue a content-focused training of key personnel who are likely to be involved with sensitive information. These personnel, who can send the basics of this training down the corporate ladder to those employees who might need to have contact with counsel (though having in-house counsel do this on a case-by-case basis might be more efficient when it comes to lower-level employees), should be first coached on the distinction between the business and legal roles of in-house counsel. As is the case with discovery, make sure to refresh both in-house counsel and key players on these distinctions on a regular basis—a little preemptive action will prevent serious future headaches.

Business-focused communications with in-house counsel are not privileged when no legal advice is being exchanged. The "primary purpose" of the communication must be for soliciting or giving legal advice.\textsuperscript{57} In this way, larger business-related documents that include some aspects

\textsuperscript{53} Id. at 4 (citing \textit{Upjohn Co. v. United States}, 449 U.S. 383 (1981)).


\textsuperscript{55} See, e.g., \textit{Texas Brine Co v Dow Chemical Co.} No. 15-1102 cw 15-3324, 2017 WL 5625812 (E.D La. Nov, 2017) (noting that the nature of in-house counsel privilege is "more difficult" due to them serving "multiple roles," including non-legal ones).


\textsuperscript{57} Fichter & Koller, \textit{supra} at 9.
of legal advice or discussion might not be as easily protected, and in-house-counsel should separate their communications into distinct emails—business and legal—whenever possible to preserve their privilege. Nevertheless, in *U.S. v. Chevron Corp.*, the court held that even if the primary purpose of the document was over business matters, a party could still assert the attorney-client privilege over sections of the document in question as long as the document was not prepared for simultaneous review by both legal and non-legal personnel.\(^{58}\) Though this supports the ability to redact portions of documents relating to legal advice, segregating documents into legal and business categories will ease discovery.

Marking documents with phrases like "Attorney-Client Privilege" and/or "Attorney Work Product" will help support the fact that the document is privileged, but with a caveat. Applying this label across the board will negate its effectiveness—ensure that only conversations between privileged persons that are confidential and for the primary purpose of obtaining or giving legal advice are marked as such. This marking practice will be particularly helpful in discovery, both in facilitating the isolation of privileged documents, and ensuring that they are not inadvertently disclosed.

**C. Joint Defense Agreements**

A common and effective tool in franchise litigation is the joint defense doctrine, which applies when parties with common interests, but who are represented by different counsel collaborate in order to share information and strategize. This approach serves as an exception to the rule that privilege is waived when documents or communications are shared with third parties. A joint defense agreement ("JDA") is more commonly used in the defense context, but is also used by plaintiffs who have joined together in a common pursuit.

There are several requirements that a party must typically show to enforce a JDA: (1) an underlying privilege protects the communication; (2) the disclosure took place at a time when the parties shared a common interest; (3) the disclosure was made in furtherance of that common interest; and (4) the parties have not waived the privilege.\(^{59}\) Though essential in making a showing to the court, a JDA does not actually have to be in writing in order to be valid.\(^{60}\) However, the clearly better practice is to have a written JDA.

Though a JDA can be incredibly useful, it has its limitations. Case law is all over the map on whether or not the joint defense and/or common interest privilege applies to pending litigation, or how closely the parties' interests must be aligned in order to qualify as having a "common interest."\(^{61}\) JDAs are often held to be an inherently privileged document, but they can be subject to an *in camera* review to examine the document for privileged information to determine what


\(^{59}\) See, e.g., *United States v. Bay State Ambulance & Hosp. Rental Serv., Inc.*, 874 F.2d 20, 28 (1st Cir.1989).


\(^{61}\) Fichter & Koller, *supra* at 33.
portions, if any, to are not. Even if all of the elements of a valid JDA exist, if documents the two parties exchange are unrelated to the common interest of the parties, or the furtherance of that interest, they can be discoverable.

Regardless, this is an effective way to preserve privilege while also sharing information, and importantly cannot be waived by a single party: both parties must agree to a waiver. This is a benefit in protecting information, particularly where opposing interests may arise at some point in the litigation. However, most joint defense agreements provide escape clauses for parties to exit the agreement. Any written agreement should carefully specify that privileged information shared prior to that exit remains subject to the privilege.

In short, caution should still be taken in choosing to adopt a joint-defense agreement if there are any lingering questions about the other party’s objectives and strategy. If subsequent litigation actually occurs between the parties who signed the JDA, that privilege is likely waived.

D. Franchisor Email Systems

A privilege dilemma unique to the franchise context is the status of privileged communications sent by franchisees on a franchisor-established or sponsored email system, and whether these retain the expectation of being made in confidence. There is applicable case law to use as guidance, but courts typically look to whether an employee possessed a subjective expectation of privacy that could be deemed objectively reasonable. Courts specifically look to (1) whether the company maintains a policy banning personal or other objectionable use; (2) whether the company monitors email use or reserves the right to do so; (3) whether third parties have a right of access to the emails; and (4) whether the company notifies employees of the company email policy.

This is necessarily a fact-specific exercise and comes down to the specific franchise agreements and guidelines surrounding the use of franchisor email systems. The safest choice for franchisees is to use some other email system to communicate with other franchisees or their counsel in confidence, while franchisors should ensure that their agreements with franchisees reserve the right to monitor or access emails.

E. Common Privilege Pitfalls and Misconceptions

In training business personnel to understand the distinctions between privileged and non-privileged information, it is important to emphasize ways in which privilege can be waived, how it can be protected, and to avoid common mistakes. Always remind clients that the easiest way to avoid making these mistakes, if they are unsure whether a written conversation would qualify for

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62 See, e.g., Steuben Foods, Inc. v. GEA Process Eng’g, Inc., No. 12-CV-00904(S)(M), 2016 WL 1238785, at *2 (W.D.N.Y. Mar. 30, 2016) (conducting an in camera review and finding the only discoverable portion of a JDA to be the standard language typically included by parties to protect from the discovery of privileged information).


64 An example of a Joint Defense Agreement is at Appendix A.

65 Fichter & Koller, supra at 34.

66 Id. at 5.

attorney-client privilege, is to simply change the medium of the conversation to a phone call or in-person conversation. While you can be deposed on the contents of a conversation, this is at least more private than a document that is enshrined in writing. In the legal sphere, the least technologically advanced methods of conversations have ironically become the easiest to protect.

F. Accidentally Waiving Privilege

There are a few key ways that the attorney-client privilege can be waived, and given the likelihood that some of these occurrences are common practice at corporations, training on these specific scenarios is vital. Forwarding a document or email string to a lawyer does not make that document or communication privileged. In the absence of an exchange involving legal advice, and a conversation being between privileged persons and in confidence, this is a futile gesture. Accordingly, copying an attorney on a communication will have just as little effect.68 Similarly, adding a third party to an email (or forwarding it) will likely destroy the privilege.69 Furthermore, disclosing the substance of an email to a third party, even if not the email itself, will undermine the attorney-client privilege.

Not every piece of privileged information shared with a party other than an attorney will constitute a waiver of privilege. There is a limited space to work with on sharing information—information can be shared with other corporate agents on a need-to-know basis.70 "Need to know" is generally defined as persons who could either benefit from or be personally liable for the information.71 Lower level employees can also qualify for this "need to know" exception, as long as they are responsible for, or required to act on, that specific information.72 Courts differ on the issue of the burden of proof for whether a waiver has occurred—while most agree that the party attempting to assert the privilege bears the burden of showing that they had not waived that privilege, some courts place that burden on the opposing party or adopt a more nuanced burden shifting analysis.73

V. EARLY ENGAGEMENT WITH OPPOSING COUNSEL TO ADDRESS ELECTRONICALLY STORED INFORMATION AND DOCUMENT MANAGEMENT ISSUES

Email has destroyed America, if not modern-day litigation. There: we said it. While the 2015 amendments to the Federal Rules of Civil Procedure sought to "right the ship" on disputes over the preservation of ESI, it is an ongoing and highly vexing problem for today's litigants. The good news is that many sanctionable acts can be avoided by a properly negotiated ESI Agreement, preferably entered by the Court as an order at the outset of the litigation.

68 For example, in Texas Brine Co v Dow Chemical Co., 2017 WL 5625812 (E.D. La. Nov, 2017), privilege was denied for communications forwarded and carbon copied to the in-house counsel when those communications did not solicit legal advice.

69 Fichter & Koller, supra at 4.

70 Id.

71 Id.

72 Id.

73 For a good analysis of the issue, see Greenwald & Michele, supra, at 105-106.
Standard 29 of the ABA’s Guidelines on e-Discovery is a good starting point for the discussion:

Standard 29. Preserving and Producing Electronic Information. a. Duty to Preserve Electronic Information. i. A party’s duty to take reasonable steps to preserve potentially relevant documents, described in Standard 10 above, also applies to information contained or stored in an electronic medium or format, including a computer word-processing document, storage medium, spreadsheet, database and electronic mail. Types of electronic data as to which a duty to preserve may exist include, without limitation: A. E-mail (including attachments); B. Word processing documents; C. Spreadsheets; D. Presentation documents; E. Graphics; F. [Omitted in original]; G. Animations; H. Images; I. Audio, video and audiovisual recordings; and J. Voicemail. ii. Electronic data as to which a duty to preserve may exist may be located in the possession of the party or a third person under the control of the party (such as an employee or outside vendor under contract). The platforms on which, and places where, such data may be found include, without limitation: A. Databases; B. Networks; C. Computer systems, including legacy systems (hardware and software); 5 D. Servers; E. Archives; F. Back up or disaster recovery systems; G. Tapes, discs, drives, cartridges and other storage media; H. Laptops; I. Personal computers; J. Internet data; K. Personal digital assistants; L. Handheld wireless devices; M. Mobile telephones; N. Paging devices; and O. Audio systems, including voicemail. iii. Electronic data subject to preservation may include data that have been deleted but can be restored.74

Working collaboratively, in-house and outside counsel must perform an early assessment of internal issues and challenges that may exist in the preservation of ESI and other documents.75 The authors have seen small and large companies struggle with IT issues that end up impacting preservation obligations. It is critical that counsel assess the sophistication of the client’s IT personnel and protocols along with any existing document retention policies and map the ESI Agreement to meet them. There is likely an inverse relationship on this point. The more sophisticated and experienced the IT personnel or the client, the more counsel (in-house and outside) can trust compliance with the implementation of litigation holds and preservation demands. The opposite is also true: early warning signs exist to alert counsel to an unsophisticated client and the need to bring in outside e-Discovery vendors to assist in collection and preservation obligations.

