Association of Corporate Counsel

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801 What You Should Know About Litigation

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Faculty Biographies

Joseph Catalano

Joseph J. Catalano serves as senior vice president and chief litigation counsel for Union Bank of California in San Francisco.

Previously he was the general counsel of Bay View Capital Corporation.

He has served as the chair of ACC's Litigation Committee, and is a past president of ACC's San Francisco Bay Area Chapter. He currently serves on the chapter's board of directors and is chair of its litigation committee. He is the president of the San Francisco Bank Attorneys Association. He is an advisory member of the financial institutions committee of the State Bar of California, and is one of the founding members of ACC's Financial Institutions Committee. He was chosen as the Member of the Year at ACC's 2006 Annual Meeting. He is a frequent speaker and has most recently spoken on the topic, *Records? We Don't Need No Stinking Records…Practice Tips and Pointers Under the New FRCP* at the 2007 annual conference of the California Bankers Association, and *Risk Management Issues Arising from the Retention and Non-Preservation of Electronic Records,* at its 2006 annual conference. He has presented on the topic of *Records Management* to the 2006 annual meeting of the Hispanic National Bar Association. His article, *Tips and Insights on: Litigation Management for Small Law* appeared in the March 2006 ACC Docket.

Mr. Catalano received his Bachelor's from Manhattan College in New York, and his J.D. from University of the Pacific, McGeorge School of Law in California.

Cedric Chao

Cedric C. Chao is a partner in the San Francisco office of Morrison & Foerster specializing in commercial litigation, international arbitration, and white-collar criminal defense. Mr. Chao co-chairs the firm's international litigation and arbitration practice. He serves as lead counsel in high stakes disputes in U.S. civil and criminal proceedings, and in international commercial arbitrations.

Mr. Chao also served as a law clerk to U.S. District Judge William Orrick, Northern District of California. Prior to joining Morrison & Foerster, he served as a federal prosecutor.

Mr. Chao's outside positions have included: board of directors and chair of the dispute resolution committee, Lex Mundi; executive committee and chair of the dispute resolution committee, Inter Pacific Bar Association; chair, Northern District of California magistrate judge screening committee; chair, litigation section of the California State Bar; and Co-Chair, international litigation committee, ABA litigation section. *San Francisco Magazine* named Mr. Chao as a "Northern California Super Lawyer." *Chambers USA 2007* designated him as a "recommended lawyer" on its national list of international arbitration specialists. *Asia Law* included him on the "Asia Law Leading Lawyers 2007" list for dispute resolution in Asia. *Lawdragon* selected him as a finalist for the "Lawdragon 500 Leading Lawyers in America" list. *IBA Who's Who Legal: California* named him as one of the eleven leading arbitration specialists in California.

Mr. Chao received his B.A. with honors and his J.D. from Harvard Law School.

Kevin Chung

Kevin F. Chung is director and senior counsel, employment and litigation for VMware, Inc. in Palo Alto, California. His responsibilities include managing employment and commercial litigation and providing legal advice and counsel to the company in these areas, both domestically and abroad.

Prior to joining the VMware legal department, Mr. Chung worked at the law firms of Littler Mendelson, P.C. and Heller Ehrman LLP.

Mr. Chung has served on the boards of the Asian American Bar Association of the Greater Bay Area and the Asian Pacific Bar Association of Silicon Valley. He is also an active member of the National Asian Pacific Bar Association (past co-chair of the community service committee). His recent volunteer activities include mentoring at-risk youth and law students, coaching the mock trial team at South San Francisco High School and coaching youth basketball.

Mr. Chung received a BA and MA from Stanford University and is a graduate of the UCLA School of Law.

Jeremy Kashian

Jeremy Kashian is the associate general counsel for NEC Corporation of America in Santa Clara, California. Since she joined NEC she has had a wide variety of responsibilities in both transactional and litigation management practice areas. Her current responsibilities include handling all aspects of employee and benefit related matters and litigation management in North America.
Prior to joining NEC, Ms. Kashian practiced employment and general litigation with a few Sacramento based law firms.
She currently serves as president of ACC's San Francisco Bay Area Chapter.

Michelle Leetham

Michelle Leetham is principal counsel and manager of litigation for Bechtel Corporation in San Francisco, where she manages the litigation department, represents the company in mediations and arbitrations, manages outside counsel on various litigation matters, provides advice and counseling on a wide variety of issues, and represents the company in government audits. Ms. Leetham has led the effort to develop alternative dispute resolution programs for Bechtel. The department she manages is responsible for Bechtel's global caseload of uninsured lawsuits and arbitrations, including class actions, complex construction disputes, employment, and other commercial matters. Bechtel is a global provider of engineering, construction and procurement services to a wide variety of market sectors, including oil and gas, civil infrastructure, power, communications, mining and metals, and environmental remediation.

Ms. Leetham joined Bechtel from Brobeck, Phleger & Harrison, where she litigated commercial, employment, and insurance coverage matters.

She is a regular contributor to bar association and other legal group efforts to promote the use of ADR in both domestic and international venues. She is the current president of the Northern California International Arbitration Club, a group formed to study, support, and promote international arbitration to resolve global business disputes.

Ms. Leetham is a graduate of Boalt Hall School of Law in Berkeley and former law clerk for the California Supreme Court.

TOOL

That Create Successful Resolutions

Given the rapid growth in international trade and investment during the last two decades, international arbitration is becoming an increasingly popular method of dispute resolution. According to a recent survey of over 100 in-house counsel at leading corporations around the world, a vast majority view international arbitration as the preferred method of dispute resolution for cross-border disputes, and report that they intend to continue using international arbitration. The most basic benefits of international arbitration (as compared with litigation in foreign courts) are fairly well known. They include avoidance of local courts that might favor their own nationals, relatively widespread acceptance of enforceability of foreign awards, and the opportunity to secure confidentiality of the proceedings.

The tools and tactics of international arbitration are less well known. In this article, we set out key facts and features of international arbitration that every in-house counsel should know. Where applicable, we offer suggestions for crafting arbitration agreements and/or managing the arbitration proceedings so as to minimize uncertainty, maximize the benefits, and avoid the pitfalls.

in International Arbitration

By Robert B. Shanks, Maria Chedid, and Cedric Chao

Choice of Arbitral Locale Is a Tactical Decision

For many reasons, a critical decision in international arbitration is the locale ("situs" or "seat") of the arbitration. First, unless otherwise specified in your arbitration agreement, choice of locale likely will determine the procedural law applicable to your arbitration, as matters of procedure are governed by the law of the arbitral situs. For example, in 1996, Singapore Law reported: "[T]he appropriate procedure would not have been English procedure but Chinese procedure since the arbitration took place in China." In *Bank Mellat v. Helliniki Techniki SA*, "The fundamental principle . . . is that under our rules of private international law, in the absence of any contractual provision to the contrary, the procedural (or curial) law governing arbitrations is that of the forum of the arbitration, whether this be England, Scotland, or some foreign country, since this is the system of law with which the agreement to arbitrate in the particular forum will have its closest connections".

This generally is true even where the parties expressly have chosen different laws to govern the *merits* of the underlying dispute. For example, in *Bank Mellat v. Helliniki Techniki SA*, a Greek company entered into a contract with an Iranian bank regarding development of certain land in Iran. The contract was governed by Iranian law, and stated that any dispute would be settled by arbitration in London. Notwithstanding that neither party had any connection with England and the contract was governed by Iranian law, the procedural law of England was held to apply in this case. Commercial Arb 113 (rejected the argument that the law chosen by the parties as governing the contract (i.e., Egyptian law) should also govern procedural issues.

Second, in addition to determining applicable procedural law, choice of locale will determine which local courts the parties can access should they need judicial assistance before, during, or after the arbitral proceedings.

Court assistance may be needed at the outset to compel arbitration if one party refuses to comply with the arbitration agreement or claims that it is unenforceable. Different countries have different rules on what constitutes an enforceable arbitration agreement. In many countries, for example, an arbitration clause calling for *ad hoc* arbitration is enforceable, while in some it is not. Before choosing where to hold your arbitration, you should confirm whether your arbitration agreement meets the criteria for enforceability in that jurisdiction.

Local courts also may be needed to enforce arbitral discovery orders, or assist in obtaining discovery from nonparties over whom the arbitral panel has no jurisdiction. Courts in some countries—but not all—are empowered to assist arbitral tribunals in obtaining documentary and other evidence. See US Federal Arbitration Act, 9 U.S.C. § 7; Singapore International Arbitration Act, (2002) Cap. 143A, §§ 12(1)(b), 12(6), 12(7) for more details.

Once arbitration is completed, parties might resort to the courts to attempt a challenge to the award. At a minimum, court proceedings will be required to confirm the arbitration award and obtain an enforceable judgment. Even among countries that are signatories to the United Nations Convention on the Enforcement and Recognition of Arbitral Awards (a treaty referred to as the "New York Convention," after the location of its negotiation), court procedure and local arbitration law with respect to these matters can differ significantly.

In short, it is strongly advised that a choice of locale not be made without sufficient planning and understanding of the governing arbitration law and courts, with particular attention to local rules for enforcing arbitration agreements, arbitral discovery orders, and arbitral awards. Should parties fail to agree on or specify a location for arbitration, the decision typically will be made by the arbitral panel.

Due Diligence Is Required Before Choosing Your Arbitrator

Once an arbitration has been initiated, the first critical next step is choosing the arbitral panel. As with many features of arbitration, the parties—unless they have specifically agreed otherwise—have considerable latitude in their choices. Most arbitral institutions provide for a three-member panel of arbitrators in large, complex disputes, and for a single arbitrator in

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MARIA CHEDID is a litigation partner at Morrison & Foerster, the California member firm for Lex Mundi. She specializes in international and domestic arbitration and mediation. She also has extensive trial and appellate court experience in international law matters, arbitration-related litigation (particularly enforcement of arbitration agreements and awards), and federal preemption disputes. She can be reached at *mchedid@mofo.com.*

CEDRIC CHAO is a litigation partner in Morrison & Foerster's San Francisco office, the California member firm for Lex Mundi. He chairs the firm's international litigation and arbitration practice. His focus is commercial litigation, international arbitration, and white collar criminal defense. Chao, a former federal prosecutor, has extensive trial experience and has led teams in significant international arbitration proceedings under the rules of the ICC, LCIA, ICDR, UNCITRAL, and JAMS. He can be reached at *cchao@mofo.com.*

Who Determines Arbitral Locale?

AAA (Commercial Rules)	Unless parties agreed otherwise, the AAA has the power to determine locale. *Rule 10.*	**JCAA**	Unless parties agreed otherwise, locale is where the arbitration request was submitted. *Rule 42.*
AAA/ICDR	Unless parties agreed otherwise, the administrator shall initially decide locale, subject to the tribunal's final determination. *Article 13.*	**KCAB (International Rules)**	Unless parties agreed otherwise, the locale shall be Seoul, subject to a different determination by the tribunal. *Article 18.*
CIETAC	Unless parties agreed otherwise, locale is where claimant submitted the dispute. *Articles 2(8), 31.*	**LCIA**	Unless parties agreed otherwise, locale shall be London, subject to a different determination by the LCIA Court. *Article 16.1.*
HKIAC	Unless parties agreed otherwise, the presumed choice of locale is the Hong Kong office of the HKIAC. *Procedure 5.*	**SCC**	Unless parties agreed otherwise, the SCC Board shall decide after reviewing initial written submissions. *Articles 9, 20.*
ICC	Unless parties agreed otherwise, locale is fixed by the Court. *Article 14.*	**SIAC (International Rules)**	Unless parties agreed otherwise, locale shall be Singapore, subject to a different determination by the tribunal. *Rule 19.1.*
JAMS (International Rules)	Unless parties agreed otherwise, locale is fixed by the administrator. *Article 14.1.*	**UNCITRAL**	Unless parties agreed otherwise, locale shall be determined by the tribunal. *Article 16.*

This and the other tables in this article are based on the rules and procedures of the institutions listed, *i.e.*, American Arbitration Association (AAA), International Centre for Dispute Resolution (ICDR), China International Economic and Trade Arbitration Commission (CIETAC), Hong Kong International Arbitration Centre (HKIAC), International Chamber of Commerce (ICC), JAMS, The Resolution Experts-formerly Judicial Arbitration and Mediation Services (JAMS), Japan Commercial Arbitration Association (JCAA), Korean Commercial Arbitration Board (KCAB), London Court of International Arbitration (LCIA), Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Singapore International Arbitration Centre (SIAC), and United Nations Commission on International Trade Law (UNCITRAL).

disputes over relatively small dollar amounts.

A commonly followed procedure is first to allow each party to nominate one arbitrator as its "party-appointed" arbitrator. The two party-appointed arbitrators then typically will choose the third arbitrator, who will serve as chair of the panel.

Parties often fail to exercise adequate due diligence in choosing arbitrators, missing out on the opportunity to gain insight into their general views on the law and overall approach to decision-making. Parties also would benefit from evaluating potential arbitrators' reputations as well as their prior experience with the other arbitrators that have been, or likely will be, chosen for their panel. The level of respect and overall dynamic among the chair of the panel and the party-appointed arbitrators can play a significant role in outcome when there is disagreement and debate over the issues to be decided in your case.

Although arbitration usually does not result in public, published opinions, there are other methods of gaining information about potential arbitrators. Many international

arbitrators have academic backgrounds or have served as former judges. You should, therefore, conduct thorough research of published articles, texts, and prior judicial rulings. In addition, experienced arbitration counsel in most cases can offer their own insight to the candidates being considered, as the elite circle of international arbitrators is fairly small and well known.

Discovery Is Traditionally Limited to Document Exchange

Parties accustomed to US-style discovery are often surprised at the narrow scope of discovery (or "disclosure") allowed in traditional international arbitration. Absent language to the contrary in the parties' arbitration clause, the scope and methods of discovery are generally a matter of arbitral discretion. Pretrial discovery typically is focused on document exchange where the requesting party must justify to the tribunal its need for requesting documents. Limited interrogatories might be used in rare circumstances, but oral depositions typically are disallowed.

