Welcome to this edition of our Section’s award winning publication, SideBAR. I am sure you will find it interesting, informative and educational.

The Federal Bar Association 2013 Annual Meeting will be held in San Juan, Puerto Rico, September 26-28. As always there will be interesting CLE programs, section and committee meetings and numerous social events which will provide opportunities to meet with your fellow federal practitioners throughout the country. Please make plans now to join us in what is sure to be a unique meeting.

The Federal Litigation Section has presented outstanding CLE programs at the last two annual meetings. This year our topic will be “Private and Government Related Consumer Litigation—Recent Developments and Hot Topics.” Our presenters and panelists will include a broad spectrum of private, corporate and government practitioners involved in this type of litigation as well as Chief Judge Gerald Rosen and Professor Linda Mullenix. The

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Two chief judges of federal district courts have accepted the honor of becoming members of the Federal Litigation Section.

Chief Judge Gerald E. Rosen, of the Eastern District of Michigan, has accepted an honorary membership conferred by the governing board of the section.

Chief Judge Loretta A. Preska has accepted the honor of section membership, conferred by the board of her hometown chapter in the Southern District of New York.

Both judges have helped our section in working with the FBA’s Government Relations Committee to support the judiciary through FBA advocacy of adequate funding for court operations.

It is an honor to welcome them as members of the Federal Litigation Section.
The Federal Litigation Section needs help. It needs you. Our section’s bylaws designate a variety of leadership roles to be filled by appointment of the chair of the section. On October 1, 2013, it will be my privilege to begin serving as chair, and filling those roles is Job 1.

So, in reality, it’s me that needs your help. I need your help to bring valuable activities and programs to the profession of federal court litigators. These programs can enhance the visibility and relevance of our section and the Federal Bar Association, in your local chapter and across the nation.

Please call me. My number is (310) 917-1011. Our section has committees in the areas of appellate law and practice, federal rules of procedure and trial practice, federal tort law, and federal rules of evidence, as well as a newly-formed committee for federal law clerks. These committees provide ways of developing deeper substantive knowledge and wider professional connectedness. Want to find another way? Call me, and we’ll work on finding it together.

This issue of SideBAR benefits, as it always does, from the contributions of you: the federal litigation bar. We depend upon you to write the insightful and diverse articles that Federal Litigation Section members enjoy each time this newsletter is published. Thank you.

About the Editor • Robert E. Kohn litigates entertainment, business, and intellectual property disputes in the Los Angeles area. He also argues appeals in federal and state courts at all levels. A former clerk to Hon. Joel F. Dubina of the Eleventh Circuit, Kohn attended Duke Law School. He can be reached at rkohn@kohnlawgroup.com or (310) 917-1011.

About the Chair • William Frank Carroll is a member of the Trial and Appellate Sections in the Dallas, Texas, office of Cox Smith Matthews Inc. He concentrates his trial and appellate practice in the areas of antitrust, class action, securities, white collar criminal, and intellectual property litigation in the federal courts and is Board Certified in both Trial and Civil Appellate Law. He is also an adjunct professor of law at Southern Methodist University, where he has taught Antitrust Law, Federal Courts, Complex Federal Litigation and Trial Advocacy. He can be contacted at fcarroll@coxsmith.com.
Join the Debate—Proposed Amendments to the Federal Rules of Civil Procedure
John G. McCarthy and Michael A. Zuckerman

Big changes to the Federal Civil Rules may be on the horizon. The Advisory Committee is proposing numerous amendments to the Rules, some of which would alter the nature of pre-trial discovery. Gone may be the days of seven hour depositions—the amended Rules limit depositions to six hours (and further cap their number at five, half of the current limit). These proposed changes to Rule 30 are just one example of the numerous amendments that are now before the Federal Judiciary’s Committee on Rules of Practice and Procedure.

In this SideBAR, we invite you to join the discussion. Our Section’s own Federal Rules of Practice and Trial Practice Committee is collecting comments on the proposed amendments. Although the Committee cannot take an official position, we hope to collect many comments from FLS members and pass them along to the Federal Judiciary.

Make your voice heard by emailing your comments to John McCarthy (jmccarthy@sgrlaw.com) and Michael Zuckerman (mzuckerman@jonesday.com). We would like to receive all comments by Oct. 7, 2013.

What follows is a brief summary of many of the proposed Rule changes. For a more complete and detailed description, please consult the Report of the Advisory Committee on Civil Rules (May 8, 2013) and other resources available at www.uscourts.gov/RulesAndPolicies/rules.aspx.

Managing and Reducing Discovery

Scope of Discovery: Proportionality. The proposed amendments import the concept of proportionality into Rule 26(b)(1). Borrowing language from current Rule 26(b)(2)(C)(iii), proposed Rule 26(b)(1) would require that otherwise allowable discovery be “proportional to the needs of the case considering the amount in controversy, the importance of the issues ... the parties’ resources, the importance of the discovery ... , and whether the burden or expense of the proposed discovery outweighs its likely benefit.”

Scope of Discovery: Relevance. Under proposed Rule 26(b)(1), the court no longer has discretion to permit discovery concerning “any matter relevant to the subject matter involved in the action.” The Advisory Committee concluded that discovery should be limited to the parties’ claims or defenses as set forth in their pleadings.

Cost-shifting. A proposed amendment to Rule 26(c) would allow a protective order to re-allocate the expenses of discovery, thereby explicitly providing for departure from the general presumption that the responding party should bear the costs of producing evidence.

Reducing the Presumed Limits on Depositions and Written Discovery. Proposed amendments to Rule 30 rein in the use of depositions: a party may take five depositions (not ten), each limited to six (not seven) hours, unless otherwise stipulated or ordered. A similar proposal would presumptively limit a party to fifteen Rule 33 interrogatories (not twenty-five). And another would, for the first time, place limits on requests for admission under Rule 36—twenty-five for each party.

Responding to Requests for Production. Rule 34 would be amended to require the responding party to state, as to each claimed objection, whether any responsive documents were actually withheld on that basis. The responding party would also be required to state whether copies of responsive documents will be produced, or whether the requesting party will be allowed to inspect the originals and make copies. Production must occur on the date specified in the request, or a later reasonable time stated in the response.

Early, Active Case Management. The proposed amendments would:

- reduce by half the amount of time for service of the summons and complaint under Rule 4(m)—from 120 to 60 days;
- grant the judge authority to issue an early scheduling order, and speed up the time by which he or she must do so under Rule 16(b);
- require an actual scheduling conference under Rule 16(b)(1)(B)—filings alone will no longer do;
- expand the permitted content of a scheduling order under Rule 16(b)(3) and discovery plan under Rule 26(f) to include preservation of evidence and Rule 502 agreements;
- add new Rule 16(b)(3)(v), allowing the judge to require the parties to request a conference with the court before moving for any order relating to discovery;
- add new Rule 26(d)(1) to allow Rule 34 requests for production to be made before the Rule 26(f) conference has occurred.

Cooperation. The proposed amendments would make explicit in Rule 1 that the parties share responsibility with the court to achieve a “just, speedy, and inexpensive determination of every action and proceeding.” Though aspirational more than anything, the amendment seeks to remind lawyers that “effective advocacy is consistent with—and indeed depends upon—cooperative and proposal use of procedure.”

Spoliation of Evidence

The proposed amendments to Rule 37(e) detail the consequences of a party’s “failure to preserve discoverable information.” This amended rule is broader than the current one, which applies only to ESI and is fairly short.

The amendments reject the view that a party may be sanctioned or subjected to an adverse inference jury instruction as a result of its mere negligent failure to preserve evidence. To impose sanctions, proposed Rule 37(e)(B) would require a finding that the non-preserving party’s actions either (1) “cause substantial prejudice in the litigation and were willful or in bad
Bringing It All Together: Raymond J. Dowd Talks About Teamwork and Professional Development in the FBA

Olivera Medenica

With a busy copyright practice and important responsibilities at the FBA, Raymond J. Dowd manages to juggle an array of titles and roles. As an author, he wrote the Copyright Litigation Handbook (Thomson West 2012-13), which is updated annually. As an art law expert and lecturer, he frequently travels the country educating art industry professionals and fellow practitioners on the pursuit of, and defenses to, claims regarding property stolen by the Nazis.

In his interview with SideBAR, Dowd talks about his involvement with the FBA, his current position as Chair of the Circuit Vice Presidents, and the significance of Circuit Vice Presidents for the Federal Litigation Section and its members.

Explain the purpose of your role as Chair of the Circuit Vice Presidents, when you took on that position, and the length of your term.

I was elected Chair of the Circuit Vice Presidents in September, 2011. I was re-elected in 2012. The Chair sits ex officio on the Board of Directors. The Chair is responsible to report to the Board on the activities of the Circuit Vice Presidents and to communicate to the Circuit Vice Presidents the priorities and tasks assigned by the Board.

My main role was to follow and implement the directives of Presidents Fern Bomchill and Bob DeSousa and to work closely with the Executive Directors, Jack Lockridge and Karen Silberman. Under President Bomchill the directive was to stimulate additional activities throughout the respective circuits and to define the duties and roles of the Circuit Vice Presidents. Under President DeSousa, the priority has been to focus on building membership and delivering value to FBA members. In my reports to the Board, I try to communicate the challenges and concerns faced by FBA members in the various chapters and circuits.

For purposes of being a voice on Capitol Hill, I sit ex officio on the Government Relations Committee of the Federal Bar Association. Each year, the Circuit Vice Presidents work with the Government Relations Committee to get FBA leaders in chapters, sections and divisions to visit Congress and to submit issues to the FBA’s legislative issues agenda.

