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ARTICLES

Trends in Securities Litigation: What to Look for in 2019

By Laurel C. Van Allen – March 05, 2019

2018 is the first year the S&P 500 experienced a negative total return since 2008 (yes, you read that right). Stock market volatility spiked in the fourth quarter of 2018 and remains elevated today. One might suspect this means we are in for an increase in shareholder litigation in 2019. The reality, though, is a bit more nuanced.

**Market Performance as a Factor in Predicting Securities Litigation Trends**

It is true that, historically, there has been a loose correlation between market downturns and increased shareholder litigation. As shown in the following graph based on data provided by the [Stanford Law School Securities Class Action Clearinghouse](https://www.clareHall.org), class action filings in federal court spiked following the dotcom crash in 2000 and jumped again after the 2007–2008 financial crisis.

![Annual Federal Securities Class Action Filings](https://example.com/graph)

The primary driver, though, of the more recent spike in federal securities class actions in 2017 (the largest spike since 2001) was a shift in where mergers-and-acquisitions (M&A) actions were filed: from state to federal court. That shift continued in 2018. Roughly 46 percent of federal securities actions filed in 2018 concerned merger disputes. In market downturns, M&A activity tends to stall, which can lead to a decrease in such cases.
Keep in mind that, because the figures depicted in the graph above are limited to federal securities suits and fail to account for a recent increase in state securities suits, they may understate the overall trends in securities litigation.

Taken together, what this means for 2019 is uncertain. What was it that President Truman said about one-handed economists? (Answer: “Give me a one-handed economist! All my economists say ‘on the one hand . . . , but on the other . . .’”)

Despite uncertainty over the direction of the stock market in 2019 and the number of securities case filings, there are several trends in the types of recent filings worth noting.

The Shift Toward Opt-Out Litigation

A U.S. Supreme Court opinion from June 2017 served, in effect, to encourage potential class members of a securities class action class to file their own, individual actions within three years of the securities offering in order to preserve their ability to pursue opt-out claims. See Cal. Pub. Emps. Ret. Sys. v. ANZ Sec., No. 16-373, slip op. (2017) (addressing whether section 13 of the Securities Act permits the filing of an individual complaint more than three years after the relevant securities offering, when a class action complaint was timely filed and the plaintiff filing the individual complaint would have been a member of the class but for opting out of it). The Court held that the petitioner’s filing of its individual complaint more than three years after the relevant securities offering was ground for dismissal because section 13’s three-year time limit is a statute of repose not subject to equitable tolling. Id. at 2 (syllabus). The Court rejected the petitioner’s argument that “dismissal of its individual suit as untimely would eviscerate its ability to opt out,” because “it does not follow from any privilege to opt out that an ensuing suit can be filed without regard to mandatory time limits.” Id. at 3 (syllabus). That ruling appears to have launched a sustained and meaningful increase in opt-out cases by major institutional investors.

A notable series of opt-out cases involving a real estate investment trust, American Realty Capital Partners (ARCP, now known as VEREIT), was initiated by a major class action filed in the Southern District of New York in October 2014 against ARCP and certain executives based on alleged accounting misrepresentations. In November 2017, ARCP’s former chief financial officer was sentenced to 18 months in prison for accounting fraud. With this factual background against ARCP and its executives, large institutional investors leveraged their substantial equity positions in the company, as well as their substantial resources, to litigate outside the class. To date, those efforts have resulted in settlements with several large institutional investors totaling more than $200 million. In its press release announcing a $90 million settlement with one of the opt-out investors (Vanguard), VEREIT noted that “Vanguard’s holdings accounted for approximately 13 percent of VEREIT’s outstanding shares of common stock held at the end of
the period covered by the various pending shareholder actions.” The press release further stated that, “[i]n light of the fact that the Vanguard lawsuit was proceeding in a different federal district court [in the District of Arizona] than the other related cases pending against VEREIT, VEREIT believes that if the Vanguard lawsuit continued, it could find itself facing successive trials on similar factual and legal issues that could have subjected VEREIT to increased legal risk.”

Given the considerable success by these opt-out plaintiffs, there undoubtedly will be more opt-out suits filed by major investors with the means to litigate separately from a class in other securities matters. Venue selection may also be an important consideration by potential opt-out plaintiffs, who strategically may select alternative venues to those selected by the class action plaintiffs. In sum: If large institutional investors determine that litigating on behalf of themselves, outside the class action, leads routinely to higher settlement outcomes, this could fundamentally change the scope and size of class actions.

Event-Driven Claims

Broadly speaking, securities litigation typically arises from two types of alleged financial misrepresentations. Accounting fraud, or “cooking the books,” may arise when a company’s actual financial performance is below expectations or targets and executives manipulate the company’s financial disclosures (either through material misstatements or omissions) to conceal the company’s true value. Event-driven claims typically arise when a company discloses—or market participants discover—that some external shock has affected the company’s performance. Oftentimes the claims surrounding these types of events focus on a company’s failure to make adequate and timely disclosures of the known risks associated with certain events. For example (and as discussed further below), claims of a company’s failure to prevent and remedy security breaches and the company’s subsequent failure to disclose the scope of those breaches to the market may constitute a basis for a securities case.

I consider two examples of event-driven causes of securities cases in which the events are alleged to have materially affected the performance and prospects of companies: (1) data security breaches and (2) manmade disasters, such as the California wildfires.

**Data security breaches.** In the last few years, a number of high-profile incidents of security breaches have occurred. A number of publicly traded companies, such as Yahoo! Inc. and Equifax, Inc., experienced declines in their company’s stock prices when data breaches were disclosed to market participants, and the corresponding securities cases have not been inconsequential.
For example, in September 2016, Yahoo announced that 500 million users’ data had been breached in 2014. Among the information accessed were names, email addresses, dates of birth, phone numbers, and passwords. In a second announcement a few months later, Yahoo announced that one billion users’ information had been stolen in August 2013 and that an unspecified number of user accounts were accessed throughout 2015 and 2016 in a separate cyberattack involving forged cookies. As a result of these data breach incidents, multiple court actions were filed against Yahoo, including a 2017 securities class action complaint (In re Yahoo! Inc. Securities Litigation, No. 17-CV-00373-LHK (N.D. Cal. filed Jan. 24, 2017)) alleging that Yahoo and three of its officers made false and misleading statements or materially misleading omissions concerning the adequacy of Yahoo’s user data security and the existence of data security breaches. That action resulted in an $80 million settlement in 2018, approved by the district court on September 7, 2018.

A second, $29 million settlement was reached in January 2019 to resolve related shareholder and derivative class actions (In re Yahoo! Inc. Shareholder Derivative Litigation) filed in California state court (Lead Case No. 17-CV-307054), Delaware state court (C.A. No. 2017-0133-SG), and the U.S. District Court for the Northern District of California (Lead Case No. 17-cv-0787-LHK). The Superior Court of California for the County of Santa Clara granted final approval of that settlement on January 9, 2019—believed to be the first monetary award to a company in a derivative action related to a data breach.

