South Carolina Bar
Continuing Legal Education Division

2019 SC BAR CONVENTION

Trial & Appellate Advocacy Section
(17th Annual Civil Law Update)

Friday, January 18

SC Supreme Court Commission on CLE Course No. 190708

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E-Discovery: Cradle to Grave
(Discovery to Courtroom)

The Honorable Roger M. Young, Sr.
The Honorable David C. Norton
John D. Martin
Jonathan D. Orent

Bow Tie Law's Blog

"We Don't Want To" is Not an Objection

Posted on **December 3, 2013**

There is a strong trend in case law for 2013: Judges understand the form of production.

Magistrate Judge Donna Martinez brought home this point in *Saliga v. Chemtura Corp.*

The Plaintiff requested ESI in native file format. The Defendant objected. However, the objection was not based on undue burden or proportionality, but that there was "no basis or need" to produce in native format. Moreover, the Defendant argued native file productions prevented Bates numbering or confidential markings in deposition or motion practice. *Saliga v. Chemtura Corp.,* 2013 U.S. Dist. LEXIS 167019, 3-7 (D. Conn. Nov. 25, 2013).

The Court held: *The rule says that the requesting party may specify the "form . . . in which [ESI] is to be produced," Fed. R. Civ. P. 34(b)(1)(C), and the defendant has not shown compelling reasons why it cannot produce the information in the format requested by the plaintiff. Accordingly, the court will grant the plaintiff's request for native format. Saliga,* at *6.

Bow Tie Thoughts

Saliga v. Chemtura Corp. is an excellent discussion of the Federal Rules of Civil Procedure and accompanying case law on the form of production. Judge Martinez is thorough and to the point on the requesting party controls the form of production, subject to an objection from the producing party.

As I have argued before, fear about Bates numbering is not a valid objection. ESI should be maintained in databases with control numbers, Docids, or other ways to sort and organize data. Those who make litigation review software are very good at organizing and searching ESI. Static images reduces the available search features a party can use to analyze ESI.

It is important to understand the difference between reviewing ESI and using ESI at a deposition or in motion practice. Just because you will have a deposition does not mean ALL ESI should be converted to static images for a production. That only reduces the ability to use search technology and likely will drive up the time to conduct review.

Parties should agree on how ESI can be used in deposition or motion practice, whether it is projected natively, or converted to static images or even printed with the MD5 hash value in the footer and an exhibit number. There are several other options as well, but this is an excellent topic for the Rule 26(f) conference.

Objections cannot be hypothetical. If there is a native file that requires redaction of confidential information, specifically object on those grounds to the responsive discovery with the specific objection.

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In "Discovery"

This entry was posted in **e-Discovery**, **Form of Production**, **Native File**, **TIFF** and tagged **e-Discovery**, **Native File Production** by **bowtielaw**. Bookmark the **permalink [https://bowtielaw.wordpress.com/2013/12/03/we-dont-want-to-is-not-an-objection/]** .

3 THOUGHTS ON ""WE DON'T WANT TO" IS NOT AN OBJECTION"

James Keuning
on **December 4, 2013 at 7:02 pm** said:

It should be telling that defendant needed to go back to 2001 (and even then misuse the source) to find support that TIFs are better than natives.

Quoting the judge: "The defendant is correct that 'TIFF is the most common choice.'" She reached the correct result in the end, but she should not have let defendant get away with this.

The defendant takes the quote from a 2001 guide written to describe considerations that may arise when lawyers use electronic equipment to display evidence during trial. That guide indicates that TIF is most common because it can be used by presentation software in the courtroom. That same guide also says that when documents are created in digital forms "the first option is to produce them in their native format."

bowtielaw
on **December 4, 2013 at 7:05 pm** said:

Good points. It also highlights there is a big difference between how to conduct discovery vs trial presentation.

Dennis Kiker
on **December 11, 2013 at 7:42 pm** said:

I think you've nailed the distinction here nicely, and that is the difference between discovery and depositions, motion practice and trial presentation. Everyone talks about the well-known fact that, of the tens or hundreds of thousands of documents produced in discovery, only a few ever wind up as exhibits. Letting that tail wag the discovery dog makes no sense whatsoever, particularly when it inhibits our ability to find those few documents that merit use as exhibits.

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eDiscovery Daily Blog

A Second State Now Has Approved a Technology CLE Requirement for its Lawyers: eDiscovery Trends

December 7, 2018 Doug Austin 0 Comments

In 2016, Florida became the first state to mandate technology training for lawyers [https://www.ediscovery.co/ediscoverydaily/electronic-discovery/florida-becomes-first-state-require-technology-cle-ediscovery-trends/] , when it adopted a rule requiring lawyers to complete three hours of CLE every three years "in approved technology programs." Then, back in May, we reported that another state was getting close to requiring technology training for part of their yearly CLE requirement. Now, that state

has formally approved that requirement.

According to Robert Ambrogi and his ***Law Sites*** blog (***North Carolina Becomes Second State to Mandate Technology Training for Lawyers [https://www.lawsitesblog.com/2018/12/north-carolina-becomes-second-state-mandate-technology-training-lawyers.html]***), North Carolina (my new home away from home because of this [https://www.ediscovery.co/ediscoverydaily/electronic-discovery/cloudnine-acquires-ediscovery-product-lines-from-lexisnexis-ediscovery-breaking-news/]) has become the second state to mandate continuing education for lawyers in technology. Beginning in 2019, all lawyers will be required to complete one hour per year of CLE devoted to technology training.

The North Carolina Supreme Court approved the requirement at a conference on Sept. 20, according to the State Bar's website [https://www.ncbar.gov/for-lawyers/ethics/proposed-amendments-to-the-rules-of-professional-conduct/] .

As proposed by the State Bar, the new rule read:

"Technology training" shall mean a program, or a segment of a program, devoted to education on information technology (IT) or cybersecurity (see N.C. Gen. Stat. §143B-1320(a)(11), or successor statutory provision, for a definition of "information technology"), including education on an information technology product, device, platform, application, or other tool, process, or methodology. To be eligible for CLE accreditation as a technology training program, the program must satisfy the accreditation standards in Rule .1519 of this subchapter: specifically, the primary objective of the program must be to increase the participant's professional competence and proficiency as a lawyer. Such programs include, but are not limited to, education on the following: a) an IT tool, process, or methodology designed to perform tasks that are specific or uniquely suited to the practice of law; b) using a generic IT tool process or methodology to increase the efficiency of performing tasks necessary to the practice of law; c) the investigation, collection, and introduction of social media evidence; d) e-discovery; e) electronic filing of legal documents; f) digital forensics for legal investigation or litigation; and g) practice management software. See Rule .1602 of this subchapter for additional information on accreditation of technology training programs.

Here is the full text [https://www.lawsitesblog.com/wp-content/uploads/sites/509/2018/12/NC-tech-rule.pdf] of the new rule amendments.

Next up, Pennsylvania? Earlier this year, the ABA Journal reported [http://www.abajournal.com/news/article/north_carolina_bar_to_propose_mandatory_technology_cle_credit] that the Pennsylvania Bar has also recommended that the state supreme court adopt a one-hour, every two-years technology CLE requirement. No word on that approval – yet.

So, what do you think? Will we see more states require technology CLE? Please share any comments you might have or if you'd like to know more about a particular topic.

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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

GLIDEPATH LIMITED, a New Zealand entity, and SIR KEN STEVENS, KNZM,	:	
Plaintiffs,	:	
v	:	Civil Action No. 12220-VCL
BEUMER CORPORATION, a Delaware corporation, GLIDEPATH LLC, a Delaware limited liability company, THOMAS DALSTEIN and FINN PEDERSON,	:	
Defendants.	:	
BEUMER CORPORATION, a Delaware corporation,	:	
Counterclaim Plaintiff,	:	
v	:	
GLIDEPATH LIMITED, a New Zealand Entity, and SIR KEN STEVENS, KNZM	:	
Counterclaim Defendants.	:	

- - -

Chancery Courtroom No. 12B
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Thursday, October 6, 2016
12:57 p.m.

- - -

BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor.

- - -

ORAL ARGUMENT ON PLAINTIFFS' MOTION TO COMPEL AND PLAINTIFFS' MOTION TO DISMISS and RULINGS OF THE COURT ON PLAINTIFFS' MOTION TO COMPEL

CHANCERY COURT REPORTERS
New Castle County Courthouse
500 North King Street - Suite 11400
Wilmington, Delaware 19801
(302) 255-0522

APPEARANCES:

GARY W. LIPKIN, ESQ.
AIMEE M. CZACHOROWSKI, ESQ.
Eckert, Seamans, Cherin & Mellott, LLC
for Plaintiffs/Counterclaim Defendants

CHRISTOPHER A. SELZER, ESQ.
McCarter & English, LLP
-and-
WILLIAM D. WALLACH, ESQ.
of the New Jersey Bar
McCarter & English, LLP
for Defendants/Counterclaim Plaintiff

- - -

THE COURT: Welcome.

MR. SELZER: Good afternoon, Your Honor.

MR. LIPKIN: Good afternoon, Your Honor.

Good afternoon, Your Honor. Gary Lipkin for Glidepath NZ and Sir Kenneth Stevens. We are here for two motions at issue today, one of which I think was substantially resolved, which I will get into in a second. But two motions, a motion to compel and our motion to dismiss.

Would Your Honor prefer that I begin with the motion to compel, only because, like I said, I think we have substantially narrowed that issue?

THE COURT: Either one is fine. If you want to start with the motion to compel, that's fine.

MR. LIPKIN: Okay. So as for the motion to compel, we originally sought discovery on two issues: One, discovery relating to Beumer's dealings with third parties. We wanted their communications with airports and the like. We also sought certain financial records from Beumer. In Beumer's response, and in subsequent conversations

with counsel, Beumer has indicated that they intend to produce the requested discovery subject to a couple of limitations.

THE COURT: Well, they didn't say that until their opposition brief. Right?

MR. LIPKIN: Correct. Correct. And then in subsequent conversations where I sought clarification.

But the first limitation is -- that they wanted to put on their scope of discovery was a geographic one. They only want to produce documents relating to the U.S., America, and the Bahamas. I'm sorry. U.S., Mexico, and the Bahamas, which we agree with.

And the next limitation is that they only want to produce documents relating to their baggage handling products, which we also agree with to the extent they are involved in --

THE COURT: Have they clarified that it's not just ICS and that it's all the baggage claim projects?

MR. LIPKIN: They have. And Mr. Selzer and I had communications about that before the hearing, and they made that clear, that it will be

just generally relating to baggage handling services.

So I don't think there is any dispute on those issues at this point. And I think that was probably 80 percent of the motion to compel, which I'm happy to say at least we resolved that part.

The remaining part just had to do with discovery relating to other earnout agreements. And specifically, what we're talking about here is two interrogatories. The first one, interrogatory 27.

THE COURT: They haven't agreed to answer this?

MR. LIPKIN: They have not.

THE COURT: Okay. Thank you.

MR. LIPKIN: And we asked Beumer to identify all other transactions in which they acquired an interest in a company which contained an earnout provision. And the follow-up interrogatory to that just asks them to identify all final agreements in connection with that transaction.

And we think we have a good reason for seeking that information. And part of that's contained in the affidavit that we submitted with our reply, is that Beumer -- and we also spoke about this in our initial motion as well. But Beumer -- you

know, it's our contention that Beumer represented to Sir Ken and Glidepath that this transaction between Beumer and Glidepath, including the earnout provision, was based on another transaction they did with a Belgian company. So we think that the way that they interpreted the earnout period in that transaction has -- it's not going to be dispositive of the issue here, but it has some relevance. And I think their objection goes more to weight.

Now, I understand their objection that, you know, whatever they did in the past doesn't apply to what they are doing in the future. But I think it depends on what is shown.

First off, I think it depends on what's shown in that Belgian transaction. If the exact same language was used but the earnout period was interpreted differently in that transaction, I think that would be probative. If, for example, discovery shows that Beumer did 50 earnout transactions using the same language, and all the time interpreting the earnout period to begin post-closing, I think that would go -- that would be probative to determining the truthfulness of Beumer's assertion now that they really understood that the earnout

transaction occurred, you know, or started preclosing.

And taking the reverse, if, for example, the documents showed that the earnout -- that they did other earnout transactions and they had a few of them that began preclosing, I think we would be hard pressed -- I think it would be a real problem for us to come before this Court and say, "Well, you know, we" -- well, quite frankly, I just think Your Honor would have -- we would have a hard time convincing Your Honor that there is no way that Beumer believed that the earnout period began preclosing if they had done that a number of times in the past. So, again, it's not necessarily dispositive, but we do think it's probative.

And one other thing I just want to point out, just with respect to this one issue. I realize it's the Court of Chancery. It's a bench trial. Motions in limine are not -- they might not be frequent, but it's an avenue that they have.

THE COURT: They are frequent.

MR. LIPKIN: Okay. Well, sorry to hear that. But -- well, in that case, well, then it might be expected that they would still have that -- they would still have that option available to them.

If we are not permitted this evidence, you know, we're foreclosed. So this doesn't end the dispute for them.

The only thing they said, one of the things they said in response that I just want to touch on is that they didn't want to comb through their files. They didn't indicate what kind of burden that would be. They just said they didn't want to do it. And it's really hard for me to imagine that there aren't counsel there or someone who wouldn't know what earnout transactions they previously entered into. And, again, they didn't indicate that that would be burdensome.

So, you know, that's really all I have to say on that one issue that's the motion to compel. I'm content to turn it over to Beumer now.

THE COURT: Let's do that.

MR. LIPKIN: Okay. Thank you.

MR. SELZER: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. SELZER: Chris Selzer at McCarter. I would like to introduce Mr. Wallach as well to the Court.

THE COURT: Welcome.

MR. WALLACH: Thank you, Your Honor.

MR. SELZER: Your Honor, thank you. And I apologize for getting involved in a motion to compel. I don't think it's quite fair to say -- the parties have been sort of speaking past each other. There is a lot of distrust between the parties. And I don't think that it's fair to say that Beumer in its response for the first time agreed to produce the types of documents they were looking for. And I want to explain to the Court a little bit about what the process -- not the document process, but what the business process is.

It's also important to know that there are a number of Beumer entities. The Beumer entity that has been sued in this litigation is Beumer Corporation, and it deals with the United States, Mexico, and the Bahamas.

Beumer Group is the overall controlling entity. It's not a party here. It owns a number of different Beumer entities all over the world. And Beumer Group does not, nor has it been alleged -- and we haven't gotten into this -- control Beumer Corp. Beumer Corp. has its own officers. It does its own thing. So at the --

THE COURT: Is it wholly owned?

MR. SELZER: Beumer Group does wholly own Beumer Corp., it does.

THE COURT: Does Beumer Group consolidate financials?

MR. SELZER: In certain instances in the United States with some of their operations. In other places they do not.

THE COURT: Does Beumer Group have a groupwide business plan and things that it actually oversees Beumer Corp.?

MR. SELZER: Beumer Corp. is its own entity and does its own --

THE COURT: We have lots of multi-national corporations that consist of thousands of individual entities, but they operate as organic wholes. So I'm trying to find out whether this is a legal separation that makes sense for limiting liability, but in practice has absolutely nothing to do with the unified internal information structure that exists inside the company.

MR. SELZER: Well, the companies maintain their own books and records. They maintain their own accounting systems. They maintain their own

e-mail and storage systems. In fact, that was one of the big issues that we had to deal with when we agreed to produce certain documents, that we had to get something off of a server in Germany, and that took a little bit of time. Because we agreed to do that. We discussed it. We objected at first, but we said, "Fine. For full disclosure, we will give that to you."

But the point is this, that Beumer U.S., the U.S. Beumer Corporation -- the reason we keep talking about ICS, ICS really is the only baggage stuff that Beumer Corp. in the United States does. Beumer Group has something else that does some things in the rest of the world. Some of it's ICS; some of it's conveyor belts; some of it may be other things. But we have all agreed that none of that is within the scope of what we are talking about here.

And what we continued to say early on was, "Hey, look, we have got these search terms. We know what facilities, because we all sat down and agreed, what facilities were bid, where is the stuff going to be, who is involved. We will collect those things. Whether they involve baggage carriers, whether they involve roller carts, whether they

involve ICS, all of that stuff will be captured there." And those were the things that we had been talking about for a long time when we were putting together the collection process and plan. And we understood during discussions with everybody that, "Hey, look. You are going to get everything." I mean, there are no conveyor belts that Beumer U.S. or Beumer Corp. sells in any of the areas. They just don't market a conveyor belt. There is a system that we discussed.

THE COURT: So why stress that aspect of the objection? I mean, you guys stress two objections. One was ICS related and the other was geographical. If geographical did the entire work, why even have the other one?

MR. SELZER: Well, we didn't stress it as much as we were just simply saying ICS is -- if you capture the ICS stuff, and also we have a search term "baggage" and we have a search term "conveyor" --

THE COURT: So you understand that while electronic discovery may be the bulk of the data, electronic discovery isn't all discovery. Right?

MR. SELZER: Yeah, I agree with that,

Your Honor.

THE COURT: So it may be something to have an electronic discovery protocol. But, actually, what people get to rely on is your discovery responses. Right?

MR. SELZER: I agree with that, Your Honor. So when we finally had a discussion yesterday --

THE COURT: That's the problem there. Because, I mean, what these guys are spot on right about is the fact that your responses said that you were only producing from Glidepath.

MR. SELZER: Well, I think that we agreed as a part of our response that we would produce certain things related to Beumer that --

THE COURT: So what I'm looking at is your actual responses. And what I'm looking at is the contrast between all of your responses except the ones that they moved on which say "the defendants" -- plural -- "will produce" and the ones they moved on which specifically say "the defendant Glidepath will produce." And where you object to everything else as not reasonably calculated to lead to the discovery of admissible evidence. So what does that tell you?

MR. SELZER: Our original objection was that we had already defined what the parties competed in, what Glidepath may compete with Beumer. There was a part of the contract, it said we can't compete. We said, "Hey, these other things aren't even relevant or competitive with Glidepath." And as a result --

THE COURT: I didn't ask you about that, did I? I asked you whether your responses said you would only produce from Glidepath. Because you resisted me on that.

MR. SELZER: No; I think that they did on those answers. They said -- you know, I'm saying that the reason we said that is because we believe that nothing from Beumer on those issues, because we didn't do anything, was responsive. And that was our original discussion, and that's what led to the back and forth for weeks and then the discussion about, "Well, do we have a conveyor belt? Is there some reason that Beumer can't produce anything?"

And we said, "Well, you already have the ICS information."

That was a part of the ongoing discussion. It wasn't, Your Honor, an intent to

object or to stall or to delay. We were trying to get to the bottom of what they needed. In fact, we have agreed to produce things that still -- I mean, the one system that we just spoke about on Friday -- it was Friday, not yesterday that we spoke -- that we agreed to produce information about, frankly, I think we both agree that it's not at all competitive and has nothing to do with it, but they're concerned because it is a special tilt tray that works on a conveyor belt. Because the words "conveyor belt" are in there, we said, "Well, we will give you everything that we have on that. We will answer questions about that." And we said, "There is nothing else conveyor belt."

And they said, "Okay." And we confirmed that for them, and they said, "Okay. Well, then your responses are okay." Which is why in their reply, after we discussed it -- and we had a conversation expressly about this issue. That's why in their reply, Your Honor, they say, "If ICS means everything baggage as they say it does" -- and we have confirmed that. We thought that we confirmed that before they even filed the motion. And we have now again confirmed that, and we have agreed that we would give them things that aren't, we don't think,

competitive. We thought we had all of that stuff resolved.

It's not an intent to stall or delay at all. In fact, we have agreed to give them many, many things that, of course, we object to, but we said, "Fine. We don't want to be, certainly not in front of the Court. But if you think it's relevant, we will give it to you. We don't want to hassle with you about it."

THE COURT: Look, that's not my reading of what you guys did. And to do this after I have gone through all of the entire motion to compel process and figured everything out and now to say, "Oh, well, yeah, we'll give it to you," not helpful.

So what I read you-all as doing is making a very clear objection and then essentially saying in your opposition, "But we didn't really say that." And when I look at your objections, it's pretty clear that you said "just Glidepath." And then in your opposition there's a bunch of this stuff that I didn't need to read. There is all this stuff about going to Yahoo! sites to watch your baggage claim stuff work. There are all these things about the ESI protocol. Well, the ESI protocol is a collection

protocol. That's great. But what says what you are going to produce is your responses.

So what's happened is -- again, I don't know why lawyers do this. I don't know why lawyers introduce themselves to the Court by taking positions that essentially indicate they can't be trusted to mean what they say. Because essentially what you guys did is you took a bunch of general objections, said you were producing subject to your general objections, and then tried to say that your general objections didn't mean anything. And then you took the position that you were just producing as to Glidepath. And then you told me in your opposition, "Well, no, we didn't mean that, either."

And now, after I have done all the work, you suddenly decide to fold your tents and do what you should have done in the first place.

MR. SELZER: Well, and I apologize for that, Your Honor, respectfully. We last week and --

THE COURT: Last week?

MR. SELZER: Last week when we --

THE COURT: Why didn't this happen in your responses?

MR. SELZER: Well, I think that if you

read our responses to the letter, I think that our responses to their letters are deficiency letters.

THE COURT: What your responses to the letters said is, "We didn't mean anything we actually said in our objections or our responses." That's what essentially they said. They actually said, "When we signed those, we actually weren't taking any of the positions that we claimed we were taking."

MR. SELZER: If Your Honor reads them that way, I apologize. That's not what we intended to do. And I believe --

THE COURT: The game of discovery is not to say random things in your responses that you never intend to live by and then to force them to file objections, force them to send you letters, and then for you to say in your letters, "Oh, yeah, we didn't really mean that. We signed it, but we didn't really mean that." And then to have a back and forth letter campaign where you don't give up any of these issues, your friend has to then move to compel, and then after I have done all the work to sort it out say, "Oh, yeah. Yeah, we're okay with that."

MR. SELZER: Well, I thought that we had this resolved, certainly after we filed our

response.

THE COURT: You didn't have it resolved as to me.

MR. SELZER: I understand.

THE COURT: Because I have now engaged -- you know, I spent a good bulk of time reading through all your stuff, figuring it out, reading your requests, reading your general objections, reading your interrogatory responses that are all framed as document responses. They say you are going to produce documents. They don't actually comply with 33(d).

MR. SELZER: Well, I wish that we had contacted the Court earlier. And we discussed it, and Mr. Lipkin and I said that we would let Your Honor know today that the only issue was the documents related to the earnout.

And it was not my intent, Your Honor, to make you go through all of that. In fact, it's my intent to make sure that you don't have to go through all of that, which is why we went through numerous meet and confer calls and responded to various letters.

THE COURT: All right. Look, I'm

going to cut you off.

MR. SELZER: Okay.

THE COURT: So I'm going to issue a ruling on this, because what you've indicated to me, unfortunately, through your responses is that it's not really clear that you mean what you say. So why don't you have a seat.

Within five days you're going to file an amended set of responses and objections to the plaintiffs' first set of document requests. In that amended first set of document requests you are actually going to say what you are doing.

General objection 1 is vapid. If you want to maintain general objection 1, you're going to explain in what ways you think the document requests and the instructions and definitions incorporated therein are contrary to the Delaware rules or case law interpreting them, so that you are going to put Mr. Lipkin on notice so that he can actually figure out what you're saying. If you have nothing specific in mind, you will not assert this objection.

Objection 3 is even more vapid than objection 1. If you want to raise this objection, you will identify specifically why you think something is

"improper," why you think it is "overly broad as to time and content," why you think it is "unduly burdensome or oppressive," why you think it is "vague or ambiguous" -- and you will be specific about this -- and why you think it's "unreasonably cumulative or duplicative," why you think it's "not relevant, immaterial, or otherwise not reasonably calculated to lead to the discovery of admissible evidence." And if you don't have anything specific that would put Mr. Lipkin on notice of an actual limitation that you are drawing in terms of your responses, you will not assert that general objection.

Objection 6. This is the same thing. If you have certain categories of documents that you think are publicly available, certain documents that you think were previously provided to the plaintiffs, or something that you, because of your psychic powers, know is already in the plaintiffs' possession, custody, or control, you will specifically identify it so that Mr. Lipkin knows what you, with your ability to read minds and look into the hearts and souls of your opponents, think that he already has. And if you don't have anything, you won't raise this objection.

No. 7. If you think something is

duplicative or repetitive and you are not producing documents on that basis, you will actually say it. You will specify it. And if you can't do it, you won't raise this one. Because just saying "to the extent that" doesn't tell Mr. Lipkin anything.

You will combine general objections 8 and 10, because just saying that you object to "all" doesn't tell anybody what you're actually doing. Now, 10, that's actually a helpful clarification if it's tied up with 8. Because 10 says "We're not going to produce from non-substantive or clerical people." That's actually sort of helpful. That lets Mr. Lipkin ask, "Well, what do you mean by clerical? Are you actually talking about their secretaries? Secretaries often have really good caches of documents."

No. 11. There are two types of experts. There's testifying experts and there's consulting experts. You don't get to just object broadly to producing everything from any expert. So you need to recast 11 in something that actually makes sense.

18. You're going to fix this one to say what you think the time period is and why you think the time period you've chosen is appropriate.

Now, maybe you guys have agreed on this since then. But all 18 says is "We're not doing your time period," and it doesn't tell you anything about what you actually are doing.

I would encourage you-all to look at all of these, but certainly in terms of 16 through 20, 33 through 34, 36, 37, and 40, it just says "Defendant Glidepath." And it says "Defendant Glidepath" in sharp contrast to everything else, which says "Defendants."

This says just Glidepath. It doesn't contain either of the two limitations you discussed in your opposition, which were ISC and geographical. So this was misleading in two ways. It was misleading in the first way because you said you were going to only produce from one entity when, in fact, you were ostensibly producing from a lot. And it was misleading in a second way because you didn't impose any of these subject matter limitations, and yet you said in your opposition you were. So you need to fix all of those. Because right now it's just wrong. You signed something saying you were going to do something that you actually aren't doing.

Now, when I get to the

interrogatories, for the interrogatories, somebody basically just took your document requests and slapped the title "interrogatories" on them, because they are framed as if these were responses to document requests rather than interrogatories. All of my comments about the general objections apply equally to this one. You guys are going to supplement, and if you can't be specific, you are not going to raise the objection.

Just to give you an example, look at No. 5: "The Defendants object to the Interrogatories to the extent the Interrogatories, or the instructions and definitions incorporated therein, call for the creation of new documents, reports, spreadsheets, or data compilations."

It's an interrogatory. The interrogatory calls for information. So either this completely misses the boat because you are focused on the creation of new documents, or you have basically said you are not going to answer the interrogatories because to answer the interrogatories you are going to have to create a new document called "responses to interrogatories." So No. 5 is completely nonsensical.

In terms of the two that they have moved on -- and I'm not going through the general

objections again, because, as I say, it just looks like somebody took the same objections and copied and pasted them over without giving any thought at all to what they were doing -- No. 14 said: "Identify all communications, including, but not limited to solicitations or negotiations You had with any third-party from 2014 to the present relating to baggage handling systems and/or services."

You answered: "... Defendant Glidepath will produce its non-privileged, responsive documents within its custody, control, or possession; the remainder of this Interrogatory is objected to ...."

You don't get to do that. Is there a rule that lets you rely on documents in lieu of providing a specific interrogatory response? Yeah, there is. But what you actually have to do -- and the cases say this -- is identify the documents. You don't just get to say "We will produce responsive documents." That's what you say in response to a document request.

And then we have this same issue with the Glidepath versus other people thing. So the Glidepath versus everyone versus subject matter

limitations has to be fixed throughout.

In terms of the interrogatories, other companies in which Beumer acquired an ownership interest and which contain an earnout provision, yeah, you have to answer this. And, again, we're talking about what you guys usually do and whether people's interpretations of this are what their reasonable expectations were going in.

This is not like some find-every-document thing. That's what you guys said in your opposition. This says "identify." So what this means is that you actually might have to talk to your client. You actually might have to go and speak with them and ask them. So that's 27 and 28. The same with 29. The same with 32, where in addition there is this idea of producing documents without any identification rather than actually giving any type of response.

When you produce garbage like this, this is what drives endless meet and confers. This is what drives motions to compel. If you do your job upfront and actually do what you're supposed to do in your responses, people might not dislike discovery so much and you might not have to engage in endless

motions to compel or endless meet and confers and motions to compel.

So I'm shifting expenses, and the expenses will include not only the motion, but all the meet and confers.

And going forward, I saw in there you guys dropped a footnote when you were doing your attempted misdirection telling me about the Yahoo! videos, and all that type of stuff, and ESI instead of actually focusing on what you said. You have got a footnote in there where you say, "Oh, and we've got some problems with them, too. We will bring those up in a separate motion to compel." It's a two-way street. Mr. Lipkin I know. He's been the subject of one of these wonderful experiences before.

But I don't want people to monkey around in discovery. And I don't want people to do it because it causes more work for me. And not only does it cause more work for me, it makes your lives stink. And more importantly, it probably makes your associates' lives stink. Do you know how horrible it is to write these discovery letters back and forth to try to find out what somebody is actually saying?

So no more. This is probably more

than a shot across the bow. This is a shot into your bow. No more. And for you, it's a shot across the bow. Because the other thing that happens whenever I hit one side with this, they always come back and think, "Oh, I'm going to make sure Lipkin gets his now." So going forward, you've got to be saying what you mean, meaning what you say.

All right. Let's move on to the motion to dismiss.

MR. LIPKIN: Thank you, Your Honor. And because I have been on the other end of one of these --

THE COURT: I know you have.

MR. LIPKIN: -- at least one, I am going to -- we are going to certainly go through everything we have ever said in discovery and make sure that it is up to the level.

THE COURT: I remember.

MR. LIPKIN: Or we are going to be supplementing within the hour.

THE COURT: Maybe not within the hour, but you better believe they are going to come asking.

MR. LIPKIN: I understand.

THE COURT: You have. I remember. I

remember that day.

MR. LIPKIN: I have been there. I have been there.

All right. Turning to the motion to dismiss. The motion to dismiss really is focused -- well, our motion to dismiss seeks to dismiss Beumer's counterclaims regarding fraud and breach of contract. Beumer clarified in its answering brief that the false statements that it's relying on are -- there's a couple of them, but the bulk of them relate to this supposed budget that -- which they claim was substantially prepared based on information provided by Glidepath.

Before we examine that budget, I just wanted to -- I thought it would be worth briefly touching on a little bit of background in this case that might help with examining the contentions at issue. Your Honor might be aware -- this is one of the first times we've had a chance to talk to Your Honor about this case -- Glidepath LLC manufactures traditional baggage -- the conveyor belt systems that we are all used to in U.S. airports and really airports everywhere. Beumer, on the other hand, produces this ICS system, which I understand is a very

good system, but right now it's being used primarily in Europe, not in the U.S. I understand Beumer is having a very difficult time right now getting the market penetration into the U.S. for this technology.

THE COURT: You are probably outside of the pleadings at this point.

MR. LIPKIN: Let me double-check that.

THE COURT: I mean, I think the pleadings say that they acquired your guy to try to get penetration.

MR. LIPKIN: Well, that was actually the next thing I wanted to focus on. So you are probably right, I was outside of the pleadings there.

Anyway, Beumer does admit in its counterclaim that one of the reasons it acquired Glidepath was to enter the U.S. market. And now we believe that this was the only reason they acquired Glidepath. Prior to this transaction, Beumer had no ability to enter into the U.S. market because they weren't licensed to do so. Glidepath LLC was. Glidepath LLC had a long reputation and had the consultants who are licensed to do business with airports, which I think Beumer has learned is not exactly easy to do.

So I think, you know, what Beumer -- we believe what Beumer was originally intending to do was acquire Glidepath -- and I think they have conceded this -- get into the U.S. markets, where it would hope to revolutionize the U.S. baggage-handling industry by putting this ICS product -- which, again, I understand it's a very good product -- into -- like, you know, kind of revolutionize the industry and put it in the U.S.

But what ended up happening is -- so basically our theory is that they paid a relatively small, million-dollar payment upfront, which gives it, in essence, the licenses it didn't have, and now it had the ability to pitch its product to the U.S., which it didn't have before. And the real money for Beumer is in pitching these ICS products. It wasn't in pursuing things with the joint venture. That was a very small part of this.