What is the role of a Circuit Vice President?

Under the FBA Constitution, each federal judicial circuit is entitled to elect two Circuit Vice Presidents. They act as liaisons between the national Federal Bar Association and individual chapters.

The Circuit Vice President’s primary role is to stimulate chapter activity by helping people cut through red tape and get good programs and value to members. This comes about through assisting chapters in understanding the many resources available to them, assisting chapters in putting together and maintaining strong leadership ladders that permit new talent to continually emerge, and to make sure that the issues that chapter members care about are expressed to Congress.

How can the Circuit Vice Presidents help Federal Litigation Section members?

Federal Litigation Section members and their clients are being impacted in their daily practices and lives by budget cuts due to sequestration. The Circuit Vice Presidents have assisted the Government Relations Committee in opening conversations with Chief Judges around the nation and bringing the message to Capitol Hill.

One area where we teamed up in the past with the FLS was to oppose legislation that would have taken away the discretion of federal judges in awarding sanctions under Rule 11 of the Federal Rules of Civil Procedure. Another way Circuit Vice Presidents can help is to assist Federal Litigation Section members organize committees and events at the chapter level. We have assisted many FBA Chapters around the nation in teaming up with the Federal Litigation Section to produce high-quality events and continuing legal education programming.

How did you get involved in the FBA?

I started out writing book reviews for The Federal Lawyer. The president of the FBA’s New York Chapter gave me a call and asked me to join the FBA and get involved.

I attended chapter meetings and eventually started attending the FBA midyear meeting in Washington and then the annual convention. Then I started organizing events. The first was an event honoring Judge Robert Carter on the 50th Anniversary of Brown v. Board of Education. Since then I have helped organize many events including attorney admissions ceremonies at the Second Circuit, an event honoring the U.S. Marshals Service at Federal Hall, and even events at the U.S. Supreme Court honoring Justices Ginsburg, Kagan and Thomas.

What positions have you held in the FBA?

Of course I have been a member of the Federal Litigation Section for over a decade now. I also belong to the Intellectual Property Section. When I joined the FBA I was invited to join the Board of the Empire State Chapter. I was then involved in launching the Eastern District of New York Chapter, so we started dividing FBA Chapters to conform to the local judicial districts. S.D.N.Y. Chief Judge Kimba Wood swore me in as President of the Southern District of New York Chapter.

I eventually ran for Circuit Vice President and worked my way up as Secretary, Vice Chair and now chair. Meanwhile I served on the Editorial Board of The Federal Lawyer, Past President Bill Lalonge appointed me there, and I was tapped by Past President Ashley Belleau to serve as General Counsel of the FBA during her 2010-2011 term. As General Counsel I helped to draft rules for the conduct of FBA National Council meetings that have proven very successful in promoting orderly discussion.

What advice do you have for Federal Litigation Section members who wish to become more active?
The FBA has a unique federal structure that puts a lot of resources at the local chapter level. This keeps the organization rich at the local level. Federal Litigation Section members ought to become active in local chapter activity – form committees, organize CLE programs, get to know and work with your local judges.

To really get active at the national level, there are three main ways. First, write something for the FLS newsletter or The Federal Lawyer. This is a great way to build your national profile. Second, keep your eye on The Federal Lawyer. You will see committee positions open up. Apply for the position. The national organization may really need someone with your interest, expertise or geographic locale. Third, attend the FBA midyear meeting in Washington, DC and the annual convention. This is a terrific way to network and create personal relationships around the nation. If you are seeking terrific volunteer opportunities and high level contacts in the government and judiciary, this is the best way to go.

Jack Lockridge was a great mentor to me. He was the Executive Director for years. If you can connect with a mentor like that, I recommend it.

How has the FBA impacted your practice?

As a litigator, I have found that there is no better way to improve and showcase your advocacy skills and to improve your knowledge of and relationship with the judiciary.

More importantly, it has helped my bottom line. I have been referred major litigation matters by FBA members. I have hired numerous FBA members as local counsel throughout the nation and referred out work through the FBA network. The FBA has helped me break out of the pack and build great relationships with other local practitioners who have done things like volunteer to moot me for appeals that I have argued to the Second Circuit. The FBA has also provided the opportunity for me to visit chapters around the country to deliver CLE programs on litigation-related topics.

What challenges will the FBA face in the coming year?

Sequestration of court funding is approaching a constitutional dimension. We have been working directly with Chief Judges and Federal Defenders throughout the nation to try to overcome this challenge. We will need the direct support of FLS members in reaching out to Congress and articulating local needs and stepping up to ensure that the structure of our government as set forth in the Constitution is preserved. The federal judiciary of the United States is considered by many to be the world’s best. Our life, liberty and property are at risk if we don’t make sure that this branch of government is functioning properly.

The Los Angeles Chapter of the FBA will be featuring Mr. Dowd at a panel event entitled “Stolen Art & Litigating Holocaust-Era Expropriation Claims” to be held on September 11, 2013 at 5:40pm. Details and registration available at www.fbsala.org/Events.php and on page 20 of this issue of SideBAR. SB

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Proposed Amendments continued from page 3

faith” or (2) “irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation.” In determining the scope of a party’s preservation obligation, and a party failure to preserve was willful or in bad faith, the Rule sets forth many factors, including “whether the party timely sought the court’s guidance on any unresolved disputes about preserving discoverable information.”

Absent any basis for sanctions under proposed Rule 37(e) (B), proposed Rule 37(e)(1)(A) limits the available remedies for the injured party: an award of attorney’s fees; additional discovery; or other “curative measures.” These other “curative measures” are not spelled-out in the proposed Rule, but the Advisory Committee offers some guidance. Curative measures may include allowing discovery from sources of ESI that are not reasonably accessible. “More generally,” the Advisory Committee explained, “the fact that a party has failed to preserve information may justify discovery that otherwise would be precluded under the proportionality analysis . . .”

Proposed Abrogation of Rule 84 and its Corresponding Forms in the Appendix

The Advisory Committee proposes to abrogate Rule 84 along with its corresponding Forms in the Appendix. As it now reads, Rule 84 simply states that that the Forms in the Appendix of the Rules “suffice” and “illustrate the simplicity and brevity” that the Rules contemplate. The Advisory Committee determined that the forms are not often used by lawyers; are not very helpful to pro se litigants; and are in tension with case law on pleading standards. Two of the forms, however—Forms 5 and 6—will live on under Rule 4. SB

John G. McCarthy is the head of litigation in the New York office of Smith, Gambrell & Russell LLP. He is a circuit vice president of the FBA for the Second Circuit, and serves as chair of the Federal Litigation Section’s Committee on Federal Rules of Procedure and Trial Practice.

Michael A. Zuckerman is a member of the section’s Committee on Federal Rules of Procedure and Trial Practice. He is an associate in the Chicago office of Jones Day, where he focuses on complex trial and appellate litigation.
Instructing a Witness Not to Answer: Is it Improper?
S. Jarret Raab and Marc S. Reiser

You are defending a deposition and opposing counsel starts asking irrelevant, confidential, personal or even harassing questions of your witness. Do you simply raise an objection, instruct your client not to answer and allow the deposition to continue, or do you terminate the deposition and walk out? And, what are the procedural obligations of the defending attorney under either of these scenarios? The answers to these questions and proper compliance with the federal rules will often determine whether the discovery will be allowed, and whether sanctions will be handed down by the court. Indeed, an attorney that fails to respond to improper and even clearly abusive questions in an appropriate manner can find himself the subject of sanctions.

Deposition Conduct Governed by the Federal Rules

Federal Rule of Civil Procedure 30 governs depositions. Ordinarily, under Rule 30(c), a defending attorney must respond to an improper question (seeking irrelevant information, over broad in scope, etc…) by noting his or her objection on the record, but allowing the deposition to proceed subject to the objection. Contrary to the practice of many practitioners, Rule 30(c) also provides that an attorney is not permitted to instruct his client not to answer except under the following limited circumstances: (1) when necessary to preserve a privilege; (2) to enforce a limitation ordered by the court; or (3) to present a motion to terminate or for a protective order under. Under Rule 30(d)(3), the deponent or another party may move to terminate or limit the deposition on the basis that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. Upon demand, the deposition must be suspended so that the objecting party is given a reasonable opportunity to seek a protective order or to file another appropriate motion.

Instructing Client Not to Answer

If an attorney instructs a witness not to answer on any basis other than the three grounds specifically permitted under Rule 30(c), including relevance, the instruction itself may be sufficient grounds for a motion to compel and/or for sanctions.1 The first two bases for issuing an instruction not to answer under Rule 30(c) are fairly straight-forward. A party is not required to divulge privileged information or other information that is protected by a court order. It is invoking the third ground—where the deposition is conducted “in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party”—that creates the most confusion.

The majority view follows the Seventh Circuit’s 2007 decision in Redwood v. Dobson, which interpreted Rule 30(d)(3) as providing the deponent with two alternatives in responding to abusive discovery.2 The court made it clear that an attorney could not simply “ instruct the witness to remain silent,” but rather must either: (1) immediately suspend the deposition and apply for a protective order; or (2) instruct the client not to answer followed by a motion for protective order after the completion of the deposition.3 In Redwood, the plaintiff’s attorney commenced a harassing line of questioning regarding, among other things, the witness’ sexual orientation, whether he was involved in a “homosexual clique” with any of the co-defendants, whether he was mentally ill, whether his secretary was single and further sought information concerning the deponent’s conversations with his counsel during a recess.4 Rather than raising privilege objections or “calling off the deposition and applying for a protective order (plus sanctions),” the defendant’s counsel simply objected on relevancy grounds and instructed the witness not to answer. Defense counsel also permitted his client to fake “amnesia,” “play dumb,” and give opposing counsel “the finger.”5 Critically, the defendant never moved for a protective order.

