Persuasion

Preliminary Injunctions

Rethinking Credibility and the Burden of Truth

Attorney-Client Privilege
FEATURES

Preliminary Injunctions
ERIK A. CHRISTIANSEN
Before filing, carefully consider the quality of the supporting evidence.

Sua Sponte
HON. CURTIS E. A. KARNOW
A judge advises both sides to be ready to move quickly and without error.

Rethinking Credibility and the Burden of Truth
KENNETH R. BERMAN
The Blasey Ford/Kavanaugh hearing provides a backdrop for examining the four stages of credibility and how factual disputes are actually resolved.

An Interview with Michael Kim
ASHISH JOSHI
The co-founder of Kobre & Kim reveals the reasoning behind the firm’s unorthodox business model.

Attorney-Client Privilege
JOHN M. BARKETT
Lawyers who don’t stay on the safe road when using this evidentiary gift may end up lost.

The Impact Litigation Campaign to End Civil Forfeiture
DAN ALBAN
The practice of governmental property seizure is increasingly controversial.

Avoiding Discovery Disasters
PATRICK OOT AND ADAM SHOSHTARI
Here’s how to stay on the path of proportional discovery.

Making the Most of Pro Bono Opportunities
GEOFFREY DERRICK AND LAUREN WEINSTEIN
A guide for associates trying to build a litigation practice.
Opening Statement

THE ESSENTIAL MENTOR: SIX SUGGESTIONS

PALMER GENE VANCE II

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Trying cases challenges us to be better lawyers. For those of us primarily in civil practice, the opportunity to conduct a trial or other adversarial proceeding can be rare. The preparation is the practice for many litigators. And so, to excel in our profession, we must excel at preparation. This is true both for the matters we handle and for honing our abilities as trial lawyers. Being mentored as young lawyers is essential to this development, and we likewise must act as mentors to those who follow. Mentorship offers benefits and satisfaction to both the mentor and the person receiving the guidance.

Steven Spielberg has said that “the delicate balance of mentoring someone is not creating them in your own image, but giving them the opportunity to create themselves.” I have been fortunate throughout my career to have mentors who have taken that approach to guiding me as a lawyer. My first exposure to the practice of law came when I was just out of high school and worked with a legendary lawyer in my hometown in eastern Kentucky. Days after my graduation and a couple of months before my 18th birthday, he had me reading a case file and then sitting with him at counsel table as he tried a personal injury case involving an accident between a coal truck and a passenger car. Over the course of three summers, I attended four trials with him, including serving as a witness in one of them (a war story for another time), and learned skills ranging from answering interrogatories to performing mineral title work to plotting a metes and bounds deed description with a ruler and compass. The most important lesson he taught was the importance of relentless attention to detail and how it could make a difference in vindicating the client’s position or explaining the failure to do so.

Each mentor I have had throughout my career has added to the full measure of the lawyer I have become. From the judge for whom I clerked, I learned how to be brief, how to better organize my thoughts, and the importance of humor in the practice of law. From the terrific trial lawyer who guided my first years of practice after that clerkship, I learned how to take a deposition, the five commandments of witness preparation, and when to forgo the urge to comment. That last lesson remains a constant struggle. From my current and former senior partners at my present firm, I have learned how to work as a team, how to try a case, and the importance of creativity and agility in representing our clients.

Working in the Section of Litigation has provided mentors in other contexts. Former authors of the Opening Statement in this journal have instilled the importance of giving back to our profession and of our role in preserving our system of justice and the rule of law. Other bar leaders have served as examples of how to collaborate and advance goals.

Having benefitted from mentors throughout my career, I have also tried to serve as a mentor to younger lawyers. As Spielberg correctly observed, this cannot be a process of superimposing yourself onto another person in an effort to create a “mini me.” Yes, you can and should provide instruction and guidance based upon how you engage in a particular task or practice a case. But your role should be to allow younger lawyers to identify their own best practices based on their skills and abilities.

In considering the effectiveness of mentoring, I have six suggestions for litigators who act as mentors to their younger colleagues. I have found that each of these ideas works well for me.

1. Avoid “Assigned” Mentorships, If Possible

My best mentoring experiences have occurred when the relationship has developed organically. Conversely, poor experiences have sometimes resulted when I have been assigned to a mentoring relationship. I recognize that avoiding this structure may be challenging in a larger law firm environment. If you are assigned someone to mentor, by all means work on development of the relationship. But you
will likely find that the best relationships develop when working together on common tasks.

2. Look Outside Your Practice

Opportunities to mentor do not rest solely within your firm or practice. Yes, you have the ability to guide younger colleagues with whom you work directly. But there are also young lawyers needing assistance who are working elsewhere. If you are in a solo or small firm practice and a newly minted lawyer hangs out a shingle next door or across town, reach out to that person and offer your assistance. If you are a former prosecutor or public defender, look for chances to guide new lawyers filling your old role.

3. Be Mindful of the Need for Diversity in Our Profession

One of the greatest benefits you can bring as a mentor is to guide young lawyers with different backgrounds. While all young lawyers need mentors, the law remains one of the least diverse professions in the United States. Reaching out to young lawyers of color not only benefits those individuals, but also helps to produce a justice system that is broadly representative of the public we serve.

4. Share Experiences

It is one thing to talk about how to conduct a discovery deposition or to prepare a witness to testify. It is quite another to actually see and experience those events. Effective teaching requires both action and reflection. After the event concludes, be sure to discuss and evaluate it. Ask the younger litigator why a witness responded in a certain way or why a witness failed to follow guidance provided in preparation. Make this a continuous process with multiple opportunities. When the younger lawyer is ready to conduct the preparation or the deposition, attend with her and then have a dialogue afterward.

5. Listen

Developing a career as a litigator requires a great deal of work and multiple skills. Mentoring includes guidance on the work we perform for our clients, but also on the work we do to develop as professionals, the work we do to earn business and our obligation to serve the public. Younger lawyers may often find a need for advice in any or all of these areas. Schedule unstructured time to talk about concerns and answer questions. Be sure to listen more than you talk in this setting. There are times when your junior colleague can talk out an issue just through a conversation with an experienced guide.

6. Care

Most of my mentors have been genuinely interested in my growth as a lawyer and as a person. To have success mentoring others, you must care about those individuals and their development. In the words of Maya Angelou, “In order to be a mentor, and an effective one, one must care. You must care. You don’t have to know how many square miles are in Idaho, you don’t need to know what is the chemical makeup chemistry, or of blood or water. Know what you know and care about the person, care about what you know and care about the person you’re sharing with.” She is right. Although what you know as a lawyer is important to mentoring another lawyer, the most critical element of a successful relationship is caring that your younger colleague gets the most from her abilities.

The title of this Opening Statement recognizes that mentorship is essential. In my view, it is essential for both the mentor and the person being mentored. When you are mentored, you grow, develop and become a better lawyer. When you mentor someone else, you gain the satisfaction of seeing another lawyer succeed. In the words of Phil Collins, “In learning you will teach; in teaching you will learn.”

Illustration by Dave Klug
From the Bench

GOING FROM TRIAL LAWYER TO TRIAL JUDGE

HON. DEAN HANSELL

The author is a judge on the California Superior Court, Los Angeles.

Making the transition from trial lawyer to trial judge has been a great journey. The job satisfaction rate among judges is high. Few of us ever will return to private practice, even those who enjoyed being there.

So today I sit in a different seat in the courtroom and see everything from a new perspective. While most of my early insights about judging are not truly new, I wish I had known them better and understood them more fully when I was an advocate. And for those insights that I did know then, I really wish I had learned them sooner and paid more attention to them. It might have made a world of difference.

As I see it, there are few if any judicial secrets. None of these points is a surprise. Rather, they all are common sense and well known, yet each is ignored more often than heeded.

First, get to the point. Fast. We judges typically deal with crowded dockets and multiple issues in each case. Get us to focus on your key points. Organize your case well. Write—and then edit and rewrite—your pleadings, motions, and briefs. Tighten them up, so that they compel the court to focus on what you believe most important. Just because a rule of court gives you 20 pages for your opening brief does not mean that you should take all of them. If you can make your points in 15, then by all means, do so.

Practice and refine your oral argument. Start with your strongest and most important points. At the outset, give the judge a mental checklist of the points you will make and what's to come as you talk about them. Remember, at oral argument, it's OK not to cover all the points that are made in your papers.

Recently, in a complicated high-dollar case before me with a lot of issues, one of the most effective oral arguments I have heard began with this:

Your Honor, there are six reasons that respondent should prevail on this issue. Today, I will discuss only four of them. Unless the Court has questions about the other two, I respectfully refer the Court to pages 8 through 11 in our moving papers for point five (statute of frauds) and point six (failure of consideration).

In three short introductory sentences, that attorney alerted the court to the multiple grounds for the relief he sought, the specific issues that he considered most important on which to focus, and where to find the other arguments. He invited questions on those other points if I wished to raise any, but he deferred spending time on them if I did not. A wise move.

Second, know—or swiftly figure out—when to stop talking. There are times when I take the bench predisposed to rule in a certain direction on an issue. Sometimes, based on the protracted oral argument of the attorney I thought would prevail, I have found myself compelled to reconsider.

There's no one reason this happens. Sometimes lawyers ask for too much; they overreach and it proves counterproductive for them. Other times it becomes apparent during oral argument that the position they had presented in their papers in such a black-and-white, absolutist way, and that I initially had accepted as clear and obvious, is actually more nuanced and less certain. Listening to the attorneys continue to argue for the very outcome that I was inclined to order when I took the bench, I've more than occasionally discovered that I had not given due consideration to the contrary points.

The more the advocates go on and on, the more time I have to contemplate the opposing perspective and realize that the other side's view may have more merit than I originally considered. These types of developments sometimes prompt a positional change on my part, based on the additional information. We are trained as judges to remain open-minded, willing to alter our initial conclusions based on more information, but I sometimes wonder what would have happened if the loquacious lawyer projected to prevail had simply spoken less and sat down.
Early in my legal career, I started to learn this lesson. One of my first arguments as a young lawyer in Los Angeles was at a remote courthouse in the San Fernando Valley. My motion was not even opposed. Regardless, I came to the oral argument fully armed with the top five reasons my client must be right. We must prevail, I thought, and I undoubtedly communicated that with certainty to the court, both expressly and implicitly.

I solidly made my first point. Then, midway through my second argument, the judge leaned forward on the bench and said, “Counsel, when I walked in, I was prepared to rule your way. The more you continue to talk, the more I may reconsider my view.” Hearing that, I sat right down.

What I had failed to do then—and what many attorneys who appear before me fail to do now—is to check in, before launching into argument, about where the judge is, or seems to be, on the issue. Even when the judge does not issue tentative opinions—(and many courts do not do so)—you may be able to inquire what is on the court’s mind. It never hurts to ask.

Such probing may elicit the response that the attorneys should simply proceed with their arguments. But if you ask first, you may find the court is already at least partially with you or perhaps can identify a few of its concerns.

The most dramatic example of this before me as a judge occurred in a case in which I announced my tentative view on a subject. The attorney with the greatest hill to climb went first. Then came the attorney who was on the side that was projected to prevail. He got to the lectern and said just this: “Your honor, I have listened carefully to my esteemed opponent’s arguments. Nothing she has said dissuades me from the wisdom of the Court’s tentative views. So, unless the Court has any questions, I submit on the tentative.” And then he wisely sat down. So know—or figure out—when to stop talking and when to sit down. Then feel confident enough to do it.

Experienced football teams call this taking a knee. It’s near the end of the game and the likely-to-prevail quarterback kneels down with the ball, rather than risking a fumble, thereby securing his team’s victory.

Third, bring out and discuss the weaknesses in your case. Most lawyers know this already, yet few follow it. All cases have negative facts. No judge believes otherwise. We are trained to look for them ourselves and then assess them. You are the one who should bring out the weaknesses of your client’s case and candidly discuss the facts that hurt your side. Then bring them into context and show why your client should prevail anyway.

In a recent hearing before me, a father asked to have 50/50 visitation with his two young daughters. The court papers eloquently and compellingly discussed what a good father he is, how the girls light up in his presence, how he helps them with their homework, how much richer their lives would be with regular and frequent visits with him, and his magnanimous offer to provide all of the transportation to pick up and drop off the girls at their mom’s house.

Only when I got to the mom’s papers did I learn that there was a criminal domestic violence order against him still in effect and that he twice had been convicted of driving under the influence. There was uncomfortable shifting around at counsel table when I sharply questioned his attorneys about why I had to read that for the first time in his adversary’s opposition brief.

Imagine what that does to a judge’s perception of the credibility of the counsel. Plus, the mom’s attorneys got to paint those facts in the way that best suited her position.

Fourth, come to court organized. Know where to find your exhibits efficiently, your court findings easily, and your legal authorities quickly. At best, not coming to court prepared to use the judge’s time well draws out the proceeding, compels everyone else to sit quietly and wait while you sort through your materials to find the right exhibit, and gives opposing counsel time to prepare a response. It also increases the odds that, in the heat of the moment, you will leave out points helpful to your case.

As well, coming to court less than fully organized often means that you have not satisfied the meet-and-confers imposed in many jurisdictions (see, for example, California Rule of Court 5.98), which can result in a matter being summarily denied or necessarily rescheduled.

A recent hearing was going well for the father on why he should be entitled to 50 percent credit for the many credit card transactions he paid for during the marriage. The best opposing counsel could come up with was that some of the charges occurred either before or after the 15-month marriage and that a few of the charges were for the husband’s son from an earlier marriage.

I asked the father’s counsel to identify, from the long list of credit card charges, those that were community property. After a long pause, counsel acknowledged that he had failed to break them down. Rather than have me continue the matter to the next available court date nearly three months later, he announced that instead he would not pursue that part of his claim after all. We moved to the next point. Better organization would have permitted him to efficiently support his argument rather than abandon it.

You know all of this—as did I, when I practiced—but given where I sit today, it bears repeating. Just as lawyers regularly discuss judges, we judges often discuss lawyers. Is an attorney credible? Well prepared? Verbose? Respectful? Easy to work with? On time?

These are all topics that we judges find ourselves discussing. While it’s the facts and the law that will carry the day, judges are often aware of attorneys who are on top of things and those who unfortunately are not. So, for the sake of your reputation and good standing as well as the success of your efforts, consider things from our point of view as you undertake to persuade us.
HEADNOTES

EXPERTS

The Dangers of Overzealous Experts

MARIA E. RODRIGUEZ

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For attorneys, zealous representation of a client is required. For experts, “zealous representation” is flatly inconsistent with what they purportedly bring to the process. An overzealous expert can tank your case and is much more dangerous than the opposite—the expert who is meek or not zealous enough.

The expert who is too gung-ho, too invested in helping your client or too eager to see a certain outcome is bad news. Savvy lawyers love facing off against overzealous experts; they are easy witnesses to pick off and jurors distrust them.

That’s because overzealous experts rarely stay within the lanes of their expertise. We’ve all faced or hired them. Experts who are not content to opine on one particular subject but, instead, want to tell the whole story and advocate for your— their—client. Experts who won’t give ground, if it helps the other side, when faced with even the most logical fact or theory.

I heard from a colleague who practices bankruptcy law, where lawyers tend to employ the same expert witnesses over and over, that her expert told her he’d gotten together with the other side’s expert, and they’d worked out how to settle the case!

If you’re lucky, your adversary will have an overzealous expert. And smart experts themselves know this as well. One expert advertises on his website: “I love having overzealous experts on the other side in litigation. They can’t help themselves. Advocacy bleeds through in many corners of their reports and their testimonies. They make easy targets for objective and dispassionate analysis.”

Blogs and articles for expert witnesses always warn them not to forget that they are advocates for their opinions and methodologies, not for the case itself. And at least one article warns that “being myopic” is one of the worst errors that experts commit.

By playing the role of advocate, instead of neutral arbiter, expert witnesses come across as guns for hire, and their opinions arouse skepticism instead of trust.

Post-trial interviews with jurors and mock jurors bear out this mistrust. Asked to identify what they found off-putting about experts, they often describe these witnesses as “salesmen,” “overzealous” and “slick.” Conversely, a mock juror once had this to say about a convincing expert witness: “He was just open and honest. He would tell the defense attorney that he was wrong and that the plaintiff could be right in certain spots. They were just more credible than the plaintiff experts. The plaintiff experts seemed like they’d say what you want to hear and when the defense got to them, they’d fall apart.”

Can an expert be so overzealous that she is excluded by the trial judge? Yes. It is true that Federal Rule of Evidence 704(a) provides explicitly that expert testimony that is “otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” Nonetheless, many courts have held that
“an expert witness cannot give an opinion as to her legal conclusion, i.e., an opinion on an ultimate issue of law.” In Century Indem. Co. v. The Marine Group, LLC, Slip Copy, 2015 U.S. Dist. LEXIS 127133 (D. Or., 2015), a complicated insurance dispute, the experts were supposed to identify which insurance policies applied, reconstruct missing or lost policies and construe their terms, fix the time period for which each policy provided coverage, establish the existence and applicability of exclusions, and determine the obligations of excess and umbrella insurers. Instead, the experts determined each party’s duty to defend—the ultimate legal conclusion that the court was supposed to make. Finding that the experts provided no “opinions about facts,” the court excluded portions of their testimony and, in the case of one expert, precluded him from testifying at trial altogether.

How do you avoid damaging your case with an overzealous expert?

First, be clear about what you are asking experts to do, and put it in writing in the retention agreement (but remember the agreement is discoverable).

Second, think of what experts may be asked to assume and rehearse what they will say in deposition and on the witness stand. Keep your discussions current—sometimes, experts will shape their views based on what your legal theory was yesterday. Make sure you remind them that your theory of the case is evolving (especially if discovery remains to be done when the expert comes on board).

Third, given that jurors are novices in most areas they are asked to deliberate about (for instance, most people don’t know much about stem cell technology, securities regulation, manufacturing processes, requirements contracts, or royalty formulas—and those that do have specialized knowledge were probably stricken from the jury), experts should not be too dismissive of what they deem to be ridiculous conclusions of opposing experts.

Fourth, your experts should avoid looking too eager. Most experts have learned how to make eye contact with jurors during their testimony. However, some overdo it. Jurors have sometimes reported that experts seemed to be trying too hard by directing themselves only to the jury. It will seem more natural for experts to respond to the attorney on shorter, simpler responses and include the jury only when giving longer answers or when explicitly told to “explain to the jury.”

Finally, remember that if experts want to offer an opinion that seems too good to be true, it probably is. I know of an expert who was hired to come up with a damages number that was fair to the defendant. Instead, he came up with a theory about how it was physically impossible for the defendant to be liable at all.

He was wrong, and when the other side pointed out the errors in his facts and reasoning, counsel had to withdraw him and his opinion from the case.

TRIALS

Why Not Trials Instead of Depositions?

DAN SKERRITT

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Like many older trial lawyers, I serve as an arbitrator from time to time. A recent American Arbitration Association continuing education program reminded me and other panel members that the norm should limit witnesses to testifying a single time: at the hearing, not in a deposition. Financial Industry Regulatory Authority (FINRA) Rule 12510 likewise states that depositions are “strongly discouraged,” with a few exceptions geared to providing recorded testimony for witnesses who cannot appear at the hearing.

Criminal procedure in my state, Oregon, seems to do just fine without depositions—not just in small cases, but as I was reminded by my friend, Multnomah County Senior Trial Judge Janice Wilson, even in the most significant matters, such as capital murder cases.

Yet, the default rule in state court civil procedure around the country is to allow depositions without meaningful limits. The mindset of most litigators is that they need to take depositions. Irving Younger’s Ten Commandments teaches aspiring lawyers to never ask a question at trial unless they already know what the answer will be. Depositions are how lawyers learn those answers before trial.

This mindset is destroying trial practice. Even cases of limited economic exposure are managed under discovery budgets that approximate the value of the case. As a result, litigation practice now follows the model of taking depositions of every available witness, blowing through the budget, then settling the case without a trial.

I’ve always been suspect of Younger’s commandment. True, its application might spare embarrassment from getting a “bad” answer at trial. But in many cases, what’s the difference? Bad answers abound at depositions. More frequently than ever, a lawyer’s only encounter with a witness is at deposition.

This leads to the question: Why not skip the deposition and face the witness just once, at trial? In most cases, this would be just as efficient, maybe even more efficient. If the “bad” answer at trial erodes the lawyer’s confidence in her case, she can consider settling. If settlement can’t be reached, the jury is capable of a decision. Those who still try cases will tell you that the jury generally gets things right. Experienced judges will also tell you that impeaching a witness through a deposition transcript seldom impresses jurors as much as the cross-examiner thinks it does.

Document discovery and interrogatory rules requiring a summary of testimony...
are often sufficient to keep lawyers from flying blind at trial when they face a witness who has not been deposed. Given the explosion of digital applications, which record communications once limited to private conversations, lawyers have vastly more written material available for trial preparation than Professor Younger ever could have imagined.

The issue is more important than efficiency. The sad truth is that we are losing the jury trial. We need more of them. We need more of them for younger lawyers to build their bodies of work and their self-confidence. We need more of them for citizens to understand that the right to a jury trial was enshrined in the Bill of Rights for good reason. It is a cornerstone of democracy.

By contrast, the Founders never mentioned—and likely never contemplated—the right to a deposition. Most of us do not like change. We get used to doing things a certain way. I too take comfort in having a deposition transcript on my laptop to use at trial to impeach or keep a witness in line. But in many cases, the cost of doing the same thing twice, requiring the witness to testify first at a deposition and then at a trial, outweighs the benefit. I grew up at a time when depositions were used less in smaller cases. And you know what? Trial practice worked just fine when the witnesses testified just once at trial.

I propose discovery rule changes similar to FINRA Rule 12510, with no depositions as the default in any case valued at less than some agreed number, say $200,000. Depositions for even larger cases should be discouraged, and when allowed, be limited in duration.

Several states have voluntary programs where the parties opt into streamlined trial programs with discovery limits. These voluntary programs are well intentioned, but they simply do not work. Just ask judges and lawyers (myself included) who have championed these efforts. They know opt in doesn’t work. If we want to transition to trial practice in lieu of depositions, mandatory rules are needed to limit deposition practice.

Another approach worth considering is to adopt ADR clauses in contracts specifying that disputes involving matters valued at less than an agreed amount will be tried (or arbitrated) with exchange of documents, but without depositions.

For all the deposition-craving readers who now have steam escaping their ears in anger, I offer a final point in rebuttal: Unless we devote resources to trials rather than depositions, economics dictate that the day is not far away when civil trials will vanish completely. Civil jury trials will become part of a quaint past. We will all be worse off when that day arrives.

Arguing Both Sides of the Excesses of Government Power

RICHARD DEAN

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Two of the darkest chapters in 20th-century American justice were Korematsu v. United States, 323 U.S. 214 (1944), upholding the forced assembly of Japanese Americans, and Barenblatt v. United States, 360 U.S. 109 (1959), upholding a contempt citation by the House Un-American Activities Committee (HUAC). Both cases stand as examples of the Supreme Court failing to stand up to excessive exercises of power by other branches of government.

They also share another interesting similarity: The same lawyers led the arguments in both cases. But while they supported the government’s authority in one case, they vigorously opposed it in the other.

In the infamous Korematsu case, the petitioner, an American citizen of Japanese descent, was branded a criminal simply for being in California after an executive order required him to “assemble” and be removed. The Supreme Court affirmed his conviction, 6–3, based on war exigencies. Justice Black, famously an absolutist on the First Amendment, authored the majority’s decision.

In 1984, Korematsu’s conviction was vacated (584 F. Supp. 1406 (N.D. Cal. 1984)), because the actual government assessment of the lack of risk from Japanese American citizens was not presented to the Court by U.S. Solicitor General Charles Fahy. But the Supreme Court holding remained in place until it was recently reversed in the travel ban case, Trump v. Hawaii, 138 S. Ct. 2392 (2018), even though reversal was not necessary to achieve the result in that case. Chief Justice John Roberts concluded that “Korematsu was gravely wrong the day it was decided, has been overruled in the course of history, and—to be clear—‘has no place in law under the Constitution.’” 323 U.S., at 248, 65 S. Ct. 193 (Jackson, J., dissenting).

In the 1959 decision in Barenblatt, the Supreme Court upheld a contempt citation against a university professor who refused on numerous grounds, including the First Amendment, to answer HUAC’s questions as to whether he had ever been a member of the Communist Party. It was a 5–4 decision, with Justice Black and three others dissenting. The results in cases like this swung the other way after the Warren Court’s ascension during the 1960s. HUAC itself was disbanded in 1975.

Lawyers represent clients. They do not necessarily agree with the legal or political position they advocate in a particular case. And it is often true that lawyers representing the government take different positions on legal issues after their government service. These cases are a great example.
Appearing on the government brief in *Korematsu*, in addition to Fahy, were Herbert Wechsler, assistant attorney general; Edward J. Ennis, director, Alien Enemy Control Unit; and Ralph Fuchs of the Solicitor General’s Office. Wechsler and Fuchs were prominent academics in the early 1940s when they joined the government because of the war.

Wechsler famously went on to argue *New York Times v. Sullivan* on behalf of the Times and to a distinguished teaching career. Less well known are Ennis and Fuchs, who appeared for the United States in *Korematsu* and against the United States in *Barenblatt*.