A third, multidistrict class action against Yahoo related to the above-described data breaches (In re Yahoo! Inc. Customer Data Security Breach Litigation, No. 16-MD–02752-LHK (N.D. Cal.)) could result in yet another large monetary settlement. In 2018, the parties to that action proposed a settlement fund of up to $50 million, with an additional potential award of up to $35 million in attorney fees. That proposal was, however, denied by the court on January 28, 2019. Among the reasons for this denial was the court’s stated concern that “the settlement may allow for unreasonably high attorneys’ fees, and therefore any unawarded attorneys’ fee may improperly revert to Defendants.” The parties presumably will pursue a revised settlement proposal and re-petition for court approval.

These types of data breach claims are not unique to Yahoo. Marriott, for example, incurred similar litigation when, in November 2018, it disclosed that its personal network had been compromised since 2014. As a result of the breach, personal data for 500 million Starwood guests potentially was exposed to the invading hackers. Upon disclosure of this news, the company’s stock price declined over 5.5 percent, and a federal class action securities case was filed the next day.
Data breach risks are high as companies face a complex cat-and-mouse game with sophisticated hackers who can adapt their strategies to overcome security measures taken by companies. It therefore is reasonable to expect that companies will continue to face data breaches and related litigation in the coming year.

**Manmade disasters.** In October 2017, northern California faced the worst set of wildfires in its history, which led to devastating destruction of property. Authorities quickly suggested that the wildfires may have been caused by downed power lines operated by a subsidiary of Pacific Gas and Electric Company (PG&E). By June 2018, the California Department of Forestry and Fire Protection concluded that a number of California wildfires in 2017 and 2018 had been started by downed PG&E power lines or other PG&E equipment. This prompted the filing of a class action complaint in federal court in the Northern District of California. The complaint alleges that throughout the defined class period, PG&E and its parent company made false and/or misleading statements and/or failed to disclose PG&E’s role in the wildfires and failed to comply with safety regulations. As a result, the company’s communications regarding its business and operations were materially false and misleading. PG&E is estimated to be facing more than $30 billion in potential liabilities and recently initiated bankruptcy proceedings as a result of the disaster.

Another example relates to the recent tragic collapse of a dam in Brazil on January 25, 2019, which is being called the worst environmental disaster in Brazil’s history. Early reports confirmed at least 65 deaths, hundreds of missing persons, and vast property destruction to nearby villages and farms. Vale, S.A., one of the world’s largest iron-ore mining companies, owns the dam that collapsed. (This collapse followed the earlier collapse of another dam—also owned by Vale—in Brazil three years ago.) While the specific cause of the dam collapse is not yet known, the Wall Street Journal has reported that Brazil’s top prosecutor intends to pursue charges against the company’s executives.

Vale’s shares are traded on the New York Stock Exchange, and the market price experienced a significant decline from $14.85 at the close on Thursday, January 24, 2019 (the day prior to the dam collapse), to $11.20 per share at the close on Monday, January 28 (the next business day): a 25 percent decline. By that Monday (January 28, 2019), a securities class action already had been filed in the Eastern District of New York on behalf of a proposed class of investors against Vale and its executives.

Event-driven actions involving as wildly disparate causal shocks as data security breaches, wildfires, and dam collapses are similar in that they involve events that plaintiffs claim would have (and ought to have) been preventable by companies and their executives had they appropriately monitored, maintained, and managed their equipment, and had they followed...
adequate safety precautions and regulatory mandates. Whether or not those allegations have any merit will be the source of detailed investigations, complex and lengthy litigation, and potentially differing interpretations of facts. In any event, we are likely to see these types of adverse incidents continue to drive securities litigation.

**Corporate Communications via Social Media**

The Securities and Exchange Commission (SEC) provided guidance in 2014 concerning companies’ use of social media platforms to communicate material information about a public offering or business combination transaction. Using the principle that material information should be disclosed to market participants in a fair and fully accessible manner, the SEC advised that companies may use social media to convey material information so long as investors are notified in advance of the social media platform—such as Facebook or Twitter—to be used for such communications.

It would be impossible to mention corporate use of social media to communicate to investors without discussing Tesla. Tesla disclosed in 2013 that it intended for Tesla Chairman and Chief Executive Officer Elon Musk’s personal Twitter account to convey material information about the company. In fact, the company encouraged investors to follow Musk’s tweets. Whether Tesla should have pursued this strategy is debatable in light of fallout from Musk’s August 7, 2018, tweet: “Am considering taking Tesla private at $420. Funding secured.” In response to Musk’s statement, Tesla’s shares soared to an intra-day high of $387.46 per share, an increase of $45.47 over the prior closing price. A class of short-sellers filed suit in *Isaacs v. Tesla, Inc.*, No. 3:2018cv04865 (N.D. Cal. filed Aug. 10, 2018), claiming that Musk’s tweet “artificially manipulate[d] the price of Tesla stock to completely decimate the Company’s short-sellers (and, on the way, injured all purchasers of Tesla securities).” Tesla and Musk each paid a $20 million penalty to resolve fraud charges by the SEC. As part of that settlement, Musk also was required to step down as Tesla chairman, and Tesla was required to add independent directors to its board.

Two issues arise from the Tesla incident. First, companies may be reluctant to use social media to disclose material information to investors without adequate controls and compliance in place. Tesla’s case may be unique given Musk’s previous outsized role at Tesla: He is something of a corporate celebrity who is known for his unconventional behavior. Second, securities actions on behalf of short-sellers are atypical, making for a potentially complex set of issues. One typically thinks of corporate actions as intended to increase value for common shareholders, not to “punish” short-sellers by increasing the value of the company’s stock. The outcome of the Tesla securities litigation may indicate whether short-sellers are likely to become a more prominent class of investors filing suit in securities actions.
Broader Turmoil Can Lead to Litigation

In the first month of 2019, more than 30 federal securities class action cases were filed—a pace that, if it keeps up, would result in nearly 500 cases in 2019. That number is well in excess of the number of filings observed in any prior year. Between recent stock market volatility, the trade war with China, the government shutdown, increased state and non-state hacking attempts on corporations, environmental factors, and a litany of other concerns, 2019 is already shaping up to be an eventful year in securities class actions.

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Bitcoin as a “Commodity” and the Resulting Impact on Bankruptcy Proceedings

By Joanne Molinaro and Susan Poll Klaessy – March 05, 2019

On August 23, 2018, Nobuaki Kobayashi, the bankruptcy and rehabilitation trustee for the estate of troubled Japanese cryptocurrency exchange MtGox Co., Ltd., opened an online “rehabilitation” claims submission process. Under this process, creditors of MtGox and users of that exchange whose Bitcoin MtGox misplaced could seek to recover their losses. The trustee subsequently made the claims process available to corporate creditors, then to transferees (claims purchasers). This followed the Tokyo District Court’s June 22, 2018, order suspending MtGox’s bankruptcy proceeding and commencing civil rehabilitation proceedings. With the June 22 shift to a civil rehabilitation proceeding, the MtGox trustee gained the ability to make distributions in Bitcoin and BCH (“Bitcoin Cash”), in lieu of paying the claims’ value in fiat currency at the time of MtGox’s bankruptcy filing—a huge victory for creditors if the trustee confirms (and the Tokyo District Court approves) such a plan. Despite the volatility of Bitcoin, the value of Bitcoin had continued to increase since MtGox filed for bankruptcy. Thus, the MtGox trustee elected to treat Bitcoin as a commodity.