On appeal, following the district court’s denial of the plaintiff’s motion for sanctions, the Seventh Circuit reversed—holding that instructing a deponent not to answer an abusive question is contingent on the filing of a protective order motion. “[I]nstructions not to respond that neither shielded a privilege nor supplied time to apply for a protective order – were unprofessional and violated the Federal Rules of Civil Procedure as well as the ethical rules that govern legal practice.”6 Accordingly, defense counsel and the deponent (also an attorney) were censured for conduct unbecoming of a member of the bar. Other courts have ruled similarly and sanctioned attorneys for instructing a witness not to answer without a concomitant motion for protective order.7 Indeed, the failure to file for protection has been deemed a waiver of any objection to the improper inquiry.8

When to Move for a Protective Order – If Ever

Is the better practice to immediately suspend the deposition, or should the attorney instruct the witness not to answer and then move for protection after the deposition is concluded? While the Seventh Circuit’s opinion in Redwood did not address this question, other courts have generally held that the immediate suspension of the deposition is part and parcel to the no-answer instruction so as to maintain order in the process. Indeed, several courts have sanctioned attorneys for allowing a deposition to proceed amidst a harassing line of inquiry. A Southern District of Florida court explained: “It is not the prerogative of counsel, but of the court, to rule on objections .... [I]f the plaintiff’s attorney believed that the examination was being conducted in bad faith ... or that the deponents were being needlessly annoyed, embarrassed, or oppressed, he should have halted the examination and applied immediately to the ex parté judge for a ruling on the questions, or for a protective order, pursuant to Rule 30(d).”9

In fact, the failure to suspend the deposition immediately may be sanctionable even where the deponent is responsible for creating the hostile environment. In an Eastern District of Pennsylvania case, the deposing attorney asked the witness a series of confidential questions, to which the witness responded with abusive answers. The court found that the defending attorney’s failure to intervene willfully contributed to his own
Cost-Cutting: Courts Limit the Recovery of E-Discovery Expenses by a Prevailing Party

Steven M. Richard

With the proliferation of modes of electronic communication, e-discovery has played an expansive and often expensive role in civil litigation. Parties must incur expenses to preserve, process, and produce electronically stored information (ESI) and may have to retain e-discovery specialists to provide technological assistance. Understandably, a party who prevails in litigation will want to recoup fully its e-discovery expenses from the other side through a bill of costs, but such expectations have been dispelled in recent judicial decisions.

Under Fed. R. Civ. P. 54(d)(1), a prevailing party is presumptively entitled to an award of costs, unless a federal statute, the rules of civil procedure, or a court order provides otherwise. The clerk may tax costs on 14 days' notice, and the court may review the clerk's action upon a motion filed 7 days thereafter. Rule 54(d)(1) does not delineate the categories of recoverable costs. The types of costs that may be awarded under Rule 54(d)(1) are enumerated in 28 U.S.C. § 1920.

The United States Supreme Court has narrowly interpreted § 1920, stating that taxable costs are "modest in scope" and "limited to relatively minor, incidental expenses." The Court has emphasized that "costs almost always amount to less than a successful litigant's total expenses in connection with a lawsuit." Further, there is a presumption "that the responding party must bear the expense of complying with discovery requests." Section 1920(4) prescribes that recoverable costs may include "fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case." In 2008, § 1920(4) was amended to allow a court to tax "the costs of making copies of any materials," replacing the prior language referencing only "copies of papers." Courts have reached conflicting results regarding the taxing of e-discovery costs, with some allowing a broad range of recoverable costs.

The Third Circuit noted that "exemplification" and "making copies" means just what is says – the scanning or copying of digital files. The appellate court reasoned that the decisions that allow taxation of all, or essentially all, electronic discovery consultant charges, such as the District Court's ruling in this case, are untethered from the statutory mooring. Section 1920(4) does not state that all steps that lead up to production of copies of materials are taxable. It does not authorize taxation merely because today's technology requires technical expertise not ordinarily possessed by the typical legal professional. It does not say that activities that encourage cost savings may be taxed. Section 1920(4) authorizes only the cost of making copies.

In April 2013, the Fourth Circuit found the reasoning of Race Tires to be persuasive and applied the same analysis to limit the awarding of e-discovery costs in The Country Vintner, LLC v. E & J Gallo Winery, Inc. The Fourth Circuit affirmed a district court's award of $218.59 in ESI-related costs, while the prevailing defendant sought to recover over $111,000. During extensive and contentious discovery requiring judicial intervention, the defendant collected more than 62 GB of data that was forwarded to its attorneys for processing and review. Shortly after it began producing the ESI, the defendant prevailed on a summary judgment motion.

Following the Third Circuit's guidance in Race Tires, the Fourth Circuit in Country Vintner determined that "making copies' means producing imitations or reproductions of original works." The appellate court rejected the argument that ESI processing costs are recoverable under § 1920(4). The Fourth Circuit ruled that only the conversion of native files to TIFF and PDF formats, and the transfer of files onto CDs, constituted "making copies" under 1920(4). The appellate court determined that none of the sought ESI costs could be classified as "exemplification." The Fourth Circuit stated that the mere fact that “[the prevailing party] will recover only a fraction of its litigation costs under our approach does not establish that our reading of the statute is too grudging in an age of unforeseen innovations in litigation-support technology.”

Race Tires and Country Vintner have gained acceptance in recent district court rulings, which have likewise strictly construed the language of § 1920(4). In contrast, the Northern
client’s misconduct, and was thus sanctionable.10 “An attorney faced with such a client cannot, however, simply sit back, allow the deposition to proceed, and then blame the client when the deposition process breaks down . . . [such behavior] frustrated the fair examination of the deponent.”11

A minority of courts have held that an attorney may not be sanctioned for giving an instruction not to answer, even without ever filing a motion for protective order. Those courts, including the Southern District of New York, reason that Rule 37 – which provides the opposing party the right to move to compel and for sanctions – offers deposing attorneys sufficient protection against abusive tactics under the guise of Rule 30.12

Conclusion

Attorneys defending an improper question or harassing environment during a deposition are often faced with a dilemma regarding the proper course of action. Redwood and its progeny illustrate the potential consequences of an attorney failing to act when obligated to do so – namely an adverse ruling on a motion to compel or the imposition of sanctions against the attorney. Accordingly, the prudent course for an attorney to take when facing an objectively harassing question is to: (1) instruct his client not to answer; (2) immediately suspend the deposition; and (3) file a motion for protective order. SB

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Endnotes

1See Patterson v. Burge, 2007 U.S. Dist. LEXIS 33102 (N.D. Ill. 2007) (disagreement regarding the relevance of a question is not a proper basis for instructing a witness not to answer a deposition question); see also In Buckley Towers Condo. Inc. v. QBE Ins. Corp., 2008 U.S. Dist. LEXIS 49305, at *27-28 (S.D. Fla. 2008) (granting motion to compel after finding that the plaintiff had asserted no ground for directing his client not to answer the deposition questions).

2Redwood v. Dobson, 476 F.3d 462 (7th Cir. 2007).

3Id. at 467-68.

4Id. at 468-69.

5Id.

6Id. at 469.

7See Quantachrome Corp. v. Micromeritics Instrument Corp., 189 F.R.D. 697, 700 (S.D. Fla. 1999) (the instruction not to answer may only be given if the instructing attorney genuinely intends to move for a protective order); American Hangar, Inc. v. Basic Line, Inc., 105 F.R.D. 173, 176 (D. Mass. 1985) (“it is the duty of the attorney instructing the witness not to answer to immediately seek a protective order.”).

8See Buckley Towers Condo. Inc. at *28 (noting the attorney’s failure to move for protection: “[o]n this basis alone, any otherwise meritorious arguments to the questions posed during the deposition were thus waived.”).

9Buckley Towers Condo. Inc., U.S. Dist. LEXIS 49305, at *25


11Id. at 195.

12See Riddell Sports, Inc. v. Brooks, 158 F.R.D. 555, 558 (S.D.N.Y. 1994) (attorney may direct a witness not to answer an improper deposition question, without filing a motion for protective order); Luc Vets Diamant v. Akush, 2006 WL 258293 (S.D.N.Y. 2006) (the party taking the deposition may move to compel the testimony it seeks, instead of waiting for the filing of a protective order motion).
Writing for Judges: Easy, Effective Ways to Improve Motions, Briefs, and Other Filings
Megan E. Boyd

Judges frequently complain that practitioners don’t know how to craft concise, well-written briefs. Lucky for us, many things that irritate judges about the briefs they see are pretty easy to fix. This list of tips is far from exhaustive—there have been whole books written on some of the suggestions. However, the tips are intended to give practitioners effective ways to improve the motions, briefs, and other documents they file. The tips are generally universal, but always defer to the first tip. If the local rules set strict outlines for briefs and filings, follow those rules.

Follow the Local Rules
Few things annoy judges more than practitioners who fail to comply with local rules, such as rules setting margins, outlining font style and size, and establishing page limitations. Judges are less likely to respect the substantive points made by attorneys whose briefs don’t comply with the local rules. Why? Because failure to comply with the local rules means one of two things: either the attorney couldn’t be bothered to read the local rules or—worse—the attorney read them but didn’t care enough to comply with them. How can the judge trust the substantive work of someone who is either that lazy or that careless?

We tend to forget the rules are there for a reason. Even if you don’t understand the reasons behind the local rules, comply with them anyway.