So with that backdrop --

THE COURT: The core theory for today is that they say, whatever it was, you guys oversold it. You overpromised what your company had and could do.

MR. LIPKIN: Well, let me jump right

to that now.

Your Honor, may I approach? I just wanted to hand up copies. This was attached to Beumer's counterclaims. This is a copy of the supposed budget that is -- that forms the core of their fraud claim. I want to highlight some things notable right off the bat that you can see.

First, it doesn't say budget, it says a business plan. And if you look at the agreements that were actually referenced in Beumer's response, it talks about how the parties were going to jointly formulate a business plan. This wasn't something that is supposed to come from Glidepath. This wasn't a Glidepath business plan. This was a Beumer business plan.

I think there is a real distinction between a budget and a business plan. A business plan is a little bit more aspirational. You are trying to -- it's a goal focus of what you are going to achieve in the future. I think a budget is a little different.

The second thing I wanted to point out is the obvious. It's on Beumer letterhead, which is unique, considering that they are claiming that this

forms the basis for our supposedly fraudulent misrepresentations; that this document, which is on Beumer letterhead, is the thing that forms their fraud claim. And they say, in response to that, "Well, all right. It might be on Beumer letterhead, but we have pled in our complaint that it was substantially prepared based on information provided by Wayne Collins of Glidepath."

There are multiple problems with their reliance on this document on the basis of fraud. Delaware law is clear you need to provide details when it comes to pleading fraud: who? what? where? when? why? Here, I think it's undisputed that Beumer failed to plead any.

Example: They say this information was based on info substantially provided by Wayne Collins. All right. When was it? When did Wayne Collins provide this information? Where did he provide it? How did he provide it? Did he provide it in an e-mail? Did he provide it in person? Did he provide it by phone? Who did he tell it to? We don't have any of these details. And Delaware law is replete with cases saying that the failure to identify these basic facts just fails to meet the burden

required by Rule 9(b).

That in and of itself, we believe, requires the dismissal of any fraud claim based on this document. But I think we have even a more fundamental problem when it comes to any fraud claim based on this document itself. We don't even have the "what." Forget about the "where," "when," "why," "how." They say that Wayne Collins provided information that formed -- that permitted -- from which they used that information to draft this document. What is that information? They still haven't identified what it is. We know they say that they used it to prepare the document, but we don't know what it was that they were told.

And, also, it's worth noting that they don't say that all of this information was provided by Wayne Collins, because that would be different. At least we would have the "what" at that point. If they said, "Wayne Collins gave us every single thing in this document. That's what he told us," we still wouldn't have the "where," "when," "how," and everything else. But we would at least have the "what." But they didn't even say that. They said it was substantially prepared by Wayne Collins. All

right. Fine. Well, what part did Glidepath or Wayne Collins provide, and what part did Beumer come up with? We don't know because they haven't pled that in their complaint or their counterclaims, and they haven't identified it in their answering brief when we were calling them out on it.

We don't know even -- because they haven't identified what information Wayne Collins provided, we don't even know if their assertion that this was substantially prepared based on information he provided is even accurate. We don't know what Wayne -- maybe Wayne Collins told them certain numbers and they said, "Well, all right. You told us this, so in our business plan which we drafted we're going to take your numbers and kind of extrapolate them years forward." We don't know. We are left completely to guess what it was Wayne Collins told them.

You know, and, again, even faced with the motion to dismiss, they haven't identified any of this information. And we think there is a real reason for this and that it's not just an oversight. The real reason, we believe the facts will show -- and this is beyond the scope of things here -- we do think the facts will show that Wayne Collins didn't provide

the information.

THE COURT: It sounds like it's because he was on the golf course.

MR. LIPKIN: Yeah; that apparently --

THE COURT: That's what I gathered from the counterclaim.

MR. LIPKIN: That's apparently the theory. Not that we are conceding that, but that's, I think, what they are saying.

You know, but it's worth noting the only time they talked about actual projections they mentioned this $30 million number. And we called them out in the motion to dismiss and said, "You can't form a fraud basis on that. The only time that you mentioned that $30 million supposed pipeline was in April 2015, post-closing. That couldn't have formed the basis for your claim."

And, again, this goes back to the background I was talking about, the reason that these numbers and why we think that Wayne Collins didn't necessarily have anything to do with this, or had very little and wasn't providing pipeline information. And I will admit, this is just for background purposes, not necessarily in the pleadings, but they didn't care

about the pipeline. They wanted the licenses. They wanted to pay a million dollars to get into the market.

So I think that this -- fraud claims based on this document can be dismissed because we don't know the "what," "who," "where," "when," "how." We know nothing relating to it.

I just want to provide a little bit of background, at least, as to our theory as to why those defects exist.

THE COURT: So if this survives, you would try to disprove reliance by making this argument that they didn't actually rely on it because they wanted the licenses, they didn't really care about the projections?

MR. LIPKIN: We think that that is the overall -- we a hundred percent believe that that is the theory of what happened in this case, and we think we can prove it.

THE COURT: All right. Well, I'm obviously not able to rule one way or the other on that today. But I have understood the words that you have uttered.

MR. LIPKIN: Okay. Thank you.

That leaves us, there is just a couple other specific misrepresentations that they alleged in their answering brief at issue here. And these are suppose -- and we think that all these misrepresentations, supposed misrepresentations relate purely to future conduct. And there's three of them at issue. Wayne Collins supposedly told Beumer that Glidepath LLC would be well situated after closing. That's one of them.

Not only is that plainly a future occurrence, but I don't even know -- that's so unspecific that I don't even know how that would be verified one way or another.

The second one: It was not anticipated that cash infusions would be necessary. Again, a future occurrence, and I don't -- again, that's one I don't know that -- you know, a lot of that would depend on how it was managed post-closing. I don't even know how you would prove that one again, too. But, in any event, it's clearly a future occurrence thing.

And the other one, the last one, I think, that they mention in their answering brief was that there would be available cash such that there

would be excess money to make a further distribution to plaintiffs in the future. June 30th, 2014, to be exact.

That, again, is plainly a future occurrence event. Delaware law is clear that expressions of what will happen in the future can't form the basis of fraud. And even something like that, again, you are just anticipating that there will be cash there. Part of that depends on how Beumer-Glidepath is going to be running the business, where he was assuming that certain things would take place, which ended up, I guess, according to Beumer, not happening.

Aside from those issues as to future intent, this can be dismissed for an even simpler issue. We still don't have the "who were these statements made to?" When? Where? How? We have no specifics. Delaware law is clear that you need them to sustain it, even on a motion to dismiss.

One other thing I wanted to note on this. It's not even clear that Beumer -- I noticed in its complaint Beumer didn't specifically say that Glidepath even knew these statements were false when they were made. The closest they came to actually

saying this was that, from our reading, unless we missed something, is that the statements were later learned to be false and inaccurate. You know, that could be taken different ways. It may be incorrect. I don't know if they are even claiming it was false.

So that's all I wanted to discuss on the fraud claims.

There was a breach of contract claim as well that I just want to touch on. We think that their breach of contract claim was primarily predicated on the fraud claim. I don't need to go through all the specific provisions they are citing to, but the gist of it is that it violated the seller's representations because certain things were untrue. Again, I think that fails because they didn't even identify what things were untrue. So that is for that specific thing.

The other provision they specifically cited related to Section 3.1.5 of the MIAA that relates to representations concerning available cash -- I don't want to read that provision to Your Honor right now -- that section simply makes no representations concerning available cash, so it's certainly not helpful to a breach of contract claim.

Finally, the last thing -- and this was first done in its answering brief and, for that reason, I think should be disregarded, because it's just not even in the complaint -- but Beumer attempts to morph its breach of contract claim into one for breach of post-closing obligations under Section 7.1 of the MIAA. And that section basically, without reading the whole thing, generally says that the seller is going to cooperate and executes -- execute the post-closing documents whenever it does. A very standard provision you will see in any merger agreement.

A couple points. First, again, that thing was never -- that was never pled. That's just -- that's not in their complaint. And -- but, you know, even getting past that, even if Count II of their complaint, the breach of contract issue, had referenced post-closing obligations, Beumer really still hasn't pled a breach of that. Beumer claims that Glidepath and Sir Ken were obligated pursuant to that section to assist Beumer in its operation of Glidepath LLC. Again, without reading that whole section, no such language exists. All it talks about is that they will cooperate and execute documents. It

doesn't have this ongoing obligation from Sir Ken to assist Beumer in its operation of Glidepath LLC. That's just not correct.

And, you know, in their answering brief, the only actual post-closing deficiency they identify is that Beumer -- or is that Sir Ken and Glidepath contacted a license holder who represented Glidepath LLC and discouraged him from continuing that relationship with Beumer. You know, even if that was true, which we absolutely -- we categorically say is not true, I don't think the few paragraphs they spent on that in their answering brief, or even in the complaint -- I actually think that one, they spoke to that a bit in their counterclaims -- we don't think that would qualify as a violation of Section 7.1, which we interpret as not some general obligation to continue to assist Beumer in the running of that business. It was meant to just be standard language that they will help execute post-closing documents.

So for those reasons, we think all of the provisions they cited in their answering brief just don't apply, and for those reasons we would ask that they be dismissed.

THE COURT: Okay. Thank you.

MR. LIPKIN: Thank you, Your Honor.

MR. SELZER: Good afternoon, Your Honor.

THE COURT: Welcome back.

MR. SELZER: So I have certainly taken my licks today, and I apologize to the Court.

THE COURT: We are on a new subject. We're moving on.

MR. SELZER: New subject and moving on.

And I certainly at this point can say that we're here to discuss the motion to dismiss. And the well-pleaded standard involves conceivability, not whether or not we can prove anything. And it seems to me that we have spent a lot of time today talking about the facts. And I want to discuss briefly some of the issues that were pled, because I do not think it's a fair characterization to suggest that Beumer waited until its response to do these things.

Your Honor, the complaint, the counterclaim, it speaks for itself. We don't have to explain it to the plaintiffs in a response. We believe that it speaks for itself. And the real issue here -- and it's critical to understand this, I think,

Your Honor -- the real issue is that we're not interested in post-transaction breaches. And it seems to me that the argument that plaintiffs are making is that financial statements aren't a statement, and unless, you know, we know that somebody said this on Tuesday, September 13th, at 3:00 a.m. to so and so, unless we have that, we can't really rely on something as a financial statement. And I think that everybody recognizes that ABRY Partners certainly throws that away.

If you look at the complaints, Your Honor, and specifically starting at paragraphs 17 and 18, let's just walk through some of these things. And before we do that, let me -- and I apologize to the court reporter. I know I'm speaking fast -- let me explain what it is that we are doing, because I'm not sure that plaintiff has it couched properly.

Beumer makes the counterclaim that what was provided by Glidepath New Zealand, by Glidepath, and by Sir Ken, through its agent, the CEO of Glidepath LLC at the time, Mr. Williams, okay, that stuff that was provided in the data room as part of the due diligence and the discussions that he has with people like Thomas Dalstein, who was the Beumer

representative, in looking at the documents and the materials to determine, when they put together a business plan -- and we're going to get to that in a moment -- what the price of the deal would be. And we allege that they made a number of misrepresentations about that. And I think that the allegations are clear that we think that that was so that they could sort of boost the numbers. That's fine.

They prepared the numbers that the parties -- and by "parties" I mean Glidepath before the acquisition and Mr. Dalstein -- started with and used as the building blocks for that business plan. And if Your Honor looks at Exhibit F -- now, they showed you Exhibit E, Your Honor. But Exhibit F to the counterclaim -- it's the very last exhibit -- it's pretty clear. This is the summary plan of the business --

THE COURT: My version actually doesn't have exhibits. Do you have a copy that I can look at?

MR. SELZER: Can I hand this up to Your Honor?

THE COURT: That would be great.

MR. SELZER: You know what? I have a

copy right here.

THE COURT: Thank you.

MR. SELZER: Do you have a copy of that, Gary?

My apologies.

THE COURT: Thanks so much. No worries.

MR. SELZER: It's in my bag somewhere. I know Your Honor is anxious to get moving.

THE COURT: Okay. Got it.

MR. SELZER: That is Exhibit F to our counterclaim. Now, it's hard to imagine that this -- this is what Beumer did in comparison from the plan, based upon the numbers that it got from Glidepath and Wayne Collins, and the actual after they had made the acquisition, they were in the business for a year, and they had everything audited and their accountants came back and said, "Wait a minute." That's for '13, for '14.

And let's look at each one of these categories. Order intake, year one. You have plan, 27,000; actual, 2,575. A variance of $24 million, okay. Let's look at the next category, revenue. 18 million in revenue, 11 million, for a change of

6 million. Contribution margin the same. So it goes through there. So it's difficult to understand, if the MIAA, the membership interest acquisition agreement, specifies GAAP and FASB, it makes distinct reps and warranties regarding accounting representations, that anybody can't look certainly at Exhibit F and, by the way, the allegations that we have made in the complaints -- and we can walk through those briefly to the extent that Your Honor wishes to do so -- can't look through this and say, "Oh, gross margin. Well, what representations were made regarding gross margin? Well, let's look at the deal documents that were put together in due diligence, and then let's compare them to actually what happened at the audit after the deal closed."

It seems to me that anybody who calculates gross margin -- and there may be some arguments back and forth between an expert about what you would include as a margin number and what you wouldn't. But that is sufficient to let them know that we're saying, "Hey, you lied about the gross margin, or at least you were incredibly reckless." But our counterclaim says that they intended to do this. The same for SG&A. The same for EBIT. The

same for EBITDA. The same for percentage and relocation costs. Every one of these categories simply details where we think their numbers were incredibly off. And where do those numbers come from? They came from Glidepath's individual and they were given to Beumer. And does it matter at the end of the day -- and this is a fact issue one way or the other -- that this original budget that was prepared by these people based upon the numbers that the plaintiffs had provided went eventually on Beumer letterhead because it was included as a part of the schedules in the MIAA? I don't see how that matters at this point in the pleadings stage.

But I would like to jump to, let's just say, if you go to page -- let's just say paragraph 39. Let's start at paragraph 39, Your Honor, in the counterclaim. That's on page 68.

THE COURT: Yep.

MR. SELZER: We don't say that anything that happens afterwards was a representation. We say that the representations that were made in the financials that we used to build these documents and to make the business plan were incorrect. In sharp contrast to the financial condition represented to

Beumer, then outlined in the 2014 budget, it can now be concluded the budget does not appear to be logical or consistent with regard to cost recoveries. I think that we can maybe argue about what cost recoveries may or may not include, but the documents include FASB GAAP, and I certainly think it puts them on notice that we are saying, "Hey, the information you gave us about cost recoveries is bad."

The same for paragraph 40. There was overspending in sales. General and administrative expenses led to materially lower numbers than budget.

We move on to paragraph 41. Improper reimbursements of nonbusiness expenses. Each one of these categories related to information that came from documents provided to us in due diligence and that were discussed by Mr. Collins as the representative of Beumer and -- excuse me -- of Glidepath and of the plaintiffs. It turns out some of this stuff that we have alleged here, none of it was really exactly accurate. And why? Because they wanted to bump the business. It's not unbelievable or unreasonable to think that somebody wants to, "Hey, we have got this acquisition coming up. Hey, guys, we want to make sure we get as much as we possibly can." And they

fudged a little bit here and there, I guess. Discovery will determine that. And Your Honor will determine the facts, how much of that fudge actually turned into cake, because we think a lot of it did. But we gave them specific examples of many of these things. All the way through paragraphs 39, 40, 41, 42, 43, 44, 45, 46.

46 especially. They made terrible misrepresentations about the backlog of business that they actually had. They made representations that Beumer, when it acquired the controlling interest in Glidepath, would assume through Glidepath $30 million in backlogs and imminent projects. It turned out that there was only actually $5.3 million in backlog. That's a pretty significant variance in a group of numbers that led to a budget item that the parties used to base the numbers upon what the value of the transaction was going to be. And again, Your Honor, it's Beumer's position that, just like in ABRY Partners, this is exactly the type of information and the specific types of information that we suggest led Beumer to come up with budget numbers that were totally inappropriate and not based in reality.

I do want to also say that there is an

argument somehow that Mr. Collins is making claims about some future issue. And it sounded a little bit like the argument that Carrols Corp. made in the Vituli v. Carrols thing in front of Judge Silverman several -- probably two years ago now. And that is the sort of "fraud in the inducement down the road" argument.

That's not really the argument we have here. What we are suggesting, and I think rightfully so under the case law -- and certainly most recently Vice Chancellor Parsons before he left the bench said so -- that, at the end of the day, one of the critical things that happens is that Mr. Collins was making statements about the future, okay -- and that's puffing, I guess -- but those statements, necessarily, about the future regarding building a budget and pricing the deal suggested, in the first instance, facts about the present that he knew and we allege were not correct. That is, the due diligence documents materially misrepresented some of the key things, including expenses and a lot of the other issues that we specifically plead in the complaint, Your Honor.

We believe that fraud is pled properly

by the counterclaim, and we also -- and by the way, there was an argument about equitable fraud and negligent misrepresentations. We didn't make that. I'm not sure I understand the distinction in the footnote. So we made it clear fraud. The intention is alleged that they wanted to get a better deal.

With respect to Section 7.1, reps and warranties, I think it's a bit unfair, or at least at this stage it's unfair to suggest that that is a bad claim. And that is, Glidepath, or at least plaintiffs, went out and did something with one of the licensees that caused a problem with Glidepath LLC. To say that that didn't fall within -- they have to sign documents and do whatever. We believe that that provision, and we think that the court -- the courts in this jurisdiction have ruled that those provisions are cooperation provisions. They are basically essentially -- and I hate to say this because it's not really true. But it's a good-faith provision. Right? You can't be out doing things that thwarts the purpose of the contract.

And when things were not well and when Mr. Stevens, Sir Ken, was not happy and Beumer started asking Mr. Collins some serious questions about, "Hey,

look, we're looking at these documents that you guys have in due diligence, and some of this stuff is really bad, guys. What's going on here?" That is when we allege Sir Ken -- and we allege that, by the way, in paragraphs 50 through 52 -- Sir Ken and somebody else, Mr. Graviet, reached out to the -- one of the license holders in California and said, "Hey, look. We're going to be doing something else here. Maybe you ought not to do business with Glidepath, that Beumer is controlling that." It led to lots of problems. It shut the work down for a little while. And Glidepath, because Beumer then was the controlling interest in Glidepath, had to solve many problems and get this license holder, because you share a license, get this license holder to get back on board to do work with Glidepath.

So we think that that clearly -- and we believe that the contract remained executory for the period prior to the earnout, the final payment. So those provisions under Section 7.1 required them to continue to act appropriately so as not to thwart the underlying benefit of the bargain the parties had made.

So we think that we have adequately

pled that particular claim, Your Honor. I don't believe, respectfully, that the claims are very complicated. It is simply an intentional misrepresentation case on the documents. And unless Your Honor has anything else to ask, I'm happy to sit down.

THE COURT: No. Thank you very much.

MR. LIPKIN: Your Honor, very, very briefly in reply.

They cited to this plan versus the actual business plan that they prepared for themselves. The actual numbers were obviously created by Beumer. And they, I guess, contend that the plan, or they ask the Court to infer that the plan numbers were provided by Mr. Collins or Glidepath. Yet we are still at a point where we're guessing as to that fact. They haven't told us what Mr. Collins said. They've admitted in their briefs, in their complaint that Mr. Collins didn't provide all of the information that was used to prepare the initial budget, much less this, what they have provided here. We still don't know -- it hasn't been said in the complaint; it hasn't been said here at argument -- what Mr. Collins prepared and what Beumer prepared. We again don't

realize -- we don't know if it's a fair reading of what Mr. Collins said or not because we don't know what he said.

And I also just wanted to note, they keep talking -- well, they mentioned that we provided financials. Okay. What financials? When? Where? Where is any of this? Where did any of this come from? We don't know. They say it happened. They say it happened here and they say it happened in the complaint. We have no details on it. And for fraud, it takes a little bit more than that.

And I just want to point one other thing out, is that even after hearing any of this, even after they say, "Well, Mr. Collins provided this information," we still don't know to whom. We still don't know when. We still don't know where. We still don't know how. That wasn't said in argument. It certainly wasn't said in the complaint under oath.

So that's really all I wanted to say on that issue.

THE COURT: All right.

MR. LIPKIN: Thank you.

THE COURT: Thank you all for your time today. I will give you something in writing on

this one, and you will get it within the 90 days.

Please take care of the discovery issues we discussed, and hopefully that will help this thing move forward more smoothly.

Thank you so much for your time.

(Court adjourned at 2:05 p.m.)

- - -

CERTIFICATE

I, DEBRA A. DONNELLY, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Merit Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify that the foregoing pages numbered 3 through 56 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except for the rulings at pages 20 through 28, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 7th day of October, 2016.

/s/ Debra A. Donnelly

Debra A. Donnelly
Official Court Reporter
Registered Merit Reporter
Certified Realtime Reporter
Delaware Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GLENDA MANCIA, et al.	*	
	*	
Plaintiffs	*	Civil Action No.
	*	1:08-CV-00273-CCB
	*	
v.	*	
	*	
MAYFLOWER TEXTILE SERVS. CO., et al.	*	
	*	
Defendants	*	

* *

MEMORANDUM OPINION

On January 31, 2008, Glenda Mancia, Maria Daysi Reyes, Alfredo Aguirre, Henri Sosa, Sandra Suzao and Obdulia Martinez ("Plaintiffs"), individually and on behalf of all similarly situated employees, filed a collective action against Mayflower Textile Services Co., Mayflower Healthcare Textile Services, LLC, Mayflower Surgical Service, Inc., Mayflower Uniforms and Medical Supplies, LLC, Lunil Services Agency, LLC, Argo Enterprises, Inc. and Mukul M. Mehta ("Defendants") for declaratory and monetary relief under the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. §§ 201 *et seq*. Pls.' Com., Paper No. 1. The Plaintiffs contended that the Defendants violated section § 207(a)(1) of the FLSA by knowingly failing to compensate Plaintiffs for overtime work and illegally deducting wages from the Plaintiffs' pay. *Id.*

¶¶ 37-40. The Plaintiffs further alleged that the supposed failure to provide overtime pay was a violation of the Maryland Wage and Hour Law, Md. Code Ann., Labor & Employ. §§ 3-401 *et seq*., and the Maryland Wage Payment and Collection Act, Md. Code Ann., Labor & Employ. §§ 3-501 *et seq*. *Id.* ¶¶ 41-50.

On April 18, 2008, the Plaintiffs served interrogatories and document production requests on the Defendants. Certificate of Counsel Pursuant to Local Rule 104.7 at 1, Paper No. 42. Plaintiffs assert that the Defendants' responses were wholly "inadequate," and on June 25, 2008, the Plaintiffs served[1] Motions to Compel Supplemental Responses to Interrogatories and Document Requests on Defendants Mayflower, Mehta and Lunil. *Id.* On June 30, 2008, the Plaintiffs served an additional Motion to Compel on Defendant Argo. *Id.* On July 14, 2008, Defendants Mayflower, Lunil and Mehta served on the Plaintiffs a Consolidated Response to the Motions to Compel, Paper No. 42, # 5. Afterwards, on July 25, 2008, the Plaintiffs served Defendants Mayflower, Mehta and Lunil with Replies to the Defendants' Responses to the Motions to Compel Supplemental Responses, Paper No. 42, ## 7-9. On August 1, 2008, Defendants Mayflower, Lunil and Mehta served on the Plaintiffs an Amended

[1]Plaintiffs properly complied with Local Rule 104.8, and did not file their Motions, or the Responses they received, until after the briefing was complete and counsel had conferred.

Consolidated Response, Paper No. 42, # 6. Defendant Argo did not file an opposition to the Plaintiffs' Motion.

On August 18, 2008, the Plaintiffs, having complied with Local Rule 104.8, filed Motions to Compel Defendants to Serve Supplemental Responses and Memoranda in Support Thereof, Paper No. 42, ## 2-4, 10, attaching all the memoranda and exhibits that had been served by the parties. On August 28, 2008, this case was referred to me for the purposes of resolving all discovery disputes. Paper No. 45.

The Motions, Responses and Replies filed were extensive. In regards to Defendant Mayflower, the Plaintiffs raised issues relating to fourteen document requests and sought two supplemental interrogatory responses. Pls.' Mot. Compel Def. Mayflower 2-14. The documents requested included the following: (1) an attachment or attachments to the contract between Defendant Mayflower and Defendant Lunil; (2) an attachment or attachments to the contract between Defendant Mayflower and Defendant Argo; (3) documents that support the making and execution of the contract between Defendant Mayflower and Defendant Lunil; (4) documents that support the making and execution of the contract between Defendant Mayflower and Defendant Argo; (5) all documents indicating the days and hours worked by the Plaintiffs; (6) all records concerning wages earned

by the Plaintiffs; (7) postings in Defendant Mayflower's place of business that inform workers of their wage and overtime rights; (8) all documents related to Defendant Mayflower's payment to Defendant Lunil for labor performed by employees at Defendant Mayflower's place of business; (9) all documents related to Defendant Mayflower's payment to Defendant Argo for labor performed by employees at Defendant Mayflower's place of business; (10) all documents regarding vehicles in which employees of Defendant Mayflower were transported to and from work; (11) records showing all production workers who worked at Defendant Mayflower's place of business during the last two pay periods of 2007 and the first pay period of 2008; (12) payroll based tax documents and filings for the period relevant to the litigation; (13) all documents showing the relationship with individual workers and Defendant Mayflower; (14) documents regarding the ownership of Defendant Mayflower. *Id.* at 2-12, Reqs. ## 1-7, 15-17, 21-23, 26, 28. The requested supplemental interrogatory responses sought the identity of the person or persons answering the interrogatories, and a description of the business operations of Defendant Mayflower. *Id.* at 12-14, Interrogs. ## 1, 3.

With Defendant Lunil, the Plaintiffs raised issues about ten document requests and sought two supplemental interrogatory

responses. Pls.' Mot. Compel Def. Lunil 2-10, Reqs. ## 1-4, 12-13, 17, 19, 22, 25, Interrogs. ## 1, 3. As for Defendant Mehta, the Plaintiffs had issues with only two document requests. Pls.' Mot. Compel Def. Mehta 2-4, Reqs. ## 1-2. In essence, Plaintiffs sought the same type of information from Defendants Lunil and Mehta as they did from Defendant Mayflower.

Finally, the Plaintiffs raised issues about twenty-five document requests served on Defendant Argo, and further sought one supplemental interrogatory response. Pls.' Mot. Compel Def. Argo 2-10, Reqs. ## 1-25, Interrog. # 3. On September 29, 2008, Plaintiffs submitted correspondence notifying the Court of the resolution of four discovery disputes with Defendant Mayflower, three discovery disputes with Defendant Lunil and twenty disputes with Defendant Argo.[2] Having resolved most of their differences with Defendant Argo, the Plaintiffs still sought certain company records and also requested that Defendant Argo supplement its interrogatory response regarding the nature of its business, the locations and addresses where business operations had been conducted and the identities of its managerial and supervisory staff at each location. *Id.* at 1-10, Reqs. ## 3-4, 12, 19, 21, Interrog. # 3.

[2]Pls.' Correspondence 1-4, Paper No. 50 (resolving Pls.' Mot. Compel Def. Mayflower, Reqs. ## 1, 17, Interrogs. ## 1, 3; Pls.' Mot. Compel Def. Lunil, Reqs. ## 1, 13, Interrog. # 1; Pls.' Mot. Compel Def. Argo, Reqs. ## 1-2, 5-11, 13-18, 20, 22-25).

During my review of the objections originally served by the Defendants in their Responses to Plaintiffs' discovery requests, I noted an obvious violation of Fed. R. Civ. P. 33(b)(4) (which requires that the grounds for objecting to an interrogatory must be stated with specificity, or else they are waived) and the ruling in *Jayne H. Lee, Inc. v. Flagstaff Indus.*, 173 F.R.D. 651, 655 (D. Md. 1997) (also noting the obligation to particularize objections to interrogatories, on pain of waiver). Similarly, facially apparent violations of Fed. R. Civ. P. 34(b)(2), the rulings of the court in *Jayne H. Lee, Inc.*, 173 F.R.D. at 656 (failure to respond to document production request in one of three appropriate ways) and *Hall v. Sullivan*, 231 F.R.D. 468, 473-74 (D. Md. 2005) (failure to object with particularity to document production request waives objection), were noted.

Further, the failure by the Defendants to particularize their objections to Plaintiffs' discovery requests suggested a probable violation of Fed. R. Civ. P. 26(g)(1) (failure to conduct a "reasonable inquiry" before objecting to an interrogatory or document request). As a result of these apparent discovery violations, I scheduled an in-court hearing with counsel to address them.

This hearing took place on September 29, 2008. During the hearing I raised with counsel my concerns about the objections

that had been filed by Defendants, as well as concern about the breadth of the Plaintiffs' discovery requests, and the possibility that they were excessively broad and costly, given what is at stake in this case. I advised counsel that the dispute appeared to be one that could be resolved, or substantially minimized, by greater communication and cooperation between counsel and the parties, and provided detailed suggestions for counsel to follow at a meet and confer session. I also explained that I would prepare a written opinion to more fully explain my concerns, suggestions and rulings, and instructed counsel how to respond if, after the conference, there continue to be disputes requiring court resolution. This memorandum provides that explanation.

One of the most important, but apparently least understood or followed, of the discovery rules is Fed. R. Civ. P. 26(g), enacted in 1983. The rule requires that every discovery disclosure, request, response or objection must be signed by at least one attorney of record, or the client, if unrepresented. Fed. R. Civ. P. 26(g)(1). The signature "certifies that to the best of the person's knowledge, information, and belief *formed after a reasonable inquiry*," the disclosure is complete and correct, and that the discovery request, response or objection is: (a) consistent with the rules of procedure and warranted by

existing law (or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law); (b) is not interposed for any improper purpose (such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation); and (c) is neither unreasonable nor 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). Fed. R. Civ. P. 26(g)(1)(A), (B)(i)-(iii) (emphasis added). If a lawyer or party makes a Rule 26(g) certification that violates the rule, without substantial justification, the court (on motion, or *sua sponte*) must impose an appropriate sanction, which may include an order to pay reasonable expenses and attorney's fees, caused by the violation. Fed. R. Civ. P. 26(g)(3).

The Advisory Committee's Notes to Rule 26(g) significantly flesh it out:

> Rule 26(g) imposes an affirmative duty to engage in pretrial discovery in a *responsible manner* that is consistent with the *spirit and purposes* of Rules 26 through 37. In addition, Rule 26(g) is *designed to curb discovery abuse* by explicitly encouraging the imposition of sanctions. The subdivision provides a *deterrent* to both *excessive discovery* and *evasion* by imposing a certification requirement that obliges each attorney to *stop and think about the legitimacy of a discovery request, a response thereto, or an objection*. . . .
>
> If primary responsibility for conducting discovery is to continue to rest with the litigants,

> they must be obliged to *act responsibly and avoid abuse*. With this in mind, Rule 26(g), which parallels the amendments to Rule 11, requires an attorney or unrepresented party to sign each discovery request, response, or objection. . . .
>
> Although the *certification duty requires the lawyer to pause and consider the reasonableness of his request, response, or objection*, it is not meant to discourage or restrict necessary and legitimate discovery. The rule simply requires that the attorney make a reasonable inquiry into *the factual basis* of his response, request, or objection.
>
> The duty to make a "reasonable inquiry" is satisfied if the investigation undertaken by the attorney and the conclusions drawn therefrom are reasonable under the circumstances. It is an objective standard similar to the one imposed by Rule 11. . . .
>
> . . . .
>
> Concern about discovery abuse has led to widespread recognition that there is a need for more aggressive judicial control and supervision. Sanctions to deter discovery abuse would be more effective if they were diligently applied "not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent."