A recent federal district court ruling here in the United States (in a different proceeding) took a similar position. On September 26, 2018, the U.S. District Court for the District of Massachusetts ruled in Commodity Futures Trading Commission v. My Big Coin Pay, Inc., No. 18-10077-RWZ, 2018 WL 4621727 (D. Mass. Sept. 26, 2018), that Bitcoin and other cryptocurrencies are “commodities” as defined by the U.S. Commodity Exchange Act (CEA), 7 U.S.C. ch. 1. That ruling is significant because the value of cryptocurrencies, as commodities, would be determined at the time of recovery, rather than on the date a bankruptcy petitioner initiated bankruptcy proceedings.

The question remains whether bankruptcy courts in the United States will follow suit and take a flexible approach to claims valuation and distributions when it comes to cryptocurrency, given the unprecedented volatility of this particular asset.

A Brief History of MtGox

MtGox was created by a U.S. programmer, Jed McCaleb, in 2010. At that time, the price of Bitcoin was about $0.08. As of 2013, MtGox was the single largest Bitcoin exchange in the world, managing over 70 percent of all Bitcoin transactions across the globe. Bitcoin’s value experienced an astronomical increase, selling at $1,200 per coin. In February 2014, it was discovered that as early as 2011, hackers began raiding MtGox and ultimately stole 744,408
Bitcoins belonging to the exchange’s customers, as well as an additional 100,000 Bitcoins belonging to the company itself.

On February 28, 2014, MtGox filed for bankruptcy protection in Japan, as well as a petition under Chapter 15 of the U.S. Bankruptcy Code in the U.S. Bankruptcy Court for the Northern District of Texas. Subsequently, in March 2014, MtGox reported that it had rediscovered 200,000 Bitcoins.

In April 2014, MtGox petitioned the Tokyo District Court for liquidation, which provides for the winding-up of the debtor’s estate. In other words, all of MtGox’s assets, including the Bitcoin it possessed, would be sold, converted to cash, and distributed to creditors. Notably, distributions would be based on the value of customer claims as of the date MtGox filed for bankruptcy relief.

To drum up cash to make distributions to creditors, the bankruptcy trustee began to sell off large chunks of MtGox’s Bitcoin, selling $400 million in Bitcoin and BCH from December 2017 through February 2018. During that time period, Bitcoin’s price fluctuated, clocking in at $10,000 to $19,000 per Bitcoin in the month of December 2017 alone. Experts criticized the MtGox trustee for having a hand in Bitcoin’s price volatility by unloading such huge quantities of Bitcoin onto what was (and still is) a nascent market.

After repeated petitions by creditors, in June 2018, the Tokyo District Court suspended the bankruptcy proceedings and approved the commencement of civil rehabilitation. The key difference between the two proceedings—at least for creditors—is that the trustee gained the ability as part of the rehabilitation process to make distributions in Bitcoin or BCH, instead of paying out claims in cash based on the cryptocurrency’s valuation as of the date of the MtGox bankruptcy. This would have a profound impact on creditor recoveries. The trustee explained the process as follows:

In bankruptcy proceedings, non-monetary claims are converted into monetary claims based on the valuation as at the time of the commencement of bankruptcy proceedings. In contrast, in civil rehabilitation proceedings, non-monetary claims are not converted into monetary claims at the time of commencement of the civil rehabilitation proceedings. Therefore, in the civil rehabilitation proceedings in this matter, claims seeking a refund of bitcoins (“Bitcoin Claims”) will also not be converted into monetary claims after the commencement of the civil rehabilitation proceedings.

MtGox Civil Rehabilitation Trustee, Announcement of Commencement of Civil Rehabilitation Proceedings, Answers to Frequently Asked Questions (June 22, 2018), Q&A A1(2).
Valuation of Claims for Cryptocurrency in Bankruptcy

Typically, the value of an unsecured claim in bankruptcy is readily available—the amount reflected on an invoice or purchase order, loan documents, or lease. These documents paper the parties’ mutual understanding of the value of whatever goods or services are traded. In the context of securities, a customer’s unsecured claim would be valued on the date of the financial institution’s bankruptcy filing, with the amount denominated in the prevailing (fiat) currency.

The MtGox bankruptcy unveiled the conundrum created by the uncertainty regarding cryptocurrency: Is it a currency? Or is it a commodity? Or some hybrid? If it truly is a currency, one would argue that any claim arising should first be “translated” into the prevailing fiat currency (e.g., yen or U.S. dollars) and then paid out in accordance with the value as of the petition date. This was the approach originally undertaken by the MtGox trustee while the case was still in bankruptcy.

Thus far, only one bankruptcy court decision in the United States has dealt with whether Bitcoin is a currency or commodity. In In re Hashfast Technologies LLC, No. 14-30725, 2016 WL 8460756 (Bankr. N.D. Cal. Feb. 5, 2016), the defendant (the transferee of an allegedly fraudulent transfer of Bitcoins by the debtor) asserted that to the extent he was held liable, he should be required to return no more than the value of the Bitcoins (as opposed to the Bitcoins themselves) on the date of transfer. In contrast, the plaintiff trustee argued that Bitcoins are more like commodities, thus the bankruptcy court should order the return of the Bitcoins themselves or their value at the time of recovery. Central to the dispute was the fact that the value of Bitcoin had increased by 400 percent since the date of transfer. Ultimately, the bankruptcy court made no decision regarding the currency-or-commodity dispute, concluding that Bitcoin are not U.S. dollars. The court deferred making a decision as to whether the Bitcoin would be returned and, if not, what the valuation date would be for purposes of its liquidation (if and when the trustee prevailed in his count for avoidance).

The debate may now be over. On September 26, 2018, the U.S. District Court for the District of Massachusetts ruled in Commodity Futures Trading Commission v. My Big Coin Pay, Inc., 2018 WL 4621727, that Bitcoin did meet the definition of a “commodity” under the CEA. In My Big Coin Pay, the U.S. Commodity Futures Trading Commission (CFTC) brought an action alleging a fraudulent virtual currency scheme by the defendants in violation of the CEA. According to the complaint, the defendants induced customers to buy virtual currency by making untrue and misleading statements, including that the defendants’ currency was “backed by gold,” would be accepted anywhere Mastercard was accepted, and was being “actively traded” on several currency exchanges. The defendants filed a motion to dismiss on the basis that virtual currency did not constitute a “commodity” under the CEA. The court considered case law related to the treatment of natural gas as analogous to virtual currency. Reasoning that, as with natural gas,

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there is futures trading in virtual currencies (like Bitcoin), the court held that virtual currencies are commodities under the CEA, and it denied the defendants’ motion to dismiss. Id. at *4–5.