The International Bar Association's 1999 Rules of Taking Evidence in International Commercial Arbitration (IBA Rules) represent an effort to balance US-style discovery and the traditional international arbitration approach. Although the IBA Rules have not been formally incorporated into the rules of any major arbitral organization, it is becoming more common for the parties and/or arbitrators to look to them for guidance. The IBA Rules do not diverge significantly from the current norms of international arbitration practice. However, the IBA Rules make a notable concession to US discovery practice by providing detailed procedures for document requests that are broader than typical arbitration practices. This broadening is balanced by the further requirement that the requests be sufficiently detailed, narrow, and specific.

If they wish, the parties can agree that the IBA Rules shall govern their dispute, or that even broader discovery shall be permitted. With explicit, clear, and unequivocal language, the parties can design their arbitration clause to allow for the discovery procedures that they anticipate will best serve their needs. Incorporating discovery specifics at the time of pre-dispute contracting is particularly advisable when arbitration is "international," because parties from different countries and different legal traditions, including both civil and common law, will likely have conflicting expectations as to the appropriate scope and means of discovery. Given this fact, and given that documentary and other discovery in some cases is critical to the outcome of arbitration, careful planning and negotiation of discovery particulars is advised.

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Arbitrators Are Not Bound by Precedent

Cases strong on equity but weak on law or contract may find arbitration a more receptive forum than the courts. Unlike judges in the United States, arbitrators are not strictly bound by precedential case authorities from higher courts. Rather, they are informally guided by the precedential authority of the applicable jurisdiction, and any decisions they reach do not become part of that canon.

Moreover, to a greater extent than the judiciary, arbitrators are likely to take into account equitable considerations when deciding cases. This notion is sometimes called "*amiable compositeur*" or "*ex aequo et bono*," both of which refer generally to a decision maker not strictly bound by legal rules and charged with the responsibility of finding a "just" and "fair" result. In contract cases, this can mean a remedy or relief that does not necessarily comply with the letter of the parties' agreement. In theory, such an approach is permitted in arbitration only with the consent of the parties. Indeed, according to ICDR Rules, most arbitral institutions provide in their rules that an arbitrator shall act as an *amiable compositeur* only if the parties have so agreed. The AAA's commercial rules, however, state that an arbitrator may "grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties[.]"

Once again, if uncertainty about this matter is of concern, parties can eliminate it by defining clearly in their arbitration clause the scope and nature of authority they wish to vest in the arbitrators.

Appointment of Arbitrators

AAA (Commercial Rules)	Unless parties have appointed the arbitrator(s) or agreed otherwise as to procedure, the AAA sends parties a list of 10 names. Parties have 15 days to eliminate unacceptable names and number the rest in order of preference. The AAA will choose the arbitrator(s) based on mutual preference. *Rules 11-13.*	**JCAA**	Unless parties have appointed the arbitrator or agreed otherwise as to procedure, the association will appoint the sole arbitrator. When constituting a panel of three, each party will appoint one arbitrator; in turn, the party arbitrators will appoint the third member. *Rules 23, 25, 26.*
AAA/ICDR	Unless parties have appointed the arbitrator(s) or agreed otherwise as to procedure within 45 days of the arbitration's commencement, the administrator shall appoint the arbitrator(s). *Article 6.*	**KCAB (International Rules)**	Parties have 30 days to agree on a sole arbitrator or the Secretariat will appoint. When constituting a panel of three, each party will appoint one arbitrator; in turn, the party arbitrators will appoint the chairman of the tribunal. *Rules 12.*
CIETAC	When constituting a panel of three, each party may appoint one arbitrator. If not jointly appointed, each party may propose a list of three candidates from which the presiding arbitrator shall be chosen by CIETAC's chairman. If not jointly appointed, the chairman similarly shall choose a sole arbitrator. *Articles 22.*	**LCIA**	The LCIA Court alone is empowered to appoint arbitrators. Even where parties have agreed that one or more of them will appoint the arbitrator(s), such appointment must be approved by the court. When constituting a panel of three, the chairman of the tribunal shall be appointed by the court regardless of party agreement. *Articles 5.5, 5.6, 7.1.*
HKIAC	HKIAC uses the UNCITRAL Rules and acts as the appointing authority under those rules. *Procedure 6.*	**SCC**	Unless parties have appointed the arbitrator(s) or agreed otherwise as to procedure, the SCC Board shall appoint the sole arbitrator, or the chairman of a multi-member panel. In constituting a multi-member panel, each party has the right to appoint an equal number of arbitrators. *Article 13.*
ICC	When constituting a panel of three, each party may nominate one arbitrator, with the Court appointing the presiding arbitrator unless the parties have agreed otherwise as to procedure. When appointing a sole arbitrator, the court will appoint the arbitrator or confirm one nominated by the parties. *Articles 7, 8, 9.*	**SIAC (International Rules)**	Unless parties have appointed the arbitrator(s) or agreed otherwise as to procedure, the SIAC chairman will appoint the sole arbitrator, or the presiding arbitrator of a three member panel. The other two members will be appointed separately by each party. *Rules 7, 8.*
JAMS (International Rules)	When appointing a sole arbitrator, unless parties have appointed the arbitrator or agreed otherwise as to procedure, JAMS will use a list procedure similar to that used under UNCITRAL. When constituting a panel of three, each party may appoint one arbitrator; in turn, the party arbitrators will appoint the presiding arbitrator. *Article 7.*	**UNCITRAL**	When appointing a sole arbitrator absent party agreement, the appointing authority shall provide a list of three names to the parties, who may eliminate unacceptable names and shall rank the remaining in order of preference. The appointing authority will choose the arbitrator based on mutual preference. When constituting a panel of three, the above list procedure will be used when party arbitrators, appointed by the parties and empowered to choose the presiding arbitrator, cannot agree on the third. *Articles 6, 7.*

Confidentiality

AAA (Commercial Rules)	The AAA staff and neutrals have an ethical obligation to keep information confidential. Parties always have the right to disclose details of proceedings, unless a separate confidentiality agreement is established. AAA Statement of Ethical Principles.	**JCAA**	Arbitral proceedings and records thereof shall be closed to the public. Persons involved in the arbitration shall not disclose any facts related to the arbitration except where required by law. Rule 40.
AAA/ICDR	Arbitrators and administrators shall keep confidential all matters relating to the arbitration or the award. Parties always have the right to disclose details of proceedings, unless a separate confidentiality agreement is established. Article 34; AAA Statement of Ethical Principles.	**KCAB (International Rules)**	Hearings are private and neither members of KCAB nor parties may disclose facts related to the arbitration unless required by law or consented to by the parties. Article 26, 45.
CIETAC	Hearings shall be held in camera, unless both parties request an open hearing and the tribunal approves. Persons involved in the arbitration shall not disclose any substantive or procedural matters of the case to any outsiders. Article 33.	**LCIA**	Unless the parties have agreed otherwise, all awards, tribunal deliberations, and materials created or produced in the proceedings shall be kept confidential except where required by law or necessary to enforce or challenge the award. Article 30.
HKIAC	HKIAC uses the UNCITRAL Rules.	**SCC**	Unless otherwise agreed upon by the parties, hearings will be private. The SCC Institute and the tribunal shall maintain the confidentiality of the arbitration and the award. Article 27, 46; Organisation of the SCC Institute, Article 9.
ICC	The tribunal may take measures for protecting trade secrets and confidential information. Article 20(7).	**SIAC (International Rules)**	The parties and the tribunal shall keep confidential all matters related to the proceedings and the award except where required by law or necessary to enforce or challenge the award. Article 34.6.
JAMS (International Rules)	Unless required by law, the tribunal will maintain the confidentiality of the arbitration. Unless required by law or all parties consent to its publication, the award shall remain confidential. Article 16.	**UNCITRAL**	The tribunal may discuss confidentiality with the parties and record any agreement reached on the issue. Notes On Organizing Arbitral Proceedings 6.

The Rules of Evidence Do Not Govern

Arbitration rules often state explicitly that the rules of evidence need not be followed; e.g., AAA Rules R-31(a); "[c]onformity to legal rules of evidence shall not be necessary." Also, the arbitrators are granted discretionary authority to decide evidentiary matters; e.g., LCIA art. 22.1(f): The Tribunal may decide rules of evidence "as to the admissibility, relevance or weight of any material tendered by a party." Thus, as a general matter, arbitrators are less likely to exclude evidence than are judges. A typical approach is to admit virtually all of the evidence a party wishes to present, with the assurance that it will be given only the weight it deserves.

As with the features of arbitration discussed above, parties seeking to conduct their proceedings in a manner that differs from the traditional approach should say so clearly and explicitly in their arbitration agreements. For example, although it is not commonly done in international arbitration, parties who are accustomed to and prefer the United States federal evidentiary practice might negotiate for incorporation of the "Federal Rules of Evidence" into their arbitration agreement. Whatever the evidentiary rules chosen, parties also should consider whether to specify in their arbitration clause that at least one arbitrator on the panel must have experience with application of such rules.

Confidentiality Should Not Be Assumed

Parties often agree to arbitration with the assumption that the entire process will be kept confidential. This is not always the case. Although virtually all arbitral institutions provide that the arbitrators and the institutions themselves are bound to confidentiality, some (such as the AAA and ICDR) impose no obligations on the parties in this regard. Absent agreement to the contrary, parties, therefore, may be left free to disclose the documents produced and the submissions made during the proceedings, as well as the final award. Again, you should give thought to this important matter at the time of contracting. If confidentiality of the proceedings, the documents, the submissions, and/or the award is a must, choose your arbitral institution accordingly and/or negotiate an arbitration clause that says so explicitly. Also, remember that even if the arbitration is confidential, related court proceedings might not be.

Grounds for Challenging an Award Are Extremely Limited

Most countries are signatories to the New York Convention. The New York Convention applies broadly to "nondomestic" arbitration agreements and awards, 9 U.S.C. § 202, and requires that national courts of contracting states recognize and enforce arbitral awards made in other states, subject to limited procedural defect and public policy exceptions as set forth in the treaty. No court review for error of law or fact is permitted.

> Parties **often agree** to **arbitration with the assumption that** the **entire process** will be **kept confidential**. This is **not always** the case.

If enforcement of an international arbitration award is sought in US federal courts pursuant to the Federal Arbitration Act (FAA) rather than under the New York Convention, the grounds for review are slightly broader. This is because federal courts will recognize an additional, judicially created ground for vacatur under the FAA, *i.e.*, an arbitrator's "manifest disregard of the law." Here again, however, the scope of review is "severely limited" according to *Duferco Int'l Steel Trading v. T. Klaveness Shipping*. Review is highly deferential to the arbitral award, and obtaining judicial relief for arbitrators' manifest disregard of the law is rare. Indeed, the award "must be confirmed if there is even a 'barely colorable justification' under the facts presented" per *Nat'l Union Fire Ins. Co. v. Dana Corp.* The *Siegel v. Titan Indus. Corp.* case from 1985 articulates the manifest disregard standard as follows:

> The erroneous application of rules of law is not a ground for vacating an arbitrator's award, nor is the fact that an arbitrator erroneously decided the facts. Manifest disregard of the law may be found, however, if the arbitrator understood and correctly stated the law but proceeded to ignore it.

Id. at. 892-93 (internal citations and quotation marks omitted).

Accordingly, in all events, parties should understand that they realistically have only "one bite at the apple" in arbitration. For those concerned about this risk, the

typical solution is to have a panel of three arbitrators, rather than a sole arbitrator, on the theory that the give and take among the panel will decrease the chances of a mistake or an extreme view. A second potential solution is to limit, by contract, the arbitrator's authority. This can be done, for example, by limiting the type of damages or relief an arbitrator may award. Finally, parties might consider providing for expanded rights of review of the arbitral award, keeping in mind, however, that there is a lack of consensus in US federal courts as to the manner in which they may do so. For example, in *Chicago Typographical Union v. Chicago Sun-Times* from 1991, the Seventh Circuit Court of Appeals held: "If the parties want, they can contract for an appellate arbitration panel

ACC Extras on… International Arbitration

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ACC Docket Articles

- *Preparing for Arbitration* (Going Global column, 2006). Trouble is brewing with one of your customers or counterparties. Try as you might, you can't seem to agree on a resolution to your dispute, and the specter of arbitration looms large. How can you best prepare for this eventuality? *www.acc.com/resource/v7116*
- *The Neutral Zone: A Practical Guide to International Arbitration* (HandsOn, 2006). With the booming growth of international business comes a boom in international business disputes. In-house lawyers for companies doing global business need skills in all aspects of international arbitration, including counseling, contracting, and the arbitral process. But they need to be aware that the international arbitration process involves procedures unfamiliar to most American lawyers. *www.acc.com/resource/v7235*

ACC Quick References

International & Domestic Arbitration of Disputes: Advantages & Disadvantages. www.acc.com/resource/v7923

Blakes Publications

Litigation and Dispute Resolution in Canada (2006). This guide provides non-Canadian business people with an introduction to the civil litigation and dispute resolution system in Canada, including a general description of the procedures in Canada's various civil courts (that is, courts dealing with non-criminal matters) and administrative tribunals and procedures for mediation and arbitration. *www.acc.com/resource/v6707*

InfoPAKs

Alternative Dispute Resolution. This InfoPAK contains materials useful to in-house counsel utilizing ADR. The materials include useful and practical information about the use of arbitration, mediation, and other modern dispute resolution methods. *www.acc.com/resource/v4893*

Leading Practice Profiles

The Use of Mediation in the United States and Western Europe to Add Value to Transactions and Effectively Resolve Commercial Disputes (2006). This practice profile examines corporate use of transnational mediation in the US and Western Europe by looking at business management initiatives that encourage mediation, as well as the experiences and outcomes of mediated disputes, mediation success stories, and the advantages and disadvantages of using this dispute resolution mechanism, as perceived by the profile participants. *www.acc.com/resource/v7474*

Program Materials

Building Better Negotiation Skills (ACC Europe's Corporate Counsel University, 2006). We all have to negotiate: with other counsel, our coworkers, and more. In this program material, you will receive insightful guidance on successfully handling all phases of the negotiation process including acquiring information from an adversary, negotiating for a competitive advantage, and identifying the best methods for closing the deal. *www.acc.com/resource/v7452*

> **Accordingly,** in all events, **parties** should **understand** that they **realistically have only "one bite at the apple"** in arbitration. For those **concerned** about this risk, the **typical solution** is to have a panel of three arbitrators, rather than a sole arbitrator, on the theory that the **give and take** among the panel will **decrease the chances** of a **mistake** or an **extreme view**.

to review the arbitrator's award. But they cannot contract for *judicial* review of that award; federal jurisdiction cannot be created by contract." The Fifth Circuit, on the other hand, is of the view that "[w]hen . . . the parties agree contractually to subject an arbitration award to expanded judicial review, federal arbitration policy demands that the court conduct its review according to the terms of the arbitration contract," *Gateway Technologies, Inc. v. MCI Communications Corp.*, as in the 1995 case.