Edward Ennis worked for the Justice Department from 1932 until 1946. After Pearl Harbor, he opposed the army’s request for the mass removal of American citizens of Japanese ancestry. But President Roosevelt approved it. At that point, Ennis considered resignation but was fearful his position would be taken by lawyers “gung-ho for the Army’s position.” He strenuously, and unsuccessfully, urged Fahy to make a full disclosure to the Supreme Court regarding the lack of risk presented by Japanese American citizens (*see Korematsu*, 584 F. Supp. at 1421–24), but eventually signed off on the brief for the sake of “institutional loyalty.” In 1946, Ennis joined the American Civil Liberties Union (ACLU). He became its general counsel in 1955 and its president in 1967.

Ralph Fuchs started teaching at Washington University Law School in St. Louis in 1926. In 1941, while still teaching, he appeared on behalf of the ACLU in a classic First Amendment case in which a St. Louis paper did an amusing parody of judicial proceedings that took place in open court. The judge, lacking a sense of humor, was offended and held the paper in contempt. *Pulitzer Co. v. Coleman*, 152 S.W.2d 640 (Mo. 1941) (vacating the contempt citation). During World War II, he served as a special assistant to the U.S. solicitor general, arguing 14 cases before the Supreme Court. After the war, he began a long teaching career at Indiana University School of Law; he was a recognized expert in administrative law and a leading advocate on behalf of academic freedom. He became general secretary of the American Association of University Professors (AAUP) in 1955. AAUP was at a low ebb then, having failed to vigorously investigate or contest the actions of many universities in dismissing professors during the McCarthy era.

Revitalizing the organization, Fuchs initiated the practice of submitting amicus briefs on behalf of the AAUP in First Amendment cases, starting with the AAUP’s *Barenblatt* brief. Barenblatt was personally represented by the ACLU, and Ennis argued on his behalf in the Supreme Court.

The issue in that case was whether Barenblatt could be asked if he was a member of the Communist Party; there was no issue about what he had said in a classroom or written in an article. Justice Harlan, writing for the majority, concluded that it was appropriate for HUAC to investigate and legislate regarding the Communist Party. Justice Black’s dissent argued that mere membership in the Communist Party was a protected free speech right. Black’s concluding paragraph was an eloquent showstopper: “Ultimately all the questions in this case really boil down to one—whether we as a people will try fearfully and futilely to preserve democracy by adopting totalitarian methods, or whether in accordance with our tradition and our Constitution we will have the confidence and courage to be free.” *Barenblatt*, 360 U.S. at 162

Most lawyers never have the opportunity to litigate a single high-profile civil rights case. Ennis and Fuchs were involved on both sides of two of the most divisive cases of the 20th century.

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On the Papers

BAD NEWS

GEORGE D. GOPEN

The author is Professor Emeritus of the Practice of Rhetoric at Duke University.

Compare the following two sentences:

(A) I have bad news.
(B) I have news not of the kind for which I would have hoped.

Authors of most composition textbooks use this kind of pairing constantly to display their wares: “Here is a bad, evilly written sentence that I have transformed into a fine, virtuous sentence by the application of my wonderfully rigid rules.” Almost all of them would by far prefer (A) to (B). They have many reasons: (A) is shorter—4 words to (B)’s 13. (A) is direct; (B) is rambling and not to the point. The news in (A), while negative, is communicated in a positive way; (B) delivers the negative news only by a use of the negative word “not.” (A) tells us the news is “bad”; (B) never utters an adjective or noun that communicates “bad.” (A) contains no prepositional phrases; (B) is weighed down by two of them.

Such responses seriously underestimate the rhetorical complexities involved in the choice between what we might call the “American” version (A) and the “British” version (B). Just imagine hearing (A) recited by a voice from Iowa and (B) by a voice from Henley-on-Thames. You can hear the difference, yes? They both sound at home.

Neither of these sample sentences is good or bad by itself. They can be evaluated only in terms of (1) the context that surrounds them and (2) the purpose they are intended to serve. For whom is the sentence written? Under what conditions? For what purposes?

If the case calls for straightforwardness, for not beating around the bush, then (A) is superior. A doctor informing a patient she has cancer may prove kinder by being direct. That works well for the patient who seems emotionally hardy enough to deal with such a shocking revelation. If, on the other hand, the patient seems particularly fragile, the longer, more buffered delivery of (B) may give her more time for the bad news to set in. I say “time” because that sentence is going to be one of the longest, most slow-motion sentences she will ever hear. It might echo in her mind forever. With (B), no individual word delivers the bad news. The word “not” warns that the rest of the sentence is likely to be unpleasant; but it doesn’t deliver the blow all by itself. It takes the global essence of sentence (B) to communicate the shock.

Change the context. Have either sample sentence be the first in an email from a man to his concerned family and friends announcing that the news from a CT scan, despite months of chemotherapy, is not good. The (B) version is not simply kinder and gentler than (A) in delivering the news; it also suggests his state of mind in advance of his articulating that state of mind. Even though stated in the negative, his stress position in (B) still contains “hope.” This sentence might well not be dispositive of the issue: The following sentence might plunge into despair. (In that case, sentence (A) might well have been the better choice.) But if the rest of the paragraph displays a positive state of mind—anywhere from acceptance to serenity—then sentence (B) will have established that possibility far better than (A). The presence of the well-placed positive word “hope” makes the eventual “acceptance” easier to perceive, receive, and understand for the reader. Sentence (A) would have seemed jolting, had it led up to “acceptance”; it would have been downright disruptive in advance of “serenity.” Indeed, it would have made that serenity unbelievable—the statement being reduced to a self-deluding and others-deluding lie.

That is one of the reasons why, compared with Americans, the British always sound so significantly superior and more self-possessed. They have been trained to make their formal, interactive language far less concerned with delivering the news and far more concerned and caring for the state of mind of the person listening. They call it “manners.” Tone of voice helps as well: An English man or woman can say “How nice it is to see you” in exactly the same tone of voice as “You won’t
be staying long, will you?” and make them sound equally hospitable.

Another, more controlling difference between the two sample sentences is their rhythmical structures. Really well-written prose—M.L. King’s “I Have a Dream” speech, JFK’s inauguration address, J.K. Rowling’s every page of the Harry Potter series—tends to be composed in a musical fashion that depends highly on rhythm. These writers balance one prose unit (phrase, clause, or even whole sentence) against another; then they change how many rhythmic subunits there are in each larger unit to influence or control the reader’s sense of either tension or relaxation, anxiety or arrival.

Because this is hard to contemplate when given only this short description, here is an example of a famous piece of prose—the opening paragraph of Charles Dickens’s A Tale of Two Cities. I have arranged it into what I call a colometric—a way of being able to “see” the rhythm. Every unit that has an extra space before or after is meant to contain one reading accent or beat.

- The first six paired lines are controlled in part by their final words. In the first three, the length of the final word keeps increasing. That done, for the next two lines, Dickens changes tactics and uses the alliteration of the “d” sound for resonance. The next two pairs are connected just by meaning—“everything”/“nothing” versus “Heaven”/“the other way.”

Compared with Americans, the British always sound so significantly superior and more self-possessed.

- All the first six paired lines have two beats on either side of the asterisk; but the seventh pair swells to three beats each. The drama that produces leads us straight to Hell. Once Dickens leads us there (“the other way”), he apparently feels this tactic has done what it could.
- He then dismisses lyricism in favor of matter, continue to communicate through their rhythmical structure. We return from Hell by returning to the original four-stress line pair. But this reduction from six beats per pair to four begins a cascade.
- In his final line, he reverts to the default value four beats that has acted as a “home” rhythm from the start. The drama is gone. The recognizable rhythm has restored order. It is—intentionally—bordering on boring.

Applying this colometric method of seeing/hearing to our two example sentences proves instructive. Sentence (A) can support an accent or beat on every single word:

I have bad news.

Sentence (B), in contrast, has a rhythmical lilt that plays a significant and signifying role in how the reader perceives its message. It is a different kind of music. Here is one way (not the only way) it might be experienced by the reader—with the rhythmical beats underscored.

I have news for which I would have hoped.

The three-beat third line rhythmically expands on its two-beat predecessors, producing the sentence’s closure, logically, grammatically, and rhythmically. That sense of arrival is aided by the alliterative “w” sounds (“which” and “would”) followed by the softer alliteration of the “h” sounds (“have” and “hoped”). (It is softer not only because “h” is itself a softer sound than “w” but also because only one of the two “h” sounds occurs in an accented word.) Sentence (B) is Mozart; sentence (A) is heavy metal. Both have their purposes.

The rhetorically sensitive writer can, to some extent, control a reader’s reception of and response to the message by the way in which the sentence is crafted—even down to its rhythm; the writer who slavishly follows the advice in nearly all writing textbooks will merely keep cutting down the number of words in the sentence and avoiding the passive voice. The former is better.
Preliminary Injunctions
Live or Die on Powerful Evidence of Wrongdoing

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Before filing a motion for a temporary restraining order (TRO) or a preliminary injunction, the most critical thing to consider is the quality of the supporting evidence. If you lack credible witness testimony and admissible documents to support interim injunctive relief, you should not file the motion. Too often, lawyers rush to court with a well-pleaded claim, but they move for immediate relief with incomplete or inadequate facts and without sufficient consideration of whether the evidence establishes the required elements for an injunction. Clients sometimes push lawyers to seek injunctive relief, not realizing the risks, procedure, burdens, costs, and ramifications. In many cases, it might be better to wait until credible and admissible facts are discovered, instead of rushing into court on an inadequate factual record. It is not unusual for injunctive relief cases to improve over time if patience is exercised in waiting for evidence of suspected nefarious conduct to bubble up in multiple places.

For example, sometimes an employer might learn that a former employee has gone to work for a competitor and might suspect that the former employee is soliciting the employer’s customers in breach of a noncompetition or non-solicitation covenant (or both). Indeed, the employer might have an incriminating email or two evidencing the former employee’s solicitation. Instead of rushing into court with the first scrap of evidence of a potential breach, it is often better for the employer to wait until numerous instances of prohibited conduct appear. As time goes by, many more customers might bring prohibited solicitations to the attention of the company. If there has been only sporadic or limited conduct without any real economic harm, some courts are reluctant to enjoin limited prohibited conduct, finding no real threat of irreparable harm. Some litigants’ own customers also are reluctant to get involved in litigation if pushed. A patient client and counsel, on the other hand, who wait for the bad conduct to emerge, often obtain more helpful documents and emails than if they simply rushed to court at the first hint of a breach.

Preliminary injunctions are a provisional equitable remedy that should be used only in extraordinary circumstances. If granted, a preliminary injunction directs a party to refrain from an action or, in rare cases, to perform an action. Preliminary injunctions are more likely to be granted to preserve the status quo pending an adjudication of a case on the merits. Injunctions are less likely to be granted if they are mandatory and order a party to take affirmative action. Courts require the moving party to establish the existence of an emergency and to do so with credible, admissible evidence.

Temporary restraining orders and preliminary injunctions are often sought in noncompetition, non-solicitation, and theft of trade secret cases, as well as in cases involving the dissipation or destruction of assets or in trademark and patent litigation.

Strategic Considerations

Many strategic considerations must be evaluated before seeking injunctive relief. For example, should a company seek a temporary restraining order and, if so, seek an ex parte restraining order? Many courts are reluctant to consider and grant ex parte motions for a temporary restraining order, except under the most
extreme and exigent circumstances. Often, when presented with an ex parte motion for a TRO, a court nevertheless will require that notice in fact be given to the opposing party, unless secrecy and speed are critical to maintaining the status quo or preventing real harm. Such exigent circumstances might exist, for example, if a party is in the process of destroying documents or electronic evidence, or dissipating assets out of the country. TROs also have a limited duration (for example, 14 days in federal court), and courts typically are required to hold a preliminary injunction hearing before the expiration of the TRO. You should never file a motion for a TRO without anticipating the evidentiary hearing at the preliminary injunction stage to be conducted shortly thereafter. When moving for a TRO, think at least one step ahead.

You thus need to evaluate whether a TRO involves a true emergency. Should you instead wait and file a motion for a preliminary injunction after sufficient facts are developed? Indeed, if a rock-solid and persuasive case can be presented at the preliminary injunction hearing, a plaintiff might consider requesting not only a preliminary injunction but also a consolidation of the preliminary injunction hearing with trial on the merits. On the other hand, preliminary injunctions are called “preliminary” for a reason. If a party waits too long before filing a motion for a preliminary injunction, a court might conclude that there are no exigent circumstances to justify injunctive relief or that the status quo need not be preserved.

TROs are best suited to emergencies where preservation of the status quo is essential to prevent an irreparable harm that cannot be compensated with money damages. A TRO is most appropriate when there are exigent circumstances that require

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**SUA SPONTE**

**A Judge Comments**

**HON. CURTIS E. A. KARNOW**

The author is a judge on the California Superior Court (San Francisco), presiding in a complex litigation department.

Flying an F-18 fighter jet is very much like flying a small propeller plane, except everything happens very, very, very fast. The inexperienced pilot cannot keep up; he or she will fall behind the curve and omit critical items, forget to call the tower or drop the landing gear. The flight will not end well.

So too with temporary restraining orders and preliminary injunctions: The procedures often compress years of litigation into weeks. As Erik Christiansen suggests in his article, counsel on both sides must be ready to move very rapidly, and there is little room for error. In California state courts, and in other jurisdictions, these motions are generally resolved on the papers—certainly temporary restraining orders (TROs) almost always are—and failures of form, failures to provide a foundation for statements in declarations, failure to authenticate, and so on, will all prove fatal. In California courts, there are specified ways to seek permission for live witnesses or for judicial notice. Declarations need specified magic language at the end. All the basic legal research on the claims—and perhaps some defenses—needs to have been done before the hearings.

In California state courts, don’t count on having live witnesses at a preliminary injunction hearing—the court has discretion to refuse,

*(Continued on page 17)*

Illustration by Jon Krause
expedited relief. For example, when a company’s trade secrets have been stolen in a computer theft by a former employee and the company wishes to recover the trade secrets from the hacker. Or when a former employee has stolen assets and is in the process of transferring the stolen assets out of the country.

Before they will grant a TRO, most courts require that the moving party establish by credible, admissible evidence that the plaintiff has a right that requires protection, the plaintiff has a likelihood of success on the merits, the plaintiff will suffer irreparable harm if the application for a TRO is denied, and the plaintiff has no adequate remedy at law. In practice, courts are most persuaded by egregious conduct, the quality of the evidence in support of the TRO, and whether the plaintiff likely will prevail at trial. Courts are less likely to grant a TRO if money damages are an adequate remedy for the defendant’s conduct.

Clients who persist in fighting a TRO in the face of overwhelming evidence of bad acts may face the wrath of an offended judge.

A plaintiff has the best shot at obtaining a TRO where the defendant’s conduct truly offends the court and where the admissible evidence in support of the TRO is credible and overwhelming. Courts, however, are reluctant to grant TROs when there are disputed facts that cannot be resolved on the papers. Courts also will not grant TROs based on affidavits that are based on hearsay, speculation, or “information and belief.” To succeed on a motion for injunctive relief, the evidence needs to tell a powerful story of wrongdoing and be credible, admissible, and substantial.

In evaluating motions for injunctive relief, courts also consider such things as whether the contract at issue expressly provides for injunctive relief, whether a statute authorizes injunctive relief, and whether the requested relief is narrowly tailored. For example, if a proposed TRO is overly broad or does not strictly comply with the applicable statutory requirements, courts can deny the TRO even if other factors are present to support injunctive relief. Plaintiffs’ counsel should be cautious in drafting a proposed TRO and should carefully limit the impact of the TRO to the offending conduct. Seek to avoid unintended collateral consequences that might result in a denial of the injunction.

In defending against a TRO, consider whether the defendant should stipulate to the TRO. Where a moving party lacks sufficient evidence, defense counsel should vigorously point out the evidentiary infirmities. But in cases in which the evidence is overwhelming, it might be advantageous to agree to refrain from the offending conduct to evidence good faith and establish credibility with the judge in voluntarily assisting to maintain the status quo. For example, if a defendant’s conduct was inadvertent or done in reliance on bad advice, stipulating to a TRO might help the defendant to minimize the consequences of the action in the litigation. A court is more likely to go easy on a defendant who owns up to bad acts and works to prevent such conduct in the future. Clients who persist in fighting a TRO in the face of overwhelming evidence of bad acts may face the wrath of an offended judge with power to stop a party in its tracks. After a TRO is granted, defendants might consider stipulating to a continuance of the TRO to permit settlement discussions and to avoid the cost, expense, and risk of a preliminary injunction hearing if there are negative facts.

Preliminary Injunction Hearing

A preliminary injunction hearing is most often like a full-blown trial on the merits. It comes with direct and cross-examination and with opening and closing statements. As a result, the process of filing a TRO and a preliminary injunction is expensive and should be used only where the economics or rights at issue merit extraordinary expense. In some cases, a client might be better off simply filing a complaint and then litigating the case without injunctive relief if the defendant’s continued conduct is unlikely to result in substantial damage to the plaintiff or damage that is recoverable in money. The filing of a lawsuit alone can in some cases deter further wrongful conduct.

Carefully plan for the preliminary injunction hearing before filing a motion for a TRO. For example, while TROs often are granted or denied based on affidavits or declarations, preliminary injunction hearings typically require live witness testimony or deposition testimony. If key witnesses are beyond the subpoena power of the court or unable to travel to court for the preliminary injunction hearing, a lawyer might find it impossible to meet the burden of proof. The lawyer must be able to get all facts, documents and testimony into evidence at the preliminary injunction hearing. The evidentiary nature of the preliminary injunction hearing might, for example, require counsel to conduct expedited discovery in the limited amount of time between the TRO and the preliminary injunction hearing. It is not uncommon for extensive depositions to be taken after a TRO is granted in the 10- or 14-day window before the preliminary injunction hearing.
This is particularly true where witnesses cannot be compelled to appear live in court or where third-party witnesses are reluctant to become involved in the dispute.

You should not file a motion for a TRO without thoughtful consideration of all facts, documents, and testimony that will be needed for the evidentiary hearing at the preliminary injunction stage. Obtaining a TRO on written affidavits is a much different process than winning a preliminary injunction with live witness testimony and cross-examination. If a case depends on having third-party documents admitted at the evidentiary hearing, you need to consider what testimony is required to get the documents into evidence. Injunctions can be denied in meritorious cases due to a failure to plan how to get key documents and testimony admitted at the evidentiary hearing.

For example, when an employee steals trade secrets, the evidence of the theft is often contained in various computer logs, emails, and complicated technical computer data. Counsel should be prepared with witnesses who can authenticate such evidence. You also need competent witnesses who can completely explain what the complex evidence is to a judge who might be inexperienced with the intricacies of computer forensics.

Another risk that counsel should consider prior to filing a motion for a TRO is that some states (Utah, for example) allow fee shifting in preliminary injunction proceedings. If the defense succeeds at the preliminary injunction stage in setting aside a TRO, some states will award attorney fees to the party who was wrongfully enjoined. Counsel needs to discuss this attorney fees risk with the client prior to filing a TRO and motion for a preliminary injunction. Defense counsel often file motions to dissolve TROs and preliminary injunctions on the grounds, for example, that the TRO was wrongfully issued, that circumstances supporting the TRO have changed, or that the TRO caused substantial damage to the enjoined party.

At the preliminary injunction hearing, a court deciding on such relief will not only consider the same four factors used to evaluate a TRO but will also decide whether the balance of hardships between the parties warrants the preliminary injunction. Courts often also consider whether the public interest weighs in favor of granting the injunction. The decision to grant or deny a preliminary injunction rests with the sound discretion of the court, and it will be overturned on appeal only for an abuse of discretion. Oftentimes, the party that wins at the preliminary injunction stage is, in substance, the prevailing party in the case. Litigation often ends after a preliminary injunction is granted or denied, particularly in cases that have no quantifiable monetary damages.

There are many defenses to evaluate before filing a motion for a TRO or a preliminary injunction. For example, the constitutionality of statutes generally is not adjudicated at the preliminary injunction stage. Courts are reluctant to enjoin public officials and hesitant to enjoin alleged criminal conduct absent statutory

and for judges with heavy motions calendars, the temptation to just rely on the papers can be irresistible. So it is that the papers have to be good—very good. The declarations have to carry their own water, as it were. The papers have to be easy to read, demonstrate their own admissibility, and appear highly credible. Effective papers make a complex case simple, not the other way around; and they respect the judge’s time. Don’t send in two bankers’ boxes of papers. If overwhelmed with exhibits, the judge won’t get to the most important pages.

In California, bonds are not essential for TROs, but a judge might require one—and will always order a bond for a preliminary injunction. The moving party should have the insurer ready to go, and the opposing party should have admissible evidence to support a request for as high a bond as possible. If depositions are sought before the injunction hearing, both sides must be armed with their reasons why those should or should not go forward—locally or sometimes, God forbid, outside the jurisdiction.

In short, within a few weeks, the lawyers must be ready to win on issues that normally erupt during every phase of litigation—motions to dismiss, evidentiary disputes, discovery battles—and indeed trial. The pace is brutal. Fall behind and you’ll crash.

I am not exaggerating the stakes. The results of a preliminary injunction hearing cast a permanent shadow over the case. First, the preliminary relief might be almost the whole ball game—blocking a competitor from a market or from using confidential information, stopping construction, and so on. But even when the preliminary relief is not so dramatic, the ruling has legs—despite a thin record, abbreviated research, and perhaps little analysis—because the judge will probably have spoken on the merits. In my past intellectual property practice, many of my cases resolved based on the results of preliminary injunction motions, settling either within weeks or later. You can be assured that the winning party will trumpet the win in the first line of every brief for every motion thereafter, whether it really matters or not. A few weeks ago, I settled another judge’s case in which an injunction had issued: It was, practically, impossible for the defendant to suggest the merits were truly on his side.

A last word from the reader of your briefs: The stakes are high not only for your client. They are for you as well. TROs and preliminary injunctions usually are the occasion of your first—and lasting—impression. This will be your first brief, your first argument. The judge will figure your credibility, skill, and judgment. Exaggerations, mis-cites, sloppy research, and analytical weaknesses can erupt in the rush to make some truly awful deadlines or as the result of the felt need to win. But the judge won’t forget.

High stakes, abbreviated records, a couple of weeks to cram in an entire case. This is the world of high-performance lawyering. Strap on your pressure suit.
In most cases in which injunctions are denied, it is for the moving party's failure to satisfy its burden of proof. Some courts require that the claim be proven by a preponderance of the evidence, while others require clear and convincing evidence to obtain injunctive relief. Courts often require the moving party to post a bond to pay for costs and damages incurred if an enjoined party is determined to have been wrongfully enjoined. Fights over the amount of a bond can be protracted and complex.

**Defending Against a TRO**

If you are defending against a TRO, your first step is to develop a credible and admissible factual record that disputes the facts in the moving papers. Defense counsel also should object to plaintiff's evidence that is not admissible. Challenge each of the factors required to obtain a TRO. Defense counsel should argue that the moving party has not met its burden on one or more of the elements a movant must show to obtain an injunction. Defense counsel also should advocate for a sizable bond. If a TRO is granted, a defendant might want to push for a quick preliminary injunction hearing to minimize the opportunity for the moving party to obtain additional and extensive discovery in support of the injunctive relief. Defense counsel should also plan for expedited depositions of the moving party's witnesses and any third parties whose testimony or documents will be essential for the defense at the preliminary injunction hearing. Like moving counsel, defense counsel needs to immediately focus on what evidence the defense will need to admit at the evidentiary hearing in terms of witnesses and documents.

Often the best defense strategy is to take tactical advantage of the moving party that too quickly files for injunctive relief without a sufficient evidentiary basis, acting on unsubstantiated suspicions, rather than concrete, solid facts. The same due diligence standard that applies to plaintiff's counsel before filing a motion for injunctive relief applies equally well to defense counsel. Defense counsel needs to master the facts and present credible, admissible evidence, if available. Defense counsel also needs to be prepared to point out the absence of proof on the moving party's part.

Many lawsuits seeking injunctive relief involve collateral consequences. For example, if an employer aggressively enforces noncompetition or non-solicitation covenants, will the employer be viewed as a bully by its workforce and have difficulty hiring and retaining employees? Will employees really be deterred from leaving the company to join competitors or form their own companies? Will competitors put an overly aggressive company at a competitive disadvantage in the labor market by using negative information to attract the best talent? Counsel should not only evaluate the merits, strategy, and costs of seeking injunctive relief but also should discuss the potential effects of such conduct on the client's larger business interests. Injunctive relief is an expensive, complex, and aggressive form of litigation and should be pursued only with thoughtful planning and consideration.
Rethinking Credibility and the Burden of Proof

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Law school didn’t teach us about the real burden of proof. Let’s rethink it.

Shortly before the Senate was to confirm Judge Brett Kavanaugh for the Supreme Court, something unexpected happened: an accusation of sexual misconduct. Professor Christine Blasey Ford claimed that when she was 15, a 17-year-old Kavanaugh threw her on a bed, tried to rip her clothes off, and covered her mouth so that no one would hear her scream.

Kavanaugh denied it. He claimed that, if Blasey Ford had been attacked, it wasn’t him.

Two claims. She said; he said. Only one of their stories could be true.

The Senate Judiciary Committee decided to hold a hearing and give them each a chance to tell their stories, presumably so that the truth would emerge. After some wrangling over ground rules, including who would go first (it was Blasey Ford) and whether other witnesses could or should be called (they couldn’t and weren’t), the protagonists spoke, questions were asked, the Federal Bureau of Investigation (FBI) conducted a limited but private follow-up investigation of little consequence, the Republican majority on the committee recommended Kavanaugh’s confirmation, and that’s what the Senate did.

