In recent years, several high-profile employment discrimination class actions have been filed against Fortune 500 companies, including The Coca-Cola Company, Microsoft Corporation, Boeing, The Home Depot, Inc., Texaco, Mitsubishi Motors, Lockheed Martin, and Southern Company. These cases have increasingly drawn attention from the public and the press, particularly in light of the historic $192.5 million settlement in the Coke case. Because much of the public focus has been on the success of these cases (especially the Coke and Texaco settlements—each of which eclipsed $150 million), employees and plaintiffs’ counsel may be led to believe that employment discrimination class actions are generally successful and often result in large settlements for monetary and injunctive relief. The facts, however, suggest the contrary.

In preparation for the May 2001 Fairness Hearing in the Coke case, plaintiffs’ counsel conducted a study of all reported employment discrimination class action decisions issued in federal courts between January 1, 1998, and May 3, 2001, to determine the percentage of such cases that were certified as class actions. The study found that nationwide, of 58 reported decisions involving rulings on motions for class certification in the employment context, courts denied certification in 37 instances, or 64% of the time. Of 39 reported decisions involving rulings on motions for class certification in the employment context and allegations of race discrimination, courts denied certification in 27 instances, or 69% of the time.

While these statistics are daunting, they may nevertheless represent the “heyday” of successful class action suits. Indeed, courts appear to becoming increasingly more hostile toward class action employment discrimination cases and are creating additional barriers that must be overcome before a class action employment discrimination case is certified. In short, employment discrimination class actions are not as successful as many may be led to believe. Accordingly, litigating a class action employment case can be a risky venture. Yet counsel can minimize that risk by providing tools and information that will help to make the decision whether to litigate a particular employment discrimination case as a class action.

Case Selection: Critical to Class Action

Litigating a class action employment discrimination case often entails a significant investment of time, money, and resources. Employment discrimination class actions typically take years, if not decades, to resolve to judgment. As the former Fifth Circuit observed in discussing a settlement that took six years to achieve:

[a] review of the leading cases from this Circuit involving litigation of employment discrimination in class actions profitably shows the length of time and expense which

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Opening the Pipeline for Minorities in the Legal Profession

BRETT J. HART AND BURNADETTE NORRIS-WEEKS
CO-CHAIRS OF THE MINORITY TRIAL LAWYER COMMITTEE

We recently attended a conference entitled Diversity in the Legal Profession: Opening the Pipeline, presented by the ABA Council on Racial and Ethnic Justice and co-sponsored by the Section of Litigation. Lawyers from a wide range of backgrounds attended the conference. They included partners in large and small law firms, general counsels of Fortune 500 companies, law professors, government/public sector counsel, and managing partners from national and international law firms. Programs and discussions covered topics such as the underlying reasons for the overall lack of diversity in law firms and the importance of mentoring.

There was discussion that corporations are the new beneficiaries of the lack of law firm diversity. There are more minorities in-house than ever before. There was also discussion that large purchasers of legal services had not put diversity into practice. In other words, nothing will happen until there is a market penalty and cost associated with failing to embrace diversity.

Noteworthy comments were made by Veta Richardson, Executive Director of the Minority Corporate Counsel Association (MCCA). Richardson discussed MCCA’s report entitled The Myth of Meritocracy: A Report on the Bridges and Barriers to Success in Large Law Firms. The MCCA report concludes that traditionally accepted benchmarks such as class rank, grade point average, participation on law review, and federal clerkships are not accurate indicators of law firm or professional success. According to MCCA’s research, compiled from interviews with senior and managing partners, the most common denominators for successful lawyers included producing consistently high-quality legal work; having mentors who assist in areas like getting high-visibility legal work, successful marketing, and generating revenue; exercising excellent judgment; and being proactive.

Several corporate general counsels stated clearly that we live in a very diverse society and that in order to provide the best possible legal services, the law firms must employ a diverse workforce. The message that quality and diversity are not mutually exclusive, but in fact go hand-in-hand, is finally being acknowledged at the highest levels of our profession.

While corporate law departments seem to be doing a far better job of achieving some measure of diversity, the prevailing sentiment was that corporate legal departments and law firms must reflect the goal of achieving diversity in their managers’ compensation processes. Developing a diverse workforce must be considered a “business imperative.”

One of Dennis Archer’s goals as President of the ABA is to improve diversity in the legal profession. As Chairs of the Minority Trial Lawyer Committee for the Section of Litigation, we totally support President Archer in pursuit of this objective. Although we represent different perspectives—one of us is an in-house counsel and the other is the owner of a small firm—we both fully recognize that, as President Archer states, the profession must get beyond simply discussing inclusion and take appropriate steps to ensure that minorities obtain full access to the “pipeline.” Regardless of the sector in which you practice, you are encouraged to pursue this same goal. Working together, we can make a difference!
“Right now, people of color comprise the world’s majority population. Soon, the United States’ census will reflect this global reality,” ABA President Dennis Archer recently noted. “We now do business with people from different cultures every day. As the so-called Third World countries continue to develop their economies and their governments, their people become more and more an economic force with which we will need to deal.

“Our corporations understand that, and have diversified their workforces to reflect the faces of their consumers both domestically and abroad.” Archer added in a statement he prepared in conjunction with the conference “Diversity in the Legal Profession: Opening the Pipeline.” The conference was convened in October 2003 by the ABA Council on Racial and Ethnic Justice and co-sponsored by the Section of Litigation.

In demonstration of their commitment to diversity, several major corporations participated in the conference, including:

◆ Abbott Laboratories
◆ BellSouth
◆ General Motors
◆ Merck & Co., Inc.
◆ Starbucks Coffee Company

These corporations—like many other consumers of legal services—are not only putting action behind their own words, but they are also urging the law firms they hire to earnestly embrace diversity. These five, along with more than 500 other corporations, have formally committed to the “Diversity in the Workplace Statement of Principle,” which originated from the BellSouth Diversity Committee in 1998.

◆ In the old days, partners might say, ‘We can’t hire a black or woman or Jew because our clients wouldn’t put up with it,”’ BellSouth General Counsel Charles Morgan stated in a Minority Corporate Counsel Association online article. “This [Statement of Principle letter] is the opposite. We are saying to the firms, ‘Not only do we permit it, we demand it.’ I hasten to add that the tone is not shrill or judgmental. But then again, we can decide whom we want to work with.”

◆ In October 2000, BellSouth formed the Diversity Planning & Implementation Team, which is composed of high-level managers representing various functional areas of the corporation. This group assists the Chairman’s Diversity Council in more clearly defining the direction of BellSouth’s diversity efforts. It also created the BellSouth Strategic Diversity Plan, which consists of 12 key strategies for the company. The group works closely with the recently appointed Chief Diversity Officer.

Abbott Laboratories

Abbott requests that the law firms it hires provide data every six months on the percentage of Abbott legal work that is performed by women and minorities. It also inquires about the overall numbers of women and minorities in the firm for that same six-month period.

Abbott takes targeted, concrete steps to recruit minority and women lawyers, e.g., works with minority- and women-owned search firms to identify women and minority talent; partners its Legal Division with minority lawyer organizations to publicize openings; solicits employee referrals from current minority lawyers.

In 2002, Abbott’s Board of Directors had 21.4% minorities and 14.3% women; among its corporate officers, 12.4% were minorities and 18.4% women; and its management consisted of 16.6% minorities and 35% women.

BellSouth

BellSouth continues to spearhead the “Diversity in the Workplace Statement of Principle” project, which originated from the BellSouth Diversity Committee in 1998.