Use Introductions and Conclusions
Judges often complain that writers launch into their arguments or fact statements without giving the reader any context. Judges love short introductions that tell them the type of case and the issues, summarize the party’s position, and state the relief the party is seeking. A powerful opening sentence that concisely sets forth your strongest argument can set the tone for a persuasive, winning brief. If the brief or filing is lengthy, use a table of contents to set the roadmap.

Judges appreciate informative conclusions as well. Use a short conclusion to summarize your client’s position and briefly remind the court of the authority you’ve cited to support that position and the reasons it should grant your motion. Keep introductions and conclusions short—I recommend no more than a double-spaced page for each.

Briefs are So Named for a Reason
Don’t feel compelled to fill every line of your 25 page (or 30 page or 50 page) limit. One of the most apt quotes I’ve encountered about legal writing says it all: lawyers suffer from an inability to say what is necessary and then to stop. Judges are busy—they appreciate brevity.

I’m not suggesting you should sacrifice important points for the sake of keeping it short, but exercise discretion in choosing your issues—unless absolutely necessary, a brief or motion should probably be limited to 3 issues or fewer. Good points get lost in lengthy, verbose briefs, and untenable arguments dilute the strength of good ones. Fancy or esoteric words, unnecessary Latin phrases, and overly long sentences do nothing but lengthen your brief and distract the judge from the merits of your argument.

And don’t belabor your points. Repeating the same position 15 times in a brief does not make the brief 15 times more persuasive. It just ticks the judge off and detracts from your credibility.

In his The Winning Brief, Brian Garner notes that Charles Alan Wright successfully opposed a petition for certiorari to the United States Supreme Court in 6 pages. It took Wright only 6 pages of straightforward, to-the-point sentences to convince the highest court in this country that a circuit court’s decision was correct and did not warrant review. If Wright could accomplish that in a mere six pages, the rest of us can learn to keep our briefs brief too.

Organize Your Arguments in a Meaningful Way
Judges also complain about unorganized briefs. Use headings and subheadings to organize your points and thoughts. Even general headings such as Factual Background, Citation to Authority, Analysis, and Conclusion will help guide the reader. In considering the issues, judges often refer back to specific parts of the parties’ briefs—make it easy for the judge to find your arguments.

A short recitation of pertinent facts is usually the best place to start (unless the court is so familiar with the facts that it is unnecessary to repeat them). Follow the factual background with an outline of the relevant authority and an analysis of the issues in light of the authority (including any counter-analysis to your opponent’s position on the issues). Unless there is a good reason to do otherwise, you should start with your strongest argument.

That said, if there are threshold, dispositive, or uncontested issues, don’t forget to address those first. For example, are you arguing a personal jurisdiction issue based solely on specific personal jurisdiction? Admit up front that the court lacks general jurisdiction—don’t make the court go through a general jurisdiction analysis only to learn you aren’t arguing it has general jurisdiction over the non-resident defendant. That would be frustrating to anyone and is especially frustrating to time-pressed judges.

Also, don’t be afraid to make strategic concessions in your argument—they enhance your credibility as an advocate and give you the opportunity to show why unfavorable facts or law do not undermine your position. Judges strive to make fair decisions that are consistent with the governing law. Don’t make it difficult for them by making meritless arguments—or worse—frivolous ones.

Perform a Legal Analysis
You are responsible for convincing the judge your position is sound. You can’t just cite cases and expect the judge to do your analysis for you. Many judges say lawyers are good at citing relevant authorities but bad at analyzing their own cases in light of those authorities. Often, a lawyer’s analysis is simply a summary of the facts in a conclusory manner. This won’t cut it. The analysis should answer one question: Why should your client win in light of the facts and law? Some questions you should ask yourself to guide your analysis:
• Why is a statute/regulation/ordinance applicable (or inapplicable)?
• How are favorable cases factually similar?
• How are unfavorable cases factually distinguishable?
• Are there policy arguments that support my position/disfavor my opponent’s position?

I try to make sure my analysis comprises 15-20% of any brief I write (e.g. 2-3 pages of a 15-page brief). I’ve found any less analysis generally isn’t enough—I haven’t done a complete analysis. And any more is too much, where I’m doing nothing more than beating the proverbial dead horse. And remember—never “fudge” the facts or law in your analysis or elsewhere in your filings. By doing so, you risk irreparable damage to your credibility and, as a result, your client’s case. Expect the judge to check your research and citations for accuracy.

Grammar and Style Do Matter

The goal of every brief should be to make it as easy as possible for the court to grant your motion. Judges have a hard time reading and understanding briefs replete with grammatical and other errors.

You should know some core writing and grammar rules: the appropriate use of commas, the difference between “its” and “it’s,” and when to use “that” and “which,” etc. If you don’t, invest in a short, helpful writing guide, such as Plain English for Lawyers or The Elements of Style.

Small Things that Are Really Big Things

Always remember that you are judged on your brief from the minute the judge picks it up. Judges have an easier time focusing on the substance of briefs that are well-formatted and professional. Don’t forget to:

• Number the pages of your brief.
• Spellcheck your documents.
• Make sure your citations are correct so the court can locate the authorities you cite. If you rely on foreign or hard-to-find authorities, attach copies to your brief.
• Format your documents in a way that is aesthetically pleasing—choose appropriate fonts and margins and ensure the font style and size is consistent throughout.
• Avoid long paragraphs—particularly those occupying an entire page—and do not overuse block quotations or emphasis, or punctuate sentences with anything other than a period (unless you are citing from the record).

These are just a few suggestions to improve your written advocacy skills. I can’t promise you’ll win every motion if you follow these tips; however, I can promise the clarity and effectiveness of your motions and briefs will improve. And judges will appreciate that.

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Endnotes

2McGrath v. Chesapeake Bay Diving, Inc., Nos. 06-11413, 08-1475, 08-4044, 2010 WL 1744628, at *1 (E.D. La. Apr. 29, 2010) (“Most reasonable persons do not continue to beat a dead horse.”).
3Richard C. Wydick, Plain English for Lawyers (5th ed. 2005).
Practical Considerations for Motions to Change Venue in Federal Court
B. Tyler Brooks and Meredith E. Woods

When considering a change of venue from one federal district court to another, there are two key statutory provisions: 28 U.S.C. § 1404(a) and 28 U.S.C. § 1406(a). Section 1404(a) applies when venue in the existing court is proper, but inconvenient for the parties or witnesses. While § 1404(a) protects witnesses and parties from an undue expenditure of time and money even though the forum is technically correct, § 1406(a) allows for transfer of a case that has been brought in an improper forum. Indeed, § 1406(a) contemplates dismissal of an action that has been filed in the wrong district as an alternative to transfer to a district in which the action could have been brought. As a practical matter, though, cases are not often dismissed under § 1406(a) unless special circumstances are present. Notably, if a plaintiff appears to have completely disregarded the applicable venue laws, then the circumstances may warrant dismissal of the action.1

When preparing to file a motion to transfer venue, a party must identify the proper statute under which to move, the proper court to which the action should be transferred, and the proper reasons for the transfer.

Identify the proper statute. Under both §§ 1404(a) and 1406(a), the transferee court must be one in which the action might otherwise have been brought. The exception to this rule is that § 1404(a) also allows for a transfer to any district to which all of the parties consent. In considering a motion to change venue, the district court is allowed to consider evidence outside of the pleadings. Because a defendant’s objection to venue generally must be raised and ruled upon at the outset of litigation, counsel will often have to act quickly to brief the issue and supply the evidence relevant to the motion well before the substantive proof in the case has been developed.

Despite many similarities, §§ 1404(a) and 1406(a) are distinct statutory vehicles and may not both be available in every case. Parties frequently choose to rely on both statutes in a motion to transfer venue as a precautionary measure. While this is often appropriate, the moving party should carefully consider the differences between the two provisions and the potential effect of a transfer under each section on the particular case at hand. Sometimes a party may wish to move under only one of the transfer of venue statutes, even though it could legitimately move under either, because moving under the other could negatively affect the rest of the case. The chief example of this arises in the context of choice of law issues. A federal court sitting in diversity usually applies the choice of law rules of the state in which it sits,2 but this is not the case when a matter has been transferred under § 1404(a). In such cases, the transferee court applies the choice of law principles of the transferee court.3 Thus, if the law of the transferor court is adverse to the moving party, it should consider limiting its grounds to § 1406(a) to ensure that the transferee court’s choice of law principles will be applied after the transfer.4

Identify the proper court. The court to which a party requests that its case be transferred may prove to be as important as the statute under which the request is made. If a case could arguably be transferred to more than one district, the moving party should consider what factors make the requested venue more appropriate than the other options given that the nonmoving party may respond to the motion by asking for a transfer to one of these alternative districts. In this respect, a motion to change venue can become something of a Pandora’s box if counsel have not thought through and prepared for all of the potential scenarios.

The likely location of a trial within the transferee forum is also an important consideration. As a statutory matter, a civil case may be tried in any division of the district in which it is pending.5 Therefore, the parties to a motion to change venue must be cognizant of the local rules and even the unwritten practices in the proposed transferee forum. This is important, not only to properly explain with precise facts (including distances and travel times) why the proposed transferee court is more convenient for the parties or witnesses, but also to fully advise one’s client about the consequences of the motion.