Those in the Blasey Ford camp were convinced that she was telling the truth, that her memory was accurate, and that the hearing was a sham. They believed that the ultimate confirmation vote was preordained, no matter what the evidence showed, and that the Republican leaders on the committee and in the Senate engineered the result, without treating Blasey Ford’s allegations with the seriousness they deserved.

Some in the Kavanaugh camp tried to treat Blasey Ford’s allegations, at least outwardly, with respect, but others treated them with disdain. In the end, the Kavanaugh backers chose to believe that Blasey Ford’s memory was faulty, pointing to Kavanaugh’s adamant denials as evidence of his innocence. They brushed aside the suggestion that more evidence was needed. They dismissed the argument that Kavanaugh so discredited himself in the hearing with his tirades and weeping that this alone should have disqualified him.

Biased Perception

We’ll come back to the Blasey Ford/Kavanaugh controversy in more detail later because it reveals much about how the real burden of proof operates. But to make more sense of it, we need to understand that what was overlooked in the Monday morning quarterbacking was a social science phenomenon that operated on both sides of the controversy, something called “motivated cognition” or “biased perception,” fancy terms for what Paul
believe
trust
like
know
Simon described in his lyrics to “The Boxer”: “Still a man hears what he wants to hear and disregards the rest.” Of course, whenever people form strongly held beliefs on one side or the other of a controversy, they seldom acknowledge that perhaps their beliefs could be mistaken or that they did not fairly consider evidence, scenarios, or explanations put forth by those on the other side. They seldom are aware of how their beliefs have been channeled into a conclusion by their education, life experience, and peer influences. All of these shape the cognitive structures that control how they perceive, interpret, and act on information.

That’s what this article is about. To be effective litigators, we need to rethink what we were taught about how factual disputes are resolved. We and our witnesses need to understand not only the formal ground rules about burdens of proof but the unwritten ones as well. We need to understand the social scientific foundations that support them, and how credibility determinations are actually made. Unless we understand this, we’ll be litigating from weakness and preaching only to our own choirs.

Here are the formal ground rules, familiar to every litigator:

First, identify the party who has the legal burden of proof. By convention and most often, that party is the accuser. At the outset, all facts, except those on which there is common agreement, are presumed to be contrary to that party’s position until that party offers evidence to establish otherwise.

Second, give the protagonists a chance to present evidence to a neutral fact finder. The party with the legal burden of proof presents first. This is the so-called burden of going forward. If that party’s evidence is insufficient, that party loses. But if someone could be persuaded by that evidence, the burden of going forward shifts, and the other party—generally the accused—can present his or her own evidence.

Third, when all the evidence is in, the neutral fact finder gives it such weight as the fact finder believes it deserves and then draws a conclusion about what happened, based on an evidentiary standard that can range from a mere preponderance (a feather more than 50 percent) to beyond a reasonable doubt (something like a moral certainty). If, under the applicable evidentiary standard, the evidence persuades the fact finder to believe that the party with the legal burden of proof is correct, then that party wins. If not, the other side wins. This is how the so-called burden of persuasion operates.

The Real Burden of Proof

That’s what they taught us in law school. But they didn’t teach us about the real burden of proof, how it really gets assigned, what the real evidentiary standard is, who has the actual burden of persuasion, and what a party must in fact do to meet it.

Let’s start by focusing on an oxymoron that has lately found traction in emotionally charged controversies: “credible allegation.” An allegation is no more than an accusation, a claim that someone has engaged in wrongdoing of some sort. It is a prelude to an offer of evidence to prove that what an accuser contends happened did in fact happen.

Allegations do not have intrinsic credibility. Allegations standing alone are not, simply by having been made, entitled to be believed. They become credible and merit some variable measure of belief only when endowed with some form of external support, such as when made by a known credible source (the FBI, for example, won’t make an allegation until it has investigated the matter) or when buttressed by some evidence that lends credence to the allegation or when the allegation is made about a person who has a known history of similar behavior.

Until that happens, the most that people without personal knowledge can say is that the matter alleged might have occurred, but it also might not have. To say that an allegation is credible before it is buttressed by external support is to put a thumb on the scale in favor of the accuser. This is no more valid than talking about a “credible denial” before support surfaces. To do so places a thumb on the scale in favor of the accused.

We seem to have more tolerance for labeling allegations as “credible” when the allegation describes some form of predatory behavior. Predation is so repugnant, and the thought of it so disturbing, that the mere making of the allegation triggers an unnervingly uncomfortable image of it occurring. In turn, the image generates a sympathetic response for the alleged victim. This is much more valid than talking about a “credible denial” before support surfaces. To do so places a thumb on the scale in favor of the accused.

We seem to have more tolerance for labeling allegations as “credible” or more tolerance for labeling it “incredible,” when the allegation tends to victimize someone unfairly for reasons unrelated to the allegation itself. Through the lens of history, we tend to view the murder allegations against Sacco and Vanzetti as incredible, the product of fervent anti-immigrant feelings and of what was then a strong fear of people whose political views were sharply on the left. At the time though, the vast number of people who held those anti-immigrant and anti-left sentiments viewed the allegations as credible, no doubt fueled by those very sentiments.

Notice how easily one can form a belief or disbelief in an allegation not based on corroborating information but on factors that stand apart from the evidence. The Sacco and Vanzetti example is particularly illuminating because it shows how attitudes about an allegation can change over time, shaped and influenced by the periods in which we live and the historical context in which the allegation is made, all still unrelated to the evidence.

One’s attitude about an allegation can also be shaped by the non-evidence-based opinions of others. In the early stages of opinion formation, one might form a nascent belief in an allegation’s truth based on its imagined plausibility or on fragmentary
evidence. The sharing of that opinion with others can cause the opinion to intensify and spread. People tend to conform their opinions to those of others with whom they identify because of the ease of adoption, the desire to go along, the discomfort of disagreeing, the fear of being rejected, the phenomenon of mutual reinforcement or confirmation, or any number of other peer-influencing factors. If one’s friends or colleagues feel a certain way, it is much easier to concur with, adopt, and repeat their views than to dissent. This explains, for example, why juries can reach a unanimous result that seems so sharply at odds with an objective analysis of the credible evidence. Strongly held opinions by some jurors can lead those with weakly held opinions to follow suit.

In history, people have been executed based on no more than an accusation, followed by a fear or belief, however ill-formed, that the accusation might be true. The Salem witch trials come to mind. The Scottsboro Boys were almost executed.

In modern day, the Innocence Project reports that, by its 25th year, it had secured the release of 322 people wrongfully convicted after trial but later exonerated by scientific DNA proof. Many were convicted based on erroneous eyewitness identifications that a fact finder accepted as reliable proof of guilt beyond a reasonable doubt. Some 130 DNA-liberated exonerees had been convicted of murder and had faced either the death penalty or life in prison. These numbers reflect the work of only one agency. It’s a safe bet that other wrongly convicted defendants have not yet been exonerated or might never be. Wrongful convictions happen.

Why didn’t the burden of proof work in these instances as it was supposed to? How could it have led to wrongful convictions? Who had the real burden of proof in To Kill a Mockingbird? Was it the prosecution or was it Atticus Finch’s client Tom Robinson, a black man accused of raping a white woman, being tried by a white jury in a town where racial prejudice was palpable? How easy is it for accusations to lead to pronouncements and firmly held beliefs of wrongdoing based on weak evidence or even without evidence?

Litigating in the Real World

Cases are decided by humans. Imperfect humans. Sometimes biased humans. Sometimes humans with agendas. Humans with preformed perspectives, with different educations and life experiences. Humans who, when confronted with disorganized, conflicting, or ambiguous information, have a natural impulse to want to impose order on it.

When the world fails to operate as we hope and expect, we are in a state of uncomfortable disequilibrium. The urge is to try to banish the chaos and to reconcile the disorganization, the conflict, and the ambiguity by mentally adopting a narrative that makes the most sense, based on all the inputs that, to that point, have formed our worldview. For this reason, when faced with unclear or conflicting information, we tend to construe it in a way that confirms what we already believe and to interpret it in the easiest way we can.

The mere making of an accusation can often, by itself, create a presumption against the accused. If someone makes an accusation or recounts an occurrence, the listener can tend to believe it if the listener has no reason either to disbelieve it or to distrust the speaker. If the listener can imagine it as having happened, the listener’s belief in its truth intensifies. If the accusation or occurrence fits with the listener’s personal experience or understanding of how the world operates, the listener’s belief in its truth intensifies even more.

And if the listener has a reason to want to believe that the accusation is true—say because an assumption that it is false is too uncomfortable or because the listener has some agenda that would be well served if the accusation were true or because the listener’s friends believe it to be true or because the accusation simply sounds plausible—the listener will tend to credit any evidence consistent with the accusation’s truth and to view any evidence that tends to disprove the accusation as untrustworthy.

These are manifestations of motivated cognition or biased perception, the tendency to conform one’s beliefs to a desired outcome based on subjective or emotional factors unrelated to an impartial assessment of evidence. These tendencies, well documented in scientific studies and academic research, pervade nearly all spheres of cognitive activity, from information processing to decision making to self-assessment to recall to perception to judgment formation.

In a perfect world, legal disputes are resolved by neutral decision makers, influenced only by the evidence, not by unrelated emotional factors. Indeed, conventional thinking holds that there can be no due process or justice without having decision makers who are neutral. Traditional notions of who has the burden of proof and how it must be met are molded around the bedrock assumption that, in the end, the decision will be made by a neutral person or neutral jury after a dispassionate, objective evaluation of reliable evidence.

But we don’t litigate in a perfect world. Decision makers are human, not necessarily neutral. They have emotions and view the world through prisms. Some might be better than others in compartmentalizing their emotions and setting aside their prisms when considering the evidence. It would be dangerous, though, to assume that any specific decision maker will do that, or do it successfully, in any given case. And if a party fails to account for motivated cognition when making assumptions about who has the burden of proof and how it must be met, good luck. That party has a good chance of getting it wrong and seriously impairing the chances of prevailing.

The Run-Up to the Blasey Ford/Kavanaugh Hearings

To demonstrate, let’s focus on the run-up to the Blasey Ford/Kavanaugh hearings. If you weren’t distracted by the political maneuvering and the nonstop punditry, you would have seen...
a pristine example of motivated cognition playing out on both sides of the national stage, and you would have been able to distill important lessons about the real burden of proof.

On one side were supporters of Blasey Ford who, based on the accusation and perhaps limited related information, were persuaded that the accusation was true. A week before the hearing, Michelle Goldberg, a New York Times opinion columnist, wrote, “I believe Christine Blasey Ford . . . who says that Brett Kavanaugh sexually assaulted her . . . I believe her when she says that Kavanaugh, who she says was drunk, held her down, covered her mouth when she tried to scream, and ground against her while attempting to pull her clothes off.”

More significantly, before hearing the evidence, Senator Mazie Hirono, a Judiciary Committee member, also said she believed Blasey Ford: “Not only do women like Dr. Ford, who bravely comes forward, need to be heard, but they need to be believed. . . . We have to create an environment where women can come forward and be heard and be listened to. I want to thank Dr. Ford. I commend her courage. I believe her.”

Senator Kirsten Gillibrand said basically the same thing. In a television interview, after calling for the FBI to conduct an investigation before the Senate Judiciary Committee hearings to begin, Gillibrand stated, “I believe her. She is credible.”

On the other side, supporters of Judge Kavanaugh believed his denials. In the week before the hearing, about 75 women held a press conference wearing “#IStandWithBrett” badges. Representatives from this group attested that the allegations against him were false. One spokeswoman said, “The reason that we know that this allegation is false is because we know Brett Kavanaugh. . . . We know the man, we know his heart, and we’ve known him over every aspect of his life. And the charge leveled against him is inconsistent with everything we know about him.”

Unlike the women in the #IStandWithBrett movement, senators on the committee who supported Kavanaugh had the good sense not to express their opinions on the allegations and denials before the hearings. Had they done so, they would have been roundly and justifiably criticized by Blasey Ford’s supporters for prejudging the issue before the evidence was heard, even though some of Blasey Ford’s supporters felt free to prejudge the issue before hearing the evidence. Such was the power of an accusation of predatory behavior and the resulting sympathies for Blasey Ford.

But Kavanaugh’s supporters gave other signals that betrayed their views of the allegations. Republican senators on the committee were openly hostile to requests from Blasey Ford’s counsel for more time to prepare for the hearings, for an FBI investigation to precede the taking of evidence, for other witnesses to be called in addition to the two protagonists, for Judge Kavanaugh to testify first, and for the questions to be asked only by the senators and not by counsel for the committee. These last two requests were hard to justify in a system where the legal and traditional burden of going forward belongs to the accuser and where examination by experienced counsel is considered necessary to get the full story out. The other requests, though, were eminently reasonable and would have made the fact-finding process more reliable.

Still, the Republicans on the committee would have none of it, arguing that the public deserved a speedy hearing. Of course, given the importance of the issues at stake, haste is often a poor substitute for doing things right. And the senators who rejected those of Blasey Ford’s requests that were plainly reasonable were, correctly as it turned out, viewed as favoring Judge Kavanaugh’s elevation.

It was against this backdrop that the Ford/Kavanaugh hearings took place. Before the committee took any evidence, neutrality had been squeezed away. Committee members had their favorites. For them to change their minds, the evidence would have had to have been overpowering in the direction that favored the other side.

And in the court of public opinion, the other forum in which this dispute played out, sides had also taken shape. Before hearing the evidence, many people, not just Michelle Goldberg, Senators Mazie Hirono and Kirsten Gillibrand, and the #IStandWithBrett women, had already decided whose account of this 30-year-old incident (or “alleged” incident, depending on one’s viewpoint) was truthful. As no evidence had yet been presented, those strongly held beliefs had to have been based on something else, like biased perceptions resting on hunches or arguments, which seemed to be batted up and down, back and forth, like badminton birdies.

Those who believed Blasey Ford found it significant that, in 2012, she reported the incident to her therapist, long before she knew there would be a Supreme Court nomination in the balance. Those who believed Kavanaugh dismissed this because she did not name the perpetrator at that time.

Those who believed Kavanaugh argued that he had a sterling reputation for personal integrity. Those who rejected Kavanaugh’s denials countered that Blasey Ford had put herself in great personal and reputational jeopardy by coming forward, knowing that Kavanaugh’s supporters would attack her character and that no rational person would do this if the accusations were untrue.

Then there were those who had not already prejudged the issue and were exhorting people to wait for the evidence before drawing any conclusions. The esteemed Harvard law professor and former federal judge Nancy Gertner wrote in an op-ed that the outcome needed to be based on evidence and that, until the evidence was heard, no one could decide who was right. New York Times opinion writer Bret Stephens echoed this view, bemoaning as “empirically worthless and intellectually dishonest” statements on the controversy that began with “I believe Blasey” or “I believe Kavanaugh,” as the evidence had not yet been presented.

The burden of proof was, to put it mildly, out of balance. In the pre-evidence phase, if people were not already persuaded about
Accusations from sources thought to be untrustworthy can con

The didactic value of the Kavanaugh/Blasey Ford dispute is so high because this dispute exposes how the real burden of proof operates and lets us understand how cases are really decided, not just in high-profile controversies like this one—although this one certainly trained a spotlight on it—but in everyday ones.

Cases start with accusations. These are powerful things. They are not made in a vacuum or on a blank slate. Many believe that someone would not make an accusation unless something happened. Those who tend to believe an accusation upon hearing it regard the accusation to be like smoke, evidence of a fire somewhere, not realizing that sometimes accusers are only blowing smoke and that there is no fire. Accusations have the power to conjure up images, even before the evidence is heard. The images seem real enough. They become the reality in the minds of easily persuadable people who have little built-in skepticism.

Some images, however, will not always match the accusation. Accusations from sources thought to be untrustworthy can conjure up an opposite image, like that of an overly motivated accuser scheming to harm the accused through fabricated allegations.

Blasey Ford accused Kavanaugh of attempted rape. Those who were cognitively motivated to accept her story formed a mental image of Blasey Ford on the bed and of Kavanaugh atop her. It seemed real to them. If those people were the relevant decision makers, Kavanaugh would have had the real burden of proving that Blasey Ford was mistaken.

But Kavanaugh was an accuser as well. A strongly voiced denial is, in effect, an accusation that the primary accuser is mistaken or lying. Those who were cognitively motivated to accept his denial formed a mental image of a confused Blasey Ford trying to cobble together fragments of an imperfect memory to create a damning story about an innocent Kavanaugh. Someone more cynical might have formed a mental image of a politically motivated Blasey Ford, intent on torpedoing the Kavanaugh candidacy. If those who were cognitively motivated to accept Kavanaugh’s denial were the relevant decision-makers, Blasey Ford would have had the real burden of proving that Kavanaugh’s denial was fabricated to cover up some awful conduct.

This leads us to two fundamental lessons about the burden of proof. First, the real burden of proof is defined by the images that root in the decision maker’s mind: Once an image takes hold, the real burden of proof is all about reinforcing or dismantling the image, depending on whether the party’s truth is consistent or in conflict with the image.

Second, the real burden of proof belongs to the party who has a vested interest in having the decision maker decide in its favor. So that there is no confusion, this means that each side in a dispute has the real burden of proof. Neither side can afford to rest comfortably on how the law or custom technically allocates it, nor can either side assume that the decision maker is neutral or leaning its way. Even before the evidence comes in, decision makers are seldom in decisional equipoise. They lean toward one side or the other, maybe slightly, maybe a lot. While the protagonists might make an educated guess about the direction and angle of the lean, placing too much stock on such guesses is rarely safe.

How Cases Are Really Decided

TheFour Stages of Credibility

To be effective litigators, we need to rethink what we were taught about how factual disputes are resolved.

This is why, in their opening statements, savvy defense lawyers will seldom tell a jury in a civil case that the evidence will not support the plaintiff’s allegations or that the plaintiff will not meet his or her burden of proof. Such a position is too lame. Instead, they act as if the burden of proof belongs to them. They own it. They embrace it and confidently declare “We will prove to you that the machine was made correctly and that the plaintiff injured herself because she violated a well-known safety instruction.”

The Four Stages of Credibility

But how should someone go about meeting his or her real burden of proof? How should someone go about moving the decision maker away from any preformed beliefs or images that stray from that party’s story? How should someone go about getting the decision maker to accept that party’s story? The key is in understanding the four stages of credibility.

The first three stages come, oddly enough, from the field of marketing: know, like, and trust. In short, marketing theory holds that the way to earn someone’s business is get the buyer to know the seller, then like the seller, and then come to trust the seller. Only when the seller can go through these steps and
attain the buyer’s trust will the buyer be comfortable giving business to the seller.

This theory can be applied across disciplines and contexts. In mercantile transactions: Know, like, trust . . . buy. In political decisions: Know, like, trust . . . vote. In interpersonal decisions: Know, like, trust . . . lend the car.

In actuality, the know-like-trust model is an imperfect and oversimplified explanation of what really happens. The ultimate decision seldom follows this pattern. We buy from people based on recommendations of others or on advertising or impulse or need or inadequate access to information or on the lack of qualified alternatives. We vote based on images made during the campaign, fueled in part by how other like-minded people say they intend to vote, and we typically vote for the most palatable or least offensive of only two candidates. We lend our cars to friends not based on trust. We do it based on fear of spoiling the friendship.

But when seeking to be favored with a credibility determination in a dispute resolution environment, earning the decision maker’s trust is key. To do this, to meet the real burden of proof, the party or witness must form a connection and establish a relationship with the decision maker. The know-like-trust ladder is perhaps the most effective way of creating that connection and of reaching the fourth and final stage: believe.

Simply stated, decision makers more readily believe the people they like. Parties, protagonists, or witnesses can’t be liked until they show enough of themselves so that the decision maker gets to know them in some relevant and favorable way. Getting to the first rung—“know”—is a huge step because whatever the decision maker comes to learn about the party or witness will control whether the party or witness is on the right pathway. If parties and witnesses don’t reveal enough of themselves to enable the decision maker to know them in a positive way, then the chances of moving up to the second rung—“like”—and of ultimately meeting the real burden of proof are next to nil.

If a party or witness shows enough favorable attributes to the decision maker, then the party or witness will have likely moved up to the “like” rung. These attributes include such things as whether the person is easily understandable, is sincere, speaks confidently, helps the decision maker learn what happened, communicates verbally and nonverbally in ways that suggest an earnest interest in the truth, or reveals experiences much like those with which the decision maker is familiar. These and other similar factors make it easier for the decision maker to like the party or witness.

Once on the “like” rung, it’s a short move up to the penultimate step: the “trust” rung. “Trust” inevitably follows “like,” unless something affirmative happens to cause the decision maker to distrust the party or witness. It’s natural to want to trust people we like. We feel safe when we surround ourselves and associate with those people. Distrusting them takes effort and some discomfort.

Parties and witnesses on the “trust” rung need not do much to ascend to the “believe” rung. Those who are trusted will almost automatically be believed. For a party or witness to lose this position, the decision maker would typically need to come across something that erodes the trust.

The tug-of-war between competing versions of events—the struggle over the burden of proof—is typically fought on the know-like-trust-believe ladder. Cross-examination is generally the major weapon, although collateral attacks through presentation of other evidence are common too. To undermine the opponent’s credibility and meet the real burden of proof, the protagonist is not simply trying to raise his or her own standing on the ladder but to suppress the opponent’s.

If we can identify something truthful about the opponent that surprises the decision maker and compels a reassessment, the protagonist might keep the opponent from reaching the top rung or topple the opponent altogether. Unexplainably inconsistent statements, affiliations that bespeak a motive or bias, bad behavior on earlier occasions—these are examples of weights that can bring the opponent down or missiles that can knock the opponent off. The challenge for the opponent is to answer in ways that will strengthen his or her foothold on any rung already earned and move him or her up the ladder to the “believe” position.

The movie A Few Good Men shows a successful attack at a key adverse witness’s position on the “trust” rung. The prosecution was trying to prove that the defendants killed a fellow Marine in a personal squabble. Defense counsel was trying to prove that the Marine died accidentally during a disciplinary hazing incident, known as a Code Red, ordered by a high-ranking colonel. The colonel denied issuing such an order, claiming he had instead ordered the Marine transferred to protect him from the defendants, but the defendants attacked the Marine before the transfer was to occur. This put the defense attorney in the position of having to impeach the colonel’s testimony, a risky tactic in a military tribunal where high-ranking officers are presumed credible and where a failed attack on a colonel’s credibility could lead to stiff sanctions. The presumption of credibility, the virtual automatic placement on the “trust” rung, arises largely because military judges tend to equate rank with honor and are thus cognitively motivated to accredit what high-ranking officers say.

Through skillful questioning, the defense attorney first got the colonel to admit that he ordered his commanding officer and the men under him not to touch the Marine. He then got the colonel to testify that the commanding officer and the men would not have questioned his order or taken matters into their own hands because they were trained to obey all orders without question. The defense attorney then pointed out that, if the colonel’s orders were always obeyed, there would have been no reason to order the Marine transferred. Having been caught in a logical contradiction, the colonel tried to come up with another
To add to the difficulty, contestants are often confronted by aggressive opponents who will readily manipulate information to portray the contestant in an unfair light. While the contestant is doing the good work needed to rise up the credibility ladder and earn a spot on the top rung, the opponent is doing its best to trap the contestant and suppress the contestant’s upward mobility or keep the contestant off the ladder altogether.

When a contestant understands that these are the dynamics at work and that the objective is to establish a strong position on the credibility ladder’s top rung, the pathway to meeting the real burden of proof then comes into sharp focus. The object isn’t simply or necessarily to demonstrate why the opponent is unworthy of being believed, although that can certainly help a great deal. The object is also to establish and protect the contestant’s own credibility, no matter how the law technically assigns the burden of proof. And to win this credibility contest, the contestant must understand how to establish a relationship of trust, not just with decision makers who already sympathize with the contestant or share the contestant’s worldview but, more importantly, with those who don’t. The task might be daunting, but that’s the task that must be achieved.

Back to the Kavanaugh Hearing

Kavanaugh’s supporters saw him as the victim of an easily made allegation by someone whose memory, while perhaps real to her, could not be trusted due to the passage of time and who might have been influenced by a desire to keep Kavanaugh off the Court, leading to misremembered events or missing gaps filled with imagined facts. To them, the supporting evidence was too unreliable to mete out a punishment or deny Kavanaugh a seat.

No one’s mind changed. The Judiciary Committee vote broke along party lines. Not one committee Republican credited Blasey Ford’s allegations. All 11 voted to recommend confirmation. Not one committee Democrat sided with Kavanaugh. All 10 voted against confirmation.

Those who are trusted will almost automatically be believed.

Each protagonist seemed to reach the credibility ladder’s top rung in the minds of those predisposed to believe them. In the minds of those predisposed in the other direction, the protagonist stumbled somewhere on the “know,” “like,” or “trust” rung. While the testimony of each protagonist enabled that protagonist’s supporters to claim that the allegation was credible or that the denial was credible, the decision went not for the party who changed decision makers’ minds but for the party who had more decision makers already cognitively motivated to support that party.