Because the sophistication of the parties can run the spectrum, the best advice is to get ahead of the issue with opposing counsel. Many courts today mandate that the parties have an early ESI conference as part of the pretrial planning process. Many others impose an obligation on the party (independent of Fed. R. Civ. P. 26(f)) to map out an ESI Agreement for presentation to the court. Consider leading on this issue with your adversary and force a discussion about the scope of the collection and searching required, the format of productions, what metadata fields must be included, how de-duplication will be addressed, whether native files must be produced, how TIFF should be created, how inadvertent disclosure and privilege issues will be resolved,

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75 It is easy in the digital world to forget that paper records still exist, are often maintained by custodians in a non-electronic format, and must be collected, reviewed, and produced if responsive to a particular request in litigation.
whether to appoint an e-Discovery liaison to take the lead on issues during the case, and how to address admissibility and other issues forming the basis for the use of the ESI in the first place. They are a low cost and highly effective means of keeping the parties on track about ESI obligations to avoid future disputes. Local rules for various courts around the country require parties to meet and confer on ESI issues early in the process. Indeed, Fed. R. Civ. P. 26(f) obligates the parties to meet and confer on ESI issues at the start.

Recent amendments to Fed. R. Civ. P. 26(b)(1) directly account for proportionality, cost shifting, and the lurking issues surrounding ESI abuse:

*Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any non-privileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

This is a marked change from the rule as it once existed and seeks to limit discovery abuse in the realm of ESI. Rule 26 goes on to further specify limitations on the pursuit of ESI as a further means to balance e-Discovery inquiries:

*Specific Limitations on Electronically Stored Information.* A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

Part and parcel of this new regime (being adopted by state courts around the country as we write) is that the sizable costs of conducting e-Discovery are being countered with rules that protect the party from whom it is sought from having to produce ESI unless counter-balancing case needs exist. Both in-house and outside counsel must be cognizant of this new regime because it is powerful tool to ward off excessive discovery costs. It is critical in determining the path forward that outside counsel negotiate terms of ESI production up front and make it part of

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76 A sample ESI Agreement is appended to this paper at Appendix B.


78 Fed. R. Civ. P. 26(b)(1) (bold supplied; italics in original.)

79 Fed. R. Civ. P. 26(b)(2)(B) (bold supplied; italics in original.)
the ESI Agreement submitted to the court. If faced with disproportionate obligations on ESI, consider forcing the issue with the court and seek to shift the costs to the adversary or otherwise move for a Protective Order to avoid the abuse and investment of time and money.

VI. NAVIGATING POTENTIAL INSURANCE COVERAGE AND INDEMNIFICATION ISSUES

When defending a suit, it is important to determine whether insurance coverage or a potential indemnitor is available that may cover liability and/or the cost of defending the claim. Knowing your notice obligations to your insurer(s) is key. The availability of insurance or indemnity can significantly impact not only the potential risk to your client or business partner but also how you decide to manage the litigation.

A. Franchisor-Franchisee Disputes

In claims between a franchisee and a franchisor, insurance coverage may be limited, although some errors and omissions policies might cover claims that a franchisor violated a state disclosure law or fraudulently induced a sale by noncompliance with registration or disclosure requirements. Moreover, insurance coverage likely will be unavailable if the covered claim is presented as a counterclaim to a lawsuit the franchisee or franchisor files against the other.

With respect to indemnification in franchisor-franchisee disputes, courts have normally rejected attempts by one party to require the other to indemnify it for costs or damages arising out of the claims asserted against the party seeking to be indemnified. Nevertheless, the prevailing party may be able to obtain reimbursement of legal fees under a fee shifting provision in the franchise agreement. If a third party is responsible for the other party’s claim, there may be an obligation on that third party to indemnify. For example, if a broker makes earnings claims to prospective franchisees that are not included in the franchise disclosure document and do not have a reasonable basis, the franchisor may have a right to indemnify from the broker from a claim by a franchisee that the offer and sale violated a state franchise disclosure law or was otherwise fraudulent. Thus, although coverage and indemnity in franchisor-franchisee disputes is unlikely in most instances, counsel should check to ensure that there is no other potential party that might be obligated to defend a claim or provide insurance coverage.

80 See, e.g., Sumanth v. Essential Brands, Inc., No. CV MJG-17-2450, 2018 WL 558612, at *3 (D. Md. Jan. 25, 2018) (noting in denying a franchisor’s attorneys’ fee petition that, under Maryland law, “[a]n indemnification provision stating that [an indemnitor] shall indemnify and hold [an indemnitee] harmless from losses (including reasonable attorneys’ fees) which may result against [the indemnitee] as a consequence of performance of [the contract] can only be interpreted to give [the indemnitee] a right to attorneys’ fees and costs for claims brought by third parties, not for claims brought by the indemnitor”).

B. Third-Party Claims Against Franchisors and Franchisees

1. Insurance Coverage Considerations

First determine the types of policies in place—commercial general liability, errors and omissions, employment practices liability, property damage, excess or umbrella policies, cybersecurity liability, etc. Depending on the nature of the claim, one or more policies might cover the claim.\(^{82}\) To make that determination, counsel should review the coverage descriptions in the policies as well as the exclusions and any riders affording additional coverage. Counsel should also determine the coverage limits to assess whether there is sufficient coverage based on the scope of the claims and the amount demanded. To the extent employees of either the franchisor or franchisee are named as parties, counsel should assess whether those persons are covered directly as named insureds or covered parties or as additional insureds; counsel should also assess whether a separate policy, such as Directors and Officers coverage may be available.

Counsel should first look to insurance policies that the party itself has in force that might cover a claim, as well as to any other policies in which the company might be named as an additional insured. This may be a franchisor’s policy, a franchisee’s policy, or the insurance of a third party. Once the various policies and policyholders have been identified, counsel should ensure that the insurance company (for policies held by the party requesting coverage) receives timely notice of the claim and that the claims are tendered to any other party for which coverage would be available to the franchisor as an additional insured.\(^{83}\) Even if coverage is questionable, counsel should tender the claim to all available insurance carriers. Written confirmation of acceptance of the tender should be obtained – even if accompanied by a reservation of rights – to avoid future issues.\(^{84}\) If the tender is not accepted, or coverage is denied, counsel should consider whether to challenge that decision; in such actions, a prevailing insured may be entitled to recover fees from the insurer based on the alleged bad faith.\(^{85}\)

2. Indemnification Considerations

In claims against the franchisee that name the franchisor as a defendant, most franchise agreements obligate the franchisee to indemnify the franchisor for liability and the cost of defense. The franchisee will usually satisfy the duty to defend through insurance because the franchisor will be named as an additional insured on the franchisee’s applicable policy. Situations do arise where that is not the case such as when the franchisor entity has changed but the franchisee’s policy was never updated to reflect this or the franchisee simply neglects to add the franchisor as an additional insured. In those instances, the franchisor may still be able to compel the franchisee to bear the responsibility to defend the case and indemnify the franchisor under the

\(^{82}\) For a more detailed discussion of types of insurance policies that might be relevant to franchised businesses and typical exclusions under those policies, see Doug Imholte, Eleanor Vaida Gerhards, and Elizabeth M. Weldon, *Insurance Dilemma – Challenges in Identifying Adequate Coverage for the Franchisor and Franchisee*, ABA 39th Annual Forum on Franchising W-20, at 3-22 (2016).

\(^{83}\) *Id.* at 40.

\(^{84}\) *Id.* at 41.

\(^{85}\) *Id.* at 42.
indemnification provisions of the franchise agreement.\textsuperscript{86} The franchisor will need to determine how it will enforce that obligation. It might make sense to force the franchisee to retain counsel to represent the franchisor under threat of default. In other circumstances it may make more sense for the franchisor to retain counsel and bill the franchisee for the expense incurred. Additionally, if the franchisor operates through master franchisees, the franchisor will need to assess whether a master franchisee’s franchisees have insurance that covers the franchisor or if there is indemnification that runs to the franchisor.

Franchisors (and franchisees) should also assess whether or not there are allegations which might arguably require the franchisor to indemnify the franchisee. In most cases, the franchise agreement will narrowly define the types of claims that require the franchisor to indemnify the franchisee (e.g., third party infringement claims related to the franchisee’s use of the licensed mark). However, consideration should be given to whether there is an allegation that amounts to a failure of the franchisor’s “system” which might warrant a claim for indemnification in the other direction. For example, if the marketing company retained by the franchisor violated the Telephone Consumer Protection Act (“TCPA”) by texting a franchisee’s customers without proper consent, the franchisee might have a valid claim under the franchise agreement that the franchisor should indemnify the franchisee for claims brought by those customers (assuming there is any provision in the franchise agreement that requires the franchisor to indemnify its franchisees).\textsuperscript{87} Moreover, there may be situations where a franchisor may want to defend (or control the defense of) the action on behalf of itself and the franchisee; such circumstances might include cases involving alleged systemic issues or those garnering significant media attention.

Finally, the parties should determine if there is a third party which might have an obligation to indemnify. In the TCPA example above, the franchisor might argue that its agreement with the vendor provides a right to indemnification from the vendor that sent the text messages if that vendor negligently failed to ensure that it obtained written consent, despite agreeing in the parties’ contract that it would do so.\textsuperscript{88} In contrast, a franchisee may not be entitled to indemnification from an architect or builder of a retail location that is later determined does not meet the requirements of the Americans with Disabilities Act (“ADA”).\textsuperscript{89}

\textsuperscript{86} “Franchisors should be careful to include a writing to the effect that the franchisee’s obligation to obtain and maintain particular insurance coverage does not in any way limit or relieve the franchisee of liability under the separate indemnity provision.” Id. at 34.

\textsuperscript{87} For example, in Agne v. Papa John’s International, Inc., 286 F.R.D. 558 (W.D. Wash. 2012), the court certified a class of claimants that sued Papa John’s for violations of the TCPA related to a text-message campaign by a Papa John’s franchisees. The court found evidence that Papa John’s had encouraged its franchisees to use the text message vendor that had sent the text messages and permitted that vendor to make a presentation at the franchisee convention. Id. at 568. Although that case did not involve a claim for indemnification under the franchise agreement, one can see the logical argument that if the franchisor directed the conduct, there might be grounds to argue that the franchisor had an obligation to indemnify the franchisees. However, absent a contractual basis for a claim of indemnification, it is likely there would be no basis for the franchisees to seek indemnification. See infra, note 71.