Accordingly, in theory, Bitcoin and other cryptocurrencies should be treated like gold or oil. The “crypto as commodity” ruling could have enormous implications on valuation in the bankruptcy context. The return of Bitcoin or any other cryptocurrency (i.e., transfer avoidance, recoupment, or claims distribution) likely will be favored in lieu of a contested and expensive valuation battle. However, if the mere return of Bitcoin is not feasible (for example, if they are stolen as in the case of MtGox), the protocol for valuation becomes critical.

In the context of a fraudulent transfer (or other award of damages to a plaintiff trustee or debtor in possession), if the transferred property is not returned, the court can award its value, which is “measured at the time of recovery where the property naturally increases in value.” Heller Ehrman LLP v. Jones Day (In re Heller Ehrman), No. 10-3221DM, 2014 WL 323068, at *8 (Bankr. N.D. Cal. Jan. 29, 2014) (citing USAA Fed. Sav. Bank v. Thack (In re Taylor), 599 F.3d 880, 890 (9th Cir. 2010)). In the context of the U.S. Bankruptcy Code, 11 U.S.C. § 101 et seq.—which at section 503(b)(9) governs the valuation of goods provided to a debtor in the 20 days preceding the petition date—a commodity is valued “based on the price at which it could be purchased during the relevant period on the commodity market.” In re Pilgrim’s Pride Corp., 421 B.R. 231, 243–44 (Bankr. N.D. Tex. 2009). Trustees and debtors may argue that the “increase in value” should be retained by the estate, for the benefit of other creditors (i.e., holders of claims for commodities that have decreased in value).

The valuation of commodities has played a large role also in assessing the feasibility of Chapter 11 reorganization plans. For example, in In re Sabine Oil & Gas Corp., 555 B.R. 180 (Bankr. S.D.N.Y. 2016), the bankruptcy court confirmed a Chapter 11 plan despite a heated battle over the amount of proposed adequate protection payments to the debtors’ lenders. (Motion to certify appeal denied, No. 16-CV-2561 (JGK), 2016 WL 6238616 (S.D.N.Y. Oct. 25, 2016); appeal dismissed as moot, No. 16 CIV. 6054 (LAP), 2017 WL 477780 (S.D.N.Y. Feb. 3, 2017).) In Sabine, the debtors’ proposed adequate protection payments were based on the historical value of the lenders’ collateral, which consisted of oil and gas (i.e., the lower the value, the higher the adequate protection payments). The creditors’ committee claimed that the adequate protection payment amounts should be based on the most recent valuation of oil and gas. The court noted that there is an “inherent tension involved in performing valuation analysis using data that is subject to constant change” and observed that “[r]esolving this tension is specially challenging in the context of a commodity industry . . . in which pricing is subject to significant volatility, seasonality, and other factors that increase the dynamism of pricing information.” Sabine, 555 B.R. at 272. Although the most current information was “most pertinent,” the court cautioned that its valuation also should take into consideration the “practical reality” of the delays within the Chapter 11 process and that “the concern that what may be a temporary shift
in commodity prices could lead to a determination of value that is inequitable to one or more parties.” *Id.* The court ultimately sided with the debtors’ valuation based on historical prices, in lieu of looking exclusively to more recent pricing information. *Id.*

**Conclusion**

Given the volatility of cryptocurrency, with the recent clarifications coming out of the courts regarding the “currency or commodity” debate, bankruptcy courts may employ greater discretion regarding how to treat the valuation of Bitcoin and other cryptocurrencies in a variety of contexts throughout the duration of a bankruptcy proceeding. Indeed, the more protracted a bankruptcy proceeding is, the greater the likelihood that the valuation of cryptocurrency—whether as collateral, damages, or claim distribution—will become a pivot point in such a proceeding.

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The Federal Mandatory Initial Discovery Pilot Project—18 Months In

By Amanda Lawrence, Scott Sakiyama, and Ian Acker – March 05, 2019

The Judicial Conference of the United States is considering drastic changes to the Federal Rules of Civil Procedure that could result in significantly accelerated time frames for the commencement of discovery. The Judicial Conference began testing these changes in a pilot program, and the experience of parties in the pilot through 2019 may shape future changes to the Federal Rules.

The Mandatory Initial Discovery Pilot Project

Beginning as early as May 1, 2017, federal courts in the Northern District of Illinois, the District of Arizona, and one judge in the Southern District of Texas undertook the federal Mandatory Initial Discovery Pilot Project (MIDP). The MIDP was approved by the Judicial Conference in September of 2016 with the purpose of testing whether early substantial disclosure of information can reduce litigation costs and shorten the time for case resolution. While the MIDP modifies the Federal Rules of Civil Procedure in a number of ways, there are two that are most significant and potentially shocking to litigators in federal court—especially defense counsel.

The MIDP Increases the Burdens Regarding Responsive Pleading and Initial Discovery

First, under the MIDP, a motion to dismiss does not stay the deadline for a defendant to answer the complaint. The defendant must file a simultaneous answer along with its motion to dismiss, unless the motion is based on a lack of subject matter or personal jurisdiction. This significantly accelerates the time frame in which a defendant must answer the complaint compared with the practice under the Federal Rules of Civil Procedure, which do not require a responsive pleading before the court issues an order on the motion to dismiss (which can take months, if not a year or more, depending on the circumstances). Under standard rules, if the motion to dismiss is granted in part or in whole and the plaintiff is allowed to re-plead, the process could continue to drag out. The MIDP shortens that process significantly.

Second, the MIDP requires the production of all relevant documents 70 days after the defendant answers the complaint. The MIDP outlines a process for this production. Thirty days after the defendant has answered the complaint, the parties must submit their initial discovery responses. These responses are similar to the initial disclosures required by Federal Rule of Civil Procedure 26, with some significant alterations. Under Rule 26, a party must disclose only those
documents that it may use to support its claims or defenses. However, the MIDP requires the disclosure of documents that may be relevant to any party’s claims or defenses, meaning disclosure of documents is required whether favorable or unfavorable, without waiting for any document requests. Finally, within 40 days of these initial disclosures, parties must produce the documents they disclosed that are within their possession, custody, or control.

The project’s Working Group of the Civil Rules Advisory Committee has identified as a basis for these changes the facts that “[d]iscovery costs have long been recognized as one of the primary sources of civil litigation expense, and the discovery process often complicates and prolongs civil litigation.” Introduction to the Mandatory Initial Discovery Pilot (Video Transcript), Apr. 6, 2017. The MIDP seeks “to test whether early substantial disclosure of information can reduce litigation costs and shorten the time for case resolution consistent with the goals of Rule 1.” Id. To meet the goals of Federal Rule of Civil Procedure 1, the working group saw the accelerated disclosures as a way to allow “the parties . . . to make an early assessment of the strengths and weaknesses of their positions.” Id. Some states, such as Colorado and Arizona, already impose a similar disclosure of all relevant documents and information at an early stage, whether favorable or not, in pursuit of this goal. See Colo. R. Civ. P. 26; Ariz. R. Civ. P. 26.1.