◆ “In the old days, partners might say, ‘We can’t hire a black or woman or Jew because our clients wouldn’t put up with it,”’ BellSouth General Counsel Charles Morgan stated in a Minority Corporate Counsel Association online article. “This [Statement of Principle letter] is the opposite. We are saying to the firms, ‘Not only do we permit it, we demand it.’ I hasten to add that the tone is not shrill or judgmental. But then again, we can decide whom we want to work with.”

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Merck & Co., Inc.

The company’s Law Firm Retention and Billing Policy, includes the following comments on diversity:

◆ Diversity is a core value of Merck and is an important consideration in Merck’s hiring practices. Merck is also committed to encouraging diversity in the hiring practices of its outside law firms.

◆ A law firm’s success in representing Merck is enhanced when its lawyers possess the breadth of experiences, outlooks and ideas that enable them to communicate persuasively with the diverse population of regulators, judges and juries whose decisions affect Merck’s business.

◆ Merck also benefits from involvement of diverse lawyers performing
transactional work on its behalf because results will be enhanced when counsel have the resources and ability to collaborate with people from different backgrounds, integrate seemingly disparate perspectives and develop unique and creative approaches to problem-solving.

- In order to assist Merck in understanding the extent to which a law firm shares its commitment to workplace diversity, outside counsel provides to Merck the most current figures of minority and women attorneys that make up the firm.

- A law firm’s commitment to the important Merck core value of diversity will continue to play an integral part in Merck’s retention of the firm, and Merck will continue to evaluate the firm’s progress on this important issue by meetings and periodic requests for information updates. Accordingly, the ability of the firm to staff a Merck project with minority and women attorneys in substantive roles will be an important criterion in Merck’s evaluation of the firm.

**Starbucks Coffee Company**

*In its cover letter accompanying the “Diversity in the Workplace: A Statement of Principle,” Starbucks general counsel tells law firm partners, among other things:*

- Starbucks’ [diversity] interest is not limited to simply improving opportunities within our company; it extends to exploring ways to improve diversity within the legal profession as a whole. We are confident you share this commitment with us.

- One of the steps we are taking, as a department, to advance our interest in diversity is to identify the amount of our legal work that is being performed by women and those who have identified themselves as minority, disabled and/or gay attorneys.

- Please identify your partners and associates from these groups who are or could be working on Starbucks projects.

- We are also interested in learning what steps you are taking to ensure a diverse workplace.

**General Motors**

*In this program presentation, GM general counsel reported:*

- For the legal staff, the diversity of legal counsel representing GM is a business imperative, which is essential for the corporation’s success.

- GM’s diversity efforts are a metric linked to the overall compensation for senior leaders on the legal staff.

- GM’s diversity efforts will be a critical success link for any outside counsel that want to initiate, maintain or expand their business with GM.

- GM’s legal staff in the U.S. is approximately 20% ethnically diverse and 33% female. By the end of 2005, the GM legal staff expects its outside counsel representation to mirror its own legal staff, i.e., ethnically diverse attorneys providing 20% of its legal work and female attorneys providing 33% of its work.

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For more information on the conference, go to www. manningmedia.net/Clients/ABA/ABA275/ and www.abanet.org/randjustice/conference/home.html.

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**Diversity Development Database**

*Are you looking for ways to become involved—not only with the Minority Trial Lawyer Committee but also with the Section of Litigation as a whole?*

Tap into the Diversity Development Database at [www.abanet.org/litigation/committee/minority/home.html](http://www.abanet.org/litigation/committee/minority/home.html).

Complete the brief online form, including your practice areas and interest in:

- **Writing** for a Section publication, e.g., committee newsletters or book projects, such as the model jury instructions series;
- **Speaking** on a CLE panel;
- **Participating** in committee or Section leadership, e.g., co-chairing a subcommittee.

The Section has launched this Diversity Database to serve as a resource for identifying Section members who want to work on substantive projects. Not only does the Section benefit from more diversity among its active members, but you will also reap many positive returns on your investment of volunteer time in Section projects.

“Involvement in the Section will keep you current on the newest developments in litigation and will give you the opportunity to participate in shaping the future of our justice system,” says Section Chair Patricia Lee Refo. “You will meet and learn from extraordinary lawyers from around the country who will help you be an even better advocate for your clients. You will make friendships and forge professional relationships that will last a lifetime,” she adds.

With more than 70,000 members and as the largest Section within the ABA, the Section of Litigation may seem a bit daunting to anyone just getting started with active involvement. The Diversity Development Database makes it much easier to navigate your way and work on the projects that fit your interests.

Remember, go to the Committee’s homepage at [www.abanet.org/litigation/committee/minority/home.html](http://www.abanet.org/litigation/committee/minority/home.html) to include your information in the Section’s Diversity Development Database today!
Breaking the Barriers without Breaking the Bank
Business Reasons for Recruiting and Retaining Minority and Women Lawyers

BY KATHLEEN B. HAVENER

We all know the mantra of financial advisors: “Diversify your investments.” It is not news to anyone that maintaining a varied financial portfolio is key to growing and protecting your hard-earned nest egg. Sometimes it seems that only a handful of the leaders of our profession have learned, however, that exactly the same advice applies to law firms and corporate law departments. To grow and protect our customer or client base, we must diversify our investments in human capital—we must achieve and sustain diversity in our legal workforce.

Why Diversify?

No matter who we are or where we practice, from the family-owned business to the multinational corporation, from the two-person law office to the international law firm with lawyers by the hundreds, we interact with an extraordinarily diverse group of people. Customer, vendor, client, judge, and juror profiles are changing faster than the profession can respond. For our organizations to grow and profit, we must learn to build and maintain strong, mutually respectful relationships—both in our own organizations and with outside colleagues, customers, and clients. Given the rapidly changing demographics of the United States and the globalization of the legal marketplace, a policy of inclusion reflects the reality of the world around us.

Already, in these early years of the 21st century, individuals who are not white males constitute a large majority of American society and the American workforce. According to the Employment Policy Foundation’s 2002 report, “Challenges Facing the American Workplace,” women will outnumber men in management and professional jobs by the year 2030. Similarly, if the demographic trends of the past 30 years continue, the overall minority share of the population, and of the labor force, will increase to 40% of the total in the same timeframe. According to the Center for Women’s Business Research, the number of companies owned by women of color is growing at a rate four times faster than any other U.S. business sector. This enormous surge in the number of minority-women-owned businesses alone is indicative of the rapidly changing face of U.S. business. Right now, therefore, achieving diversity in our legal workforce is a strategic business necessity. And sustaining diversity will be a critical factor in gaining—and maintaining—a competitive advantage in the years to come.

Many of our law firms and corporate law departments overlook diversity as a factor that can both improve bottom-line profits now and secure competitive positions in the future marketplace. Our leaders often fail to nurture, encourage, or adequately finance initiatives to increase the number of minority and women attorneys in our own ranks. What does such inattention cost? What will it cost in the future? Aside from the mistrust, cynicism, and frustration it incurs in our present-day legal work settings, with the demographics of our society changing at such a rapid pace, if we do not find a way to make women and minorities integral members of our legal teams, it will not be long before we simply won’t have the legal talent we need to get the job done. We all need to understand—and teach others—that promoting diversity is not just “the right thing to do.” A diverse workforce is a competitive necessity for corporate law departments and law firms in the 21st century. In a knowledge-based economy and profession, people are what make an organization succeed—and diversity only increases knowledge.