\textsuperscript{88} That said, a number of courts have concluded that common law claims for indemnification and contribution are not available under the TCPA. See, e.g., Lemieux v. Lender Processing Ctr., No. 16-cv-01850-BAS-DHB, 2018 WL 637945, at *2-3 (S.D. Cal. Jan. 31, 2018) (“The Court rejects Hightech’s argument that Ninth Circuit and FCC precedent shows that indemnity and contribution are available under federal law for violations of the TCPA.”) (citing cases from other jurisdictions).

\textsuperscript{89} See, e.g., Equal Rights Center v. Niles Bolton Associates, 602 F.3d 597, 560-03 (4th. Cir. 2010) (holding that developer’s claims against architect for indemnification were preempted under the ADA and therefore summary judgment on those claims was appropriate); Access 4 All, Inc. v. Trump Int’l Hotel & Tower Condominium, No. 04-cv-7497-KMK, 2007 WL 633851, at *6-7 (S.D.N.Y. Feb. 26, 2007) (granting motion to dismiss condominium building
C. Control over Counsel and the Case

Once the tender is accepted or the insurer notifies the insured that the claim is covered, the question will become how the litigation is managed. There are two key considerations: (1) which counsel will handle the case for the party covered or indemnified; and (2) how much control over the defense the company will be able to assert.

1. Counsel of Choice vs. Insurance-Approved Panel Counsel or Appointed Counsel

For in-house counsel that have preferred outside counsel, the acceptance of the claim by an insurer is accompanied by the strong likelihood that the insurer will appoint pre-approved panel counsel to handle the dispute. However, there are obvious benefits to having counsel familiar with the company involved in—if not lead counsel on—these cases. Counsel will know the company’s employees and the decision makers, understand how the company operates, will potentially know the company’s sensitivities regarding a particular claim or issue, and may be able to better assess collateral issues that might impact decision making in a particular case. Given those factors, an alternative to panel counsel might be appropriate, depending on the circumstances of the case. The argument to the insurer is cost efficiencies and avoiding having a new lawyer get up to speed.

In-house counsel or the business partner may choose to push for the insurer to approve the company’s chosen counsel to handle the case. Normally, the issue for insurers will be whether the chosen counsel’s hourly rates are within the range of what the insurer is willing to pay. One alternative is for the company (or in-house counsel) to request that preferred counsel be included on the insurer’s list of pre-approved panel counsel for claims against the company. This option is probably only viable when the coverage arises out of a policy held by the company. Another option is for preferred counsel to charge a reduced rate on cases covered by insurance with the understanding that (a) counsel will receive a greater volume of cases as preferred counsel on those types of cases and (b) counsel can charge its standard rate on non-insured matters, and will be preferred on those matters as a result of the willingness to reduce its rate on insured matters. A third alternative is for the insurer to pay the hourly rate it will pay to the company’s preferred counsel for a particular case and have the company pay the difference in that rate and the company’s preferred counsel’s standard rate. The company could also pay its preferred counsel to review pleadings, motions, and case strategy in a case being handled by appointed insurance counsel and provide comments and advice for in-house counsel or the business partner to relay to appointed counsel. Certainly, the company will have more flexibility in the role that its preferred counsel will have in an insured case where the company is the policyholder. In cases where coverage arises as an additional insured, the company will have less ability to dictate the role of its preferred counsel in the face of losing coverage.

2. Scope of Control

Another key decision that the company must make is how much control it wants to assert over the litigation once insurance coverage or indemnity is in place. Often, this may depend on the type of claim at issue. For a simple “slip and fall” claim at a franchise location that seeks damages in the tens of thousands of dollars, a franchisor may be content to rely on counsel appointed by the insurer or retained locally by the franchisee to manage the case with minimal input. In contrast, claims of foodborne illnesses allegedly contracted at several franchise locations

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owner’s common law indemnification and contribution claims against architects and developer because “there is no federal common-law right to indemnification under the ADA”).
may be sufficiently damaging to the franchisor’s brand that the franchise chooses to designate its counsel of choice to manage the case as lead counsel, even if there is insurance coverage or an agreement to indemnify by the franchisees or the vendor that supplied the tainted food products.

There are concerns to be addressed in cases seeking to hold the franchisor directly or vicariously liable for the acts or omissions of the franchisees. First, the franchisor should direct assigned counsel to attempt to have the franchisor dismissed from the case as soon as possible. In some situations, the claimant inadvertently sues the franchisor, unaware that the business is franchised and independently owned and operated by a franchisee. In other situations, once it is clear that an insurance company is covering the claim, counsel may be willing to dismiss the franchisor voluntarily, with a different “deep pocket” potentially on the hook. However, in other cases, even when there is no legitimate claim for liability against the franchisor, counsel will refuse to dismiss claims against the franchisor. In those cases, the franchisor should, push assigned counsel to move for dismissal of or summary adjudication on the claims asserted against the franchisor. The franchisor would also be well served to have its in-house counsel or its outside counsel provide governing authority on vicarious liability in franchise cases to appointed counsel or review and comment on motions and briefs prepared by appointed counsel on these issues. In situations where no colorable theory of liability exists against the franchisor, counsel should consider seeking sanctions against the claimant.

The franchisor should also monitor pleadings to make sure that franchisee does not plead, allege, or assert anything adverse to the franchisor’s interests. For example, the franchisee should not file a joint answer for the franchisor and franchisee admitting knowledge of facts related to an incident at the franchised business because the franchisor likely does not have knowledge of the facts surrounding the incident. Although such a filing might seem innocuous, an admission that allegations relating to an incident are true (even if not admissions of ultimate liability) might undermine the franchisor’s argument that it was not involved in the day-to-day operation of the business.

This concern extends beyond mere legal positions. The franchisor should also take care to ensure that strategic decisions proposed by appointed counsel are not inconsistent with the franchisor’s overall business strategy. For example, the estate of a person that died in a single-car accident sues a franchisor and franchisee of a franchised restaurant chain for dram shop liability, claiming the decedent was obviously intoxicated and the defendants should not have served the decedent. Insurance counsel may see a strategic benefit to filing a third-party complaint against the hosts and attendees of a party that the decedent attended at the franchised restaurant, alleging that the hosts and other attendees were contributorily negligent because they bought numerous alcoholic beverages for the attendee, unbeknownst to the staff of the restaurant. The franchisor may not wish to join a third-party complaint against customers of its franchised establishments—headline: “Popular Restaurant Brand Sues Customers Claiming They Were Responsible for the Death of their Friend”—particularly given its likely position that it is not vicariously liable for the death.

90 For example, under California law, a franchisor is likely to resolve such a claim on summary judgment (or potentially on a motion to dismiss or demurrer) where the claimant asserts that the franchisor is vicariously liable for the acts or omissions of its franchisees or their employees. See, e.g., Patterson v. Domino’s Pizza, LLC, 333 P.3d 723, 739 (Cal. 2014) (“A franchisor enters this arena, and becomes potentially liable for actions of the franchisee’s employees, only if it has retained or assumed a general right of control over factors such as hiring, direction, supervision, discipline, discharge, and relevant day-to-day aspects of the workplace behavior of the franchisee’s employees. Any other guiding principle would disrupt the franchise relationship.”).
D. Other Considerations for Insured Cases

In the event that outside counsel is approved to handle a case by the insurer, there are a few ministerial considerations that are important to remember. First, ensure that you are complying with the insurer's disclosure obligations. Be aware of the policy disclosure obligations and provide disclosure early and often during the progress of the case. Second, make sure that you are aware both how the insurer wants to be updated on the status of the case. In some cases, insurers may want written reports of each significant action in the case. In other situations, the insurer may request a standing conference call for regular or periodic updates, even if there has been no significant activity. In other circumstances, the insurance company may require outside counsel to seek approval of actions to be taken or filings to be made. Third, pay close attention to billing guidelines from insurers. Finally, as touched on earlier, ensure that your rates and what you bill as expenses, or your selected law firm’s rates and what it bills as expenses, are acceptable to the insurer.

VII. EARLY CASE EVALUATION AND ASSESSMENT OF POTENTIAL OUTCOMES AND THE RELATED COSTS

Another key role that outside and in-house counsel play is in evaluating and assessing the likely outcomes and related costs of a litigation matter, both before and after litigation commences. This role is critical in enabling the client or business partner to assess strengths and weaknesses in its position and determine whether to consider settlement. Early case evaluation is critical. Often clients or business partners close to a dispute will have attempted resolve an issue amicably directly with the other side, only to have been frustrated in that process. Under those circumstances, the client or business partner may approach counsel with a "litigation is the only alternative" mentality. Or, the business partner may be emotionally invested in the dispute, either due to a negative relationship with her or his counterpart on the other side or because the lawsuit involves allegations of misconduct by the business partner.

Counsel should efficiently and thoroughly evaluate the merits of the case at the outset, assess the potential outcomes—both from a legal and business perspective—based on an independent review of the facts available, and determine the potential costs of litigation versus alternative resolution.

A. Evaluation of the Merits of the Case

1. Substantive Merits of the Claims and Defenses

Evaluating the merits of the case involves more than reviewing the complaint filed against your company or client and discussing its merits with the most knowledgeable business partner. Instead, counsel should, at a minimum, request the material documents necessary in order to make that evaluation. Such documents in a franchise case might include:

- The franchise agreement(s) and any amendments or other related agreements;
- The franchise disclosure documents and receipts; notices of default and/or termination;
- Any brand or operating standards;
• Emails and other written communications between the parties relating to the disputed issues and leading up to the lawsuit (or the request to file suit);

• Any written demands or offers of compromise;

• Any relevant inspections or audits of the franchised business(es); and

• Any documents that contain admissions against interest (either by your client/company or by your potential opponent).

Gathering and reviewing documents is imperative to being able to assess the validity of the claims to be made or the defenses to those claims. Counsel should also interview the key stakeholders involved in relationships who will be able to provide information about oral communications and historical information about the relationship that may not be evident from the documents.