Identify the proper reasons. Whether a court is entertaining a motion to transfer under § 1404(a) or § 1406(a), the relevant considerations are often the same, and the motion is ultimately decided on an individualized, case-by-case weighing of factors pertinent to the individual action.6 The precise articulation of these factors will vary depending upon the particular circuit in which the action is pending, though they are often divided into “private interest” and “public interest” considerations.7 Private interest factors to be considered include the location of witnesses and locations of sources of proof, while public interest factors are considered to be the “interests of justice” however that may be interpreted within the context of the particular action.

Location of witnesses and sources of proof. The convenience of the witnesses to be called at trial is a key consideration for a motion to change venue.8 Thus, a party seeking the transfer should think carefully about the availability of witnesses likely to be called to testify. Moreover, it is not simply the number of witnesses that matters. It is also the significance of their testimony that should be highlighted when seeking to transfer.9 Additionally, a party should provide the court actual evidence in support of its motion unless all of the relevant considerations are obvious from the pleadings, which is uncommon.

For instance, affidavits from potentially relevant witnesses can often prove more persuasive for the court than counsel’s mere representations that it would be difficult for the witnesses to participate in the trial should the case not be transferred. It can also be persuasive to note when the transferor court lacks subpoena power over adverse witnesses but the transferee court would not. This may affect a party’s ability to compel the attendance of witnesses at trial and thus might convince the court to transfer venue, especially if a defendant is moving for a transfer of venue and the plaintiff’s witnesses are within the subpoena power only of the proposed transferee district.10
Similarly, the location of physical proof and the potential need for a jury view of one or more sites within the proposed transferee forum are relevant considerations for motions to change venue.\(^8\) The predicate facts necessary to establish these potentially significant factors should not be overlooked when collecting affidavits to support the motion. Thus, someone with knowledge of the location of physical evidence should submit an affidavit identifying its location if this is a factor important to the potential change in venue. Likewise, if the location that the jury may need to view is not clear from the plaintiff’s complaint and could be relevant to the case, this location should also be established by affidavit.

**Interests of justice.** The “interests of justice” is a broad term that has been interpreted to include consideration of such factors as “(1) judicial economy, (2) the plaintiff’s choice of forum, (3) the comparative costs to the parties of litigating in each forum, (4) each party’s ability to enforce a judgment, (5) obstacles to a fair trial, (6) conflict of law issues, and (7) the advantages of having a local court determine questions of local law.”\(^9\) One consideration for this factor that has the potential to arise in every case and that requires some internet research on the part of counsel is the relative congestion of the dockets between the transferor and transferee courts.\(^10\) Both the moving party and the party objecting to the venue transfer should familiarize themselves with the current case management statistics for the two courts by reviewing data from the Administrative Office of the United States Courts. Some courts are also persuaded by the pendency of similar or related actions in the transferee court, and thus the existence of any related actions in the proposed forum should be highlighted by the party requesting the transfer.\(^11\)

Furthermore, though it is common for courts to say that a plaintiff’s choice of forum should be entitled to “substantial” weight,\(^12\) this choice is by no means determinative. The plaintiff’s preference will often be overcome by other relevant factors, especially when the plaintiff sues in a forum that has no particular connection to the controversy or the plaintiff does not reside in the forum.\(^13\) It also bearing noting that courts do not agree as to whether the plaintiff’s choice of forum qualifies as a public or private interest factor.\(^14\)

Motions to change venue typically require a great deal of hard work and creativity in a limited amount of time. Even then, the particular facts and circumstances will likely dictate the outcome of the motion. Because of this, the best way to ensure success is to understand how the established case law of the transferor court’s circuit articulates the basic rules and considerations for changing venue and then creatively demonstrate how the particular facts of the case at hand do or do not satisfy that standard. **SB**

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**Endnotes**

3. E.g., Wisland v. Admiral Beverage Corp., 119 F.3d 733, 735-36 (8th Cir. 1997).
4. Id. (“A § 1406(a) transfer calls for application of the law of the transferee court[].”)
5. 28 U.S.C. § 1404(c).
6. See Cote v. Wadel, 796 F.2d 981, 985 (7th Cir. 1986); see also Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29-30 (1988); Nichols, 991 F.2d at 1201 n.5.
8. See, e.g., Gundle Lining Constr. Corp. v. Fireman’s Fund Ins. Co., 844 F. Supp. 1163, 1166 (S.D. Tex. 1994) (“The relative convenience to the witnesses is often recognized as the most important factor to be considered in ruling on a motion under § 1404(a)”).
17. Compare Terra Int’l, Inc., 119 F.3d at 696 with Jumara, 55 F.3d at 879-80.

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Starting Off on the Right Foot
Chad Cooper

“You never get a second chance to make a first impression.”

The complaint has been filed and you have entered an appearance on behalf of your client. Perhaps all defendants have answered or maybe motions are pending. Rule 16 of the Federal Rules of Civil Procedure permits the Court to “order the attorneys and any unrepresented parties to appear for one or more pretrial conferences.” You just received an order from the court calling you and opposing counsel into chambers for an initial pretrial conference. The Rule 16 conference may be your only chance to appear in person before the judge who will decide any dispositive motion and try your case. This pretrial conference is a wonderful opportunity to advocate for your client, raise complicated issues that may arise, highlight for the court potential discovery disputes, and set a schedule for the speedy disposition of the litigation. Too often, unfortunately, lawyers just go through the motions and fail to devote sufficient time to properly prepare for the initial pretrial conference. Here are some ideas for properly preparing for and handling the conference, which will no doubt lead to making a great first impression on the judge.

First, show up. Woody Allen knows that “80 percent of success is just showing up.” Regrettably, too often I must call an attorney to ask why they are not in chambers for a conference that was scheduled months ago. The attorney invariably begs for the forgiveness of the court and offers that excuse that he or she had no idea the conference was scheduled because the order was never noted in his or her calendar. An attorney’s absence at a court-ordered Rule 16 conference makes an awful impression on the judge and risks having the judge sanction the dilatory attorney for wasting another lawyer’s time. To avoid this fate, immediately note the date of the conference when the order scheduling it arrives in your calendar. You will arrive on time, perhaps early, and be more than three-quarters on your way to success.

While on the topic of showing up, my experience is that trial counsel should attend the conference in person. Resist the temptation to send a surrogate with your calendar because you have something else set for the day of the conference. The face to face contact with the judge who will be deciding dispositive motions, resolving discovery disputes, and ultimately presiding over the trial is invaluable. Never underestimate what can be gained by spending even a few minutes with your adversary and the judge in what is often a more relaxed environment.

Additionally, Rule 16(c)(1) of the Federal Rules of Civil Procedure requires that an attorney at the pretrial conference be authorized “to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference.” It is therefore unwise to send an uninformed colleague who might make a damaging concession. While it is not necessary to send an army of associates, consider inviting along an associate who will be involved in the case as well. For a younger lawyer, the Rule 16 conference can serve as a wonderful learning experience. It is also an opportunity to allow another member of the team who will be working on the case to advocate our client’s position and discuss the case. It is also another set of eyes and ears to recall to conference, which is helpful particularly since these conferences are rarely recorded.

Second, review the sixteen “Matters for Consideration” laid out at Rule 16(c)(2) and be able to address all of those issues, which include just about every aspect of litigation. Take seriously the requirement that counsel confer to discuss the case prior to the Rule 16 conference. Additionally, remember to review the particular judge’s rules and procedures for any idiosyncrasies that may be lurking. For example, the judge for whom I work uses a common, but far from universal, method for preparing summary judgment motions. Lawyers who fail to note this and fail to use this method risk having their motion denied or certain facts deemed admitted. The Rule 16 conference also serves as the attorneys’ opportunity to coordinate their schedules, as well as their clients’, with that of the Court. If you think discovery will be difficult because numerous out-of-town depositions must be taken, the Rule 16 conference is the time to speak up. If you take a family vacation every August but failed to mention that during the Rule 16 conference, do not ask for a continuance to reschedule an August trial two weeks before the trial.

Third, think about your case. Of course, as the facts develop in discovery, unanticipated issues may rear their head and issues that seemed critical may dim in importance. But spend some time anticipating what witnesses you will need to depose, what documents you will seek, and whether new claims or counterclaims need to be asserted. The federal rules require a complaint to include only a short and plain statement of the claim showing that the pleader is entitled to relief. Answers often contain only general denials and boilerplate affirmative defenses. The judge might therefore know very little about your case. Discuss the facts with your client before the conference and be prepared to give a concise but informative of your factual and legal positions.

Fourth and closely related to the third point, develop a theme early and prepare some helpful guideposts for the court that will highlight key factual and legal issues. Consider drafting a timeline or a document with bullet points that lays out the important individuals involved and the legal issues that are expected to arise. A refresher sets your case apart for the very busy judge and allows him or her to immediately identify it.

Fifth, be ready to talk about the prospects of settlement. Yes, it is still early, but if you represent the plaintiff, you must have some idea of the value of your client’s case. Too often, the plaintiff’s lawyer has yet to even make a demand. Early settlement can save a client money and judges love to have one less case on their docket. Parties should consider whether a settlement conference before a magistrate judge makes sense, perhaps even before discovery commences in earnest. But you should not inform a judge that you have no clue what it would take to settle the case or that the parties have yet to broach the subject.

Sixth, consider and propose ways to make the case run as smoothly and efficiently as possible. Rule 16 authorizes the court to bring the parties together to discuss virtually every aspect of the litigation. It also makes clear that judges “establish early and continuing control so that the case will not be protracted because of lack of management.” Rule 16
Upon Further Review, the Ruling on the Field Stands—Standards of Appellate Review.