Bottom-Line Reasons

In February 2003, the Section of Litigation presented a general counsel’s forum entitled “Breaking the Barriers Without Breaking the Bank: Business Reasons for Recruiting and Retaining Minority and Women Lawyers,” at the Committee on Corporate Counsel’s annual meeting. The forum, which was co-sponsored by the Minority Trial Lawyer committee, focused on the business reasons for law firms and corporate law departments to employ a legal workforce that better mirrors the customers and clients they serve. In many respects, the forum served as a crash course on the benefits of achieving sustainable diversity in legal personnel.

The panelists, who represented corporate law departments of some of the world’s most powerful and influential businesses and industries, explained the economic benefits of their companies’ commitments to diversity and why they expect the law firms they engage to share that commitment. More important, the panelists shared their viewpoints on the nuts and bolts of how we can promote diversity in our own ranks and what we can do to nurture an employment environment that is hospitable to minority and women lawyers.

Veta T. Richardson, executive director of the Minority Corporate Counsel Association, discussed the recent study “Creating Pathways to Diversity,” a research project she led. “The people at the top of legal organizations are starting to match the population at large,” Richardson noted. “There are now 63 women and 25 persons of color who lead the legal departments of Fortune 500 companies. Those numbers combine to represent 18% of all general counsel of Fortune 500 companies.” Moreover, Richardson pointed out,
“Case studies, including several out of Harvard Business School, have conclusively established that diverse problem-solving teams reach better solutions than homogenous groups, so it’s in the client’s best interest to push for diversity of representation,” both in corporate law departments and in the law firms they hire.

Panelist Martin J. Barrington, vice president and associate general counsel of Altria, formerly Philip Morris Companies, Inc., agreed. “Our law department doesn’t have a diversity plan just because it’s the right thing to do,” Barrington said. “[Rather], it is an essential element in our strategy to achieve our vision of being the best law department in the world. And it supports and makes actionable one of the department’s core values—the importance we place on people.”

Altria’s law department’s composition in the United States already roughly approximates the country’s demographics.

Panelist Catherine A. Lamboley, senior vice president, general counsel, and corporate secretary of Shell Oil Company, emphasized how Shell’s comprehensive diversity initiative emphasizes accountability—requiring concrete information from its legal service providers about the numbers of hours billed by minority and women lawyers on Shell matters.

Panelist Michelle Coleman Mayes, general counsel of Pitney Bowes and board chair of the N.O.W. Legal Defense and Education Fund, stressed the need for action. “We’ve been talking about this subject for far too long,” Mayes said, urging the mainstream of the profession to hear this message and implement change.

Asked by an audience member whether general counsel for a company whose chief executive officer or chief financial officer might face criminal liability should really be expected to hire a law firm based on its diversity record rather than on who can best defend against the allegations, panelist Meryl R. Kaynard, senior vice president and assistant general counsel of J.P. Morgan Chase & Company, insisted, “It’s not an either/or question.” Kaynard explained that a company can and should find appropriate representation from a firm that is working to improve its diversity profile and should choose a diverse firm over one that isn’t making the effort.

ABA Section of Litigation Chair Patricia Refo commented, “If anyone needs proof that the profession is changing, all you have to do is look at the ABA. Our President is African American. The Chair of the ABA’s largest section is me—a woman.” The need for the profession to respond to changing demographics can be summarized in a single line, Refo said: “This is not your father’s ABA.”

Bench Diversity

As diversity in the legal profession remains a hot topic in many quarters, the all-too-common “reason” given for diversity deficiencies also remains: “We couldn’t find a minority lawyer in this practice area.” When it comes to finding minority judges, that reasoning will no longer suffice (if it ever did).

The Directory of Minority Judges of the United States, 3rd ed., lists more than 4,000 judges, including federal and state judges, administrative law judges, administrative judges, commissioners, magistrates, referees, justices of the peace, and hearing officers performing adjudication functions.

The ABA Judicial Division’s Standing Committee on Minorities in the Judiciary, which publishes the directory, is now soliciting information for the fourth edition. To submit contact information on a minority judge in the United States, go to www.abanet.org/jd/qform.html.

The directory provides information on judges throughout the United States, including the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and the Northern Mariana Islands. Listings are categorized by race/ethnicity:

- African-American (Black) Judges
- Asian/Pacific Island Judges
- Hispanic Judges
- Native American Judges
- Tribal Court Judges

There are several sub-listings within each main category, including federal, state, state supreme court, appellate, trial court, administrative law, and juvenile court judges.

This reliable, comprehensive information compiled for easy access can complement diversity efforts in countless ways. The directory’s editor, Arthur L. Burnett, Sr., Senior Judge in the Superior Court of the District of Columbia, suggests several potential purposes for the directory:

- To seek internship and judicial clerkships (law students)
- To invite minority judges to appear at law schools as guest speakers and as moot court judges (law professors and law students)
- To motivate racial and ethnic minority students to consider becoming judicial law clerks, lawyers and ultimately judges or judicial officers
- To educate and inform the media of the increasing diversity of the judicial system
- To make the public aware of the extent that racial and ethnic minorities are participating in the dispensing of justice in America

For more information and to order the directory, call 800.285.2221 and request PC#523003201. Or visit the ABA Judicial Division Website at www.abanet.org/jd.
Demonstrative Evidence and Illustrative Materials

Demonstrative evidence, for our purposes, is any evidence other than the live testimony of a witness. In my opinion, everything that happens in a trial except witness testimony, lawyer arguments, and judicial remarks is governed by a single, coherent set of principles of presentation. This “other” can go by various names—demonstrative evidence, visual aids, writing on the blackboard, “publishing” the exhibit—but the same basic ideas govern, whatever the name. Works on demonstrative evidence are usually limited to charts, summaries, and graphic aids. They consider tangible objects a different subject and use of deposition still another area. I think the similarities of tactics and basic principles are greater than the differences. You might also call these things “tangible evidence.”

Wigmore reminded us:

We are to remember, then, that a document purporting to be a map, picture, or diagram is, for evidential purposes simply nothing, except so far as it has human beings’ credit to support it. It is mere waste paper—testimonial nonentity. It speaks to us no more than a stick or a stone. It can of itself tell us no more as to the existence of the thing portrayed upon than can a tree or an ox. We must somehow put a testimonial human being behind it (as it were) before it can be treated as having any testimonial standing in court. It is somebody’s testimony—or it is nothing.

Because neither the law nor lawyers know a bright line between demonstrative evidence and “other” illustrative materials, I am going to discuss them together. There is, I think, a continuum from the single document shown to the witness and then read to the jury, all the way to an interactive video reconstruction that may not be “in evidence” but may be exhibited to the jury as “illustrative” or even “argumentative.”

The question here is the impression that pictures and physical objects make on jurors, and for this purpose we can put aside the rules of evidence after a brief introduction.

I confess a strong bias, which I have often expressed, against getting too “high-tech.” Here are some examples of my bias in action. In a recent non-jury hearing, I wanted to focus on key admissions made by the sponsoring witness. I typed up about fifteen pages, in Times Roman 12-point type, on a standard piece of paper with generous margins and spacing. I had those enlarged—after trying some bombing cases, I no longer say “blown up”—at a copy service onto 2-foot by 3-foot foam boards. I used an easel in the courtroom to show them to the judge as I presented my case.

Another lawyer in the case wondered aloud why I did not use PowerPoint. I said that in an urban state court, where you have to use it.

According to Professor Wigmore, it is sometimes necessary to do a PowerPoint presentation, my message would be drowned by the medium. I would look too slick.

In the Terry Lynn Nichols case, we were compelled to work in a “state of the art” courtroom. I think our Luddite logic and tactics helped us in front of the jury. We relied on real exhibits and not electronic versions that flashed on a television screen and then were gone.