2. **Evaluating Procedural Issues that Might Impact the Outcome**

Early evaluation should extend beyond the merits of the factual allegations. Reviewing the franchise agreement may reveal procedural arguments that might impact counsel’s evaluation of the potential outcomes and strategy for proceeding.

First, the franchise agreement may include pre-filing requirements before suit can be filed. Many franchise agreements require that the complaining party make a formal written demand specifying its complaint to afford the other party notice of the issue. These requirements may be accompanied by an obligation that the parties meet face-to-face and attempt to resolve the potential dispute, or may require the passage of a particular amount of time after the demand is made for the other party to respond or for the parties to meet. Some agreements provide for pre-suit mediation as a condition to pursuing litigation. A point made earlier in this paper but worth repeating: you risk dismissal if you file a suit before these conditions are met.\(^91\)

Second, many franchise agreements include exclusive venue provisions. Many franchise agreements also specify that the parties must resolve their dispute through arbitration in a

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\(^91\) See, e.g., *World of Beer Franchising, Inc. v. MWB Dev. I, LLC*, 711 Fed. App’x. 561 (7th Cir. 2017) (affirming lower court denial of a franchisor’s motion for preliminary injunction because the franchisor had failed to comply with requirement in the franchise agreement to mediate with the franchisee prior to seeking a preliminary injunction); *Delamater v. Anytime Fitness, Inc.*, 722 F. Supp. 2d 1168, 1180–81 (E.D. Cal. 2010) (granting summary judgment to franchisor in case where franchisee failed to mediate prior to filing suit because “[failure to mediate a dispute pursuant to a contract that makes mediation a condition precedent to filing a lawsuit warrants dismissal”). But see *Govemara v. 7-Eleven, Inc.*, No. 13-CV-8094 LAP, 2014 WL 4476534, at *8 (S.D.N.Y. Aug. 20, 2014) (denying a franchisor’s motion to dismiss due the failure of the franchisee plaintiffs to mediate prior to filing suit because “[under New York law, an agreement to submit a dispute to mediation and arbitration is not a defense to an action, and, thus, may not be the basis for a motion to dismiss a complaint based on documentary evidence”).
particular locale. A suit filed in the wrong forum could be subject to dismissal, transfer, or stay in favor of arbitration (and potential sanctions).

Finally, franchise agreements may include contractual limitations and waivers that might impact the ultimate outcome. Many franchise agreements have contractually shortened limitations periods that specify the time period in which a claim must be filed. These provisions may bar a party from pursuing otherwise meritorious claims. Franchise agreements also often include waivers of the right to pursue certain types of damages, such as multiple, punitive or consequential damages. These limitations could impact a party’s willingness to pursue its claim or provide incentives to settle. There may also be provisions that waive a party’s right to have its claim resolved by a jury or the right to pursue claims through a multi-party or class action lawsuit or arbitration. The inability to pursue claims as part of a multi-party suit may impact the strategy for resolving claims.

B. Assessment of Potential Outcomes

Once counsel has gathered documents and information and evaluated the merits of the claims, defenses, and potential counterclaims, she should assess the potential outcomes of litigation. Although this analysis should include an assessment of the likely success of each side, counsel should go beyond who is the probable winner on the substance of the claims and defenses. This can be challenging because outside counsel will typically be wary of offering anything more than educated guesses on outcomes based on the information then before them.

1. Outcomes at Various Stages of the Litigation and Impacts on Both the Case and Business Interests

Assessing potential outcomes also involves examining the possible results of each action taken during litigation, as well as the impacts of those results. For example, a company may be confident that it can successfully defend against a claim that it violated the Sherman Act by forcing a franchisee to purchase from specified suppliers with whom the franchisor allegedly conspired to charge unrealistically inflated prices to the franchisor’s benefit through rebates or kickbacks.


93 See, e.g., Caribbean Rests., LLC v. Burger King Corp., 23 F. Supp. 3d 70, 80 (D.P.R. 2014) (granting franchisor defendant’s motion to transfer because “the court is unconvinced by the Plaintiff’s arguments against enforcement of the forum-selection clause, and we thus find it has failed to meet its burden of establishing that transfer to the forum for which the parties freely bargained is unwarranted”).

94 See, e.g., Torres v. CleanNet, U.S.A., Inc., 90 F. Supp. 3d 369, 382 (E.D. Pa. 2015) (granting franchisor’s motion to stay litigation and to compel arbitration because claims were within scope of franchise agreement’s arbitration provision and, as a result of class action waiver, the franchisee was obligated to “arbitrate his claims on an individual basis”).

95 See, e.g., Siddle v. Crants, No. 3:09-CV-00175, 2013 WL 1245678, at *32 (M.D. Tenn. Mar. 26, 2013) (on defendants motion for attorneys’ fees and plaintiffs’ request to hold its counsel jointly and severally responsible for any fee award, the court noted that because counsel for the plaintiffs did not “justify their decision to file [suit] in Illinois (and to fight the motions to dismiss or transfer) in spite of the forum selection clause” and that conduct “needlessly caused the defendants to retain local counsel (thereby incurring the fees and expenses attendant to litigating the early stages of the case) and to incur attorney’s fees and expenses to have the case transferred to the district in which it should have been brought in the first place” sanctions were warranted against the defendants’ counsel); Am. Roller Co., LLC v. Foster Adams Leasing, LLP, 421 F. Supp. 2d 1109, 1116 (N.D. Ill. 2006) (imposing sanctions against party that filed motion to transfer in spite of forum selection clause in contract because, among other things, the defendants’ motion was largely, but not entirely, based on personal inconvenience”).

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The franchisor’s counsel must consider the how discovery requests for its contracts with those suppliers and information about product pricing will be resolved. No doubt the franchisor and its suppliers would object to disclosing commercially sensitive product pricing information to competitors of the suppliers or to other purchasers of the suppliers’ products. Although the outcome of that discovery dispute may have little impact on the ultimate resolution of the merits of the underlying claims, it might have a significant impact on the franchisor’s relationships with its suppliers. As a result, counsel must provide its client and business partners both insight into the possibility of discovery of those materials becoming an issue in the case as well as what the likely outcome of a dispute about production of those materials will be. A solution might be simple—a stipulated protective order with restriction on who is entitled to access those materials and who they can be used in the litigation—but providing an assessment of that potential issue and possible outcome early on will enable the client or business partner to feel comfortable with the issue when it ultimately arises.

Assessing potential outcomes also requires counsel to consider what happens after the case ends. For example, a franchisor’s counsel might be confident that it will succeed on claims that the franchisee owes significant past-due royalties and recommend pursuit of a breach of contract claim to recover those amounts, rather than recommending default and termination. However, counsel should also assess what happens once the franchisor obtains a judgment: will the franchisee have exhausted resources so it cannot pay the judgment or fund its operation? Alternatively, is there a larger relationship that must be considered?

2. Using Decision Trees to Assess Most Likely and Most Desirable Outcomes

In assessing potential outcomes, counsel may consider the use of decision trees and probability outcome analysis. These processes that help decision makers think through and evaluate the many elements of a complex decision. These processes disaggregate complex problems into smaller, more manageable elements whose outcomes can be individually assessed and then analyzed to determine the outcome of the more complex problems. Functionally, a decision tree is a graphical means of analyzing and determining an expected or most likely outcome of competing options. The “tree” is a diagram with “arms” or “branches” representing potential variables leading to outcomes, with assigned probabilities for each potential outcome. By evaluating these variables and probabilities, a decision maker can identify a sequence of decisions that will maximize value, minimize costs, or balance multiple attributes.

Counsel can create decision trees using five simple steps. First, identify the decision(s) that must be made. Usually, there will be secondary decisions to be made after each initial choice, in addition to “chance” or uncontrollable events, and a range of possible consequences

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96 For a more fulsome and complete analysis of the use of decision trees, see the excellent paper that accompanied the workshop presented by Robert B. Calihan, John R. Dent, and Marc B. Victor at the 2004 Forum Annual Meeting in Vancouver, BC. Robert B. Calihan, John R. Dent, and Marc B. Victor, The Role of Risk Analysis in Dispute Resolution and Litigation Management, ABA 27th Annual Forum on Franchising, LB-4 (2004). The discussion in that paper is beyond the scope of this brief summary of how in-house and outside counsel can use decision trees in assessing franchise litigation.

97 Id. at 7.

98 Id. at 13-16.
or outcomes. Second, identify the strategies and variables, often referred to as “solutions.” These would include available claims, defenses, or arguments in a litigation as well as various positions the company could take in mediation or settlement negotiations. These strategies and variables are the choices and chance events that lead to the outcomes. Third, identify the outcomes. As discussed above, the outcomes may be more than just winning or losing; there may be financial or other ramifications that should be included as potential outcomes from the choices made and chance events. Fourth, estimate the probabilities in terms of a percentage of the likelihood of each particular outcome based on the choices and chance events leading up to that outcome. Counsel should be prepared to update these percentages as additional information and the case unfolds. When economically feasible, counsel can use surveys, mock juries, and other resources to add precision to these percentages. Finally, quantify potential costs of each strategy, variable, and decision. Once those steps are taken, counsel can calculate the value of each decision by applying the probabilities at each step of the decision process to the assigned value of the outcome and deducting the costs of the choices to reach that outcome. From that analysis, counsel can assess the both the most likely outcome and the choices that will lead to the most favorable result.

In their 2004 paper accompanying the workshop “The Role of Risk Analysis in Dispute Resolution and Litigation Management,” Robert Calihan, John Dent, and Marc Victor provided a useful example of a franchise decision tree in their discussion of risk analysis in franchise cases. The figure appended to this paper as Appendix C is a portion of the decision tree from that paper.