Fed. R. Civ. P. 26(g) advisory committee's notes to the 1983 amendments (emphasis added) (citations omitted). Rule 26(g) and its commentary provide many important "take away points" that ought to, but unfortunately do not, regulate the way discovery is conducted. First, the rule is intended to impose an "affirmative duty" on counsel to behave responsibly during discovery, and to ensure that it is conducted in a way that is consistent "with the

spirit and purposes" of the discovery rules, which are contained in Rules 26 through 37. *Id.* It cannot seriously be disputed that compliance with the "spirit and purposes" of these discovery rules requires cooperation by counsel to identify and fulfill legitimate discovery needs, yet avoid seeking discovery the cost and burden of which is disproportionally large to what is at stake in the litigation. Counsel cannot "behave responsively" during discovery unless they do both, which requires cooperation rather than contrariety, communication rather than confrontation.

Second, the rule is intended to curb discovery abuse by requiring the court to impose sanctions if it is violated, absent "substantial justification," and those sanctions are intended to both penalize the noncompliant lawyer or unrepresented client, and to deter others from noncompliance. Fed. R. Civ. P. 26(g)(3). As the Advisory Committee's Notes state, "Because of the asserted reluctance to impose sanctions on attorneys who abuse the discovery rules, Rule 26(g) makes explicit the authority judges now have to impose appropriate sanctions and requires them to use it. This authority derives from Rule 37, 28 U.S.C. § 1927, and the court's inherent authority." Fed. R. Civ. P. 26(g) advisory committee's notes to the 1983 amendments (internal citations omitted).

Third, the rule aspires to eliminate one of the most prevalent of all discovery abuses: kneejerk discovery requests served without consideration of cost or burden to the responding party. Despite the requirements of the rule, however, the reality appears to be that with respect to certain discovery, principally interrogatories and document production requests, lawyers customarily serve requests that are far broader, more redundant and burdensome than necessary to obtain sufficient facts to enable them to resolve the case through motion, settlement or trial. The rationalization for this behavior is that the party propounding Rule 33 and 34 discovery does not know enough information to more narrowly tailor them, but this would not be so if lawyers approached discovery responsibly, as the rule mandates, and met and conferred before initiating discovery, and simply discussed what the amount in controversy is, and how much, what type, and in what sequence, discovery should be conducted so that its cost–to all parties–is proportional to what is at stake in the litigation. The requirement of discovery being proportional to what is at issue is clearly stated at Rule 26(g)(1)(B)(iii) (lawyer's signature on a discovery request certifies that it is "neither unreasonable nor 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"), as well as Rule 26(b)(2)(C)(i)-(iii) (court, on motion or on its own, must limit the scope of discovery if the discovery sought is unreasonably cumulative or duplicative, can be obtained from a more convenient source, could have been previously obtained by the party seeking the discovery or the burden or expense of the proposed discovery outweighs its likely benefit).

Similarly, Rule 26(g) also was enacted over twenty-five years ago to bring an end to the equally abusive practice of objecting to discovery requests reflexively–but not reflectively–and without a factual basis. The rule and its commentary are starkly clear: an objection to requested discovery may not be made until after a lawyer has "paused and consider[ed]" whether, based on a "reasonable inquiry," there is a "factual basis [for the] . . . objection." Fed. R. Civ. P. 26(g) advisory committee's notes to the 1983 amendments. Yet, as in this case, boilerplate objections that a request for discovery is "overboard and unduly burdensome, and not reasonably calculated to lead to the discovery of material admissible in evidence," Pls.' Mot. Compel Def. Mayflower 3, Req. # 2, persist despite a litany of decisions from courts, including this one, that such objections are improper unless based on particularized facts. *See, e.g.*, *A. Farber & Partners, Inc. v. Garber*, 234

F.R.D. 186, 188 (C.D. Cal. 2006); *Hall*, 231 F.R.D. at 470; *Wagner v. Dryvit Sys. Inc.*, 208 F.R.D. 606, 610 (D. Neb. 2001) (citing *Roesberg v. Johns-Manville Corp.*, 85 F.R.D. 292, 296-97 (E.D. Pa. 1980)); *Thompson v. HUD*, 199 F.R.D. 168, 173 (D. Md. 2001); *Marens v. Carrabba's Italian Grill, Inc.*, 196 F.R.D. 35, 38 (D. Md. 2000) (citing *Tucker v. Ohtsu Tire & Rubber Co.*, 191 F.R.D. 495, 498 (D. Md. 2000) (citations omitted); *Kelling v. Bridgestone/Firestone, Inc.*, 157 F.R.D. 496, 497 (D. Kan. 1994); *Eureka Fin. Corp. v. Hartford Accident & Indem. Co.*, 136 F.R.D. 179, 182-83 (E.D. Ca. 1991); *Willemijn Houdstermaatschaapij BV v. Apollo Computer, Inc.*, 707 F. Supp. 1429, 1439-40 (D. Del. 1989)); *Momah v. Albert Einstein Med. Ctr.*, 164 F.R.D. 412, 417 (E.D. Pa. 1996); *Obiajulu v. City of Rochester, Dept. of Law*, 166 F.R.D. 293, 295 (W.D.N.Y. 1996); *Harding v. Dana Transport, Inc.*, 914 F. Supp. 1084, 1102 (D.N.J. 1996).

It would be difficult to dispute the notion that the very act of making such boilerplate objections is *prima facie* evidence of a Rule 26(g) violation, because if the lawyer had paused, made a reasonable inquiry, and discovered facts that demonstrated the burdensomeness or excessive cost of the discovery request, he or she should have disclosed them in the objection, as both Rule 33 and 34 responses must state objections with particularity, on pain of waiver. Fed R. Civ. P. 33(b)(4) ("The grounds for

objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure."); *see also Beverly v. Depuy Orthopaedics, Inc.*, No. 3:07-CV-137 AS, 2008 WL 45357, at *2 (N.D. Ind. 2008) ("An underdeveloped argument, or argument not raised at all, is a waived argument."); *DL v. District of Columbia*, 251 F.R.D. 38, 43 (D.D.C. 2008) ("When faced with general objections, the applicability of which to specific document requests is not explained further, '[t]his Court will not raise objections for [the responding party],' but instead will 'overrule[] [the responding party's] objection[s] on those grounds.'") (quoting *Tequila Centinela, S.A. de C.V. v. Bacardi & Co., Ltd.*, 242 F.R.D. 1, 12 (D.D.C. 2007)); *Johnson v. Kraft Foods North America, Inc.*, 236 F.R.D. 535, 538 (D.C. Kan. 2006) ("The Court . . . holds that a general objection which objects to a discovery request 'to the extent' that it asks the responding party to provide certain categories of documents or information is tantamount to asserting no objection at all. In other words, such a general objection does not preserve the asserted challenge to production."); *Hall*, 231 F.R.D. at 473-74 (objections to Rule 34 document production requests must be stated with particularity or are waived); *Swackhammer v. Sprint Corp. PCS*, 225 F.R.D. 658, 660-61 (D. Kan. 2004) ("This Court has on several occasions

disapproved of the practice of asserting a general objection 'to the extent' it may apply to particular requests for discovery. This Court has characterized these types of objections as worthless for anything beyond delay of the discovery. Such objections are considered mere hypothetical or contingent possibilities, where the objecting party makes no meaningful effort to show the application of any such theoretical objection to any request for discovery. Thus, this Court has deemed such ostensible objections waived or [has] declined to consider them as objections.") (quoting *Sonnino v. Univ. of Kan. Hosp. Auth.*, 221 F.R.D. 661, 666-67 (D. Kan. 2004) (internal quotations and citations omitted)).

The failure to engage in discovery as required by Rule 26(g) is one reason why the cost of discovery is so widely criticized as being excessive–to the point of pricing litigants out of court. *See, e.g.*, Am. Coll. of Trial Lawyers & Inst. for the Advancement of the Am. Legal Sys., *Interim Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System* 3 (2008) ("Although the civil justice system is not broken, it is in serious need of repair. The survey shows that the system is not working; it takes too long and costs too much. Deserving cases are not brought because the cost of pursuing them

fails a rational cost-benefit test, while meritless cases, especially smaller cases, are being settled rather than being tried because it costs too much to litigate them."); Gregory P. Joseph, *Trial Balloon: Federal Litigation–Where Did It Go Off Track?*, Litig., Summer 2008, at 62 (observing that discovery costs, particularly related to ESI discovery, is partly responsible for making federal litigation "procedurally more complex, risky to prosecute, and very expensive," causing litigants to avoid litigating in federal court); The Sedona Conference, *The Sedona Conference Cooperation Proclamation* 1 (2008) [hereinafter *Cooperation Proclamation*], *available at* http://www.thesedonaconference.org/content/miscFiles /cooperation_Proclamation_Press.pdf ("The costs associated with adversarial conduct in pre-trial discovery have become a serious burden to the American judicial system. This burden rises significantly in discovery of electronically stored information ("ESI"). In addition to rising monetary costs, courts have seen escalating motion practice, overreaching, obstruction, and extensive, but unproductive discovery disputes–in some cases precluding adjudication on the merits altogether . . . ."); Kent D. Syverud, *ADR and the Decline of the American Civil Jury*, 44 UCLA L. Rev. 1935, 1942 (1997) ("Our civil process before and during trial, in state and federal courts, is a masterpiece of

complexity that dazzles in its details–in discovery, in the use of experts, in the preparation and presentation of evidence, in the selection of the factfinder and the choreography of the trial. But few litigants or courts can afford it.").

Comparing these recent lamentations about the costs of civil litigation to those voiced eighteen years ago when the Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471 *et seq.*, was passed, and comprehensive changes to the discovery rules enacted, reflects that little has changed, despite concerted efforts to do so:

> Perhaps the greatest driving force in litigation today is discovery. Discovery abuse is a principal cause of high litigation transaction costs. Indeed, in far too many cases, economics–and not the merits–govern discovery decisions. Litigants of moderate means are often deterred through discovery from vindicating claims or defenses, and the litigation process all too often becomes a war of attrition for all parties. . . .
>
> . . . .
>
> Excessive and abusive discovery has been recognized as a serious problem for some time. More than 10 years ago, a study of Federal trial judges in two district courts found that they perceived "unnecessary, expensive, overburdening discovery as a substantial threat to the efficient and just functioning of the federal trial system for civil litigation." In 1980, a study of lawyers in Chicago found that 49 percent of those practicing in Federal courts believe that "overdiscovery" is a major abuse of the discovery process.

S. Rep. No. 101-650, at 20-21, *as reprinted in* 1990 U.S.C.C.A.N. 6823-24 (internal citations omitted).

Rule 26(g) charges those responsible for the success or failure of pretrial discovery–the trial judge and the lawyers for the adverse parties–with approaching the process properly: discovery must be initiated and responded to responsibly, in accordance with the letter and spirit of the discovery rules, to achieve a proper purpose (i.e., not to harass, unnecessarily delay, or impose needless expense), and be proportional to what is at issue in the litigation, and if it is not, the judge is expected to impose appropriate sanctions to punish and deter.

The apparent ineffectiveness of Rule 26(g) in changing the way discovery is in fact practiced often is excused by arguing that the cooperation that judges expect during discovery[3]

[3] Courts repeatedly have noted the need for attorneys to work cooperatively to conduct discovery, and sanctioned lawyers and parties for failing to do so. *See, e.g.*, *Board of Regents of the Univ. of Nebraska v. BASF Corp*., 2007 WL 3342423, at *5 (D. Neb. Nov. 5, 2007) ("The overriding theme of recent amendments to the discovery rules has been open and forthright sharing of information by all parties to a case with the aim of expediting case progress, minimizing burden and expense, and removing contentiousness as much as practicable."); *Network Computing Servs. Corp. v. CISCO Sys., Inc*., 223 F.R.D. 392 (D.S.C. 2004). In *Network Computing Servs.*, the court discussed problems caused by failures of counsel and parties to approach discovery more cooperatively and professionally, stating, "The discovery beast has yet to be tamed," 223 F.R.D. at 395 (quoting Patrick E. Higginbotham, *So Why Do We Call Them Trial Courts?*, 55 SMU L. Rev. 1405, 1417 (2002)), and taking note of United States District Judge Wayne Alley's caustic observation that "[i]f there is a hell to which disputatious, uncivil, vituperative lawyers go, let it be one in which the damned are eternally locked in discovery disputes with other lawyers of equally repugnant attributes." *Id.* (quoting *Krueger v. Pelican Prod. Corp.*, C/A No. 87-2385-A, slip op. (W.D. Okla. Feb. 24, 1989)). The district court judge affirmed the recommendation of a magistrate judge that sanctions for discovery abuse were appropriate, and instead of imposing a monetary sanction, ordered that the jury would be

is unrealistic because it is at odds with the demands of the adversary system, within which the discovery process operates. But this is just not so. The adversary system has been aptly summarized as follows:

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informed of the misconduct. *Id.* at 395-401. *See also, e.g.*, *Buss v. Western Airlines, Inc*. 738 F. 2d 1053, 1053-54 (9th Cir. 1984) ("The voluminous file in this case reveals that a vast amount of lawyer time on both sides was expended in largely unnecessary paper shuffling as the parties battled over discovery and preliminary matters. . . . It is not the purpose of this decision to assess fault. The trial judge, however, was not at fault. A judge with a caseload to manage must depend upon counsel meeting each other and the court halfway in moving a case toward trial."); *Flanagan v. Benicia Unified Sch. Dist.*, 2008 WL 2073952, at *10 (E.D. Ca. 2008) ("The abusiveness of plaintiff's discovery responses indicate a lack of cooperative spirit. . . . [P]laintiff's wilful disregard of the Federal Rules, and her lack of communication and cooperation with defense counsel in regard to all discovery, undermine the judicial process plaintiff herself has invoked."); *Marion v. State Farm Fire and Casualty Co.*, 2008 WL 723976, at *3-4 (S.D. Miss. Mar. 17, 2008) ("[T]he gravest 'error' committed by the Magistrate [Judge] was thinking that 'the parties [could] meet and confer to discuss any outstanding discovery requests,' because after this 'meet and confer' it was 'clear that the parties had done little to resolve their perceived differences on document production.'. . . This Court demands the mutual cooperation of the parties. It hopes that some agreement can be reached . . . . Neither [the Magistrate Judge] nor this Court will hesitate to impose sanctions on any one–party or counsel or both–who engages in any conduct that causes unnecessary delay or needless increase in the costs of litigation." (citing Fed. R. Civ. P. 26(g))); *Malot v. Dorado Beach Cottages Assocs.*, 478 F. 3d 40, 45 (1st Cir. 2007) (sustaining certain sanctions imposed by district court for discovery violations and noting with disapproval the lack of cooperation and responsiveness of defendants to plaintiff's attempts to comply with the discovery schedule); *In re Spoonemore*, 370 B.R. 833, 844 (Bkrtcy. D. Kan. 2007) ("Discovery should not be a sporting contest or a test of wills, particularly in a bankruptcy case where the parties' resources are limited and the dollar value of the stakes is often low. When a party and its counsel are as intransigent and uncooperative in discovery as [the parties] have been in this matter, the Court has no choice but to impose sanctions that, hopefully, emphasize that the conduct sanctioned is both unprofessional and unacceptable."); *Sweat v. Peabody Coal Co.*, 94 F.3d 301, 306 (7th Cir. 1996) ("This Court cannot determine where the fault in this latest breakdown of attempted discovery lies. The Court is therefore assuming that both attorneys have failed in this regard. This Court is not happy with the progress, or should say lack of progress, relating to getting this case ready for trial. It is apparent that the attorneys involved in this case do not like each other, do not get along, and will not cooperate in the discovery process. The people who suffer when this happens are the parties.").

> The central precept of the adversary process is that out of the sharp clash of proofs presented by adversaries in a highly structured forensic setting is most likely to come the information upon which a neutral and passive decision maker can base the resolution of a litigated dispute acceptable to both the parties and society. This formulation is advantageous not only because it expresses the overarching adversarial concept, but also because it identifies the method to be utilized in adjudication (the sharp clash of proofs in a highly structured setting), the actors essential to the process (two adversaries and a decision maker), the nature of their functions (presentation of proofs and adjudication of disputes, respectively), and the goal of the entire endeavor (the resolution of disputes in a manner acceptable to the parties and to society).

Stephen Landsman, A.B.A. Section of Litigation, *Readings on Adversarial Justice: The American Approach to Adjudication* 2 (1988). However central the adversary system is to our way of formal dispute resolution, there is nothing inherent in it that precludes cooperation between the parties and their attorneys during the litigation process to achieve orderly and cost effective discovery of the competing facts on which the system depends. In fact, no less a proponent of the adversary system than Professor Lon L. Fuller[4] observed:

> Thus, partisan advocacy is a form of public service so long as it aids the process of adjudication; it ceases to be when it hinders that process, when it misleads, distorts and obfuscates,

[4]Professor Fuller, 1902-1978, was a celebrated professor at Harvard Law School who wrote extensively on jurisprudence, including the importance of the adversary system. His publications include the influential article *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353 (1978).

> when it renders the task of the deciding tribunal not easier, but more difficult.
>
> . . . .
>
> The lawyer's highest loyalty is at the same time the most tangible. It is loyalty that runs, not to persons, but to procedures and institutions. The lawyer's role imposes on him a trusteeship for the integrity of those fundamental processes of government and self-government upon which the successful functioning of our society depends.
>
> . . . A lawyer recreant to his responsibilities can so disrupt the hearing of a cause as to undermine those rational foundations without which an adversary proceeding loses its meaning and its justification. Everywhere democratic and constitutional government is tragically dependant on voluntary and understanding co-operation in the maintenance of its fundamental processes and forms.
>
> It is the lawyer's duty to preserve and advance this indispensable co-operation by keeping alive the willingness to engage in it and by imparting the understanding necessary to give it direction and effectiveness. . . .
>
> . . . It is chiefly for the lawyer that the term "due process" takes on tangible meaning, for whom it indicates what is allowable and what is not, who realizes what a ruinous cost is incurred when its demands are disregarded. For the lawyer the insidious dangers contained in the notion that "the end justifies the means" is not a matter of abstract philosophic conviction, but of direct professional experience.

Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1162, 1216 (1958). A lawyer who seeks excessive discovery given what is at

stake in the litigation, or who makes boilerplate objections to discovery requests without particularizing their basis, or who is evasive or incomplete in responding to discovery, or pursues discovery in order to make the cost for his or her adversary so great that the case settles to avoid the transaction costs, or who delays the completion of discovery to prolong the litigation in order to achieve a tactical advantage, or who engages in any of the myriad forms of discovery abuse that are so commonplace is, as Professor Fuller observes, hindering the adjudication process, and making the task of the "deciding tribunal not easier, but more difficult," and violating his or her duty of loyalty to the "procedures and institutions" the adversary system is intended to serve. Thus, rules of procedure,[5] ethics[6] and

[5] *See, e.g.*, Fed. R. Civ. P. 26(f) (requiring parties and their counsel to confer to "consider the nature and basis of their claims and defenses," the possibility of settlement and to develop and agree on a proposed discovery plan to submit to the court); Fed. R. Civ. P. 26(g) (requiring that discovery not be initiated, responded to, or objections made unless there first has been a reasonable inquiry, and the discovery, response or objection is founded in law, not interposed for an improper purpose, and neither unreasonable nor unduly burdensome); Fed. R. Civ. P. 26(c)(1), 37(a)(1) (prohibiting the filing of discovery motions without first certifying that the moving party has conferred in good faith with the adverse party in an effort to resolve the dispute without court action).

[6] *See, e.g.*, Model Rules of Prof'l Conduct R. 3.4(d) (2007) ("[A lawyer shall not,] in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party[.]"); Model Rules of Prof'l Conduct R. 3.4 cmt. [1] (2007) ("The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, *obstructive tactics in discovery procedure*, and the like.") (emphasis added). *See also* Restatement (Third) of the Law Governing Lawyers: Frivolous Advocacy § 110(3) (2000) ("A lawyer may not make a frivolous discovery request, fail to make a reasonably diligent effort to comply with a proper discovery request of another party, or intentionally fail otherwise to comply with applicable

even statutes[7] make clear that there are limits to how the adversary system may operate during discovery.

Although judges, scholars, commentators and lawyers themselves long have recognized the problems associated with abusive discovery, what has been missing is a thoughtful means to engage all the stakeholders in the litigation process–lawyers, judges and the public at large–and provide them with the encouragement, means and incentive to approach discovery in a different way. The Sedona Conference, a non-profit, educational research institute[8] best known for its *Best Practices Recommendations and Principles for Addressing Electronic Document Production*,[9] recently issued a *Cooperation Proclamation* to announce the launching of "a national drive to promote open and

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procedural requirements concerning discovery."); Restatement (Third) of the Law Governing Lawyers ch. 7, topic 2, introductory n. (2000) ("Advocates are guided primarily by the goal of advancing their individual clients' interests. They are expected to marshal evidence and legal arguments in support of the positions of their respective clients and to cross-examine and otherwise test the evidence and positions of opposing parties, without personal responsibility for the outcome of the proceeding. However, there are limitations on an advocate's forensic freedom. In addition to the general requirement of complying with legal requirements and rulings of tribunals, a lawyer is subject to the constraints described in this Topic concerning frivolous litigation [which includes prohibitions against frivolous advocacy and conduct during discovery].") (internal citations omitted).

[7] *See, e.g.*, 28 U.S.C. § 1927 (2008) ("Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.").

[8] The Sedona Conference, http://www.thesedonaconference.org/content/faq (last visited Oct. 8, 2008).

[9] The Sedona Conference, *Best Practices Recommendations and Principles for Addressing Electronic Document Production* (rev. 2004), *available at* http://www.thesedonaconference.org/content/miscFiles/SedonaPrinciples200401.pdf.

forthright information sharing, dialogue (internal and external), training, and the development of practical tools to facilitate cooperative, collaborative, transparent discovery." *Cooperation Proclamation*, *supra*, at 1. To accomplish this laudable goal, the Sedona Conference proposes to develop "a detailed understanding and full articulation of the issues and changes needed to obtain cooperative fact-finding," as well as "[d]eveloping and distributing practical 'toolkits' to train and support lawyers, judges, other professionals, and students in techniques of discovery cooperation, collaboration, and transparency." *Id.* at 3. If these goals are achieved, the benefits will be profound. In the meantime, however, the present dispute evidences the need for clearer guidance how to comply with the requirements of Rules 26(b)(2)(C) and 26(g) in order to ensure that the Plaintiffs obtain appropriate discovery to support their claims, and the Defendants are not unduly burdened by discovery demands that are disproportionate to the issues in this case.

As previously noted, Plaintiffs served Rule 33 interrogatories and Rule 34 document production requests on each of the Defendants. Initially, there was communication between counsel, as well as some degree of cooperation, as Plaintiffs agreed to give the Defendants an extension of time to answer this discovery. When they did answer, however, Defendants Mayflower,

Lunil and Mehta (all represented by the same counsel) objected to a number of Plaintiffs' document production requests by making boilerplate, non-particularized objections.[10] Defendant Argo also relied on this practice when objecting to one of the Plaintiffs' interrogatories.[11] Rule 33(b)(4) requires that "the grounds for objecting to an interrogatory must be stated with specificity" and cautions that "any ground not stated in a timely

[10]*See, e.g.*, Pls.' Mot. Compel Def. Mayflower 2-8, Reqs. ## 1-7, 15-17; Pls.' Mot. Compel Def. Lunil 2-7, Reqs. ## 1-4, 12, 17, 19; Pls.' Mot. Compel Def. Mehta 2, 4, Reqs. ## 1-2. Two examples of the Plaintiffs' requests for production of documents, and Defendant Mayflower's responses, are as follows:

> DOCUMENT REQUESTS
>
> 1. The contract or contracts between each of the Mayflower entities and Lunil Services, Agency, L.L.C. ("Lunil") reflecting Lunil's agreement to provide plant production workers for the Mayflower laundry for all the years in which the agreement or agreements between the Mayflower entities and Lunil were in effect.
>
> **RESPONSE:** Objection. This request is overly broad and unduly burdensome, and is not reasonably calculated to lead to the discovery of material admissible in evidence at the trial of this matter in that it contains no time limitation whatsoever, and clearly seeks documents outside of the limitations period governing this action. Subject to and without waiving this objection, see attached agreement between Lunil Services Agency, LLC and Mayflower Healthcare Textile Services, LLC.
>
> 4. Any and all correspondence, e-mail, and/or notes of oral conversations, and any other recordings, including documentation of payments that support the formation of a contract between Mayflower and Argo whereby Agro [sic] agreed to provide plant production workers for the Mayflower laundry plant, and any and all records that reflect the terms of that agreement.
>
> **RESPONSE:** Subject to and without waiving this objection, any responsive non-privileged documents, in [sic] any exist, ill [sic] be produced at a time mutually acceptable to the parties.

Pls.' Mot. Compel Def. Mayflower 2-4, Reqs. ## 1, 4.

[11]Pls.' Mot. Compel Def. Argo 10, Interrog. # 3.

objection is waived, unless the court, for good cause, excuses the failure"; therefore, the boilerplate objection to Plaintiffs' interrogatory waived any legitimate objection Defendant Argo may have had. *Jayne H. Lee, Inc.,* 173 F.R.D. at 655. The same is true for the boilerplate objections to Plaintiffs' document production requests. *Hall*, 231 F.R.D. at 273-74. The failure to particularize these objections as required leads to one of two conclusions: either the Defendants lacked a factual basis to make the objections that they did, which would violate Rule 26(g), or they complied with Rule 26(g), made a reasonable inquiry before answering and discovered facts that would support a legitimate objection, but they were waived for failure to specify them as required. Neither alternative helps the Defendants' position, and either would justify a ruling requiring that the Defendants provide the requested discovery regardless of cost or burden, because proper grounds for objecting have not been established.

However, Rule 26(b)(2)(C) imposes an obligation on the Court, *sua sponte*, to:

> [L]imit the frequency or extent of discovery otherwise allowed by [the] rules . . . if it determines that:
>
> > (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

> (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
>
> (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

Fed. R. Civ. P. 26(b)(2)(C)(i)-(iii). I noted during the hearing that I had concerns that the discovery sought by the Plaintiffs might be excessive or overly burdensome, given the nature of this FLSA and wage and hour case, the few number of named Plaintiffs and the relatively modest amounts of wages claimed for each. Because the record before me lacked facts to enable me to make a determination of overbreadth or burden under Rule 26(b)(2)(C), I ordered counsel to meet and confer in good faith and do the following. First, I asked Plaintiffs and Defendants each to estimate the likely range of provable damages that foreseeably could be awarded if Plaintiffs prevail at trial. In doing so, I suggested that the Plaintiffs assume for purposes of this analysis that their pending motion to certify a FLSA collective action would be granted, because doing so would allow the parties to gauge the "worst case" outcome Defendants could face. I then ordered that counsel for Plaintiffs and Defendants compare these estimates and attempt to identify a foreseeable range of damages,

from zero if Plaintiffs do not prevail, to the largest award they likely could prove if they succeed. I also asked Plaintiffs' counsel to estimate their attorneys' fees. While admittedly a rough estimate, this range is useful for determining what the "amount in controversy" is in the case, and what is "at stake" for purposes of Rule 26(b)(2)(C)'s proportionality analysis. The goal is to attempt to quantify a workable "discovery budget" that is proportional to what is at issue in the case.

Second, I ordered Plaintiffs' counsel and Defendants' counsel to discuss the amount and type of discovery already provided, and then discuss the additional discovery still sought by Plaintiffs, in order to evaluate the Rule 26(b)(2)(C) factors, to determine whether Plaintiffs' legitimate additional discovery needs could be fulfilled from non-duplicative, more convenient, less burdensome, or less expensive sources than those currently sought by the Plaintiffs. I further instructed Defendants' counsel that during this portion of the discussion, the burden was on the Defendants to provide a particularized factual basis to support any claims of excessive burden or expense.

I then advised counsel that in their discussion they should attempt to reach an agreement, in full or at least partially, about what additional discovery (and from what sources) should be

provided by Defendants to Plaintiffs. In doing so, I suggested that they consider "phased discovery," so that the most promising, but least burdensome or expensive sources of information could be produced initially, which would enable Plaintiffs to reevaluate their needs depending on the information already provided.

Finally, I advised counsel that when they had completed their discussion, they were to provide me with a status report identifying any unresolved issues, and if there were any, I gave them a format to use to present them to me in a fashion that would enable me to rule on them expeditiously.

It is apparent that the process outlined above requires that counsel cooperate and communicate, and I note that had these steps been taken by counsel at the start of discovery, most, if not all, of the disputes could have been resolved without involving the court. It also is apparent that there is nothing at all about the cooperation needed to evaluate the discovery outlined above that requires the parties to abandon meritorious arguments they may have, or even to commit to resolving all disagreements on their own. Further, it is in the interests of each of the parties to engage in this process cooperatively. For the Defendants, doing so will almost certainly result in having to produce less discovery, at lower cost. For the Plaintiffs,

cooperation will almost certainly result in getting helpful information more quickly, and both Plaintiffs and Defendants are better off if they can avoid the costs associated with the voluminous filings submitted to the court in connection with this dispute. Finally, it is obvious that if undertaken in the spirit required by the discovery rules, particularly Rules 26(b)(2)(C) and 26(g), the adversary system will be fully engaged, as counsel will be able to advocate their clients' positions as relevant to the factors the rules establish, and if unable to reach a full agreement, will be able to bring their dispute back to the court for a prompt resolution. In fact, the cooperation that is necessary for this process to take place enhances the legitimate goals of the adversary system, by facilitating discovery of the facts needed to support the claims and defenses that have been raised, at a lesser cost, and expediting the time when the case may be resolved on its merits, or settled. This clearly is advantageous to both Plaintiffs and Defendants.

October 15, 2008

/S/

Paul W. Grimm

Chief United States Magistrate Judge

—

Mobile to the Mainstream

17 - *Wednesday* - *Oct 2018*

Posted by craigball in Computer Forensics, E-Discovery, General Technology Posts, Uncategorized

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Once you've preserved the contents of a mobile device, how do you extract responsive content in forms that are searchable and amenable to review? Most information items on mobile devices aren't "documents" that can be printed to a static format for review. Instead, much mobile content is fielded data that must retain a measure of structural integrity for intelligibility. This article looks at simple, low-cost approaches to getting relevant and responsive mobile data into a standard e-discovery review workflow, and offers a Mobile Evidence Scorecard designed to start a dialogue leading to a consensus about what forms of mobile content should be routinely collected and reviewed in e-discovery, without the need for digital forensic examination.

In the last decade, the iPhone and other smart mobile devices have tethered us to apps and networks in powerful, unprecedented ways. Daily, the average user spends four hours on her phone spread over seventy-six sessions. For most users, smartphones are the first thing picked up in the morning and the last set down at night. Even when we aren't looking at them, smartphones receive communications, push and pull data, record our activities and broadcast our locations. Two-thirds of e-mail communications are sent and received using phones.

Over the last fifteen years, litigants have made strides in establishing defensible, repeatable procedures for preserving, collecting, processing, culling, reviewing and producing legacy paper documents, e-mail and productivity files residing on personal computers and servers, to the point that these functions have been brought in-house at many corporations and a few law firms. By contrast, few corporations and firms have acted to systemize the preservation and production of data from smartphones. Despite being powerful, capacious computers, most lawyers and litigants treat mobile devices as if they only made phone calls. When addressed at all, smartphones are relegated to forensic examination by an expert rather than approached as a routine, repeatable process managed by e-discovery teams. Smartphones aren't "special" and, by virtue of enhanced security features on phones, there's little responsive content that can be collected through forensics that cannot also be gotten by e-discovery personnel. Smartphones are everyday tools that must be made a part of everyday, mainstream e-discovery.

Collection from computers could be routinized because there was consensus as to the types of information that should ordinarily be preserved, collected and reviewed. These included, *e.g.*, e-mail messages, photos, videos, and productivity formats like Word documents, Excel spreadsheets, PowerPoint presentations and PDFs. Contents of databases tended to be addressed on an *ad hoc* basis through negotiation between opposing parties.

No consensus exists as to what data must be routinely preserved and produced from mobile sources. Partly this stems from litigants' recalcitrance towards mobile evidence, and partly it's a consequence of the "special" forensic treatment accorded mobile sources. A forensic extraction seeks to recover everything: active data, latent data and deleted artifacts. "Get all you can get" is the *de facto* forensic standard, but often bears no proportionate relationship to the issues in the case. Forensic examiners endeavor to "get it all" because that's what we're trained to do, and what forensic tools are designed to do. Yet, "getting it all"—irrespective of relevance or materiality—is NOT what litigants or lawyers are obliged to do in e-discovery.