The courtroom was equipped with all the modern equipment. All the government’s exhibits had been digitized and placed on CD-ROMs. There were TV monitors at all key locations. An exhibit would appear on the monitors, so that jurors, counsel, parties, spectators, and the judge could see it. One had only to key in an exhibit number and there the exhibit would be.

I disdained all of this. The defense team brought out exhibits to court in boxes. To show a photograph, document, or tangible object, I would put it on the ELMO projector device. The exhibit then appeared on the monitors, but I could touch it, move it, put my finger on it to point to something. I was visibly handling the exhibit in the way the sponsoring witness had done at some time in the past, and as the jurors would be able to do when they retired to deliberate. I was making the process transparent, and (I hoped) empowering the jurors.

I admit that a slick PowerPoint presentation can get attention, and I would use that device in some settings, as I discuss later. For now, I insist only that the availability of a high-tech solution does not mean you have to use it.

Basic Principles

Five sets of rules govern the use of demonstrative evidence. I hold in my hand a chart. I want the jury to see it.

1. Is it authentic? That is, under Federal Rules of Evidence 901 through 903, is it what it claims to be? A letter is what it claims to be if the sender or recipient says so. A rock is what it claims to be if the sender or recipient says so. A gun is what it claims to be if it was found in such and such a place. A place. A rock is what it claims to be if it was found in such and such a place. A place.

2. Is it the “best evidence”? This question arises only for “writings” and “recordings,” but Federal Rule of Evidence 1001(1) makes those terms cover a lot of...
territory: they include any “form of data compilation.” Federal Rule of Evidence 1002 says: “To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise required in these rules or by Act of Congress.” Rule 1003 adds that “a duplicate is admissible to the same extent as an original unless (1) a genuine issue is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.” Rule 1003 thus creates a rebuttable presumption of admissibility, but one must still prove that the item offered is a duplicate.

3. Is the item admissible hearsay or admissible nonhearsay? If the exhibit contains statements of a witness other than while testifying, offered for the truth of the matter asserted, you must find a hearsay exception.

4. If the chart is a summary of other data, does it meet the standards of Federal Rule of Evidence 1006? This rule is one of the trial lawyer’s most valuable allies, especially when you want to present complex data persuasively.

5. Finally, does the chart tend to make a matter in issue more probable than it would be without the evidence, and can you overcome objections phrased as “cumulative, time-wasting, misleading or unduly prejudicial?”

If the chart does not meet these tests, you may still be able to use it as “illustrative,” in the opening statement, the closing argument, or even while the witness is on the stand. It will not be “in evidence,” however, and it will not go to the jury room. This is not necessarily a disadvantage, as we shall see, provided it brings to life evidence that the jury will have—and which they will be more likely to remember in deliberation.

The term “authentication” takes in a lot of territory. The Federal Rules of Evidence and their state counterparts have simplified the matter by suggesting easy ways to authenticate and by providing for self-authentication as to some documents.

If the exhibit is a stack of complicated charts that purport to summarize boxes and boxes of data, authentication by the proponent may require putting a live witness on the stand. By the same token, the opponent can challenge admissibility by showing that the summary is incorrect or misleading in some important way. Again, this is a tactical question. You may decide that the inaccuracies, in the venerable cliché, “go to weight and not to admissibility.” That means, as the opponent, you will lie behind the log and cross-examine about the errors when your turn comes. There is no better way to rattle an expert than to conduct a disciplined cross-examination that tears apart the factual basis of the expert’s conclusion.

The most sophisticated authentication problems arise in connection with computer animations, video recreations, and other complex representations of a past event. Consider, for example, a computer reconstruction of the last ten minutes of an airplane flight that ended in disaster when the airplane missed the approach, skidded off the runway, wound up in the bay, and caused death and injury. Using data about weather, the airplane’s flight recorder readings on speed, altitude, and so forth, with an overview provided by the recorded conversation between the cockpit and the tower, a computer animation expert can recreate on a video screen the conditions as the pilot “must have seen” them on approach. Drama may be added by using the flight recorder as a voice-over.

The computer animation technique, which results in a sort of cartoon, is subject to a high risk of error. First, there are simple calculation errors; the designer may have misinterpreted the data. Second, the designer must fill in some information gaps by making more or less educated assumptions. Third, the resulting animation can be very dramatic, heightening the effect of any errors and of all the choices made by the originator.

To figure out what demonstrative evidence you will use, first decide your goals, then choose the best technique for reaching them. Only then should you try to decide the details of admissibility. Admissibility theories and limits vary from jurisdiction to jurisdiction. Because the trial judge has so much discretion on what to permit, individual judges in the same courthouse may have widely differing attitudes.

I can recall having invested money and time in video- and computer-based demonstrative evidence in a complex case, only to have the trial judge say that he “didn’t believe in all that stuff.” Fortunately, the investment was not great, and we had already decided that high-technology evidence was not going to present the persuasive picture that we wanted our client to sponsor.

It is a good idea to have a file memo on admissibility and non-evidentiary use of illustrative materials, with cases on both sides. Then, when an issue arises, you can quickly generate a short memorandum of law to support use of your materials or oppose your opponent’s plans.

Agreement or Ruling?
In addition to reading up on evidence law and finding out the judge’s attitude toward your proposed techniques, you will have to figure out the mechanics of admissibility rulings. Some of the methods we will discuss are expensive and involve a lot of lead time. Your opponent knows this—and will delight in having the court limit or reject your presentation on the eve of trial.

Whatever demonstrative devices you choose to use, you must maintain the flexibility to change your presentation in light of trial events. In one case, the prosecutors had invested great sums in “story boards” to use in summation. These were not exhibits as such. They were colorful visual aids. Because of the lead time in making them, the boards had no doubt been planned and ordered before the trial was very far along.

The problem was that the trial evidence varied from the government’s confident expectation, so the summation based on the boards had a kind of unreality to it, a sort of disconnect. If a visual depiction will help you, then you must use a technique, such as PowerPoint, that you can edit easily.

The pretrial order in your case should provide for exchange of demonstrative evidence and other illustrative material, whether or not the party will seek to offer it in evidence. The timing of this exchange
can vary depending on what is involved. Obviously, a party cannot be expected to produce opening statement graphics until motions in limine are resolved.

With exchange, and with understanding of the judge’s attitude and the law, agreement usually follows on most items. Remember, if your opponent’s materials are misleading, you may want to withhold an objection in favor of conducting a scathing cross-examination of the sponsoring witness. If agreement fails, the trial judge or, in federal civil cases in some districts, the magistrate can make rulings before trial.

In every case, subject to the limits imposed by the pretrial order, there will be an exhibit that you want to introduce at trial or a graphic representation that you decide to use at the last minute. Then, as Professor Pat Hazel says, MIAO: Mark it; ask the witness to identify it; Accredit it by going through as many as necessary of the five steps set out above; and Offer it.

You usually mark exhibits with press-on stickers furnished by the court clerk or purchased from a legal supply store. The court is likely to have a preference about the exact kind of sticker to use. Check with the clerk’s office, and get a plentiful supply. Have a kind of sticker to use. Check with the clerk’s office, and get a plentiful supply. Have a kind of sticker to use. Check with the clerk’s office, and get a plentiful supply.

If your materials are computer-generated or otherwise not able to be marked in the traditional way, work out an arrangement with co-counsel and get approval of the judge or the courtroom deputy clerk. If you have not resolved admissibility issues before trial, the litany of admissibility is fairly standard.

Q. Ms. Bolger, I am showing you [or asking the bailiff to show you] what I have marked as Plaintiff’s Exhibit 3.

The exhibit has now been “marked.”