In the above example, the franchisor, “Dirty Larry’s,” is assessing the viability of its claim for liquidated damages against its terminated franchisee, “Joe Clean,” as well as the viability of Joe Clean’s counterclaim seeking rescission, which would effectively vitiate Dirty Larry’s claim. Counsel has assessed the various outcomes and assigned values to those outcomes, and then assessed the likely percentage chance of each outcome. Let us assume counsel estimates that there is a 64% chance that Joe Clean will prevail on its counterclaim against Dirty Larry and a 36% chance that the counterclaim will fail. In the event that the counterclaim fails, counsel estimates that Dirty Larry is 75% likely to succeed on its claim that it had the right to terminate the franchise agreement for nonpayment of fees, a 67% chance of convincing the court to award liquidated damages, and a 50% chance that the court will find the liquidated damages provision enforceable. In light of the fact that the liquidated damages provision provides for payment of $2 million, counsel can then “roll-back” that amount through the prior percentages to determine the “value” of Dirty Larry’s claim. Using that calculating method, counsel can assess the value

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99 Id.
100 Id at 18-21.
101 Id.
102 Id at 21-23.
103 Id at 23. The discussion of this decision tree that follows is gleaned from that paper.
104 Id at 5, 21-23. In the Calihan paper, there is a separate decision tree analysis of Joe Clean’s counterclaims. Id at 22. However, that tree is much more extensive, and has been omitted from this discussion for purposes of brevity.
105 Id at 9-11, 23.
of Dirty Larry’s claim to be $450,000. The authors separately calculated the value of Joe Clean’s counterclaims to be $3.23 million. As a result, the overall potential result from litigating this case for Dirty Larry using the decision tree analysis would be a potential loss of $2.78 million, not including the costs of litigation.

Litigation decision trees may be much more complex than the above example, and can be crafted to include assessments of the potential cost of litigating as well as likelihood of recovering or paying an award of attorneys’ fees and costs. However, there are a number of readily available decision tree software applications. Using those programs, counsel can conduct probability outcome analysis to assess the value of claims as well as what decisions should be taken to obtain the most favorable—even if not the most likely—outcome, which can be particularly useful in assessing settlement positions.

C. Analysis of Potential Costs of Litigation and Alternative Resolution

1. Creating and Using an Early Case Assessment Budget

An evaluation of potential outcomes is only complete if counsel provides an analysis of the potential costs of litigating and the attractiveness of alternative avenues for resolution. In quantifying the potential cost of litigation, counsel should create and provide (and in house counsel should require) an early case assessment and litigation budget. This budget should estimate costs using educated assumptions from counsel’s experience with prior cases with similar facts or involving this client and the information know from the case evaluation. Counsel should be prepared to regularly update the budget during litigation. Monthly updating often makes sense, as it can be aligned with monthly billings on the case. Good cost estimates are important to the strategy analysis, particularly in the decision tree analysis discussed above, as the costs of taking certain actions in a case must be balanced against the value to be gained from making those choices. A main theme of this paper and a question that should always be asked is “will it be worth it?” For example, does it make sense to file a motion for summary judgment that will cost $50,000 if that motion has a 10% chance of success? It might, if the value of the claim is $50 million, the trial will cost $3 million, and the likely success at trial is only 40%. But it might not, if the value of the claim is $100,000, the trial will cost $100,000, and the likely success at trial is 80%.

Providing an estimate of the total cost of litigation in an early case assessment budget is also important to protect counsel (and in house counsel) as the case progresses. Clients or business partners business priorities may change during the course of litigation, especially if the expense is far outweigh the perceived benefit of the litigation. The early budget can serve as a reminder that counsel advised of these expenses when before the decision was made to litigate. Similarly, being able to point to that estimate can enable counsel to justify the ongoing costs as the bills mount and the litigation shows no signs of ending. In addition, providing that estimate at

\[106\] Id.

\[107\] Id at 22.

\[108\] Id at 23.

\[109\] Id. at 12.

\[110\] Id. at 23-33.
the outset may change the client’s desire to pursue a case where the potential value of the claim may not justify spending the amount estimated to achieve that outcome.

2. **Consideration of Unquantifiable Costs and Alternative Fee Arrangements**

   In analyzing the cost of litigation, counsel should also consider unquantifiable costs. For example, in-house counsel must consider the cost of internal legal department resources in managing the litigation. Certainly, there is a cost to assisting outside counsel in preparing witnesses for depositions, collecting documents and ESI for discovery, and reviewing strategy with outside counsel and business partners. There are also costs associated with distracting company employees who must make themselves and their files and documents available for internal case evaluation, discovery, and hearings. Public relations issues can be another unquantifiable cost. Newsworthy events that lead to litigation can have an impact on the brand and the franchisee system, including other franchisees (as further discussed below); this impact must be considered. As discussed above, there is also a risk of unknown facts that will surface during the litigation. Such facts can change the evaluation of the merits, the potential outcomes, and the cost to try to litigate the case to successful conclusion.

   Finally, counsel should explore the possibility and feasibility of alternative fee arrangements. For franchisee counsel, contingency fee arrangements might be a viable option to take on a case that has more limited resources than the franchisor. However, in-house counsel—for larger franchisees and for franchisors—should ask whether outside counsel will consider alternative fee arrangements, including flat fees for specified tasks (drafting a filing a complaint, drafting and filing a motion for preliminary injunction, etc.), offering a blended rate for all attorneys staffed on a case, providing a mixed fee where outside counsel are paid lower than established hourly rates and a percentage of recovery, or more creative arrangements, such as fee caps with the opportunity to exceed the cap for fees generated above the cap if counsel obtains a successful result.

3. **Alternatives to the Cost of Litigating to Resolve the Dispute**

   Counsel should determine the client’s appetite for settlement. Resolving a dispute early on will enable the company to avoid the potentially significant time and expense of litigation. Counsel should determine what steps have already been taken to try to resolve the matter to evaluate whether further settlement efforts are worthwhile. Counsel should also analyze whether non-binding mediation or arbitration is worth proposing if informal discussion have been unsuccessful. Such processes have the benefit of not only affording the parties a chance to settle their dispute without significant expense but also allowing the parties to have a neutral third party provide an unvarnished view of the respective claims, defenses, and likely outcomes. Whether or not to pursue early non-binding mediation or arbitration will likely differ for third party claims versus disputes between the franchisor and franchisee. In many cases, the nature of the ongoing relationship will suggest that early ADR may prove successful. In other circumstances, however, the relationship may have soured to the point that neither side is willing to budge and would rather fight it out in court.
VIII. HANDLING PUBLIC RELATIONS ISSUES FOR HIGH PROFILE AND/OR “BET THE COMPANY” CASES

A. Cases Involving Incidents at Franchised Businesses

An adverse incident or event in the public domain may create a public relations crisis and ultimately lead to litigation—for both the franchisor and franchisees. For example, an E. coli outbreak in a restaurant chain will likely be a crisis management and public relations issue that the company must address well before the affected customers file suit. However, in some instances, litigation itself can generate media interest; in other instances, the litigation about a prior incident will generate as much interest as the events themselves—the OJ Simpson trial was as much of a media event as the report of the murder of Nicole Simpson and Ron Goldman and the infamous “chase” after Al Cowlings’ Ford Bronco. As a result, counsel and in-house counsel should be prepared to assist in handling public relations and media coverage of high profile cases involving the company or its franchisees.

The most important thing for counsel to do in these circumstances is to reach out to the company’s internal and/or external communications teams as soon as there is some indication that an event that could lead to media coverage or public relations issues. Collaborating with those teams as the crisis unfolds and providing information to them about the status of the litigation is important to ensure the right messaging to the public. Obviously, legal filings must be drafted to meet legal requirements, not PR messaging guidelines. As a result, a company’s public filings may not be written the way the communications team would prefer. It is therefore incumbent on counsel to balance the need to ensure that the legal filings do not damage the company reputation with the imperative to present the company’s position sufficiently to survive legal scrutiny. On the other hand, giving the communications team advance notice of filings, appearances, and other events will enable that team to have an appropriate message in place to respond to media coverage.

As noted above, franchise companies face the challenge that an issue at a local franchised business can become a broader issue for the franchisor and the entire system. A local independent restaurant that is reported to have had customers exposed to a harmful pathogen in its food will likely only need to address that issue on a local level. However, an entire franchise chain may be implicated by a similar occurrence at a single franchised restaurant. Neither the media nor customers will likely distinguish between or even care that franchisor and other franchised businesses that were not directly involved. Franchisors should consider when it is appropriate to simply respond to press inquiries by stating that the location is franchised and the franchisee is handling the issue. In some high profile cases, it may be more important from a brand protection standpoint for the franchisor to take a more active role in addressing the issue and responding to the media.111 The franchisor may also deem it appropriate to provide advice to the franchisee about how to respond to the media attention generated by an incident at the franchisee’s business. At least one court has held that such actions alone are insufficient to make

111 For example, a manager at a Dunkin’ Donuts franchised location recently posted a sign offering customers a reward (in the form of coupons for free products) for reporting any employee “shouting in a language other than English.” See Jonas Shaffer, Baltimore Dunkin’ Donuts Removes Sign Asking Patrons to Report Employees Shouting in Foreign Languages,” THE BALTIMORE SUN (June 18, 2018), http://www.baltimoresun.com/business/bs-md-dunkin-donuts-english-sign-20180618-story.html#. Rather than simply allowing the franchisee to address this situation, Dunkin’ Donuts issued a statement that the general manager of the store used her “personal judgment” in posting the sign to address a “customer service and satisfaction issue,” but that franchise owner had determined the sign was “inappropriate” and removed the sign. Id.
the franchisor vicariously liable for any harmed resulting from the underlying incident.\textsuperscript{112} Finally, the franchisor consider "encouraging" a franchisee (or the insurer) to settle these cases to avoid protracted litigation and media attention when the franchisor would prefer fade away as quickly as possible. The franchisor may even consider contributing to a settlement—even though it may not have any ultimate liability or is indemnified—in order to effectuate an expeditious resolution that quiets the media coverage surrounding the incident.

B. **Cases Between Franchisees and Franchiseors**

A separate consideration is messaging about high-stakes cases between a franchisee and the franchisor. When a franchisee sues a franchisor asserting claims that implicate the entire franchise system franchisees not involved in the action are likely to learn about the case. Counsel for the franchisee must decide whether to try to draw media attention to the case—or at least find some way to publicize the case to the system—in order to generate support from other franchisees, including having them join the suit.\textsuperscript{113} Such media attention may also be viewed as a means of creating leverage to settle in a favorable manner. In contrast, if the franchisee's counsel knows there are weaknesses in its clients' claims or issues that are sensitive to its clients' interests, media attention may not be desirable, as the press may publicize those aspects of the case, even if unintentionally. Counsel for the franchisee should also work with her or his client(s) to ensure that there is a consistent message to share with other franchisees that (a) does not disparage or defame the franchisor; (b) does not divulge any privileged information or counsel's strategy for the case; and (c) is largely factual, as opposed to opinion.