In the absence of circumstance prompting a need for digital forensics, e-discovery centers on active data, not latent artifacts. Forensically-sound techniques are routinely bought to bear on preservation; but, it's the rare matter that calls for forensic analyses of all sources. The cost would be unbearable were forensic analysis the norm for all matters.

So, what's our takeaway for smartphones? I'd argue that we must get the readily-accessible evidence on phones when it's relevant and responsive, but we must also strike a balance between what may be obtained through forensics versus what can be obtained using less-exacting but *reasonable and proportionate* methodologies. That is, not all we might want, but what's readily available, relevant and non-privileged considering the needs of the case.

Applying this principle, let's look at the data routinely found on a smartphone (and its backup) and consider potential relevance and burden issues. Note that all the extractions and exports I'm about to describe were accomplished with an easy−to−use, dirt cheap tool that runs on both Windows AND Mac−−just one of several such inexpensive tools in the marketplace:

Files: Like a personal computer, phones hold word processed documents, spreadsheets, presentations and other files routinely responsive in e-discovery. Some of these items may be duplicative of other sources, but some may be unique to the phone. The burden of collecting files from mobile sources is not fundamentally different than collection from desktops, laptops, servers and cloud sources; so, unless it can be shown that documents on phones are merely duplicates of material collected elsewhere, there would seem to be no basis to eschew collection of files from mobile sources when potentially relevant.

Photos and Videos: Photographs and videos are some of the easiest items to collect from mobile sources, and phones have become the richest sources of photographic evidence. A phone may hold only a thumbnail-sized version of photos if the user, seeking to save space on the phone, configured the device to store photos in the cloud for download on demand. In that case, full resolution photos must either be downloaded to the phone before backup (if enough local storage is available) or

independently collected from cloud storage. As iPhones now store photos in a High Efficiency Image File Format (with the file extension HEIC), parties collecting photos must weigh whether to collect in HEIC or convert to images JPEGs. Conversion entails loss of functionality for so-called "live" storing image sequences; but, many tools do not yet support the HEIC format.

Music and Ringtones: I've handled only two matters where a custodian's music collection was relevant to the issues in the case, and both were forensic investigations. Generally, music and ringtones won't be collected in e-discovery apart from the rare case where they have some unique relevance to the dispute. The burden to collect is small; but, the volume may be large, and music files are often rendered unusable by encryption.

Books: Like music, commercially-published books are rarely candidates for collection in discovery. Conceivably, references sources used by a key custodian and stored on the custodian's mobile device might be relevant, but that's not likely to occur with such frequency as to regard books as routine fodder for collection. Like music, books may be rendered unusable by encryption for copyright protection.

Messages: Messaging has eclipsed e-mail as the most common form of personal and business communication. Double-digit growth in messaging volume mirrors double-digit declines in e-mail usage. ***More than any other form of mobile evidence, messaging must become a source routinely scrutinized in e-discovery.*** The default message retention setting for the native messaging app on iPhones is to keep messages "forever;" so, it's common to encounter many thousands of messages and dozens or hundreds of message threads on each device.

Messages are threaded according to the participants in the thread; consequently, you may have multiple threads including the same person in different groups of recipients as well as separate threads for the same person communicating from different devices or under different aliases (that is, by phone number or by contact name or nickname). The threading issues don't complicate collection, but they make review challenging. E-discovery veterans may note that the same challenges existed with e-mail and were solved once tools were purpose-built to deal with e-mail in discovery. Demand drove innovation for e-mail in ways that have yet to emerge for messaging.

There is little burden to collect threaded messaging stored on mobile devices, and it's trivial to export messaging in delimited formats like CSV files that can be viewed as spreadsheets. Attachments to messages can also be exported with ease, although the tools to do so may not neatly pair the attachment with its transmitting message and emoji may render as cryptic characters unless you change the encoding to Unicode UTF-8 when loading the file. It's also easy to export the threads as a text or PDF file, though so doing will severely limit the utility of the data in terms of reordering the contents of columns for sender, date, etc. Delimited formats are preferable unless the reviewer cannot use a spreadsheet or intends to (*shudder*) print the messages out. All forms will facilitate text search when ingested by an e-discovery review tool, unless the tool requires load files be generated to support even rudimentary text searches.

That last point underscores why messaging can be so simple to collect yet daunting to review*: too many review tools have failed to keep pace with important sources of electronic evidence* (like messaging or collaboration tools like Slack). It's not a preservation or collection problem. It's not even a processing problem. *All these are cheap and easy tasks.* The problem lies with culling and review.

The other big challenge to messaging is the variety of messaging channels in the marketplace. Though most people message from the native messaging app on their phones, many use proprietary and cross-platform apps like WhatsApp, Facebook Messenger, WeChat or Skype. Even Words with Friends supports texting between players!

Some of the low-cost apps capable of exporting messaging don't support specialized messaging apps as capably as they support native messaging capabilities or may not support them at all. These shortcomings doesn't auger for continuing to ignore messaging in discovery; however, it does require that expectations be calibrated to the limitations of the tools at your disposal and, crucially, to the reasonable expectations of the Court and opposing parties. The inability to get all the messages that may exist isn't reason to collect none but may require the use of more sophisticated tools and expert assistance to achieve quality and completeness.

Phone Call History: It's just a click or two to export a delimited file of an iPhone's call history, including contacts/phone numbers, call times, call directions (incoming/outgoing) and call durations. It's considerably less burdensome than it was to pull a paper phone call detail from a file, back when phone companies routinely supplied call details. It's far easier than logging into a cell provider's website and downloading a call history. Yet in e-discovery practice, phone call histories were only sought and produced when the call record was pertinent to a claim or defense in the cause; they weren't routinely sought simply because the information existed. Accordingly, mobile phone call history records aren't likely to be scrutinized absent a specific request and a plausible nexus between the data and the issues.

Voice Mail: Voice mail can be easily exported as a delimited CSV file showing time of call, duration, caller, number and, in some instances, a transcript of the message. The audio files for each message can also be exported in the .amr audio format, playable via QuickTime or iTunes. Unfortunately, the CSV file doesn't hyperlink to the audio files, making review a tedious process. Comparing mobile voicemail to its e-discovery antecedents, it's considerably easier to collect mobile voicemail, but it's just as challenging to review absent costly processing for message transcription or phonemic search.

Browser History and Bookmarks: Exporting browser history and bookmarks is far simpler for a mobile device as the task usually required expert assistance to collect from a personal computer but can be achieved with a few clicks from a phone backup. But, even if the data doesn't require expert intervention, is it likely to be relevant in enough matters to require routine collection? The jury is out on that, but the better approach is probably to require a specific request before routinely collecting and reviewing browser histories.

Calendar: Calendar entries for any selected interval can be exported to an iCal or CSV file format. If paper or Outlook calendars would have been reviewed in the past, then this data is easier to collect and ingest than processing a PST or photocopying years of paper calendars. The mobile calendar data is also much easier to redact.

Contacts: Another case- and custodian-specific determination as to collection and processing. All contacts or just selected contacts can be exported as a CSV file or as discrete VCards. Rudimentary text filtering before export is feasible, such as by including only contacts that include a relevant area- or zip code.

Notes: On iPhones, Notes is a no-frills word processing application akin to Windows Notepad. Some use it extensively; some not at all; but whether it holds user-generated documents relevant to the case should be routinely assessed. Single notes documents can be exported to PDF. Selected items or all Notes documents can be exported as discrete plain text files for each document, files named by date, time and first eight words of the Notes entry.

Voice Memos: As the name implies, the built-in Voice Memos app lets users record any audio to the iPhone. These can be exported, singly or collectively, as .M4A audio files and the exported files will retain the names of the source recordings. Like Voice Mail, Voice Memos are challenging to review without transcription or processing the audio for phonemic search; otherwise, there's no clear reason to distinguish a custodian's potentially responsive voice memos from memos made with Notes or other word processor in terms of preservation and collection.

Apps: Evidence that can be exported from individual apps varies as widely as the apps themselves. Although the data collected from apps comprise the customary JSON, PLIST and SQLITE files familiar to forensic examiners, apps also yield photos and documents in familiar productivity formats; the same files customarily collected were found on a user's laptop, desktop or network share. Any file can be exported easily; but, it's a manual process unaided by search or filtering features. As such, parsing all apps in this manner approaches the burden of a forensic examination without the benefit of an examiner's expertise. If a handful of apps are known to hold responsive files in intelligible formats, it's feasible and cost-effective to export potentially-responsive files one-by-one; else, it's not a scalable workflow.

File System: Though it's feasible to export most of the thousands of data and configuration files that make up the phone's file system, little of that data would be intelligible to counsel without further processing, expert assistance and, sometimes, decryption of contents. As such, file system artifacts are probably best left to forensic investigations and won't be routinely collected and reviewed as part of routine e-discovery.

Geolocation Data: Geolocation data is relevant in many cases, even dispositive in some. Geolocation data is one of those peculiar sources of powerfully probative evidence (like e-mail stored on iPhones) that is readily accessible to a user via a few screen taps but enormously difficult to collect and review efficiently. By U.S. Federal law, any cell phone capable of making or receiving calls must broadcast its

location in order to support 911 emergency response services. By default, an iPhone closely tracks a user's movements for months, recording locations visited and the times and durations of visits in its Significant Locations database. The latest version even records the length of the drive prior to arrival.

Any iPhone user can readily access their geolocation history via *Settings>Privacy>Location Services>System Services>Significant Locations*. It's trivial. But, the only way to collect this data without jailbreaking the phone and using specialized forensics software is to grab screenshots of the Significant Locations screens. That's because Apple protects this data and won't allow it to be exported. It's not backed up nor is it stored in iCloud. It's not difficult to acquire geolocation data by screenshots; it's just tedious, and data acquired by screenshots won't be text searchable or capable of being exported to mapping tools that would enhance its utility. To accomplish that, you need a digital forensics expert to acquire the recorded coordinates in a standard file format suited to geospatial data (*e.g.*, Keyhole Markup or JSON files).

The Mobile Evidence Scorecard

The information just shared are my opinions; however, they're based on experience and testing for each form of evidence listed. In my latest testing, I used a $50.00 tool called iMazing (www.imazing.com) that runs on both Windows and Mac machines. I like iMazing for these tasks, but there are other low-cost tools that perform admirably.

In an effort to distill these observations into a lay roadmap for collection and review of mobile content in e-discovery, I prepared the Mobile Evidence Scorecard. In it, I assess the burdens attendant to collection and review and the potential relevance of each source based upon existing standards in e-discovery and my years as a trial lawyer, e-discovery special master and forensic examiner. I invite different views of the criteria I've employed and conclusions reached, asking only that the rationale for a different conclusion be shared, too. Please share better, cheaper and faster ways.

Mobile Evidence Burden and Relevance Scorecard				
Mobile Data	Ease of Collection	Ease of Review	Potential Relevance	Routinely Collect?
 Files	Easy	Easy	Frequent	Yes
 Photos	Easy	Easy	Frequent	Yes
 Videos	Easy	Moderate	Frequent	Yes

Music	Moderate	Difficult	Rare	No
Ringtones	Easy	Moderate	Rare	No
Books	Easy	Moderate	Rare	No
Messages	Easy	Moderate	Frequent	Yes
Phone	Easy	Easy	Case Specific	Yes
Browser	Easy	Moderate	Rare	No
Calendar	Easy	Easy	Case Specific	Yes
Contacts	Easy	Moderate	Rare	No
Notes	Easy	Easy	Frequent	Yes
Voice Memos	Easy	Difficult	Frequent	Maybe
Apps	Moderate	Difficult	Rare	No

 File System	Difficult	Difficult	Rare	No
 Geolocation	Difficult	Moderate	Case Specific	Maybe

My goal is to foster consensus as to what data must be routinely preserved and produced from mobile sources. Messaging (be it called SMS, MMS, texting or instant messaging) must be every bit as mainstream and obligatory as e-mail. Mobile photos and video must be considered in appropriate cases for both the probative value of the images and that of the embedded EXIF time and geolocation data.

We can't keep our heads in the sand on mobile simply because we've grown complacent with e-mail and documents. Evidence isn't documents anymore; it's data, and much of that evidence resides in those tiny, powerful computers in our pockets and purses. Notes content should be given a measure of the same scrutiny we devote to Word documents. Call logs, voice mail and calendar entries should all be collected and processed when they may bear on the issues. Relevant files are no less relevant because they've been stored in a pocket instead of on a server. If such evidence can be made ready for review with little skill and a fifty dollar tool, where is the burden?

We've only to look around to see the changes wrought by mobile devices and the compelling reasons to move mobile to the mainstream of e-discovery. But honestly, who looks around anymore? We're all so busy staring at our phones.

thoughts on "Mobile to the Mainstream"

1. *said:* Doug Austin

   October 17, 2018 at 7:48 PM

   Craig, I love the scorecard! What a great way to set expectations with the legal profession regarding collection (difficulty and frequency), review and relevance. This communicates what lawyers should expect with regard to mobile discovery better than anything I've seen yet.

   REPLY

   - *said:* **craigball**

     October 17, 2018 at 8:14 PM

Thanks, Doug. Kudos from you are praise from someone whose opinions mean a lot because you know a lot. Thanks for the read.

REPLY

2. *said:*Matthew

   October 17, 2018 at 8:43 PM

   This is an excellent initiative, Craig. Mobile devices are a perpetual headache when they're within scope however the matter doesn't justify full blown forensics.

   REPLY

3. *said:*Yaniv Schiff

   October 18, 2018 at 1:56 PM

   Nice article Craig. Have you found a tool that works well for Android?

   REPLY

   - ***said:*craigball**

     October 18, 2018 at 1:56 PM

     Not one I like. No.

     REPLY

4. Pingback: Mobile to the mainstream – Craig Ball on proportionate retrieval of mobile data | eDisclosure Information Project

5. Pingback: Discovery messages for participants and for investigators in an alleged murder plot | eDisclosure Information Project

6. *said:*Andrew

   October 29, 2018 at 5:41 PM

   Craig, great article and the scorecard is really useful.

   My experience is that even with forensic collection tools, the extraction of chat messages from various applications can be quite difficult and problematic, as you note, if you want to have a proper relationship between the chat and any media files.

In a recent case we had issues with extracting WhatsApp and WeChat messages due to the version of the software on the device. The iPhone had the latest version of both the operating system and the applications and the forensic software was behind on what versions it could extract from the forensic image.

I agree that messaging content is incredibly important to collect and review, but would say from my experience that collection is not always easy.

REPLY

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8. Pingback: Cloud Takeouts: Can I Get That to Go? | Ball in your Court
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'2

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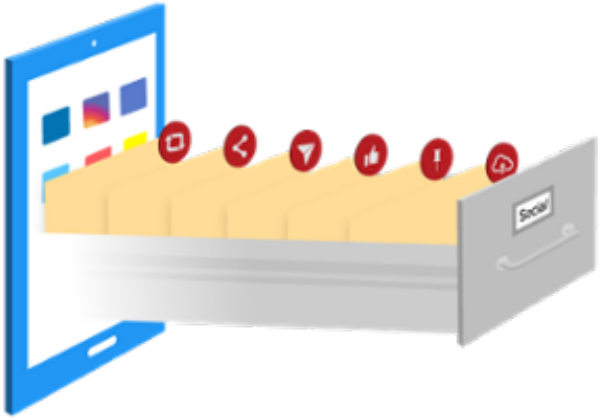
Gone Viral: Social Media in e-Discovery

July 06, 2017 | Matthew Verga - Xact Data Discovery | Collection, In-house Counsel, Law Firm, Litigation Support

Relativity Authorized Partner Xact Data Discovery (XDD) recently published an insightful eight-part blog series around the technical and legal challenges of social media in e-discovery. The following is a condensed version of that series with the takeaways we found most helpful.



As the last election cycle made abundantly clear, social media is currently an influential, indispensable part of American life. And, as it worms its way ever deeper into our relationships, our professional activities, and our culture as a whole, its impact on discovery is growing as well.

Unfortunately, the nature, diversity, and volume of social media data present a variety of challenges for practitioners, both technical and legal.

In this blog post, we'll explore some of those challenges and the ways they can be met, beginning with an overview of the different social media sources.

Social Media Sources

Although there are numerous social media services and applications, the majority of use activity is centered on five services: Facebook, Instagram, Pinterest, LinkedIn, and Twitter. Pew Research Center's 2016 Social Media Update reveals that, as of spring 2016, "68 percent of all US adults are Facebook users, while 28 percent use Instagram, 26 percent use Pinterest, 25 percent use LinkedIn, and 21 percent use Twitter." Additionally, 56 percent of online adults use two or more of these five services.

These five services—Facebook in particular—will be your most likely social media sources, though there are a wide variety of (much) smaller social media services competing for users (e.g. Google+ Snapchat, Reddit, and Tumblr).

Additionally, an increasing number of smartphone owners (72 percent of American adults) are also adopting the use of new messaging applications as an alternative to text messages or messaging through one of the major social media services. These applications come in both general purpose (e.g. WhatsApp) and auto-deleting (e.g. Wickr) varieties.

What's There

Each social media account for each individual user can contain hundreds or thousands of pages of materials in a mishmash of formats. For example, in one highly publicized case a few years ago (related to the end of the US-EU Safe Harbor program), a law student requested all of Facebook's retained data on him and received 1,222 pages that included: posts, messages, and chat logs; log-on and posting times; records of his friends and connections; GPS data from photographs; some deleted materials, etc.

That student received those materials primarily in PDF format, but in their original formats, live on the Facebook platform, many of the files also would have carried their own metadata, such as fields documenting their unique identifier, item type, parent item, thread, recipients, author/poster, linked media, comments, and more.

Additionally, beyond all of the user-created and user-shared materials, and beyond all of the metadata associated with those materials, most social media services also generate their own records of and about user activity, such as IP address logs, which can be relevant in some circumstances.

Ways to Get It

There are usually a variety of options for the acquisition of social media materials for use in litigation. The most basic is printing out the material or capturing a screen image of it.

One level up from printing or screen capturing content is using the self-service export tools provided by the social media platform to allow users to download an aggregated copy of the materials associated with their account. Facebook's dates back to 2010 and is called

Create a Centralized Case Summary for Every e-Discovery Project

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The Relativity Blog provides engaging e-discovery and legal technology lessons to a diverse audience of practitioners. Written by the team behind Relativity and the community that drives this industry, the blog is your go-to source for tangible takeaways, thought-provoking discussion, and expert insights into stories and technologies that can help you improve your day-to-day work.

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Want to be an author on *The Relativity Blog*? We're always happy to feature

"Download Your Information"; Twitter's dates back to 2012 and is called "Twitter Archive."

These kinds of features export a package of a user's materials, which may be in a mixture of files and formats or may just be combined in a single PDF, depending on the platform and the materials in the account. This, too, is fast, simple, and cheap, but it can only be done by the account holder (or by someone with their credentials and consent). Additionally, the length and format can make the export challenging to sort through and separate once obtained.

An additional level up from the use of self-service export tools is the use of specialized forensic collection software. Just as you can forensically image a custodian's computer using a specialized tool, you have the option of using a similar type of software collection tool to capture the contents of a social media account. Such tools capture the files and materials, along with their metadata and any linked content, and provide options for searching, sorting, and filtering.

General Discoverability

While the publicly-shared materials on social media services can be collected directly by any party, the non-public materials in those user accounts can only be obtained through discovery. In general, social media materials are discoverable under the same conditions and in the same ways as any other type of evidence.

As defined in Federal Rule of Civil Procedure 26(b), the scope of permissible discovery is:

> *Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case ... Information within this scope of discovery need not be admissible in evidence to be discoverable.*

This standard applies to tweets, Facebook posts, or Instagram pictures the same way it does to more traditional sources like Office documents or emails. If it's relevant, it's discoverable.

The relevance requirement is an extremely low bar to clear under the Federal rules. Federal Rule of Evidence 401 establishes that evidence

readers.

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is relevant if, “it has any tendency to make a fact more or less probable than it would be without the evidence” and “the fact is of consequence in determining the action.” Thus, non-public social media materials are discoverable.

Despite the lowness of this bar and the relative simplicity of this standard, parties have frequently ended up in dispute over the appropriate scope of discovery of these materials, with requesting parties routinely making blanket requests for all materials and producing parties pushing back, asserting overbreadth, irrelevance, and privacy issues.

When traditional requests for production and direct scope negotiations have failed, parties have tried a variety of alternative tactics.

So far, the most commonly used mechanism has been *in camera* review of the materials by the judge. Some judges, however, have declined to take such relevancy evaluations upon themselves.

In the first few years of social media discovery, a number of litigants attempted to compel production of the opposing party’s social media account password to provide the requesting party with unrestricted access to review all non-public content in the account. Because this approach exposes extensive irrelevant (and private) materials, it is generally disfavored by judges and parties, and it has become uncommon in recent years.

Finally, some litigants have attempted to obtain non-public social media materials by subpoenaing those materials directly from the social media service providers. Unfortunately for the requesting parties, those attempts have run up against Title II of the Electronic Communications Privacy Act of 1986 (Pub. L. 99-508, Oct. 21, 1986)—also known as the Stored Communications Act—which establishes certain privacy protections for our electronic materials stored with third-party service providers, from both government intrusion and third-party access.

Authenticity and Admissibility

Unfortunately, in the context of social media evidence, the question of authenticity can be a challenging one. Social media platforms, like all

internet sources, are still very new, legally speaking, and they are constantly evolving in form and content.

The process for establishing evidentiary authenticity is laid out in Federal Rule of Evidence 901. To establish authenticity, "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." The rule goes on in subpart (b) to provide a **non-exclusive** list of ten example ways that authenticity might be shown for various types of evidence.

Subpart 901(b)(4) says that "distinctive characteristics" of a piece of evidence can be considered to establish its authenticity. For social media materials, distinctive characteristics might include (but are not limited to): materials appearing on a page that is in the alleged author's name; relevant individuals appearing in included pictures; relevant topics being discussed; distinctive slang being used; the appearance of relevant names or nicknames; the times or locations on shared posts or photos; or, the IP address of the device from which posts were made. Basically, to quote Judge Grimm's shorthand for this rule: "If it looks like a duck, waddles like a duck, and quacks like a duck, it must be a duck."

Even if a showing sufficient to establish authenticity is made, the authenticity of the evidence can still be challenged by a similar, contrary showing from another party. In the event of conflicting showings, what arises is a situation where relevance depends on a factual determination: If the underlying facts about the offered evidence are as the submitting party contends, the evidence is authentic and relevant; if instead the underlying facts about the offered evidence are as the opposing party contends, the evidence is inauthentic and, therefore, irrelevant.

Such situations are governed by Federal Rule of Evidence 104(b) Relevance That Depends on a Fact, which requires that "proof must be introduced sufficient to support a finding that the fact does exist."

While parties and their attorneys may be struggling with social media, courts are very comfortable treating it like any other source: if relevant, it needs to be preserved and produced; and, under no circumstances should it be intentionally altered, deleted, or hidden.

Reliability Concerns

Just how reliable are individuals' own, real social media posts? Do people really create accurate, spontaneous reflections of themselves and their lives? Probably not, at least not entirely.

In a 2012 paper published in the *Vanderbilt Journal of Entertainment & Technology Law*, Kathryn R. Brown distilled recent research on social media psychology and found that users selectively screen photos to present themselves as "attractive" and "having fun," and that they tune their personae to come across as "socially desirable," "group-oriented," and "smiling." Meanwhile, "individuals are unlikely to capture shameful, regrettable, or lonely moments with a camera."

So, to at least some extent, we all generate our own mildly "fake news" about ourselves, editing our comments and curating our images to try to appear as we wish to be seen rather than as we may be. This does not mean that there may not be reliable, valuable evidence to be had in social media materials but, rather, that we should consider such materials with this in mind and be conservative in the inferences we draw and the assumptions we make. As one judge put it:

> *The fact that an individual may express some degree of joy, happiness, or sociability on certain occasions sheds little light on the issue of whether he or she is actually suffering emotional distress.*
>
> *While the relevance of a posting reflecting engagement in a physical activity that would not be feasible given the plaintiff's claimed physical injury is obvious, the relationship of routine expressions of mood to a claim for emotional distress damages is much more tenuous.*

Last month, XDD presented a live webinar on social media—in conjunction with ACEDS – called "Gone Viral – Social Media in eDiscovery." A recording of the program, including the Q&A that followed, is available for free here.

Matthew Verga is an electronic discovery expert proficient at leveraging his legal experience as an attorney, his technical knowledge as a practitioner, and his skills as a communicator to make complex eDiscovery topics accessible to diverse audiences. A ten-year industry veteran, Matthew has worked across every phase of the EDRM and at every level from the project trenches to enterprise program design. He leverages this background to produce engaging educational content to empower practitioners at all levels with knowledge they can use to improve their projects, their careers, and their organizations.

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Gayle O'Connor 7/7/2017, 1:48:43 PM

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Delaware Corporate & Commercial Litigation Blog

Highlights & Analysis of Key Decisions from Delaware's Supreme Court & Court of Chancery

PUBLISHED BY Francis G.X. Pileggi of Eckert Seamans

What Data Given to Experts is Discoverable

By Francis Pileggi on September 30, 2016
Posted in Other Court Decisions

This post was prepared by an associate in the Delaware office of Eckert Seamans.

The focus of this blog is key Delaware corporate and commercial litigation decisions. That includes the Complex Commercial Litigation Division of the Superior Court. The rules and procedures in that court are not always the same as those in the Court of Chancery. It remains important to know the differences. For example, Court of Chancery Rule 26 and Superior Court Rule 26 are not identical, regarding what information provided to a party's expert is discoverable.

Two recent rulings address this topic: *CIM Urban Lending GP v. Cantor Commercial Real Estate Sponsor, L.P.*, C.A. No. 11060-VCS (Del. Ch. May 19, 2016) (TRANSCRIPT) and *Green v. Nemours Found.,* C.A. No. N15C-03-208 (Del. Super. Aug. 17, 2016).

Superior Court Rule 26: The Superior Court of Delaware recently took a close look at Superior Court Rule 26 and made some very important distinctions regarding what is discoverable and what is not when it comes to information given to a party's expert.

Background: In *Green*, the Superior Court considered plaintiff's counsel inadvertently including two documents titled "Work Product Memorandum" and "Deposition Preparation Exhibits" in a binder that was produced to defense counsel prior to taking the plaintiff's expert's deposition. The plaintiff sought to recover those documents once the mistake was realized. After returning the documents, defendants' counsel filed a motion to compel their production.

Analysis: The Superior Court has adopted the federal version of Rule 26(b), which requires counsel to "identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed"

and "identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed."

The court left no stone unturned with its analysis of Rule 26 — often relying on the Advisory Committee's comments to the Rule when it was amended. The Superior Court held that documents are deemed "considered," and thus not privileged, "if it was seen by the expert, regardless whether he relies upon it and indeed, even if he rejects it entirely."

However, the court did not extend such a sweeping definition of the other non-disclosure exception — the requirement that assumptions provided by counsel to the expert be disclosed. The Superior Court stated: "So to the extent the attorney communicates with the expert his 'assumptions' about the case — be they hypotheticals or other possibilities — these communications are privileged from disclosure unless the expert were to aver that he 'relied' on the assumption as posited by the attorney."

Court of Chancery Rule 26: The Court of Chancery's ruling in *CIM Urban Lending GP* stems from a dispute over the language in a limited partnership agreement and cross motions to compel information provided to each parties' experts. The plaintiffs sought documents that the defenses' expert relied on in determining his report. The defendants sought documents from the plaintiffs regarding a pre-litigation investigation into whether the limited partnership agreement was breached.

Analysis: Citing Chancery Rule 26(b)(4), which requires production of facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, the court held that the information that was actually considered and relied on in the final defendants' expert's report was not privileged because that expert report was placed at issue since the expert will be testifying at trial.

However, the court held that documents considered and relied on by a non-testifying expert to prepare a pre-litigation report were protected work product and not discoverable. This is a very important distinction made by the court

Finally, it is important to note that, unlike the Superior Court, the Court of Chancery has not adopted the most-recent language of the federal rules. Both the Superior Court and the Court of Chancery Rules contain substantially similar language in Rules 26(b)(1)–(4).

Importantly, however, Court of Chancery Rule 26 does **not** have a counterpart to Superior Court Rule 26(b)(6), which expressly exempts: (1) the compensation that the expert is paid; (2) the facts or data provided to the expert; and (3) the assumptions provided to the experts from any claim of privilege.

However, the Guidelines on Best Practices for Litigating Cases before the Court of Chancery (the "Guidelines") ex-

presses a preference for parties to stipulate what information is privileged. It's also important to note that according to the Guidelines, parties are encouraged to agree to stipulate that "[m]aterials or information that may have been viewed or considered *but not relied upon* by the [e]xpert" are **not** discoverable, and the court provides a sample stipulation to address these issues.

Court Denies Defendant's Request for Protective Order Against Producing Metadata for Medical Records: eDiscovery Case Law

I love it when a reader suggests a case for us to cover! Thanks for the tip, Mike Hannon!

In *Miller v. Sauberman, Index No. 805270/16 (N.Y. Dec. 6, 2018)*, New York Supreme Court Justice Joan A. Madden, despite the defendant's estimated cost of **$250,000** to produce metadata related to the plaintiff's medical records, denied the defendant's motion for a protective order and granted the plaintiff's cross-motion to compel the production of that metadata within 30 days of the decision and order.

Case Background

In this action for damages for medical malpractice, the plaintiff's counsel indicated that she received conflicting versions of the plaintiff's medical record, with conflicting entries for the same items on the same record for the same days and those records were provided pre-suit. The plaintiff argued that given the materiality of the fact as to when plaintiff developed bed sores, he was entitled to the audit trail and metadata that would presumably show when plaintiff's electronic medical record was altered and by whom.

The defendant's Chief Information Officer indicated his understanding that the record history was a "true record audit detailing any records with modifications that took place to the records after 7/29/14". However, he also indicated that they had not been able to determine the "root cause of why certain fields in the EMR print differently from the electronic version as seen on the computer screen." The plaintiff responded by stating that the defendant failed to provide an explanation for the "alteration" of the medical records, failed to produce the metadata and the audit trail exchanged was insufficient, since it did not cover the period after plaintiff's discharge.

On August 16 after oral argument, the Court ordered the defendant to provide an affidavit regarding various parameters, including the software and storage systems, the date and parameters of the search, accessibility of the data in other storage systems or by other software systems and the cost of producing the requested metadata. The vendor responsible for storing and maintaining the defendant's electronic medical records indicated that they used "a software system called 'SQL Server Management Studio'" and the "storage system from where the audit report was generated is called 'SQL Server 2014'". The vendor also stated that "[b]ased on my many years of experience in the software and information technology sector generally, and in the area of metadata extraction specifically, in my opinion the cost estimate of producting [sic] full metadata for plaintiff's entire medical record would be approximately $250,000 if MatrixCare were to outsource it to a vendor." Noting that the application is a "legacy system", he also classified that as a "reasonable estimate, that could change extremely, either up or down, based on the specifics we would learn afer [sic] hiring the

team and learning more about how the system gathers data."

Judge's Ruling

Judge Madden stated: "Based on the foregoing, plaintiff has made a sufficient showing for the production of metadata. Defendant has yet to provide a credible explanation for the different and conflicting versions of plaintiff's medical record…Moreover, while the audit report is intended to show 'all edits, changes, or modifications to any single record' from May 8, 2014 through April 10, 2018, the report produced by Village Care shows no changes or modifications. Under these circumstances, where there is no explanation for the different and conflicting versions of plaintiff's medical record, and where the issue as to when plaintiff developed bed sores is clearly material to plaintiff's malpractice claim, plaintiff is entitled to the metadata for his medical record to determine if the medical record was altered, and if so, when and by whom." As agreed to by the plaintiff, Judge Madden limited the metadata to be produced to "Village Care's Physician Progress Notes from May 8, 2014 through July 29, 2014". As a result, she denied the defendant's motion for a protective order and granted the plaintiff's cross-motion to compel the production of that metadata within 30 days of the decision and order.