Bradford McCullough

Throughout the fall, many of us are glued to our televisions or sitting in stadiums, watching the latest NCAA or NFL football game. Invariably, there will be some close calls on the field that will cause controversy among the fans. Was that a fumble or was the ball carrier already down when he lost control of the ball? Did the receiver catch the ball or did the ball hit the ground first? Did the ball cross the goal line for a touchdown or did the defense stop the runner before he could score? In those situations, whatever the officials called on the field will be questioned. There will be further review—this time by looking at instant replay. While we fans wait for the outcome of that further review, announcers will tell us that—unless there is “incontrovertible visual evidence” that the call was wrong—the call on the field will not be reversed. If replay shows that the call was correct, that call is “confirmed.” If the replay clearly and indisputably shows that the call was wrong, the call is reversed. But if the replay does not provide indispensible evidence one way or the other, the call “stands,” i.e., it will not be reversed. This often frustrates fans who think that the call was probably wrong. Their frustration arises from a failure to understand the applicable standard of review.

Standards of review are crucial. Just as a football fan or coach must appreciate the standard by which an official’s decision will be reviewed, a lawyer must understand the standard that an appellate court will employ to review a trial judge’s decision. Knowing the trial court record and the applicable substantive law is not enough. Counsel must know the standards that will control the appellate court’s review of the trial court’s decision. Different types of ruling are reviewed under different standards. Some standards are deferential to the trial court. Those standards include an abuse of discretion standard and a review for clear error. For other decisions, no deference is given and the decision will be reviewed de novo.

This article will review what those standards mean and will give a sampling of which rulings are reviewed under which standards. And as always, counsel must keep in mind the specific circuit where the case is being litigated. Different circuits might interpret and apply these standards differently.

Basic standards of review and what they mean

The clearly erroneous standard. One of the basic standards of review is the clearly erroneous standard. The Supreme Court long ago held that “[a] finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” This standard, however, “does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently . . . . Where there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.” The clearly erroneous standard of review recognizes “that district courts have a good deal of ‘expertise’ when it comes to fact-finding.” When findings are reviewed under the “clearly erroneous” standard, the appellate court must remember—that “the court of appeals may not reverse [a district court] even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.”

The abuse of discretion standard. Many trial court decisions are reviewed under an abuse of discretion standard. Exactly what constitutes an abuse of discretion can be complicated, as courts have used different definitions in different contexts. In short, when a district court is given discretion to decide something, the court is permitted to make a decision “that falls within a range of permissible decisions.” Although the abuse of discretion standard is a deferential standard of review, appellate courts do not simply “rubber-stamp” the discretionary decisions made by trial courts. “There is an abuse of discretion ‘if the district court relied on erroneous findings of fact, applied the wrong legal standard, mis-applied the correct legal standard when reaching a conclusion, or made a clear error of judgment.’”

The de novo standard. Finally, many trial court decisions are subjected to de novo review. While the clearly erroneous and abuse of discretion standards are deferential standards of appellate review, “[d]e novo review is review without deference.” De novo review “is independent and plenary,” and the appellate court is looking at the matter “as though it had come to the courts for the first time.”

Application to particular types of rulings

The Federal Rules of Civil Procedure provide that “[f]indings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court’s opportunity to judge the witnesses’ credibility.” Thus, a district court’s finding of facts issued after a bench trial are reviewed for clear error, as are other rulings that involve findings of fact. For example, when asked to rule on a “Batson challenge” to the use of peremptory jury strikes, a district court’s determination of discriminatory intent—i.e., whether the juror was struck due to his or her race or gender—is reviewed on appeal under the clearly erroneous standard.

The standard of review for jury instructions depends on the type of error being claimed. The Ninth Circuit has explained that it reviews de novo whether the instruction is wrong on the law, but reviews the formulation of the instructions in a civil case for an abuse of discretion. The First Circuit has labeled this as a split standard. “We review de novo questions as to whether jury instructions capture the essence of the applicable law, while reviewing for abuse of discretion questions as to whether the court’s choice of phraseology in crafting its jury instructions is unfairly prejudicial.”

Decisions regarding the sufficiency of evidence are legal rulings that are reviewed de novo. Thus, a district court’s ruling on a motion for judgment is reviewed de novo. Similarly, a district court’s grant of summary judgment is reviewed de novo. An appellate court asks if the trial court’s decision was legally correct.

Finally, evidentiary rulings are generally reviewed for abuse of discretion. For example, decisions regarding the admission or exclusion of expert testimony or the relevance of evidence are reviewed “for a clear and prejudicial abuse of discretion.”
In conclusion, appellate counsel must know and understand the applicable standards of appellate review – for the standard of review can determine the outcome of an appeal. Indeed, appreciating the proper standard of review can help appellant’s counsel decide what issues to pursue, or whether an appeal should be pursued at all. In short, knowing and understanding the applicable standard of appellate review is crucial for the lawyer handling an appeal.
The Essentials of Toxic Tort Litigation
Mick Marderosian and Heather Cohen

Make no mistake, a toxic tort case is the legal profession’s version of the landing at Normandy, France on June 6, 1944. There are known and anticipated risks and hazards you could not possibly have imagined. It will be overwhelming, controversial and isolating, but it will also be intellectually and professionally stimulating and rewarding, and can certainly be a complete game changer in terms of your practice.

Traditional toxic tort cases involve a group of people, often a neighborhood, who have been exposed to a toxic chemical through one or more of the following “exposure pathways”: air, groundwater, surface water, or soils. Because neither you nor your clients are often aware of the exposure at the time it is occurring, and therefore you are not able to sample these exposure pathways for toxins, you will need to employ experts to analyze and determine which exposure pathways are viable. You will also have to prove the duration of exposure and concentration levels of exposure.

Once you identify the “exposure pathways,” you must then determine how people were actually exposed. That is, people can be exposed by inhalation (breathing the chemical, chemical vapors, contaminated dust), ingestion (drinking water, contaminated food), or absorption through the skin. Depending on the nature of the toxin and the manner of exposure, illness, injury, or death can result in a matter of days or depending on the constituent, it could be as long as decades. You will have to prove medical causation – that the exposure, at the concentration levels and duration levels determined, can and did cause the harm to your clients. Additionally, your medical experts will have to perform differential diagnoses to determine that it was the exposure to the toxin, and not some other factor, that caused cancer or other illness. Most toxins also have a latency period affiliated with exposure. That is, there is often a period of years, if not decades, during which illness can manifest. Consider medical monitoring for future illness can manifest. Effective communication with the clients themselves is essential in collecting this information. Consider medical monitoring for future years, and be compassionate of your own clients’ fear, anguish, and uncertainty in knowing that a deadly disease (cancer) could manifest decades later.

Traditional causes of action in toxic tort cases include negligence, nuisance, trespass, fear of cancer, and/or violations of state and federal statutes and regulations. In addition to the federal Clean Drinking Water Act, Clean Air Act, CERCLA and RCRA, many states have their own laws, such as California’s “toxic hot spots” law and Propositions 64 and 65. If you are able to prove these claims, damages can include general damages including fear of illness and emotional distress, special damages including medical expenses, future medical monitoring and property devaluation, and possibly punitive damages. Many of the regulatory claims also include a provision for recovery of attorneys’ fees.

Before taking on a toxic tort case, make sure you have favorable data from qualified consultants and scientifically reliable evidence acquired through investigative efforts to establish the causes of action alleged. Some of this work can be done by you and your staff, but most of it will require environmental engineers, geologists, hydrogeologists, air quality experts, toxicologists, risk assessors, medical doctors, epidemiologists, property devaluation experts, and economists. Obviously, this is a very expensive undertaking. The questions you need to ask and get answers to before you take on a case like this are as follows:

What is the substance that will be the subject of the litigation, and how harmful is it?

Know everything about the substance that your clients may have been exposed to. Is it considered a toxin and dangerous to human health? Has it been regulated by the state and federal government? What is the EPA’s position on the substance? How long has the substance been recognized as harmful to human health? Is it more harmful via inhalation or ingestion? Become familiar with the toxin, learn everything you can about it, and learn how to pronounce it correctly.

What are the minimum levels of exposure necessary to cause serious illness and injury?

This is a complicated question and is going to be hotly disputed as you will be caught between different designated and recognized “safe levels” – those advanced by industry funded groups and those advanced by environmental groups. Rely on an environmental toxicologist and risk assessor for assistance in clarifying this issue, so that you can overcome any arguments that the exposure levels were so low that it is unlikely that any harm resulted.

What are the type of illnesses, injuries and causes of death that occur as a result of exposure to the subject toxin?

You need to prove causation generally. If the substance is recognized as a harmful substance, then there should be plenty of research and studies discussing the type of illnesses, injuries and harm that can result from exposure. This will allow you to develop information sheets that can be provided to your clients in an effort to get some idea on whether your client pool exhibits the types of illness and injuries recognized by medical science as being related to exposure to this toxin.

Do your clients exhibit the type of illness, injury and cause of death that is related to exposure to the subject chemical?

Was the lung cancer caused by exposure and inhalation of a deadly toxin, or from years of smoking? To answer questions like this, you need accurate client information, as well as assistance from medical doctors familiar with the toxin and an epidemiologist to assist you in finding consistency within the client pool of this type of disease or illness. Effective communication with the clients themselves is essential in collecting this information.

How did the releases occur? How long did they occur? At what levels? Where did the toxin migrate to? What were the exposure pathways (air, ground water, surface water, soil)?

“Exposure pathways” are the physical routes taken by the toxic substance from its proper place (such as a storage tank) to actual contact your clients. Did the toxin get into the air, groundwater, or surface water? Have samples been taken? Has air monitoring been done? Is there a risk of contamination of the local drinking water? Do not underestimate this part of the case. It will require scientific evidence that withstands the Daubert or Frye tests. You will need scientists who may need to employ computer modeling.
How were the plaintiffs exposed (ingestion, inhalation, dermal contact)? Is the constituent capable of causing harm through that mechanism?