In contrast, counsel for the franchisor should work with the communications team on a strategy for both internal messaging to the franchise system and external messaging, to the extent the franchisee elects to publicize the suit. Based on the nature of the claims, the franchisor will need to choose how to characterize the case. Does the suit raise real issues that the system needs to address and that the franchisor is committed to addressing, although the preference would be to do so without the backdrop of contentious and expensive litigation? Or should the franchisor portray the suit as a cabal of troublemakers attacking the system for selfish purposes to the detriment of the majority of the franchisees who are good stakeholders and who should not be swayed to join litigation clearly designed to rip the system apart? Careful consideration should be given to the message to be sent to the franchisees not involved in the suit, as keeping those franchisees engaged and in line with the brand is often more critical to the system than the outcome of the suit itself. Regular updates about significant litigation in the system can prove beneficial but should be fully vetted by outside counsel and the corporate communications team involved.


IX. THE FINANCIAL AND HUMAN COST OF EFFECTIVELY MANAGING AND LITIGATING A FRANCHISE CASE

Counsel should constantly evaluate the ongoing financial and human costs associated with continuing with the case. Success is the top priority, but so is managing the litigation in a manner that minimizes disruption for the client and the business partners, stays within the budget, and reaches a favorable resolution. Be attuned to these needs and implement processes and strategies to meet those needs. In other words, franchise counsel should develop a “playbook” to try to alleviate the burdens of franchise litigation—cost, time, and relationship strain—as much as possible.

A. Managing the Financial Cost and Burdens of Litigation

One of the main premises of this paper is that costs, or potential costs, must be evaluated at every gating point of a dispute. Sometimes, despite the potential burden of cost and time, it makes sense to move forward. In such cases there are a number of strategies counsel can undertake to try to minimize these burdens. For example, franchise counsel should have a brief bank and model pleadings used in prior franchise cases. Outside counsel who handle franchise cases regularly likely have litigated cases involving similar facts or, if franchisor counsel, involving the same client or in the same jurisdiction. Maintaining a repository of pleadings, motions, and briefs from those cases can reduce the cost to the client in preparing those documents in subsequent cases. In-house counsel should also consider maintaining his or her own repository; in the event insurance counsel is assigned to handle a case involving facts similar to cases that the company has litigated previously, in-house counsel can provide the pleadings and other filings from those cases to enable counsel to more efficiently handle the case. Having model briefs and pleadings will reduce the cost required to prepare filings as well as decrease the time the client or business partner will need to spend providing information to prepare those filings.

Another way to minimize the cost and time spent on franchise litigation is to dedicate specific resources for particular types of matters. For in-house counsel, that may mean having a specific attorney, paralegal, or business partner involved in all franchise cases. Assigning particular employees to work on those cases can reduce the overall distraction to business operations that would occur if numerous employees might work on franchise cases without any consistency. Moreover, if different employees are assigned to franchise cases, there may be inconsistencies in how the cases are managed and handled, which could lead to inconsistent results in cases with similar facts. Outside counsel can accomplish this by having subject matter experts on various aspects of franchise law who can be brought in to handle aspects of cases within their expertise. For example, one litigator might handle a case involving a holdover franchisee and another litigator might handle a case involving encroachment of an exclusive territory. One final way that counsel can manage the expenditure burdens of franchise litigation is to conduct a post-mortem. Outside counsel should take time to discuss the client’s perspective on how the litigation was handled and resolved. In-house counsel should provide feedback to outside counsel on the process and the result. In-house counsel should also poll the business partners involved in the case to gauge their satisfaction with the process and outcome.

Questions to be asked and considered include:

- Did the overall strategy work?
- Was the client/business partner sufficiently informed of the risks and potential outcomes of litigation early on in the case or before filing suit?
• Was the client/business partner provided sufficient explanation as to what was happening during the course of the case?

• Was the client/business partner prepared for and did the client/business partner understand the decisions that were made during the course of the case?

• Were there decisions made during the litigation that, in hindsight, the client/business partner felt should have been made differently?

• Was the cost managed appropriately and did counsel provide adequate of notice and explanation for deviations from the budgeted/estimated costs?

• Did counsel give proper consideration to the business needs of the client/business partners in developing the strategy for the case and analyzing the potential outcomes?

• Is the company satisfied with the ultimate result?

• Could the litigation have been avoided and, if so, how?

• What changes in internal processes could be made to prevent similar future litigation?

Reviewing these questions can afford counsel with a better understanding of what worked and what didn’t.

B. Managing the Human Cost and Burdens of Litigation

Aside from managing the financial burdens of franchise litigation, counsel should also have strategies for managing the human cost—the burden on the people involved in the litigation. The stress of litigation goes beyond the burden on financial resources, because it taxes the company’s personnel. Although lawyers understand the turmoil and distraction of litigation, non-lawyer clients and business partners may not. As a result, litigation can often be highly emotional for non-lawyer clients and business partners who might feel as if they are being attacked personally. Because litigation is, in part, about allocating fault and responsibility when something goes wrong, there may be lots of opportunities for internal finger pointing. Moreover, the finger pointing may be between the franchisee and franchisor. That can damage the franchise relationship, even if the goal of the suit is not termination of the parties’ relationship. In the chaos of litigation, internal and external relationships can fray or even break.

Litigation therefore poses an opportunity for counsel and in-house counsel. A memorable quote from the hit television show, Game of Thrones, is applicable here: “Chaos is a ladder.” Counsel should strive to be the voice of reason and calm in these situations. Approaching the issues and arguments in an even and reasoned manner can diffuse hostility inherent in litigation. Business partners and clients will take their cues from their counsel in how to act or react in litigation. A measured approach as an advocate or advisor will belie any need for concern or hand-wringing, and will likely foster trust in your advice and counsel as to strategy.

The “human cost” associated with litigation is perhaps most evident when it comes to depositions. Counsel must coordinate schedules of employees (sometimes officers and directors) who will not completely understand the time-consuming nature of the deposition process.
Depending on the importance of any given witness, multiple days of preparation are necessary just to prepare for a 7-hour deposition of a key witness. This is time well spent—for sure—but there is a tangible cost to any company when key personnel are forced to sit in a conference room with outside counsel learning about depositions, how to approach answering questions, and talking strategically about the substance of the testimony.

For all of these reasons, counsel should provide clients and business partners with a "flight plan" for the case. Counsel should explain that sometimes there will be a need for course corrections due to the turbulence of litigation, and describe how and when those circumstances might occur. If counsel has evaluated the case properly and uses the tools discussed above, making this plan will be fairly straightforward and the client and business partners will be comfortable following the plan. Litigation, while an often terrifying prospect for a franchise company, can be a terrific opportunity for counsel to become a trusted business partner through his or her ability to manage the human burden of litigation.

X. CONCLUSION

The job of helping clients be prepared for litigation begins long before any matter is filed. That said, if litigation seems like the only path forward, there are two fundamental themes that must be at the forefront of counsel’s mind: 1) the cost of it all: constantly evaluate the impact of time, money and potential publicity involved; and 2) ensure the appropriate procedural steps are taken during the course of the matter, including a proper litigation hold and preservation of relevant documents. Sometimes litigation is inevitable, but the best counsel will have an ongoing dialogue and communicate frequently with clients around the risk/reward analysis of the matter. Circling back to the goals of Rule 1 of the Federal Rules of Civil Procedure, which call for a "just, speedy and inexpensive determination of every action and proceeding", so should counsel keep that as a fundamental foundation in representing clients.
APPENDIX A

JOINT DEFENSE, COMMON INTEREST AND CONFIDENTIALITY AGREEMENT

1. Scope of Agreement. This Joint Defense, Common Interest and Confidentiality Agreement ("Agreement") pertains to the defense of a civil complaint filed by ________ ("Plaintiffs"), and related discovery and other proceedings, in the lawsuit captioned ________, or in any court to which such actions may be removed, transferred or to which any judgment or result may be appealed ("Current Litigation"). This Agreement is entered into between ________ (individually referred to as "Client" or collectively referred to as "Clients"), and the undersigned counsel and their agents acting for and on behalf of their respective Clients (together referred to as the "Defense Group"). This Agreement memorializes understandings reached among the Defense Group and Clients (collectively referred to as "Parties").

2. Common Legal Interest in Defense. The Parties anticipate that the nature of the Current Litigation and the relationship among the Clients will present various legal and factual issues common to the Clients, thus making essential joint efforts in preparation for defense of the Current Litigation. The Parties to this Agreement believe there is mutuality of legal interest in at least some issues, which may relate to the common defense of the Clients. The Defense Group wishes to work together on issues common to their respective Clients without waiving applicable rules of privilege and confidentiality vis-à-vis potentially adverse parties or other third parties.

3. Intent. It is the Parties' intention and understanding that: (1) the fact that particular communications have been made between Parties to this Agreement; (2) the contents of such communications; (3) any document reflecting or referring to such communications; and (4) any work product obtained from any Client or member of the Defense Group shall remain confidential and protected from disclosure to any third party by each Client's attorney-client privilege, each attorney's work-product doctrine immunity from discovery production, the "joint defense doctrine," and any other applicable privilege or protections including the self-evaluation privilege. A third party under this Agreement is defined as a person or entity other than: (1) a Client or member of the Defense Group; (2) clerical, paralegal and secretarial staff employed by a member of the Defense Group who need to review such information in connection with the preparation for any proceeding conducted in or relating to the Current Litigation; (3) outside experts and consultants working with the Parties; or (4) the Clients' insurance carriers. Sharing of information among the Clients for the benefit of one or more Clients is not a waiver of applicable privileges or work product rules relating to discovery obligations.

4. No Disqualification. The participation in and execution of this Agreement, as well as the receipt of any information pursuant to this Agreement, shall not disqualify any representative of a signatory (including a law firm or its professionals) from accepting any other further engagement. Each signatory to this Agreement knowingly and intelligently waives any conflict of interest that may arise from any undersigned counsel examining such person, or any agent or representative thereof, at any trial or proceeding.