These Pilot Project Rules Arguably Benefit Plaintiffs More Than Defendants

These rule changes under the MIDP can be seen as a significant advantage for plaintiffs over defendants. Traditionally, if a plaintiff survived a motion to dismiss and it was clear that the case would proceed to discovery, defendants often could expect a settlement demand that at least reflected the cost of expected discovery. Under the MIDP (as currently in effect in the District of Arizona and the Southern District of Texas, and as in effect in the Northern District of Illinois up to December 1, 2018), that cost has to be immediately factored in upon filing of the case. As a result, defendants with meritorious motions to dismiss are required to engage in unnecessary discovery.

This effect is not limited to defendants who have meritorious arguments for dismissal, in full, of a complaint. A defendant could have arguments that significantly limit the claims or potential damages in a case, even if some claims could withstand a motion to dismiss. Under Rule 26 of the Federal Rules of Civil Procedure, the scope of traditional discovery is limited to “nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.” Imagine a defendant that faces a complaint alleging $10 million in damages. The defendant brings a partially successful motion to dismiss, limiting the potentially available damages to a much lower $500,000. The amount of discovery that is proportional to the needs of that case ought to change significantly (compared with a $10 million case).

Some Courts Have Allowed Exceptions to the MIDP Requirements
Perhaps in recognition of the burden on defendants, there is some indication that courts operating under the MIDP will grant relief where necessary while parties adjust to the accelerated MIDP timeline. In one case out of the Northern District of Illinois, *Insight Global, LLC v. Borchardt*, No. 18 C 00628, 2018 WL 2267810 (N.D. Ill. May 17, 2018), the court granted procedural leniency to amend pleadings in the face of the MIDP’s strict requirements. Specifically, the defendant, Borchardt, was permitted by the court to file an amended answer because, as the court acknowledged, the defendant filed his original answer only because the project required him to do so in conjunction with his motion to dismiss. *Id.* at *5.

Further, the Northern District of Illinois recently announced a modification to the MIDP in that district effective December 1, 2018. For cases filed after that date, defendants no longer will have to file a simultaneous answer if they file a motion to dismiss under Rule 12(b)(6). Thus, the filing of a Rule 12(b)(6) motion would toll the beginning of the discovery obligations that previously were imposed under the MIDP. The court made this change in response to comments that the MIDP imposed unnecessary costs on defendants who ultimately prevailed on their Rule 12 motions.

Similarly, a case out of the District of Arizona indicates that court’s willingness to depart from the MIDP in certain circumstances. In *Salt River Project Agriculture Improvement & Power District v. Trench France SAS*, 303 F. Supp. 3d 1004 (D. Ariz. 2018), the district court was faced with an MIDP-related decision pertaining to the scope of discovery and its intersection with the Hague Convention. As stated above, the MIDP requires disclosure of all relevant information in the possession of each party, which here included information that was maintained by the defendant in France. *Id.* at 1006–7. However, here there was a blocking statute enacted in France that prohibits certain disclosures outside specified international discovery norms (the Hague Convention procedures). *Id.* Considering the issues of comity, the District of Arizona was required to evaluate whether the MIDP could function in conjunction with the French blocking statute and determine an appropriate remedy in the face of the more stringent Hague Convention requirements and the MIDP goal of quick production. *Id.* The court ultimately concluded that the MIDP did not trump the Hague Convention and that the Hague Convention would govern production of material held by a party in France. *Id.* at 1010. Accordingly, the MIDP may give way when a case has international discovery.

Conclusion

Defense counsel and parties likely to be defendants in cases with potentially asymmetric discovery, such as parties potentially subject to consumer class actions, should follow these developments closely. As originally proposed and currently still in effect in the District of Arizona and the Southern District of Texas, the MIDP increases the burden on defendants who otherwise have meritorious dismissal arguments, and on all parties in cases involving significant
or complex discovery. It is encouraging that some cases indicate a willingness by the affected courts to address that burden on a case-by-case basis and that the Northern District of Illinois shows a willingness to address the project as a whole. Over the last half of the project, those parties and counsel most likely to be affected by the project (if it were to become the new standard under the Federal Rules) should monitor cases closely and look for an opportunity to provide feedback on the project.

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Getting the Discovery You Need in Arbitration

By Carly Milner and Aurra Fellows – March 05, 2019

In one of its first opinions of 2019, the U.S. Supreme Court continued a trend of pushing cases to arbitration. The Court unanimously held that the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq., requires arbitrators, not courts, to decide the question of arbitrability if the parties have so agreed, even if the dispute clearly is outside the scope of the parties’ arbitration clause. See Henry Schein, Inc. v. Archer & White Sales, Inc., No. 17-1272, 2019 WL 122164, at *4 (U.S. Jan. 8, 2019). As courts continue to push disputes to arbitration, parties must confront the limitations of that forum. Parties long have assumed that limited discovery in arbitration would translate to a benefit—saving costs and time—but what if those limits prevent a party from proving its case? Before agreeing to arbitrate or moving to compel arbitration, parties need to understand what discovery will be available and whether that meets their needs.

Variable Rules Depending on the Parties’ Agreements.

The rules specified in an arbitration agreement govern the parties’ discovery in arbitration. Sometimes the parties elect external rules, such as those promulgated by the American Arbitration Association (AAA) or JAMS. Each arbitral organization approaches party discovery differently, and the rules often vary with the type of dispute. For example, the AAA Commercial Arbitration Rules allow the arbitrator to decide what the parties must produce. See AAA Commercial Arb. R. R-34. But the rules do not provide for depositions except in “large, complex commercial disputes,” and then only in “exceptional cases, at the discretion of the arbitrator.” AAA Commercial Arb. R. L-3(f). In contrast, the JAMS Comprehensive Arbitration Rules & Procedures require the parties to produce “all non-privileged documents . . . relevant to the dispute or claim immediately after commencement of the Arbitration” and permit one deposition of the opposing party or person controlled by the opposing party, with discretion in the arbitrator to permit additional depositions. JAMS R. 17. In other cases, the parties’ agreement identifies a different set of rules for party discovery.

These rules disrupt the typical litigation process: How many litigators are accustomed to having to justify their need for a handful of depositions? Or to relying on the opposing party to decide what documents are relevant, rather than choosing what documents to request? For some disputes, these limitations operate as intended, focusing parties and lawyers on the key information needed for a fair hearing. But in other cases, particularly where access to information is lopsided or documents are not readily available, the rules may prevent a party from obtaining necessary facts or evidence.
Obtaining Discovery from Nonparties

What happens if important information resides with former employees no longer controlled by a party? Or another third party? The parties’ arbitration agreement does not bind nonparties and does not, therefore, require them to participate in any aspect of the arbitration. Courts can bind nonparties, but they must have the authority to do so. The ability to obtain an enforceable subpoena for nonparty discovery in advance of the arbitration hearing depends heavily on the location of the arbitration and the state law applicable to the agreement.