So, what do you think? Is it possible that it could actually cost $250K to produce metadata for a single patient's medical records, even in a "legacy system"? And, how do you get hired for that gig? **;o)** Please let us know if any comments you might have or if you'd like to know more about a particular topic.

Case opinion link courtesy of eDiscovery Assistant.

Sponsor: This blog is sponsored by CloudNine, which is a data and legal discovery technology company with proven expertise in simplifying and automating the discovery of data for audits, investigations, and litigation. Used by legal and business customers worldwide including more than **50** of the top **250** Am Law firms and many of the world's leading corporations, CloudNine's eDiscovery automation software and services help customers gain insight and intelligence on electronic data.

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THE SEDONA PRINCIPLES, THIRD EDITION

1. Electronically stored information is generally subject to the same preservation and discovery requirements as other relevant information.
2. When balancing the cost, burden, and need for electronically stored information, courts and parties should apply the proportionality standard embodied in Fed. R. Civ. P. 26(b)(1) and its state equivalents, which requires consideration of 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.
3. As soon as practicable, parties should confer and seek to reach agreement regarding the preservation and production of electronically stored information.
4. Discovery requests for electronically stored information should be as specific as possible; responses and objections to discovery should disclose the scope and limits of the production.
5. The obligation to preserve electronically stored information requires reasonable and good faith efforts to retain information that is expected to be relevant to claims or defenses in reasonably anticipated or pending litigation. However, it is unreasonable to expect parties to take every conceivable step or disproportionate steps to preserve each instance of relevant electronically stored information.

6. Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information.

7. The requesting party has the burden on a motion to compel to show that the responding party's steps to preserve and produce relevant electronically stored information were inadequate.

8. The primary sources of electronically stored information to be preserved and produced should be those readily accessible in the ordinary course. Only when electronically stored information is not available through such primary sources should parties move down a continuum of less accessible sources until the information requested to be preserved or produced is no longer proportional.

9. Absent a showing of special need and relevance, a responding party should not be required to preserve, review, or produce deleted, shadowed, fragmented, or residual electronically stored information.

10. Parties should take reasonable steps to safeguard electronically stored information, the disclosure or dissemination of which is subject to privileges, work product protections, privacy obligations, or other legally enforceable restrictions.

11. A responding party may satisfy its good faith obligations to preserve and produce relevant electronically stored information by using technology and processes, such as sampling, searching, or the use of selection criteria.

12. The production of electronically stored information should be made in the form or forms in which it is ordinarily maintained or that is reasonably usable given the nature of the electronically stored information and the proportional needs of the case.

13. The costs of preserving and producing relevant and proportionate electronically stored information ordinarily should be borne by the responding party.

14. The breach of a duty to preserve electronically stored information may be addressed by remedial measures, sanctions, or both: remedial measures are appropriate to cure prejudice; sanctions are appropriate only if a party acted with intent to deprive another party of the use of relevant electronically stored information.

THE SEDONA PRINCIPLES, THIRD EDITION
AND THE FEDERAL RULES

Topic of Discussion	**Sedona Principle**	**Federal Rules of Civil Procedure**[16] *(Dec 2015)*
Discovery Scope	Principles 1, 2, 5, 6, 8, 9, 11	Rule 26(b)(1); Rule 16(b)(3)(B)(ii)
Preservation Obligations	Principles 1, 3, 5, 6, 8, 9, 12	Rule 26(f)(2) & (3); Rule 16(b)(3)(B)(iii)
Form of Preservation	Principle 12	n/a
Metadata	Principle 12	n/a
Form of Production	Principles 3, 4, 12	Rule 26(f)(3); Rule 34(b)
Meet & Confer	Principle 3	Rule 26(f)
Initial Disclosures	Principle 3	Rule 26(a)(1)
Preservation Orders	Principle 5	n/a
Discovery Requests & Responses	Principles 4, 6	Rule 26(d)(2); Rule 34
Tiered Production	Principle 8	Rule 26(b)(2)(B)
Cost Shifting	Principle 13	Rule 26(b)(2)(B); Rule 26(c)
Proportionality Limits	Principle 2 & *passim*	Rule 26(b)(1)
Identity of Unsearched Sources	Principle 4	Rule 26(b)(2)(B); Rule 34(b)(2)(C)

16. Unless otherwise noted.

Topic of Discussion	**Sedona Principle**	**Federal Rules of Civil Procedure**[16] *(Dec 2015)*
Protecting Privilege & Avoiding Waiver	Principles 3, 10	Rule 26(b)(2)(5); Federal Rule of Evidence 502
Spoliation Remedial Measures & Sanctions	Principle 14	Rule 37(e)
Cooperation	Principles 3, 6 & *passim*	*See* Rule 1, 2015 Advisory Committee Note
Non-party Discovery	Principles 3, 5, 7, 13	Rule 45
Search & Retrieval	Principles 3, 10, 11	n/a

RULE 1.1: COMPETENCE

October, 2016

ABA Model Rules of Professional Conduct and Code of Judicial Conduct > CLIENT-LAWYER RELATIONSHIP

CLIENT-LAWYER RELATIONSHIP

Core Terms

skill, competent representation, particular matter, legal problem, practitioner, reasonably necessary, requisite knowledge, legal knowledge, legal services, confidential, ethical, nonfirm, handle, train

Notice

Comment

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity

and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Retaining or Contracting With Other Lawyers

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Definitional Cross-References

"Reasonably" *See* Rule 1.0(h)

RULE ***1.1***: COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

USCS Fed Rules Civ Proc R 26, Part 1 of 5

Current through changes received December 5, 2018.

USCS Court Rules > Federal Rules of Civil Procedure > Title V. Disclosures and Discovery

Rule 26. Duty to Disclose; General Provisions Governing Discovery

(a) Required Disclosures.

(1) *Initial Disclosure.*

(A) In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(B) Proceedings Exempt from Initial Disclosure. The following proceedings are exempt from initial disclosure:

(i) an action for review on an administrative record;

(ii) a forfeiture action in rem arising from a federal statute;

(iii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

(iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(v) an action to enforce or quash an administrative summons or subpoena;

(vi) an action by the United States to recover benefit payments;

(vii) an action by the United States to collect on a student loan guaranteed by the United States;

(viii) a proceeding ancillary to a proceeding in another court; and

(ix) an action to enforce an arbitration award.

(C) Time for Initial Disclosures—In General. A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in

this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(D) Time for Initial Disclosures—For Parties Served or Joined Later. A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(E) Basis for Initial Disclosure; Unacceptable Excuses. A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2)*Disclosure of Expert Testimony.*

(A) In General. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under *Federal Rule of Evidence 702*, 703, or 705.

(B) Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i)a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii)the facts or data considered by the witness in forming them;

(iii)any exhibits that will be used to summarize or support them;

(iv)the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v)a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi)a statement of the compensation to be paid for the study and testimony in the case.

(C) Witnesses Who Do Not Provide a Written Report. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i)the subject matter on which the witness is expected to present evidence under *Federal Rule of Evidence 702*, 703, or 705; and

(ii)a summary of the facts and opinions to which the witness is expected to testify.

(D) Time to Disclose Expert Testimony. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i)at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii)if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) Supplementing the Disclosure. The parties must supplement these disclosures when required under Rule 26(e).

(3)*Pretrial Disclosures.*

(A) In General. In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(i)the name and, if not previously provided, the address and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises;

(ii)the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii)an identification of each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) Time for Pretrial Disclosures; Objections. Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made—except for one under *Federal Rule of Evidence 402* or *403*—is waived unless excused by the court for good cause.

(4)*Form of Disclosures.* Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

(b) Discovery Scope and Limits.

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

(2)*Limitations on Frequency and Extent.*

(A) When Permitted. By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

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

(C) When Required. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i)the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii)the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii)the proposed discovery is outside the scope permitted by Rule 26(b)(1).

(3)*Trial Preparation: Materials.*

(A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i)they are otherwise discoverable under Rule 26(b)(1); and

(ii)the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) Previous Statement. Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i)a written statement that the person has signed or otherwise adopted or approved; or

(ii)a contemporaneous stenographic, mechanical, electrical, or other recording—or a transcription of it—that recites substantially verbatim the person's oral statement.

(4)*Trial Preparation: Experts.*

(A) Deposition of an Expert Who May Testify. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) Trial-Preparation Protection for Draft Reports or Disclosures. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(i)relate to compensation for the expert's study or testimony;

(ii)identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii)identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(D) Expert Employed Only for Trial Preparation. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i)as provided in Rule 35(b); or

(ii)on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) Payment. Unless manifest injustice would result, the court must require that the party seeking discovery:

(i)pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and

(ii)for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5)*Claiming Privilege or Protecting Trial-Preparation Materials.*

(A) Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i)expressly make the claim; and

(ii)describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) Protective Orders.

(1)*In General.* A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending — or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A)forbidding the disclosure or discovery;

(B)specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;

(C)prescribing a discovery method other than the one selected by the party seeking discovery;

(D)forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E)designating the persons who may be present while the discovery is conducted;

(F)requiring that a deposition be sealed and opened only on court order;

(G)requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H)requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2)*Ordering Discovery.* If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3)*Awarding Expenses.* Rule 37(a)(5) applies to the award of expenses.

(d) Timing and Sequence of Discovery.

(1)*Timing.* A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2)*Early Rule 34 Requests.*

(A) Time to Deliver. More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered:

(i)to that party by any other party, and

(ii)by that party to any plaintiff or to any other party that has been served.

(B) When Considered Served. The request is considered to have been served at the first Rule 26(f) conference.

(3)*Sequence.* Unless the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A)methods of discovery may be used in any sequence; and

(B)discovery by one party does not require any other party to delay its discovery.

(e) Supplementing Disclosures and Responses.

(1)*In General.* A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response:

(A)in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B)as ordered by the court.

(2)*Expert Witness.* For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

(f) Conference of the Parties; Planning for Discovery.

(1)*Conference Timing.* Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable—and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b).

(2)*Conference Content; Parties' Responsibilities.* In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3)*Discovery Plan.* A discovery plan must state the parties' views and proposals on:

(A)what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

(B)the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C)any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(D)any issues about claims of privilege or of protection as trial-preparation materials, including — if the parties agree on a procedure to assert these claims after production — whether to ask the court to include their agreement in an order under *Federal Rule of Evidence 502*;

(E)what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F)any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

(4)*Expedited Schedule.* If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule:

(A)require the parties' conference to occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b); and

(B)require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

(1)*Signature Required; Effect of Signature.* Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name—or by the party personally, if unrepresented—and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A)with respect to a disclosure, it is complete and correct as of the time it is made; and

(B)with respect to a discovery request, response, or objection, it is:

(i)consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii)not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii)neither unreasonable nor 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.

(2)*Failure to Sign.* Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3)*Sanction for Improper Certification.* If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

History

Amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; March 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980; Apr. 28, 1983, eff. Aug. 1, 1983; March 2, 1987, eff. Aug. 1, 1987; Dec. 1, 1993; Dec. 1, 2000; Dec. 1, 2006; Dec. 1, 2007; As amended April 28, 2010, eff. Dec. 1, 2010; April 29, 2015, eff. Dec. 1, 2015.

"Note to Subdivision (g); Signing of Discovery Requests, Responses, and Objections. Rule 26(g) imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37. In addition, Rule 26(g) is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions. The subdivision provides a deterrent to both excessive discovery and evasion by imposing a certification requirement that obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection. The term "response" includes answers to interrogatories and to requests to admit as well as responses to production requests.

If primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obliged to act responsibly and avoid abuse. With this in mind, Rule 26(g), which parallels the amendments to Rule 11, requires an attorney or unrepresented party to sign each discovery request, response, or objection. Motions relating to discovery are governed by Rule 11. However, since a discovery request, response, or objection usually deals with more specific subject matter than motions or papers, the elements that must be certified in connection with the former are spelled out more completely. The signature is a certification of the elements set forth in Rule 26(g).

Although the certification duty requires the lawyer to pause and consider the reasonableness of his request, response, or objection, it is not meant to discourage or restrict necessary and legitimate discovery. The rule simply requires that the attorney make a reasonable inquiry into the factual basis of his response, request, or objection.

The duty to make a "reasonable inquiry" is satisfied if the investigation undertaken by the attorney and the conclusions drawn therefrom are reasonable under the circumstances. It is an objective standard similar to the one imposed by Rule 11. See the Advisory Committee Note to Rule 11. See also Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n, 365 F.Supp. 975 (E.D. Pa. 1973). In making the inquiry, the attorney may rely on assertions by the client and on communications with other counsel in the case as long as that reliance is appropriate under the circumstances. Ultimately, what is reasonable is a matter for the court to decide on the totality of the circumstances.

Rule 26(g) does not require the signing attorney to certify the truthfulness of the client's factual responses to a discovery request. Rather, the signature certifies that the lawyer has made a reasonable effort to assure that the client has provided all the information and documents available to him that are responsive to the discovery demand. Thus, the lawyer's certification under Rule 26(g) should be distinguished from other signature requirements in the rules, such as those in Rules 30(e) and 33.

Nor does the rule require a party or an attorney to disclose privileged communications or work product in order to show that a discovery request, response, or objection is substantially justified. The provisions of Rule 26(c), including appropriate orders after in camera inspection by the court, remain available to protect a party claiming privilege or work product protection.

The signing requirement means that every discovery request, response, or objection should be grounded on a theory that is reasonable under the precedents or a good faith belief as to what

should be the law. This standard is heavily dependent on the circumstances of each case. The certification speaks as of the time it is made. The duty to supplement discovery responses continues to be governed by Rule 26(e).

Concern about discovery abuse has led to widespread recognition that there is a need for more aggressive judicial control and supervision. ACF Industries, Inc. v. EEOC, 439 U.S. 1081 (1979) (certiorari denied) (Powell, J., dissenting). Sanctions to deter discovery abuse would be more effective if they were diligently applied "not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 643 (1976). See also Note, The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions, 91 Harv. L. Rev. 1033 (1978). Thus the premise of Rule 26(g) is that imposing sanctions on attorneys who fail to meet the rule's standards will significantly reduce abuse by imposing disadvantages therefor.

Because of the asserted reluctance to impose sanctions on attorneys who abuse the discovery rules, see Brazil, Civil Discovery: Lawyers' Views of its Effectiveness, Principal Problems and Abuses, American Bar Foundation (1980); Ellington, A Study of Sanctions for Discovery Abuse, Department of Justice (1979), Rule 26(g) makes explicit the authority judges now have to impose appropriate sanctions and requires them to use it. This authority derives from Rule 37, 28 U.S.C. § 1927, and the court's inherent power. See Roadway Express, Inc., v. Piper, 447 U.S. 752 (1980); Martin v. Bell Helicopter Co., 85 F.R.D. 654, 661–62 (D. Col. 1980); Note, Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process, 44 U.Chi.L.Rev. 619 (1977). The new rule mandates that sanctions be imposed on attorneys who fail to meet the standards established in the first portion of Rule 26(g). The nature of the sanction is a matter of judicial discretion to be exercised in light of the particular circumstances. The court may take into account any failure by the party seeking sanctions to invoke protection under Rule 26(c) at an early stage in the litigation.

The sanctioning process must comport with due process requirements. The kind of notice and hearing required will depend on the facts of the case and the severity of the sanction being considered. To prevent the proliferation of the sanction procedure and to avoid multiple hearings, discovery in any sanction proceeding normally should be permitted only when it is clearly required by the interests of justice. In most cases the court will be aware of the circumstances and only a brief hearing should be necessary."

Fed. R. Civ. P. 26(g) advisory committee's note to 1983 amendments.

"Former Rule 26(g)(1) did not call for striking an unsigned disclosure. The omission was an obvious drafting oversight. Amended Rule 26(g)(2) includes disclosures in the list of matters that the court must strike unless a signature is provided "promptly * * * after being called to the attorney's or party's attention." Fed. R. Civ. P. 26 advisory committee's note to 2007 amendment.

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The Judiciary's Brave New World: The Internet, Social Media & The American Courtroom

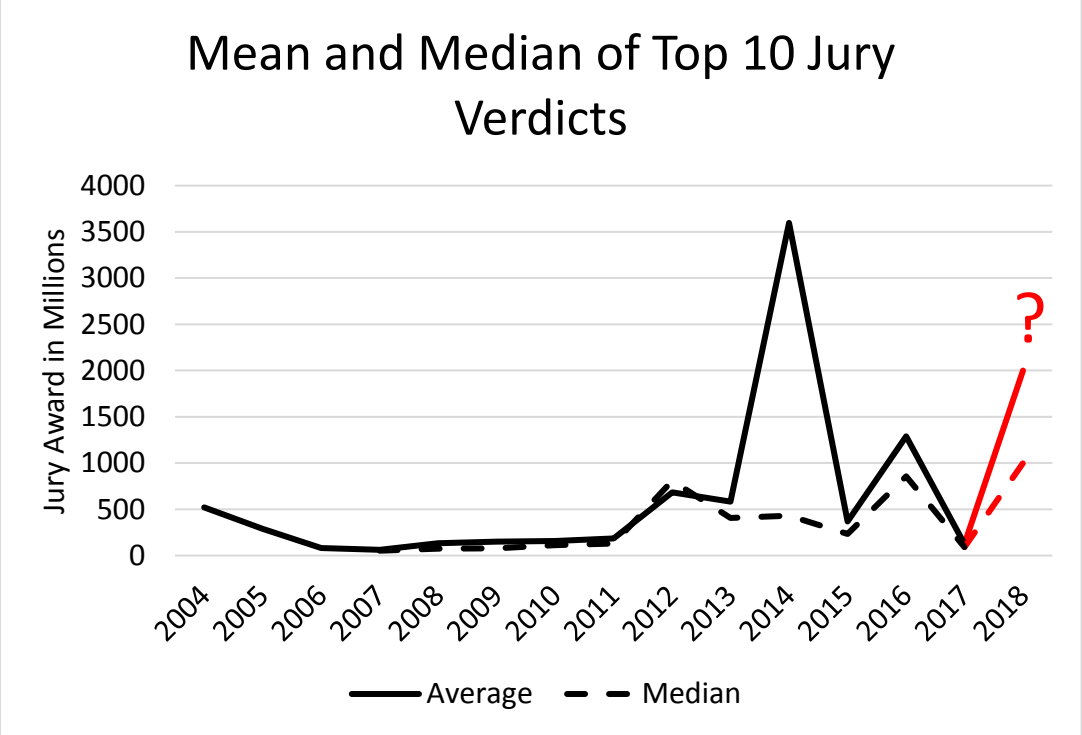
Robert F. Bettler, Jr., Ph.D.

Top 8 Reasons for the Recent Surge in Blockbuster Verdicts

Robert F. Bettler Jr., Ph.D.

Over the past decade—and especially since 2012—the size of the largest jury verdicts has risen dramatically. While most verdicts are not "blockbuster," these trends suggest the flood began to rise slightly in 2008 after several years of declining, as is illustrated in Figure 1. Then, in about 2012, the dam broke, leading to the record high-water mark of 2014, thanks to a series of multibillion-dollar verdicts in tobacco, medical devices and pharmaceutical litigation. Although averages dipped in 2017, this year's multibillion-dollar talc verdicts mean that 2018 may be another record year.[i]

Figure 1



It's not hard to see why some feel juries are out of control. A doughnut shop in Muscogee County, Georgia, was recently sued and although the demonstrated medical expenses totaled no more than $100,000, the jury returned a verdict of $7 million.[ii] And in Clayton County, Georgia, a jury recently returned what may be among the largest verdicts in personal injury lawsuit history: $1 billion.[iii] It's gotten so bad that insurance companies are leaving industries where nuclear verdicts have negatively impacted their claims-loss ratios.[iv]

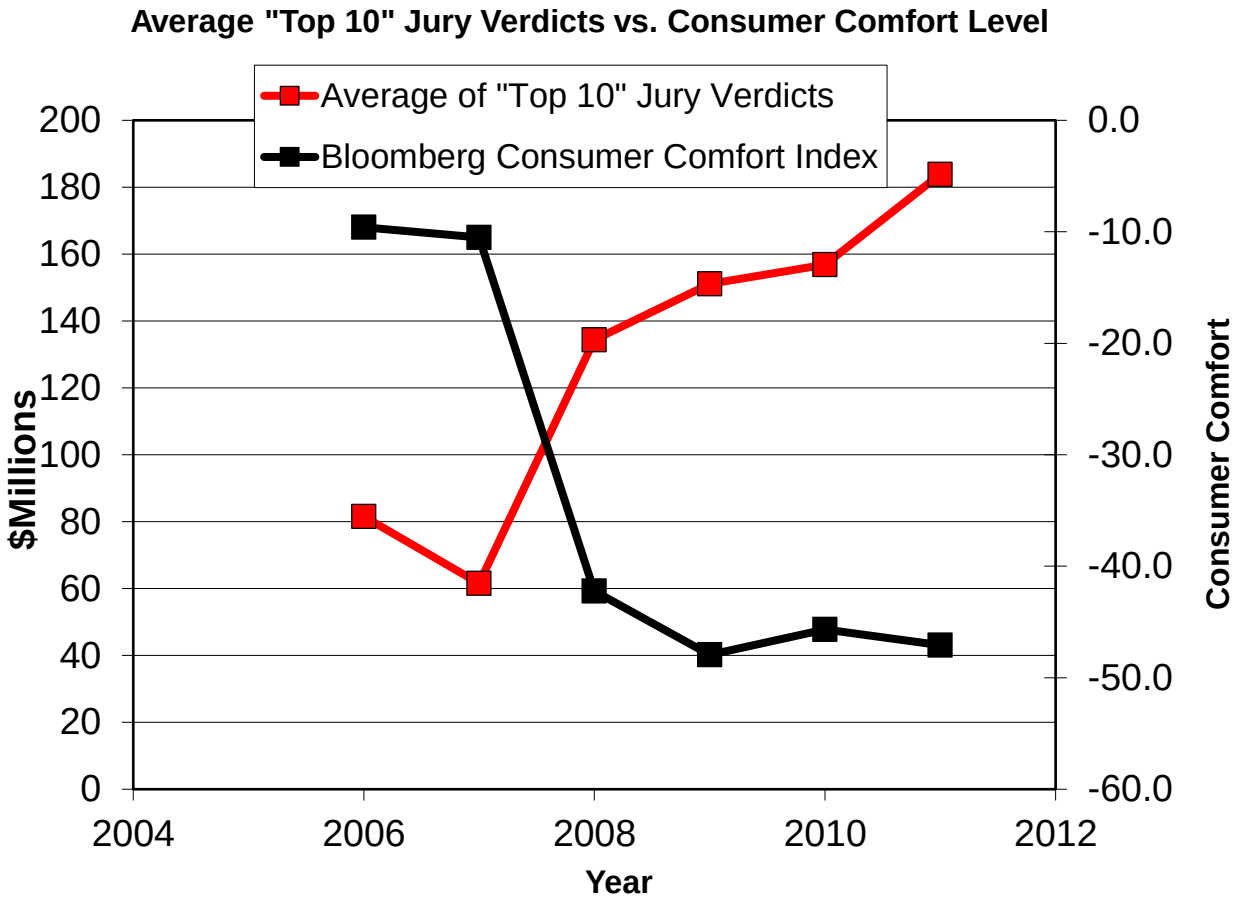
What might have caused the "new norm" of blockbuster verdicts? Here are eight potential reasons.

1. First, our whole culture has been impacted by the expansion of Internet access. Smartphone ownership has increased from about 30 percent of all adults in 2011 to about 75 percent in 2018. This means that news about big verdicts spreads instantly all over the country. Whether potential jurors read about billion-dollar verdicts in their morning newspapers, hear about them on cable news or see the headlines on their smartphones, such verdicts act as a benchmark for what might constitute a legitimate damages award. The net effect is to normalize blockbuster verdicts.
2. Further, thanks to the Internet and the 24-hour cable news cycle, people are exposed to other benchmarks against which they could evaluate what constitutes a reasonable damages award. Every day, we hear about different corporations' net worth, multibillion-dollar mergers, buyouts, bailouts, and tax breaks, not to mention stock markets riding a rocket ship to ever-higher profits. To many jurors,

it seems as though corporate America's ability to generate wealth knows no bounds.

3. Attorney advertising has likely contributed too. In 2011, just a year before damages averages began to rise so dramatically, legal advertising increased significantly. Between 2010 and 2011, money spent on legal ads rose 18%, compared to only 3% for the rest of TV advertising.[v] Many of these solicitations were about asbestos, pharmaceuticals and medical devices—the very case types that would drive a rise in peak damages.
4. Moving from the larger culture to the American legal culture, lawsuit filings went up immediately following the Great Recession of 2008. This is a familiar pattern, seen all the way back to the Great Depression of the 1930s. Furthermore, a number of studies have shown a correlation between economic indicators and jury behavior. In *Race Poverty, and American Tort Awards: Evidence from Three Data Sets* (2003)[vi], Eric Helland and Alexander Tabarrok reported, for example, that as a county's poverty rate went up from 4.1 to 21.9 percent, the average award tripled, from about $400,000 to just over $1.3 million. In line with this, between 2006 and 2011, economic conditions and damages displayed a strong relationship. As shown in Figure 2: As consumer confidence fell in 2008, the "Top 10" damages averages rose. Plotting sentiments about the economy and damages year by year yields two curves that are almost mirror images of one another.

Figure 2



Within a few years of the Great Recession, consumer confidence began to rise again, but instead of going back down, peak verdict numbers continued to rise even higher.

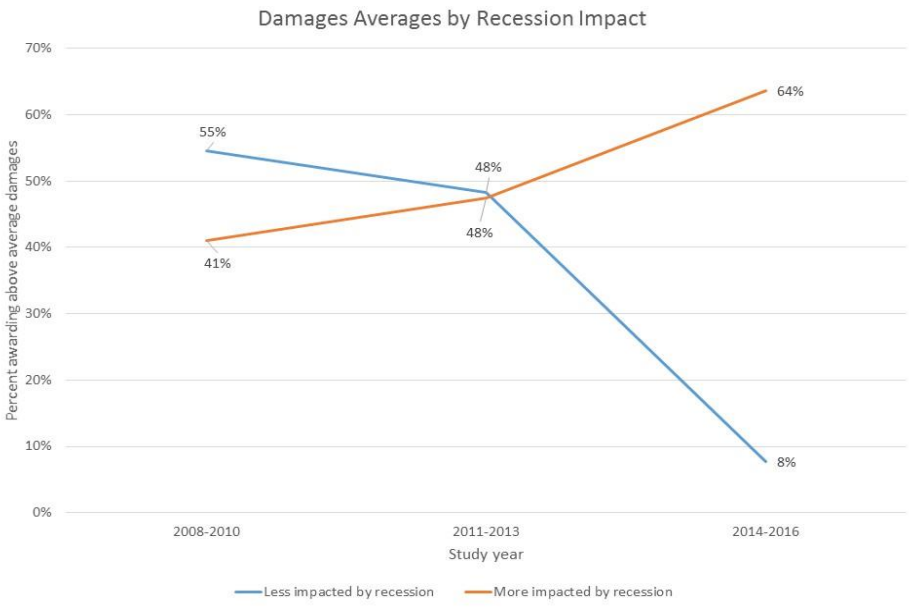
5. Damages did not recede following the Great Recession because, according to Miguel Moya and Susan T. Fiske in *The Social Psychology of the Great Recession and Social Class Divides (*2017),[vii] events like it threaten people's sense of control. Such a "threatened sense of control (as in economic crisis) triggers mechanisms to restore control; one may be collective thinking and

collective action." In *The Great Recession and Group-Based Control: Converting Personal Helplessness into Social Class In-Group Trust and Collective Action* (2016), Immo Fritsche concurs[viii]: When people feel they're losing control over the world around them, it can, as it were, throw a switch in the brain, turning "helpless individuals into collective actors…automatically."

6. How this impetus towards collective action might affect a lawsuit is suggested by *Growing Up in a Recession* (2014) by Paola Giuliano and Antonio Spilimbergo[ix] Analyzing several large cross-cultural and historical data sets, they concluded that "large macroeconomic shocks experienced during the critical years of adolescence and early adulthood, between the ages of 18 and 25, shape preferences for redistribution and that this effect is statistically and economically significant.… The effect is quite general and persistent."
7. To date, no empirical investigation of the Giuliano and Spilimbergo (2014), "Great Recession Hypothesis" has appeared in the literature, but proprietary studies using large-scale DecisionQuest research samples appear supportive. Since 2008, DQ has probed our focus group, mock trial, and survey participants on how the Great Recession has affected them. In each of 27 separate studies with a total of 716 surrogate jurors, conducted all over the country in a variety of case types, we asked, "Have you personally been affected by the current economic situation?" Each of these studies also asked participants to award compensatory or punitive damages, or both. An analysis of this aggregated sample showed that the recession cohort (again, those who came of age in the 2008-2009 time frame) were significantly more likely to award higher damages if they reported

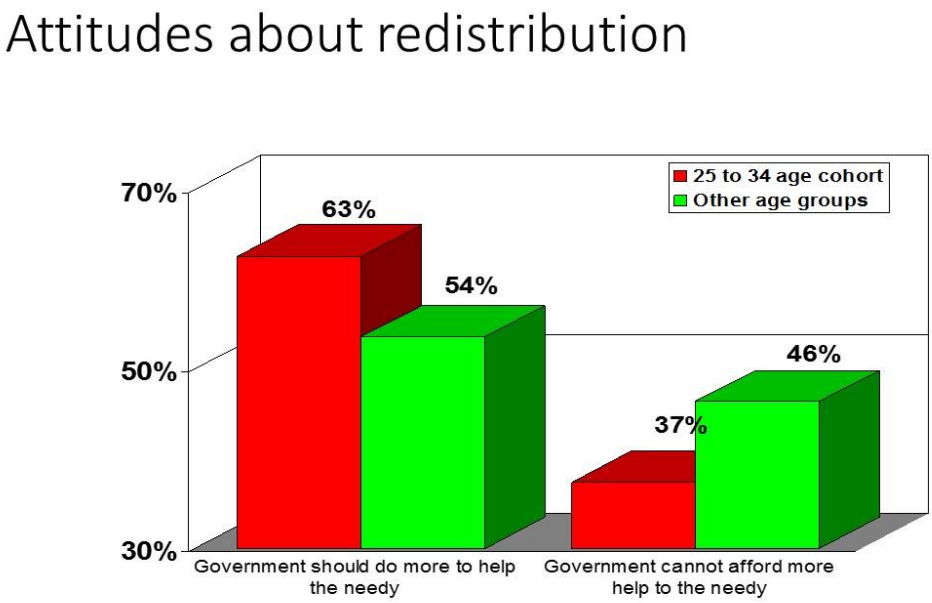
being adversely impacted by the economy (red line in Figure 3). By contrast, people in this cohort who had not been so affected awarded lower damages (blue line).

Figure 3



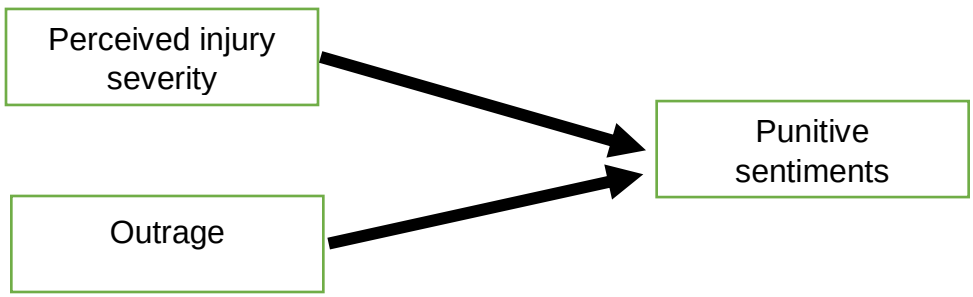
More recent survey data collected by DecisionQuest suggests this age cohort may indeed be more in favor of a redistribution of wealth via the court system than other age groups.

Figure 5



8. Finally, it is well established in the literature that damages stem from jurors' punitive sentiments toward (usually) a corporate defendant, as shown in Figure 6.