Q. [Continuing.] Is that a memorandum from your company?

You can lead on preliminary matters. If you are not permitted to lead, ask this:

Q. Without telling us what’s in there, what is Exhibit 3?

A. It is a memorandum from the vice-president of our company, EnviroScene, to the comptroller of EnviroScene.

Q. Is it the original memorandum?

A. No, it is a photocopy of the original.

Q. How do you know?

A. By looking at the distribution list at the bottom and noting that one of the names has been checked on this copy.

Q. Is that memorandum made in the regular course of business of EnviroScene?

A. Yes.

Q. Is it the regular course of business of EnviroScene to make and keep records like this?

A. Sure. That’s the way we keep track of things, with memos like this.

Q. Were the entries made on this memorandum done at or about the time of the events that are described, and by people with personal knowledge?

A. Sure.

Now we have almost finished “accrediting” a business record. An admission of a party opponent would require fewer questions. A chart summarizing many documents would require additional questions, first, to lay an authentication and hearsay exception to the underlying records and then to inquire if the witness knows that the chart or summary is accurate.

One step remains to “accredit.” You must show that the memo is relevant.

Q. What is this memo about?

A. It is the memorandum with the August sales figures on the Micromanager pocket PC.

Q. I offer Exhibit 3. [The court:] Without objection, it will be received.

Q. Your Honor, I have a copy of Exhibit 3 on a transparency, and I’d like to put it up now so that the jurors and Ms. Bolger can see it. [The court:] Move along, counsel.

Once a chart or other visual aid is in evidence or used in argument, you have a powerful motivation to keep it where the jurors will see it. Your opponents have the same motivation about their materials.

Basic Publication Strategy

I confess a love of archaism, the words our legal forebears passed along to us. So I catch myself saying, when I have successfully completed a MIAO, “Your Honor, may I publish this to the jury?” And she either says, “Why, certainly, counsel,” or, archly, “Well, you can sure show it to them.”

Jargon aside, you decide when the jury will see your exhibits, to enhance, not interrupt, the flow of testimony. The first limitation on your power is Federal Rule of Evidence 106, the “rule of completeness.” When you offer something in evidence, your opponent can ask that the rest of that something, or a related something, come in at the same time. When you show the jury the part you are interested in, your opponent may ask that some other part be shown at the same time, to make your presentation not misleading.

The trial judge has latitude in applying these principles. The paired arguments are “Your Honor, let each side try its case in its own way” and “Your Honor, let’s not mislead the jury by unduly one-sided presentations.”

Suppose your witness has just identified an important letter. What are you going to do with it? Don’t pass it to the jurors. Even if the judge would let you stop everything while they all read it, all the jurors but one would be unoccupied at any given moment. You could make 12 copies and pass them out, so that everybody could read at once. Don’t laugh; this technique may sometimes make sense.

The best way to “publish” is to have the witness read aloud the portion you want to emphasize while you simultaneously display that portion on a screen. You have choices about handling exhibits, and your choices influence the kind of graphic material you decide to use. There is an industry of graphics/demonstrative evidence/illustrative material specialists. The approaches, techniques, and fee structures of these outfits vary widely. Some of the best of them are members of the Demonstrative Evidence Specialists Association (DESA). Some DESA members are first-rate, but I would not retain anybody to help you with graphics until you know the story of your case. Much money and time spent on visual evidence is a substitute for thinking about how to try your case. I am an experienced procrastinator, and have a lot of on-the-job training in it, so I know whereof I speak.

A final word about publication: No complicated experiments in the courtroom, please. The device you or your expert builds to go whiz, pop, or bang will fail in the jury’s presence. Do the experiment under controlled conditions, and videotape it.

For more information and to order Examining Witnesses, visit the Section’s online bookstore (www.abanet.org/litigation/pubs/home.html) or call ABA Service Center at 1.800.285.2221 and order PC: 5310329; $110 Section of Litigation members and $125 for non-members.
Class Actions

Continued from page 1

must be incurred before the dust of combat has finally settled.5

United States District Court Judge Richard Story reconfirmed the Fifth Circuit’s finding in his order approving the settlement in Coke:

The testimony of the mediator, evidence submitted by Class Counsel, and the experience of the Court establish that cases such as this typically take years, if not decades, to resolve to judgment. (citations omitted). Indeed, a credible projection for litigating this case through class certification and Stage I and Stage II trials, not to mention multiple opportunities for appeal, is ten years from the date of filing.6

The substantial investment of time associated with litigating a class action employment discrimination case is only rivaled by the sizeable amount of money it takes to pursue these cases to judgment. For example, the Coca-Cola racial discrimination suit, which was settled only one year after it was filed, cost more than $1.5 million to litigate. Not surprisingly, given this significant time and expense (and the concomitant risk), case selection is one of the critical elements in this practice area.

There are at least three general questions that need to be asked, investigated, and resolved before deciding whether to undertake a class action employment discrimination case:

1. Are there adequate class representatives?
2. Are there common employment policies and practices at issue, thereby making the claims of the class representatives common and typical of the members of the proposed class?
3. Is there evidence of class-wide discrimination?

Are There Adequate Class Representatives?

Answering this question involves primarily the same analysis that is required whenever counsel is faced with the decision of whether to pursue a claim, regardless of the subject matter. Among other routine investigations, counsel must examine the merits of the proposed class representatives’ claims and ensure that any meritorious claims are timely. This investigation is not only important to the issue of their adequacy as class representatives, but it is also imperative to the viability of the action in the event certification is denied. In other words, the case should be sufficiently strong that, even if it does not proceed as a class action, going forward on individual claims makes sense. Major considerations in this regard are the prospects of recovering compensatory and/or punitive damages, in addition to back pay, and whether any cap on such damages applies.7

Unlike the typical personal injury or breach of contract claim—which generally involves an analysis focusing primarily (if not solely) on the merits of the potential plaintiff’s claims—class action employment discrimination cases require additional considerations that are nearly unique to this context.

One of these considerations involves the class representative’s motivation for bringing the suit as a class action. Is the potential plaintiff’s motivation to make additional money by leveraging a class claim? Or, is the potential plaintiff motivated to change the company’s policies and practices through injunctive relief? A simplistic, but surprisingly effective way of conducting this measurement is by asking direct questions, such as “what do you hope to achieve from this case?” and “what were your motivations for seeking an attorney?” Oftentimes, the best class representatives are those motivated by altruistic goals, such as making certain that future minorities are not treated in the same manner that they were.

If, after conducting this inquiry, counsel believes that the potential plaintiff’s sole or primary goal is monetary relief, then use of the potential plaintiff as a class representative may warrant reconsideration. With money as a main motivator, such a class representative will often conflict with plaintiffs’ counsel whose primary goal is to seek the best result for the class as a whole. In particular, conflicts may arise because a class representative is sometimes asked to accept a lower monetary award than she may obtain in an individual suit, given a class representative’s fiduciary duty not to benefit herself over absent class members.8

A second consideration unique to class cases involves analyzing whether the plaintiffs’ claims are certifiable, regardless of their underlying individual merits. This consideration is necessary because class actions present a hurdle—certification—that is not present in most plaintiffs’ cases. In a personal injury case, for example, the plaintiff is assured that, if the factual and legal merits of his case are sufficiently strong to withstand dismissal or summary judgment, the plaintiff will be able to present his claims to a jury and will have the opportunity to recover compensatory and possibly punitive damages. In the class action context, however, having an individual case that can withstand dismissal or summary judgment is no guarantee that the plaintiff will (in a representative capacity, as opposed to an individual capacity) have the opportunity to reach a finder-of-fact. The plaintiffs must also be able to persuade the court to certify the case as a class action.