5. Agreement to Share Information. To further the mutual legal interests of the Clients, the Defense Group and their respective Clients agree to share and exchange among the Parties, as each counsel deems appropriate, witness statements and interview summaries, memoranda of law, debriefing memoranda, factual summaries, transcripts, digests, mental impressions, documents, legal strategies and theories, and other confidential information for the
limited and restricted purpose of assisting counsel in protecting the rights and interests of their respective, individual Clients.

6. Agreement Not to Disclose Shared Material to Third Parties. Each signatory to this Agreement agrees that he or she will not reveal to any third party any information received under this Agreement, except as follows:

   a. A Client or member of the Defense Group receiving information from another undersigned Client or member of the Defense Group pursuant to this Agreement may communicate that same information to a third party only with the advance, written consent of: (i) the client or attorney who contributed it to the joint defense effort; and (ii) every other signatory to this Agreement who may be entitled to claim any privilege with respect to the information to be disclosed.

   b. A Client or member of the Defense Group receiving information from another undersigned signatory pursuant to this Agreement may communicate that same information pursuant to a compulsion order from a court of competent jurisdiction. Each Client and member of the Defense Group agrees that if it receives any summons, subpoena, or similar process, or request to produce information or materials which includes information or materials received under this Agreement, it will immediately notify all other Clients and members of the Defense Group, provide a copy of such request or demand, and provide not less than five (5) business days’ notice before production, in order to permit these other Parties to intervene. If five business days’ notice cannot be provided, because of the return date of the process, the Client or member of the Defense Group upon which the demand or request is made agrees to bring a motion to stay the proceedings in order to allow provision of five business days’ notice to the remaining signatories to this Agreement.

7. Modification of Agreement—Addition of New Parties. Modification of this Agreement or addition of other parties as signatories to this Agreement requires that all Parties execute a new agreement.

8. No Privilege Regarding Facts Not Otherwise Privileged. The Parties recognize and agree that facts and other information which are not otherwise privileged from disclosure shall not gain any privilege simply because such facts and other information may be shared in a joint defense communication. Although information may not be privileged, it is understood by the Parties that the joint defense, work product, and other applicable privileges protect against disclosure of: (a) the fact that particular joint defense communications have been made among the Parties; (b) the contents of such joint communications; and (c) any document reflecting or referring to such joint communications.

9. Parties Are Not Required to Share All Information. The Parties agree and recognize that information known to one Client or Defense Group member need not be shared with some or all other Parties to this Agreement at the former’s election.

10. Attorneys’ Duty to Zealously Represent Own Client. The Parties understand and acknowledge that each member of the Defense Group has an obligation to zealously represent his or her own Client. Thus, each member of the Defense Group may need to, and is free to take
action which may be contrary to the interests of other signatories to this Agreement. These actions include, but are not limited to: (a) advising his or her Client to cooperate with the government or any other entities; (b) generating and disclosing evidence or information to the government or third parties (apart from information obtained pursuant to this Agreement); and (c) cross-examining other Client-signatories at trial or other proceedings, should such Client-signatories testify in any proceeding.

11. Not an Agreement to Violate Any Law. This Agreement in no way is intended to encourage or commit any violation of law or unlawful interference with any official proceeding or investigation. Each Client and Defense Group member acknowledges that explanation and understanding.

12. Agreement Fully Explained. Each Defense Group member has fully explained the terms of this Agreement to his or her Client and is fully satisfied that the Client: (a) understands the terms; (b) agrees to abide by them; and (c) authorizes that attorney to execute this Joint Defense, Common Interest and Confidentiality Agreement.

13. Right to Terminate Participation: Termination Is Prospective Only. Any Client is free to withdraw from this Agreement at any time. In the event any Client decides to withdraw from this Agreement for any reason, that Client shall immediately notify the remaining signatories in writing of his or her withdrawal from this Agreement, which will thereupon be terminated; provided, however, that no such termination shall affect or impair the obligations imposed by this Agreement upon any Client or member of the Defense Group with respect to information previously furnished hereunder. Further, upon withdrawal of any Client, that withdrawing Client shall return all materials provided or produced under this Agreement, including any copies of such information or materials that such recipient person made or had made, or any documents such recipient has created reflecting or referring to the information or materials of a remaining Client or Defense Group member and shall remove and return all such information or materials from all electronic memory devices.

14. Potential Disputes Among the Parties to This Agreement. If there is a dispute among the Parties or any of them in the future, no signatory shall make use of information or materials provided to that signatory under this Agreement in that dispute, unless expressly agreed to and permitted by the Parties or unless the Party seeking to use the information or materials obtained the information or materials from an independent source without violation of this agreement or any other legal duty or obligation. Nor shall any oral or written statements covered by this Agreement be deemed an admission in any civil, alternative dispute resolution, criminal, administrative or other proceeding arising from that dispute or otherwise. However, nothing in this Agreement shall bar a Client or Defense Group member from using in any subsequent dispute any unprivileged information obtained through a legitimate discovery mechanism during the course of that dispute. The Parties further agree to enter into a stipulated protective order in any subsequent proceedings between or among them or any of them which protects all information and materials from disclosure to third parties. The Parties agree that the sharing of any information or materials shall not be grounds for disqualification of undersigned counsel in any current or subsequent civil, alternative dispute resolution, criminal, administrative or other proceeding among the Parties or any of them, and each Party knowingly and intelligently waives the right to rely on the sharing of information or materials as the basis for disqualification of undersigned counsel in any subsequent disputes among any of the Parties.

15. Replacement of Counsel. If a member of the Defense Group is later replaced by successor counsel, the signatories hereto will continue to protect the confidentiality of all
information and materials received from a Client or Defense Group member, as if undersigned counsel were still actively representing his former Client. The Parties agree to use best efforts to get successor counsel to sign this Agreement. Successor counsel shall be bound by the provisions of this Agreement to the same extent and in the same manner as his predecessor counsel, unless and until the Clients and Defense Group members execute a new agreement that supersedes and replaces this Agreement. The undersigned counsel withdrawing from this Agreement agrees to either destroy information or materials provided or produced under this Agreement or provide such information or materials to successor counsel.

16. Continuance of Agreement. This Agreement shall continue in effect notwithstanding any conclusion or resolution as to any Client in any pending or future civil, alternative dispute resolution, criminal, administrative or other proceeding arising from or relating to it, including any appeals or collateral litigation related to the Current Litigation. Each of the Parties agrees that it will continue to be bound by this Agreement following any such conclusion or resolution.

17. Non-Waiver. Any waiver in any particular instance of the rights and limitations contained herein shall not be deemed, and is not intended to be, a general waiver of any rights or limitations contained herein and shall not operate as a waiver beyond the particular instance.

18. Entire Agreement. This Agreement constitutes the entire agreement among the Parties regarding the Parties' joint defense agreement and supersedes all prior or contemporaneous agreements, representations or understandings with respect thereto.

19. Amendment. This Agreement may not be modified, altered, amended, or otherwise changed except pursuant to an instrument in writing signed by undersigned counsel or successor counsel and all of the Parties.

20. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original.

21. Construction. None of the Parties shall be considered to have been the drafter of this Agreement or any of its provisions for the purpose of any statute, case law or rule or interpretation or construction that would or might cause any provision of this Agreement to be construed against the drafter of this Agreement.

22. Severability. Any provision hereof which is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof and without affecting the validity or enforceability of any provision in any other jurisdiction. Where provisions of any law or regulation resulting in such prohibition or unenforceability may be waived they are hereby waived by each Client and member of the Defense Group to the full extent permitted by law so that this Agreement shall be deemed a valid, binding agreement, enforceable in accordance with its terms.

23. Notice. Any and all notices, requests, demands and other communications required or otherwise contemplated to be made under this Agreement shall be in writing and shall be deemed to have been duly given (i) if delivered personally, when received; or (ii) if transmitted by facsimile or email, upon receipt of confirmation. All such notices, requests, demands and other communications shall be addressed as follows (or to such other address as may be specified in writing and delivered in accordance with this section):
24. Specific Remedies to Enforce Confidentiality. Each of the Parties acknowledges that disclosure of any communication in violation of this Agreement will cause all Parties to this Agreement to suffer irreparable harm for which there is no adequate legal remedy. Each of the Parties acknowledges that immediate injunctive relief is an appropriate and necessary remedy for any violation or threatened violation of this Agreement.

25. Choice of Law and Forum. This Agreement and the rights and obligations of the Parties hereunder shall be governed by, and construed and interpreted with, the laws of the State of _________, without regard to conflict of law principles. The Parties agree that the exclusive venue and jurisdiction for any disputes, actions or conflicts with respect to this Agreement shall be the courts of the State of _________, located in ______________.

26. Application. This Agreement is binding upon, and shall inure to the benefit of, the parties hereto and their respective agents, employees, representatives, officers, directors, subsidiaries, assigns, heirs, executors, administrators, insurers, and successors in interest.

AGREED AND ACCEPTED:

[ Insert Signature Blocks. ]
APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT __________

[PLAINTIFF],

Plaintiff,

v.

[DEFENDANT],

Defendant.

CASE NO. [CASE #]

[MODEL] AGREEMENT REGARDING DISCOVERY OF ELECTRONICALLY STORED INFORMATION AND [PROPOSED] ORDER

The parties hereby stipulate to the following provisions regarding the discovery of electronically stored information ("ESI") in this matter:

A. General Principles.

1. An attorney's zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.

2. The proportionality standard set forth in Fed. R. Civ. P. 26(b)(1) must be applied in each case when formulating a discovery plan. To further the application of the proportionality standard in discovery, requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as possible.

B. ESI Disclosures.

Within 30 days after the Rule 26(f) conference, or at a later time if agreed to by the parties, each party shall disclose:

1. Custodians. The five custodians most likely to have discoverable ESI in their possession, custody or control. The custodians shall be identified by name, title, connection to the instant litigation, and the type of the information under his/her control.

2. Non-custodial Data Sources. A list of non-custodial data sources (e.g. shared drives, servers, etc.), if any, likely to contain discoverable ESI.

3. Third-Party Data Sources. A list of third-party data sources, if any, likely to contain discoverable ESI (e.g. third-party email and/or mobile device providers, "cloud" storage, etc.) and, for each such source, the extent to which a party is (or is not) able to preserve information stored in the third-party data source.
4. Inaccessible Data. A list of data sources, if any, likely to contain discoverable ESI (by type, date, custodian, electronic system or other criteria sufficient to specifically identify the data source) that a party asserts is not reasonably accessible under Fed. R. Civ. P. 26(b)(2)(B)(C)(i). [Section (C)(3)(a)(ii) below sets forth data sources and ESI which are not required to be preserved by the parties. Those data sources and ESI do not need to be included on this list.]