Figure 6



Punitive sentiments, reflected in both punitive damages and pain and suffering noneconomic damages, are driven by two things: the perceived severity of the plaintiff's injuries and jurors' outrage at the defendant's behavior.[x] It seems unlikely that the perceived severity of the injuries seen in our courts has

changed, disfigurement and death mean today what they did 20 years ago, but what has changed is juror outrage, or more precisely, the dollar value of outrage. In summation then, this "outrage inflation" occurs in a culture where the ever-increasing net worth of big corporations is instantly accessible with a few clicks on a smartphone, where every new and highly publicized blockbuster jury award sets the benchmark for what constitutes a reasonable award and where at least a swath of the population, now about 28 to 35 years old, views the redistribution of immense corporate wealth as something to be desired. If all this is true, then as the Great Recession cohort begins filling American jury boxes, we will likely see a level of juror activism that is unlikely to abate for a full generation or more.

Understanding how your case is affected by juror attitudes and predispositions— based on case-specific research—and helping you build a strategy to address them, is the challenge DecisionQuest professionals face with our clients every day.
Want more insight and assistance? Please contact us at rbettler@decisionquest.com.

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[i] https://www.stltoday.com/news/local/crime-and-courts/talc-cancer-verdict-of-billion-from-st-louis-jury-sends/article_c15e7f98-fce0-5a74-80ee-45371d5e98b1.html
[ii] http://www.galawsuitreform.com/georgias-legal-environment-consistent-downward-trend/
[iii] https://cmlawfirm.com/legal-alert-georgia-jury-awards-1-billion-on-premises-liability-case/
[iv] http://www.dcvelocity.com/articles/201872--nuclear----verdicts-take-toll-on-insurance-firms----appetite-to-underwrite-trucking-risk/
[v] Kantar Media
[vi] https://www.jstor.org/stable/10.1086/344560?seq=1#page_scan_tab_contents
[vii] https://spssi.onlinelibrary.wiley.com/doi/full/10.1111/josi.12201.
[viii] https://www.researchgate.net/publication/310477691_The_Great_Recession_and_Group-Based_Control_Converting_Personal_Helplessness_into_Social_Class_In-Group_Trust_and_Collective_Action
[ix] https://www.jstor.org/stable/43551580?seq=1#page_scan_tab_contents
[x]Sunstein, Cass R., Growing Outrage (January 5, 2018). Forthcoming, Behavioural Public Policy. Available at SSRN: https://ssrn.com/abstract=3097224

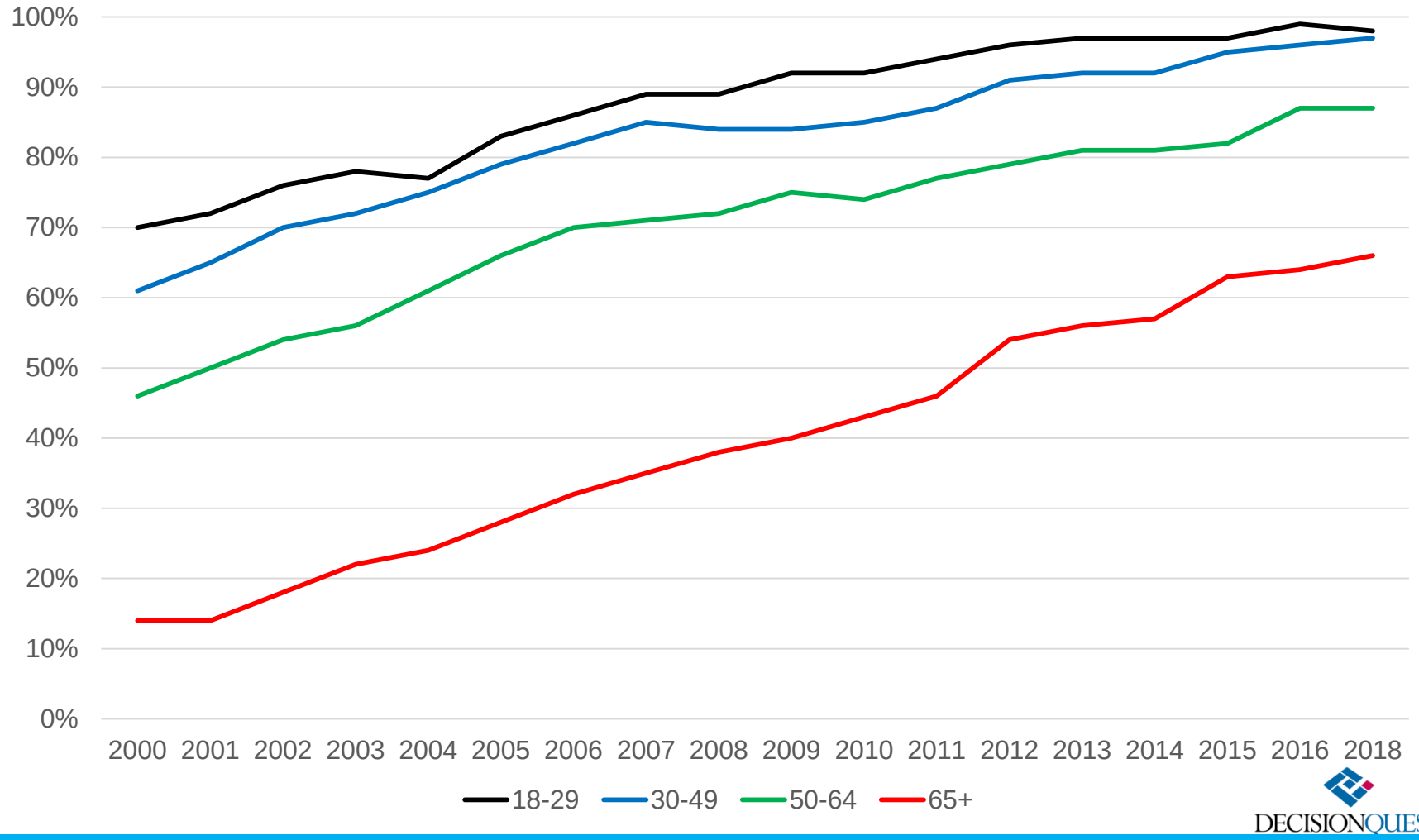
Brave New World:

How the Internet is impacting American courts

Robert F. Bettler, Jr., Ph.D
Senior consultant, DecisionQuest - Atlanta
rbettler@decisionquest.com

DECISIONQUEST®

Internet use by age by year



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Social Media Statistics

2.27 Billion monthly users worldwide
1.74 Billion use mobile device to access
53% of Americans on FB “several times a day”

---

500 Million tweets/day
3.5 Billion tweets/week

---

500 Million registered users worldwide

---

1 Billion hours of videos viewed daily

Sources: www.statista.com, www.fortune.com, www.techcrunch.com

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Jurors Influenced by Wide Range of Social Media

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Cultural shockwaves through history

- Moveable type
- Guns, germs, and steel
- Telegraph and Railroad
- Telephone and automobile
- Radio and Movies
- TV
- Internet

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- Is the Internet impacting human psychology?
- How is it impacting our culture?
- How is it impacting the legal system?
  - What are lawyers doing?
  - How common is juror misconduct?
  - What are courts doing about it?

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How is the Internet affecting human psychology?

- The new science of CyberPsychology
- Nose-in-phone syndrome
  - Dick Tracy
  - Kittens
- Impact on cognitive processes?
- Social impact?

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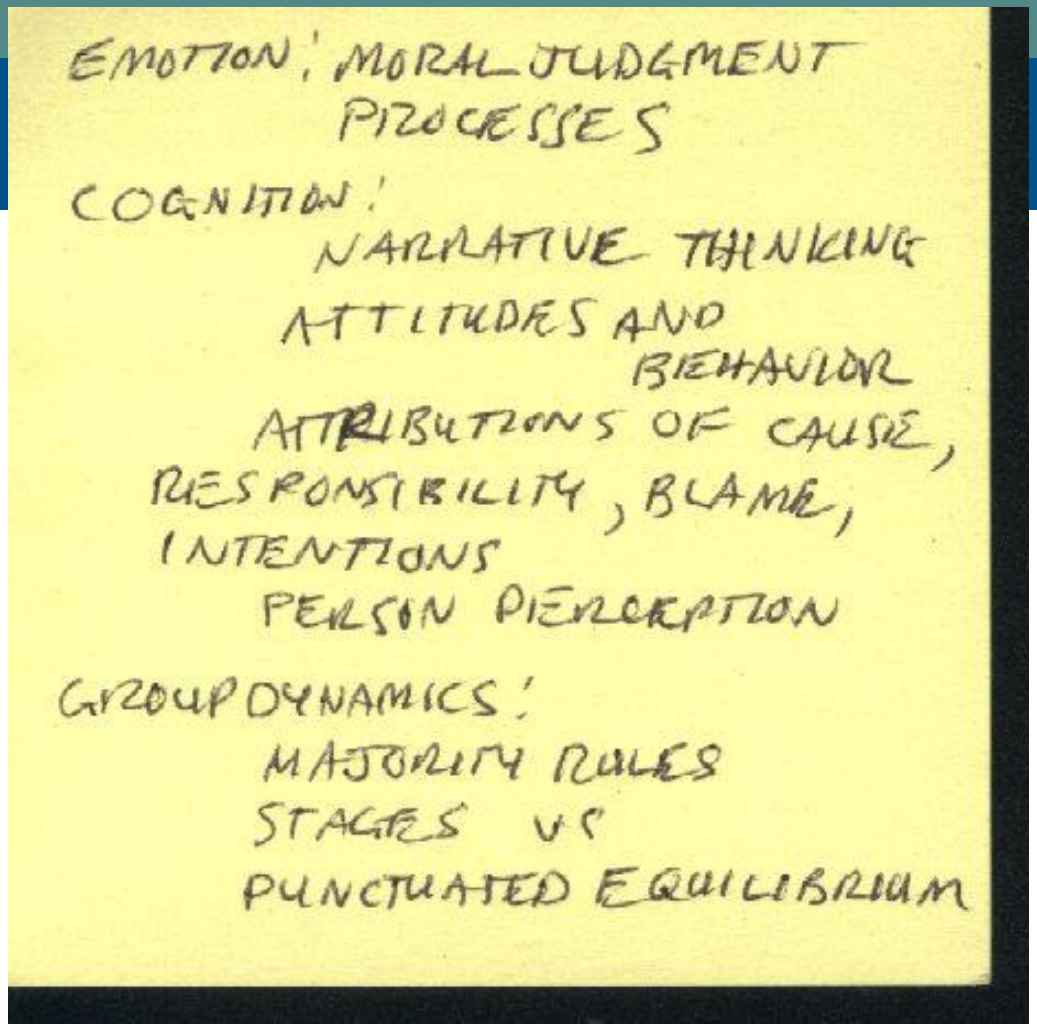
Psychological prosesses



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Psychological versus cultural change

- Basic psychological processes unlikely to change, except over many generations
- A Darwinian view: Reproductive success
- But culture can change very quickly
- The raw material of basic processes, the plots

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Cultural changes

Cultural changes

- Walnut Street, Louisville KY, late 1950s
- From Mad Men to #metoo
- DQ's sexual harassment study
  - Age and gender differences

What are practitioners doing?

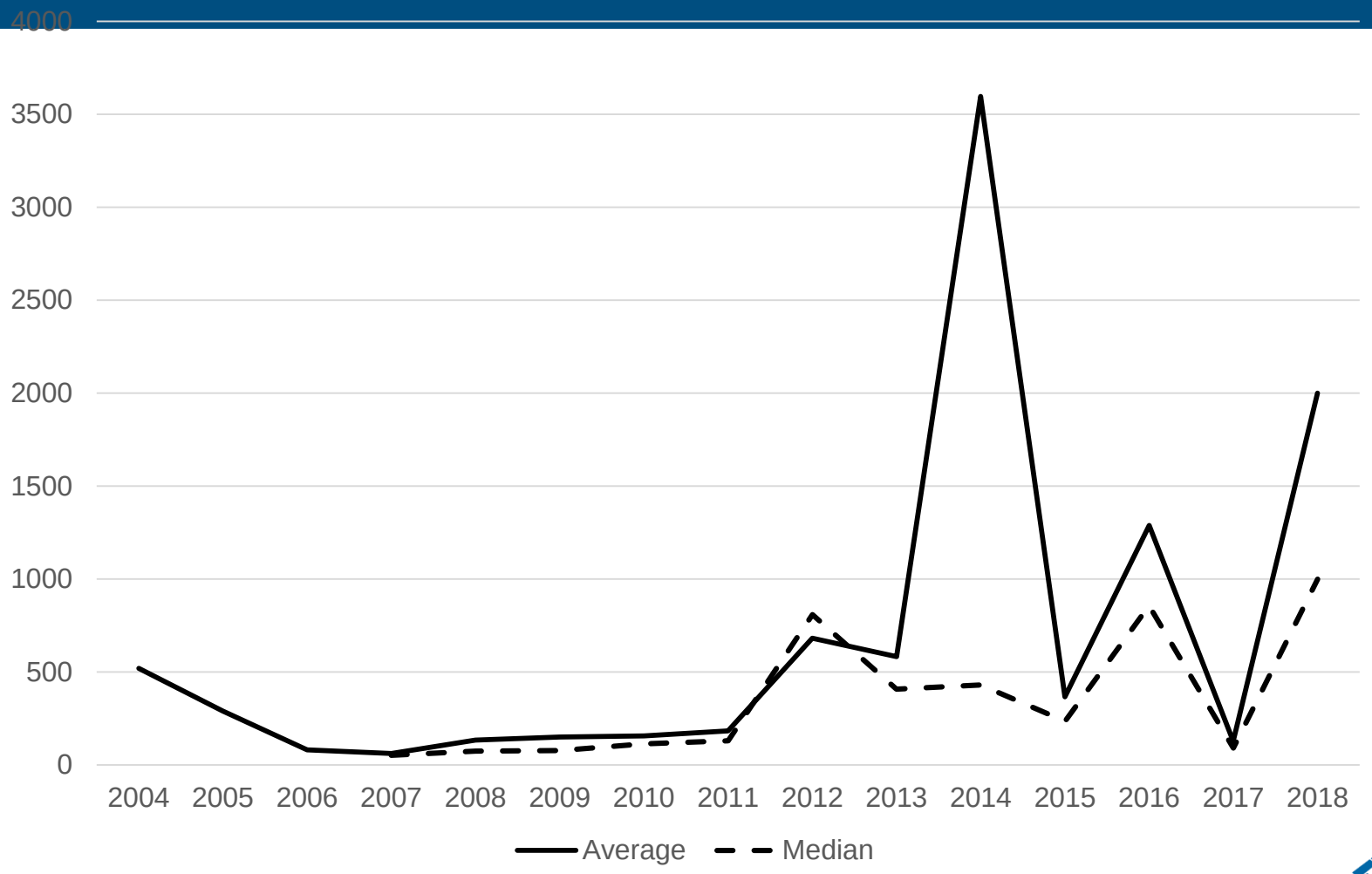
- Lawyers and trial consultants
- Background searches, social media searches on jurors
- Strictly passive, accessing only publicly open material

DECISIONQUEST

How has social media analysis assisted trial teams?

- Led to impeachment of witness during cross-examination
- Galvanized the team to proceed to trial instead of exiting earlier less favorably
  - Usually supplemented with targeted jury research
  - EG, on-line, video chat room focus group
- Supported motion for change of venue
- Uncovered adversary's misuse of social media

Changes in the legal culture: "Blockbuster" verdict trends

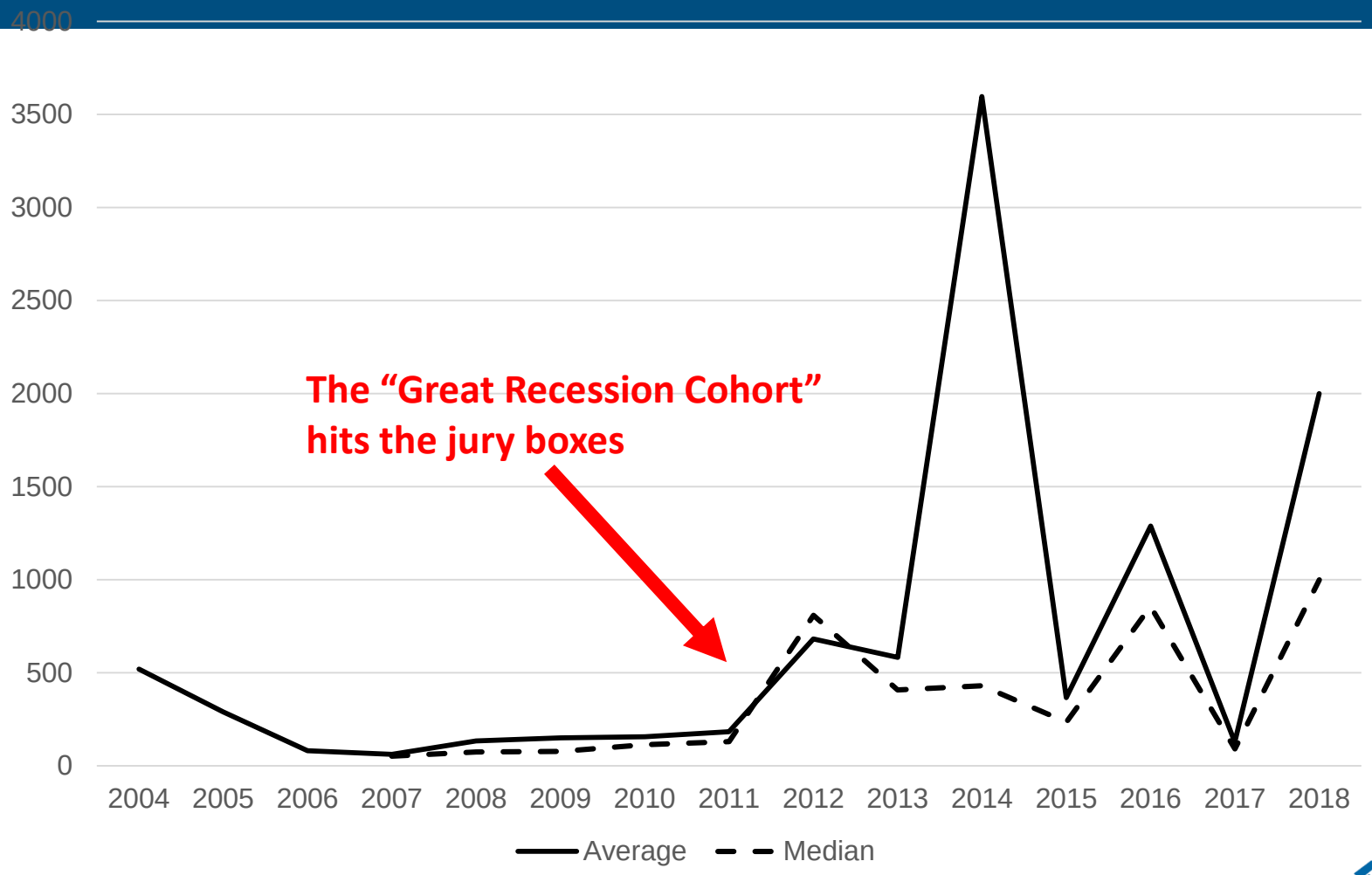


DECISIONQUEST

The impact of the Great Recession

- Economic crises and the loss of control
- Switch from individual to collective action
- Research support

“Blockbuster” verdict trends



DECISIONQUEST

Juror misconduct

CITIZEN MEDIA LAW PROJECT

LEGAL RESOURCES FOR CITIZEN MEDIA

Courts In Colorado, Maryland, New Jersey, Florida Declare Mistrials After Juror Internet Research

Herald-Tribune

Convicted flipper seeks retrial, citing jury misconduct

By Michael Braga
Published: Monday, March 4, 2013 at 4:15 p.m.

What if convictions from the only trial to emerge from the biggest fraud in Southwest Florida history suddenly blew up?

A Tampa criminal defense attorney representing one of three defendants convicted

Hera

Facebook request gets man kicked o

By Todd Ruger
Published: Friday, December 30, 2011 at 11:26 a.m.

Mistrial declared in Mahwah pastor's sex-assault case

TUESDAY, JULY 12, 2011 LAST UPDATED: TUESDAY JULY 12, 2011, 6:34 PM
BY KIBRET MARKOS
STAFF WRITER
THE RECORD

A judge declared a mistrial Tuesday in the sexual-assault trial of a Mahwah minister, a few days after a juror researched the case online and distributed printouts to the other jurors.

Tampa Bay

Judge orders search of juror's co case

William R. Levesque, Times Staff Writer
Tuesday, February 19, 2013 1:17pm

Facebook 247 Tweet 24

TAMPA — A juror accused of conduct star Buju Banton will have her comput

U.S. District Court Judge James Mood expert from releasing to attorneys any Internet research about Banton's case

Los Angeles Times | LOCAL

LOCAL U.S. WORLD BUSINESS SPORTS ENTERTAINMENT HEALTH LIVING TRAVEL OPINION DEALS Weekly Ad

« Previous Post | L.A. NOW Home | Next Post »

Bell corruption trial: Juror dismissed; deliberations to restart

February 28, 2013 | 12:10 pm

DECISIONQUEST

twitter

Eiyesha @iLoserYouLike 11 Apr

I cant do **jury duty** cause Im bias like a a mug lol "Oh you sexy.... NOT **GUILTY!** Here is my number call me" LMAO

I AM TRAYVON MARTIN @cash_no_checks 11 Apr

Who eva trail I got **jury duty** 4 dey gon b pissed cuz dey gon b **guilty** automatically

RichardUSA @RichardUSA 11 Apr

@JoeSixpackSays lol I just got called case was settled two days later I got got another letter for **jury duty**. I think I'll just yell **guilty**.

In reply to Cool Car Guy

CiaoBella□ @Royalcouturexox 11 Apr

In the future If i get **jury duty** I'm running to it cause it might just be for Zimmerman and HELL YEA HE **GUILTY** AF!

DECISIONQUEST

41. As referenced in the instructions to this questionnaire, **you are prohibited from doing any independent investigation whatsoever regarding this case, the parties to the case, the subject matter involved in the case or the attorneys involved in the case. Do not do any Internet searches (Google, etc.) regarding any person, company, or topic in any way involved in this trial until after the trial is concluded. To do so compromises the fairness of the trial and violates your oath as a juror**. If selected as a juror, this prohibition will extend through the end of your jury service in this case.

Do you understand this prohibition? ☒ Yes ☐ No

Is there any reason you cannot abide by this order as a juror? ☒ Yes ☐ No

If yes, please explain:

My profession is advertising on Google often I am called on to research marketing to provide services like Kryptonite services.

42. Do you believe there is any reason that you should not or cannot serve as a juror in this case (including ethical, religious, political, or other beliefs, as well as any medical problems)?

☐ Yes ☒ No

If yes, please explain: _____

Examples of juror misconduct

- Publishing or distributing information about a trial
- Uncovering information about the case by searching the Internet, entering social networking sites, or viewing virtual crime scenes
- Contacting parties, witnesses, lawyers, or judges via social networking
- Discussing or deliberating the merits of the litigation prematurely, or soliciting outside opinions

Source: New York Law Journal, 2011

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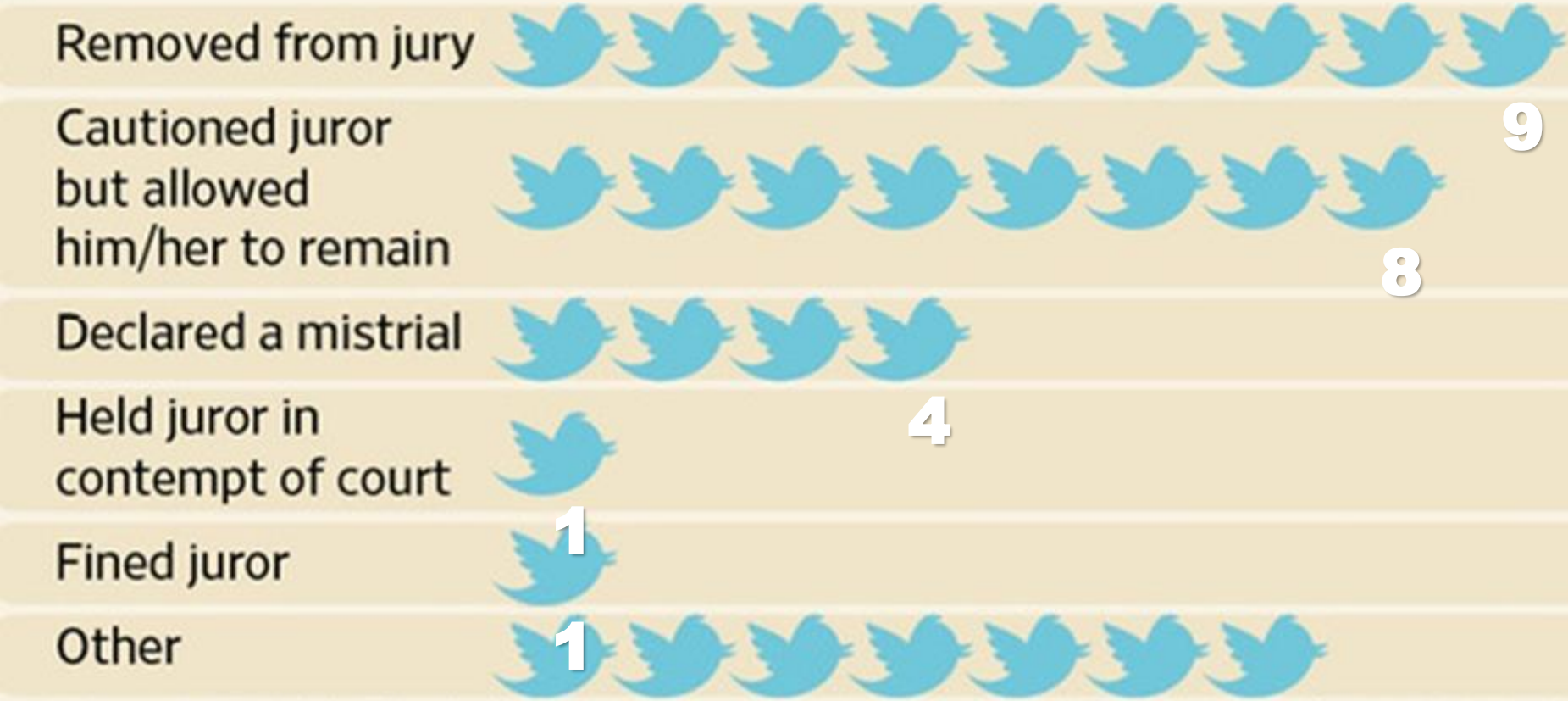
Consequences of juror misconduct

In a recent survey, 30 federal judges discussed which action they took when social media were used by a juror.



Source: Federal Judicial Center

The Wall Street Journal

Sample jury instructions

- It varies by jurisdiction, but instructions are standard now, in jury selection and throughout a trial.
  - Examples: CA, PA, GA, NY
- The Federal Judicial Conference Committee on Court Administration and Case Management approved model jury instructions in January 2010 (revised August 2012).

DECISIONQUEST®

Voir dire

- Ask or seek voir dire questions about internet habits:
  - Do you get your news/information online – Where and how often?
  - Do you use social networks? Which? How often?
  - Do you post to a blog or forum? Which? How often? Under what name(s) do you blog?
  - Will you be able to abide by the rule not to search the Internet about the parties or the case, or post online?
  - Do you realize that some information on the Internet is not correct?
  - Have you read or seen anything about this case already?

South Carolina Bar
Continuing Legal Education Division

2019 SC BAR CONVENTION

Trial & Appellate Advocacy Section
(17th Annual Civil Law Update)

Friday, January 18

Civil Law Update

John S. Nichols

SOUTH CAROLINA BAR CONVENTION

TRIAL & APPELLATE ADVOCACY SECTION
17TH ANNUAL CIVIL LAW UPDATE

2018 CIVIL LAW UPDATE

JOHN S. NICHOLS

FRIDAY, JANUARY 18, 2019

2018 Supreme Court Administrative Orders

Interest Rate for Money Decrees and Judgments - The Court issued its annual order pursuant to S.C. Code Ann. § 34-31-20(B)(Supp. 2017) setting interest rates for judgments entered between January 15, 2018 and January 14, 2019 at 8.50%, compounded annually. *RE: Interest Rates*, Order (S.C. Sup. Ct. filed Jan. 4, 2018).

Digital Courtroom Recorder Pilot Project - The Court created a pilot program for digital recording of certain court proceedings. *RE: Digital Courtroom Recorder Project*, Order (S.C. Sup. Ct. filed Jan. 8, 2018). The Order provides "[t]he transcribed paper copy remains the official record pursuant to Rule 607, SCACR." The Court added counties to the program throughout the year. The counties for **Family Court** include Anderson (1/8/18), Darlington (2/24/18), Dorchester (2/8/18), Greenville (1/22/18), Pickens (2/24/18), Richland (9/24/18), Spartanburg (9/24/18). The counties for **Circuit Court** include Richland (1/16/18), Sumter (1/18/18).

Electronic Filing Pilot Program - The Court expanded the e-filing program to new counties effective throughout the year: Berkeley (9/4/18), Calhoun (8/7/18), Chester (4/24/18), Chesterfield (12/4/18), Dorchester (6/19/18), Fairfield (4/24/18), Florence (10/2/18), Greenwood (1/24/18), Lancaster (5/15/18), Marion (10/20/18), Orangeburg (7/17/18), Richland (reinstated 3/8/18), Union (3/20/18), York (2/27/18). Also, the Court notified attorney e-filers that effective 2/22/18, two enhancements were made to the E-Filing System: New case ID hyperlinks have been added to the My Filings and Notifications pages. Clicking on these links will access the Case History pages for the selected Case ID.

Bulk Distribution of and Compiled Information from Judicial Records - The Court amended Rule 610, SCACR, which gives Court Administration the discretion to authorize bulk distribution of or compiled information from judicial records, if not sought for commercial purposes. The order directs inquiries to an approved form for making requests under Rule 610.

Annual License Fee Increase - The Court granted the Bar's request to increase the annual membership fee $15 based on a recent five-year fiscal projection. *RE: Annual License Fee*, Order (S.C. Sup. Ct. filed April 4, 2018).

Transcript Request Form - The Court adopted a new Form 800 for use in requesting transcripts pursuant to Rules 207 or 607, SCACR. *RE: SCCA Form 800*, Order (S.C. Sup. Ct. filed Aug. 9, 2018).

Limited Scope Rules - The Court requested and received public comments regarding proposed rules amendments to implement limited scope representation in South Carolina whereby a lawyer would handle a discrete portion of the matter, and the client would handle the remainder of the matter on his or her own. Notice posted October 2, 2018.
https://www.sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=2334

2018 Cases

SUPREME COURT

Error Preservation – Application of Preservation Rules. "Considering [Husband's] arguments practically, however, we clearly see that his argument was the same at each stage of these proceedings—he does not own a thirty-acre farm in Greece; he owns a three-acre farm; and it is not worth anything near what [Wife] claims or the family court found. *See Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 644 (2011) ('We are mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner.'). When Husband argued in his Rule 59(e) motion and wrote in his brief to the court of appeals that he 'does not own a thirty-acre farm in Greece,' he did not argue there was no farm. Rather, he argued the farm he admitted he owns is not thirty acres, and is not worth $1,420,000. The issue raised at the court of appeals is precisely the same one Husband raised to the family court at trial and in his Rule 59(e) motion. The family court ruled on the issue, and thus it is preserved. See *Herron*, 395 S.C. at 465, 719 S.E.2d at 642 (stating 'issue preservation requires that an issue be raised to and ruled upon by the trial judge')." *Conits v. Conits*, 422 S.C. 74, 810 S.E.2d 253 (2018).