This merits one more observation about the real burden of proof. When passions run high or when decision makers have already formed strong impressions based on incomplete or preliminary information, process matters. In these circumstances, one person’s word against the word of another will seldom be enough to discern the truth. The truth will more readily emerge when a person’s words are subjected to effective cross-examination, when other evidence bearing on the allegations is allowed to surface, and when that evidence is subjected to sufficient scrutiny. An effective process allows parties to make a legitimate effort to earn a coveted place on the credibility ladder’s top rung. Otherwise, no one’s beliefs are apt to change or, alternatively, be validated. And if decision makers do not form conclusions during a process that invites reliable credibility determinations, but instead go with their initial cognitively motivated impressions, truth will be the loser and justice, if done, will only be coincidental.
An Interview with Michael Kim

“Don’t expect clients to praise you for having a clean kitchen.”

ASHISH JOSHI

The author is with Joshi: Attorneys + Counselors, Ann Arbor, Michigan, and is the editor in chief of Litigation.

Michael Kim is the co-founder of Kobre & Kim, a global law firm—with offices in the United States, Asia, Europe, the Middle East, and the Caribbean—that focuses on disputes and investigations. Before starting the firm, Kim was an assistant U.S. attorney at the Department of Justice for the Southern District of New York, where he worked on white-collar criminal cases. One of his cases—the Sterling Foster scam—is purportedly the inspiration for the Ben Affleck movie The Boiler Room. (Spoiler alert: The FBI comes in at the end of the movie, before the prosecutors get involved. Don’t see it to find out who plays Kim; he is not featured.)


The firm’s unorthodox business model focuses on offering end users (Kim doesn’t call them “clients”) service products (not “practice areas”), creating a culture that emphasizes its products over its superstar lawyers while “staying within its lane” and avoiding repeat clients to minimize, if not eliminate, conflicts. Kim views his firm’s services as specialized products that are scalable and that can be commoditized and sold in different parts of the world with uniformity and consistency.

Despite the firm’s professional accolades, soaring revenues, and global success, Kim is worried about the growth, but not in the way we would think. Kim sees growth as a problem. For...
Kim, maintaining quality control and giving clients consistency in their experience with the firm takes precedence over growth. “Growth happens despite what we’re trying to do,” he says. See Passarella & Barker, supra.

Kim and I met at his firm’s Manhattan offices. He was generous with his time and genuinely enthusiastic about discussing artificial intelligence, “market inefficiencies,” “uniform user experience,” “specialized service products,” “conflict footprint,” “margin discipline,” and other worldly wonders that are at the heart of Kobre & Kim’s business model.

**AJ:** Let’s talk about the founding of Kobre & Kim. What led you to strike out on your own instead of joining big law?

**MK:** Steve and I were at the U.S. Attorney’s Office in the Southern District of New York. Both of us wanted to start a business. It wasn’t so much that we wanted to get away from big law, but we really were entrepreneurs at heart. We wanted to test our ideas about how the litigation industry could be improved. We saw inefficiencies in the marketplace and we believed that we could exploit them. One, for example, was the lack of a truly disciplined, litigation-only firm that was international and primarily geared toward what we call secondary distribution—that is, getting work from other service providers as opposed to the end users themselves.

**AJ:** Why would you call that an inefficiency?

**MK:** Because typically a referral is made from an existing law firm or a professional services provider of a smaller case, so economically they don’t want to do it, or there’s a conflict, or it involves a specialty that the referring firm doesn’t have. By and large, those opportunities were being absorbed by small, local boutiques. But there also were cases that were very large, international, and with features that the primary law firm lacked the specialization to do or didn’t have the geographic coverage to do or had a conflict with. In those situations, there was no international firm that was disciplined to absorb that type of referral and be trusted by other law firms to stay within its lane and be a team player. We wanted to create an AmLaw 100 firm that was international, but disciplined in working with other service providers, rather than pursuing broad, repeat relationships with the end users themselves. We saw that as a major inefficiency in the worldwide market for disputes and investigations.

**AJ:** What’s wrong with pursuing broad, repeat relationships with the clients?

**MK:** It’s a simple business concept that if you have a differentiated product, it is most efficiently distributed through distributors and resellers, rather than through trying to find end users directly. Yet, what happens is that lawyers who sell specialized litigation services often try to hunt for end users themselves and become very frustrated. In their earlier years, when they were small, they might have gotten referrals from other law firms or financial advisors, but because they never truly understood their business, when they ran across opportunities to get additional work from the same end user by doing something else, they took it.

Imagine, for example, that initially you were hired for a criminal case. Then the client needs employment services, so you start doing employment litigation for them. If you do that, you threaten your own distributor/seller relationships. You also start diluting your margins by selling products of different value to the buyer. Remember, anything that buyers buy repeatedly regresses to be essentially price-competitive.

These basic business concepts led us to see the type of law firm we wanted to create. But the two of us were coming from the government, had very little money, and were operating initially out of Steve’s apartment with just our home computers. So it was more like a dream than a business plan. We had neither the money nor the business nor the connections to actually do it. We just had the concept.

**AJ:** Are disputes and investigations your firm’s specialty?

**MK:** For us as a law firm to say that our specialty lies in disputes and investigations is like opening a restaurant and saying our specialty is food. Disputes and investigations are not products in themselves; they’re product categories. A product is defined by how a buyer defines his need, not how a producer defines what it’s making. The problem is that lawyers define themselves by the products they sell. “I am a criminal defense specialist,” for example. But very few people want to buy criminal defense services. They want to buy “Not Guilty” or they want to buy “I’m not going to jail”; but they don’t want to buy criminal defense. Criminal defense is a process. That’s what you’re making. It’s not what they’re buying.

When we say “disputes and investigations,” that’s just a broad description of our product categories. What we have within those categories are highly specific products. The best way to describe our focus is that all our products are clustered around international fraud or conflict cases. Everything from defending against government enforcement to investigating that alleged misconduct—the seizure of assets, recovering stolen proceeds, defending assets that have been taken during an alleged crime, using legal defenses to protect assets from being confiscated by government officials. They’re basically all clustered around international fraud or misconduct.

**AJ:** How do you ensure that your firm remains conflict-free to capitalize on the opportunities as they arise?

**MK:** That actually is very hard to do in law firms because most law firms put individual lawyers under pressure to acquire revenue. If you do that, you’re going to erode your ability to remain
conflict-free. We have two screening processes. First, when a potential matter comes in, we weigh the potential profitability versus the size of the conflict footprint. Let’s say a very large bank wants us to do an engagement that would generate $300,000 in fees and perhaps $150,000 in profit, and that engagement is expected to last six months. We wouldn’t take it. The lost profits of being unable to serve adversely against that big bank for six months is many multiples more than $150,000.

AJ: You’re weighing the opportunity cost.
MK: Exactly. Many firms have a business model that’s simply, “If we have empty offices and idle associates, then there isn’t a piece of revenue we don’t like.” They’ll engage with anybody who wants to give them money, because otherwise the associates and empty offices are all going to go to waste. What I’m talking about is margin discipline combined with conflict footprint discipline. We make conflict footprint a factor in calculating what kind of profitability we’re going to get.

AJ: How do you do that?
MK: We begin by assessing how large is the conflict footprint. What are the probable types of matters we will not be able to get if we take this matter? The second process we have is that once we complete an engagement for an end user that was introduced to us by a distributor or reseller, we will not go and pitch that end user for new business. And if that end user contacts us for a second or subsequent case, we will get the permission of the original reseller or distributor before accepting the case, if at all possible.

AJ: It is one thing to start a firm on all these principles, but as you grow, how do you mollify the mutinous voices within the firm that might say, “This is crazy; we are turning business away!”?
MK: You have to reward people for doing what the firm wants them to do, which is to pursue one-off, highly profitable business that’s within our specialty area, and not let people offer discounted services or chase repeat revenue at lower margins or go beyond our specialty areas just to get more revenue. The firm management has to be very much in the weeds with each partner’s behavior to help them understand what is in the interest of the firm and what isn’t. The firm management has to be very much in the weeds with each partner’s behavior to help them understand what is in the interest of the firm and what isn’t.

We hire technically superior lawyers. That’s why it works. But it requires a huge amount of constant discipline and a lot of internal control systems to manage it.

We also differentiate ourselves by our products-based approach, which in turn is defined by what the buyer wants. So rather than saying “We practice in asset forfeiture,” we say to the billionaires whose assets are being attacked by governments around the world that we have a specific set of legal strategies to remove the trustees that are inclined to violate their own fiduciary duties and hand over assets to a government without submitting it to judicial scrutiny. We say that we have a specific strategy—service product, if you will—to put trustees in place that will submit issues to the court for a decision, to see if the assets can be protected.

The firm management has to be very much in the weeds with each partner’s behavior to help them understand what is in the interest of the firm and what isn’t.

AJ: How is that different from marketing a particular end result to a potential client?
MK: It’s the difference between telling people you’re a dermatologist and saying, “I clear up skin.” And it’s crucial. Help buyers to find out how they define the solutions to their problems. That appears completely obvious because almost every product that we buy is based on product-based marketing.

AJ: Then why isn’t that the case in the legal industry?
MK: Because law is one of the very few industries where there are legal barriers to people owning property. Those restrictions can cause distortions in the legal services marketplace. The other thing about a product-based approach is that a lot of lawyers market themselves by saying, “We’re really good; we’re better than other lawyers” or “We think about the clients’ interests and put...
them first.” That’s like marketing a restaurant by saying “Come on in; we have food and our kitchen is clean!”

When you walk into a restaurant, you’re basically assuming that’s the case. That’s why you’re actually willing to eat there. You would expect that, right? You would think that anyone who hires a law firm would want those lawyers to be competent and service-oriented. That’s bare minimum.

A product-based approach gets away from lawyers marketing themselves by how they think about themselves. A lot of lawyers think, “I went to that law school and I have this résumé, so I’m better than other lawyers who don’t have my credentials,” and that, therefore, clients must think of which lawyer to hire based on the way that lawyers think of how impressive they are, that clients must care where their lawyer went to law school and what credentials their lawyer has.

Well, yes, they do, but only to the extent that they want to ensure that you’re competent. They’re not sitting there obsessed with whether you were the deputy chief of this or that or whether you went to Yale Law School or somewhere else. The only thing they really care about is solving their own problem. You’re really just a tool to get it done. So don’t tell clients to come praise you for having a clean kitchen. If you don’t have one, you should just get out of the business.

The thing that the buyer is trying to buy is resolution of a particular situation. They’re not buying an FCPA investigation.

AJ: Let’s say you are trying to pitch your services to a client that is embroiled in a Foreign Corrupt Practices Act (FCPA) investigation. How does your pitch differ from the one typically made by other firms?

MK: Typically, law firms go to companies and tell them of all the things that they do. They say, “Look, we have our securities litigation department; we have our criminal defense department—look how impressive they are! This lawyer has all these incredible credentials. Very impressive. Everyone’s so smart.”

All the client hears is that every one of these law firms basically has exactly the same thing. The probability that any particular company would need a specialized service such as an FCPA matter is extremely small. So, by the time they actually need it, it might be three years after they met you. In the meantime, 10 other firms have come to tell them how wonderful they are on the very same basis. So, probably, the most recent person to tell them that gets the job. Or, when the crisis happens, the CEO just calls the lawyer they usually talk to, typically their chief M&A lawyer or another highly valued transactional advisor who deals with them all the time, and asks, “What should I do?” And that lawyer just gets one of their white-collar partners to come in. That’s how business gets distributed a lot of the time.

For us, it’s different. We don’t have a transactional department. Nor do we have those high-level regular relationships with end users. Instead, we go to the law firms that have the relationships with a particular set of companies that operate in high-risk areas. They operate in Africa, the Middle East, Latin America. We don’t know which company has an FCPA problem, but we know that this set of companies has a realistic chance of having an FCPA problem. We would go to the primary law firm and say, “We have ex-DOJ people in China, Korea, Hong Kong, Argentina, around the globe. We are completely conflict-free and all we do is investigations.”

Those primary law firms are distributors. They are incentivized to try to introduce us because it prevents one of their competitors from getting in front of their client. They know we’re going to do a competent job, and more importantly they know that we have no ties to other industry participants and that they are hiring a law firm that doesn’t have any interest in competing with them for the end user’s repeat business.

That’s one example of how we’re marketing our product. Remember, the thing that the buyer is trying to buy is resolution of a particular situation. They’re not buying an FCPA investigation. Nobody wants to be investigated. What they want is the situation resolved. We’re selling the resolution.

AJ: Given that Kobre & Kim operates in many different countries, how do you ensure that a client of yours will have the same uniform experience whether it goes to the firm’s New York office or to the one in Hong Kong?

MK: This is one of our major areas of focus. We do a number of things to try to mimic institutions like the Four Seasons hotel company. If you walk into a Four Seasons hotel anywhere in the world and ask a random person who works there where the bathroom is, you will be taken directly to the bathroom and pointed toward the door. They’ll never just point you in the general direction or fob you off on someone else to do it. Try it. Walk into any Four Seasons, anywhere in the world! It’s because they were all centrally trained to respond to that inquiry in the same way.

We try to do that with our lawyers. We have a massive set of
best practices on how to react to different situations. We have an internal training and certification system so that if you are going to work on a client engagement, you have to be certified as knowing those best practices.

We also are investing in developing an artificial intelligence system that will help in detecting when to use one of our best practices. Say you’re brought onto a case and it turns out that the co-counsel who selected you has made a terrible mistake that the client doesn’t yet know about. That client needs to be told because the mistake needs to be corrected. But what is the most diplomatic way to make sure that the client’s interests are served without embarrassing your co-counsel horribly? There are a lot of lessons learned about different ways of doing that, which we push out to the person facing the situation. Right now, we do it manually, but eventually we’ll do it by our artificial intelligence system. The problem we’re talking about is much more complex than “Where’s the bathroom?” but it’s the same principle.

**AJ:** One of the joys of practicing law is its creativity and the opportunity it offers for human ingenuity. Do you think that having such best practices would stifle creativity or discourage lawyers from coming up with innovative solutions to complex legal problems?

**MK:** That’s a very good point. That’s why we don’t have best practices around the practice of law itself. The best practices are all about business issues, client relations issues, client communication issues, things of that sort, rather than how to practice law.

On how to practice law, we actually take the extreme opposite approach, which is to make it as creative as possible. What I want the client or adversary to feel when dealing with Kobre & Kim is that we’re always doing something unexpected, always coming up with a new idea that was unexpected. That’s the uniform experience I want them to have.

On the client relations end, I want them to experience predictability. On the legal end, I want them to experience unpredictability.

**AJ:** Peter Drucker famously said, “Culture eats strategy for breakfast.” How do you institutionalize a culture of unpredictability?

**MK:** What we do, on all our cases, is to have the team meet once a month. We start with having the lowest-ranking member of the team criticize—in a constructive manner—how the case is being run and say if there’s something that we should be doing that we’re not doing or what could be our adversary’s next possible move. Each person comes up with a new idea of how things could change.

Ultimately, the person in charge of the engagement has to make a decision, but people from outside the engagement listen in. Steve and I sometimes listen in; a person from a different team might listen in. We all try to assess and look for good ideas, so that people in charge of our teams don’t feel that because he or she didn’t come up with the idea, it should be squashed.

There’s a lot of external transparency into that idea-generation process. And when ideas are adopted, we actually give cash prizes so that people are incentivized to brainstorm new ideas before coming to the meeting. But I actually agree with you about the legal work itself—I want that to be as free-flowing and creative as possible.

**AJ:** You mentioned artificial intelligence. Do you think that AI will dramatically change the practice of litigation?

**MK:** Yes. But it’s going to take a lot longer than people think. Because of the lack of outside ownership of law firms, you don’t have the best and smartest owners owning law firms. You only have lawyers owning law firms. What I’ve heard a lot of lawyers say is “Why should we adopt AI in any of the high-margin areas?”

They understand that in the low-margin areas where the clients are exerting incredible price pressure and things are done on a fixed fee or on a budget, reducing the cost of production by having AI do legal research may increase margins.

But there are categories in law in which the client has no budget constraint, where it will pay whatever it’s told to pay, because the value of a solution to a problem is far greater than anything the firm could charge on an hourly basis. Then lawyers typically say, “Why should I reduce the time it takes for something to get done when the client is willing to pay on an hourly basis and there’s no fee cap?” That type of thinking inhibits AI from really taking hold and doing what it can do.

What the lawyers really should be asking themselves is not “Why should I do things faster, given that we charge by the hour and the client has a budget with no fee cap?” What lawyers should be thinking about instead is whether the client has a certain amount of money it will pay because of the value of the problem. Instead of charging by the hour, lawyers should just tell the client to pay that amount. By definition, the client will pay it because it’s worth it to them.

That’s true whenever you buy something. Take the cuff links you’re wearing—say you paid $100 for them. You did that because those cuff links are worth more than $100 to you. Otherwise, it would be totally irrational for you to buy them. The same is true in law. Take for example a motion for summary disposition. Charging by the hour, it may end up being $200,000 or it may end up being $600,000. We don’t know. But what if the client was willing to pay up to $600,000 because the client valued getting the case dismissed at far greater than $600,000. If the client is spending $600,000 by the hour, then the client values dismissal at more than $600,000. That law firm should think about saying to its client, “We will do it for $400,000, but if we win, you will pay us another million dollars.”
AJ: You're talking about success-fee arrangements?

MK: Right. If you're specialized enough, no amount of tricky pricing is going to substitute for the fact that you're a commodity. If the client can substitute others for you, then you really can't have any kind of pricing leverage. Rather, the client actually must pursue you as a scarce resource, seeing that there are not substitutes for you. Once you're in that position, you can basically tell the client, “This is the value of the problem and this is the price of my solution.” If it's worth it to them, the client will pay it.

In the meantime, what you can do is make as much profit as possible out of your pricing by reducing your cost of production. But you don't want to reduce it in a way that affects the quality because then it will affect the probability of the outcome and, therefore, the amount of money that you can get paid. You want to cut your costs in a way that doesn't affect quality, where the user experience and the outcome will be the same.

That's where I think AI will change the game. The fact that AI in law has not progressed as fast as in many other fields, again, comes down to the restrictions on law firm ownership, because if professional owners, like hedge funds, filled with very smart business-oriented people, could buy law firms, that is how they would think, that is how they would price, as opposed to lawyers, who for the most part are more interested in earning an income that's good enough and keeping the producers within the firm happy, rather than in maximizing financial returns for their business.

AJ: Now that ROSS AI software can do low-margin tasks such as legal research and document reviews, why would law firms want to invest in training young associates to do those tasks? And if firms don't offer those basic opportunities to young litigators, how can firms develop the next generation of litigators and trial lawyers?

MK: This is the same reason that, for example, the U.S. Army has a lot of soldiers who couldn't find their way from point A to point B in a forest if we took away their GPS. I used to be in the army. We used to train with a lenisastic compass—the type with the needle that spins around and points north. Try using it to figure out where you are on a map. It's very ineffective, compared to GPS. You get lost a lot because you have to make a lot of judgment calls about where you are. It's a lot more prone to error than GPS. But once you just give GPS to everyone instead, when the GPS fails you have a bunch of people unable to navigate themselves through the woods.

That's what's happening in law. The AI for document review and legal research works very well. In one sense, because it works really well, one can say, “Well, then, why should we have lawyers for those tasks?”

Of course, there are a lot of things that lawyers don't do today that used to be part of a lawyer's function. For example, Sheppardization. It was a major task of a young lawyer. It would take me days to figure out if a brief had all the correct law. Now a program does that and does it quite effectively. I think a lot of things that we still define as a lawyer's function are going to be mined away and permanently moved out of the scope of what a lawyer is.

There are certain tasks—the process of analyzing cases to see the ambiguities or the nuances in the law, for example, and learning how to exploit them—that firms are going to have to try to invest in. Also, a lot of lawyers hired today cannot do a jury trial. It used to be, not long ago, that most lawyers in litigation at least got to do some jury trials when they were young. That's simply not true anymore.

AJ: How do you grapple with that problem at your firm?

MK: We have among the highest concentration of former DOJ people in the marketplace. We have a core amount of trial experience in the firm. What we have tried to do includes getting people certified within the firm to do witness examinations to a certain quality. We do mock exercises within the firm, and we have a pro bono program where people can get experience and be observed and acknowledged as being good enough if they're in a client matter. Those are some of the things that we try to do. Industry-wide, the number of jury trials has plummeted since the sentencing guidelines came out in 1986.

But no matter what we do at Kobre & Kim, we're not able to change that industry-wide phenomenon. Fewer and fewer lawyers have actual trial experience. That's really unfortunate. A lawyer who hasn't experienced trial is a little bit like a soldier who hasn't actually been to battle. If you are trying to prepare for a war, you can achieve only a certain quality if you haven't done the real thing. The challenges of training and trial experience are profession-wide issues. No individual firm is able to do enough or has the right incentives to fix the problem.

AJ: In your mind, is there a difference between owning and running a law practice versus owning and running a business?

MK: Most of the time, law firms aggrandize particular lawyers and sell them to clients with various other lawyers supporting that effort. That model is scalable only to a certain point. Even then, you can sell only a certain volume of it. If the product were “Hire me—Michael Kim—because I'm good at X,” there's a limited supply of Michael Kim. That's the key difference between running a law practice and running a business—a practice is focused on individual lawyers and their quality, whereas the business of law is focused on the fact that all the lawyers must have the right level of quality, but what the client is buying is the specialism of that law firm that other law firms don't have.

We do have lawyers here whom clients seek out because they think those lawyers have special abilities that others don't have.
But that’s not a scalable product. It’s just something that happens along the way, and it’s not part of our strategy. Our strategy is to sell specialized products.

**AJ:** Do you then discourage having superstar lawyers at Kobre & Kim to avoid aggrandizing particular individuals?

**MK:** Yes and no. There are a number of lawyers who are much more skilled than others at particular things. One has to acknowledge that that is what creates client valuation and really help support it. But on the flip side, it’s not our firm’s strategy to try to grow the reputations of our individual lawyers. Our firm’s strategy is to come up with new products that end users want and to sell those products to maximize profits. What that means is that—while along the way there are superstars at Kobre & Kim and we support them—the primary strategy is on the firm’s products and having the superstars support the products. Not the other way around.

I have completely let go of the concept of eating or sleeping at particular times and just do it whenever I am able to.

**AJ:** How do you get your lawyers to practice law and the business professionals to run the firm?

**MK:** It’s immensely difficult if you’re not sure what the goal of your organization is. In many law firms, if you strip it down, their goal is not to maximize profit, but to keep the rainmakers at the firm and not have them leave. Of course, the two are closely related. The reason the rainmakers are retained is because those firms think that leads to higher profit. But there are many paths to making profits. Keeping rainmakers in-house is only one of them.

And that path has its own costs. If you have an organization in which the primary goal is to keep the rainmakers happy, then you won’t be able to have a firm that truly is professionally managed. Sometimes decisions will be made that are very financially and business-savvy, but other times they won’t be. Just because some lawyers are very good at producing legal work doesn’t mean they’re good at running law businesses. In fact, the two are usually opposite. Many good lawyers are terrible business people. Not only are they bad at it—they actually mistakenly believe that they know everything, so they refuse to listen to other people.

What we’ve endeavored to do here is not to try to retain rainmakers. That’s not our goal because fundamentally no one here has an open business in a traditional sense. People here are good technical lawyers who excel at what they do. They don’t really feel like they need to decide what kind of furniture an office should have or what kind of accounting software the firm should use. To them, that is not really a part of what they want. And as the firm, what we really want is for the firm’s performance to be maximized.

**AJ:** Last question: What’s it like to be in the shoes of Michael Kim? How do you manage your time among your firm’s many global offices?

**MK:** I’m in Asia about one to two weeks a month. I’m in Europe or Latin America quite often as well. But I actually go wherever I’m needed. I don’t really regard myself as practicing law out of any one of our offices. I’m usually on the road quite a bit.

Many years ago, I read about this primitive tribe discovered in the Amazon, one of those tribes that have not had any human contact for a millennium. The unusual thing about this tribe was that it had no sense of communal meal times or sleep times. In most societies, people eat together or there’s a time when most everyone goes to sleep, but this tribe had no concept like that; so the people just ate whenever they were hungry, whether by themselves or in groups, and if people were tired, they’d just flop over and go to sleep, at any time in the 24-hour cycle.

I’ve become like that. I have completely let go of the concept of eating or sleeping at particular times and just do it whenever I am able to.
The attorney-client privilege is a crown jewel of the legal profession. Many lawyers don’t understand its contours, yet know that when they provide legal advice to a client, that information is protected from disclosure by common law—or, depending on the jurisdiction, by statutory or procedural rules—as long as the privilege has not been waived and no exception applies.

But the attorney-client privilege is inconsistent with the truth-seeking function. It conceals information even when that information may be essential to determining facts. Thus, it is not unusual to read judicial decisions narrowing its application. Nor is it surprising that lawyers have had to confront numerous forks in the road in deciding when to assert the privilege or how to protect information as privileged.

Two of those forks changed the face of privilege law in the federal courts. In 1981, the U.S. Supreme Court decided *Upjohn Co. v. United States*, 449 U.S. 383. And in 2008, Congress adopted Rule 502 of the Federal Rules of Evidence. If the privilege could speak, it would say that those decisions by the Supreme Court and by Congress were watershed moments. But in the same breath, it would add that organizational depositions, selective waiver, common interest legal groups, and ethics rules present issues of privilege protection or privilege waiver that are challenging to follow even with a road map.

*Upjohn* Conundrums: Former Employees and Public Relations Consultants

Before *Upjohn*, lawyers faced the thorny question of whether conversations with employees other than key management personnel (or the “control group” of a corporation) were privileged. *Upjohn* established the principle that a lawyer’s communications with employees to obtain information needed by the lawyer to provide legal advice to the corporation are protected from disclosure by the privilege.