Are There Common or Typical Claims?

The second question that must be resolved is “are the claims of the proposed class representatives common or typical of the members of the proposed class?” Federal Rule 23(a)(2) requires that, as a prerequisite to certification, a proposed class representative must show that “there are questions of law or fact common to the class.” In the class action employment discrimination context, this often involves the question of whether there are employment policies or practices that affect each member of the proposed class.9 Investigating this question involves looking at the employer’s policies and practices with respect to promotions, compensation, performance evaluations, hiring, termination, discipline, handling complaints of discrimination or any other employment action(s) raised by the potential suit to determine whether they apply to some or all of the members of the class. If they do apply, are there any inadequacies therein that cause, foster, or otherwise result in discrimination?

As a practical matter, there are at least two basic ways to conduct this investigation. First, review employee handbooks, manuals, and other policies the employer disseminates to employees. These materials will provide a sense of the employer’s stated policies and whether they are commonly applied among members of the proposed class. Second, when conducting
interviews with prospective class members (which are typically conducted to assess liability issues), inquire about what policies and procedures governed or contributed to the adverse employment actions at issue. Such inquiry assists in determining how policies operate in practice and how particular policies and practices affect employees in the protected class.

In conducting this part of the investigation, be aware that the existence of a common policy of subjective, discretionary decision-making can establish commonality that supports class certification. This point is important because many employers have adopted decentralized, subjective decision-making processes for awarding promotions and compensation.

Is There Evidence of Class-Wide Discrimination?

This is often the most difficult question to answer. Examining this issue, however, is of paramount importance to ensure that Rule 23(a)’s commonality requirement can be met by showing that the claims of discrimination stem from a common policy or practice, as opposed to being the result of a few isolated incidents.

There are two primary means of conducting an investigation to determine whether allegations of discrimination involve a class-wide or isolated problem. Start with a Freedom of Information Act (FOIA) request to the Office of Federal Contract Compliance Programs (OFCCP). It is particularly useful to request all conciliation agreements and notices of violations between the OFCCP and the potential defendant employer.

The Southern Company lawsuit provides an example of the type of critical information that a FOIA request can provide. Prior to agreeing to litigate the Southern Company case, plaintiffs’ counsel submitted a FOIA request to the OFCCP, requesting all notice of violations and conciliation agreements between Southern Company (and its subsidiaries) and the OFCCP entered into within the past seven years. That request revealed the existence of a conciliation agreement between the OFCCP and Georgia Power Company (Southern Company’s largest subsidiary), which included, inter alia, findings that “under-representation of minorities . . . exists in several key areas” and that the company “failed to ensure that positions held by minorities and women are at salary levels comparable to non-minority and male peers.” These findings provided significant information to plaintiffs’ counsel regarding the scope of the alleged disparities.

The second primary means of determining the breadth of alleged discriminatory conduct involves interviewing current and former employees. Inquiring about each employee’s job level, department, and supervisor should assist counsel in determining whether the alleged discriminatory conduct is company-wide or limited to a certain area (such as managerial level and above) or to a certain manager in the company. As noted above, inquiry into whether employees are subject to the same employment policies and practices, as well as whether those policies and practices have been the cause of or have fostered the alleged discrimination, should also assist in determining whether the commonality requirement of Rule 23(a)(2) can be satisfied. Employees should be able to provide counsel with copies of documents to aid in this determination.

In sum, asking and answering the foregoing questions provide counsel with useful tools when making the decision whether to litigate a class action employment discrimination case. By answering these questions, counsel can minimize—though not eliminate—the chance of losing a substantial amount of time and money pursuing a class action employment discrimination case that is unlikely to be certified.


Endnotes

3. The study included only those cases reported on Westlaw and thus did not include unreported opinions since they are not systematically obtainable. See, e.g., Allison v. Citgo Petroleum Corp., 151 F.3d 402 (5th Cir. 1998).
4. See, e.g., Saltus v. Citi Petroleum Corp., 151 F.3d 402 (5th Cir. 2000).
5. Cotton v. Hinton, 559 F.2d 1331 (5th Cir. 1977); see also, e.g., Pettway v. American Cast Iron Pipe Co., 567 F.2d 1157, 1168 (5th Cir. 1978). (describing how “length of litigation in complex Title VII class actions often rivals that of even the most notorious antitrust cases” and that “[i]n the instant case, we encounter another judicial paleolithium museum piece”) (case originally filed in 1966); Hartman v. Duffey, 88 F.3d 1232, 1234 (D.C. Cir. 1996), cert. denied, 520 U.S. 1234 (1997) (noting that sex discrimination class action “appears before us on appeal for the third time” after “working its way up and down the system for nearly 20 years”).
8. See, e.g., Holnes v. Continental Can Co., 706 F.2d 1141, 1147 (11th Cir. 1983) (stating that careful scrutiny by the court is “necessary to guard against settlements that may benefit the class representatives or their attorneys at the expense of absent class members.”)
10. Moreover, even substantial factual differences do not destroy standing or typicality when there is a “strong similarity of legal theories.” Murray v. Auslander, 244 F.3d 807, 811 (11th Cir. 2001).
11. See Cox v. American Cast Iron Pipe Co., 784 F.2d 1546, 1557 (11th Cir.) (“[O]nly it is clear from the interrogatories that plaintiffs allege no policy of discrimination; indeed, the ‘individual acts’ they cite could very likely be manifestations of such a policy. Among plaintiffs, ‘[a]lllegations of similar discriminatory employment practices, such as . . . [the] use of entirely subjective personnel processes that operated to discriminate, would satisfy the commonality and typicality requirements of Rule 23(a)(2)’”) (citations omitted), cert. denied, 479 U.S. 883 (1986). See also Shores, 1996 WL 407850 at **6-7 (“Public’s policy of delegating hiring and promotion decisions to managers, who make those decisions on the basis of subjective criteria, is a common course of conduct. Plaintiffs allegation that this course of conduct results in a discriminatory practice is not adequate to meet the commonality requirement of Rule 23(3).”); Corrida v. Metro-North Commuter R.R., 191 F.3d 283, 292 (2d Cir. 1999), cert. denied, 529 U.S. 107 (2000); Cox, 784 F.2d 1546; Ingram v. The Coca-Cola Co., 200 F.R.D. 685 (N.D. Ga. 2001).
Legal Services

Continued from page 1

Providing Limited Scope Legal Assistance to Clients

There is no single “right” approach to providing limited scope assistance to clients. There are, however, several common steps that experienced limited-service lawyers recommend, and follow in their practices.

Informational Materials: Consider providing self-help informational materials to prospective clients in your waiting room, through the mail, or online. Forrest Mosten provides an excellent description of the ways in which lawyers can adapt their offices, and the information they provide, to market limited representation and to begin to help litigants to help themselves.¹ The information includes explanations of limited representation, descriptions of ways in which lawyers and clients work together in limited-service partnerships, summaries of substantive and procedural law within the lawyer’s specialty areas, and interview questionnaires and forms with instructions on how to use them. This helps prospective clients to understand limited representation, consider whether it is right for them, and, in some cases, to begin to help themselves to resolve their problems.

Field of Practice: Stay within your field of practice. You must be competent in your field before you provide any type of legal service to a client. Limited services are no exception. The acceptable limitation is on the scope of the service, not on one’s competence to provide it.²

Conflicts: Check for them. You will be establishing attorney-client relationships with those to whom you provide legal services, even if the services are very limited. Lawyers owe the same duties of loyalty, confidentiality, diligence, and competence to limited-service clients as they do to full-service clients. Avoiding conflicts of interest is a component of the duties of loyalty and confidentiality.