C. Preservation of ESI.

The parties acknowledge that they have a common law obligation to take reasonable and proportional steps to preserve discoverable information in the party’s possession, custody or control. With respect to the preservation of ESI, the parties agree as follows:

1. Absent a showing of good cause by the requesting party, the parties shall not be required to modify the procedures used by them in the ordinary course of business to back-up and archive data; provided, however, that the parties shall preserve all discoverable ESI in their possession, custody or control.

2. All parties shall supplement their disclosures in accordance with Rule 26(e) with discoverable ESI responsive to a particular discovery request or mandatory disclosure where that data is created after a disclosure or response is made (unless excluded under (C)(3) or (D)(1)-(2) below).

3. Absent a showing of good cause by the requesting party, the following categories of ESI need not be preserved:

   a. Deleted, slack, fragmented, or other data only accessible by forensics.

   b. Random access memory (RAM), temporary files, or other ephemeral data that are difficult to preserve without disabling the operating system.

   c. On-line access data such as temporary internet files, history, cache, cookies, and the like.

   d. Data in metadata fields that are frequently updated automatically, such as last-opened dates (see also Section (E)(5)).

   e. Back-up data that are substantially duplicative of data that are more accessible elsewhere.

   f. Server, system or network logs.

   g. Data remaining from systems no longer in use that is unintelligible on the systems in use.

   h. Electronic data (e.g., email, calendars, contact data, and notes) sent to or from mobile devices (e.g., iPhone, iPad, Android, and Blackberry devices), provided that a copy of all such electronic data is routinely saved elsewhere (such as on a server, laptop, desktop computer, or “cloud” storage).
D. Privilege

[The parties should confer regarding the nature and scope of privilege logs for the case, including whether categories of information may be excluded from any logging requirements and whether alternatives to document-by-document logs can be exchanged.]

1. With respect to privileged or work-product information generated after the filing of the complaint, parties are not required to include any such information in privilege logs.

2. Activities undertaken in compliance with the duty to preserve information are protected from disclosure and discovery under Fed. R. Civ. P. 26(b)(3)(A) and (B).

3. Information produced in discovery that is protected as privileged or work product shall be immediately returned to the producing party, and its production shall not constitute a waiver of such protection, if: (i) such information appears on its face to have been inadvertently produced or (ii) the producing party provides notice within 15 days of discovery by the producing party of the inadvertent production.

E. ESI Discovery Procedures

1. On-site inspection of electronic media. Such an inspection shall not be permitted absent a demonstration by the requesting party of specific need and good cause or by agreement of the parties.

2. Search methodology. [The Court presumes that in the majority of cases, the use of search terms will be reasonably necessary to locate or filter ESI likely to contain discoverable information.] The parties shall timely attempt to reach agreement on appropriate search terms, or an appropriate computer- or technology-aided methodology, before any such effort is undertaken. The parties shall continue to cooperate in revising the appropriateness of the search terms or computer- or technology-aided methodology.

In the absence of agreement on appropriate search terms, or an appropriate computer- or technology-aided methodology, the following procedures shall apply:

a. A producing party shall disclose the search terms or queries, if any, and methodology that it proposes to use to locate ESI likely to contain discoverable information. The parties shall meet and confer to attempt to reach an agreement on the producing party’s search terms and/or other methodology.

b. If search terms or queries are used to locate ESI likely to contain discoverable information, a requesting party is entitled to no more than 5 additional terms or queries to be used in connection with further electronic searches absent a showing of good cause or agreement of the parties. The 5 additional terms or queries, if any, must be provided by the requesting party within 14 days of receipt of the producing party’s production.
c. Focused terms and queries should be employed; broad terms or queries, such as product and company names, generally should be avoided. Absent a showing of good cause, each search term or query returning more than 250 megabytes of data are presumed to be overbroad, excluding Microsoft PowerPoint files, image and audio files, and similarly large file types.

d. The producing party shall search both non-custodial data sources and ESI maintained by the custodians identified above.

3. Format. The parties agree that ESI will be produced to the requesting party with searchable text, in a format to be decided between the parties. Acceptable formats include, but are not limited to, native files, multi-page TIFFs (with a companion OCR or extracted text file), single-page TIFFs (only with load files for e-discovery software that includes metadata fields identifying natural document breaks and also includes companion OCR and/or extracted text files), and searchable PDF. Unless otherwise agreed to by the parties, files that are not easily converted to image format, such as spreadsheet, database and drawing files, should be produced in native format.

4. De-duplication. The parties may de-duplicate their ESI production across custodial and non-custodial data sources after disclosure to the requesting party.

5. Metadata fields. If the requesting party seeks metadata, the parties agree that only the following metadata fields need be produced: document type; custodian and duplicate custodians; author/from; recipient/to, cc and bcc; title/subject; file name and size; original file path; date and time created, sent, modified and/or received; and hash value.

AGREED AND ACCEPTED this ___ day of __________, 20___

[ INSERT SIGNATURE BLOCKS FOR ALL PARTIES ]

Based on the foregoing, IT IS SO ORDERED.

Dated: ______________________

__________________________
The Honorable ______________

UNITED STATES DISTRICT JUDGE

Additional Provisions for More Complex Cases:

In addition to the provisions set forth in the Model ESI Agreement above, parties may find the following provisions appropriate and useful in addressing more complicated ESI discovery issues. The complexity of ESI discovery varies from case to case and is not necessarily tied to the number or size of the parties or the amount in controversy. The additional provisions below are intended to assist parties in anticipating and addressing early on more complicated ESI discovery issues but may not be appropriate or necessary in every case. The following provisions are intended as suggested provisions from which parties may pick and choose, taking into consideration the needs of the particular case.
1. Search methodology. Upon reasonable request and if appropriate for the particular case, a party shall also disclose information relating to network design, the types of databases, database dictionaries, the access control list and security access logs and rights of individuals to access the system and specific files and applications, the ESI document retention policy, organizational chart for information systems personnel, or the backup and systems recovery routines, including, but not limited to, tape rotation and destruction/overwrite policy.

2. Format.

a. Each document image file shall be named with a unique Bates Number (e.g., the unique Bates Number of the page of the document in question, followed by its file extension). File names should not be more than twenty characters long or contain spaces. When a text-searchable image file is produced, the producing party must preserve the integrity of the underlying ESI, i.e., the original formatting, the metadata (as noted below) and, where applicable, the revision history. The parties shall produce their information in the following format: single-page images and associated multi-page text files containing extracted text or with appropriate software load files containing all requisite information for use with the document management system (e.g., Concordance® or Summation®), as agreed to by the parties.

b. If appropriate to the particular case, the parties shall consider whether or not the full text of each electronic document shall be extracted (“Extracted Text”) and produced in a text file. If the parties so agree, the Extracted Text shall be provided in searchable ASCII text format (or Unicode text format if the text is in a foreign language) and shall be named with a unique Bates Number (e.g., the unique Bates Number of the first page of the corresponding production version of the document followed by its file extension).

c. If a document is more than one page, the unitization of the document and any attachments and/or affixed notes shall be maintained as they existed in the original document.

3. Metadata fields. The parties are to confer and agree on whether metadata is to be produced or may be excluded from discovery. Metadata may not be relevant to the issues presented or, if relevant, may not be reasonably subject to discovery, or may be subject to cost-shifting, considering the factors set forth in Fed. R. Civ. P. 26(b)(2)(C). For example, if one party is producing only paper documents, and the other party is producing ESI, the parties should confer on whether the additional cost and burden of producing metadata by the party producing ESI is reasonable or should be shifted under the facts and circumstances of the case. If the parties agree to produce metadata, and unless otherwise agreed, each party shall produce the following metadata associated with ESI to the extent reasonably accessible: (a) the author(s) of the ESI; (b) the recipient(s) of the ESI; (c) the date the ESI was created; and (d) the source from which the ESI was produced. The “source” of ESI shall be the name of the person who was the custodian of the ESI or, if the name of a person is not available, the storage location (e.g., “Regulatory Shared Drive-Wayne, PA”). This information will be included in the “Author,” “Recipient,” “Date,” and “Source” fields (respectively) for each document in the load file associated with the document images. Although it is presumed generally that the above list of metadata fields will be provided, the list of metadata fields is intended to be flexible and may be changed by agreement of the
parties, particularly in light of advances and changes in technology, vendor and business practices.

4. Hard-Copy Documents. If the parties elect to produce hard-copy documents in an electronic format, the production of hard-copy documents shall include a cross-reference file that indicates document breaks and sets forth the Custodian or Source associated with each produced document. Hard-copy documents shall be scanned using Optical Character Recognition technology and searchable ASCII text files shall be produced (or Unicode text format if the text is in a foreign language), unless the producing party can show that the cost would outweigh the usefulness of scanning (for example, when the condition of the paper is not conducive to scanning and will not result in accurate or reasonably useable/searchable ESI). Each file shall be named with a unique Bates Number (e.g., the Unique Bates Number of the first page of the corresponding production version of the document followed by its file extension).

5. Privilege Log Based on Metadata. The parties agree that privilege logs shall be provided 30 days after the date agreed upon for final production in this matter. The privilege log shall include a unique identification number for each document and the basis for the claim (attorney-client privileged or work-product protection). For ESI, the privilege log may be generated using available metadata, including author/recipient or to/from/cc/bcc names; the subject matter or title and date created. Should the available metadata provide insufficient information for the purpose of evaluation the privilege claim asserted, the producing party shall include such additional information as required by the Federal Rules of Civil Procedure.
APPENDIX C
BIOGRAPHIES

**Joseph S. Goode** is the Managing Partner of Laffey, Leitner & Goode LLC, a trial law firm based in Milwaukee, Wisconsin. Joe’s practice is focused on franchise and dealership law and business litigation across various economic sectors.

**Laura Heltebran** is Senior Vice President and Deputy General Counsel for Hilton Worldwide in McLean, Virginia. Laura manages the global litigation, technology, employment and benefits practice areas, and also oversees global operations for the Hilton Legal Department.