But *Upjohn* closed one fork in the privilege road, only to create many others. The attorney-client privilege has had to evolve as lawyers’ information sources have evolved. Former employees and public relations consultants, in particular, represent a jurisprudential crossroads for lawyers.

For example, in 1981 “outsourcing” was not a common practice—indeed, it was not identified as a business strategy until several years later—and today outsourcing happens in any industry, including law firms. So when is a nonemployee the “functional equivalent” of an employee, embraced by the rule in *Upjohn*? When confronted with the choice of applying *Upjohn* to nonemployees, many courts have been persuaded by lawyers that *who is on the payroll* is not controlling; rather, *who*
The court was matter-of-fact in its holding: 186 Wash. 2d 769 (2016), the Washington Supreme Court deter-

viding individuals who provide information in confidence to the lawyer so whether its rule should apply to former employees, but the Fourth

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Lawyers hoping to protect their conversations with public relations consultants should know they are treading on thin ice.

To illustrate, in Newman v. Highland School District No. 203, 186 Wash. 2d 769 (2016), the Washington Supreme Court determined that Upjohn did not apply to a conversation between a school district lawyer and a former coach who had information about a football player seriously injured in a high school game. The court was matter-of-fact in its holding:

At issue is whether postemployment communications between former employees and corporate counsel should be treated the same as communications with current employees for purposes of applying the corporate attorney-client privilege. Although we follow a flexible approach to application of the attorney-client privilege in the corporate context, we hold that the privilege does not broadly shield counsel's postem-

ployment communications with former employees.

As a result, counsel for the plaintiff was allowed to inquire about conversations between the school district's counsel and the former employee.

In contrast, the Fourth Circuit in In re Allen, 106 F.3d 582 (4th Cir. 1997), noted that the Upjohn court left open the question of whether its rule should apply to former employees, but the Fourth Circuit adopted Chief Justice Burger's analysis in his concurring opinion in Upjohn: “[I]n my view the Court should make clear now that, as a general rule, a communication is privileged at least when, as here, an employee or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment.”

Of course, a former employee does not speak “at the direction of management,” but the Fourth Circuit was persuaded by a host of decisions that Upjohn should be extended to a former employee who had information needed by the lawyer “to de-

velop her legal analysis for the client.” As a result, counsel's notes and summary of her interview with the former employee were insulated from discovery.

But while the Ninth Circuit has agreed with the Fourth Circuit, see Admiral Ins. Co. v. U.S. Dist. Court for Dist. of Arizona, 881 F.2d 1486 (9th Cir. 1989), even in federal court there are forks in the road. For example, Infosystems, Inc. v. Ceridian Corp., 197 F.R.D. 303 (E.D. Mich. 2000), limits Upjohn protection to communications with a former employee that concern “a confidential matter that was uniquely within the knowledge of the former employee when he worked for the client corporation, such that counsel's communications with this former employee must becloaked with the privilege in order for meaningful fact-gathering to occur.”

That's a mouthful, but if you are speaking with a former em-

ployee in the Eastern District of Michigan and cannot make that re-

quired showing, your conversation will not be privileged. So, when facing forks in the road involving former employees, choose wisely.

Another interesting example is public relations consultants. In litigation today, lawyers often use public relations strategies and strategists, including when the risk of an indictment might be affected by public sentiment. But lawyers hoping to protect their conversations with public relations consultants should know they are treading on thin ice.

Among the decisions holding that a public relations consultant is the functional equivalent of an employee for Upjohn purposes, there is a fundamental theme: The firm either serves as the equiva-

lent of an in-house public relations staff (and thus is, in effect, part of the “client”) or is integral to the lawyer's effort to provide a defense to a target of a criminal investigation. This statement from a magistrate judge's decision in In re Abilify (Aripiprazole) Products Liability Litigation, 2017 U.S. Dist. LEXIS 213493 (N.D. Fla. Dec. 29, 2017), captures the theme:

To the extent these [two marketing] firms were retained [by the defendants] to assist Otsuka's in-house legal departments in moni-

toring and analyzing media coverage as part of in-house counsel's strategies and legal advice relating to threatened and ongoing litigation and actions by regulatory agencies, the consultants would stand in the shoes of an Otsuka corporate employee.

The court added this context, which is applicable to many types of high-profile litigation in today's 24-hour instantaneous news cycle:
In the world today—where a drug manufacturer may face liability in the hundreds of millions of dollars in a product liability suit—it is not only common but necessary to involve public relations and marketing consultants to assist in-house counsel and outside counsel in responding to media inquiries regarding ongoing or threatened legal actions. So long as the role of the consultant is to assist legal counsel in responding to the media the protections of the attorney-client privilege should apply the same as where a corporate employee is tasked with responding to media inquiries.

Alas, there are numerous decisions that reach the opposite conclusion when the required “functional equivalent” showing was not made. For example, the argument failed in McNamee v. Clemens, 2013 U.S. Dist. LEXIS 179736 (E.D.N.Y. Sept. 18, 2013), because the public relations firm provided “standard public relations or agent services.” What is a “standard” service and what is a litigation-specific service may be in the eyes of the beholder, but lawyers who plan ahead will shape that determination.

In some cases in which a public relations firm was found not to be a functional equivalent of an employee for privilege purposes, there still was a finding of a work-product protection. For example, in Pemberton v. Republic Services, Inc., 308 F.R.D. 195, 201 (E.D. Mo. 2015), the court rejected an Upjohn argument but determined that all of the materials at issue “were created by a party and its attorney or an agent of the attorney, and would not have been prepared in substantially similar form but for the prospect of litigation.” So not all hope is always lost.

Work product aside, lawyers hoping to make a public relations consultant into the functional equivalent of an employee must wisely structure the relationship (who retains whom, when, and why) and must account for the potential that the selected structure, and communications made under it, will be tested. Listing a public relations consultant’s communications with counsel on a privilege log will almost certainly result in a request for in camera review, unless the parties have reached an agreement to avoid such review. So, when approaching a fork in this privilege road, packaging may dictate which road the court takes.

But there are about 300,000 cases filed in federal court annually and many times that number in state courts. While only a small percentage will have large amounts of electronic discovery, that’s still a lot of cases. And multidistrict litigation, which represents over 30 percent of the federal docket nationwide, will always have significant electronic discovery.

Combine an extrajudicial process with the tens or hundreds of thousands—or millions—of documents, and the attorney-client privilege becomes a wayward traveler, trying to survive the elements. Lawyers dealing with tens or hundreds of gigabytes or a terabyte or more of information are challenged to identify and remove all privileged documents when responding to a request for production. Inadvertent production of privileged communications could result in waiver of the privilege not only for the documents produced but also for other documents involving the same subject matter.

Hence, the nuanced subjects of inadvertent production, waiver, and subject matter waiver. If ever lawyers needed a wizard, Congress gave it to them in adopting Rule 502. Remarkably, it was a rule of evidence—not a rule of civil procedure—that came to the rescue.

How? First, Rule 502(a) eliminated subject matter waiver claims unless a disclosure of privileged information is intentional. Under Rule 502(a), an inadvertent production of a privileged document in a federal court or to a federal agency can no longer trigger subject matter waiver claims in any federal or state proceeding. The reference to “state proceeding” here is designed, according to the explanatory note to Rule 502(a), to ensure “protection and predictability” in that the federal rule on subject matter waiver will govern “subsequent state court determinations on the scope of the waiver” by the disclosure.

Rule 502(a) gives courts even more direction when a production of privileged communications is intentional. There still is no subject matter waiver unless documents relating to the same subject matter “ought in fairness” to be produced. And lest one think that’s always going to be the case, consider the opinion in In re General Motors Ignition Switch Litigation, 80 F. Supp. 3d 521 (S.D.N.Y. Jan. 15, 2015), in which General Motors provided Congress and others with the results of its attorney-managed investigation. Nonetheless, the court held that “fairness” did not require production of counsel’s interview notes and memoranda because GM was not attempting to use the investigative report as a “sword” that would require the production of the notes and memoranda that GM was trying to shield.

Rule 502(b) solved a different problem. Under the pre–Rule 502 case law, an inadvertent production of a privileged document was subject to three competing lines of authority: (1) the strict rule (waiver is automatic); (2) the lenient rule (the client will not be penalized for a mistaken production); and (3) the rule of reason (courts judge the reasonableness of the conduct that

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Electronically Stored Information and the Privilege: Avoiding Waiver

When the Federal Rules of Civil Procedure were adopted in 1938, document production was controlled by the court. Parties had to file a motion and show good cause to obtain documents from each other. That changed in 1970, when document production became extrajudicial. Then along came electronic discovery.

In most lawsuits, electronic discovery may involve no more than printing emails and producing them. Identifying privileged documents and creating a privilege log are then manageable tasks.
The Rule 30(b)(6) Witness Trap

Trial testimony is governed by evidence rules, which, in federal court, include Rule 612, entitled “Writing Used to Refresh a Witness’s Memory.” Rule 612(a) and (b) provide for production to the adverse party of any writing used by a witness to refresh a recollection while testifying, or “before testifying, if the court decides that justice requires” the adverse party to have the option to inspect the document, to cross-examine the witness about it, or to introduce in evidence any portion that relates to the witness’s testimony.

Of course, a corporation can speak only through its representatives. Federal Rule of Civil Procedure 30(b)(6) provides for the deposition of an organization, allows a party to identify topics for examination, and requires the organization to designate a person or persons to testify on those topics. Sometimes it happens that corporate witnesses are shown privileged information or work product, and sometimes that is necessary to teach the designated witness the “corporate memory” in response to a topic of which the witness might not otherwise have personal knowledge.

Does Evidence Rule 612 compromise the integrity of the attorney-client privilege or work-product protection if a Rule 30(b)(6) deponent is shown a privileged document or work product to prepare the witness for the deposition? One might say, No, Rule 612 applies only to trial testimony. After all, there is a reference to “the court” in Rule 612(a)(2), so it must be referring to testimony before a judicial officer.

That argument, however, has not succeeded before most federal judges. Why not? There are at least two reasons. First, Rule 30(c)(1) provides that “examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence. . . .” (emphasis added). Second, too many courts have held that Rule 30(c)(1) trumps the reference to “the court” in Rule 612.

Thus, this is a road filled with potholes, not forks. Avoid them.

Selective Waiver: A Lonely Road

When privileged information or work product is voluntarily disclosed to a regulatory agency under a “non-waiver” and confidentiality agreement, the disclosing person will argue that the privilege is not waived as to any other person or entity under the so-called “selective waiver” doctrine.

The Eighth Circuit adopted the doctrine in Diversified Industries, Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1978) (en banc). The court held that memoranda of counsel’s interviews with employees provided to the Securities and Exchange Commission in response to a subpoena in a nonpublic investigation did not waive the privilege as to other parties. “To hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers.”

Diversified has been widely criticized. The D.C., First, Third, Fourth, Sixth, Ninth, and Tenth Circuits have rejected the doctrine of selective waiver of privileged information voluntarily disclosed to a regulatory agency. The Second Circuit decided not to adopt a per se rule of waiver, instead allowing for a case-by-case determination:

Establishing a rigid rule would fail to anticipate situations in which the disclosing party and the government may share a
common interest in developing legal theories and analyzing information, or situations in which the SEC and the disclosing party have entered into an explicit agreement that the SEC will maintain the confidentiality of the disclosed materials.

In re Steinhardt Partners, L.P., 9 F.3d 230 (2d Cir. 1993).

So what should you do when the government agency is demanding cooperation and wants the results of your investigation, and you want to preserve the privilege and work product as to others? First recognize that hope is not a strategy. Then consider following this road map, all the while realizing it may lead to nowhere:

1. Enter into a confidentiality agreement with the agency.
2. Attempt to provide facts—orally, if possible—in lieu of privileged materials or work product.
3. If you must provide privileged information or work product, limit it to fact work product and provide, in a non-waiver and confidentiality agreement, that the waiver is limited to the agency, there are no third-party beneficiaries, and privilege and work product are preserved as to all other persons.
4. Attempt to obtain an agreement that the agency will not disseminate or disclose the materials to any other person or entity.
5. Define the subject matter of the materials provided to the agency. If the waiver is contoured by a subject matter definition, arguments over subject matter waiver may be avoided. Remember that under Federal Evidence Rule 502(a), voluntary disclosure amounts to a subject matter waiver only if “fairness” requires disclosure of other information within the same subject matter.
6. Define the subject matter up front to avoid Rule 502(a) arguments about what “fairness” requires. In SEC v. Bank of America, 2009 U.S. Dist. LEXIS 133901 (S.D.N.Y. Oct. 14, 2009), a subpoena existed giving the bank access to a court proceeding to obtain a Rule 502 protective order, and Bank of America made the most of it. The court approved a protective order that allowed Bank of America to waive attorney-client privilege and work-product protection regarding certain categories of information material to the matter at issue without waiving such privilege and protection regarding other information of interest in related private lawsuits. The court said that the order comports with Rule 502 “which permits such cabined waivers.” At a minimum, however, commit the agency to not making a subject matter waiver argument.
7. Attempt to identify a common interest with the agency that may allow for an argument that there has not been any waiver.
8. Provide for a clawback of privileged information or work product inadvertently produced.
9. Evaluate the risk and benefits of disclosure up front. “Game out” potential consequences at the outset of the investigation and as appropriate at various stages of the investigation. Cooperation with an agency may outweigh the risk of losing a selective waiver argument.

Forks in the Common Interest Road

There is a difference between a joint defense group and a common interest (or community of interest) legal group. Historically, a joint defense group means one lawyer represents multiple parties, while a common interest legal group means that, among multiple parties, each party has its own lawyer and the parties collectively have a common legal interest.

In a joint defense setting, waiving the joint-client privilege requires the consent of all joint clients; but in a dispute between co-clients, all communications in the course of joint representation are discoverable.

Ethics opinions in this arena do not necessarily comport with the case law.

In a community of interest or common interest setting, privileged information or work product can be shared with members without waiver. But each member must be represented by a lawyer. Then attorneys can exchange privileged information without waiver. Clients in a common interest group cannot do the sharing directly. And to prevent abuse, the type of information exchanged must relate to the common legal interest.

So far, so good. Unfortunately, there are numerous forks in the common interest road. Consider just these two:

First, must there be litigation to establish a common interest privilege? No, says Schaeffler v. United States, 806 F.3d 34, 37, 40–41 (2d Cir. 2015) (citations omitted). And United States v. BDO Seidman, LLP, 492 F.3d 806, 816 (7th Cir. 2007), agrees: “The weight of authority favors our conclusion that litigation need not be actual or imminent for communications to be within the common interest doctrine. At least five of our sister circuits have recognized that the threat of litigation is not a prerequisite to the common interest doctrine.”

But do not accelerate too quickly. In re Santa Fe International Corp., 272 F.3d 705, 710–11 (5th Cir. 2001), takes a different view.
The privilege is “an obstacle to truth seeking,” [and] must “be construed narrowly to effectuate necessary consultation between legal advisers and clients . . . [I]t appears that there must be a palpable threat of litigation at the time of the communication, rather than a mere awareness that one’s questionable conduct might some day result in litigation, before communications between one possible future co-defendant and another . . . could qualify for protection.”

And the highest court in New York agrees. “New York courts uniformly [have] rejected efforts to expand the common interest doctrine to communications that do not concern pending or reasonably anticipated litigation . . . .” *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 627, 628–29, 57 N.E.3d 30, 37, 38 (N.Y. 2016).

Can the common interest be used to compel disclosure? Yes, according to *Waste Management, Inc. v. International Surplus Lines Insurance Co.*, 579 N.E.2d 322, 327–329 (Ill. 1991). This was an action for indemnification from insurers for moneys paid to settle litigation. The insurers sought the insured’s defense counsel files. Some documents were withheld based on privilege claims. A log was provided. The insureds moved to compel.

The Illinois Supreme Court held that the privilege was not applicable because of (1) the cooperation clause in the insurance policy and (2) insurers and insureds have a common interest in defeating or settling the claim against the insured. Hence, communications between the insured and its attorneys were not privileged in a dispute between them.


*Bituminous Casualty Corp. v. Tonka Corp.*, 140 F.R.D. 381, 386–87 (D. Minn. 1992), is one those rejecters:

The *Waste Management* opinion extends this doctrine to hold the attorney-client privilege unavailable to an insured even where the insured’s attorney never represented the insurance company, and was not even retained by the insurance company to represent the insured. This reasoning is unsound. The rationale which supports the “common interest” exception to the attorney-client privilege simply doesn’t apply if the attorney never represented the party seeking the allegedly privileged materials.

Once again, privilege protection is tied to jurisdictional precedents. It’s advisable to arm oneself with legal authority. On these roads, cases are better than maps.

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**Receiving Privileged Documents: The Road to Victory or Defeat?**

Model Rule of Professional Conduct 4.4(b) provides: “A lawyer who receives a document or electronically stored information relating to the representation of the lawyer’s client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.”

If an employer is in litigation with a former employee and the employer discovers emails between the former employee and the former employee’s counsel on its email servers, does counsel for the employer read the emails, or eschew reading and notify the “sender”?

Another fork. Which path to choose?

The case law on privilege waiver in this arena is very fact-dependent. Ethics opinions in this arena do not necessarily comport with the case law. And state versions of Rule 4.4(b) may be more stringent than the Model Rule version.

In New Hampshire, for example, Rule 4.4(b) provides that a lawyer who receives privileged material and knows it was inadvertently sent “shall not examine” the materials. In New Jersey, a lawyer is also prohibited from reading the document or required to stop reading the document: “A lawyer who receives a document and has reasonable cause to believe that the document was inadvertently sent shall not read the document if he or she has not begun to do so or stop reading the document, promptly notify the sender and return the document to the sender.”

In *Stengart v. Loving Care Agency, Inc.*, 201 N.J. 300, 990 A.2d 650 (N.J. 2010), the New Jersey Supreme Court determined that counsel for an employer violated Rule 4.4 when the lawyer retrieved privileged emails located in the cache folder of temporary Internet files on the hard drive of a former employee’s laptop. The court held that counsel should have set aside the “arguably privileged messages once” counsel “realized they were attorney-client communications.” Counsel then erred by “failing either to notify its adversary or seek court permission before reading further.” The matter was remanded for determination of what sanction to impose, including, potentially, disqualification.

When dealing with this privilege fork, then, the path to take is relatively clear: (1) Do not read the privileged documents; (2) know your jurisdiction’s version of Rule 4.4; (3) know your jurisdiction’s case law; (4) get legal advice on the issue of waiver if appropriate; and (5) make your arguments to the court before you read.

The safest road is usually the soundest road.

Travel smart. The attorney-client privilege is a delicate evidentiary gift to lawyers. It should be properly packaged, zealously safeguarded, and objectively respected. Lawyers who do so will stay on the path to privilege protection. Lawyers who don’t may find that there is no way to turn back.
The Impact Litigation Campaign to End Civil Forfeiture

DAN ALBAN

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Just after dark on February 27, 2017, Eh Wah was pulled over for a broken tail light while driving through Muskogee, Oklahoma. Eh Wah was a shy 40-year-old man who had immigrated to the United States from a refugee camp on the Thai-Burmese border 20 years earlier. Eh Wah was returning home to Dallas for a short break from his work as the volunteer manager for a Burmese Christian band during their five-month-long charity tour of the United States to raise money for a Thai orphanage and a remote Burmese refugee college. With him in his car was over $53,000 in cash that the band had raised on the tour, stored in envelopes identifying the concert location and amount of money raised. Dozens of envelopes filled with cash donations for the Hsa Thoo Lei orphanage listed the orphanage’s name, address, phone number, and email in English.

What seemed like a routine traffic stop suddenly became a full-blown narcotics investigation. After grilling Eh Wah about the details of his trip, sheriff’s deputies searched the car and found the envelopes filled with cash, but no drugs, paraphernalia, or any evidence of illegal activity. After a drug dog alerted on the cash, Eh Wah was interrogated for six hours before finally being released around midnight. The Muskogee County sheriff’s deputies kept all of the cash as suspected “drug proceeds.”

Two weeks later, without any further investigation, the Muskogee district attorney filed papers to permanently keep the money through civil forfeiture. And then Eh Wah, whose only prior run-in with the law was a 2001 traffic ticket, was charged with felony possession of drug proceeds based on a cursory five-sentence affidavit that failed to describe any illegal activity but stated that the money was seized due to “inconsistent stories” and “Wah unable to confirm the money was his.”

Eh Wah’s story sounds like a nightmare, but it is a common one—emblematic of the Kafkaesque world of civil forfeiture, an inequitable legal labyrinth from which even orphans and refugees are not safe. Across the country, unsuspecting travelers at airports, train stations, and highways are pulled aside and subjected to this legalized form of highway robbery. Small businesses and individuals suddenly discover that all of their funds have been seized from their bank accounts on the suspicion that they are “structuring” their banking transactions to avoid reporting requirements. Homes are raided—and sometimes even seized and sealed on the spot—in searches for cash or contraband.

In recent years, civil forfeiture has become an increasingly prominent subject of public scrutiny, featured on Last Week Tonight with John Oliver and VICE, as well as in major feature stories and investigative series in the New Yorker, the New York Times, and the Washington Post.

The scope of modern forfeiture laws has also been questioned recently by at least two—ideologically very different—justices on
the U.S. Supreme Court. In March 2017, Justice Thomas wrote an unusual statement about the denial of certiorari in a civil forfeiture case, questioning whether civil forfeiture laws have come unmoored from traditional limitations, and explained why he was “skeptical that this historical practice is capable of sustaining, as a constitutional matter, the contours of modern practice.” Leonard v. Texas, cert. denied, 137 S. Ct. 847 (Mar. 6, 2017) (No. 16-122). A few months later, Justice Sotomayor, writing a unanimous opinion of the court, pointedly discussed the historic distinction between in rem and in personam forfeiture as a limitation on the scope of property subject to forfeiture in a case rejecting the applicability of joint and several liability to a federal criminal forfeiture. Honeycutt v. United States, 137 S. Ct. 1626, 1634–35 (2017).

This term, the Court heard argument in Timbs v. Indiana, a civil forfeiture case that presents the question of whether the Eighth Amendment’s Excessive Fines Clause is incorporated against the states under the Fourteenth Amendment. State v. Timbs, 84 N.E.3d 1179 (Ind. 2017), cert. granted, 138 S. Ct. 2650 (June 18, 2018) (No. 17-1091).

What Civil Forfeiture Is Not
To understand what civil forfeiture is, it is perhaps helpful to clear up a few common areas of confusion by explaining what civil forfeiture is not. The first key distinction is the difference between seizure and forfeiture. Seizure is the initial confiscation of property by law enforcement officers, generally based simply on a probable cause standard. Seizure does not terminate ownership, and not all seized property will even be subjected to forfeiture proceedings—some property may simply be seized to be used as evidence, for example. Forfeiture is the permanent termination of the prior owner’s property rights in the seized property when the government becomes the legal owner of the property.

The second key distinction is between civil forfeiture and criminal forfeiture. Criminal forfeiture is an in personam proceeding that occurs after a criminal conviction and generally takes place during the sentencing phase of a criminal proceeding. Because criminal forfeiture is in personam, only the property of the convicted criminal is supposed to be forfeited via criminal forfeiture. In contrast, civil forfeiture is an in rem proceeding—a proceeding against the property itself—and does not require a criminal conviction in most states, much less a conviction of the property’s owner. Instead, property is permanently forfeited if the government can show by a preponderance of the evidence that the property was connected to a forfeitable offense.

Thus, in the topsy-turvy world of civil forfeiture, property owners can lose their property without even being charged with a crime. And, because civil forfeiture is not a criminal proceeding, property owners are not entitled to the protections accorded to criminal defendants, like the right to counsel, and their decision to exercise their Fifth Amendment right against self-incrimination may be used against them. Moreover, innocent third-party property owners—such as a mother who lets her son borrow her car—typically bear the burden of proving their own innocence and lack of knowledge that the property might be used for illegal purposes.

Civil forfeiture dates back to early Anglo-American maritime law (and even before that to the medieval concept of deodand, by which an object that caused someone’s death would be forfeited to the crown) and operates on the legal fiction that the property
itself is “guilty” of participating in a crime. As the U.S. Supreme Court explained in an oft-cited early 19th-century case involving the seizure of the brig Palmyra for piracy, “[t]he thing [was] primarily considered as the offender, or rather the offence [was] attached primarily to the thing.” The Palmyra, 12 Wheat. 1, 14 (1827). As a result, most forfeiture cases are titled with the property listed as the defendants, leading to case names like United States v. One 1974 Cadillac Eldorado Sedan and United States v. One Book Called Ulysses.

Originally limited to admiralty issues involving smuggling and piracy—where a ship’s owner might be overseas and thus outside a government’s jurisdiction, while the ship itself was in custody—the use of forfeiture laws expanded during Prohibition. Civil forfeiture expanded dramatically again under the Comprehensive Crime Control Act of 1984, which allowed law enforcement agencies to keep the proceeds of forfeited property, creating a very strong, if perverse, incentive. As a result, forfeitures exploded. Today, federal forfeitures exceed $5 billion per year, more than the $3.5 billion lost annually to burglary.