Federal law provides little relief. Section 7 of the FAA, 9 U.S.C. § 7, permits arbitrators to subpoena witnesses:

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.

Whether this permits the subpoena of third-party witnesses or things prior to an actual hearing, though, is debatable. Courts disagree about whether the FAA provides authority for arbitrators to compel pre-hearing, nonparty discovery. Many courts interpret the above provision to allow arbitrators to summon witnesses only for the hearing because the statute says that arbitrators may summon witnesses “to attend before them” and to “bring with them” the requested documents. Currently, only the Sixth and Eighth Circuits interpret this provision to allow arbitrators to issue document subpoenas to nonparties for pre-hearing document discovery, concluding that the power is implicit in the FAA’s discovery provision. See In re Sec. Life Ins. Co. of Am., 228 F.3d 865, 870–71 (8th Cir. 2000); Am. Fed’n of Television & Radio Artists, AFL-CIO v. WJBK-TV (New World Commc’ns of Detroit, Inc.), 164 F.3d 1004, 1009 (6th Cir. 1999). The Second, Third, and Ninth Circuits have rejected pre-hearing document subpoenas to nonparties in opinions focused on the plain meaning of the statutory text. See CVS Health Corp. v. Vividus, LLC, 878 F.3d 703, 705 (9th Cir. 2017); Life Receivables Tr. v. Syndicate 102 at Lloyd’s of London, 549 F.3d 210, 216–17 (2d Cir. 2008); Hay Grp., Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 407 (3d Cir. 2004).

No appellate court has allowed pre-hearing depositions in arbitration as a general matter. The Second Circuit has indicated that arbitrators may be able to issue a subpoena for a pre-hearing deposition to take place before the arbitrators, and the Fourth Circuit has held that pre-hearing document discovery and depositions of nonparties may be possible if the party shows a special need or hardship. See Stolt-Nielsen SA v. Celanese AG, 430 F.3d 567, 577–78 (2d Cir. 2005); COMSAT Corp. v. Nat’l Sci. Found., 190 F.3d 269, 276 (4th Cir. 1999). The Second Circuit’s
approach hews closely to the text of the FAA, which does not explicitly require the witness to appear at the final hearing—only before the arbitrator or arbitrators.

Given the Supreme Court’s recent focus on close textual readings of the FAA, it seems unlikely that the current Supreme Court would construe the FAA as providing for pre-hearing discovery from nonparties outside the presence of the arbitrators, whether at the final hearing or some other proceeding. See Schein, 2019 WL 122164, at *2; see also Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1620 (2018). In fact, former Third Circuit judge Alito wrote the opinion in Hay, in which the Third Circuit held that “Section 7’s language unambiguously restricts an arbitrator’s subpoena power to situations in which the non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time.” Hay, 360 F.3d at 407. While the Supreme Court likely would interpret the FAA to permit some type of subpoenaed pre-hearing testimony and document discovery from nonparties to be provided in the presence of the arbitrator or arbitrators, it is unlikely many parties will want to conduct pre-hearing discovery in such a setting.

With these severe limitations on assistance from federal courts, where can you turn in arbitration to compel nonparties to appear for a deposition or produce needed documents? Fortunately, many states’ arbitration and foreign discovery statutes provide a path to subpoenaing nonparties, and the FAA does not preempt discovery provisions of state arbitration acts.

**The Importance of Researching Applicable State Law**

The first step is to review the arbitration statute in the state in which your arbitration is seated (unless your agreement is governed by a different state’s law). Does this law provide for nonparty depositions or document discovery, and what are the requirements? California provides for expansive pre-hearing discovery from nonparties, only requiring an affidavit explaining why such discovery is necessary. Cal. Civ. Proc. Code § 1985. In contrast, New York permits nonparty discovery only when there is a special need or extraordinary circumstances (the same standard as the Fourth Circuit’s). See ImClone Sys. Inc. v. Waksal, 22 A.D.3d 387, 388, 802 N.Y.S.2d 653, 654 (2005); see also AXA Equitable Life Ins. Co. v. Kalina, 101 A.D.3d 1655, 1656, 956 N.Y.S.2d 743, 744–45 (2012). States that have adopted the Uniform Arbitration Act created in 1955 (amended in 1956) by the Uniform Law Commission—including, e.g., Delaware and Pennsylvania—generally allow issuance of nonparty subpoenas in the arbitrator’s discretion. (The Revised Uniform Arbitration Act created by the Uniform Law Commission in 2000 has not been as widely adopted, but it also allows for issuance of nonparty subpoenas in the arbitrator’s discretion.)
If the state does allow nonparty discovery subpoenas, the typical procedure requires the arbitrators to issue the subpoena, then the party institutes a proceeding in the local state court to enforce the subpoena. Depending on the location of your arbitration, this may require hiring local counsel to appear in the state court (some states, such as Wisconsin, require the party to file a petition to enforce the arbitral subpoena). If your witness resides in the same state as your arbitration, this completes the process. However, if your witness lives in another state, a further step is required: examining the law of the state in which your witness resides to determine the rules for obtaining discovery to be used in foreign proceedings.

Many states will enforce subpoenas for discovery from another state (including in the arbitration context) under their versions of the Uniform Interstate Depositions and Discovery Act. See, e.g., S.C. Code § 15-47-100 to § 15-47-160; Va. Code § 8.01-412.10; Wis. Stat. § 887.24. This generally requires a subpoena from the arbitrator or arbitrators; a subpoena (or a “commission” for issuance of a subpoena) from the state court in the state of the arbitration; and a domestication of that subpoena by the court clerk of the state in which the witness resides. This last step may require hiring of local counsel depending on state law and whether the witness contests the subpoena. Other states, such as Colorado, allow their courts to enforce arbitral subpoenas from arbitrations in other states, so that parties can skip the step of obtaining a subpoena from the state of the arbitration. See Colo. Rev. Stat. § 13-22-217. This multistep process for obtaining a nonparty subpoena takes time and money, particularly if it is contested by your opponent or the nonparty. In a fast-track arbitration, parties should plan ahead if nonparty discovery may be needed.

Conclusion
Arbitration agreements, the FAA, and state arbitration statutes interact to create a complex and highly variable system of discovery, both from parties and nonparties, and the trend at the federal level is to restrict nonparty discovery under the FAA. Before your client agrees to arbitrate or moves to compel arbitration, review the discovery provisions of the arbitration agreement, any rules adopted by the agreement, and the arbitration statutes of the relevant state to determine whether you will be able to obtain the discovery you need.

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A Brightening Horizon for Diversity in the Dispute Resolution Profession

By Kimberly Taylor – March 05, 2019

One topic that has dominated the headlines recently is diversity, or its absence, in a wide variety of industries. Notably, in March 2018, actress Frances McDormand made headlines for her Oscar acceptance speech when she said, “I have two words to leave with you tonight... inclusion rider.” This was a familiar term to many in the auditorium that evening—a contractual stipulation that requires racial and gender diversity among participants in a film project—and it was starting to get some attention as a means to address the poor representation of diverse groups in film and elsewhere in the entertainment industry. The term was not widely known outside Hollywood, however, including in many other industries that are notoriously homogenous, like the legal profession.