Arbitration Can Be as Expensive and Protracted as Litigation

Parties often view arbitration as a means of reducing dispute resolution costs, and are surprised when this is not the case. Preparation for and conduct of a high-stakes arbitration require the concerted assistance of a capable team of attorneys and experts, costs for which can approach or equal the cost of employing such professionals for a traditional trial. Judges are employed by the public, whereas top arbitrators can command salaries of over $5,000 per day, plus travel and accommodations—all to be paid by the parties. By way of example, to conduct an ICC arbitration in a $10 million dispute overseen by a panel of three arbitrators, the estimated administrative and arbitrators' fees (assuming average rates and not including the arbitrators' expenses) is $304,025.[1] Arbitration with a sole arbitrator, rather than three, is less costly but, as discussed above, can be more risky since a *final* decision in your dispute will be rendered by a single individual.

Similarly, arbitration is not always more speedy than litigation; in fact, arbitral proceedings can drag on for years and can be substantially slower than judicial proceedings, at least in those jurisdictions where local rules and effective case management lead to relatively fast judicial decisions. Under the ICC Rules, parties in the average case should expect to receive an award within six months of execution of the "terms of reference." ICC Rules art. 24(1). Where there is a simple dispute before a sole arbitrator, or where the arbitrators have relatively open calendars, that speed can sometimes be achieved. More likely, however, coordinating the schedules of three prominent arbitrators, multiple parties, and their counsel is so challenging that a hearing on the merits is not set until a year after the demand for arbitration is made. The hearing on the merits may be followed by a lengthy delay prior to issuance of the decision, a subsequent hearing on damages, another delay pending this decision, and yet another hearing to determine award of costs.

For Best Results, Plan for and Manage the Process Carefully

For parties not familiar with the workings of international arbitration, the process can present uncertainty, surprise, and sometimes unexpected results. For parties who engage in careful planning and crafting of the arbitration agreement and effective management of the arbitration process, however, international arbitration offers many benefits and the opportunity to design a dispute resolution process that is uniquely tailored to their needs.

Have a comment on this article? Email editorinchief@acc.com.

NOTE

1 This total is calculated by the ICC's "Fees and Administrative Expenses Calculator," which is provided by the ICC on its website to enable prospective parties to an ICC arbitration to estimate administrative expenses and arbitrators' fees. *See* ICC Arbitration Cost Calculator, *www.iccwbo.org/court/arbitration/id4097/index.html.*

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Commentary

International Arbitration: Selecting The Proper Forum

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This article compares aspects of the leading international commercial arbitration rules to assist parties in defining the best legal environment in which to arbitrate. Specifically, we compare selected provisions of the rules of the United Nations Commission on International Trade Law (UNCITRAL), the International Chamber of Commerce (ICC), the International Arbitration Rules of the American Arbitration Association, the Stockholm Chamber of Commerce (SCC), the Japan Commercial Arbitration Association (JCAA), the World Intellectual Property Organization (WIPO), the China International Economic and Trade Arbitration Commission (CIETAC), the London Court of International Arbitration (LCIA), the Singapore International Arbitration Centre (SIAC), the International Centre for Settlement of Investment Disputes (ICSID), and JAMS. These forums were selected as leaders in the field of international dispute resolution and illustrate the dominant models of international arbitration.

The Arbitration Institutions Under Discussion

China International Economic and Trade Arbitration Commission. Established in 1954, CIETAC has reinvented itself on a number of occasions, amending its rules to address perceived inadequacies. The current rules, revised and adapted by the Chinese Chamber of Commerce in January 2005, took effect on May 1, 2005. This most recent version borrows from the AAA, SCC, ICC, and UNCITRAL. Measured by the number of disputes filed, CIETAC is a success story. CIETAC's case load has increased from 37 in 1985 to 633 from 50 countries last year.

One of the most important changes introduced in the new CIETAC rules was the scope of CIETAC's jurisdiction. Under the 1989 Rules, CIETAC's jurisdiction was limited to the arbitration of "disputes arising from international economic and trade transactions." This created a problem for joint ventures and wholly foreign-owned enterprises organized in China, which are both deemed to have the status of Chinese legal persons. Under the 1994 Rules, however, CIETAC's jurisdiction was expanded to include international *and external* transactions. Derived from the Chinese phrase *shewai* or "foreign-related," the term "external" has historically been construed to refer to situations directly involving a foreign party or to an international transaction (including one between two domestic parties). The effect of the revision is both to clarify and to expand the application of the CIETAC rules.

Under its most recent rule revision, the scope of disputes is even broader. CIETAC will hear disputes if they: (1) concern international or foreign relations;

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(2) affect the Hong Kong SAR, Macao, or Taiwan regions; (3) are between foreign investment enterprises, Chinese citizens, or economic organizations; (4) relate to commercial activities conducted by Chinese citizens or by foreign individuals or organizations utilizing foreign capital, technology, or services; or (5) arise under special governmental provisions or agreements requesting CIETAC arbitration. The commission will not consider disputes concerning domestic, administrative, labor, or agricultural matters.

United Nations Commission on International Trade Law. Published in 1976, the UNCITRAL Arbitration Rules provide a set of procedures for international commercial arbitration. The rules were established to further the development of international economic relations for use by parties and international arbitration centers as model rules. Today the rules are perhaps the most widely used procedural rules in *ad hoc* arbitrations in international commercial transactions as well as in investment, joint ventures, and technology transfer.

Administering institutions may draft their own rules using the UNCITRAL model, adopt the UNCITRAL rules wholesale, or provide parties with the option of choosing from either set of rules. Prior to 1982, institutions occasionally combined UNCITRAL procedures with their own rules; however, the United Nations Commission on International Trade Law later restrained institutions from modifying them. Numerous institutions, such as the AAA, JCAA, or SCC, can administer arbitrations under the UNCITRAL rules.

International Chamber of Commerce. The International Court of Arbitration, founded by the ICC in 1919, is the oldest and largest provider of international ADR services. Today, the ICC includes thousands of member companies and associations from over 130 countries. As a result, while the court is based in Paris, most ICC arbitrations are conducted outside France. In the past year, 541 requests for arbitration were filed concerning 1,398 parties from 120 different continents. Many of the cases filed with the ICC addressed financial services, information technologies, marketing ethics, transportation, competition law, and intellectual property. Approximately 54% of ICC's requests exceeded $1 million. The current ICC rules were adopted in 1998, following its first major revision in more than 20 years.

American Arbitration Association. The AAA was established in 1926 as an independent, nonprofit organization to promote the use of arbitration. The organization comprises individuals, law firms, and organizations. As the largest alternative dispute resolution service provider, the AAA administered 198,491 cases last year, a 41% increase from the year before. In the international arena, however, the AAA is a relatively new participant. The AAA introduced its International Dispute Resolution Procedures in March 1991 and revised them in 1997, 2003, and 2006. Most international disputes are handled through the AAA's International Center for Dispute Resolution in New York, which typically hears disputes concerning telecommunications, pharmaceuticals, corporate and public utilities, the Internet, and e-commerce. The number and size of international arbitrations handled by the AAA has steadily increased, up from 343 in 1999 to 510 cases in 2000. Of the claims and counterclaims filed last year, 311 concerned amounts under $1 million, and 142 concerned amounts over $1 million, while 168 did not specify an amount. Most of the parties involved in the disputes were non-U.S. nationals, commonly from Australia, Canada, England, Germany, or Mexico.

London Court of International Arbitration. The London Court of International Arbitration was established in 1892 as an institution for commercial dispute resolution. The institution administers dispute resolution proceedings for all parties, regardless of their membership or location, and under any system of law. The LCIA is a not-for-profit organization that operates under a three-tier structure, comprising the Company, the Arbitration Court, and the Secretariat, supported by five Users' Councils around the world. The LCIA provides a comprehensive international dispute resolution service, both under its own arbitration and mediation rules and under the UNCITRAL Rules. The subject matter of contracts in disputes referred to LCIA includes all aspects of international commerce, particularly, telecommunications, insurance, oil and gas exploration, construction, shipping, aviation, pharmaceuticals, information technology, finance, and banking.

The LCIA Secretariat, based at the International Dispute Resolution Centre in London, is responsible for the day-to-day administration of all arbitrations and mediations, whether or not under the LCIA Rules.

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It supervises and supports the proceeding; and it provides information and advice to the parties, their representatives, the tribunals, and to members.

Stockholm Chamber of Commerce. Established in 1917, the SCC has served as a forum for resolving trade, industry, and shipping disputes. During the 1970s, the United States and the Soviet Union recognized the SCC as a neutral center for resolving East-West trade disputes; it has since expanded its international arbitration services to over 40 countries. The current SCC rules came into force in 1999. The SCC has also adopted Rules for Expedited Arbitrations, Insurance Arbitration Rules and Procedures, and Services under the UNCITRAL Arbitration Rules. The model clause provides for arbitration in Sweden or under UNCITRAL, with the SCC serving as appointing authority and administrator. Last year, the SCC administered 135 cases, 92 of them under its own rules.

The SCC typically hears arbitration requests concerning construction licensing and intellectual property, joint venture, investment, and mergers and acquisitions. Last year, a large number of the SCC's arbitration requests (33 of 135) concerned sale-of-goods disputes, while share purchase agreements increased 700%. The SCC has also experienced a significant increase in the number of expedited arbitration requests. Last year, approximately 27 new cases were initiated; the SCC has applied the expedited procedure to a total of 61 cases since it implemented the rules. Arbitration parties include individuals, public and private companies, states, and state-owned enterprises.

Japan Commercial Arbitration Association. Originally the International Commercial Arbitration Committee, JCAA was established in 1950 within the Japan Chamber of Commerce and Industry along with six other business organizations, including the Japan Federation of Economic Organizations, the Japan Foreign Trade Council, and the Federation of Banking Associations of Japan. JCAA helped develop the Japanese economy by settling commercial disputes and promoting international trade. In 1953, JCAA separated from the Japan Chamber of Commerce to expand and streamline its activities. Over the last 40 years, JCAA has attempted to settle mainly international commercial disputes by encouraging the use of its consultation and information services. JCAA has played a key role the development of APEC's 2000 Alternative Dispute Resolution Project, an effort to promote ADR in APEC regions through executive education. The present version of JCAA's arbitration rules came into effect in July 2006.

Singapore International Arbitration Centre. SIAC is a nonprofit organization incorporated as a public company limited by guarantee, which commenced operations on July 1, 1991. The institution promotes arbitration and conciliation as alternatives to litigation and provides facilities for domestic and international proceedings. It also has a developed pool of arbitrators and experts in the law and practice of international arbitration and conciliation. Parties seeking arbitration have maximum freedom when choosing the governing law in their contract; SIAC will not impose Singapore law on the parties without their agreement. Institutional rules are largely based on the UNCITRAL Arbitration Rules and Rules of the London Court of International Arbitrations, with some modifications. The modifications have shortened the length of the written requirements and the time limit within which the tribunal must render an award.

World Intellectual Property Organization. WIPO is an intergovernmental organization that is a specialized agency of the United Nations system of organizations. WIPO has approximately 157 member states, with headquarters in Geneva, Switzerland. On October 1, 1994, WIPO adopted several dispute resolution procedures: Arbitration, Expedited Arbitration, and Mediation. The WIPO Arbitration Center also maintains lists of specialized mediators and arbitrators. WIPO arbitration rules are based on the UNCITRAL Rules but include several provisions directed at intellectual property rights. These provisions make WIPO especially suitable for disputes involving intellectual property, such as licensing agreements or other forms of transactions relating to patents, trademarks, or copyright.

Arbitration under WIPO may also be particularly appropriate for disputes involving technology, entertainment, or intellectual property, because of two recent developments. In 1999, the center implemented an on-line dispute resolution service, which will allow parties to communicate over the Internet, thus reducing the time and cost of reaching a solu-

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tion. This may provide an effective service for parties exploiting intellectual property rights across borders. Recently, the Internet Corporation for Assigned Names and Numbers (ICANN) adopted a Uniform Dispute Policy and accredited WIPO to administer it. Since then, the center has received approximately two new domain name claims daily. Today, the center is recognized as the leading dispute resolution service provider for disputes arising out of the registration and use of domain names.

The following examines some procedural differences among the above-described organizations.

Commencing Arbitration

Timeline. Under most arbitration rules, the pleadings phase is expedited. The JCAA is the most generous in terms of time. A party has four weeks from the "Basic Date" to reply to a claim. The Basic Date is three weeks after the date the Association sends notice of acceptance of the request for arbitration, so the time to respond is actually seven weeks. (JCAA 2, 18.) The CIETAC Rules allow 45 days for answers and counterclaims. (CIETAC 12.) The ICC, AAA International, LCIA, WIPO, and JAMS rules allow 30 days to reply to a claim or counterclaim. (ICC 5; AAA 3; LCIA 2.1; WIPO 11; JAMS 4.1.) The AAA Commercial Rules allow 15 days for response during the pleading phase. (AAA Com'l 4(b).) By way of comparison, the SIAC rules provide parties with the shortest response time, 14 days. (SIAC 4.1.) The UNCITRAL, SCC, and ICSID Rules do not provide any pre-determined time for pleading. Under these Rules, the response to the claimant's initial statement is to be provided within the period determined by the tribunal. (UNCITRAL 19; SCC 21; ICSID 31(1).) Under UNCITRAL Rules, time periods set for written pleadings generally cannot exceed 45 days. (UNCITRAL 23.) The ICSID does not impose such a limit; however, the ICSID Rules do provide for a "Preliminary Procedural Consultation" conference where the tribunal and the parties can discuss the ground rules for the arbitration, such as timeline, language, and allocation of costs. (ICSID 20.)