Strategies for Ending the Practice

In 2014, the Institute for Justice (IJ), the national public interest nonprofit law firm where I work, announced our National Initiative to End Forfeiture Abuse with the explicit goal of ending civil forfeiture as it currently exists. Our two primary aims are to eliminate the possibility that someone could have his or her property forfeited without first being convicted of a crime and to dismantle the perverse profit incentive that drives forfeiture abuse. We also want to ensure that there are procedural protections such as an opportunity for property owners to promptly challenge the seizure of their property and to seek to have it released to them on an interim basis while the forfeiture proceedings are pending.

Since 2014, we have made substantial progress through legislative reforms, public advocacy, and litigation: A majority of states—29 plus the District of Columbia—have reformed their civil forfeiture laws, including 15 states that now require a criminal conviction for most or all forfeitures. Over 300 editorials in major newspapers have editorialized against civil forfeiture, and a large majority of Americans—84 percent in a December 2016 poll conducted by the Cato Institute and YouGov—oppose civil forfeiture and support reforms. IJ has won about a dozen cases challenging different aspects of civil forfeiture. Our central strategy is impact litigation, which allows us not only to achieve just results for individual clients but also to highlight the invidiousness of the practice we’re challenging.

An essential aspect of effective impact litigation is sound client selection. Although we frequently come across innocent forfeiture victims, we do not have the resources to represent everyone. At IJ, we want to make our clients the “poster children” for a given issue, and so we look for sympathetic clients who can effectively tell their story to reporters and to the public. Sometimes we hit the jackpot. In our Muskogee, Oklahoma, case, we ended up representing a Thai orphanage for displaced refugees, a church, and a Christian band from Burma on a charitable fundraising trip. After all, if even orphans and refugees are not safe from civil forfeiture, no one is safe from civil forfeiture.

It is also essential to vet potential clients thoroughly to ensure that there is nothing in their background that could distract from the actual legal issues in their case. In forfeiture cases, this process is particularly demanding because there is generally at least an implicit accusation that they or their property were involved in criminal activity. Accordingly, we conduct a very thorough due diligence review of each potential client covering everything from criminal background checks to employment history to a review of credit issues.

We also must conduct case-specific investigations about the basis for the seizure. For example, for clients who are innocent third-party owners of seized property, such as a parent whose car was seized while being borrowed by a child, we need to investigate whether the parent was (or should have been) aware of any underlying criminal activity the child may have been involved in. For seizures of cash, we often dig through years of tax returns, bank statements, and other financial documents to confirm the legitimate source of the cash. Although not always necessary, we also review any documentation a potential client may have regarding a legitimate purpose for the seized cash, such as purchase contracts, earnest money payments, or communications with a seller about the prospective purchase of a vehicle, real estate, or a piece of equipment.

Litigation—especially impact litigation—depends on far more than just what happens in the courtroom. We also tell all our clients that we litigate their case not only in the court of law but also in the court of public opinion by telling their story to journalists, legislators, policy makers, and the public. In the context of civil forfeiture, we want everyone to know how outrageous our latest case is and potentially shame law enforcement and prosecutors into dropping the case and, ideally, changing their seizure or forfeiture policy. As part of this strategy, we typically work in advance with a major media outlet to give the media outlet an embargoed exclusive about the case, with an opportunity to interview us and our clients. Then we announce our involvement in the case as part of a “case launch” with a coordinated release of a video about the case produced by our in-house production team, the publication of the exclusive feature, and a webpage with a press release, media backgrounder, case documents, and photos of our clients.

We employ this two-pronged strategy because it can sometimes produce faster, more cost-effective victories for our clients.
and because it can also bring about lasting change. For example, we were able to secure coverage in the New York Times for client Carole Hinders, the owner of a Mexican restaurant in Spirit Lake, Iowa, whose business bank account was seized by the Internal Revenue Service (IRS) on the suspicion that she “structured” her bank deposits. She had done nothing wrong by regularly depositing the cash receipts from her restaurant, but the IRS suspected that she was attempting to avoid the requirement that deposits of $10,000 or more be reported to the IRS by making multiple small deposits. The IRS had already received extremely negative publicity from our prior “structuring” forfeiture cases on behalf of the owners of other small businesses across the country—including a grocery store, a gas station, a convenience store, and a wholesale distributor. Apparently anticipating another firestorm of criticism, the IRS not only returned Carole’s money but also announced a change in its seizure policy in the very same New York Times article covering her case. Now, the IRS no longer attempts to forfeit bank accounts based on what it calls “legal source” structuring—that is, money that comes from a legitimate business.

When placed under substantial public scrutiny for a given seizure or forfeiture, the government is often shamed into returning the seized property, sometimes within hours of the announcement. In our Muskogee case, for example, the Washington Post feature was posted online at around 9:30 a.m., and by 3:30 p.m., we received a call from the Muskogee district attorney saying that they would be dropping the criminal charge and the forfeiture case and that they wanted a mailing address so that they could send out the check that very afternoon!

While sudden victories like this are obviously great developments for our clients, they do not establish legal precedent that can be used to help others and prevent the continuing widespread abuse of forfeiture laws. These quick surrenders generally moot our client’s case, so they no longer have standing to challenge specific forfeiture practices or procedures that we may have challenged in our pleadings. Because our institutional goal is to bring about systemic change, we began looking for ways to overcome this recurring mootness problem. While there are doctrines that permit review of mooted cases, such as cases that are capable of repetition yet evading review, they are often not applied consistently, and so we are reluctant to put all our eggs in that basket. Instead, we have increasingly gone on the offense by filing federal class action lawsuits on behalf of classes of plaintiffs affected by the same civil forfeiture policies to ensure that our cases can overcome mootness obstacles and proceed to a final resolution on the merits.

Class actions are particularly resistant to mootness issues because of the “relation back” doctrine, which says that class claims relate back to the date that a motion for class certification is filed and thus prevent defendants from mooting the entire case by “picking off” class representatives with settlement offers designed to settle their individual claims. See, e.g., Sosna v. Iowa, 419 U.S. 393, 402 (1975); Deposit Guar. Nat’l Bank, Jackson, Miss. v. Roper, 445 U.S. 326, 339 (1980). Although the exact parameters of the “relation back” doctrine remains a subject of dispute, federal courts generally permit class actions to continue even after the claims of class representatives have been mooted, so long as a motion to certify the class is pending or is timely pursued after the filing of the complaint. Accordingly, we generally try to file our motion for class certification when, or shortly after, we file our class action complaint. If we’re able to obtain additional information through class discovery, then we can always amend our class-certification motion at a later point.

In the topsy-turvy world of civil forfeiture, property owners can lose their property without even being charged with a crime.

A recent successful example of this strategy is our four-year-long class action lawsuit challenging Philadelphia’s civil forfeiture machine, which was among the most abusive in the nation. Among other outrageous practices, Philadelphia sent all civil forfeiture cases to a courtroom run by prosecutors—not judges—who repeatedly “relisted” cases by telling property owners to come back at another date, until they finally stopped showing up and lost their property by default. To put an end to this and other abusive practices, we filed a federal class action complaint with several lead plaintiffs representing about 25,000 members of the class who had been victimized by civil forfeiture. We initially brought suit against the City of Philadelphia and its District Attorney’s Office, but we later added a court system, the First Judicial District of Pennsylvania, after it became clear that it was complicit in these practices and that its involvement was necessary to fully correct them.

The Philadelphia defendants attempted to return the property of our lead plaintiffs in an effort to moot the lawsuit, but the class action continued because we had filed our motion for class

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certification contemporaneously with our class action complaint; thus, the claims related back to the date of that initial filing. After overcoming multiple motions to dismiss, we managed to obtain class certification on one of the claims and settled two of the other claims: Philadelphia agreed to no longer seize and seal people’s homes without notice, suddenly evicting families from their homes, and to no longer require them to agree to unconstitutional conditions—such as not allowing family members to live with them—as a condition of letting them back in their home.

The case is currently awaiting approval of a class-wide settlement that would completely overhaul Philadelphia’s civil forfeiture procedures and establish a $3 million settlement fund to provide restitution to victims from the past six years.

Dismantling the Machine
While our ultimate goal is to end civil forfeiture altogether, dismantling America’s civil forfeiture machine is a daunting task that must be done a piece or two at a time. Accordingly, we have often focused our litigation on attacking specific unjust procedures or practices that independently violate due process or other provisions of the Bill of Rights, such as the “innocent owner” burden, the absence of a prompt post-seizure hearing, and the imposition of forfeitures that constitute excessive fines.

One particularly troubling aspect of civil forfeiture laws involves the burden of proof placed on innocent third-party property owners whose property was allegedly used by others to commit a crime, such as a mother who lets her son borrow her car, which is later seized when the son is arrested for driving under the influence. While there is generally an “innocent owner” defense available in such situations, federal law and most state laws place the burden on these property owners to effectively prove their own innocence and lack of knowledge about any criminal activity in order to get their property back. See, e.g., 18 U.S.C. § 983(d)(1) (“The claimant shall have the burden of proving that the claimant is an innocent owner by a preponderance of the evidence.”). This flips the presumption of innocence on its head, presenting a serious threat to due process.

Our due process challenge to this “innocent owner” burden recently found additional support in the Supreme Court’s ruling in Nelson v. Colorado, 137 S. Ct. 1249 (2017) (No. 15-1256). In a 7–1 decision written by Justice Ginsburg, the Court struck down Colorado statutes requiring criminal defendants whose convictions were reversed or vacated to prove their own innocence by clear and convincing evidence in order to be repaid for any fines, penalties, court costs, or restitution that they paid as part of their now-invalidated conviction. Id. at 1255. Finding that this scheme did not comport with due process, the Court explained that “Colorado may not presume a person, adjudged guilty of no crime, nonetheless guilty enough for monetary exactions.” Id. at 1256. Like the monetary exactions found unconstitutional in Nelson, forfeitures of property owned by third parties impose a punitive penalty even though the owners have not been adjudged guilty of any crime.

Following Nelson, we obtained an important ruling striking down the innocent-owner burden in Albuquerque, New Mexico, where city officials had continued seizing and forfeiting vehicles in defiance of New Mexico’s recent elimination of civil forfeiture. In that case, Arlene Harjo challenged Albuquerque’s forfeiture program after her 2014 Nissan Versa was seized and held for over 200 days in an impound lot because her son borrowed the car and was arrested for driving while intoxicated. The city attempted to permanently forfeit the car, and Arlene appeared at an administrative hearing to explain that her son had borrowed her car many times without incident, but the hearing officer dismissed her pleas, stating, “Well, your trust was misplaced.”

The city told Arlene it would forfeit her car unless she paid $4,000 and agreed to immobilize the car for 18 months. Instead, she sued in federal court, challenging the requirement that she must prove her own innocence (and the city’s profit incentive). In July 2018, the U.S. District Court held, in part, that Albuquerque’s civil forfeiture ordinance “violates due process by depriving car owners of their property unless they prove their innocence.” Harjo v. City of Albuquerque, No. 1:16-CV-01113-JB-JHR, 2018 U.S. Dist. LEXIS 127905, 326 F. Supp. 3d 1145, at *33, slip op. at 74 (D. N.M. July 28, 2018).

A Lack of Prompt Hearings
Another issue that creates particular hardship for victims of civil forfeiture is their inability to obtain a prompt hearing to challenge probable cause or seek the interim return of their property while the case proceeds on the merits. This is particularly difficult in vehicle seizures, where the owner may depend on the car to get to work, take children to school, run errands, and the like. Federal law provides for a limited hardship hearing in such circumstances, see 18 U.S.C. § 983(f), but many states have no such laws.

For real property, federal due process requires states to provide notice and an opportunity to be heard before the seizure for civil forfeiture, absent exigent circumstances. United States v. James Daniel Good Real Prop., 510 U.S. 43 (1993). In our Philadelphia class action, we leveraged James Daniel Good to bring about an early settlement related to seizures of real estate, in which the city agreed to, inter alia, stop conducting surprise “seize and seal” seizures of homes and instead provide notice and a hearing. But James Daniel Good did not resolve the question of post-seizure hearings for seizures of personal property.

The Supreme Court appeared poised to resolve whether due process requires a prompt hearing after warrantless seizures of personal property when it granted certiorari in a case in which
the Seventh Circuit held that Illinois’s failure to provide prompt hearings after vehicle seizures failed to satisfy due process. Smith v. City of Chicago, 524 F.3d 834 (2008). But that case was unfortunately mooted while pending before the Court, and the Seventh Circuit’s opinion was vacated. Alvarez v. Smith, 558 U.S. 89, 97 (2009), vacating as moot Smith v. City of Chicago, 524 F.3d 834 (2008).

However, there has been significant guidance from the lower courts in cases such as Krimstock v. Kelly, in which then Judge Sotomayor wrote an opinion for a unanimous Second Circuit panel holding that due process requires a prompt post-seizure hearing for vehicle owners whose vehicles were seized for civil forfeiture after the driver was accused of driving while intoxicated or for other alleged crimes for which the vehicle was an instrumentality. 306 F.3d 40, 44 (2d Cir. 2003). Noting that “[a] car or truck is often central to a person’s livelihood or daily activities,” id., the Krimstock opinion held that vehicle owners “must be given an opportunity to test the probable validity of the City’s deprivation of their vehicles pendente lite, including probable cause for the initial warrantless seizure.” Id. at 70.

Krimstock and other cases like it have opened the door to challenging the absence of a prompt post-seizure hearing in several states. Most notably, in our Philadelphia class action, we secured as part of the yet-to-be-approved settlement a guarantee of a prompt post-seizure hearing for those who have their property seized in Philadelphia. Under the terms of this agreement, Philadelphia courts will now provide a post-seizure hearing within 10 business days after a property owner files a motion seeking such a hearing. At the same time, we continue to seek to make additional precedent further establishing the right to a prompt post-seizure hearing.

Excessive Fines

A third issue that arises frequently in civil forfeiture cases is excessive fines. The value of property taken through civil forfeiture often far exceeds the maximum criminal penalty that could be imposed following a conviction. In United States v. Bajakajian, 524 U.S. 321 (1998), the Supreme Court held that criminal forfeitures are punitive and thus subject to the Eighth Amendment’s Excessive Fines Clause. In that case, Syrian immigrant Hosep Bajakajian had over $357,144 seized from his luggage while traveling to Cyprus because he failed to declare it while departing the United States, in violation of federal currency reporting requirements that require cash amounts of more than $10,000 to be reported to U.S. Customs and Border Protection upon departure. Id. at 324–25. The money was not alleged to have been involved in any other criminal activity, so the sole crime was the reporting offense. Id. at 337–38. Under the Sentencing Guidelines, the maximum sentence that Bajakajian could have faced was six months in prison and a fine of $5,000. Id. Because a $357,144 criminal forfeiture would have been “many orders of magnitude” greater than the maximum $5,000 fine, the Court concluded that “such a forfeiture would be grossly disproportional to the gravity of the offense.” Id. at 339–40.

In our civil forfeiture litigation, we have sought to expand the application of Bajakajian to civil forfeitures where the value of the property seized is “grossly disproportional” to the gravity of the alleged offense. Most notably, we have elevated this issue once again to the Court’s attention in Timbs v. Indiana, in which it was argued this term.

Timbs is about whether, and how, the Excessive Fines Clause is incorporated against the states. Indiana resident Tyson Timbs used the proceeds from his recently deceased father’s life insurance to purchase a sport utility vehicle (SUV) for about $42,000. A short time later, he became addicted to an opioid medication and turned to the black market when his prescription expired. After a confidential informant put him in touch with undercover officers, he was arrested in the SUV during a sting operation for selling a small amount of drugs. He pleaded guilty and served one year of house arrest, was sentenced to five years of probation, and paid $1,200 in court fees. The State of Indiana—acting through a private law firm working on a contingency-fee basis—then attempted to forfeit his SUV, which was seized during the arrest, using civil forfeiture. The seizure of Timbs’s car made it difficult for him to comply with the terms of his probation.

Timbs challenged the forfeiture as a violation of his right to be free from excessive fines under the Eighth Amendment. The state trial court found for Timbs, noting that the seized property was worth four times more than the maximum $10,000 statutory fine Timbs faced, and thus was excessive and grossly disproportional to the gravity of the offense. The trial court was affirmed by the state court of appeals, but the Indiana Supreme Court declined to treat the Excessive Fines Clause as incorporated against the states and reversed. See State v. Timbs, 84 N.E.3d 1179, 1184 (Ind. 2017).

Representing Timbs, we petitioned for certiorari on whether the Eighth Amendment’s Excessive Fines Clause is incorporated against the states under the Fourteenth Amendment, arguing that it is incorporated under both the Due Process Clause and the Privileges or Immunities Clause. The Supreme Court granted certiorari and heard argument on November 28, 2018. On February 20, 2019, shortly before this issue of Litigation went to press, the Court ruled that the Constitution’s ban on excessive fines does also apply to states.)

The Profit Incentive

In addition to focusing on specific forfeiture procedures that violate due process, we remain mindful of the fact that the extremely high number of seizures and forfeitures is driven by
the profit incentive, which distorts law enforcement priorities. Unsurprisingly, when law enforcement agencies and prosecutors are able to keep up to 100 percent of the proceeds from property they forfeit, they make forfeiture a much higher priority. To truly limit abuse of forfeiture laws, we must eliminate this profit incentive. Accordingly, we have repeatedly challenged this profit incentive itself as a systemic violation of due process, and those efforts are beginning to bear fruit.

While the principle that judges may not have a financial incentive in the outcome of cases they preside over is both intuitive and well known, less known is the fact that this same principle applies to prosecutors and law enforcement officers. Although the case law on due process and financial incentives for prosecutors and law enforcement officers is just beginning to develop, the U.S. Supreme Court offered guidance in *Marshall v. Jerrico*, Inc. In that case the Court rejected a due process challenge to an administrative enforcement scheme that directed penalties for child labor law violations to the enforcing agency, because the funds collected made up substantially less than 1 percent of the budget of the Employment Standards Administration of the Department of Labor and the salary of the relevant official was fixed by law and did not fluctuate based on penalties collected. 446 U.S. 238, 250 (1980). Explaining the narrow scope of its ruling, the Court noted that “traditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which the enforcement decisions of an administrator were motivated by improper factors.” *Id.* at 249. The Court explained that such “improper factors” included both institutional and personal interests, such as when enforcement decisions are “distorted by the prospect of institutional gain as a result of zealous enforcement efforts” or “[a] scheme injecting a personal interest, financial or otherwise, into the enforcement process [which] may bring irrelevant or impermissible factors into the prosecutorial decision.” *Id.* at 250.

Following the Court’s guidance in *Marshall v. Jerrico*, we have repeatedly brought due process claims (and raised affirmative defenses) challenging forfeiture programs that create institutional or personal financial incentives likely to distort enforcement behavior, such as when a significant percentage of an agency’s budget is derived from forfeiture proceeds or when forfeiture proceeds are used to pay for law enforcement officers’ or prosecutors’ salaries, overtime, and other benefits. These efforts are beginning to pay dividends.

In our Philadelphia class action, for example, our profit-incentive claim survived multiple motions to dismiss, and a class was even certified to bring this claim. Although the settlement of the case is pending approval, the consent decree provides that the city may no longer direct funds from forfeiture to law enforcement use and must disgorge the remaining money from the city’s forfeiture fund to provide restitution to victims.

Our legal arguments on the unconstitutionality of civil forfeiture’s profit incentive were recently adopted by a federal district court in our challenge to Albuquerque’s civil forfeiture program. The landmark 105-page opinion by Judge James O. Browning found that “the City of Albuquerque has an unconstitutional institutional incentive to prosecute forfeiture cases, because, in practice, the forfeiture program sets its own budget and can spend, without meaningful oversight, all of the excess funds it raises from previous years.” *Harjo v. City of Albuquerque*, No. 1:16-CV-01113-JB-JHR, 2018 U.S. Dist. LEXIS 127905, 326 F. Supp. 3d 1145, at *1, slip op. at 2 (D. N.M. July 28, 2018). The court further explained that “there is a realistic possibility that the forfeiture program prosecutors’ judgment will be distorted, because in effect, the more revenues the prosecutor raises, the more money the forfeiture program can spend.” *Id.* at *35, slip op. at 77.

**Conclusion**

Many early legal victories have been won to limit civil forfeiture, and public opinion remains strongly supportive of forfeiture reform, according to an October 15, 2018, poll by IJ and YouGov finding that 76 percent of Americans are more likely to vote for candidates who support forfeiture reform. Nonetheless, much work remains in our campaign to end civil forfeiture. Strategic impact litigation requires patience and perseverance coupled with a sound litigation strategy. Our multi-prong strategy for attacking various procedural aspects of civil forfeiture laws while also challenging the profit incentive that lies at the root of forfeiture abuse provides essential flexibility. We are able to test cutting-edge constitutional theories while also extending existing precedent to challenge unjust procedures. There will no doubt be many further challenges as we continue this campaign, but we remain confident that something as inherently abusive as civil forfeiture can be brought to an end.
A Litigator’s Pragmatic Approach to Avoiding Discovery Disasters

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Discovery is a messy proposition. When in the throes of bit-to-byte battle, litigators make reasonable and good-faith judgments on preservation triggers, scope evaluation, and the selection of document categorization tools, only to have those decisions analyzed and reevaluated with the precision of adversarial, years-after hindsight by an opponent who will scrutinize processes and convey to the court that they could have done better.

Now consider electronically stored information (ESI) and the problem becomes even more complex. ESI can multiply like a gremlin and disappear like Casper—all at the stroke of a few keys. The nebulous and imprecise characteristics of ESI lay the groundwork for what can develop into litigating about litigation (or litigation about litigating)—a wasteful proposition, but one that has turned into a multibillion-dollar industry of lawyers, consultants, data services companies, and, yes, old-fashioned scanning and copy vendors, all discovering more about discovery.

So you say you’re a litigator and you have “people” who take care of ESI for you—according to the State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion 2015-193, you better have co-counsel or an ESI consultant to act as your Rosetta stone. If you haven’t heard Judge Peck’s “wake-up calls,” we are here to tell you that ESI issues are front and center in litigation. See, e.g., Fischer v. Forrest, No. 14 Civ. 1304 (PAE) (AJP), 2017 U.S. Dist. LEXIS 28102, at *1 (S.D.N.Y. Feb. 28, 2017) (“It is time, once again, to issue a discovery wake-up call to the Bar in this District: the Federal Rules of Civil Procedure were amended effective December 1, 2015, and one change that affects the daily work of every litigator is to Rule 34.”). It’s 2018 and discovery is litigation. Cases are won (and lost) on data.

- If you (or your co-counsel) can’t explain ESI issues in simple plain-English sound bites, you and your client may be at a disadvantage.
- A poorly negotiated pretrial order or a less-than-average e-discovery or document review vendor may place your client at a disadvantage.
- The inadvertent production of information that includes privileged information will place you and your client at a disadvantage.

Luckily, litigators can likely avoid and manage most discovery disasters and ESI shortcomings. This article aims to provide every legal professional with “war tested” tips on how to successfully avoid those “Oh muck!” moments of e-discovery.
Know the Rules

By now, you should understand and acknowledge that the Federal Rules of Civil Procedure were amended and adopted on December 1, 2015. Yet, while most practitioners have heard about the changes to the rules, many still struggle to advocate strong positions. Counsel must know the rules and work to educate the entire court system to avoid meaningless pre-2015 citations to old rules and outdated case law.

The changes are so important that Chief Justice Roberts highlighted them in his 2015 year end report:

The 2015 civil rules amendments are a major stride toward a better federal court system. But they will achieve the goal of Rule 1—“the just, speedy, and inexpensive determination of every action and proceeding”—only if the entire legal community, including the bench, bar, and legal academy, step up to the challenge of making real change.


Litigators should heed the Court’s guidance and adopt plans for deploying these tools on matters. They are designed to make the process more efficient.

Litigants should quickly point to the death of the “reasonably calculated” language and strike at misguided citations to Oppenheimer Fund, Inc. v. Sanders, when an adversary attempts to go fishing in a producing party's ESI lake. Remember this equation: Discovery = relevant to claim or defense + proportional to the needs of the case. Even with the shift in discovery’s scope, requesting parties continue to cite the Supreme Court case of Oppenheimer Fund, Inc. v. Sanders, in misguided attempts to open back up the scope of discovery to the now defunct standard. While the Oppenheimer Court may have cited the “reasonably calculated” standard, the Court ruled that the discovery sought in the case (the names of potential class members) was outside the scope of discovery under Rule 26(b)(1) and better placed within the scope of Rule 23(d)—the class action rule. The Court ordered the requesting party to pay for the requested discovery. Thus, a strange case for requesting parties to cite to hark back to days prior to the 2015 amendments.

After the 2015 amendments, the scope of discovery is neither liberal nor broad, but Rule 26(b)(1) requires that discovery be proportional. Defining the scope of discovery as anything other than proportional is contrary to the unambiguous language of Rule 26(b)(1), the supporting advisory committee notes, and Chief Justice Roberts’s 2015 Year-End Report on the Federal Judiciary.

Rule 26(b)(1) makes explicit that “Parties may obtain discovery...” that is relevant to any party's claim or defense and proportional to the needs of the case...” Therefore, parties must now deploy a two-part “relevant and proportional” analysis to identify the permissible scope.

When faced with old cites, producing parties should be quick to point out that Rule 26(b)(1)’s emphasis on proportionality is so important that courts are sanctioning attorneys for referencing the outdated “reasonably calculated” language, such as in Fulton v. Livingston Financial LLC, No. C15-0574JLR, 2016 U.S. Dist. LEXIS 96825, at *7 (W.D. Wash. July 25, 2016).