In 2016, the ABA—recognizing that despite inroads that women and minorities have made in many professions, their representation in the top ranks of the legal field remains disappointingly low—adopted Resolution 113. It urged “all providers of legal services, including law firms and corporations, to expand and create opportunities at all levels of responsibility for diverse attorneys; and... to direct a greater percentage of the legal services they purchase, both currently and in the future, to diverse attorneys.” Although top global law firms recently have announced higher-than-usual numbers of women and minorities being elevated to partner status, women still make up only about 20 percent of equity partners in AmLaw 200 law firms, and the number of minority partners is even smaller.

That lack of diversity is reflected among dispute resolution professionals. The National Association of Women Judges (NAWJ) reports that in 2018, 33 percent of all state court judges were female. The American Constitution Society recently constructed a database of state judicial biographies, including more than 10,000 sitting judges throughout the United States, and determined that people of color represent less than 20 percent of state court judges.

Many alternative dispute resolution (ADR) professionals transition into that work after reaching partner status in their law firms or serving on a state or federal court, so it is unsurprising that lack of diversity among mediators and arbitrators is a challenge in the ADR industry. In August 2018, the ABA adopted another resolution to address the issue (Resolution 105), this time urging ADR providers like JAMS and the American Arbitration Association (AAA) to expand their rosters with diverse neutrals (minorities, women, persons with disabilities, and persons of differing sexual orientation and gender identities). Resolution 105 also encourages users of domestic and international legal and neutral services to select and use diverse neutrals.
ADR providers have been focused on this issue for some time, recognizing that diverse neutrals (like diverse teams in the workplace) bring new perspectives to decision making and instill greater confidence in the outcome among the users of their services. Among their other efforts, AAA (including its international branch, AAA-International Center for Dispute Resolution) and JAMS include diversity as part of their core values. JAMS was an early supporter of the Equal Representation in Arbitration Pledge, which seeks to increase the number of women appointed as arbitrators, with the ultimate goal of full parity. AAA’s Higginbotham Fellows Program attempts to introduce diverse neutrals to the ADR profession. The International Institute for Conflict Prevention and Resolution (CPR) issues an annual Diversity Award; and JAMS—inspired by Frances McDormand’s Oscar night entreaty—issued its own inclusion rider earlier this year as a means to encourage parties to consider diversity when choosing an arbitrator or panel of arbitrators. The “rider” is sample language that parties can include in their arbitration contract clauses: “The parties agree that whenever practicable, they will seek to appoint a fair representation of diverse arbitrators (considering gender, ethnicity and sexual orientation) and will request administering institutions to include a fair representation of diverse candidates on their rosters and list of potential arbitrator appointees.”

The rider attempts to address a perpetual problem within the ADR industry that is holding diverse neutrals back. On the one hand, ADR providers can and do actively pursue increased diversity among their practitioners, recognizing the benefits of recruiting and retaining the most qualified ADR professionals inclusive of varied ethnicity, race, gender, religion, and sexual orientation. ADR providers primarily draw their recruits from law firm partner and judicial ranks, so until the numbers of women and minorities in those pools increase, that will have an impact on who enters the ADR profession. More importantly, however, it is the marketplace—including those lawyers who are drafting contracts requiring arbitration and the litigators and clients who are involved in the arbitrator selection process—that decides who gets selected for cases. The ADR providers rarely make the decision about which arbitrator a particular party chooses, and it isn’t evident that those who do make the decisions are thinking about diversity when they do so.

That problem was highlighted recently when New York rapper and mega-star Jay-Z asked a New York court to halt an arbitration because there were too few minority arbitrators to choose from. That matter is in dispute, but it received a lot of media attention. Attorneys who represent diverse clients should think about their clients’ perspective and whether they might have more confidence in the outcome of a dispute if the decision makers more accurately reflect the general population, bringing different life experiences and backgrounds and a fresh perspective to their decision making.

ADR providers will continue to rigorously identify and mentor diverse neutral candidates. Law firms, corporations, and legal departments should partner with the ADR providers to bring
more diversity to ADR by signing the Equal Representation in Arbitration Pledge, incorporating the inclusion rider into their arbitration clauses, and being mindful of diversity during the arbitration selection process.

The road toward inclusivity and diversity has been long, and the progress slower than ideal. But progress is being made; and so long as all stakeholders in the process—law firms, corporations, in-house counsel, and ADR providers and practitioners—embrace the importance of diversity in the ADR industry (not to mention the broader legal profession) and work together to consciously and deliberately encourage the appointment of diverse candidates to state and federal courts, promote diverse attorneys onto the partnership track in law firms, and choose qualified diverse candidates as their ADR professionals, we can change the landscape for the future.

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#UsToo: Be Part of the Legal Profession’s Positive Response to #MeToo

By Carla Varriale – March 05, 2019

The recent “#MeToo” movement has captivated the attention of the public and the media, so much so that the hashtag has become ubiquitous. It has had an indelible impression on every employer and workplace, and the legal profession is no exception. In addition to its tangible impact in our profession—with a renewed interest in sexual harassment and discrimination actions, an increase in requests for guidance on handbooks and policies, and requests for training and legal opinions—there also have been intangible consequences of the movement. #MeToo has started a valuable conversation about the presence of bias (both conscious and unconscious), discrimination, and harassment in the workplace, and its groundswell has created an opportunity for reflection and action for the legal profession. We are encouraged to examine our own perceptions and behaviors and our own workplaces and culture. #MeToo presents an opportunity to be proactive in addressing bias and discrimination in our workplace. We have #MeToo to thank for creating awareness of the need for change in the legal profession. But it is up to us to use our awareness to make positive strides in 2019 and beyond.

2018 Report: The State of the Profession

Last year, the ABA was involved in a blockbuster study that addressed discrimination, bias, and sexual harassment. The study was conducted on behalf of the ABA’s Commission on Women in the Profession and the Minority Corporate Counsel Association by the Center for WorkLife Law at the University of California, Hastings College of Law. The resulting report—released in September 2018 and aptly titled *You Can’t Change What You Can’t See: Interrupting Racial and Gender Bias in the Legal Profession*—details the sort of ingrained bias that diverse lawyers face, with women of color reporting the highest level of bias in the workplace. The report also provides statistics regarding female lawyers and their experiences of sexual harassment at work. For example, one quarter of female lawyers reported that they had encountered some form of sexual advances or harassment at work. The report identifies patterns of systemic bias, including an expectation that women and people of color must work harder than their colleagues just to prove themselves as equal, and a Bias Interrupters Toolkit (beginning on page 14 of the report) offers suggestions to produce change in behaviors and outcomes in the workplace.