Pleadings. The UNCITRAL, SCC, and ICSID rules establish a two-stage pleading procedure. (*See, e.g.*, SCC 5, 10.) The claimant first files a request for arbitration. (UNCITRAL 3; SCC 5; ICSID Convention 36.) *(Under the UNCITRAL Rules, the notice of arbitration and the statement of claims together provide the same level of notice as the AAA, SIAC, and JCAA requirements described below.)* The parties then prepare detailed statements of their positions and attach any documents supporting the claim or defense.

The AAA, SIAC, JCAA, and JAMS provide for a relatively detailed notice procedure that includes, among other elements, a reference to the invoked arbitration clause or agreement; a reference to any contract out of or in relation to which the dispute arises; a description of the claim and an indication of the facts supporting it; and the relief or remedy sought and the amount claimed. (AAA 2; SIAC 3.1; JCAA 14; JAMS 2.1.) The WIPO rules require (in addition to background information) a copy of the arbitration agreement and, if applicable, any separate choice-of-law clause; a brief description of the nature and circumstances of the dispute, including an indication of the rights and property involved and the nature of any technology involved; and a statement of the relief sought and an indication, to the extent possible, of any amount claimed. (WIPO 9.)

The ICC pleading procedures are the most exacting and complicated. Parties must prepare and exchange detailed statements of their positions and attach all relevant documentation. (ICC 4, 5.) Subsequently, the arbitrators and parties must draft the Terms of Reference defining the issues to be arbitrated and the scope of the arbitrators' jurisdiction. (*Id.* 18.) This document is prepared by the arbitrators, signed by the parties, and submitted to the court within two months after referral of the matter to arbitration.

CIETAC requires a detailed statement of the claim and of the facts and evidence on which the claim is based. (CIETAC 10.) Moreover, CIETAC requires that the claimant also provide the "relevant [documentary] evidence" on which the claimant relies at the time the application for arbitration is submitted. (*Id.* 10.) Finally, under the CIETAC rules, a tribunal may hold pre-hearing meetings and preliminary hearings, draw up terms of reference, and issue procedural directions and question lists, unless the parties agree otherwise. (*Id.* 29.)

Most parties find the level of detail required in ICC pleadings to be helpful in framing the issues in complex disputes. On the other hand, for smaller matters,

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the more truncated pleading requirements of the AAA are preferred.

Selection Of Arbitrators

Number of arbitrators. In the absence of specific language in the contract, the parties can agree after commencement of the arbitration, or rely on the default number specified by the rules, to determine the number of arbitrators. The UNCITRAL rules allow the parties 15 days after receipt of notice by respondent to specify the number of arbitrators. (UNCITRAL 5.) JCAA allows three weeks after the "Basic Date", and after the Association determines the request is appropriate. (JCAA 24.) The ICSID allows the parties 60 days after registration of the arbitration request to agree on the number of arbitrators and the method of their selection. A request for arbitration is registered when the Secretary General of ICSID consents to the request and notifies the parties of its registration. (ICSID Convention 36.) Unless they have agreed otherwise, the parties need to follow a proposal exchange framework specified in the Rules for negotiating the size of the tribunal and the method of its appointment. (ICSID 2(1).) If the parties fail to agree within 60 days, a three-arbitrator tribunal will be appointed. (ICSID 2(3).)

The ICC, AAA, WIPO, LCIA, JCAA, and JAMS call for a single arbitrator, but grant the administrator discretion to determine whether a larger number is warranted by the circumstances of the case. (AAA 5; ICC 8; JCAA 24; LCIA 5.4; WIPO 14; JAMS 7.1.) The UNCITRAL, CIETAC, and SCC rules generally call for a three-arbitrator tribunal unless the parties agree otherwise, or a single arbitrator may be appointed in less complex cases. (SCC 16; CIETAC 20; UNCITRAL 5.) The SIAC rules provide for a single arbitrator unless the parties agree otherwise. (SIAC 6.)

Selection. The UNCITRAL rules allow parties the greatest degree of participation in the selection process. (UNCITRAL 6, 7.) When parties are allowed to participate in the arbitrator selection process, the rules generally impose short time limitations. (ICC 8; UNCITRAL 6, 7.) UNCITRAL uses a list procedure that allows the parties to make their preferences known within very short periods of time. The administering authority provides to each party an identical list of potential arbitrators, with instructions to strike the names deemed unacceptable, number the remaining names in order of preference, and return the list. (UNCITRAL 6.) The UNCITRAL rules allow the parties 15 days to return the list after the date of receipt. (*Id.* 6.) The appointing authority then invites arbitrators to serve from among those names remaining on the list in the designated order of mutual preference. JAMS uses essentially the same procedure, but allows the parties 20 days to return their preferences. (JAMS 7.5.) To give the parties even more control over this process, JAMS allows parties to stipulate regarding particular qualifications the proposed arbitrators must have. (JAMS 7.5(a).)

The JCAA does not use a list procedure but allows the parties "three (3) weeks" after the "Basic Date" to select an arbitrator, the number of arbitrators, or the method for appointment. (JCAA 23-26.) The JCAA defines the "Basic Date" as three weeks after the day the Association mails notification to parties that a request for arbitration has been accepted. (*Id.* 21.) If for any reason these procedures are not successful, the appointing authority will exercise its discretion and appoint an arbitrator. (UNCITRAL 6; JCAA 24-26.)

The SIAC grants parties more control over the appointment process. The parties are allowed 21 days to agree on the choice of a sole arbitrator, after which the arbitrator is appointed by the chosen appointing authority or the Chairman of the SIAC. (SIAC 7.) If there are to be three arbitrators, each party appoints one arbitrator, and the third arbitrator is chosen by the two party-appointed arbitrators within 21 days or, if they cannot reach agreement, by the appointing authority or chairman. (*Id.* 8.)

The ICSID allows the parties 90 days from the registration of the arbitration request to constitute the tribunal. Where the default three-arbitrator panel is to be used, each party may appoint one arbitrator. The third, who shall be the president of the tribunal, will be appointed by both parties through a proposal exchange framework. (ICSID 3.) If the parties cannot agree on the tribunal's composition within 90 days, the Chairman of the Administrative Counsel will, at a party's request, appoint the arbitrators. (ICSID 4.) In this case, the Chairman is asked to use "his best efforts" to appoint the arbitrators within 30 days of the request. (ICSID 4(4).)

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In an ICC-administered arbitration, the parties have far less influence in the selection process, and the provider alone is empowered to appoint the presiding arbitrator. (ICC 9.) The ICC rules allow the parties to nominate an arbitrator. The nominations, however, are subject to confirmation by the administering authority. (*Id.* 9(2).) If the parties fail to make a nomination within the specified time (the ICC allows a total of 30 days for nominations (*id.* 8(2)), the institute will appoint an arbitrator. Similarly, the SCC rules provide that the chairman of the tribunal shall be appointed by the SCC. (SCC 16(4).) The CIETAC rules provide that the arbitrator shall be appointed jointly by the parties or appointed by CIETAC with joint authorization. (CIETAC 22, 23.)

The AAA provides something of a middle ground. The parties are free to designate the arbitrator, with or without the assistance of the administrator. The parties may also mutually agree upon any procedure for selecting an arbitrator. In the absence of any agreement, however, within 45 days after the commencement of the arbitration, the AAA shall, at the written request of any party, appoint the arbitrator. (AAA 6.)

For large, complex cases involving claims of at least $1 million, the AAA will allow parties to choose, or arbitrators to recommend, optional procedures, one of which is an administrative conference held prior to the selection of arbitrators. (AAA Com'l L-2.) During these conferences, parties may determine arbitrator qualifications as well as consider whether mediation or other non-adjudicative methods might be appropriate.

The WIPO rules provide perhaps the most detailed set of procedures relating to the appointment of a sole arbitrator (WIPO 16), appointment of three arbitrators (*id.* 17), appointment of three arbitrators in case of multiple claimants or respondents (*id.* 18), as well as default procedures (*id.* 19). The most significant achievement in the WIPO rules is perhaps the procedure for appointing arbitrators in cases involving multiple claimants.

Failure to select arbitrators. If the agreed system of selection fails, the ICC rules mandate a time-consuming appointment process involving nomination by an ICC National Committee and approval by the ICC Court of Arbitration. This process can delay the arbitration proceedings by several months. The ICC, SCC, WIPO, JCAA, UNCITRAL, CIETAC, SIAC, ICSID, and JAMS rules explicitly guard against the possibility that a party may fail to appoint its arbitrator. If a party does not make an appointment within the specified time limit, the appointing authority will make the appointment. (ICC 8; SCC 16; WIPO 14-19; JCAA 25; UNCITRAL 7; CIETAC 22-23; SIAC 7.2, 8.2; ICSID 4; JAMS 7.4.) Under the UNCITRAL rules, the party-appointed arbitrators are allowed 30 days to make the appointment before the appointing authority selects the neutral arbitrator. (UNCITRAL 7.)

Challenges to and removal of arbitrators. All of the rules permit the parties to challenge arbitrators appointed by the administering agency for cause. (ICC 11; UNCITRAL 10-12; AAA 8; CIETAC 26; SCC 18; WIPO 24-29; SIAC 12.1; ICSID 9; JAMS 9.1.) Challenges initiated by one party are generally evaluated by the appointing authority. (ICC 11; UNCITRAL 12; CIETAC 26; AAA 9; SCC 18(4); WIPO 29; SIAC 14.1; JAMS 9.4.) ICSID Rules give that review power to the other members of the tribunal, unless the proposed disqualification relates to a sole arbitrator or a majority of the arbitrators — in which case, the Chairman of the Administrative Counsel will decide on the challenge. (ICSID 9(2)(a).)

Generally, arbitrators can be disqualified for lack of neutrality. For example, under the AAA and JAMS rules, a party may challenge an arbitrator whenever circumstances exist that give rise to "justifiable doubts as to the arbitrator's impartiality or independence." (AAA 8; JAMS 9.1.) The ICSID Rules allow parties to challenge arbitrators' competence as well as their neutrality. (ICSID Convention 14(1), 57.) Under many of the rules, the sole or presiding arbitrator must be independent of the parties, impartial, and from a different country than the parties. (ICC 9(5); UNCITRAL 6(4); AAA 7; SCC 16(8), 17; ICSID 1(3).) ICSID requires that a majority of the arbitrators be of a different nationality than that of either of the parties, regardless of the size of the tribunal. (ICSID 1(3).) More strikingly, when the parties have the chance to appoint arbitrators directly, the ICSID prohibits them from appointing arbitrators who are of the same national-

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ity as them. (ICSID 1(3), 3(1)(a)(i).) On the other end of the spectrum are the AAA, who does not require the presiding arbitrator to be from a different country than the parties, and JAMS, whose rules do not mention nationality.

The ICC, SIAC, AAA, CIETAC, and JAMS rules also require party-appointed arbitrators to be "independent" of the parties. (ICC 7(1); SIAC 11.2; AAA 7; CIETAC 19; JAMS 8.1.) Under the ICC rules, the court itself may on its own initiative replace arbitrators who fail to perform their functions according to the rules or within the prescribed time limits. (ICC 12(2).) The ICC, UNCITRAL, CIETAC, SIAC, SCC, and ICSID rules require a limited degree of disclosure. (ICC 7; UNCITRAL 9; CIETAC 25; SIAC 11.3; SCC 17; ICSID 6.) The JCAA rules require that, when an arbitrator is approached by a party, "he or she shall fully disclose to that person any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence." (JCAA 28.) The WIPO rules provide that an arbitrator "may be challenged by a party if circumstances exist that give rise to justifiable doubt as to the arbitrator's impartiality or independence." (WIPO 24(a).)

Finally, the UNCITRAL rules provide the most expedited and conclusive procedures for challenging an arbitrator after appointment. (UNCITRAL 9-12.) The challenge must be made within 15 days after the arbitrator's appointment or after the circumstances giving rise to the challenge become known. (*Id.* 11(1).) Similarly, under the SCC and JAMS rules, the challenge must be made within 15 days after the date on which the allegedly disqualifying circumstance becomes known. (SCC 18(2); JAMS 9.1.)

Pre-Hearing Procedures

Jurisdiction. Most of the rules allow the tribunal to rule on its own jurisdiction, including any objections as to the validity or existence of an arbitration agreement. (AAA Com'l 7; LCIA 23.1; AAA 15; UNCITRAL 21; CIETAC 6; WIPO 36; SIAC 26.1; ICSID Convention 32; ICSID 41; JAMS 17.1.) In general, parties must raise objections to the tribunal's jurisdiction no later than the statement of defense or answer. (AAA Com'l 7(c); LCIA 23.2; AAA 15(3); UNCITRAL 21(3); WIPO 36(c); SIAC 26.2; ICSID 1(1); JAMS 17.2.)

Discovery. The rules of discovery in international arbitration differ widely. The UNCITRAL, SIAC, and AAA rules provide the arbitrator with broad discovery powers. The tribunal can require parties to disclose summaries of documents and evidence, names of witnesses, and the subjects on which the witnesses will testify. (UNCITRAL 24, 25; SIAC 18.6, 23.1; AAA 19, 20.)

Under the LCIA rules, the tribunal may require a party to give "any relevant information or to provide access to any relevant documents, goods, samples, property or site for inspection by the expert." (LCIA 21.1(b).) The ICSID Rules require a party to provide "precise information" regarding the evidence it intends to produce or which it intends to request the tribunal to call for. (ICSID 33.) Under both ICSID and JAMS rules, the arbitrators have the discretion to call a pre-hearing conference for disclosure, discovery, and scheduling purposes. (ICSID 21; JAMS 22.)

Discovery in ICC arbitrations is generally left to the discretion of the parties and is set out in the Terms of Reference. The ICC rules further provide that the tribunal may summon any party to provide evidence. (ICC 20(5).) On the other hand, the WIPO and CIETAC rules provide pre-hearing discovery in the form of an exchange of "the relevant evidence supporting the facts on which the . . . claim is based." (CIETAC 10, 12, 13; WIPO 41, 42.) The JCAA and the SCC require the parties to summarize the bases for their positions but do not expressly provide for pre-hearing discovery.