Discovery on discovery is rarely appropriate. Only upon specific evidence of a deficiency should courts consider unduly burdensome discovery on discovery. “Discovery on discovery” is the broad range of discovery tactics requesting parties deploy, designed to deflect from merits-focused litigation and onto ESI production issues. Questions about legal holds, servers, systems, document review protocols, and departed employees, and dispositions about discovery practice all fit into this category.

To avoid discovery-on-discovery gamesmanship, counsel should consider precocious navigation of ESI protocols and in-depth protective and standing orders while focusing on meeting discovery obligations with lines in the sand drawn based on proportionality arguments. Counsel should also point out to courts that jurisprudence has never permitted a requesting party to conduct an over-the-shoulder spot check of a producing attorney’s work product. The civil litigation system is based on counsel conducting a “reasonable inquiry” under Rule 26(g)—not perfection and not a system in which a producing party is required to open its doors for unfettered access to its files and systems.

While Rule 26(b)(1) states the scope of discovery, Rule 26(g) mandates that counsel must adhere to the principles of reasonableness and proportionality—and certify they are doing so. Rule 26(g) sets the stage for counsel's interaction with the court and litigation adversaries. While requesting parties often use broad, sweeping words like “any,” “every,” and “all” in ESI search mandates, the true requirement under Rule 26(g) is that counsel conduct a “reasonable inquiry”—not a scorched-earth, perfect production. The sanctions mandate of Rule 26(g) adds a proportionality bite to Rule 26(b)(1)’s bark. Therefore, counsel should use Rule 26(g) to set the standard of care for parties when both requesting and producing information.

Rule 26(g)(1)(B) requires the parties to certify that discovery is “not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation...” Courts are specifically instructed to reject discovery that is “unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.”

Rule 26(g)(3) requires courts to enforce these needlessness and disproportionality prohibitions with an “appropriate sanction.” In 2000, the U.S. District Court for the District of Maryland...
Get Involved Early

Litigators often find themselves between the devil and the deep blue sea when walking into discovery spoliation claims, mishaps, missteps, and mistakes—requiring the defense of discovery choices made by non-lawyers, predecessors, and co-counsel. A less reactive and more cost-effective approach involves working with an organization on how to properly manage e-discovery as soon as the organization becomes aware of potential litigation. Developing a discovery plan early can later provide the process road map that will be needed to reconnect the dots.

Failure to research the provider can and will most likely lead to a host of issues.

Litigants should work with an organization to familiarize themselves with the organization’s data structure (and the location of relevant systems), data retention policies (including automatic deletion policies), and key custodians (who are most knowledgeable about the litigation issues). Once familiar with these systems, standard operating procedures, and processes, it is much easier to adjust e-discovery parameters so they are less costly and burdensome going forward.

Interview and Question the Selected Vendor

With more than 600 e-discovery vendors in the United States alone, trying to find the right vendor to meet and fulfill the organization’s requirements is extremely difficult. Some vendors use their own technologies, others use off-the-shelf products, and a few outliers provide traditional (i.e., from the paper world) processing and hosting services. Who the organization ultimately chooses can actually make or break the litigation. Having to revisit battles already won for no other reason than a vendor’s mistake can cost valuable credibility with your adversaries—or worse, with the court.

While certain organizations have long-standing relationships with specific vendors, it is your job as counsel to research the provider. A stress test might be required to determine if the provider can meet a demanding discovery schedule. What kind of resources can the provider draw on? How big is its staff? When are its hours of operation? Is it a West Coast provider for an East Coast client? How many other organizations is the provider working with? Failure to research the provider can and will most likely lead to a host of issues with the vendor and ultimately opposing counsel and the court.

Missed deadlines, due to the vendor’s or the firm’s inability to meet a scheduling order, frustrates opposing counsel and ruins credibility with the court. In large rocket-docket intellectual property matters or mass tort class actions, it is not uncommon for the court to set an expedited discovery schedule. While this may lead to quick rulings, service providers or even outside law firms without the appropriate resources to scale up to the speed and complexity of the litigation can lead to difficult situations. A single blown deadline or technical issue is likely not going to make or break the case, nor will it upset reasonable opposing counsel or the judge. However, continually missing production deadlines will not only frustrate opposing counsel but will also ruin your credibility with the court. “It’s not us; it’s the vendor” is not an appropriate response.

Production of privileged information happens more often than you might think—use Federal Rule of Evidence 502(d) to protect against it. Legal professionals should be well enough versed in the law of privilege to identify a communication that might be protected by the attorney-client privilege or what type of work product is protected by the attorney work-product protection, but even after eight or more years in action, very few practitioners have a good grasp of how to effectively use a Federal Rule of Evidence 502(d) order in federal court to protect against waiver. A Rule 502(d) order will prevent waiver of a privileged document in a federal proceeding.

Depending on the attorney ethics rules in play, the receiving party may contact a producing party to provide notice of an inadvertently produced privileged document upon reading it, and the producing party can thereby execute the clawback. Alternatively, upon noticing the error, a producing party can claw back the document on its own. A Rule 502(d) order will not prevent your adversary from knowing what you produce if he or she reads it (e.g., you can’t put the toothpaste back in the tube), so proper privilege review screening is crucial—even with the protection of the rule. Regardless, a Rule 502(d) order will prevent privilege waiver.

Get Your Documents in Order: The ESI Protocol and Protective Order

Under Federal Rule of Civil Procedure 26(f), parties are required to meet and confer early on in a case to discuss, in part, any issues about preserving discoverable information and thereafter develop a proposed discovery plan. Although Rule 26(f) does not
require formal documentation, many local rules dictate that the parties cooperate to develop a formal, written ESI protocol to control the conduct of e-discovery in the case and to ultimately avoid discovery-on-discovery gamesmanship down the road.

An example of a recently negotiated ESI protocol developed by the parties in a large federal multidistrict litigation is Pretrial Order No. 49 in In re Taxotere (Docetaxel) Products Liability Litigation, http://www.laed.uscourts.gov/sites/default/files/taxotere/Taxotere.MDL-..2740.PTO-.No-.49.Governing.ESI_.Protocol.Mag_.North_.Doc_.611.7-5-17_0.pdf. As another example, courts in the Northern District of California regularly order the parties to meet and agree to develop an ESI protocol that addresses the formats in which various forms of ESI would be produced. See, e.g., In re Facebook PPC Advert. Litig., U.S. Dist. LEXIS 39830 (N.D. Cal. Apr. 6, 2011). To do so requires significant preparation as to the topics discussed below (and others), which generally arise in nearly every ESI protocol.

**E-discovery liaison.** To promote communication and cooperation between the parties, it is advisable that each party designate an individual through whom all e-discovery requests and responses are coordinated. Regardless of whether the e-discovery liaison is an attorney (in-house or outside counsel), a third-party consultant, or an employee of the party, he or she must be (a) familiar with the party’s electronic systems and capabilities in order to explain these systems and answer relevant questions; (b) knowledgeable about the technical aspects of e-discovery, among them electronic document storage, organization, and format issues; (c) prepared to participate in e-discovery dispute resolutions; and (d) responsible for organizing the party’s e-discovery efforts to ensure consistency and thoroughness.

Some courts, like the U.S. District Court for the Northern District of California and those within the Seventh Circuit, expressly encourage the designation of an e-discovery liaison. The U.S. District Court for the Northern District of California recommends that, “[f]or complex ESI productions, each party should involve individuals with sufficient technical knowledge and experience to understand, communicate about, and plan for the orderly exchange of ESI discovery.” N.D. Cal., Electronic Discovery Protocol, http://www.cand.uscourts.gov/cja/e-discovery. The court goes on to state that “[l]awyers have a responsibility to have an adequate understanding of electronic discovery.” Id. Meanwhile, the Seventh Circuit Court of Appeals has concluded that “the meet and confer process will be aided by participation of one or more e-discovery liaison(s).” 7th Cir., Principles Relating to the Discovery of Electronically Stored Information, Principle 2.02 (7th Cir. pilot program), https://www.discoverypilot.com/sites/default/files/7thCircuitESIPilotProgramPrinciplesSecondEdition2018.pdf.

**Scope of ESI.** As stated, it is imperative that the ESI protocol be consistent with Rule 26(b)(1) and therefore limit the scope of discovery to discovery regarding any non-privileged information that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

One aspect that is important in accomplishing this is the identification of ESI that is not reasonably accessible, such as the following:

- orphaned data (e.g., archives created for backup or disaster recovery purposes)
- information deemed as junk or irrelevant ESI outside the scope of permissible discovery
- server, system, or network logs, or electronic data temporarily stored by scientific equipment
- documents collected from custodians that cannot be processed with known or available tools
- ESI sent to or from mobile devices, provided a copy of that data is routinely saved elsewhere
- data stored on photocopiers, scanners, and fax machines

**Format of production.** Most ESI produced consists of email (e.g., Outlook or Exchange messages) and loose, stand-alone documents like word-processing files (e.g., Word), presentations (e.g., PowerPoint), and spreadsheets (e.g., Excel). For these files, the biggest production format conflict between parties is whether they should be produced in native format (the unaltered, default format of how information is kept in the normal course of business) or tagged image file format (TIFF) (a static image file, with extracted text and metadata). Federal Rule of Civil Procedure 34 provides that ESI is to be produced, absent agreement or court order, “in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.” However, local rules and guidelines favor the use of text-searchable imaged formats, such as TIFF files for production of email and other document-like images.

The U.S. District Court for the District of Delaware mandates that “ESI and non-ESI shall be produced to the requesting party as text searchable image files (e.g., PDF or TIFF).” D. Del., Default Standard for Discovery, Including Discovery of Electronically Stored Information, http://www.ded.uscourts.gov/sites/default/files/pages/Electronic%20Discovery%20Default%20Standard.pdf. Meanwhile, the U.S. District Court for the Western District of Washington has advised counsel that acceptable formats include, but are not limited to, native files, multi-age TIFFs, single-page TIFFs, and searchable PDF files. W.D. Wash., Model Agreement Regarding Discovery of Electronically Stored Information and Proposed Order, http://www.wawd.uscourts.gov/sites/wawd/files/ModelESIAgreement.pdf.
Native production, as the U.S. District Court for the Western District of Washington has previously explained, is generally reserved for files “not easily converted to image format, such as Excel, Access files, and drawing files.” *Id.*

Use Logs, Charts, and Forms

Data collection is a dynamic and multifaceted process that can ultimately be extremely burdensome, depending on the size and structure of an organization. But absent a legitimate argument that all relevant documents—within the scope of discovery—have been produced to opposing counsel, counsel’s best defense against a motion to compel or notice of a 30(b)(6) deposition is a transparent road map documenting and illustrating the reasonableness of the strategic decisions made in discovery. See, e.g., *Victor Stanley v. Creative Pipe, Inc.*, 250 F.R.D. 251, 261 (D. Md. 2008) (parties need to be prepared to back up their positions with reliable information “from someone with the qualifications to produce helpful opinions, not conclusory argument by counsel”).

Counsel’s failure to create “logs, charts, and forms”—while adding an additional burden to data collection—provides opposing counsel and the court with no understanding of counsel’s efforts and only leaves additional justification for the court to grant discovery on discovery.

Logs, charts, and forms should be used to document the following:

**Witness interviews**: where the custodian has relevant data stored, and what might have been previously deleted. The way an organization’s employees create, share, and store data varies across departments (or business units). Therefore, it is imperative that you work with each relevant employee during the witness interviews to appropriately document the location of relevant information and documents—thereafter avoiding the problems generated by missing a goldmine of relevant information and documents.

The following are important to this task:

- Understanding how employees are communicating in their department. In today’s age, all employees use email, but have you confirmed that they have followed the company’s acceptable use policy—e.g., not using their personal accounts for business purposes? Have you asked them if they use Facebook, Twitter, LinkedIn, Skype, etc., to discuss work projects?
- Trying not to take the employee’s word for it. Ask employees to see the data in its native environment or for a live demonstration of the system over a web meeting screenshare. “I store the emails in my archive” or “My folders are kept in the T: drive” can mean two entirely different things to two different employees. It is imperative that you (or someone on your legal team) are given a demonstration, not only to document the process but also to be able to explain to opposing counsel and the court why or why not a particular system is relevant.
- Identifying code words, acronyms, abbreviations, nicknames, etc., for documents, projects, and people. The last thing you want to do is represent to opposing counsel and the court that requested information and documents do not exist, only to find out months later that they do in fact exist under a different name. This not only creates an additional obligation to collect, review, and produce the relevant information and documents, but it also raises opposing counsel’s eyebrows as to whether or not your information and document collection is deficient.

Production of privileged information happens more often than you might think—use Federal Rule of Evidence 502(d) to protect against it.

Requests by opposing counsel: when the request was made, whether you responded (and on what date), and how you responded or remedied the request. Throughout discovery in any litigation—big or small—you may receive emails, letters, phone calls, or other communications from opposing counsel explaining the need for a particular document or citing a specific production set that has technical issues. And, sure, not every one of opposing counsel’s requests requires a letter-writing campaign. In fact, most requests can be resolved in a quick telephone call or email. However, upon initiating the process of “resolving” opposing counsel’s request, you should document all steps (either formally or informally) and store the information in an easy-to-access and easy-to-use format.

For example, a “Request Tracker” can be easily made in an Excel spreadsheet to include the following sections:

- source of the request
- date of the request
- description of the request
• steps required for resolution
• anticipated date of resolution
• notes or comments

Doing so not only ensures that you are diligently keeping track of and pursuing reasonable resolutions to opposing counsel's requests; it also creates a paper trail in the event that opposing counsel claims a lack of attention to or mishandling of a request, or makes any other form of accusation that may eventually require the court's intervention and guidance.

Understand that 30(b)(6) Depositions Are Rough Justice—Imprecise and Expensive

The general purpose of a Federal Rule of Civil Procedure 30(b)(6) deposition is to permit the examining party to discover the organization's position through a witness designated by the corporation to testify on its behalf. Rosenrust-Gestao E. Servicos LDA v. Virgin Enters., Ltd., 511 F.3d 437, 441 n.2 (4th Cir. 2007).

Once noticed, the organization is required to designate and produce at the deposition one or more “officers, directors, or managing agents, or other persons who consent to testify” and who possess sufficient knowledge to testify as to the matters listed for examination.

To satisfy such an obligation, the organization must work with counsel to somehow ascertain the knowledge necessary to respond to the topics for examination and teach that knowledge to an individual. Ultimately, the burden to produce a 30(b)(6) deponent is onerous, as counsel must spend extraordinary amounts of time and effort to diligently prepare an individual, which creates even further legal expense for the organization.

The organization then becomes legally bound by the testimony—which often amounts to merely what the witness can recall from his or her countless hours of classroom-like preparation with counsel. This is contrary to the rule's goal of operating “as a vehicle for streamlining the discovery process.” Hooker v. Norfolk S. Ry. Co., 204 F.R.D. 124, 126 (S.D. Ind. 2001).

Therefore, litigants should avoid 30(b)(6) depositions on ESI because of the burden and cost associated with stacking the knowledge of many systems and procedures into a single deponent. Written discovery—whether interrogatories or informal requests—that seeks the same information (and is arguably more accurate) is a viable alternative that promotes meaningful cooperation.

Work with Opposing Counsel

As counsel for an organization, you are hired to zealously advocate on behalf of the organization. However, to accomplish this, counsel should “fight the fights that matter.” Responding to what you considered to be an unreasonable proposal by opposing counsel with an equally unreasonable proposal is a surefire way to anger the court and destroy any hope of meaningful cooperation when needed most in a case.

One need look no further than Federal Rule of Civil Procedure 1 (and similar state rules) to find support for meaningful cooperation, as the rule states that the Federal Rules “should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.” Chief Justice John Roberts addressed this very idea in his 2015 Year-End Report on the Federal Judiciary and noted that “lawyers—though representing adverse parties—have an affirmative duty to work together, and with the court, to achieve prompt and efficient resolutions of disputes.”

It is safe to say that judges in lower courts are on the same page with Chief Justice Roberts. For example, in Pyle v. Selective Insurance Co., the plaintiff argued that it did not have to cooperate because its opponent cited no authority obligating it to do so. No. 2:16-CV-335, 2016 U.S. Dist. LEXIS 140789, at *2 (W.D. Pa. Sept. 30, 2016). As one would expect, the judge did not take kindly to the plaintiff’s argument and went on to state:

Plaintiff’s argument totally misses the mark; in fact, it borders on being incomprehensible. Far from being baseless, Defendant's request is entirely consistent with both the letter and spirit of the Federal Rules of Civil Procedure regarding the discovery of electronically stored information and this Court’s Local Rules. It is well settled by now that “electronic discovery should be a party-driven process.”

Id.

Therefore, negotiating and having regularly scheduled meet-and-confers with opposing counsel can minimize costs “because if the method is approved, there will be no dispute regarding sufficiency, and doing it right the first time is always cheaper than doing it over if ordered to do so by the court.” Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 261 (D. Md. 2008).

Conclusion

While many of these quick tips might seem like common sense to a seasoned practitioner, a rookie ESI litigator can deploy these strategies to make discovery more efficient, avoid discovery disputes, and better protect a client’s ESI sources. In sum, knowing the rules, assigning the proper resources, documenting processes, and checking your work will place any practitioner on the path to proportional discovery.
Making the Most of Pro Bono Opportunities
Building a Litigation Practice

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Litigation associates nationwide sometimes face tremendous hurdles in getting stand-up experience. That is due, in large part, to the decline of trials. The apex of a case is now more likely to be summary judgment briefing, a key deposition, or mediation. If the court grants argument on a dispositive motion or in an appeal, a partner will likely handle it.

Associates doubtless get valuable experience in fee-paying cases but often struggle to gain quick and frequent stand-up experience. An excellent way to obtain that experience is by building a personal pro bono practice, helping the community while developing valuable litigation skills.

Cultivating a personal pro bono practice offers litigation associates additional opportunities for courtroom experience and business development early in their careers. Pro bono work also forces associates to learn case-management skills and case-winning strategies—they are running the show after all. They gather facts from the ground up and make crucial decisions about how to litigate, all with the support of dedicated partners overseeing their work.

Many firms have already developed robust institutional pro bono practices. But associates can also find valuable opportunities by developing pro bono work in their own areas of interest. Doing so allows associates to contribute to essential, justice-oriented work that they care about personally while cultivating critical litigation and business development skills.

Some attorneys might bristle at the suggestion that developing a personal pro bono practice is time well spent. The reality of corporate litigation is that associates may have little free time for pro bono work. And, of course, billable work is what keeps the lights on.

But associates in litigation practices should shed their hesitations about building a personal pro bono practice. Firms and clients alike want their litigation attorneys to actually have litigation instincts. Developing one’s own pro bono practice is an invaluable way to hone those instincts, become a better lawyer, and develop the experience that pays dividends over the course of a career.

So how do you develop a personal pro bono practice?

Developing a Pro Bono Practice

Pursuing federal pro bono appeals, criminal pro bono matters, and amicus brief opportunities are three ways in which associates can develop their own pro bono practices. Note that these are just ideas: There are many other great prospects, as well, in landlord-tenant disputes, immigration matters, and civil rights
cases, to name only a few. When brainstorming how to develop a pro bono practice, what is most important is to identify an issue area in which you are genuinely interested and want to dedicate your time.

Federal courts of appeals provide substantial opportunities for pro bono lawyers. Many circuits have pro bono coordinators who can explain the steps for you to take on a case and ultimately assign one to you. Many firms already have relationships with the pro bono offices of federal courts of appeals and may be able to facilitate pro bono representation.

Pursuing federal appellate pro bono opportunities is time well spent, not a luxury that litigation associates should pursue only when billable work slows down. Federal pro bono appeals are a goldmine for associate drafting and advocacy experience. They provide significant opportunities for honing an associate’s issue-spotting and legal-writing skills. The associate is tasked with delving into the record and researching the relevant law to determine the best issues to raise on appeal. Once that part is done, the associate must make the most persuasive case possible, drafting the brief from soup to nuts.

An associate, of course, is less likely to have an opportunity to argue an appeal in a paid case. After all, the client only gets one shot at the argument—why not give it to the head of the appellate practice or another partner who has a proven track record of success? By taking on pro bono appeals, however, associates can develop their own proven track records and better position themselves to ask for or be given an argument in a paying case down the road. Some federal courts of appeals (the Seventh and Ninth Circuits, for example) will even guarantee arguments to attorneys who take on pro bono matters.

Another area to consider when thinking about building your own pro bono practice is criminal representation. Many litigation associates hated criminal law in law school and have no desire to make it central to their practice. Yet, criminal pro bono work offers a wealth of meat-and-potatoes litigation experience. Criminal representation is one of the largest untapped pro bono resources for associates because there is such tremendous need. Courts arraign and sentence defendants in every jurisdiction every day of the week.

What specific opportunities does a criminal pro bono practice provide? One option is to second-chair a criminal trial with the local office of the state or federal public defender. The federal defender in the Eastern District of Virginia, for example, regularly offers second-chair opportunities. Representing a criminal defendant at trial offers associates opportunities that include client counseling, motions practice, negotiation with the government, and jury trial practice. Most public defenders have so much trial experience already (not to mention other cases to deal with) that they are glad to give pro bono attorneys as much stand-up experience as they can handle.

Serving as pro bono counsel in a criminal trial provides opportunities to open, close, and examine key witnesses. And the seasoned, first-chair public defender can provide valuable mentorship through novel litigation situations that, as a practical matter, seldom arise in the corporate context, including negotiations with the government, witness proffers, and sentencing hearings.

But what if the pro bono client ultimately chooses to plead guilty? Handling the earlier stages of a criminal pro bono matter still permits associates to develop useful litigation skills. Nearly every billable litigation matter entails a fact-finding investigation and discovery practice; so too does every criminal trial matter. Even if the client pleads guilty, you will learn how to handle clients, conduct discovery, and develop a winning theory of the case. All of those skills are directly transferrable to billable practices.

Another option is to handle a client’s direct appeal from a criminal conviction in state court. This involves counseling incarcerated clients, reviewing the trial record, briefing issues on appeal, and arguing the case. Combing a pretrial and trial transcript for legal error is a fantastic chance to issue-spot: It demands the same rigor and analysis that more senior attorneys
apply when preparing deposition outlines and strategy memos in billable cases. Associates should not overlook the opportunity to do essentially the same record review early on in their careers.

Besides mechanical litigation skills, working on a criminal case offers associates a new perspective. There are few lawyering opportunities more fulfilling than the opportunity to fight for a client’s liberty. And it is hard to think of anything that would motivate an associate more to sharpen his or her listening, investigative, writing, and critical thinking skills.

Strategies for Finding Criminal Work

So how can associates cultivate criminal pro bono work? It starts by convincing a partner—ideally a former public defender or prosecutor who shares the associate’s desire to affiliate the firm with providing representation to indigent criminal defendants—to supervise the matter, assuming the firm can secure it. The associate then has to connect with the public defender’s office to try and get a case assigned.

Does the public defender’s office have a committee of pro bono firms that offer it assistance? As with developing any new business, it will be difficult to grow the firm’s relationship with the public defender’s office from scratch. Associates should ask colleagues at their firm and at peer firms whether anyone has a relationship with the local state or federal public defender. If so, get an introduction; if not, take the initiative to email the public defender’s office to talk about opportunities for you to help.

Here are some other strategies you might try:

Ask whether any colleague previously worked as a public defender or local prosecutor. If so, enlist that attorney in efforts to instill the public defender’s trust in the firm’s competency to handle matters.

See if any law firm colleagues are members of the local Criminal Justice Act (CJA) panel. If so, see if the colleague would accept an assignment on which you could work.

Reach out to nonprofits that litigate criminal law issues. Those issues run the gamut from suits challenging conditions of confinement to post-conviction habeas corpus motions. For example, the affiliate offices of the national Innocence Project recruit law firm attorneys to investigate claims of actual innocence and file the attendant habeas corpus challenges or to seek and obtain pardons and compensation from the state for exonerees.

Nonprofits are typically understaffed but tightly control their dockets. They may not need help on their high-profile cases, but associates can get a foot in the door by offering to handle smaller matters. Stay in touch with the nonprofit’s attorneys and show a genuine interest in their work. Attend the nonprofit’s fundraiser to foster the relationship. If nothing else, you will learn how to build relationships and work a room—key parts of any business development strategy.

By doing criminal pro bono, associates can deepen (or establish) their firms’ relationships with local state and federal public defenders’ offices or national nonprofits focused on particular criminal law matters. Associates should consider partnering with public defenders’ offices or not-for-profit organizations focused on criminal justice reform like the Innocence Project or the MacArthur Justice Center to provide pro bono services in criminal cases.

Writing Amicus Briefs

Writing amicus briefs is another valuable way to build a pro bono practice and develop litigation skills along the way. Some attorneys view amicus briefs as a drag: Judges sometimes don’t read them; and, at their worst, they can devolve into glorified law school papers. But an amicus brief with a powerful message can be very effective. Moreover, drafting amicus briefs offers associates valuable drafting experience and the opportunity to build their own reputations.

Amicus briefs are most often filed in the Supreme Court (at the merits or certiorari stages) or the federal courts of appeals. But they are becoming increasingly common in federal district courts as well.

Drafting an amicus brief teaches an associate the essential mechanics of litigating—formatting the brief; complying with federal, local, and judge-specific rules; editing until the draft is file-ready; and e-filing. For associates in practices that don’t do much writing or for more junior associates who rarely have an opportunity to draft an entire brief from scratch, they can provide invaluable legal writing experience.