Parties - "Real Party in Interest" in Action on Behalf of Deceased Person. "The Probate Code defines who may act on behalf of the estate of a deceased person. The Probate Code, therefore, is the substantive law by which the identity of the 'real party in interest' is determined for all civil actions brought on behalf of the estate of a deceased person. When the personal representative of the estate cannot or should not bring the lawsuit, a 'special administrator' should be appointed pursuant to [S.C. Code Ann. §] 62-3-614 [('A special administrator may be appointed . . . in circumstances where a general personal representative cannot or should not act.')]. After the defendants challenged Fisher's status as the real party in interest, she did not ask for 'a reasonable time . . . for ratification . . . or joinder or substitution.' In that circumstance, Rule 17(a) [SCRCP ('Every action shall be prosecuted in the name of the real party in interest')] provides for dismissal, and the circuit court did not err."
Fisher v. Huckabee, 422 S.C. 234, 811 S.E.2d 739 (2018)

Appealability - State May Not Appeal Immediately from Mid-trial Ruling on Proposed Jury Instruction. Father was indicted for inflicting great bodily injury upon a child – a violation of S.C. Code Ann. § 16-3-95 (2015). The applicable portion of the statute does not set forth a specific level of intent the State must prove. One of Father's requested jury charges stated:

> It is unlawful to inflict great bodily injury upon a child. To violate this statute, the [S]tate is required to prove that [Father] acted wil[l]fully. To act wil[l]fully, the [S]tate is required to prove that [Father] knew his act would inflict great bodily injury upon a child. It is not sufficient that the [S]tate prove that he

> acted negligently, grossly negligent[ly] or reckless[ly] in his action. Such actions are not wil[l]ful as alleged in the indictment.

The State objected to the proposed jury charge, arguing the jury charge added an element to the offense that was not in the statute. The trial court determined Father's requested jury charge – except for the last sentence – was appropriate. Before the trial court could charge the jury, the State filed its notice of appeal with the court of appeals. The court of appeals promptly dismissed the State's appeal, ruling the trial court's decision to give the disputed jury charge was not immediately appealable. The Supreme Court granted certiorari and affirmed the dismissal, stating:

> In the instant case, we hold the State's issue is not immediately appealable. An immediate appeal from a mid-trial ruling on a proposed jury charge is a different animal from an immediate appeal from a pre-trial evidentiary ruling which materially hampers the State's prosecution of a case. [S.C. Code Ann. §] 14-3-330(2) requires the State to show that the trial court's decision to charge "willfulness" to the jury "in effect determines the action." The State simply has not made that showing. The trial court's decision to give the disputed charge might make it more difficult for the State to prove its case; however, it does not foreclose the possibility that the jury could find Father acted willfully in inflicting great bodily injury upon Child. Therefore, the trial court's decision to give the disputed charge did not in effect determine the action.
>
> We acknowledge that if the appeal is dismissed, the State will have no opportunity for appellate review of the propriety of the disputed jury charge. If the jury were to return a verdict of acquittal, the State would not be able to appeal the trial court's jury charge. *See State v. Tillinghast*, 375 S.C. 201, 203, 652 S.E.2d 400, 401 (2007) (providing the State may not appeal from an acquittal when raising a question of law). However, the State's argument stands true for any objection the State may have to any ruling made by the trial court during trial. There are countless situations in which a trial court's mid-trial ruling could make the State's prosecution of its case more difficult, and the State would still be prohibited from appealing the trial court's decision if the jury returned a verdict of acquittal. If we were to adopt the State's reasoning, the State would conceivably be permitted to appeal any adverse mid-trial ruling on the ground the State would not be able to appeal the ruling following a verdict of acquittal. Section 14-3-330(2) cannot be interpreted to permit such appeals to go forward, as such an interpretation would result in the trial process becoming an unmanageable "stop-and-start" enterprise.

State v. Ledford, 422 S.C. 244, 810 S.E.2d 868 (2018).

Medical Malpractice Presuit Procedure - Expert Affidavit Sufficient Even Though Expert Not in Same Area of Practice as Defendant Doctor. This case required the Court to decide whether an expert witness affidavit submitted prior to the commencement of a medical malpractice action complied with S.C. Code Ann. § 15-36-100(A) (Supp. 2016). The trial court found the affidavit insufficient based on the expert's practice area and dismissed the Notice of Intent to File Suit (NOI). The Supreme Court reversed, finding the statute permits the production of an affidavit from an expert who does not practice in the same area of medicine as the allegedly negligent doctor. Section 15-36-100(A)(3) provides that an individual who is not otherwise qualified under subsections (A)(1) or (2) may still qualify as an expert if he has "scientific, technical, or other specialized knowledge which may assist the trier of fact in understanding the evidence and determining a fact or issue in the case, by reason of the individual's study, experience, or both." To qualify under this provision, an affidavit filed by a proposed expert must contain an explanation of the expert's credentials and their relevance to the case. Thus, this subsection contemplates the production of an expert affidavit from a doctor who is not certified in or does not practice in the same area of medicine as the defendant doctor, but otherwise possesses specialized knowledge to assist the trier of fact. *Eades v. Palmetto Cardiovascular and Thoracic, PA*, 422 S.C. 196, 810 S.E.2d 848 (2018)

Appellate Practice - Insufficiency of the Record. The Supreme Court stated:

> As we read this record and the court of appeals' opinion, Donevant was fired because she carried out her mandatory responsibility under the law to enforce the provisions of the building code. *The jury charge and the closing arguments are not in the record, which prevents us from determining the precise factual question the trial court put before the jury*. However, during oral argument at the court of appeals, "the Town conceded that the reason Donevant was fired is not an issue on appeal." [*Donevant v. Town of Surfside Beach*, 414 S.C. 396, 408, 778 S.E.2d 320, 327 (Ct. App. 2015)]. Therefore, based on the record as it appears to us, the question on appeal is whether it is a violation of a clear mandate of public policy to fire a building official for enforcing the building code. *Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 219, 225, 337 S.E.2d 213, 216 (1985). As the court of appeals held, the answer is "yes." This case fits squarely within the long established limits of the public policy exception to the at-will employment doctrine because firing Donevant for enforcing the building code violates a clear mandate of public policy. *See Barron v. Labor Finders of S.C.*, 393 S.C. 609, 614, 713 S.E.2d 634, 636-37 (2011) ("Under the 'public policy exception' to the at-will employment doctrine . . . an at-will employee has a cause of action in tort for wrongful termination where there is a retaliatory termination of the at-will employee in violation of a clear mandate of public policy." (citing *Ludwick*, 287 S.C. 219, 337 S.E.2d 213)).

Donevant v. Town of Surfside Beach, 422 S.C. 264, 811 S.E.2d 744 (2018).

Email from Court, Attorney of Record, or a Party, Triggers Time for Serving Notice of Appeal. The Supreme Court granted certiorari to review "the novel issue of whether an email that provides written notice of entry of an order or judgment triggers the time for serving a notice of appeal for purposes of Rule 203(b)(1) of the South Carolina Appellate Court Rules ('SCACR'). As will be discussed, we hold that such an email, if sent from the court, an attorney of record, or a party, triggers the time to serve a notice of appeal. Because the email giving rise to this appeal was from a master-in-equity's administrative assistant and provided written notice of the entry of an order, we find the email triggered the time to appeal. Since the notice of appeal was not served until thirty-one days after the parties received the email, we agree with the Court of Appeals that the service of the notice of appeal was untimely. However, given the novelty of the issue, the frequency in which the issue is likely to arise, and the inconsistent case law interpreting Rule 203, SCACR, fairness dictates that our ruling on this issue be applied prospectively. Accordingly, we affirm as modified and remand to the Court of Appeals to allow the appeal to proceed on its merits." *Wells Fargo Bank, NA v. Fallon Properties S.C., LLC*, 422 S.C. 211, 810 S.E.2d 856 (2018).

Action Between Two State Agencies - Writ of Mandamus Rules - Injunction Rules - Receiver Rules. Richland County sued the SC Department of Revenue, seeking mandamus to compel the DOR to pay over the "Penny Tax" that DOR collected and seeking an injunction preventing DOR from contesting various expenditures or withholding future taxes. DOR counterclaimed, asserting the County misused the funds, that DOR had oversight authority on the expenditures, and that DOR was entitled to injunctive relief against the County and the appointment of a receiver. The Supreme Court affirmed the grant of mandamus, the denial of an injunction for the County, and the refusal to appoint a receiver. The Court reversed, however, the failure to grant injunctive relief for DOR, finding DOR had established misuse of the Penny Tax funds. The Court stated: (A) In a dispute between two government agencies, the complaining agency must at least show that it has some special interest from which it is charged with responsibility that may be adversely affected by the action attacked. When a state agency has significant duties relating to the subject matter of the action, the agency's real and substantial interest in the case is established. Moreover, a party who names a state agency in a complaint and motion cannot thereafter claim the state agency lacks standing to appear and defend itself in the action. See Rule 13(a), SCRCP (a counterclaim is compulsory "if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim."). (B) Whether to issue a writ of mandamus lies within the sound discretion of the trial court, and an appellate court will not overturn that decision unless the trial court abuses its discretion. An abuse of discretion arises where the trial court was controlled by an error of law or where its order is based on factual conclusions that are without evidentiary support. To obtain a writ of mandamus requiring the performance of an act, the petitioner must show: (1) a duty of respondent to perform the act; (2) the ministerial nature of the act; (3) the petitioner's specific legal right for which discharge of the duty is necessary; and (4) a lack of any other legal remedy. A writ of mandamus is designed to promote justice, subject to certain well-defined qualifications. Its principal function is to

command and execute, and not to inquire and adjudicate. (C) The duties of public officials are generally classified as ministerial and discretionary (or quasi-judicial). The character of an official's public duties is determined by the nature of the act performed. The duty is ministerial when it is absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts. It is ministerial if it is defined by law with such precision as to leave nothing to the exercise of discretion. In contrast, a quasi-judicial duty requires the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued. (D) An order granting or denying an injunction is reviewed for abuse of discretion. An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff. To obtain an injunction, a party must demonstrate irreparable harm, a likelihood of success on the merits, and the absence of an adequate remedy at law. In order to receive the aid of a Court of equity to enjoin a public corporation or department of government in the performance of actions or duties provided by statute, there must be allegations or showing that the public department or corporation has exercised its power in an arbitrary, oppressive or capricious manner. (E) South Carolina Code section 15-65-10 sets forth the circumstances under which the appointment of a receiver is appropriate. Before judgment is rendered, "A receiver may be appointed by a judge of the circuit court . . . on the application of either party when he establishes an apparent right to property which is the subject of the action and which is in the possession of an adverse party and the property, or its rents and profits, are in danger of being lost or materially injured or impaired . . . ." S.C. Code Ann. § 15-65-10(1). The appointment of a receiver is within the discretion of the circuit judge. The appointment of a receiver is a drastic remedy, and should be granted only with reluctance and caution. As a rule, a receiver will not be appointed during the progress of a cause, unless there is the strongest reason to believe that the plaintiff is entitled to the relief demanded in his complaint, and there is danger that the property will be materially injured before the case can be determined. *Richland County v. SC Dep't of Revenue*, 422 S.C. 292, 811 S.E.2d 758 (2018).

Error Preservation - Rule 59, SCRCP - *Res Judicata* Rules. Roddey sued Wal-Mart and its security company, USSA, after Roddey's decedent was killed while being pursued by a USSA employee who suspected her of shoplifting. The trial court dismissed Wal-Mart as a matter of law, and the jury found against USSA for negligently hiring and supervising its employee but found decedent 65% at fault. Roddey made post trial motions and subsequently appealed. He lost at the Court of Appeals, but the Supreme Court reversed and remanded. On remand, the trial court struck Roddey's claims against Wal-Mart for negligent hiring of USSA, and Roddey appealed. The Supreme Court certified the appeal for its review and affirmed. The Court noted that in his Rule 59, SCRCP motion, Roddey did not challenge the circuit court's grant of a directed verdict in favor of Wal-Mart on the negligent hiring action or allege any error regarding the jury's verdict in favor of USSA on the negligent hiring action. Moreover, the only issue Roddey appealed was the circuit court's grant of a directed verdict in favor of Wal-Mart on the negligence action, which was the only issue addressed by the Supreme Court and the Court of Appeals. Therefore, the Supreme Court's prior decision to grant a new trial only encompassed

the negligence action since the negligent hiring action was not preserved for its review. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge."); *Summersell v. S.C. Dep't of Pub. Safety*, 337 S.C. 19, 22, 522 S.E.2d 144, 145-46 (1999) (stating "where an issue presented to the circuit court in a civil case is not explicitly ruled upon in the final order, the issue must be raised by an appropriate post-trial motion to be preserved for appellate review"); *Hendrix v. E. Distrib., Inc.*, 320 S.C. 218, 219, 464 S.E.2d 112, 113 (1995) (providing that an issue should not be addressed by an appellate court if it is not preserved for the court's review). Accordingly, the Court affirmed the circuit court's decision to strike the negligent hiring action on the basis of *res judicata*. *See Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999) ("*Res judicata* bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties."); *id.* ("Under the doctrine of *res judicata*, '[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.'" (quoting *Hilton Head Ctr. of S. Carolina, Inc. v. Pub. Serv. Comm'n of S. Carolina*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987))). *Roddey v. Wal-Mart Stores East, LP*, 422 S.C. 344, 811 S.E.2d 785 (2018).

Appellate Scope of Review - Workers' Compensation Commission - Determination of Timely Notice. The Workers' Compensation Commission's determination of whether a claimant gave timely notice under S.C. Code Ann. § 42-15-20 is not a jurisdictional determination, and must be reviewed on appeal under the substantial evidence standard. *Nero v. SC Dep't of Transp.*, 422 S.C. 424, 812 S.E.2d 735 (2018).

Rule 60(B), SCRCP - Adoption Action - Extrinsic Fraud. (A) Once a final adoption decree is entered, a validly executed consent to adoption is irrevocable. S.C. Code Ann. § 63-9-350 (2010). However, a court retains its authority to grant collateral relief from an adoption decree on the ground of extrinsic fraud. S.C. Code Ann. § 63-9-770(B) (2010). (B) Extrinsic fraud "is 'fraud that induces a person not to present a case or deprives a person of the opportunity to be heard.'" *Hagy v. Pruitt*, 339 S.C. 425, 431, 529 S.E.2d 714, 718 (2000) (quoting *Hilton Head Center of S.C. v. Pub. Serv. Comm'n*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987)). (C) The Supreme Court held extrinsic fraud was sufficiently alleged in the Rule 60(b) motion, and the court of appeals erred in affirming the family court's dismissal on that basis. *See Hagy*, 339 S.C. at 431–32, 529 S.E.2d at 718 (holding allegations that fraudulent actions which induced a mother to sign a consent to adoption thereby waiving her right to notice and appearance in the adoption proceeding sufficiently alleged extrinsic fraud); *Greer v. McFadden*, 295 S.C. 14, 17, 366 S.E.2d 263, 265 (Ct. App. 1988) (holding even if a *pro se* claim is not framed with expert precision, where the point is clear, the issue should be addressed); *cf. Iowa Sup. Ct. Att'y Disciplinary Bd. v. Rhinehart*, 827 N.W.2d 169, 172–74 (2013) (finding an attorney's failure to disclose to the family court the existence of separate pending actions that could potentially impact the family court's division of marital assets constituted extrinsic fraud). (D) Rule 60(b), SCRCP, provides

that a party may be relieved from a final judgment on the basis of "fraud, misrepresentation, or other misconduct of an adverse party." A motion pursuant to Rule 60(b) "shall be made within a reasonable time, and . . . not more than one year after the judgment, order, or proceeding was entered or taken." (E) The final adoption decree was entered December 15, 2014. At a hearing on April 1, 2015, the family court instructed the Carters to file the Rule 60(b) motion. The Carters did so on April 7, 2015. "Because this period of time is both reasonable and not more than one year after the entry of the final adoption decree, we find the family court abused its discretion in finding the Carters' Rule 60(b) motion was untimely. *See Coleman v. Dunlap*, 306 S.C. 491, 495, 413 S.E.2d 15, 17 (1992) (where Rule 60(b) motion is filed shortly after the movant becomes aware of the basis therefor and there is no evidence of unreasonable delay, the motion is timely). Because the Rule 60(b) motion was timely filed, Petitioner is entitled to an opportunity to be heard on the merits of her claim therein." *Ex Parte Carter*, 422 S.C. 623, 813 S.E.2d 686 (2018).

Criminal Cases - Jury Instruction to "Seek the Truth" Prohibited – Trial Court May Control Manner of State's Closing Argument in Criminal Cases. (A) A trial judge should refrain from informing the jury, whether through comments or through a charge on the law, that its role is to search for the truth, or to find the true facts, or to render a just verdict. These phrases could be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict the jury believes best serves its perception of justice. The Court added, "We instruct trial judges to avoid these terms and any others that may divert the jury from its obligation in a criminal case to determine whether the State has proven the defendant's guilt beyond a reasonable doubt." (B) Article V, section 5 of the South Carolina Constitution limits the Supreme Court's authority to correcting errors of law and does not empower the Court to promulgate a procedural rule for future cases by simply issuing an opinion. Article V, section 4A, of the South Carolina Constitution prohibits the Court from adopting any rules of practice and procedure – even a much-needed rule governing the practice and procedure of closing arguments in criminal cases – without first going through the prescribed legislative process. Currently, there is no rule governing the content and order of closing arguments in criminal cases in which a defendant introduces evidence, except for the "constitutional rule" that a defendant's right to due process cannot be violated at any stage of a trial. Consequently, trial judges must, on a case-by-case basis, ensure that a defendant's due process rights are not violated during the closing argument stage. Absent authority to formally adopt procedural rules, the Court's authority – and the authority of the trial court – is but to address due process considerations as they arise. In cases in which a defendant introduces evidence, trial judges clearly have the authority to require the State to open in full on the facts and the law and have the authority to restrict the State's reply argument to matters raised by the defense in closing. This authority remains in keeping with the trial judge's authority to ensure that a defendant's due process rights are not violated during a criminal trial. The Court added, "We remain mindful of the need for clearly articulated rules governing the content and order of closing arguments in cases in which a defendant introduces evidence. The uncertainty resulting from the absence of such rules is unfortunate. We hope the day will soon come when such rules are firmly in place." *State v. Beaty*, 423 S.C. 26, 813 S.E.2d 502 (2018).

Summary Judgment Inappropriate Where Parties Have Not Had Opportunity to Conduct Significant Discovery. Access2Care contracted with the S.C. Department of Health and Human Services (DHHS) to administer Medicaid's Nonemergency Medical Transportation Program. Pursuant to its contract with DHHS, Access2Care served as broker, whereby it contracted with Low Country Medical Services, the entity that transported patients for nonemergency medical appointments. Charles Gary was injured in a collision while being transported in an ambulance operated by Low Country Medical Services. Less than three months after Access2Care filed its amended answer and without any meaningful discovery, Gary moved for summary judgment, arguing both public policy and the contract between Access2Care and DHHS imposed a nondelegable duty on Access2Care to ensure safe transportation of patients. The trial court granted summary judgment in favor of Gary, but the court of appeals reversed, holding Access2Care did not owe a nondelegable duty to safely transport Gary. *Gary v. Askew*, 417 S.C. 232, 789 S.E.2d 94 (Ct. App. 2016). The Supreme Court vacated and remanded, stating "Because the record contains minimal evidence about the nature of the collision and the parties have not had an opportunity to conduct significant discovery, we find summary judgment is premature. *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 644, 594 S.E.2d 455, 462 (2004) ("[S]ince it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues."); *Baird v. Charleston Cty.*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999) ("[S]ummary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery."); *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991) (holding summary judgment was premature where the plaintiff did not have an adequate opportunity to conduct discovery on the issue of medical causation). The Court noted it expressed no opinion about the merits of Gary's nondelegable duty claim. *Gary v. Askew*, 423 S.C. 47, 813 S.E.2d 717 (2018).

Error Preservation Rules Should be Applied with Practical Eye. No party should be penalized for not addressing an issue as to which it had previously prevailed, and which it did not reasonably contemplate would yet be the basis of the court's ruling. *See Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 644 (2011) (finding appellate courts should remain "mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner"); *In re Timmerman*, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct. App. 1998) ("When a party receives an order that grants certain relief not previously contemplated or presented to the trial court, the aggrieved party must move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issue for appeal."). *Amisub of SC v. S.C. Dep't of Health and Envir. Ctrl.*, 423 S. 50, 813 S.E.2d 719 (2018).

Qualified Evidentiary Privilege for Trade Secrets. The Supreme Court accepted the following certified question from the United States Court of Appeals for the Fourth Circuit: "Does South Carolina recognize an evidentiary privilege for trade secrets?" The Court answered by holding "South Carolina does recognize an evidentiary privilege for trade secrets, but it is a qualified

privilege." The Court concluded, "The existence of an evidentiary privilege will invariably bring to the fore the tension between the law's overarching goal of seeking the truth and the ability of an owner of a trade secret to resist its disclosure. Here, in discerning legislative intent, the Trade Secrets Act [S.C. Code Ann. §§ 39-8-10 to -130 (Supp. 2017)] sets forth a specific balancing test to resolve that tension. The legislature has chosen to strike that balance through the heightened 'substantial need' test. Therefore, we answer the certified question ... by holding that South Carolina does recognize a qualified evidentiary privilege for trade secrets." *Hartsock v. Goodyear Dunlop Tires NA*, 422 S.C. 643, 813 S.E.2d 696 (2018).

Trial Court May Not Extend Time to File Motion Pursuant to Rule 59(e), SCRCP - Ten-Day Limit is an Absolute Deadline. Rule 6(b) of the South Carolina Rules of Civil Procedure gives trial courts limited authority to extend deadlines set forth in the Rules. However, Rule (6)(b) explicitly excludes Rule 59 and certain other rules from that authority. Rule 6(b) states, "The time for taking any action under rules 50(b), 52(b), 59, and 60(b) may not be extended except to the extent and under the conditions stated in them." Rule 59(e) does not have any "conditions stated" which would allow such an extension. Rather, Rule 59(e) states, "A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order." The Supreme Court noted it has previously held that the ten-day limit for serving a Rule 59(e) motion is an absolute deadline. In *Leviner v. Sonoco Prods. Co.*, 339 S.C. 492, 530 S.E.2d 127 (2000), the circuit court entered a dispositive order on January 10, 1997. 339 S.C. at 493, 530 S.E.2d at 127. "Neither party filed a Rule 59(e), SCRCP, motion within the ten day period allowed by that rule." *Id.* Nevertheless, on February 10, the circuit court issued another dispositive order completely reversing itself from the January 10 order. The *Leviner* Court held, "the trial judge's . . . order filed February 10, 1997, more than thirty days later, was patently untimely. Under Rule59(e), SCRCP, the trial judge has only ten days from entry of judgment to alter or amend an earlier order on his own initiative . . . . When no timely Rule 59 motion was made nor timely *sua sponte* order filed under Rule 59(e), the January . . . order 'matured' into a final judgment. The order filed on February 10 was a nullity because the trial judge no longer had jurisdiction over the matter." 339 S.C. at 494, 530 S.E.2d at 128; *see also Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 20, 633 S.E.2d 722, 730 (2006) ("Generally, a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed."); *Doran v. Doran*, 288 S.C. 477, 343 S.E.2d 618 (1986) (on appeal from an order entered just before the effective date of the Rules of Civil Procedure, holding the trial court lost the power to modify the final order after end of the term of court, and noted that under Rule 59(e) the trial court would have the power to alter or amend such an order for a ten-day period after entry of judgment). The Supreme Court stated, "In light of these authorities, we repeat that the ten-day deadline in Rule 59(e) is an absolute deadline. A trial court does not have the power to alter or amend a final order if more than ten days passes and no Rule 59(e) motion has been served, *Leviner*, 339 S.C. at 494, 530 S.E.2d at 128, nor does a trial court have any power to grant the moving party an extension of time in which to file a Rule 59(e) motion, *see Alston v. MCI Commc'ns Corp.*, 84 F.3d 705, 706 (4th Cir. 1996) ('It is clear . . . that the district court was without power to enlarge the time period for filing a Rule 59(e) motion.'). The failure to serve a

Rule 59(e) motion within ten days of receipt of notice of entry of the order converts the order into a final judgment, and the aggrieved party's only recourse is to file a notice of ... appeal." *Overland v. Nance*, 423 S.C. 253, 815 S.E.2d 431 (2018).

Local Chamber of Commerce not Subject to FOIA. This appeal presented the question of whether the Hilton Head Island-Bluffton Chamber of Commerce (Chamber) was subject to the Freedom of Information Act (FOIA), S.C. Code Ann. §§ 30-4-10 to -165 (2007 & Supp. 2017), due to its receipt and expenditure of certain funds designated for promoting tourism (referred to collectively as accommodation tax funds). The Chamber's receipt and expenditure of these funds is pursuant to, and governed by, the Accommodations Tax (A-Tax) statute and Proviso 39.2 of the Appropriation Act for Budget Year 2012–2013. The trial court held that the Chamber was a public body and, thus, was subject to FOIA's provisions. The Supreme Court reversed and held, as a matter of discerning legislative intent, that the General Assembly did not intend the Chamber to be considered a public body for purposes of FOIA as a result of its receipt and expenditure of these specific funds. *DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Commerce*, 423 S.C. 295, 814 S.E.2d 513 (2018).

Appeals from Circuit Court Sitting in Appellate Capacity - "Two-judge Rule" Not Applicable. The "two-judge rule" has no applicability to cases wherein the circuit court, sitting in a purely appellate capacity, affirms the findings of a lower tribunal. Instead, the applicable standard of review is the same as in other equity matters, and the appellate courts of this state may take their own view of the preponderance of the evidence. *Matter of Estate of Kay v. Sullivan*, 423 S.C. 476, 816 S.E.2d 542 (2018).

Discretionary Decisions must Be Based upon Evidence. Although the circuit court has discretion in deciding the specific amount of reasonable attorneys' fees, its decision must not be based on unsupported factual conclusions. In the absence of any evidence to support the rate less than that claimed, the Supreme Court found the circuit court abused its discretion. The Court stated, "If this were a situation in which the parties offered conflicting evidence as to the appropriate hourly rate, we would remand this case to the circuit court to allow the court to reconsider its decision and provide specific findings that support the award amount. [citation omitted] Decisions as to the amount of attorneys' fees should ordinarily be made by trial courts. When a trial court's decision is made on a sound evidentiary basis and is adequately explained with specific findings – as the law requires – we defer to the trial court's discretion. Here, however, there is no evidence in the record that supports the circuit court's reduction of the hourly rate (from the proposed rates of $275 and $250 down to $100). Thus, we find a remand unnecessary." The Supreme Court reversed and awarded plaintiff fees in the amounts sought. *Horton v. Jasper County School Dist.*, 423 S.C. 325, 815 S.E.2d 442 (2018).

Order from Administrative Law Court That Contains a Remand Not Immediately Appealable - Rules Governing Operation of Rule 601, Scacr, Regarding Conflicts Between Scheduled Hearings. (A) Whether an order is "final" and therefore appealable depends on the substance of the order: Whether it disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined. The label given to the order is not determinative of its immediate appealability. When a party seeks review of an order of the ALC – pursuant to S.C. Code Ann. § 1-23-380 or § 1-23-610 – the court of appeals will not entertain an appeal from an order that leaves some further act which must be done. (B) Rule 601(a), SCACR, provides, "In the event an attorney of record is called to appear simultaneously in actions pending in two or more tribunals of this State, the following list shall establish the priority of his obligations to those tribunals," followed by thirteen subsections listing various courts and tribunals in the order of priority to be given to each. Rule 601(c) provides, "An attorney who cannot make a scheduled appearance because of the priority established by paragraph (a) of this rule shall notify the affected tribunals as soon as the conflict becomes apparent." (C) The Appellate Court Rules supersede any conflicting procedural rule of an agency. (D) An attorney does not need a "continuance" in a tribunal when Rule 601 gives priority to another tribunal. When a tribunal with lower priority under Rule 601(a) is advised that an attorney summoned to appear before it has been called to appear simultaneously in a tribunal with higher priority, Rule 601(a) requires the tribunal with lower priority to yield. While Rule 601(c) and the general obligation of respect and candor an attorney owes any tribunal require the attorney to notify the tribunal of the conflict, Rule 601(a) itself "establish[es] the priority of his obligations," and therefore resolves the conflict. When Rule 601(a) sets the priority, the attorney may appear in the tribunal with higher priority – and is excused from appearing in the tribunal with lower priority – without the permission of the lower priority tribunal. When an attorney demonstrates to a tribunal with lower priority that he has been called to appear simultaneously in a tribunal with higher priority, Rule 601(a) requires the tribunal with lower priority to yield. By automatic operation of the Rule – without the permission of the lower priority tribunal – the attorney is excused from appearing in the lower priority tribunal. This is true even if the judge or hearing officer reasonably believes the attorney has not adequately complied with Rule 601(c). (E) Trial judges have a variety of options to deal with attorneys who do not comply with Rule 601(c), or who otherwise abuse the privileges Rule 601(a) provides, but dismissing the action in the lower priority tribunal simply because the attorney is attending a proceeding in a higher priority tribunal – as Rule 601(a) specifically permits – is not one of the options. (F) However, Rule 601 requires more from attorneys and judges than merely to resort to the technical provisions of the Rule. A tribunal's failure to accommodate the scheduling demands of an attorney can result in the unlawful denial of a litigant's right to be heard. On the other hand, an attorney's failure to promptly provide notice of scheduling conflicts creates difficult challenges for courts in fulfilling their duty to maintain current dockets. The Court added that it is well-aware that a very small number of attorneys intentionally abuse the privileges given to them by Rule 601, not only to enable their own disorganization or lack of diligence, but in some instances even to gain strategic advantage for their clients. The Court stated: "To minimize these problems, we recommend attorneys, trial judges, and hearing officers employ the following approach to accommodate the scheduling

conflicts addressed by Rule 601. First, attorneys and courts should work together as far as practicable to avoid scheduling conflicts in the first place. Second, when potential scheduling conflicts do arise, attorneys should notify all affected tribunals reasonably promptly. In instances where the attorney recognizes a reasonable possibility the conflict may resolve itself, the attorney should consider communicating that fact to the tribunal. This information will alert the lower priority tribunal that a hearing may have to be rescheduled, but permit the hearing to go forward as scheduled if the conflict resolves. Third, attorneys and tribunals should show flexibility. In some instances, attorneys should consider asking the higher priority tribunal to be flexible. For example, our experience is that family courts hearing matters that will be short in duration (Rule 601(a)(4) or (a)(7)), general sessions courts hearing guilty pleas (Rule 601(a)(5)), common pleas courts hearing motions (Rule 601(a)(8)), and others, are willing to move a scheduled hearing around in a day or a week to accommodate an attorney who is simultaneously called to appear in a lower priority tribunal such as the ALC (Rule 601(a)(9)) or magistrates court (Rule 601(a)(12)) when rescheduling the proceeding in the lower priority tribunal poses problems. These suggestions are not intended to be mandatory nor to be exclusive. We are confident attorneys and tribunals will devise additional ways to minimize scheduling problems and accomplish the purposes of Rule 601. In all instances, attorneys and tribunals should attempt to resolve conflicts without significant delays in any proceedings. Finally, trial judges and hearing officers who suspect that attorneys are abusing the privileges granted by Rule 601 should confront the suspected abuse. In many instances, a judge who suspects abuse who contacts the attorney within the limits of *ex parte* communications will discover the suspicion arose from a misunderstanding. The mere knowledge that judges are alert to potential abuse will deter attorneys from engaging in it. In the rare case in which actual abuse is discovered, such a conversation is likely to keep it from happening again. If a judge 'receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct,' the judge 'should take appropriate action' as set forth in Canon 3D(2) of the Code of Judicial Conduct. Rule 501, SCACR. In extreme cases – and only where appropriate under the law – a judicial branch court may use its contempt power after notice and an opportunity to be heard." *Spalt v. SC Dep't of Motor Veh.*, 423 S.C. 576, 816 S.E.2d 579 (2018).