As a general matter, however, discovery in international arbitrations can pose a problem, as arbitrators lack the power of a court to enforce compliance with discovery rulings. Arbitrators can and do inform the parties that the tribunal will draw whatever inferences are reasonable and appropriate from the failure to produce evidence. In selecting the proper forum, therefore, parties must consider the procedural law of the seat of the arbitration with respect to the gathering of evidence.

Availability of Provisional Relief. The AAA, SCC, WIPO, SIAC, JCAA, and UNCITRAL rules empower the arbitration tribunal to grant ancillary relief. (*See, e.g.*, AAA 21; SCC 31; JCAA 46; WIPO 46; SIAC 25(j).) CIETAC allows an interlocutory award,

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but a party's failure to perform it does not affect the ongoing proceedings. (CIETAC 44.) Under the AAA rules, arbitrators may issue interim awards to safeguard the subject matter of a dispute. (AAA 21; *see also* UNCITRAL 26.) Under the ICC rules, arbitrators may order any interim or conservatory measure they deem appropriate. Parties may also apply to any competent authority for interim relief before or, in some circumstances, after a file is transmitted to the arbitration tribunal. (ICC 23.) The ICSID may issue recommendations for provisional measures to protect a party's rights, either at that party's request or on its own initiative. (ICSID 39.) An ICSID tribunal is required to give the parties opportunities for hearing before issuing such a recommendation. (*Id.*)

The LCIA rules provide the tribunal with broad powers to order interim and conservatory measures, including to provide security for all or part of the amount in dispute by way of deposit or bank guarantee; to order the preservation, storage, sale, or other disposal of any property or thing; or to grant a provisional order for the payment of money or disposition of property as between any parties. (LCIA 25.)

Among the institutions, JAMS has the most detailed rules regarding remedies. Like LCIA arbitrators, JAMS arbitrators can issue interim awards to secure the payment of any award that might be rendered. (JAMS 26.1.) JAMS rules also allow specific performance as a remedy but explicitly rule out punitive or exemplary damages unless the parties agree otherwise. (JAMS 30.1, 31.2.)

Hearings

All of the rules allow the tribunal to conduct the hearing in a manner it considers appropriate. (AAA 20; JCAA 34; UNCITRAL 15; ICC 21; SCC 20; CIETAC 29; SIAC 22; WIPO 38(a); ICSID 19, 20; JAMS 23.) This is limited only by the AAA practices and procedures, which strongly encourage that hearings be scheduled on consecutive days in an attempt to minimize travel expenses.

Power to subpoena. Under the AAA, CIETAC, UNCITRAL, WIPO, JCAA, LCIA, SIAC, and JAMS rules, the tribunal is expressly authorized to inspect or investigate any goods, property, or documents (AAA 19; CIETAC 37; UNCITRAL 16(3); WIPO 48; JCAA 37; LCIA 22.1(d)-22.1(f); SIAC 25(f)-25(h); JAMS 25.2.) In UNCITRAL arbitrations, the arbitrator can order a party to produce documents or summon witnesses. (UNCITRAL 16, 24, 25.) The same is true for the AAA, WIPO, JCAA, and ICSID arbitrations. (AAA 19; WIPO 48; JCAA 37; ICSID 34(2).) Although the UNCITRAL rules have no express provision addressing subpoenas, the parties may apply to local courts for assistance. JAMS rules specifically provide that "[t]he tribunal has the power to summon witnesses and to compel the production of relevant documents by subpoena or other compulsory process where authorized to do so by . . . law." (JAMS 24.2.)

In UNCITRAL proceedings, the arbitrator is empowered to impose sanctions for failure to comply with orders. If a party fails to comply with an order to produce documents, the arbitrator has the power to make the award based solely on the evidence presented. (UNCITRAL 28(3).) The ICSID arbitrators are asked to take "formal note" of a party's failure to produce evidence ordered by the tribunal. (ICSID 34(3).) JAMS arbitrators have the authority to take into account a party's "dilatory or bad faith conduct" in the arbitration in apportioning arbitration costs between the parties. (JAMS 30.2.) The WIPO rules provide that at any time during the arbitration, the tribunal may order the production of documents or evidence it considers necessary or appropriate. (WIPO 48(b).) In addition, the tribunal may order the inspection of any site, property, machinery, product, or process as it deems appropriate. (WIPO 50.)

Evidence. Each party in an arbitration proceeding is allowed to present evidence to the arbitrator using direct examination, cross-examination and redirect examination with opening and closing statements. Most institutions allow arbitrators to deviate from these common law procedures.

The AAA rules limit the tribunal's discretion and do not allow adoption of an inquisitorial hearing. The parties must be given the right to be heard and to present their own case. (AAA 16(1).) The JCAA rules, on the other hand, grant the tribunal more discretion in limiting procedures and allow the tribunal to conduct inquiries considered necessary or expedient. (*See* JCAA 32-40.)

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The AAA, ICC, CIETAC, UNCITRAL, ICSID, and JAMS rules allow the parties to submit the testimony of witnesses in the form of affidavits and the tribunal to decide the case based on documents without an evidentiary hearing. (AAA 20(5); ICC 20(6); CIETAC 29(2); ICSID 36(a), 20(1)(e); JAMS 23.1, 24.4.) The JCAA rules allow the parties to agree to a "document-only" presentation unless the tribunal rules otherwise. (JCAA 52.) CIETAC and SIAC require the parties' consent for a decision without a hearing. (CIETAC 29(2); SIAC 22.1.) Finally, the SCC rules allow the arbitration tribunal to determine the form in which proof may be established. (SCC 26.)

Unique among the institutions, the ICSID allows a tribunal to accept non-party written submissions regarding the matter in dispute. (ICSID 37(2).) The disputing parties can comment on the third-party submission but do not have the right to cross-examine that third party. (*Id.*)

Experts

Arbitrator-appointed. All the rules permit the arbitration tribunal to appoint its own experts. (ICC 20(4); UNCITRAL 27(1); AAA 22(1); SCC 27; JCAA 38; CIETAC 38; WIPO 55; SIAC 24.1; LCIA 21; ICSID 36(b); JAMS 24.7.) The AAA, WIPO, and UNCITRAL rules are the most detailed and provide that the arbitrator may require the expert to report in writing. (UNCITRAL 27; AAA 22; WIPO 55.) The parties then have the right to examine any document on which the tribunal's expert has relied, cross-examine the expert at the hearing, and present their own expert witnesses to testify on the points at issue. (UNITRAL 27; AAA 22; WIPO 55.) Similarly, the LCIA rules provide that the expert shall participate in one or more hearings to be questioned by the parties, who may present expert rebuttal testimony. (LCIA 21.) ICSID tribunals may examine experts not otherwise before the tribunal, but only with the consent of both parties. (ICSID 36(b).) The parties may participate in examining such experts. (*Id.*)

Party-appointed. Parties have the right to present expert testimony in the AAA, WIPO, UNCITRAL, ICSID, and JAMS arbitration hearings. The ICC, SCC, SIAC, and JCAA rules, on the other hand, grant the tribunal discretion in deciding whether to hear an expert. The CIETAC rules are silent on the issue of party-appointed experts, but as a practical matter, expert testimony is generally welcomed by CIETAC.

Awards

Amiable compositeur. The power of an arbitration tribunal to resolve disputes according to customary rules of equity and international commerce depends on the law applicable to the arbitration proceeding. The ICC, WIPO, UNCITRAL, SCC, AAA, ICSID, and JAMS allow the arbitrator to act as *amiable compositeur* or exercise *ex aequo et bono* powers and base the award on equity rather than law if the parties agree. (ICC 17(3); WIPO 59(a); UNCITRAL 33(2); SCC 24(3); AAA 28(3); ICSID Convention 42(3); JAMS 30.1.)

The AAA International Rules state that the tribunal shall not act as *amiable compositeur* or *ex aequo et bono* unless the parties have authorized it to do so. (AAA 28(3).) While the power to act as *amiable compositeur* is not explicitly granted by the rules, it is still common for the AAA arbitrators to base awards on equitable principles. The AAA Commercial Rules allow the arbitrator to grant relief deemed "just and equitable and within the scope of the agreement of the parties." (AAA Com'l 43(a).) CIETAC directs the arbitrators to make their award in accordance with the facts, law, contract terms, international practices, and "the principle of fairness and reasonableness." (CIETAC 43(1).) The JCAA and SIAC rules are silent on this point.

Timing. The AAA Commercial Rules specify the time period in which the tribunal must present its award. The tribunal is allowed 30 days after the close of hearings unless otherwise agreed or required by law. (AAA Com'l 41.) No extensions of this time limit are permitted except by stipulation of the parties. (*Id.*) The SIAC rules require that awards be made within 45 days after the close of hearings, and no extensions are permitted without the permission of all parties. (SIAC 28.1.)

The JCAA requires awards to be made within five to eight weeks after the conclusion of proceedings. (JCAA 53(1).) Both the WIPO and JAMS rules provide that the award shall be made within three months after the closing of the proceedings. (*See* WIPO 63(c); JAMS 31.1.) JAMS also asks the parties to conclude their proceedings and submit the dis-

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pute to the tribunal for decision within nine months of the pre-hearing conference. (JAMS 31.1.) The SCC requires that the award be made no later than six months after the case has been referred to the arbitration tribunal. (SCC 33.) The ICC rules require that awards be made within six months after the date the parties sign the Terms of Reference. (ICC 24.1.) This time limit is seldom met; consequently, the ICC Court of Arbitration may grant an extension in response to a request from the tribunal or on its own initiative. The CIETAC rules provide for a three-month deadline after the formation of the tribunal. (CIETAC 52.) The ICSID Rules require an award be rendered within 120 days after closure of the proceeding; however, the tribunal can extend this period by 60 days. (ICSID 46.) The UNCITRAL rules do not specify a time limit for the award.

Administrative authority/scrutiny. The ICC requires draft awards to be submitted to the ICC Court, which may mandate changes in the form of the award and suggest changes of substance "without affecting the Arbitral Tribunal's liberty of decision." (ICC 27.) No ICC award may be rendered until it has been approved by the court as to its form. Other than ICC, CIETAC, and JAMS, no other forum has this requirement. (*See* CIETAC 45; JAMS 32.3.)

"Reasoned" awards. The ICC, UNCITRAL, WIPO, CIETAC, JCAA, SIAC, LCIA, AAA, and JAMS rules require that the tribunal state the reasons upon which the award is based, unless the parties have agreed otherwise. (ICC 25(2); UNCITRAL 32(3); WIPO 62(c); CIETAC 43(2); AAA 27(2); JCAA 54; LCIA 26.1; SIAC 28.1; JAMS 32.2.) The SCC and ICSID rules require reasoned awards but are silent with respect to the parties' ability to opt out of such. (SCC 32(1); ICSID 47(1)(i).) The AAA Commercial Arbitration Rules do not require reasoned awards, unless the parties indicate otherwise "in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate." (AAA Com'l R-42(b).) In practice, tribunals operating under the AAA Commercial Arbitration rules rarely provide reasoned awards.

Enforcement. The UNCITRAL rules allow an arbitration award to be set aside only if a party can prove (1) incapacity; (2) lack of due process; (3) departure from the scope of the arbitration agreement; (4) improper procedure; (5) inappropriate subject matter; or (6) conflict with stated public policy. (UNCITRAL Model Law on International Commercial Arbitration, 40 U.N. GAOR SUPP. 81 NO. 17, U.N. DOC. A 40(17).)

The ICSID Rules prevent the parties from seeking remedies against an award except through the Centre. (ICSID Convention 53.) The Centre Rules allow parties to apply for interpretation, rectification, revision, or annulment of an award. A party can apply for rectification to correct an error in the award; it can apply for revision if it discovers a fact that would decisively affect the award; and it can apply for annulment if it can demonstrate jurisdictional or procedural defects in the tribunal, or if the tribunal failed to state the reasons behind its award. (ICSID 49(1), 50(1).) Simultaneous with an application for interpretation, revision, or annulment, the challenger can request a stay in the enforcement of the award. (ICSID 54.)

The ICC forces parties to agree to waive any right of recourse to the courts against the award, in order to ensure finality of the decision. (ICC 28(6).) The WIPO rules provide that "[b]y agreeing to arbitration under these Rules, the parties undertake to carry out the award without delay, and waive their right to any form of appeal or recourse to a court of law or other judicial authority, insofar as such waiver may validly be made under applicable law." (WIPO 64(a).) CIETAC provides that neither party may seek judicial review of an award, which may be enforced by a Chinese or foreign court. (CIETAC 43(a).)

Fees And Expenses

The ICC provides for a minimum for arbitrator fees with a decreasing percentage of the amount at issue. (ICC App. III, 4(2)(B).) When determining the fees, ICC may consider the complexity of the case, the duration of the proceedings, and the time spent by the arbitrators. In exceptional cases, the tribunal, applying the above factors, may reach a figure higher or lower than the scaled amount. (ICC 31(2).) A minimum of $2,500 is paid to an arbitrator for matters involving $50,000 or less. Above this amount, the ICC will set the appropriate fee.

In more complicated matters, the AAA will consult with the arbitrators and the parties to determine appropriate compensation. No AAA fee schedules are

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established for neutrals. However, the fees must be reasonable. (AAA 32.)

Similarly, UNCITRAL and SIAC Rules provide that the arbitrator's fees should be reasonable. (UNCITRAL 39(1); SIAC 31.1.) If the appointing authority has issued a schedule of fees, the tribunal will take the schedule into account. (UNCITRAL 39(2); SIAC 31.2.) If the authority has not issued a schedule, the parties may request that the appointing authority provide a statement of fees customarily paid in cases administered by the authority. In contrast, JAMS allows each individual arbitrator to set his or her own fees and does not require the fees to be reasonable. (JAMS Schedule of Fees and Costs.)

The SCC arbitrators' fees and costs are set by the SCC regulations at the commencement of the arbitration. (SCC 39.) The arbitrator's fees in JCAA-administered arbitrations are fixed by the Association. (JCAA 68-72.) The ICSID likewise fixes arbitrator fees in its regulations. (ICSID Administrative and Financial Regulations 14.) Currently, ICSID arbitrators are entitled to $3,000 per day of work, in addition to any direct expenses reasonably incurred. (ICSID Schedule of Fees ¶ 3.)