The report also identifies disparities among male and female lawyers as well as lawyers of color when it comes to expressing anger in the workplace. *See You Can’t Change What You Can’t See* 24–25. “The research suggests that women lawyers are more likely to be judged in a harsher
light than men when they display assertiveness, self-promotion, or anger, according to [report coauthor] Joan Williams.” Debra Cassens Weiss, “Showing anger can backfire for female lawyers, studies say; law prof suggests ‘gender judo’ response,” ABA J., Aug. 6, 2018. Male and female attorneys were asked in a survey if they felt free to express anger at work when it is justified and whether they felt penalized for assertive behavior. The attorneys’ responses revealed an overwhelming double standard that was exacerbated, in some instances, by race as well as gender. More than 56 percent of white men felt free to express anger, compared with about 44 percent of white women and lower numbers for men and women of color:

![Bar chart showing free to express anger by gender and race](image)

You Can’t Change What You Can’t See 25.

In addition, just over 62 percent of white men said they are not penalized for being assertive (with men of color at a roughly equivalent 60 percent), compared with 48.5 percent of white women and less than 46 percent of women of color:
The survey demonstrated that showing anger can backfire for female lawyers, but not their male counterparts. The way the lawyers were perceived was influenced by their gender.

A separate study led by Arizona State University psychology professor Jessica Salerno reached similar conclusions regarding displays of anger in the courtroom. Salerno’s study, “Closing with emotion: The differential impact of male versus female attorneys expressing anger in court” (42 Law & Hum. Behav. 385–401, Aug. 2018), demonstrated that gender bias can have an impact on the way people perceive a lawyer’s competence. For example, female lawyers who showed anger during closing arguments in a jury trial reenactment were found by viewers to be “shrill, hysterical, grating and ineffective,” whereas their angry male counterparts were viewed as “commanding, powerful, competent and hirable” as reported in an article about the study, “Justice not blind to gender bias,” ASU Now, June 25, 2018. According to Salerno, “[a] good attorney is expected to show traditionally male characteristics in court—anger, aggression, power. But what’s happening is that men benefit from this, while we are penalizing women for showing these same characteristics[]” Id.

Opportunities for Growth in 2019

The 2018 report You Can’t Change What You Can’t See highlights problems that need solving. After doing some of my own inventory and reflecting on more than 20 years of practice, I have
prepared the following basic “toolkit” to address (and hopefully eradicate) discrimination, harassment, and bias in the workplace as well as in the legal profession. Be the change you want to see in 2019, and encourage your friends and colleagues to do the same.

1. **Examine your own implicit bias, behavior, and reliance on stereotypes.** No one wants to view themselves in this light, but as we say about potential jurors, no one comes into the room a blank slate. We all bring with us into the workplace our life experiences, values, and beliefs. That includes our own implicit bias. Implicit bias may not be readily apparent but is based on adherence to outmoded or pernicious stereotypes. This was perhaps the most difficult step for me, and it flew in the face of how I thought about myself as a feminist and as a proponent of equality and equity. I realized that I was influenced by stereotypes and some of my own biases more than I would like to admit. However, as the title of the 2018 report says, “you can’t change what you can’t [or won’t] see.” The first step to avoid transmitting bias in hiring, assignments, performance evaluations, compensation, and promotions starts with yourself. Lawyers and law firm managers need to engage in unvarnished and frank self-study about how stereotypes or their own beliefs can influence their actions at work. For me, that meant writing my beliefs in a journal or doing a writing exercise, then having a frank discussion with a trusted advisor. When you see your values and preconceptions clearly, and you commit to being mindful about how you act—knowing that you may be influenced by bias or a stereotype—you take a step toward change. After a personal “inventory,” you can set about improving yourself and, thereafter, your workplace.

2. **Prioritize diversity.** Make diversity a value and something that is sought after in your workplace. That also means embracing a spectrum of sexual orientation and identity, race, ethnicity, and ability in your workplace. Make the creation of a diverse workplace a factor in each hiring and promotion decision that your organization makes. And let that be known; if it is a value, it is worth communicating—especially within your organization. Diverse leaders bring diverse viewpoints. Giving diverse lawyers the proverbial “seat at the table” matters, especially where work assignments, performance evaluations, compensation, and promotion to leadership positions are concerned. It isn’t that bias, discrimination, or harassment cannot happen at a diverse firm. But I believe, and my experience tells me, that as the balance of power equals out, the culture does, too; and for the better.

3. **Exercise the power of the purse (or the briefcase).** Nothing secures a place at the table (and power) like having business and client relationships. Promotions often are tied to one’s ability to attract and maintain business, particularly in the law firm environment. If you are in a position to steer business to a lawyer or a firm, prioritize
retaining a minority- or a women-owned firm or a diverse lawyer or firm. There are plenty to choose from. But don’t stop there. Ensure that the firm and the lawyers working on your assignments include women and that there is no “window dressing.” Back up your values with action, and ensure you are working with qualified diverse lawyers and firms wherever and whenever possible (hint: it is always possible). As noted above, communicate within and outside your organization that this is a value. Again, if it is a value, it is worth communicating.

4. Be a mentor. Be a sponsor. Be an ally. Do you know these terms and the difference among them? Get to know them as part of your initial self-study. The distinctions are important (and you can be all three). For example, a mentor is a trusted person who advises and shepherds a mentee based on his or her experience or expertise, while a sponsor is someone who takes a more direct role in the success of a putative sponsee. I think of a sponsor as more of an advocate for opportunities for or the advancement of the sponsee. An ally, by contrast, need not have a guidance role or an advocacy role (though of course he or she can have such a role), but I use “ally” in the way that the lesbian, gay, transgender, bisexual, and queer (LGBTQ) community uses the term: An ally is someone who is supportive of LGBTQ people. It is important to be supportive, including of differences among your colleagues.

One example I can think of involved a colleague who discussed the way a female associate dressed (the office had a “business casual” dress code), and I was taken aback because his statement about her choice of casual seemed sexist and derogatory. To be supportive of her, I queried whether he had the same concerns about her male counterparts, who sometimes wore sneakers and hoodies to the office, and whether he thought her being “too casual” was based on the fact that he did not expect a woman to dress that way for the office. The prompt made him think about it. I didn’t need to call him a sexist or fight with him; the prompt was enough for him to realize what he was doing and redirect his thinking. It’s a small example, but within your organization there may be similar “teachable moments” to uncover (and eradicate) bias or the use of stereotypes.

5. Educate yourself. Educate your organization. Here is where bar associations can really boost professional development. There are numerous educational opportunities and opportunities to raise your own awareness through education offered through bar associations. Encourage colleagues and managers to get trained. Make use of educational materials like webinars to assist in the promulgation of policies that enhance diversity and target conscious and unconscious bias and discrimination. Most bar associations provide (and some states now require) continuing legal education credits regarding discrimination and the elimination of bias. The ABA is a valuable
resource for educational materials. For example, the Commission on Women in the Profession has published *Zero Tolerance: Best Practices for Combating Sex-Based Harassment in the Legal Profession* (Aug. 31, 2018), and it is a mainstay on my office bookshelf. It provides guidance for assessing implicit bias and developing workplace policies, and it includes practical sample polices, including a policy prohibiting harassment.

#MeToo started a conversation, and the legal profession is a necessary part of that conversation: #UsToo.

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