The traditional conflicts of interest rules apply to the types of limited representation that most lawyers provide, even though brief client relationships usually mean more clients.

Consider using limited-service retainer agreements.³ We recommend adding an additional conflicts of interest provision that (1) states that the lawyer has conducted a conflicts of interest inquiry, which has revealed no conflicts, and (2) describes what will happen if, subsequently, a conflict is discovered or arises.

Initial Interview: Make it thorough and comprehensive. The Colorado State Bar Association Ethics Committee found that limited assistance includes “advice from lawyers who supplement case management without dominating it. In such circumstances, the lawyer is retained to diagnose legal problems, but not to appear as counsel of record.”⁴

The initial “diagnostic interview is critical” in limited representation, in part because, “[u]nlike a full representation case, if you miss a critical issue in the initial interview you will generally not get another chance to pick up the pieces later in the case.”⁵ It also is “[p]erhaps the most fundamental legal skill” of a lawyer in that it “consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge.”⁶

You may have a standard interview form or questionnaire. If not, we recommend that you develop one. It serves as a guide that can improve the quality and efficiency of interviews and creates records of lawyer-client agreements. Therefore, a standard interview form is an important risk-management tool.

Problem Identification: The first interview steps are to identify the problems for which the client seeks assistance, and to work with the client to determine the client’s goals. We say no more, not because these steps are unimportant—on the contrary, they are the primary objectives of any good interview—but because they are the same steps that lawyers take in both full-service and limited-service interviews.

Advice and Options: Advise the client about the available strategic and representational options, and help the client make selections. The client initially must select a strategy (or alternative strategies) for resolving the problems, for example, negotiation, mediation, or litigation. The lawyer then can present the client with representational options, i.e., the range of services that the lawyer can provide to effectuate the strategy.

The lawyer’s retainer agreement may set out the representational options, for example, in checklists that have 10, 15 or more categories of services. Other agreements simply have blank spaces where the lawyer and client can write in the services they have decided that the lawyer will provide. Still others have preprinted service provisions, used when the lawyer provides the same limited services to all clients.

M. Sue Talia advises clients that this planning phase “is not a time to get cheap about paying your lawyer. The savings occur because you will only be paying for the services that you want and need.”⁷ She adds that the first rule of apportioning tasks is clarity:

[M]ake no assumptions. Take the time to spell out exactly what you want the attorney to do and what you intend to do yourself. Fully discuss all of the legal and factual issues in your case. You will, in fact, spend more time with your attorney discussing the facts and legalities if you unbundle, because it is so critical that you are clear on what each of you is doing and how your roles intermesh … The division of responsibility must be stated clearly and in writing.⁸

As part of this planning process, the client needs to identify how much he or she can spend on the litigation, and the client and lawyer then need to allocate the available funds to the tasks, services, and costs of the litigation.

The Lawyer’s Tasks: Identify what the lawyer will, and will not, do. There are at least three dimensions of the scope of representation: (1) the legal problem for which the lawyer will provide services; (2) the remedial measures the lawyer will take to

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Defining “Unbundled” Legal Services

The term refers to discrete task representation, i.e., situations in which a client hires an attorney to assist with specific elements of a matter such as legal advice, document preparation (or review) and/or limited appearances. The client and attorney agree on discrete tasks to be performed for a particular fee or pro bono. Depending on the nature of the attorney’s involvement, the attorney may or may not enter an appearance with the court. The client represents him/herself in other aspects of the case.

From Handbook on Limited Scope Legal Assistance

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resolve the problem; and (3) the services the lawyer will provide in the process. The lawyer and client should clearly provide for each in their retainer agreement, specifically identifying the legal problems, remedial measures, and services that are within the scope of the limited-service agreement.

The client and lawyer may agree that the lawyer will provide full representation—pretrial investigation through mediation and litigation—on one issue in a case, for example, a contested custody issue in a divorce case. The retainer agreement should clearly limit the representation to that problem, and describe the services the lawyer will provide and the forums in which the lawyer will provide those services.

Or, the lawyer and client may agree that the lawyer will provide a limited service—drafting a complaint—in a case that has several legal problems, for example, a divorce case in which there are disputes about the grounds for divorce, the disposition of property, marital support, child custody, and child support. The retainer agreement should clearly limit the representation to that service, describe the problems for which the service is being provided, and explain that the lawyer is providing no service after drafting the complaint, e.g., that the lawyer will not file the complaint (the client must do this) or represent the client in any post-filing step in the process.

The lawyer must also alert the client to reasonably apparent related problems and remedies that are beyond the scope of the limited-service agreement. For example, in interviewing the client about one legal problem (the “first problem”), it may be reasonably apparent that the client has another related legal problem (the “second problem”). The lawyer should alert the client to the second problem even though the lawyer and client have limited the scope of representation to the first problem. The lawyer should make it clear, including in the written retainer agreement, that the lawyer is not representing the client on the second problem, and that the lawyer has advised the client to seek separate representation for that problem if the client wishes to pursue it.

The lawyer should take the same approach when there are several possible remedies for the problem that is within the scope of the agreement (i.e., the first problem). For example, when a client has a right to pursue a claim before both an administrative agency and in a court, or to sue more than one party, the lawyer needs to explain these options to the client. This assumes, of course, that these truly are options. In some cases, it will not be possible, without jeopardizing the client’s claim, to bypass an administrative remedy (when “exhaustion” of that remedy is mandatory), or to refrain from suing a defendant (when that defendant is a “necessary” party).

In those cases in which there are such options, if the lawyer and client agree to limit the scope of the engagement to one forum or to one defendant, the lawyer should make it clear, including in the written retainer agreement, that the lawyer is not representing the client in the second forum or is not suing the second defendant. The lawyer should advise the client to consult with other counsel if the client decides to pursue the remedies that have been excluded from the scope of the limited-service agreement.

In an ethics opinion about limited representation, the Los Angeles County Bar Association’s Professional Responsibility and Ethics Committee described this duty:

The attorney has a duty to alert the client to legal problems which are reasonably apparent, even though they fall outside the scope of retention, and to inform the client that the limitations on the representation create the possible need to obtain additional advice, including advice on issues collateral to the representation.

This duty applies, the Committee stated “whether the attorney is representing the client on an hourly, contingency, fixed or no fee basis.”

We do not suggest that a lawyer has an affirmative duty to look for and advise clients about collateral legal problems that are not reasonably apparent or related to the primary problem. Rather, the duty is limited to giving clients notice of reasonably apparent and related legal problems and remedies in the process of limiting the scope of the representation to exclude them. It is, therefore, part of the process of obtaining the client’s informed consent to the limits of the representation.

The Client’s Tasks: Identify what the client can do. Some clients can effectively perform tasks that will reduce the amount of the fee the client will need to pay the lawyer, thereby making the representation affordable. For example, some clients have clerical and administrative skills. They can type pleadings, organize and maintain documents, and provide other support services to lawyers, particularly lawyers in solo practices who have limited support staff.

John H. Price, Jr., a Maryland lawyer who provides limited as well as full services to clients, offers another example of how a lawyer can use the time of a

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**WHAT’S IN IT?**

In more than 250 pages, the *Handbook on Limited Scope Legal Assistance* gives lawyers comprehensive information and examples to better deliver unbundled legal services. The handbook also encourages judicial and bar leaders, court administrators, legal service program directors, and others to revise rules and develop programs that support these essential forms of legal representation.