The WIPO rules provide that, if parties and arbitrators have not agreed otherwise, the current Schedule of Fees determines the range of arbitrator compensation. (WIPO Article 69.) The Schedule of Fees takes into account the time needed to conduct the arbitration, the amount in dispute, the complexity of the subject matter of the suit, and the urgency of the case.

Finally, the LCIA provides a schedule based on an hourly rate of £150 to £350.

Administrative costs. The ICC, JCAA, CIETAC, SCC, WIPO, SIAC, and AAA charge administrative fees based on a decreasing percentage of the amount in issue. The AAA and the SCC fees, however, are generally lower than those of the ICC or the JCAA. ICC has a minimum administrative fee of $2,500 assessed for the first $50,000. A 3.5% fee is assessed for the next $50,000, and a 1.7% fee is assessed for the next $400,000 up to a maximum of $88,800, the fee for claims over $80 million. A single registration fee of $2,500 per request is charged if the arbitration is conducted under rules other than those of the ICC. (ICC App. III, 3.)

The AAA charges an initial filing fee of $750 and a $200 minimum case service fee. For claims from $10,000 to $10,000,000, the initial filing fee and the case service fee increase gradually. For disputes involving in excess of $10 million, the filing fee is $12,500 plus 0.01% of any amount above $10 million plus a case service fee of $6,000. The AAA charges a flat rate of $3,250 for the initial filing fee and $1,250 case service fee when no stated amount is claimed. For any case having three or more arbitrators, the minimum fee is a $2,750 filing fee plus a $1,250 service fee. The combined AAA fees are still significantly less than ICC administrative costs.

JAMS charges an initial filing fee of $1,000 and an administrative fee equivalent to 20% of the arbitrators' fees. (JAMS Schedule of Fees and Costs.) All fees are paid through the JAMS administrator, who may require advance payments from the parties. (JAMS 33.2.)

The ICSID charges $25,000 for lodging an arbitration request initially and an annual administrative fee of $10,000 for each case. (ICSID Schedule of Fees ¶¶ 1, 2.) In addition, the Centre requires the parties to pay in advance for all direct administrative expenses of the Centre related to their proceeding. (ICSID Administrative and Financial Regulations 14(3).) The Secretary General of the Centre estimates the amount of advance payment required. (*Id.*)

The LCIA fees are computed on an hourly basis: the Registrar and his/her deputy at £200 per hour and the secretariat at £100 per hour.

Allocation of costs. The UNCITRAL rules state that generally all costs should be borne by the unsuccessful party. (UNCITRAL 40(1).) The tribunal, however, can apportion the costs between the parties if it determines apportionment is reasonable based on the circumstances of the case. (*Id.*) By contrast, the SCC, AAA, ICC, JCAA, WIPO, SIAC, CIETAC, and ICSID grant the arbitrators discretion to determine which party should bear the costs. (SCC 40; AAA 31; ICC 31(3); JCAA 68-69; WIPO 71(c); SIAC 30.2; CIETAC 46; ICSID Convention 61(2).)

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JAMS allows the arbitrators to apportion "arbitration costs" among the parties, taking into account the parties' conduct during the arbitration and the circumstances of the case. (JAMS 30.2, 34.4.) The "arbitration costs" subject to apportionment include all fees plus the reasonable cost for legal representation of a successful party. (JAMS 34.1.)

Legal fees. The AAA, ICC, SCC, WIPO, SIAC, UNCITRAL, and JAMS rules grant the arbitrator discretion to determine the amount and allocation of legal fees. (AAA 31; ICC 31; SCC 41; WIPO 72; SIAC 30.3; UNCITRAL 40(2); JAMS 34.1(d), 34.4.)

Location

Location is as important to arbitration as it is to real estate. While a discussion of the advantages of a particular location is outside the scope of this article, parties must consider practicality and convenience factors (travel time, expense, security, communication facilities, availability of competent lawyers and an arbitration institution's administrative facilities, etc.), home versus neutral sites, as well as legal issues in selecting a location or locations. Further, even though parties choose a governing law in their agreement, the law of the arbitration location generally fills in the gaps and may override the parties' agreement in whole or in part. Local law and custom influences what can be arbitrated, who may conduct the arbitration, how the arbitration is conducted, and the law that may be applied to the contract. Perhaps most importantly, local law significantly affects whether the arbitration award will be enforceable. The New York Convention of 1958 (the "New York Convention") is the strongest enforcement mechanism; the contracting states provide for recognition and enforcement of commercial arbitration agreements and foreign arbitration awards rendered in other contracting states. However, there are several important exceptions in the New York Convention related to the law of the arbitration location, including whether or not that law recognizes the award.

Arbitration And Conciliation

Parties pursuing dispute resolution may have a variety of procedural opportunities not only among institutions but within each forum. Several organizations have implemented alternative dispute resolution rules either as an alternative or as a preliminary step to arbitration. On July 1, 2001, the ICC implemented the Alternative Dispute Resolution Rules, replacing its Rules of Optional Conciliation. The AAA's Commercial Arbitration Rules have historically addressed the availability of mediation as part of the administrative conference. (AAA Com'l R-9.) Such developments reflect institutional efforts to provide parties with alternative means to settle disputes, greater procedural control, and resolution efficiency.

Arbitration-mediation procedural distinctions. International institutions administer mediation and arbitration services in different ways. For institutions like the AAA, UNCITRAL, ICC, ICSID, and JAMS, arbitration and mediation or conciliation remain separate and distinct means for resolving disputes. For example, under both UNCITRAL and JAMS conciliation rules, parties who agree to proceed under conciliation will not go forward with any arbitral or judicial proceedings except when such proceedings are necessary for preserving rights. (UNCITRAL Conciliation 16; JAMS Mediation 16.) For others like CIETAC, mediation may serve as a procedural subset to arbitration.

Procedural timing. Parties may pursue a variety of dispute resolution strategies depending on which institution they use. The AAA allows parties to initiate mediation at any stage of the arbitration proceedings under its Commercial Mediation Procedures. (AAA Com'l R-8.) If parties to a pending arbitration pursue mediation, the AAA does not charge an additional administrative fee. (*Id.*) Under the ICC ADR rules, parties may pursue mediation prior to or during arbitration. These services, however, are administered separately by distinct ICC bodies. Similarly, the ICSID Rules treat conciliation and arbitration entirely separately and do not restrict when a party may request conciliation.

For CIETAC, the arbitration-mediation distinction is more fluid. Parties seeking resolution through CIETAC may request that the tribunal mediate the case instead. (CIETAC 40(2).) The arbitration tribunal does not apply a separate set of mediation rules but "may conciliate the case in the manner it considers appropriate." (CIETAC 40(3).)

Individuals serving as mediators and arbitrators. Institutions take different approaches in regards to

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a mediator's ability to preside over arbitration proceedings as well as an arbitrator's ability to serve as a mediator. The ICC ADR rules, unless the parties otherwise agree, prohibit parties from appointing individuals engaged in related arbitration proceedings as mediators and prevent chosen mediators from serving in later arbitration proceedings. (ICC ADR 7.) The ICSID prohibits persons who had previously served as conciliators or arbitrators in a related proceeding from serving as arbitrators in the current proceeding. (ICSID 1(4).) While the AAA is silent on whether a chosen mediator can later serve as an arbitrator, if a party pursues mediation, the mediator cannot be the appointed arbitrator. (AAA Com'l R-8.) Similarly, UNCITRAL and JAMS prohibit a conciliator from acting as an arbitrator, representative, or counsel of a party in a later proceeding but allow an arbitrator to propose conciliation and to preside over the settlement process. (UNCITRAL Conciliation 13, 19; JAMS Mediation 9, 15.) By contrast, CIETAC allows the chosen arbitration tribunal to conciliate a case in the process of arbitration in the manner it considers appropriate; if conciliation fails, the same tribunal may resume arbitration proceedings. (CIETAC 45, 47.)

Prior evidence. For the AAA, ICC, CIETAC, UNCITRAL, ICSID, and JAMS, parties may not introduce any evidence from conciliation proceedings into later arbitration or judicial proceedings. (AAA Com'l M-12; ICC ADR 7(2); CIETAC 50; UNCITRAL Conciliation 14; ICSID Convention 35; JAMS Mediation 11.) These institutions prohibit party suggestions or views of settlement, party admissions made during the course of mediation proceedings, proposals made by the conciliator, or evidence of party willingness to accept a conciliator's proposal. (ICC ADR 7; AAA Com'l M-12; UNCITRAL Conciliation 20; ICSID Convention 35; JAMS Mediation 11.) All records, reports, and other documents received by a mediator in his or her capacity remain confidential.

Enforceability. CIETAC strictly enforces conciliation decisions. Generally, parties may have more difficulty enforcing mediation settlements, which do not receive the same protection as arbitration awards under the New York Convention. Under CIETAC, however, if parties during the course of arbitration reach a settlement through conciliation, the arbitration tribunal renders an arbitration award in accordance with the parties' terms, thus giving the settlement the same effect as an arbitration award. (CIETAC 49.)

Expedited Procedure

When expedited arbitration applies. Several institutions provide expedited arbitration procedures for parties with smaller claims or a desire to resolve their disputes quickly. Some institutions apply expedited procedural rules when disclosed claims and counterclaims do not exceed a specific amount. (AAA Com'l R-1(b) ($75,000); JCAA 59 (20,000,000 Yen).) Others allow parties to pursue an expedited process regardless of the amount in dispute. (AAA Com'l R-1(b); SCC Expedited Arbitration 1; WIPO Expedited Arbitration 2.) For the AAA and JCAA, proceedings will be conducted under the regular arbitration rules if an increased claim or counterclaim exceeds the designated amount. (AAA Com'l E-2; JCAA 59.) JCAA will not allow a proceeding to continue under the expedited rules if within two weeks of the filing the parties cannot determine the exact amount disputed, if parties prefer more than one arbitrator, or if a party notifies the tribunal that it will not submit to the expedited procedure. (JCAA 59.) JAMS does not have separate expedited procedures, but it allows a party to apply for expedited formation of the tribunal where there are "exceptionally urgent circumstances." (JAMS 21.2.)

Number of arbitrators. Expedited arbitration procedures usually provide for a single arbitrator. WIPO requires that parties choose an arbitrator within 15 days after being provided a list; JCAA grants parties a four-week time frame. (WIPO Expedited Arbitration 14(b); JCAA 63.) Institutional administrations appoint arbitrators when parties fail to do so.

Shorter pleadings and response time. Under expedited arbitration, the pleadings and responses generally must be filed within a shorter time frame and appear in a more condensed form. The SCC insists that in addition to the Statements of Claim and Defense, parties may only submit one written statement within a period of 10 days after receipt of a claim. (SCC Expedited Arbitration 16.)

Under WIPO, the Statement of Claim must accompany the Request for Arbitration, and the Statement of Defense must be submitted with the Answer to the

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Request. (WIPO Expedited Arbitration 11, 12.) The tribunal typically closes all proceedings within three months. (*Id.* 56.) JCAA requires that respondents submit any counterclaim within two weeks from the "Basic Date"; neither the claimant nor the counterclaimant may amend or supplement a claim or a counterclaim. (JCAA 61.)

Shortened hearings. Under expedited arbitration procedures, organizations either shorten hearings or do not conduct them at all. For the AAA, hearings must be scheduled to take place within 30 days after the arbitrator's appointment; parties exchange copies of all exhibits they intend to submit at least two business days prior to the hearing. (AAA Com'l E-7, E-5.) For the AAA and JCAA, hearings should not exceed one day; under the WIPO rules, hearings should not exceed three days. (AAA Com'l E-8; JCAA 64; WIPO Expedited Arbitration 47(b).) Unless a party so requests or an arbitrator finds one necessary, the SCC will not conduct an oral hearing. (SCC Expedited Arbitration 21.) Similarly, the AAA will resolve disputes based solely on submitted documents when no claim exceeds $10,000. (AAA Com'l E-6.) The SCC notes that most case proceedings under its Expedited Rules take approximately six months from the time of the arbitration request until the award is rendered.

Time frame for awards. Tribunals render awards in shorter periods of time under expedited procedures. For the SCC and the JCAA, an award must be rendered within three months after the close of hearings. (SCC Expedited Arbitration 28; JCAA 65.) WIPO requires arbitrators to give an award within 30 days after the end of the oral hearing. (WIPO Expedited Arbitration 56.) The AAA has the shortest turn-around period; tribunals must render an award within 14 days after the end of the hearing. (AAA Com'l E-9.)

Conclusion

Selection of the proper forum and procedural rules will turn upon a series of case-specific facts. The above comparison, while not exhaustive, highlights many of the principal differences between leading arbitration forums, the application of their respective rules, as well as a variety of procedural options available within each forum. As a result of these differences, some institutions are more likely to specialize in subject matter or appeal to certain parties.

Seen in the light of the practices described above, general trends among institutions reflect a desire to provide alternative procedures, greater party control, resolution efficiency, and a variety of services to suit specific needs. What emerges from this comparison is that, while a large variety of services and procedures are available to parties, arbitration under one set of procedural rules may be very different from arbitration under another. Selection of the proper forum, therefore, must be evaluated with care. ■

ACC Corporate Counsel University: "What You Should Know About Litigation"

San Francisco May 23, 2008

Depositions: A Guide for the Witness

Joseph J. Catalano: Chair of San Francisco Bay Area Litigation Committee of ACC Corporate Counsel University

DEPOSITIONS: A GUIDE FOR THE WITNESS
-or-
EVERYTHING YOU EVER WANTED TO KNOW ABOUT A DEPOSITION, BUT THOUGHT YOU COULDN'T AFFORD TO ASK YOUR LAWYER

INTRODUCTION

Hollywood has created a fearsome image of trial lawyers. Whether at trial or at a deposition, the heroic, relentless lawyer deftly forces the cowering witness to confess to all manner of horrible misdeeds. The lawyer uses words like swords in a duel the lawyer is destined to win. The wretched witness would get our sympathy if only he or she wasn't such a pathetic example of human depravity. In Hollywood, attorneys are awesome.

If the real life witness feels apprehensive about being deposed, Hollywood has made this feeling understandable.