Amicus briefs also often involve clients exercising tight editorial control over content. Learning to channel the client’s voice and position and learning to work with opinionated clients are essential facets of client service for all litigators. It can be difficult for junior associates to learn client-management skills. Taking the lead on an amicus brief provides junior associates the opportunity to develop those essential skills.

Amicus briefs also often contain policy arguments grounded in history or another social science. Working on those briefs allows associates to keep their non-legal research skills fresh by, for example, visiting the library to research and read primary sources. There is more to litigation research than running searches on Westlaw or LexisNexis, and the best litigation associates have a broader set of research skills.

Finding Amicus Work

How can associates cultivate work on amicus briefs? Keep your ear to the ground for cases that your friends or classmates are handling. They may be looking for pro bono authors to pair with...
Federal pro bono appeals are a goldmine for associate drafting and advocacy experience.

Associates can also create relationships with amici on their own. Contact law school professors who have submitted amicus briefs with law firm assistance or law school classmates and friends working at nonprofits that submit amicus briefs. Or identify potential organizations to cold-call, but first identify several high-profile federal cases in which you suspect the amicus have a strong interest or in which they would be a particularly strong messenger.

Submitting a few amicus briefs in an issue area can help an associate develop a reputation in the legal community. That reputation can snowball into other opportunities. You might be invited to sit on the board of a nonprofit or to speak at a panel. Those sorts of opportunities will allow associates to expand their networks and cultivate relationships that may lead to billable work down the road.

What’s in It for the Firm?

Litigation partners understand the situation and usually are supportive. They know that junior litigation associates often fail to receive as much stand-up experience as they might like. Developing a personal pro bono practice creates opportunities for litigation associates to develop critical litigation skills.

Equally important is that a pro bono matter can provide an associate with a meaningful opportunity to take control of his or her career. It’s a dry run at flexing the same project-management and business development muscles that more senior attorneys use in creating a niche to market both within the firm and to clients. And it provides opportunities to develop client-counseling and management skills.

A personal pro bono practice also serves a more practical business development goal—networking. Building a pro bono practice forces associates to think beyond the work being assigned within the firm. It affords associates early opportunities to practice the attorney-to-attorney networking that can lead to productive client contact. It draws on the same business development skills relevant to generating billable work: mining your network to see where opportunities might lie. Perhaps a law school classmate is working at the local legal aid office. Maybe a family friend works at the federal defenders’ office. Or perhaps a law school professor or classmate is looking for pro bono authors for amicus briefs.

Trying to drum up one’s own pro bono work is not only a good way to practice business development skills; it can also expand one’s network outside the firm. Let’s say, for example, an associate volunteers to write an amicus brief for a public interest organization. That contact could blossom into co-counseling with that organization on high-profile impact litigation or becoming involved with the organization’s board of directors. Nonprofit boards often include prominent in-house attorneys who may become paying clients.

Originating pro bono work allows associates to grow their professional networks or reenergize old connections. In the best of cases, cultivating a pro bono practice provides a gateway to mentorship from outside one’s law firm, which can provide a valuable perspective and future opportunities. In the worst case, you meet an old colleague for coffee and catch up.

The best law firms empower litigation associates to take ownership of their personal pro bono practices and work to grow them. Those firms provide opportunities for pro bono work and encourage their associates to pursue that work. Those firms may also fund associate networking opportunities with pro bono clients, including, for example, covering seats at a nonprofit’s annual fundraiser.

Above all, a strong law firm pro bono practice does not presume that associates should handle only the pro bono work offered to them. Offering associates opportunities for pro bono work is important, particularly to reflect the firm’s belief in the importance of pro bono. But the best pro bono practices expect associates to cultivate pro bono business of their own while balancing their billable matters and other obligations. Asking associates to perform only the work that partners hand them is a recipe for weak business development skills.

Litigation associates want stand-up and business development experience. A personal pro bono practice is one of the best ways for associates to get that experience early in their careers.
At first blush, the removal statute seems simplicity itself. We all know the rule. If a case in which there would be original federal jurisdiction is filed in state court, you may remove the case to federal court so long as you do so within 30 days. The idea is that a plaintiff, particularly one in its home state, should not be able to force into a state forum a defendant that would qualify to have a case heard in federal court. Cases based on federal question jurisdiction and diversity jurisdiction both qualify for removal. But because the theory behind diversity jurisdiction is that an out-of-state defendant may need the protection of federal court to deflect any bias arising from the plaintiff’s choice of forum, an exception applies. A defendant that is a resident of the state in which the lawsuit was filed ordinarily may not remove. In-state defendants are presumed to have nothing to worry about from the home forum. See, simple. But as so often in the law, not everything is quite as straightforward as it may seem. To begin with, you should immediately notice that removal is governed by a number of different statutory provisions and rules. Section 1441 states the basic rule, section 1446 the procedure, and Federal Rule of Civil Procedure 80 the time limits for answering the complaint after removal. Be particularly wary of the last. You may not have as much time to respond as you think, maybe no more than five days. But other than that, what else is there to know? Plenty.

Statute Oddities

First, there is the question of what is “removable.” Generally speaking, the rule is that federal jurisdiction must be clear on the face of the complaint. This means a defendant can forget about removing if its defense raises a federal question, not to mention a counterclaim based on federal law. Neither qualifies. But there are still puzzles. What about a diversity case in which the plaintiff or his lawyer tries to prevent removal by seeking only an injunction, perhaps one providing a monetary reward only by way of attorney fees? To get over the jurisdictional minimum, is the injunction measured by its value to the plaintiff (which may be nominal) or the value to the defendant (where costs of compliance, provable by affidavit, can be substantial)? On this the circuits are split or, worse, silent.

Still further, it turns out that the statute is rife with grammatical oddities. Please notice, for example, that section 1446 says that removal must take place within 30 days “after receipt by the defendant, through service or otherwise,” of the initial pleading setting out a claim for relief. What happens if you learn about the case before service and download the complaint from PACER? Does the 30-day period run from the time you first got the complaint, as strict application of the “otherwise” language seems to suggest? The answer is no. The particular wording of the statute had many different purposes, some involving archaic and long-since-abandoned procedures in state court. The Supreme Court long ago nixed the idea that seeing the complaint before it is filed and served sets the 30-day period running, regardless the wording of the statute itself.

But even that clarification did not solve all problems. Although removal is a jurisdictional procedure, as it moves a case from one jurisdiction to another, it turns out that the courts view the procedural provision, section 1446, as not part of removal’s jurisdictional character. Therefore, as the courts are wont to say, the 30-day period is mandatory but not jurisdictional. Translated, this means that you must meet the 30-day period unless it has been waived or the other side is stopped from complaining of a violation.

Waiver can take many forms. For example, if your adversary does not notice
that you removed too late, and files no motion to remand, the mandatory bar can be deemed waived under certain circumstances, particularly if a significant amount of time has passed and motions have been considered. She cannot suddenly wake up and claim that the 30-day period should later be enforced.

Less well known is that there can also be a pre-removal waiver. Let’s say your adversary files a state court complaint and tells your client not to worry about it, committing to resolve the matter forthwith and representing that he need take no action, including informing you. Depending on the conduct involved, you may still be able to remove the case months later if the representations are egregious enough and little or nothing has happened in the state court.

Strikingly, none of this actually appears in the statute. It is all a matter of judicial gloss, an interpretation of Congress’s intent, which does not stop here. Removal also has a one-year time limit. If diversity becomes available only after one year because, say, the only non-diverse party was dismissed, you would have diversity jurisdiction in federal court, and so original jurisdiction there. But it’s now too late to remove, even if you were helpless to do so at the start. The thinking appears to be that necessary efficiencies outweigh “homing” concerns.

What’s interesting is that this is waivable too, if the plaintiff fails to file a motion to remand. There’s nothing in the statute to distinguish the 30-day requirement and the one-year requirement, say the courts. But, of course, there’s nothing in the statute telling you that the 30-day requirement was waivable in the first place. But the courts have uniformly found that what’s sauce for the 30-day requirement is sauce for the one-year requirement too. One wonders why, then, on the model of the possibility for pre-removal waiver of the 30-day requirement, fraudulent joinder of a non-diverse party is not sufficient to extend the one-year requirement.

Here’s yet another quirk: Suppose a state court filing has been made based on a state statute. There’s diversity, so you seem to be able to remove. But suppose there’s an argument, once it gets to federal court, that there is no standing in federal court, even if there was standing in state court. There is thus no “original” jurisdiction in federal court. The judge dismisses, sending it back to state court, notwithstanding that the parties are diverse and you are from out of state. Is this right? Isn’t the point of the statute that you should be able to take a case filed by a litigant seeking to “homer” you and move it to a more neutral setting? Why shouldn’t this principle apply here? There’s a case and controversy in state court. Some courts dismiss, but at least one federal court has rejected a remand, looking past the literal language of the statute, another instance of the practical purposes of the statute overcoming a too-literal application of it.

There’s a pattern in all this. Courts have heretofore approached the removal statute practically, seeking to interpret its language to serve its broader purposes, construing the statute’s words to effect a serviceable result. In effect, they have put the language in the larger context of the goal to be achieved, and policy concerns, rather than giving it any pinched meaning. And the results have made the statute work or at least have made it workable, if not always completely predictably.

Snap Removal

What has made all that more perplexing is how the courts have recently managed something called “snap” removal. Here’s the issue: As mentioned, the statute provides one initial restriction on removal in diversity cases. As we know, a defendant who is a resident of the state in which a diversity case was filed cannot remove it. But the wording of the statute is that a case may not be removed if any of the defendants “properly joined and served” is a home-state party. What if, reversing the tables on the “service or otherwise” notion, a defendant gets wind of a filing of a complaint in the state courts of the state where it resides and wants to remove? Can it not just remove before it gets served? No service, no restriction. Or so the statute seems to say.

Correct, have said some courts. If a home-state defendant manages to file the removal papers before it is served, it is not limited by the exception to the rule. This, these courts have argued (somewhat ruefully), is what the language says, even if it is not what was intended. Strict construction requires the courts to enforce what Congress enacted, not what the courts believe it intended to do.

Wrong, say a few dissenters. The intention was to bar home-state defendants from removing diversity cases, so the statute should be construed in that fashion, regardless of the language. Which should operate? The actual language or congressional intent?

Take a moment to consider why this has even arisen. In the relevant cases, a corporate defendant has wanted out of a state court even when it is domiciled in that jurisdiction. Why? No risk of being “homed” in that case, is there? Well, yes and no. On the one hand, the defendant is on home ground. But this ignores the elephant in the room. Plaintiffs often feel much more at home in state courts because these forums often tend to be more plaintiff friendly. The corporation wants out of state court because it does not think it will get a fair shake there, knowing the federal courts to be more even-handed and efficient, at least. There is also often the belief, not always true, that federal judges are better. In effect, these corporations are telling us that the original purposes of removal are not their real concern. They’ve just used removal to solve another, perhaps more pressing, problem. The courts permitting “snap” removal have not really noted this problem, except a bit obliquely
by viewing removal as sanctioned by the language, if not the purposes, of the statute and allowing it to happen.

In short, Congress has decided that a home state defendant has no right or reason to fear the state courts, but defendants think otherwise even if the real fear has nothing to do with home state bias at all. But which way does this cut? If it is true that a large corporation does not think it can get a fair hearing in the state court, shouldn’t we want it to be able to get out and lend it a federal forum to ensure fairness? If it had been able to file first, it could have done so in federal court. And fairness is the ultimate end, isn’t it? On pure policy grounds, the removal through the loophole ought to be encouraged, no?

None of the courts deciding on “snap” removal has really probed the policy issues to this extent. They have merely contrasted the language seemingly favoring removal with the policy disfavoring it where a defendant is in its home state. But if fairness is a paramount policy, then doesn’t policy favor removal too? Or does this just go too far? One way or another, it is not at all clear that good policy should prohibit rather than encourage and permit snap removal.

Conversely, the “strict constructionists” suffer from truncated thinking as well. The courts’ dilemma arises from the language “properly joined and served.” No service, no restriction. But is that the only way the language can be read? Another possibility is that Congress meant a defendant that could be properly joined and served, rather than one that has already been properly joined and served. Is there anything in the language or the statute that precludes this result? Or take another approach: Is not the party that removed serve as the last word, any more than constitutional interpretation ought not to be overlooked. Too often in the modern age the argument has been between so-called “strict constructionists,” who focus on words, and “living constitution” theorists, who dwell on policy concerns. Perhaps these reflections on the removal statute can show us a better way: a three-part process by which words and policy are seasoned by intent. The most striking element of contemporary debates is how little either “originalism” or policy debates on the Constitution have focused on what the founders who wrote the documents themselves intended by what they said. Their prudent judgment may not serve as the last word, any more than Congress’s intention to prevent home-state defendants from removing would be. But surely it is a part, and an essential part, of any interpretation equation.

The courts deciding on “snap” removal have done poor work on both sides of the equation.

Statutory Interpretation

At the deepest level, the problem of “snap removal” elucidates the problem of statutory interpretation. Generally speaking, words do not interpret themselves. They arise in a context. Anyone who has ever dealt with the words “hew” or “cleave” knows that you need context—the sentence as a whole and the author’s intention—to know whether these mean “cut apart” or “cling to.” And when dealing with the law, policy matters too. “The law wishes to be the discovery of what is,” the philosopher tells us. It aims at fairness and truth, even if it doesn’t always or ever quite get there. No law should be construed to bring about a manifest injustice, if that can be avoided.

In dealing with any statute, all three things need be considered: words, intention, and policy. None can be considered without the others. Just as the words need intention and policy to be understood correctly, policy ought to be limited by words and intention. Congress’s own determination of what that policy should be is expressed in the words it chose for a purpose, hopefully, has evinced. Similarly, congressional intention may, particularly in doubtful cases, need the words and the policy to reveal or even correct it. This is what real statutory construction is all about. Too bad the courts at issue did not address “snap removal” in such clear terms.

As a final note, the application of those principles to constitutional interpretation ought not to be overlooked. Too often in the modern age the argument has been between so-called “strict constructionists,” who focus on words, and “living constitution” theorists, who dwell on policy concerns. Perhaps these reflections on the removal statute can show us a better way: a three-part process by which words and policy are seasoned by intent. The most striking element of contemporary debates is how little either “originalism” or policy debates on the Constitution have focused on what the founders who wrote the documents themselves intended by what they said. Their prudent judgment may not serve as the last word, any more than Congress’s intention to prevent home-state defendants from removing would be. But surely it is a part, and an essential part, of any interpretation equation.
Back in the ice age when I first started, you had three trials in three different counties all on the same day. So you ran from one to the next, learning how to select a jury, give an opening, ask a question. Your ears would be boxed by the courthouse lifer whose tie told you he had spaghetti marinara for lunch. Judges would sarcastically toy with you, and you’d believe you were making progress until you’d ask one too many and the expert would slice you open with a cogent and devastating response. Eventually, bloody and battered, you acquired experience and expertise.

Now a trial is as rare as a New York politician not under indictment. Everything settles. Whether it’s good or bad is for the law professors and their footnotes. All I know is that you, the litigator, have to position the case so when you’re at your 10th conference, the judge turns to your adversary and snaps, “You better pay more, or else…” (which means she’ll schedule 10 more settlement conferences).

Depositions are the new trials. They determine how and when the case settles. Decades ago, depositions were relatively informal investigations that would last an hour or two. “I have nothing further,” you would announce, staring at the dirty, rotten liar. Just wait, you vow, after my cross-examination, you’ll wish you were never born. It was on the stand where the witness would sweat and squirm.

No longer. You can’t hold back the question, document, video that shocks the witness, destroying his credibility, revealing to the jury the fraud. Now, at the deposition, you have to shatter, or at least damage, the witness’s integrity for we realize this dispute will never see a courtroom.

How do you do learn this skill, the ability to question a witness? Used to be late one afternoon, the managing partner would toss a file and order: “Hey, we need you to take this deposition tomorrow. You’re free, right?” At an early one, my older, polite adversary kept repeating: “Objection as to form.” I had no idea what he meant. “Form, what the heck is form?” I thought. Finally, I snapped: “What’s wrong with my form?” He patiently explained how all my questions were improper as my face reddened.

It’ll happen to you, too. Builds character. But here are some suggestions on how to take effective depositions:

**Know everything.** Facts, law, especially the subject. If you’re involved in a product liability lawsuit, you must comprehend how the product was created, built, marketed, installed, used. All that stuff. Why was this pill, this talcum powder developed? How was it tested? Its side effects, warnings? Those you’re questioning spend their lives in one industry, concentrating on one product, perhaps. They know way more than you.

The internet is a wonderful tool for research, but I’m old-fashioned. Better to sit with an expert and pick her brain. Early on, I was referred an obstetrical malpractice case and obtained the records. Looked like hieroglyphics, so I hired a nurse, who patiently deciphered the code and explained the procedures. At her kitchen table, I interrupted, asked her to expound until I understood. Much more valuable than via phone or email.

Be conversant with the lingo. Google every unfamiliar word, abbreviation. Listen to and practice the pronunciation of technical terms. If you mangle “spondylolisthesis,” and the witness corrects you: advantage, witness. If you sound confident and assured, the witness will be less likely to try to confuse and disguise through technical shorthand. It won’t hurt your self-confidence either.

**Read transcripts.** Become familiar with the process, the give-and-take. Grab a bunch and read them out loud as if you were conducting the depo. Listen to your voice so you become more relaxed, more assertive. Learn how to mark an exhibit, how to question using an exhibit. Study how an able questioner pins down what the witness saw or heard, or how she
clarifies an answer that is vague or uncertain. Take note on how to handle objections, interruptions.

**Learn the rules.** In researching this article, I asked my good buddy and evidence guru, Magistrate Judge Jeff Cole, Northern District of Illinois, to advise me on the Federal Rules of Evidence that govern depositions. Of course I meant the Federal Rules of Civil Procedure. I knew that.

I may not be able to cite the rules, but I was never afraid to stop the stenographer after he said, “Usual stipulations?” If unsure, I would respond: “What are they? Could you read them to me, please?” Then on the record, I would agree or object, and have my adversaries do the same, so later there’s no confusion. Don’t be intimidated by opposing counsel smirking: “You don’t know what the usual stipulations are? Have you ever taken a deposition before?”

Study them all—the judge’s, the state, the federal ones. Ask those who are experienced their meaning and whether you should agree. Don’t be blindsided. Is there a time limit? If your adversary won’t permit an answer—“Outside the scope of the deposition”—is that proper? Can you immediately call the judge? If not, make a record, but without invective. “I’ve asked Mr. Jones a perfectly legitimate question and Ms. Smith has instructed her witness not to answer. This violates the rules. I will make a motion as soon as I return to the office.” And make the motion.

**Have a goal.** Strategize with others. Why this guy; why now? What’s the best and worst scenario? Usually it’s to gather information, fill in the blanks, evaluate the demeanor, credibility. In the past, we sometimes deliberately avoided deposing a witness because we didn’t want to make a record in case he moved to Florida before trial. That eventuality is mostly gone, but analyze who you’re questioning and what you wish to achieve. Before completing your questioning, take a break and determine if you’ve accomplished your purpose. If not, ask more questions.

**Use an outline, but listen.** If you’re young, write out each question: “What is your name? Have you ever been known by any other name?” I did. That way when I’d become flustered, I could read the next question. The problem is, of course, that this doesn’t promote flexibility, so when the witness gives an unexpected answer—admits a conviction, the suspension of his license, there’s a tendency to return to the next question, rather than: “Tell us the circumstances regarding the suspension of your license.”

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**Some witnesses love to tell you how smart they are. They wish to teach, explain. Let them.**

So, when first beginning, I had a list of questions, and an outline. I’d use the outline when questioning, but consult the list during a break to ensure I didn’t forget anything. This isn’t figure skating where you get style points. All that matters is what’s on the record, not if you act or look like a dweeb.

Perhaps the most difficult is to listen to the answer and react. A partner once confiscated a young lawyer’s outline in the middle of the deposition because she failed to follow up. Take your time. If you hear something you didn’t expect, pause, and if unsure, have the reporter reread the question and answer. Go where the witness takes you. Be curious. If the witness sounds uncomfortable, hone in and explore.

Break down an answer into many parts: You said you had a meeting. What time did it begin? How do you know? What time did it end? How do you know? Who was in the room at the beginning of the meeting? Who was in the room at the end? Was anyone on the phone? Anyone enter during the meeting? Leave the room? Are you certain? Anyone else ever communicate with the people in the room at any time during the meeting? And on and on. Then I’d always sum up. “From the beginning of the meeting to the end of the meeting on June 11, 2017, the only people in the conference room on the 21st floor were you, Thomas Walsh, and William Drago, is that correct?”

Some witnesses love to tell you how smart they are. They wish to teach, explain. Let them. Ask open-ended questions: “Tell me how that works…Tell me what you did…You thought of that? Wow! How did that come about?” The more they yap, the more you know, and the better the chance the witness divulges a contradictory statement. Take notes, then dissect the testimony and insist on a detailed explanation. Don’t be afraid to ask the stenographer to read back testimony even if everyone groans. Go where the witness leads; then return to your outline.

**Depose everyone.** In a medical malpractice case, we represented the family of a young father who died as a result of complications from a perforated bowel that occurred during a hernia repair. We deposed every person who had contact, but all, supported by the medical chart, denied error. After a dozen depositions, our adversaries mocked us and threatened sanctions for harassment. Finally, we questioned the operating room clerk whose job was to record all medical equipment used for billing purposes. Each item had a sticker with a unique identifier that would be affixed to the log. He showed us that multiple mesh stickers were used during the surgery, meaning that the first mesh failed and the surgeon had to implant a second, during which the bowel was perforated. All this was previously and repeatedly denied. The case settled shortly after we received the transcript of the clerk’s testimony.

**Relax the morning of.** Go for a run. Eat healthy. Listen to Sinatra. You’ll be fine. •
Scruples

AGGREGATE SETTLEMENTS

MICHAEL DOWNEY

The author is a legal ethics lawyer at Downey Law Group LLC, a St. Louis law firm devoted to legal ethics and the law of lawyering.

Paradox approached Ethox, seeking guidance. “I have questions about a possible settlement,” Paradox said. “Remember how we were representing a group of plaintiffs suing ACME Industries for exposure to toxic fumes?”

“Yes,” Ethox said.

“Well, Nemesis represents ACME,” continued Paradox, “and just offered a large lump-sum settlement, saying that if we can settle all our clients’ claims, we could divide the funds among our clients.

“Such an arrangement seems to raise a whole mess of conflicts,” said Paradox with concern. “Some of our clients seem anxious to settle. Others seem far more prepared for a long fight. And some will let the amount of money they are to receive determine what they think of the settlement.”

“Such differing interests among clients are quite common,” Ethox reassured Paradox. “In fact, there is an ethics rule specifically targeted to addressing conflicts in such situations, which are known as aggregate settlements.”

“An aggregate settlement. What is that?” Paradox asked.

“Fun you should ask,” Ethox said. “That is one of the complaints with the ethics rule, that it does not define exactly what constitutes an aggregate settlement.

“The key element of an aggregate settlement is some interconnection between the potential settlements, so the lawyer’s clients are effectively competing with each other over the settlement funds. The lump sum ACME has offered is one type of aggregate settlement. But an aggregate settlement also includes when a defendant offers a specific sum to each plaintiff but conditions the resolution of claims on all or a certain portion of the plaintiffs accepting their individual settlement.”

“If a settlement is aggregate, what happens?” Paradox asked.

“When an aggregate settlement is made, ABA Model Rule 1.8(g) requires that the lawyer must disclose ‘the existence and nature of all claims involved and the participation of each person in the settlement.’ Participation here means what each client will be receiving and why. Once you make that disclosure, you will have to secure informed consent from each client involved, in a writing signed by each of those clients.”

“Could we have an agreement in advance that if a majority of clients accept the lump-sum settlement, then all our clients will be bound?” Paradox asked.

“Probably not. Some jurisdictions allow lawyers to obtain advance client agreement to a majority or supermajority decision process,” Ethox explained. “But, reflecting that Rule 1.2 recognizes a client’s absolute control over a decision to settle, most jurisdictions require each client to sign off.”

“What if I don’t want to mess with an aggregate settlement?” Paradox asked, somewhat exasperated. “I am not sure all the clients would want to share information about their health problems and claims.”

“That is a good reason to avoid an aggregate settlement,” Ethox answered. “You could go back to Nemesis and make a separate demand for any plaintiff, clarifying there is no connection between the settlement offers. Such separate settlement demands would not trigger the Rule 1.8(g) aggregate settlement requirements.”


“If you are thinking of pursuing separate settlements,” Ethox said, “you should still consider securing conflict waivers from each client. Rule 1.7(a)(2) states a lawyer has a conflict requiring waiver when there is a significant risk the representation of one client may materially limit other clients. That is likely true of your clients’ claims against ACME. One client’s settlement will likely influence what the defendant will pay other clients for similar claims. Also, the funds ACME agrees to pay to one client may limit what ACME has available to settle with other clients. Thus, it would be smart to have all clients waive the relevant conflicts from the concurrent representation as provided in Rule 1.7(b), even though you do not need to satisfy the more stringent requirements Rule 1.8(g) imposes on an aggregate settlement.”

“I already have those Rule 1.7(b) waivers,” Paradox beamed. “I have been learning from our past conversations.”

“That is great to hear,” Ethox answered.
## DEPOSITS TO FEDERAL FORFEITURE FUNDS

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<th>DOJ</th>
<th>Treasury</th>
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