Among the distinctive features of the handbook and appendix are:

- Identification of 13 different types of limited scope legal assistance (Chapter 2);
- Profiles of lawyers who provide these forms of legal assistance (Chapter 3);
- “How-to” chapters full of practical information (Chapters 4-8);
- Extensive analysis of ethical issues, with proposed answers and rule revisions (Chapter 9);
- Descriptions of recent rule changes and limited legal service initiatives in six states—California, Colorado, Florida, Maine, Oregon, and Washington—and two counties Contra Costa County, California, and Mecklenberg County, North Carolina (Chapter 10); and
- Recommended reforms, proposed by the Task Force (Chapter 11).

The appendix, consisting of 35 different items, includes practice forms, recent rule changes, and a collection of ethics opinions.

Full text of the handbook and appendix are available on the Section of Litigation’s Website: [www.abanet.org/litigation/task_forces/modest/home.html](http://www.abanet.org/litigation/task_forces/modest/home.html).
client to substantially reduce the costs of representation. He asks his clients to be responsible for the “dead time” in his practice, for example, by filing papers in court, serving papers (when they can under the state rules), and attending conferences and hearings and calling him when their cases are called. (The office in which he primarily practices is close to the courthouse.) He argues that the billed hours that lawyers spend unproductively substantially inflate lawyers’ fees and preclude many people from retaining counsel.

In each of the 13 types of limited representation (see box, page 15), there are also tasks that some clients can perform to partially represent themselves. Before the client and lawyer can determine what tasks the lawyer will perform, they must assess whether, and to what extent, the client can perform some of the required tasks. Clients who can pay for full representation may wish to perform some of the required tasks. Clients who cannot, may be required to do so. In either case, the client and lawyer will need to go through the process of identifying and apportioning responsibility for tasks.

Informed Consent: Obtain informed consent from the client for the representation. The lawyer must obtain the informed consent of the client for the representation and memorialize it in the retainer agreement. Although there is no one-size-fits-all explanation for clients, the retainer agreement might include:

- A general description of limited representation;
- A specific description of the type of limited representation the lawyer will provide to the client;
- What the lawyer and client each will do;
- What the lawyer will not do under the agreement (a little redundancy here helps);
- Whether the lawyer will enter an appearance;
- When and how the lawyer will withdraw or strike that appearance (making it clear the client will be required to support the withdrawal);
- Whether and how the lawyer and client can modify the initial agreement if they need or want to do so; and
- Identification of the risks of limited representation.12

Although the ethics rules in most states do not require that a client’s consent to limited representation be in writing, Barrie Althoff, former Chief Disciplinary Counsel of the Washington State Bar Association, advises lawyers that, “as a matter of good practice and self-protection it should be. It could be a part of your written fee agreement, or in a memorandum attached to it, or a letter to your client confirming and describing your mutual decision to limit the scope of your representation.”13 He explains that “[i]f your client disputes the limitation, the written consent would be merely one part of the relevant evidence, which might also include other documentation, your billing statements, or your course of conduct.”14

If there is informed consent for limited representation, and it is reasonable under the circumstances, the lawyer and client should have the right to adopt any variant of limited representation that they wish. This is a contractual right. It protects the client’s right of access to justice. It also respects the lawyer’s discretionary and contextual judgment about the potential usefulness of a particular service to a particular person in a particular case.

Written Retainer Agreement: Embody all of the agreements and understandings, and the informed consent, in a written retainer agreement. Limited-service agreements, as well as client consent to them, should be in writing for the same reasons that full-service agreements should be.15 There are additional reasons as well.

Because of the prevalence of full-service representation, clients may wrongly assume that lawyers will provide more than limited services to them. A written agreement, accompanied by a careful explanation, will help to dispel such an assumption.

There should be, in any event, a written description of how the lawyer and client have agreed to allocate the required work. Moreover, the fee and scope-of-services agreements usually are linked, and if a lawyer needs to enforce a fee agreement, it will be very helpful if it and the related scope-of-services agreement are in writing.

A written limited-service agreement also will help to prevent disputes. It will refresh the recollections of clients who, in good faith, do not accurately recall the agreement, and will discourage some clients from intentionally giving revisionist accounts of the agreement.

If there are later disagreements, a written agreement will help to resolve them more fairly and efficiently.

In addition, when a lawyer who enters into a limited-service agreement asks a court to enforce it, the court may require that the agreement be in writing and that the lawyer file a copy of it with the court. For example, when a lawyer who has entered an appearance in court pursuant to a limited-service agreement completes the promised work and seeks to withdraw from the representation, a judge is more likely to allow this if the agreement is in writing. Some states have revised their ethics rules to require a written retainer agreement under these circumstances.16 In most states, the applicable rule is based on Rule 1.2 (c) of the Model Rules of Professional Conduct.17

Revision Provision: Anticipate the need to revise the agreement by adding a flexible revision provision to it. There is a frequent need to revise limited assistance agreements. To accommodate this need, M. Sue Talia recommends including the apportionment of tasks in an appendix to the retainer agreement, rather than in the agreement itself.

When the need to re-apportion tasks arises, the lawyer and client can do it by replacing the original appendix with a new one. The other terms of the retainer agreement do not change, at least when the lawyer is billing on an hourly rate. The lawyer and client need to re-execute the replacement appendix and memorialize the revisions.

Endnotes
2. See ABA Section of Litigation, Handbook on Limited Scope Legal Assistance: A Report of the Modest Means Task Force [hereinafter Handbook], chap. 9(c) (discusses the ethics rules concerning competency and provides a hypothetical limited-service case example to describe how the competency requirements may change as the complexity and scope of services in a matter increase and expand).
Positions Open

### Law Students Urged to Apply

**Judicial Intern Opportunity Program**

Do you know any law students who may be interested in securing a judicial clerkship? Have them log on to [www.abanet.org/litigation/jiop/home.html](http://www.abanet.org/litigation/jiop/home.html) for an application to the 2004 Judicial Intern Opportunity Program (JIOP), administered by the ABA Section of Litigation in partnership with the Council on Legal Education Opportunity (CLEO).

JIOP is a full-time, six-week minimum, summer internship open to all first- or second-year minority and disadvantaged law students. The program provides law students the opportunity to do legal research and writing for state or federal judges. The 2004 program will include Illinois and Texas judges from U.S. and state district courts, circuit courts, and U.S. bankruptcy courts, among others.

Interns observe courtroom proceedings, develop relationships with judges, and potentially secure valuable references. Interns will receive a stipend of $1,500 for the entire summer.

**Application Deadline:** January 30, 2004.

### Practicing Lawyers Urged to Apply

#### One Child: One Lawyer

One lawyer can make a difference in the life of a child. The ABA Section of Litigation’s Children’s Rights Litigation Committee has launched a major initiative to encourage lawyers and law firms to volunteer to represent children.

Examples of advocacy opportunities in children’s law include: child welfare, domestic violence, juvenile delinquency, education, benefits advocacy, SSI advocacy, and immigration.

To find an organization in your area through which you can volunteer to help a child in need, visit the online [ABA Directory of Pro Bono Children's Law Programs](http://www.abanet.org/litigation/committee/childrens_l/publications.html). It provides in-depth state-by-state listings of children’s law programs, clinics, and resource centers. Many of the programs listed offer training, cases, and mentoring to the volunteering pro bono lawyers.

For more information, visit the Children’s Rights Litigation Committee at [www.abanet.org/litigation/committee/childrens_l/home.html](http://www.abanet.org/litigation/committee/childrens_l/home.html).
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