Fortunately, there are ways to prepare yourself for your deposition or trial testimony. The experience need not be approached in terror. This guide is designed to help you, a first-time witness, prepare for your deposition. In this guide it is assumed that: (1) you are represented by an attorney; (2) your attorney has asked you to read this manual; (3) you have no experience in being deposed; and (4) your only knowledge of legal procedures comes from tv, movies, or novels. Even if none of these assumptions apply to you, the information provided here should still be helpful to you.

A premise of this guide is that court or deposition testimony is a kind of drama or theatre. A good performance requires certain basic skills which anybody can learn. The truly great players have special talents, of course, but all of us can be reasonably effective if we have a knowledge of the basic rules and techniques. A deposition is like a conversation, or the telling of a story. Everyone can do it!

This manual will not encourage you to give smart, snappy responses to bullying attorneys. A premise of this manual is that a first-time witness should avoid repartee with the opposing attorney. Instead, this manual will encourage you to give short, simple, accurate answers which minimize the chance that you will say something which you later regret.

.As you read this manual, you should mark any part which you have a question about. Discuss your questions with your attorney. You will better prepare yourself for your deposition if you take an active role in the process.

I. PRELIMINARY CONSIDERATIONS

THE ROLE OF THE PLAYERS

In order to begin your preparation, you must first understand the role of the people attending the deposition.

THE OPPOSING ATTORNEY: The examining attorney wants to know the facts; but, even more importantly, the attorney wants to shape the facts so that they seem to favor the attorney's client. Even if you testify truthfully, the jury may disregard your testimony if it is suspicious of what you say. The examining attorney wants to create that suspicion. The deposing attorney has a long list of ways to try to discredit your testimony. These include trying to show that:

(1) you could not accurately see or hear what you testify to;
(2) you do not remember accurately what you saw or heard;
(3) you are prejudiced against the opposing party and so won't be truthful;
(4) your testimony contradicts other statements you have made or documents you have prepared; and
(5) your testimony is contradicted by the testimony of other witnesses or by documents prepared by other persons. This list does not exhaust the ways that your truthful testimony can be totally or partially discredited! Remember, the opposing attorney is NOT your friend, no matter how nice the attorney appears to be. The opposing attorney wants your testimony to seem unbelievable.

YOUR ATTORNEY: Your attorney protects you from unfair or improper tactics the deposing attorney may try to use against you. Your attorney cannot give answers for you, but you may consult privately with your attorney during the deposition if you desire to do so. Don't hesitate to ask for this if you think you need to do so! That is why your attorney is there.

YOU:* Your role as a witness is simple: you must answer questions truthfully and you must follow any instructions your attorney may give you. Your goal at your deposition is also simple: you want to answer the questions as briefly and truthfully as possible and finish your deposition as soon as possible. Brevity is important because every extra word or sentence you speak may provide an opportunity to find an inconsistency in your testimony. Truthfulness is important because it is the foundation of our judicial system.

Your goal is NOT to overwhelm the other side with facts in order to convince them to abandon the case. If no settlement occurs and the case goes to trial, then your chance to tell your whole story will be at the trial, not at your deposition. The message you must accept is simple: DON'T TALK TOO MUCH AT YOUR DEPOSITION.

Some people like to deal with stressful situations by visualizing themselves successfully coping with the situation. if you use this technique, the image you should create is that of you, an adult, trying to explain proper behavior to a stubborn, uncooperative child (the opposing attorney), who is trying to control you and provoke you. As an adult you know that the child can control or anger you only if you allow the child to do so. You also know that that is what the child wants to happen. As an adult you know that you will control the

situation if you remain firm and calm.

Some people mistakenly imagine the opposing attorney as a large angry gorilla from whom they must escape. Don't use this image. The end of the story will be very sad if the gorilla catches you. Do not create an image of a situation where you might be in fear for yourself. A deposition is not an attack on you; it is a conversation. You will be in control of the conversation if you are truthful and brief, calm and firm. Imagine that.

PREPARING ORNOT PREPARING FOR YOUR DEPOSITION

Preparing for your deposition usually means reviewing any documents about the case, and then meeting with your attorney. Consult your attorney before you review any documents. Your attorney may want to limit what you review. In some cases, your attorney may prefer that you review nothing at all and that you rely only upon your memory. Discuss with your attorney the strategy you should follow. Your attorney will advise you.

REHEARSALS - PRACTICING YOUR TESTIMONY

Depending on many factors, you and your attorney may spend time practicing your testimony. It is entirely proper for you to do this. Your oath at your deposition obligates you to tell the truth. Your attorney is entitled to assist you so that your truthful testimony will appear as favorable as possible to you. This may include lengthy practice answering questions expected to be asked.

You must spend enough time with your attorney so that you and your attorney believe that you are prepared to testify. The amount of time needed varies with each witness and each case. Discuss with your attorney any fears or concerns you have about your deposition beforehand. It may not be possible to calm all your fears, but you should be able to minimize unexpected questions.

HOW TO DRESS FOR YOUR DEPOSITION

What you wear says something about you. The opposing attorney evaluates everything about you to try to predict how effective you will be before a judge or jury. The way you dress is sometimes a factor. Your attorney may or may not want you to convey a message about you by what you wear. Discuss this with your attorney if there is anything unusual about your appearance or how you dress. If you intend to give no special message about yourself, wear plain business clothes. If there are no special considerations about how you should dress, follow this rule: dress comfortably but neatly.

WHO WILL ATTEND YOUR DEPOSITION

Each attorney involved in the case may attend the deposition. Every party to the lawsuit may also attend. Usually only the attorneys appear. A court reporter will also attend. The court reporter is not an employee of the court. The reporter's duty is simply to record everything said during the deposition. Very recently many courts have allowed depositions to be video taped. Few cases justify the expense of video taping. This guide does not discuss issues created by video taping of depositions.

TRANSLATORS TO AND FROM ENGLISH

If English is not your native language, then you may request a translator to assist you.

You may request a translator even if you have some ability to speak English. If you believe that you will understand the questions better in your own language, then request a translator. The translator will translate all questions into your native language; you then answer in your native language. The translator will translate your answers to English; the reporter will record only the English questions and English translated answers. If you desire a translator, advise your attorney so that arrangements can be made.

GETTING TO THE DEPOSITION/TALKING TO OTHERS ABOUT YOUR CASE

Your deposition will usually be held at the office of an opposing attorney. If possible, arrange to meet your attorney and then go to the deposition together. This avoids the possibility that you might arrive before your attorney and inadvertently engage in conversation with someone about the case. The attorney-client privilege permits you to refuse to answer questions about conversations or written communications with your attorney. However, at the deposition you can be asked about any conversation you have had with anyone else about the case. Depending upon the magnitude of the case, everyone to whom you have spoken may be forced to appear for a deposition to answer questions about what you told them. To minimize the chance of this, you should talk about your case only to those who need to know. The old wartime admonition applies here: loose lips sink ships.

WHAT SHOULD YOU BRING TO YOUR DEPOSITION?

Answer: nothing, unless your attorney tells you to bring something. The party who asks for your deposition can require you to bring documents or things related to the case. Bring only what your attorney tells you to bring. Generally you should let your attorney carry in whatever you bring. Let your attorney control the handling and review of your documents during the deposition.

STARTING THE DEPOSITION: THE OATH

Your deposition begins with your oath to tell the truth.
The reporter will ask you to raise your right hand and ask you essentially the following question: Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth? You must answer affirmatively before the deposition can begin. Let your attorney know if there is any religious or other reason why you object to taking an oath. The oath can be modified to fit your requirements; but some form of affirmation that you will tell the truth is required. From that time until-the conclusion of the deposition, you must speak truthfully.

STARTING THE DEPOSITION: THE ADMONITIONS

A common ritual at depositions is for the deposing attorney to start by asking questions to see if the witness understands what a deposition is all about. The questions often seem designed to put you to sleep, humiliate you, or to get you into the habit of answering "yes" to whatever the deposing attorney asks you. This process usually lasts from 2 to 15 minutes. The time varies because attorneys don't agree on what questions need to be

asked. Most attorneys can recite catechism-like reasons for asking these questions, but few attorneys can give you an example of how these questions ever affected a case. Experience tells us that the admonition questions are rarely needed. Expect them anyway.

One improper use of "admonitions" is to induce you to agree to something which you need not agree to. A common and seemingly innocuous example is:

QUESTIONER: "If you answer a question I ask, then I will assume that you understand the question, okay?"

You do not need to agree to this. You may misunderstand a question for many reasons. Even if you answer, that does not always mean that you understood the question. You are sworn to tell the truth and that is your obligation to the questioner. Any agreements or deals about the deposition process should be made only through your attorney. You may simply answer "no" to any question which sounds like an agreement about the deposition process.

STARTING THE DEPOSITION: BACKGROUND QUESTIONS ABOUT YOU

After the admonition questions are finished, the questioner usually begins a series of background questions about you. The length of this inquiry will vary depending upon the importance of your testimony in the case. The questions may be wide ranging and include any of the following about you:

name and any previous names you have used
address and previous addresses
marital and family status
educational history
employment history/military service history
medical history
income history
arrest, criminal conviction and imprisonment history
previous lawsuits as a party sued or suing
previous testimony in trials or depositions .
previous jury duty
licenses and professional memberships
honors or awards received
social club memberships
hobbies
materials published
your relationship to any other party or witness in the case
any materials you reviewed to prepare for the deposition
names of any person you have spoken to about the case
just about anything else about you which may be relevant

Not all of these categories may be asked about in every case. You must discuss with your attorney in advance anything about you that you do not want discussed at your deposition. You must advise your attorney of anything important about you or the case which your attorney may not be aware of. The questioner cannot ask you to disclose what you talked about with your attorney.

GENERAL DEMEANOR: GETTING "ON THE RECORD"

Do not nod your head for "yes" or "no" or "I don't know" answers. The court reporter types only the words spoken. Gestures, movements or conduct do not appear in the official transcript. Speak up to get "on the record."

GENERAL DEMEANOR: KEEP THE RECORD CLEAN

Your testimony may someday be read to a judge or jury. You want the judge or jury to think well of you. Be polite, in spite of what anyone is doing to provoke you. Avoid levity, sarcasm, anger, profanity, or any strong language or emotion. Play it straight. Keep it clean. Be serious. A bit of nervousness is natural and okay. It won't show on the transcript.

READING BACK THE RECORD

In order to remind everyone of what has been said or asked, the attorneys may occasionally ask the reporter to "read back" a short portion of the transcript. The reporter will comply with the request.

SHOULD YOU LOOK AT THE EXAMINER DURING THE QUESTIONING?

This is partly a matter of your personal conversational style. The printed transcript of your testimony is much more important than anyone's memory of what happened or was said. You want the transcript to be accurate. Misquotes by the reporter tend to be embarrassing, and fast paced depositions are more likely to have misquotes. You can help insure accuracy by watching the court reporter and waiting until the reporter finishes typing a question before you answer it. You are less likely to be distracted if you watch the reporter. It is not considered rude if you decide not to look at the examiner during the deposition. Do whatever helps you to focus on the question and to answer it truthfully.

COPING WITH ANNOYING, RUDE, OR ABUSIVE CONDUCT

In order for you to concentrate and think, you are entitled to an atmosphere without distractions, harassment or intimidation. Offensive conduct sometimes occurs at depositions. Ask to consult with your attorney in private if anything is happening which you think is inappropriate or affects your ability' to concentrate. Depending upon the circumstances, you and/or your attorney may both need to become active in combating offensive conduct. Follow your attorney's advice. Your attorney should usually take the active role in combating the offensive conduct.

In combating offensive conduct you must first remember that the court reporter types only what is said at the deposition. You or your attorney must therefore describe whatever the offending person is doing. The reporter will type the verbal picture into the record. This will effectively deter the conduct in almost all cases. If the conduct persists, you or your attorney should continue to state that fact. You may also need to state your opinion as to whether the conduct affects your ability to pay attention to the questions and to give proper responses. In extreme cases, you may need to preface every response you give with your complaint and a threat to leave. In very rare cases, you

may need to leave the deposition.

The courts can impose sanctions for misconduct occurring at a deposition. Your attorney should clearly establish the misconduct "on the record" before doing anything drastic, like leaving or threatening to leave. You or your attorney can be sanctioned if you disrupt the deposition by making frivolous complaints on the record.

II. ANSWERING THE QUESTIONS: THE RULES

All of history's accumulated wisdom on answering questions at depositions boils down to two rules: (1) Tell the truth; (2) but be brief. These two maxims are sometimes helpfully reformulated as follows: (1) say only what you know, (2) but volunteer nothing. Either formulation gives you the two fundamental principles for answering questions at a deposition. In the excitement and tension of a deposition, you may forget everything else in this manual, but if you follow these two rules you will still do well. A discussion of each of these rules follows.

TELL THE TRUTH

We all know people who, have no qualms about misstating or "shading" the truth Don't do this at your deposition. The reasons follow.

1. All major ethical and moral philosophies in the world urge honesty as the proper policy. Hopefully you are in tune with the majority of great thinkers who have written at length on this subject.

2. Perjury is the deliberate giving of false testimony while under oath. It is a very serious crime.

3. The opposing attorney's job is to ferret out any lies you may tell in order to destroy your credibility. Lawyers have the mystique of being able to smell a lie from a mile away. Telling lies to lawyers is like diving into shark-infested waters with oozing wounds. You may survive, but you invite an attack by someone who will enjoy eating you up. Few thrills excite a trial lawyer like the chance to expose a liar.

A famous story is told about Abraham Lincoln when he was a trial lawyer. Mr. Lincoln's client was on trial for murder. Mr. Lincoln was interrogating a man who was the only known witness to the murder. The murder occurred in the country in the middle of the night. The witness claimed to be several dozen yards away from the scene of the crime. Mr. Lincoln asked the witness how he could be sure of the identity of the killer. The witness confidently answered that he could see the killer by the light of the moon. Mr. Lincoln then went to his briefcase and pulled out his Farmer's Almanac. The Almanac reported that the night in question was moonless. Mr. Lincoln's client was acquitted.

The lesson is simple: don't think you can outwit lawyers by telling lies. You never know what evidence they may pull out of their briefcases. If you challenge the lawyer mystique, you too may become a famous example of why it exists.

4. Jurors are not dumb. Even if the opposing lawyer cannot decisively prove that you have lied, if the jurors believe you are lying about any small thing, then they may disregard all of your testimony as if it were all lies.