Was the drinking water contaminated? Was it the air? Was it just a public waterway where people swim or fish? You will have to nail this down so you can determine if the mechanism of exposure can cause the harm complained of. Depending on the nature of the substance, it will be next to impossible to prove lung cancer resulted from swimming in a contaminated canal; however, if the air is contaminated too, it will be an easier road to prove medical causation of illness in the lungs.

Who is the source of the releases of the toxin? Is it industrial, governmental, private? Is there a viable defendant?

The source of the contamination must be identified early. Where did the pollution come from? Who released the toxin into the environment? Who owned the plant? Who operated the plant? Comb through state and federal records for public information on the source. It is worth checking to see if the Regional Water Quality Control Board, California Air Resources Board, or U.S. Environmental Protection Agency have a file on the facility. Then check to see if the site has been the subject of remediation and regulation. Who has been designated the “responsible party” and “discharger” for purposes of regulation? Who is on title to the real property? This is where you need to pin down the ownership and control over the property and activity that caused the contamination and determine if they are a viable defendant capable of responding to the level of damage they have caused the plaintiffs.

Are you prepared to take this on?

Do you have adequate personnel, both attorneys and administrative staff, to manage a large client base? Are you willing to fully commit yourself to a case for five or more years? Have you figured out how to financially weather the storm? If you have a viable defendant, the odds are that you will be faced with a defendant whose best defense will be to retain an army of lawyers who will bury you in paper and seek to financially destroy you. These cases are not for the faint of heart.

It is every lawyer’s dream to take on a “career case”, however, most lawyers fail to consider and appreciate what is really involved, the toll it takes, and the full price one pays for tackling this type of litigation. No “once in a life time case” goes without unparalleled opposition and work effort. To achieve a successful result, it will become all-consuming. Success is directly related to your level of effort, skill, and coordination of your legal team and staff. Nevertheless, these cases offer the opportunity to make a real difference for a lot of people and test your skills as a lawyer like no other type of case.

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The Use of Classified Information in Criminal Trials
Stephen C. Shannon

The Classified Information Procedures Act (CIPA) is a multifaceted statute controlling the treatment of classified documents in discovery and at trial. A statute designed to reduce the likelihood of exposing state secrets in a public trial while ensuring a fair trial to a defendant, CIPA has been the subject of numerous constitutional challenges. Despite these challenges, federal courts consistently have found that the overall structure of CIPA constitutionally is sound.

Section 1 of CIPA broadly defines classified information as “any information or material” related to national security that requires protection against unauthorized disclosure. The executive branch has broad and exclusive authority to determine national security classifications. The protection of classified information, however, does not trump a criminal defendant’s constitutional right to a fair trial. CIPA aims to balance these competing interests.

Classified information arises in both national security litigation and garden variety criminal cases. Both prosecutors and defense attorneys in federal court should understand CIPA’s procedural framework.

CIPA’s Procedural Framework

CIPA largely tracks the progression of a criminal case. Section 2 allows either party to move for a pretrial conference to discuss matters related to classified information. Typically, issues would include discovery deadlines, timing requirements for notifying the government of an intent to disclose classified information, and scheduling pre-trial hearing dates.

Upon the government’s motion, Section 3 requires a court to issue a protective order prohibiting public disclosure of classified information produced by the government. The court can require that anyone given access to the information obtain a security clearance as a pre-condition—a byproduct of which may result in a defendant being unable to review documents or court-appointed counsel being brought in to assist retained counsel lacking a security clearance. Protective orders often detail procedures for accessing documents and designate a Court Security Officer to oversee the process.

Section 4 is the key provision addressing discovery. In an in camera and ex parte hearing, prosecutors can obtain rulings on whether particular classified documents are discoverable. If so, the government oftentimes will seek permission to produce non-classified substitutes instead. The court, “upon a specific showing” by the government, may permit the government to delete classified parts of documents, produce to the defense non-classified summaries of classified information, or produce non-classified statements admitting relevant facts that classified information would tend to prove.

Under Section 5, a defendant seeking to introduce classified information at trial must notify the government at least thirty days in advance and particularize the information at issue. A judge can preclude disclosure of the information if the notice requirement is violated.

Section 6 is the key provision addressing the use of classified information at trial. After a defendant’s Section 5 notice, a Section 6 adversarial hearing can occur. The government must inform the defense of the classified information at issue, although the government is permitted to notify the defense of generic categories of information at issue if the classified information itself was not produced in discovery. This can include potential testimony.

The court must determine the relevancy and admissibility of classified information, and if so, whether non-classified substitutes may be used at trial instead. CIPA is intended to preserve Federal Rule of Evidence (FRE) 401-403 standards of relevancy and admissibility. Thus, even if relevant, under FRE 403 the court still needs to find that the probative value is not substantially outweighed by, inter alia, the danger of undue prejudice or needlessly presenting cumulative evidence.

If a document, particular testimony, or a generic category of information is admissible, the government can propose substituting the classified information at trial with either non-classified summaries or non-classified statements admitting relevant facts. This is oftentimes the focus of a Section 6 hearing. To permit substitutes, the court must find that the defendant substantially has the same ability to put forward a defense as would occur with disclosure of the classified information.

If the court rejects a proposed substitute, the Attorney General can prevent disclosure of classified information under Section 6(e) by filing an affidavit with the court certifying with explanation that disclosure would cause identifiable damage to national security. The court is obliged to prohibit the defendant from using or eliciting the classified information at trial, but the court then must consider options to make the defendant whole. These options include dismissing an indictment or information; ruling against the government on disputed issues related to the excluded classified information; and striking or precluding witness testimony.

Under Section 7, the government is entitled to an expedited interlocutory appeal of adverse rulings before trial commences, which can flow from evidentiary rulings at a Section 4 hearing, a Section 6 hearing, or a denial of a protective order under Section 3.

Application

While CIPA eliminates surprise disclosure of state secrets at trial, it does not eliminate the risk of state secrets being exposed. Therefore, prosecutors always must consider whether classified information has the potential of entering into a case, and if so, the damage to national security if a judge rejects proposed non-classified substitutes at a Section 4 or Section 6 hearing.

There are several constitutional and statutory reasons why classified information enters into criminal cases. During discovery, the government may conclude that classified information is discoverable. Under Federal Rule of Criminal Procedure 16, a particular agency may possess classified information “relevant and helpful to the defense”. An agency may possess information considered exculpatory to the defendant by Brady v. Maryland standards, or an agency may have recorded statements of a government witness that must be turned over pursuant to the Jencks Act.

At trial, the government may conclude that it must rely upon classified information to prove its case, although use of such information is always a last resort. One example is with cases

*Note: The text continues on page 20.*
Once Reserved For Drug Crimes, Wiretapping Takes Center Stage in White Collar Prosecutions
Jordan D. Maglich

Today, tomorrow, next week, the week after, privileged Wall Street insiders who are considering breaking the law will have to ask themselves one important question: Is law enforcement listening? —Preet Bharara, U.S. Attorney for Southern District of New York.

When the Omnibus Crime Control and Safe Streets Act was passed in 1968, proponents called it a new weapon against organized crime and its growing involvement in the importation and distribution of narcotics. For the first time, federal law enforcement was permitted to wiretap conversations of criminals with suspected involvement in a variety of serious offenses, including organized crime, gang-related activities, and drug trafficking.

These techniques would prove to be a valuable addition to authorities' arsenal in fighting blue-collar crime. Fast-forward forty-five years later. Where once reserved for violent and narcotic-related crime, the use of wiretaps has evolved to become a potent tool in the fledgling battle against white-collar crime.

Wiretaps: A History and Expansion

The use of wiretaps proliferated from the 1990s to the 2000s, with the amount of court-issued wiretap warrants surging from 1,190 in 2000 to 3,194 in 2010 – a nearly 200% increase. Their use, however, remained predominantly isolated to combating violent and drug-related crimes, owing partly to the strict process required for a judge to sign off. Indeed, many involved in passage of the bill recognized the fine line that existed between an individual's privacy rights and authorities' investigatory needs. The crafters recognized that any wiretap must be "conducted in such a way as to minimize the interception of communications not otherwise subject to interception," with a focus on preventing unnecessary intrusion into the target's privacy.

When the Act was passed, electronic surveillance was authorized only during the investigation of a list of enumerated offenses. This list did not include white collar crimes, and was initially limited to crimes pertaining to organized crime and narcotics. However, the list was expanded over time, eventually including crimes such as mail fraud, wire fraud, money laundering, bank fraud, and obstruction of justice in later amendments. Indeed, in early 2011, the Obama administration even proposed that wiretaps be authorized for prosecutions of criminal copyright and trademark offenses. Prosecutors also have the ability, as a result of Section 2517, to use properly obtained wiretap evidence to prosecute crimes that were not specifically listed in the Act.

Wiretaps Meet White-Collar Crime

While the use of wiretaps in white-collar prosecutions was not unprecedented, its use had largely been limited to isolated occurrences that lacked any coordination or significance. However, it was authorities' decision to employ wiretaps in an insider-trading case that would mark the beginning of an unparalleled and aggressive entrance of wiretaps into white-collar crime jurisprudence.