Proper Inquiry for Determining Whether a Particular Subject Area Falls Outside the Realm of Lay Knowledge, Thus Requiring Expert Testimony. (A) Behavioral characteristics of sex abuse victims is an area of specialized knowledge where expert testimony may be utilized. *See State v. Anderson*, 413 S.C. 212, 218, 776 S.E.2d 76, 79 (2015) ("Certainly we recognize that there is such an expertise: this is the type of expert who can, for example, testify to the behavioral characteristics of sex abuse victims."). The Court noted, "We caution this holding does not create a categorical rule establishing this as a recognized area of expertise in every case. If such an expert is challenged, the proper course of action for the trial court remains to hear a proffer of the proposed expert's testimony and determine whether the all of the requirements of Rule 702, SCRE, have been satisfied." (B) Whether the subject matter of a proposed expert's testimony is outside the realm of lay knowledge is a determination left solely to the trial judge and his or her sense of what knowledge is commonly held by the average juror. The purpose of

voir dire is to assess a juror's individual biases and overall fitness to serve on the jury – –not to probe the need for expert testimony. (C) In assessing the admissibility of expert testimony, the trial court must make a threshold determination of reliability. *State v. White*, 382 S.C. 265, 273, 676 S.E.2d 684, 688 (2009). While both scientific and nonscientific expert testimony require the trial court make a finding of reliability, there is no formulaic approach for determining the reliability of nonscientific testimony. (D) The Court concluded, "We find Jones's argument conflates reliability with perfection. There is always a possibility that an expert witness's opinions are incorrect. However, whether to accept the expert's opinions or not is a matter for the jury to decide. Trial courts are tasked only with determining whether the basis for the expert's opinion is sufficiently reliable such that it be may offered into evidence. Here, Galloway-Williams met the threshold reliability requirement when she testified her methods were published in professional articles and trade publications, subject to peer review, and uniformly accepted and relied upon by other professionals in the field. Accordingly, we affirm the trial judge's finding" that the expert was qualified to testify and render certain opinions. *State v. Jones*, 423 S.C. 631, 817 S.E.2dd 268 (2018).

Error Preservation Rules Should Not Be Applied in an Overly-zealous Fashion. In a footnote, the Supreme Court stated, "The court of appeals erred in concluding this issue was not preserved for appellate review; further, it was an abuse of discretion for the court of appeals to raise this issue *sua sponte* then to deny Petitioners' request to supplement the record with materials in response to the court of appeals' questions at oral argument, particularly where counsel for Pertuis conceded the Hammonds' challenge was preserved. 'Judicial economy is not served when a case, ripe for decision, is decided on a procedural technicality of this nature. In the interests of justice and fair play, cases should be decided on the merits when deficiencies of this nature can be easily corrected.' *Silk v. Terrill*, 898 S.W.2d 764, 766 (Tex. 1995) (citation omitted) (finding an intermediate appellate court abused its discretion in denying a party's motion to supplement the record then concluding the resulting insufficiencies in the record procedurally barred the substantive consideration of the legal issues where the omitted documents had not previously been at issue and the appellate court was not in any way misled or its decision hindered or delayed); *see also Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (expressing concern about the 'over-zealous application' of 'long-standing error preservation rules' and discouraging a 'hypertechnical application' of those rules resulting in appellate arguments being procedurally barred); *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) ('Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review . . . . Imposing such a requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.' (quotation marks and citations omitted)); *Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (citation omitted) ('Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it.')." *Pertuis v. Front Roe Restaurants*, 423 S.C. 640, 817 S.E.2d 273 (2018).

Issue Raised in Questions Presented but Not Argued is Deemed Abandoned. An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court. *Nationwide Mut. Ins. Co. v. Eagle Window & Door*, 424 S.C. 256, 818 S.E.2d 447 (2018).

Authentication Requirement for GPS Monitoring Evidence. The central issue before the Court concerned authentication of Global Positioning System (GPS) monitoring evidence. The Court stated that, specifically, is the requirement for authentication satisfied by testimony by Agent Powell that GPS data is accurate because "[w]e use it in court all the time"? The answer is an unqualified "no." (A) It is black letter law that evidence must be authenticated or identified in order to be admissible. Upon adoption of the South Carolina Rules of Evidence, this common law rule was codified at Rule 901, SCRE. This rule specifically provides, "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 901(a), SCRE. In addition, the rule contains examples of "authentication or identification conforming with the requirements of this rule." Rule 901(b), SCRE. (B) The method at issue in this case was: "(9) Process or System. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result." Rule 901(b)(9), SCRE. (C) The State acknowledged that it was required to authenticate the GPS records, but argued that this burden is not high. The Supreme Court agreed, and moreover, acknowledged that the reliability or operation of GPS technology in general is not genuinely disputed. The Court added, "This general acceptance of GPS technology does not, however, translate to the State getting a pass from making a minimum showing that the GPS records it seeks to introduce into evidence are accurate. Here, the testimony of Agent Powell failed to authenticate because it shed no light on the accuracy of the GPS records. The State's argument that authentication was fulfilled through other means fails to appreciate the nature of GPS records and that these records are generated and result from, at least in part, the process or system used by a machine." (D) "Any concerns about the reliability of such machine-generated information is addressed through the process of authentication . . . ." *United States v. Washington*, 498 F.3d 225, 231 (4th Cir. 2007). "When information provided by machines is mainly a product of 'mechanical measurement or manipulation of data by well-accepted scientific or mathematical techniques,'" then "a foundation must be established for the information through authentication, which Federal Rule of Evidence 901(b)(9) allows such proof to be authenticated by evidence 'describing [the] process or system used to produce [the] result' and showing it 'produces an accurate result.'" *Id.* (citation omitted) (E) The Supreme Court stated, "We emphasize that '[n]o elaborate showing of the accuracy of the recorded data is required'; however, the State must make some showing to authenticate the records. *People v. Rodriguez*, 224 Cal. Rptr. 3d 295, 309 (Ct. App. 2017). (F) Other jurisdictions have allowed GPS records to be authenticated by someone who has general knowledge and experience with the system used, explains how the records are generated, and confirms the accuracy of the result. (G) The Court held, "After reviewing various authorities, we require that a witness should have experience with the electronic monitoring system used and

provide testimony describing the monitoring system, the process of generating or obtaining the records, and how this process has produced accurate results for the particular device or data at issue. As noted, the witness need not be an expert. However, even under the minimally burdensome test we set forth, Agent Powell failed to properly authenticate the accuracy of the GPS records. Thus, it was error for the trial court to admit this evidence because the GPS records were not properly authenticated." *State v. Brown*, 424 S.C. 479, 818 S.E.2d 735 (2018).

Appellate Court May Not Reverse on Legal or Factual Premise Not Advanced by Party Who Lost at Trial Court Level. An appellate court may not reverse a lower court order based on a legal or factual premise not advanced by the party who lost at the trial court level. In *I'On, L.L.C. v. Town of Mt. Pleasant*, the Supreme Court noted "the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments." 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). The Court also clarified that while an appellate court may affirm a lower court judgment for any reason appearing in the record, "[a]n appellate court may not, of course, reverse for any reason appearing in the record." *Id.* at 421-22, 526 S.E.2d at 724. The Supreme Court held the "court of appeals *sua sponte* raised and ruled upon an issue Repko never presented to the trial court." The Court therefore reversed the court of appeals' holding addressing that issue. *Repko v. County of Georgetown*, 424 S.C. 494, 818 S.E.2d 743 (2018).

Investigating Officer Does Not Satisfy Witness Requirement of "John Doe" UIM Statute. The Court accepted two certified questions from the United States District Court for the District of South Carolina arising from a dispute over uninsured motorist (UM) coverage: First, whether a police officer who conducts an investigation of an accident qualifies as a "witness" under S.C. Code Ann. § 38-77-170 ("John Doe" statute), and second, whether injuries suffered during a drive-by shooting "arise out of" the operation of the vehicle for insurance purposes. Because the Court answered the first question, "No," the Court declined to reach the second question. (A) Ordinarily, an insured has no right of recovery against his insurer for injuries caused by an unknown vehicle, unless three requirements are fulfilled: (1) the insured or someone in his behalf has reported the accident to some appropriate police authority within a reasonable time, under all the circumstances, after its occurrence; (2) the injury or damage was caused by physical contact with the unknown vehicle, or *the accident must have been witnessed by someone other than the owner or operator of the insured vehicle*; provided however, the witness must sign an affidavit attesting to the truth of the facts of the accident contained in the affidavit; (3) the insured was not ngligent in failing to determine the identity of the other vehicle and the driver of the other vehicle at the time of the accident." S.C. Code Ann. § 38-77-170 (2015) (emphasis added by the Court). Because Silva's injuries were not caused by physical contact with the unknown vehicle, claimant (Wife) must produce a signed affidavit by someone who witnessed the events. *Id.* (B) The Court held "To comply with Section 38-77- 170(2), the affiant must have observed at least some part of the incident. While circumstantial evidence may be sufficient to satisfy the 'truth of the facts'

prong of this provision, it does not satisfy the statutory requirement that the affiant actually witness the accident. Moreover, we must honor the General Assembly's effort to balance compensation for those injured by unknown motorists while safeguarding against fraudulent claims. As the court of appeals has recognized, this policy choice occasionally is 'lamentable to the injured party, but mandated by the statute.' [*Shealy v. Doe*, 370 S.C. 194, 201, 634 S.E.2d 45, 49 (Ct. App. 2006)]. Here, [Officer] Clarke's knowledge is derived solely from his investigation, and he did not observe the underlying facts of Silva's death. While we concede Clarke presents circumstantial evidence of the manner of Silva's death, the statute requires more, specifically, that 'the accident must have been witnessed' by the affiant. S.C. Code Ann § 38-77-170(2). We acknowledge the purpose behind this requirement – to prevent fraudulent claims – is not advanced in this particular case. Indeed, we do not doubt the veracity of Clarke's affidavit; however, we must remain faithful to the language in the statute. As the General Assembly has done before, it certainly is capable of amending this provision. Consistent with the language of the statute, we conclude Clarke does not qualify as a witness because he failed to observe the incident; accordingly, we answer the first question, 'No'." *Silva v. Allstate Prop. and Cas. Ins. Co.*, 424 S.C. 512, 818 S.E.2d 753 (2018).

Motion for Sanctions Under FCPSA Must be Filed within 10 days of receiving notice of entry of judgment – Motion for Sanctions under Rule 11, SCRCP, Must Be Filed Within a Reasonable Time - Factors. (A) A party must file a motion for sanctions under the South Carolina Frivolous Civil Proceedings Sanctions Act (FCPSA) within ten (10) days of the notice of entry of the judgment. However, Rule 11, SCRCP – unlike the FCPSA – does not contain any time limit for filing a motion for sanctions, and South Carolina appellate courts have never interpreted Rule 11 to include a specific time limit. (B) Although Rule 11 does not contain a specific time limit, the law does not allow a person to sit on legal rights indefinitely. Therefore, there are a number of important considerations a circuit court must make when determining whether a motion for sanctions under Rule 11 is untimely. (C) The first and most important consideration is whether the court still retains jurisdiction over the case. The jurisdiction of the circuit court to hear matters after issuance of the remittitur is well established. For instance, once the remittitur is issued from an appellate court, the circuit court acquires jurisdiction to enforce the judgment and take any action consistent with the appellate court's ruling. (D) The second consideration for a circuit court to make is to analyze the timing of the motion in light of the multiple purposes of Rule 11. The primary purpose of Rule 11 is to deter future litigation abuse. However, there are additional purposes, including compensating the victims of the Rule 11 violation, punishing present litigation abuse, streamlining court dockets and facilitating court management. The Court stated, "To analyze whether the timing of the estate's Rule 11 motion is consistent with the purposes of the rule, we begin with the premise that early filing – and quick resolution – of legal claims is always to be promoted. We recognize, however, that accusing the opposing party of misconduct under Rule 11 does not always 'deter future litigation abuse.' In fact, the common experience of trial lawyers across the country is that accusing an opposing lawyer or party of Rule 11 misconduct will often draw 'return fire.' That is particularly true in a case where the opposing lawyer has repeatedly engaged in 'vexatious' behavior that 'caused . . .

substantial and unnecessary legal bills,' and 'required the court to spend significant time addressing these matters through hearings and phone conferences,' as the circuit court found was true in this case. When that occurs, not only can additional future abuse be likely, but the secondary purposes of 'streamlining court dockets and facilitating court management' can be frustrated by the delays that result from the litigation of sanctions motions. As counsel for the estate explained, he based his decision to wait to file the Rule 11 motion until after remittitur in part on his goal of achieving a successful – and timely – result for his client, at the least cost to his client. Counsel explained his experience with [opposing counsel] throughout the protracted litigation led him to believe that a sanctions motion would only exacerbate the already contentious litigation, further delaying a decision on the merits and costing his client more money. In other words, counsel considered the circumstances of the case and concluded that filing a motion for sanctions would not 'deter future litigation abuse,' but rather would only encourage more abusive behavior, which counsel determined to be against his client's interests in getting the litigation resolved quickly and inexpensively. Counsel compares the situation to a lawyer's duty to report opposing counsel's unethical behavior to the Commission on Lawyer Conduct under Rule 8.3 of the Rules of Professional Conduct, Rule 407, SCACR, and cites to a recent South Carolina Bar Ethics Advisory Opinion stating a lawyer may wait to report the misconduct 'at the conclusion of the litigation or appeal,' if the lawyer determines reporting the misconduct immediately would be adverse to his client's interests. 'The Committee believes it is appropriate for a lawyer to consider any potential adverse impact to his or [her] client in determining the timing of a report against another lawyer.' S.C. Bar Ethics Advisory Opinion, 16-04. Counsel's considerations resonate in South Carolina. Unlike other parts of the country, the atmosphere of litigation here is relatively collegial, and it is vitally important to our profession that we maintain that atmosphere to the extent possible. We are concerned that a rule requiring a party to file a Rule 11 motion for sanctions during the course of active litigation – or else it be found untimely regardless of these valid considerations – would endanger our collegial atmosphere, unnecessarily delay the resolution of claims, and thus be inconsistent with the purposes of Rule 11. Under the circumstances of this case, we find these to be reasonable and valid considerations by the estate's counsel." (E) The third consideration a court should make when determining if a Rule 11 motion is untimely is embodied in the common law doctrine of laches, which the Court has defined as the "neglect for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done" promptly. *Jefferson Pilot Life Ins. Co. v. Gum*, 302 S.C. 8, 11, 393 S.E.2d 180, 181 (1990). The Court stated, "As we have explained, laches bars a cause of action 'if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position.' In situations where the circuit court determines these elements are met, the court may find laches prevents a party from pursuing sanctions under Rule 11. (F) The Court added, "Finally, we come to the basis of the court of appeals' decision finding the motion in this case untimely – reasonableness. As a general proposition, we cannot disagree with the court of appeals' holding 'that a party must file a motion for sanctions pursuant to Rule 11 within a reasonable time of discovering the alleged improprieties.' Other courts that have addressed the question of the timeliness of a Rule 11 motion have also imposed a reasonableness standard. (Citation omitted) We agree with the

court of appeals, therefore, that a Rule 11 motion is untimely if the circuit court – considering all relevant circumstances in the context of the litigation – determines the motion was not filed in a reasonable period of time after the discovery of the alleged misconduct." *Pee Dee Health Care, PA v. Estate of Thompson*, 424 S.C. 520, 818 S.E.2d 758 (2018).

Ten Year Limit on Judgments is a Statute of Repose - Period Cannot be Renewed - *Linda Mc Co. v. Shore* overruled. S.C. Code Ann. § 15-39-30 provides, "Executions may issue upon final judgments or decrees at any time within ten years from the date of the original entry thereof and shall have active energy during such period, without any renewal or renewals thereof, and this whether any return may or may not have been made during such period on such executions. According to the statute's plain language, a creditor has ten years to execute on the judgment from the date of its entry, a time period that cannot be renewed. The Court revisited and overruled *Linda Mc Co. v. Shore*, 390 S.C. 543, 703 S.E.2d 499 (2010), stating "we decline to judicially adopt an exception to the brightline rule that a judgment expires after ten years from its enrollment." *Gordon v. Lancaster*, Op. No. 27847 (S.C. Sup. Ct. filed Nov. 21, 2018) (Shearouse Adv. Sh. No. 46 at 8).

COURT OF APPEALS

Indemnification Agreement was Against Public Policy. S.C. Code Ann. § 32-2-10 (2007) permitted the builder and the general contractor to agree that the general contractor would indemnify the builder for damages caused by the general contractor or its subcontractors. However, to the extent the agreement purported to require the general contractor to indemnify the builder for damages caused by the builder's negligence or the negligence of the builder's subcontractors, the clause was void as against public policy. The inclusion of the illegal contractual indemnification term, along with an unreasoned award of damages only, proved fatal to the builder's claim for indemnification. The builder "cannot ask the arbitrator to conceal its reasons for an award, which may have included damages caused by its own negligence, and then ask the circuit court to award it damages that would be barred by statute. "Because it is impossible to determine whether, and to what extent, the arbitrator's award included damages for [the builder's] own negligence, indemnification is inappropriate in this case." *D.R. Horton v. Builders FirstSource*, No. 5529 (1/10/18)

Post-judgment Contributions to 401(k) Plan Exempt from Execution. S.C. Code Ann. § 15-41-30(A) (14) provides: "The following real and personal property of a debtor domiciled in this [s]tate is exempt from attachment, levy, and sale under any mesne or final process issued by a court or bankruptcy proceeding: ... (14) The debtor's interest in a pension plan qualified under the Employee Retirement Income Security Act of 1974, as amended." The plain language of subsection (14) does not provide for any exception to the exemption for 401(k) plans. Thus, the debtor's postjudgment contributions to his 401(k) plan were not subject to execution by the judgment creditor. *First Citizens Bank and Trust Co. v. Blue Ox, LLC*, No. 5532 (1/31/18).

Error Preservation Rules. Issue preservation is not a "gotcha" game aimed at embarrassing attorneys or harming litigants. While it may be good practice for the Court to reach the merits of an issue when error preservation is doubtful, the Court should following longstanding precedent and resolve the issue on preservation grounds when it *clearly* is unpreserved. Where the question of issue preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation. *Johnson v. Roberts*, No. 5535 (2/7/14).

Error Preservation Rules - Additional Sustaining Grounds Rules. (A) In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial court. Issues not raised and ruled upon in the trial court will not be considered on appeal. (B) A party cannot complain of error his own conduct has induced. (C) When an appellant expressly waives an argument at trial, it cannot be raised on appeal. (D) An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority. Short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not preserved for review. When a party provides no legal authority regarding

a particular argument, the argument is abandoned and the court will not address the merits of the issue. (E) Under the present rules, a respondent – the "winner" in the lower court – may raise on appeal any additional reason the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled upon by the lower court. The basis for a respondent's additional sustaining ground must appear in the record on appeal. The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal. *Equivest Financial v. Ravenel*, No. 5536 (2/14/18).

Commencement of Lawsuit Tied to Date of Filing - Tolling of Statute of Limitations for "Insanity" Includes Incompetency Due to Profound Disability. (A) The Court of Appeals held Mims' lawsuit was commenced on May 7, 2008, the day Mims' amended complaint was filed. S.C. Code Ann. § 15-3-20(B) (2005) ("A civil action is commenced when the summons and complaint are *filed* with the clerk of court if actual service is accomplished within one hundred twenty days after filing." (emphasis added)); Rule 3(a), SCRCP ("A civil action is commenced when the summons and complaint are *filed* with the clerk of court . . . ."(emphasis added)). The Court stated, "[w]hile this reading of section 15-3-20(B) and Rule 3(a), SCRCP, is a departure from pre-2004 jurisprudence, it is the only logical way to interpret and apply the current version of Rule 3(a)(2), SCRCP, which explicitly permits commencement of a lawsuit when a pleading has been served after the statute of limitations has run. *See* [*Mims v. Babcock Ctr., Inc.*, 399 S.C. 341, 346, 732 S.E.2d 395, 397–98 (2012)] ("[Section 15-3-20(B)] and [Rule 3(a), SCRCP], read together, provide that (1) an action is commenced upon filing the summons and complaint, if service is made within the statute of limitations, and (2) if filing but not service is accomplished within the statute of limitations, then service must be made within 120 days of filing."); *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 369 S.C. 150, 154, 631 S.E.2d 533, 535 (2006) (stating that whenever possible, legislative intent should be found in the plain language of the statute itself). (B) The Court of Appeals stated in a footnote: "We reject Mims' argument that under the relation-back doctrine of Rule 15(c), SCRCP, his lawsuit commenced on the day the original complaint was filed. The original complaint was never served. We find nothing in the language of Rule 15(c), SCRCP, that allows relation-back to an unserved pleading, and applying the rule in that way would have the undesirable consequence of permitting litigants to extend the statute of limitations for several of their causes of actions by choosing to wait until the conclusion of their longest statute of limitations to file and serve an amended complaint. *See Logan v. Cherokee Landscaping & Grading Co.*, 389 S.C. 611, 618, 698 S.E.2d 879, 883 (Ct. App. 2010) ("One purpose of a statute of limitations is 'to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights.'" (quoting *Moates v. Bobb*, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996)). (C) The Court of Appeals next found that under S.C. Code Ann. § 15-3-40, Mims was entitled to tolling of the statute of limitations. Section 15-3-40 permits tolling if a claimant is "insane." In *Wiggins v. Edwards*, 314 S.C. 126, 442 S.E.2d 169 (1994), the Court defined the term "insane" for purposes of the tolling statute by stating: "Insanity or mental incompetency that tolls the statute of limitations consists of a mental condition which precludes understanding the nature or effects of one's acts, an incapacity to manage one's affairs, an inability to understand or protect one's rights, because of an over-all

inability to function in society, or the mental condition is such as to require care in a hospital." 314 S.C at 129, 442 S.E.2d at 170 (quoting 54 C.J.S. Limitations of Actions § 117). The Court of Appeals stated, "We find there is no material fact in dispute regarding the severe mental disabilities Mims experienced since birth. Uncontroverted evidence presented to the circuit court demonstrates Mims was never able to manage his own affairs or protect his rights, and Mims required consistent one-on-one care to accomplish daily tasks of living. We therefore find Mims was entitled to the statutory tolling protection of section 15-3-40. See *Wiggins*, 314 S.C at 129, 442 S.E.2d at 170. (D) The Court of Appeals found further that the circuit court erred in ruling S.C. Code Ann. § 44-26-90 (2018), permits tolling for only those who were declared legally incapacitated by a formal court order before their actions accrued. The Court stated, "[t]here is no explicit language in section 44-26-90 that restricts the effect of the disability tolling statute in this way, and both statutes were passed by the Legislature to protect vulnerable people. To interpret section 44-26-90 as removing the protections created by section 15-3-40 for someone who meets the definition of 'insane' from *Wiggins*, but who has not yet been declared incompetent by a probate court, is contrary to the general policy in South Carolina of affording special protection to the mentally disabled, especially in civil legal proceedings. See *Lancaster Cty. Bar Ass'n v. S.C. Comm'n on Indigent Def.*, 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008) ("In construing a statute, [an appellate court] will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the [L]egislature." (*citing Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 663 S.E.2d 484 (2008)); see, *e.g.*, *Caughman v. Caughman*, 247 S.C. 104, 109, 146 S.E.2d 93, 95 (1965) ("[T]he duty to protect the rights of incompetents has precedence over procedural rules otherwise limiting the scope of review."). (E) The Court also found Mims' disability did not cease when Ms. Mims was appointed his guardian. *See* S.C. Code Ann. § 15-3-40 ("[T]he time of the disability is not a part of the time limited for the commencement of the action, except that the period within which the action must be brought cannot be extended . . . in any case longer than one year after the disability ceases."). The Court stated, "[t]he question of whether a disability ceases when a legal guardian is appointed is novel in South Carolina. However, the vast majority of jurisdictions with similar tolling statutes hold the appointment of a guardian does not end the disability when the tolling statute is unambiguous and does not suggest a legislative intent to end the disability when a guardian is appointed. (F) The Court concluded Section 15-3-40 extended the time allowed for the commencement of each of Mims' causes of action by five years. *Harrison v. Bevilacqua*, 354 S.C. 129, 140 n.5, 580 S.E.2d 109, 115 n.5 (2003) ("The express language of the statute allows the time for commencement of an action to be 'extended' by a maximum of five years."). *Mims v. SC Dep't of Disabilities and Special Needs*, No. 5540 (2/28/18).

Confrontation Clause Precluded Investigator Testifying via Skype. The Court of Appeals agreed that the trial court erred in permitting an investigator to testify via Skype in violation of the Sixth Amendment Confrontation Clause, but held the error was harmless. The Court stated: (A) South Carolina has not specifically addressed the tension between two-way video testimony and a defendant's rights under the Confrontation Clause. However, South Carolina has recognized modifications to the traditional presentation of testimony may be appropriate in

certain situations involving vulnerable witnesses. See S.C. Code Ann. § 16-3-1550(E) (2015) ("The circuit or family court must treat sensitively witnesses who are very young, elderly, handicapped, or who have special needs by using closed or taped sessions when appropriate."). (B) Our state has adopted the test from *Maryland v. Craig*, 497 U.S. 836 (1990) (Sixth Amendment confrontation clause is not absolute, but may only be modified "where denial of such confrontation is necessary to further an important public policy and only where reliability of the testimony is otherwise assured") in cases of one-way closed-circuit testimony and the testimony of children in sexual assault cases. *See State v. Lewis*, 324 S.C. 539, 544-45, 478 S.E.2d 861, 864 (Ct. App. 1996) (citing the *Craig* test for analyzing whether a witness's testimony via one-way closed circuit television violated the defendant's Sixth Amendment rights). (C) While our courts have generally noted the protection of children is an important public policy concern, the appellate courts have not adopted a generalized policy of permitting child victims to present testimony via video recording. Rather, the courts require a specific case-by-case finding that a child witness will be traumatized by testifying in front of the defendant. *See Lewis*, 324 S.C. at 547-49, 478 S.E.2d at 865-67 (finding a Confrontation Clause violation when trial court permitted video testimony of a particular child without specific evidentiary support the child would be traumatized by testifying in the defendant's presence); *State v. Murrell*, 302 S.C. 77, 80, 393 S.E.2d 919, 921 (1990) (holding a trial judge must make a case-specific determination of the need for videotaped testimony in a child sexual assault case). This approach underscores the reluctance of the court to use methods other than live testimony except under extreme circumstances. (D) The Court held, "[a]fter examining federal and state jurisprudence, we conclude the circuit court erred in permitting the State to present Investigator Moore's testimony via Skype. The Fourth Circuit has indicated the generalized conviction of criminal offenses is not sufficient to dispense with in-court confrontation and other courts have generally permitted such testimony only in cases in which the witness's health prevents him or her from traveling or possibly when a witness is beyond the subpoena power of the court. We recognize the advancements in technology permit two-way closed circuit testimony to more closely approximate face-to-face confrontation. However, in the absence of an important public policy or at least an exceptional circumstance, modifying a defendant's truest exercise of the Sixth Amendment right via in-person confrontation is inappropriate. (E) In a footnote the Court stated, "We decline to adopt a specific test for the admission of two-way closed circuit testimony in this case, as convenience and expediency alone do not rise to the level of an exceptional circumstance, as set forth in [*United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999)], or implicate an important public policy consideration as required by *Craig*. Additionally, this ruling does not prohibit parties from consenting to use two-way video testimony." [Footnote 6]. *State v. Johnson*, No. 5533 (3/28/18).

Viability of Immunity Claim under Castle Doctrine Statute Ended with Guilty Plea. Defendant was indicted for attempted murder and claimed immunity from prosecution under the Protection of Persons and Property Act (Act), S.C. Code Ann. §§ 16-11-410 to -450 (2015 & Supp. 2017). The trial court held an evidentiary hearing and denied defendant's claim. Defendant then pled guilty to ABHAN. He then appealed, contending his assertion of immunity was a

jurisdictional challenge he may raise on appeal even after pleading guilty. The Court of Appeals found defendant's argument fit no exception to South Carolina's steadfast rule against conditional guilty pleas. The Court noted the right to immunity does not spontaneously appear; it is a statutory right a defendant must establish. Thus, the viability of defendant's immunity claim under the Act ended with his plea of guilty, that is, his guilty plea was "a lid on the box, whatever is in it, not a platform from which to explore further possibilities." Defendant's statutory immunity claim warranted no exception to the rule against conditional pleas and the key role it plays in ensuring the finality of judgments. *State v. Jett*, No. 5554 (4/25/18).

Void versus Voidable Judgments. (A) Rule 60(b)(4), SCRCP, provides a court may, "upon such terms as are just," relieve a party from a void judgment or order. (B) A void judgment is one that, from its inception, is a complete nullity and is without legal effect. Void judgments are defined as those from courts that lacked personal or subject matter jurisdiction, or failed to provide due process. (C) A void judgment is far different from one merely "voidable." A voidable judgment is nothing more than one made in error by a court with jurisdiction. (D) Given the stage of this case, it could have been voluntarily dismissed only by stipulation of dismissal signed by all the parties. Rule 41(a)(1), SCRCP. Consequently, even if, after notice and a hearing, a circuit judge had signed the Form 4 order purportedly ending the case pursuant to Rule 41(a), it would have been error. But it would have been an error fixable by the trial court on reconsideration, or by the court of appeals on appeal: the error not being one of jurisdiction, the judgment would have been voidable, not void. But the Form 4 ending this case was signed without notice or hearing and by the clerk of court, who had no authority to do so. The tasks of the clerk of court are ministerial, always subject to judicial control and the rules of court. A clerk may only sign and enter judgment without court direction and approval when the judgment merely confirms a jury's general verdict, or upon the court's decision "that a party shall recover only a sum certain or costs or that all relief shall be denied...." Rule 58(a)(1), SCRCP. (E) The record disclosed no action of the court authorizing the Form 4 dismissal, much less after notice and hearing, as due process required. It was therefore void, and was "in legal effect, nothing." All acts performed under it, and all claims flowing out of it, are void. (F) Although the appellate court typically reviews denials of Rule 60, SCRCP, motions for abuse of discretion, a court has no discretion to perpetuate a void judgment. *Innovative Waste Mgmt. v. Crest Energy Partners GP*, No. 5561 (5/23/18).

Failure to Deliver Rule 59(e), SCRCP, Motion to Judge Does Not Affect Tolling of Time to Appeal – Misjoinder Rules. (A) The failure to serve the presiding judge with a Rule 59(e), SCRCP, motion does not affect the tolling provision of Rule 203(b)(1), SCACR. Therefore, the time for serving the notice of appeal does not begin to run until the circuit court rules on the motion. (B) A motion to dismiss a party under Rule 21, SCRCP (misjoinder) is addressed to the court's discretion. Rule 21 should be viewed by the company it keeps; its neighbors, Rules 17, 19, and 20, are provisions that also tell us who are proper parties. Taken together, these rules evidence the general purpose to eliminate the old restrictive and inflexible rules of joinder

designed for a day when formalism was the vogue and to allow joinder of interested parties liberally to the end that an unnecessary multiplicity of actions thus might be avoided. Although Rule 21 does not define misjoinder, the cases make it clear that parties are misjoined when they fail to satisfy either of the preconditions for permissive joinder of parties set forth in Rule 20(a). (C) As to joining parties as defendants, Rule 20(a), SCRCP, states "All persons may be joined in one action as defendants if there is asserted against them ... any right to relief in respect of or arising out of the same transaction, occurrence ... and if any question of law or fact common to all defendants will arise in the action." Misjoinder therefore occurs when there is no common question of law or fact or when the events that give rise to the plaintiff's claims against defendants do not stem from the same transaction. (D) The circuit court does not have discretion to answer a question of first impression with no factual record while ruling upon a Rule 21 motion. Motions to dismiss are no place for novelty. (E) Although joinder of a party does not remove a statute of limitations defense, a motion to dismiss on such grounds is properly brought pursuant to Rule 12(b)(6), SCRCP, rather than Rule 21, SCRCP. *Farmer v. CCAGC Ins. Co.*, No. 5562 (5/23/18).

Parties Bound by Pleadings - Exceptions. (A) Parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise. The allegations, statements or admissions contained in a pleading are conclusive as against the pleader and a party cannot subsequently take a position contrary of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are taken as true against the pleader for the purpose of the action. (B) Notwithstanding allegations to the contrary in his or her pleadings, a party is not precluded from showing the facts to be as they really are where his or her allegations are due to an honest mistake or ignorance of the facts. (C) While ordinarily a party may be bound by its previous assertions, that policy should yield to an overriding policy. *Gary v. Lowcountry Medical Transport*, No. 5563 (5/23/18).