In 2006, the Securities and Exchange Commission ("SEC") opened an investigation into Raj Rajaratnam and his hedge fund, Galleon Group ("Galleon"), based on an uncanny pattern of well-timed trades that had resulted in handsome profits. Rajaratnam's Galleon Group was an example of the many rags-to-riches stories on Wall Street, with Galleon rising to prominence based on an impressive record of above-average returns that were credited to aggressive analyst research. It quickly went from managing $830 million in its first year to over $7 billion at its peak. This resulted in immense wealth for Rajaratnam, with Forbes pegging him as the world's 559th richest person in 2009 with a net worth of $1.3 billion.

Despite an extensive investigation that yielded millions of pages of documents, numerous interviews and subpoenas, and even sworn testimony from Rajaratnam himself, the investigation was generally not successful, and yielded little evidence to support a case that Rajaratnam had engaged in insider trading. Indeed, unlike violent crime, drug-trafficking, or narcotic crimes, the underlying inherent acts of insider trading are inherently legal – there is no law against (attempting) to buy low and sell high in the high-stakes arena of Wall Street, where fortunes were regularly made (and lost). While the SEC gathered a substantial amount of circumstantial evidence pointing towards insider-trading, it was not viewed as enough to initiate a case against Rajaratnam.

After the SEC's investigation stalled, criminal authorities at the U.S. Attorney's Office in New York were brought up to speed. One year later, on March 7, 2008, United States District Judge Richard J. Holwell received a government request for a wiretap on Rajaratnam's cell phone, with prosecutors explaining that "normal investigative techniques" had either been exhausted or had failed. Judge Holwell granted the request, and over the

Wiretapping continued on page 21
involving illegal disclosure of classified information.

From a defendant’s perspective, it may be that the content of classified information produced in discovery assists in presenting a legitimate defense. Finally, there is the practice of “graymail”, whereby a defendant tries to leverage the ability to reveal state secrets at trial in an effort to intimidate the prosecution from going forward. This may not have anything to do with a meritorious defense, although CIPA significantly impedes the meritless use of classified information at trial.

Conclusion

CIPA impacts both discovery and the flow of a trial. Whether addressing the security clearance process, notice requirements for using classified information at trial, or proposed non-classified substitutes, practitioners need to have a working knowledge of the statute’s requirements in the event that classified information arises during the course of federal criminal litigation. SB

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Endnotes

2. S. Rep. No. 96-823 at 8. Note that some courts require in a relevancy determination a showing that the information is helpful to the defense. E.g., U.S. v. Fernandez, 913 F.2d 148 (4th Cir. 1990); U.S. v. Yunis, 867 F.2d 617 (D.C. Cir. 1989).
5. 18 U.S.C. 3500.

Stolen Art & Litigating Holocaust-Era Expropriation Claims

A moderated panel discussion featuring leading authorities discussing claims to Nazi-looted artworks; Issues surrounding the pursuit of, and defenses to, claims regarding property stolen by the Nazis; and the moral and other issues confronting institutions possessing property against which claims have been made.

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Registration & Reception at 5:00 p.m.

Location:
Latham & Watkins // 355 South Grand Ave // Los Angeles, CA 90071

Program Moderator:
Raymond (“Ray”) Dowd, Dunnington Bartholow & Miller LLP, New York, NY

Panelists:
The Hon. Alex Kozinski, Chief Judge, Ninth Circuit Court of Appeals, Pasadena, CA
John J. (“Skip”) Byrne, Byrne Goldenberg & Hamilton LLP, Washington, D.C.
Simon J. Frankel, Covington & Burling LLP, San Francisco, CA
Prof. Jonathan Petropoulos, Claremont McKenna College, Claremont, CA

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next nine months, the government would intercept over 2,000 calls between Rajaratnam and his accomplices. What followed would stun authorities as they discovered a deeply-entrenched insider-trading scheme with tentacles reaching deep into corporate America. By the end of 2008, authorities had amassed a treasure trove of information.

Among Rajaratnam and his group, the wiretaps showed that insider information was traded freely as a virtual currency. For example, Rajaratnam disclosed in a call that “I heard yesterday from somebody who’s on the board of Goldman Sachs that they are going to lose $2 per share. The Street has them making $2.50.” In another call, after learning that a company would be making a favorable announcement, Rajaratnam declared that “I blew it out today, because, I just said, I need to get back to basics, I’m gonna become Mr. October.”

After learning that Rajaratnam was planning to leave the country, authorities brought criminal charges on October 16, 2009, charging Rajaratnam and five others with conspiracy and fraud charges. After surviving an attempt to have the wiretap evidence thrown out, the government obtained a guilty verdict, and Rajaratnam was sentenced to a record 11-year prison term. He is currently appealing the wiretap suppression before the Second Circuit Court of Appeals, with eight former federal judges filing amicus curiae briefs on his behalf.

The wiretaps used to convict Rajaratnam resulted in numerous additional convictions against Rajaratnam accomplices, including Danielle Chiesi, Anil Kumar, and Rajat Gupta, and have served as the impetus in what has been an extraordinarily successful focus by authorities on insider trading. Indeed, the statistics paint a telling story—the SEC has filed more insider trading cases in the past three years than any three-year period in history, and criminal authorities have obtained more than seventy convictions. Authorities have seized on this momentum, and many more cases are expected.

Wiretap Evidence Extends Beyond Insider-Trading Prosecutions

As wiretaps have become increasingly prevalent in insider trading cases, authorities have started expanding their use of wiretaps in the prosecution of other white-collar crimes, including a “pump and dump” stock manipulation scheme, and a massive Ponzi scheme.

In the case of Timothy Durham, who was notoriously pegged as the “Midwest’s Madoff” after being convicted of running one of the largest Ponzi schemes in Ohio history, wiretaps played a pivotal role. In several recorded phone conversations between Durham and several of his co-conspirators, prosecutors captured conversations about plans to hide financial irregularities, how to handle investor redemption requests, and even the possibility of jail time for their actions. Armed with this evidence, a jury convicted Durham and his associates, and Durham later received a 50-year prison sentence—well above the average sentence for the amount of estimated losses.

Future Implications of Wiretaps in Investigating White-Collar Crime

As authorities become increasingly comfortable in using wiretaps to prosecute a growing variety of white-collar crime, the legal community is taking notice. Michael Volkov, a noted authority in the increasingly popular area of Foreign Corrupt Practices Act (FCPA) litigation, recently authored an article warning that wiretaps could soon extend to FCPA prosecutions. In a conversation with Forbes.com, Volkov noted that the FBI had recently arrested a senior executive of a mining company for FCPA and obstruction of justice violations based on recordings made by a cooperating witness. According to Volkov:

There is no question that federal prosecutors will and want to use a wiretap to investigate and prosecute high-level executives who may be violating the FCPA.

Volkov’s comments reflect a growing consensus that federal authorities would welcome the opportunity to employ wiretaps in previously-untested legal areas such as FCPA prosecutions. As a surge in the use of wiretaps has proven successful in rooting out white-collar crime, authorities have not only touted their successes, but also insinuated that this approach could serve as a model blueprint. U.S. Attorney Preet Bharara stated in a recent speech that

“This aggressive use of wiretaps is important. It shows that we are targeting white-collar insider trading rings with the same powerful investigative tools that have worked so successfully against the mob and drug cartels.”

Bharara warned, after Rajaratnam was convicted, “When sophisticated business people begin to adopt the methods of common criminals, we have no choice but to treat them as such. But some have urged restraint. Peter J. Henning, a professor at Wayne State University Law School and expert on white-collar crime, authored a blog post at the New York Times’ Dealbook urging that wiretaps be used very carefully, and warning that

The Justice Department needs to be careful, however, that it does not become so enamored of this tool that prosecutors rush to use it when it will not be effective, or worse, ignore the complex requirements for tapping telephones.

Authorities have amassed an impressive record fighting insider-trading that has been bolstered by the use of wiretaps. Indeed, the statistics are daunting—over seventy convictions and not a single acquittal over the past few years. However, while this streak has emboldened authorities, the war is far from over. Rajaratnam is currently appealing his conviction, arguing that the wiretaps should be thrown out. And as authorities increasingly turn to wiretap evidence, there is the chance that future court decisions will restrict, rather than increase, the use of wiretaps. Finally, there is the threat that criminals will stay a step ahead of authorities by embracing the latest and greatest technology, such as untraceable conversations or dialogues. But all can agree on one thing—the criminal activity will continue.
E-discovery Costs continued from page 7

California federal district took note of Race Tires, but found that, in the absence of controlling Ninth Circuit authority, broad construction of § 1920(4) was appropriate with respect to the e-discovery costs in a case before it. As ESI increasingly becomes relevant evidence in most civil litigation, the issues relating to the recovery of e-discovery costs will continue to make their way through the district courts up to the circuit courts and possibly the United States Supreme Court, if the circuits split in the interpretation of § 1920(4). Practitioners should monitor developments in their jurisdiction closely, given the significant impact that e-discovery expenses can have in litigation.

Race Tires and Country Vintner offer important lessons for litigants and their counsel. Courts are applying the plain language in § 1920(4) to determine which costs constitute “exemplification” or “making copies,” rather taxing costs based on the “equities” or other factors presented by a prevailing party. A bill of costs should describe ESI costs clearly and segregate them, so that the reviewing court can determine whether items properly fit within the § 1920(4) framework. To the extent that tasks are commingled or described in overly technical jargon, the less likely that a court will determine that they constitute recoverable costs. Most important, parties should be proactive during the early stages of litigation in accessing and controlling e-discovery costs. If e-discovery becomes unduly expansive or expensive, the parties should address such concerns with the district court through case management orders or by filing motions under Rule 26 seeking the entry of a protective order or, if appropriate, a cost-shifting order. SB

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Endnotes
5. Id. at *23.
6. Id. at *30.