5. The penalty for lying can be grossly disproportional to the seriousness of the lie.

History's greatest example of this truth is Richard Nixon who lost the presidency for being dishonest about what he knew about the Watergate burglary. Even if the truth hurts, that hurt is better than the pain which a lie can inflict on you. Cut your losses; lies can multiply them.

6. None of us are saints. The temptation to lie or stretch the truth can strike anyone. Talk to your lawyer about anything, you may be tempted to lie about. You may find that the facts which you thought would hurt really have no legal impact at all, or that their impact can effectively be minimized. Your attorney has the same kind of schooling as the opposing lawyer. Discuss possible weaknesses in your case with your lawyer in advance. Let your lawyer show you how to, present bad facts in the best light. Trust your lawyer. Avoid temptation. Don't tell lies.

7. Your memory is fickle. Each time you tell the story about something you saw or did, you make small changes in the story. In almost every case your trial and deposition testimony will vary, even if in only subtle ways. A trial lawyer is trained to discover these microscopic changes in your story. These changes will be used against you as if you are fabricating everything, or as if you simply don't know what you are talking about. Trial attorneys make mountains out of molehills. Your attorney has enough work to do just fending of f attacks on you due to normal lapses in your memory. You can make your attorney's job hopeless if you add deliberate lies on top of that.

SAY ONLY WHAT YOU KNOW - BUT WHAT DO YOU KNOW?

You can only testify about what you know. Attorneys divide your testimony into general categories. The main categories are:

Percipient/firsthand knowledge: things you have directly perceived by hearing, sight, taste, touch or smell. Percipient facts are anything you perceive with your five senses. You normally are expected to testify only to what you have perceived.

Hearsay: : facts you know from another source such as someone telling you or something you read about. You may testify about your hearsay knowledge at a deposition, but usually not at a trial.

Opinion: your interpretation of the meaning of facts. You may testify about your opinions at a deposition, but you usually are not allowed to do so at trial because the jury is expected to form its own opinion from the facts.

Estimate/guess: a fact you believe exists or an opinion you hold based on related knowledge or recollection you have. You are usually allowed to testify to "educated" guesses or estimates, especially when you are asked about events you witnessed.

Speculation: a fact you believe exists or an opinion you hold based upon inadequate knowledge or recollection of an event. Speculation is always improper even when asked for. You may advise the questioner if you think the only answer you can give to a question would be speculation. The questioner will then usually withdraw the question.

These categories overlap. Each category has different legal effects. The outcome of the case may depend upon which category your testimony falls into. Attorneys will therefore argue at length about which category your testimony belongs in.

BE BRIEF: VOLUNTEER NOTHING

A deposition is not the chance for you to sell your story to the other side. A deposition is a chance for the other side to poke as many holes as possible in your story. Nothing you can say at your deposition will convince the other side to give up. That is not the purpose of a deposition. Anything you say that is not responsive to the examiner's question may provide an opportunity to discredit your testimony. Each extra sentence and word you speak is an opportunity for you to make a mistake. You must be truthful; but try to be brief.

Another reason for being brief is that you will save time and money. You save money two ways. Your attorney is probably paid by the hour. Shorter depositions means lower attorneys' fees. The court reporter is paid by the number of pages of transcript. This means that the court reporter is effectively paid by the word! Fewer words means lower costs. Finally, if you are brief, you will also save your own time because the deposition will end sooner.

The essence of being brief is best understood by analyzing how to answer the following question:

"Can you tell me the time?"

In normal conversation, your natural response to this question is to give the questioner the time of day. That is the wrong answer in a deposition. In a deposition the correct response is either "yes" or "no", depending upon whether you know the time of day. In a deposition, you should then stop taking because you have answered the question. If the questioner wants to know the time of day, then wait for that question to be asked. (Warning - do not practice these deposition techniques on your spouse - or you will end up divorced.)

ANSWER ONLY THE QUESTION ASKED: THEN STOP

You are most likely to violate this rule when a question calls for a simple yes, no, or maybe answer. In normal conversation you will usually explain your response without being asked to do so. In a deposition, wait for the examiner to ask for the explanation. Sometimes you won't get asked.

Example:

QUESTIONER: Can you tell me your favorite color?

RESPONSE: yes.

-- Stop and wait for the next question.

THE BIG 5 SIMPLE ANSWERS

Simple short answers should be used whenever possible. The most important simple and short answers are:

Yes.

No.

I don't know.

I don't recall.

Maybe/sometimes (or similar indefinite answers)

Try to be accurate when using "I don't know" and "I don't recall" answers. "I don't know" can often be used instead of "I don't recall." However, it is better to use "I don't know" only in situations where you never knew the answer. Use "I don't recall" when you have forgotten what you previously knew.

Example: QUESTIONER: Who was at the meeting?

If you weren't at the meeting, your answer is "I don't know." If you were at the meeting, but can't recall who also attended, use "I don't recall" even though "I don't know" could also apply.

Many people can be embarrassed into trying to answer a question about an event when they have forgotten what actually occurred. Do not let shame or embarrassment tempt you to say something which you do not recall. Overstretching your memory can easily cause you to make a false statement which the examiner may then pounce on. Stick with "I don't recall" or "I don't know" unless you are certain of your answer. On the other hand, you must not let the examiner coax you or bully you into saying you do not recall an event just because your memory is hazy about parts of it.

Sometimes your answer to a question will be an indefinite response such as "maybe", or "sometimes", or "not always." In normal conversation you usually then go on to explain why your response is indefinite. Do not give the explanation unless asked to do so. Volunteer nothing.

Avoid diluting short answers with tag-on qualifiers such as:

"Yes, I think so"

"No, probably not"

"I don't know for sure"

"I don't remember right now"

Such qualifiers invite follow-up questions about why you have qualified your answer. If you think you must dilute one of these answers, then you probably need to rethink your answer. Take more time to give an answer which does not qualify your answer, if you can.

Some people have inhibitions about using "I don't know" or "I don't recall" answers because these answers were abused by many witnesses in the famous Watergate and Contragate hearings on TV. Don't be intimidated by history. When either of these two answers applies, anything else you say may get you into trouble. It is always dangerous to say

anything at a deposition unless you are certain it is true.

EXAGGERATION: OVERSTATEMENT AND UNDERSTATEMENT

Any form of exaggeration is just as bad as a false statement. It casts doubt on the truth of anything else you may say. Don't let the inability to be precise tempt you to overstate or understate a fact. Say only what you know.

SUMMARIZE WHEN ANSWERING OPEN-ENDED QUESTIONS

Open-ended questions are those which potentially require long answers. Questions asking for what, why or how are usually open-ended type questions. Questions asking for who, when, or where usually are not open-ended, but may still require long answers. When possible, give short summary answers to all questions.

For example, on a particular night you may have done the following: you met friends after work; you went with them to a restaurant for dinner; then you all went to a theater to see a movie; then some of you went to an ice cream parlor for some dessert, and then a few of you went to a late night bowling alley for a few games; then you went home. If the questioner asks you what you did that night after work, you could respond with a long explanation of everything you did. You could also give a short summary answer as follows:

RESPONSE: "I went out."

Note that the long explanation and the short summary are both 100% responsive to the question and both 100% true. But the long explanation violates the "be brief - volunteer nothing" rule. Give summary answers whenever you can. Let the examiner ask follow-up questions for whatever detail is desired. If your summary is accepted without any follow-ups, then you have shortened your deposition.

It may take you several moments or minutes to think of a proper summary answer. Take all the time you need.

DO NOT RUSH YOUR ANSWERS; PAUSE TO THINK BEFORE SPEAKING.

A short accurate answer may take longer to prepare than a long answer. Stories are told about witnesses who thought silently for a half-hour or more before answering a difficult question. You likely will never need that much time; but if you
do, take it. The pace of a deposition is the only part of a deposition which you can control. You must slow the pace to whatever is comfortable for you. You must not let the opposing attorney rush you if that may cause you to make a mistake.

MARKING OF DOCUMENTS
The examiner may ask the reporter to "mark" a document. That means that a copy of the document will be attached to the deposition transcript. Each marked document is given an identifying number or letter.

TESTIFYING ABOUT DOCUMENTS

Many depositions revolve around identifying documents and explaining the information contained in them. The questioner may ask you questions about the documents before showing them to you.
This is proper in order to see how much you recall without

reading the document. If you cannot answer a question without looking at the document, then your proper response is simply "I don't know" or "I don't recall." After exhausting your memory, the examiner may let you see the document in order to refresh your memory and to ask you more questions.

TESTIFYING ABOUT CONVERSATIONS

You will frequently be asked to testify about conversations. This may include where and when held, who participated, and most importantly, what was said. You may not remember exactly what was said in a conversation. If asked, tell the examiner only what you recall. Do not summarize or paraphrase the conversation until asked to do so. You will probably be asked to do so. A typical exchange in a deposition may go like this:

QUESTIONER: Do you remember having a conversation with Mr. X? RESPONSE: Yes.

QUESTIONER: Tell me what was said in the conversation. RESPONSE: I don't recall the exact words spoken.

QUESTIONER: Can you tell me in general what the conversation was about?

RESPONSE: Yes.

QUESTIONER: Tell me in general what the conversation was about.

TESTIFYING ABOUT OBSERVATIONS

Your deposition may be taken only because you saw something happen - such as an automobile accident. You may have no connection to the lawsuit other than that you saw something happen. In these situations you may not have your own attorney.

Even in these situations the questioning may seem hostile to you. This is because the attorney who does not like what you say will try to find a way to discredit your testimony. To avoid complications and embarrassment you should still follow the basic rules: be truthful and be brief.

"ANYTHING ELSE" QUESTIONS

In order to be sure that you have stated all that you know about an event or a conversation, most attorneys will continue to ask you “Is there anything else you recall" about that event.

Eventually, your memory will be exhausted. At that point, don't let the examiner box you into a statement that nothing else was said or done at the event. Simply say that is all you can recall. This allows for the possibility that you will have a "flash recall" later.

FLASH RECALL
Long after answering a question you may remember something that you should have said. Keep these flash recollections to yourself until you have had an opportunity to speak to your attorney. Ask for a private conference. Let your attorney advise you as to when and how to correct your testimony.

DO NOT VOLUNTEER OTHER SOURCES OF INFORMATION

If you cannot answer a question unless you refer to other sources of information, simply state that you cannot answer the question. Do not volunteer what information you need or where you could get it. Never identify other persons who might have information unless specifically asked to do so. Except as discussed below, don't hint that you could get other information by qualified answers such as: "I don't know right now" or "I can't tell you from memory." If you don't know, simply say: "I don't know." Then wait for the next question.

Sometimes you will be able to answer a question only because someone else gave you the information. This is hearsay knowledge, not percipient knowledge. It is risky to give an answer based upon hearsay knowledge unless you are certain the hearsay is true or unless you alert the questioner that your knowledge is hearsay. This is because your hearsay information may be erroneous. Your credibility may be questioned if you gave the impression that your answer was from your firsthand knowledge. On the other hand, an "I don't know" answer might not be appropriate because of the hearsay information you have.

Example:

QUESTIONER: Who was at the meeting?

If you were not at the meeting and are not sure if your hearsay information is correct, you could give a qualified answer such as:

RESPONSE: I don't know for sure.
-or
RESPONSE: I don't have any firsthand knowledge of that.

The second suggested response is a slight evasion of the question, but it would be a 100% true statement for you to make.

Both of these responses give a hint to the examiner to ask follow up questions about what you may or may not know. Wait for the follow up questions. You may or may not get any.

EVASIVE ANSWERS

Politicians are masters of this technique: A television reporter asks the politician a tough question. The politician ignores the question and gives a short speech about something which may not even be related to what was asked. The reporter thanks the politician and has already forgotten what he asked about. Don't expect this technique to work well for you at your deposition. Attorneys are better trained than reporters to get the information they ask for. Expect persistence in response to evasiveness.

Evasive answers also violate the "volunteer nothing" rule. Anything you say which is not responsive to the question is volunteered information. Avoid evasive answers; but see the limited exception in the preceding section.

A final reason for avoiding evasive answers is that they make you appear to be evasive! Judges, juries, and attorneys get suspicious of evasive people. You will occasionally misunderstand a question and give an unintentional evasive answer. Don't compound this by deliberately giving evasive answers.

DO NOT EXPLAIN WHY YOU REMEMBER AN EVENT

Ironically, it can be harmful when you remember too much detail about an event. It may appear that you are fabricating everything. There may be a special reason why you remember an event in unusual detail. Don't disclose that reason unless you are asked to do so. Let your attorney know later if there is such a reason. Your attorney will see that you get an opportunity to explain that reason at trial, if it is necessary to do so.

DO NOT ASSIST THE CONFUSED EXAMINER

The examiner's questions may be nonsensical because the examiner does not understand words used in your occupation or because the examiner does not understand something else about you. If you notice this happening, ask for a private conference with your attorney before answering. Your attorney may or may not want you to clear up the misunderstanding. Let your attorney decide what to do.

PUTTING WORDS IN YOUR MOUTH: LEADING QUESTIONS

Leading questions are any questions in which you are asked to affirm or deny a version of the facts. This is sometimes called "putting words in your mouth" because the questioner tells the story; you just affirm or deny it. Example:
QUESTIONER: Isn't it true that you drove straight to work from your home this morning?

RESPONSE: Yes.

This form of question is proper for the examiner to ask. Answer these questions if you can with a simple answer such as: yes, no, I don't know, I don't recall, maybe, etc. But be on guard because the questioner's version of the case is not the same as yours. Slight changes in the question may change your answer.

PUTTING WORDS IN YOUR MOUTH: THE SUMMARIZING QUESTION

A summarizing question is a type of leading question in which the questioner rephrases your testimony and asks you if you agree with the rephrasing. The rephrasing will often have a new twist on it with which you do not agree. Be careful when answering this type of question to be sure you agree with every part of the questioner's summary.

Attorneys often abuse this questioning technique. The questioner may try to summarize large portions of your testimony and misstate important parts when doing so. The length and convoluted nature of the question may make it hard to pinpoint all of the ways that the summary is inaccurate. You need not reexplain every portion of your testimony if you simply deny that the questioner's summary is accurate.

The examiner may then ask you to pinpoint the inaccurate parts of the examiner's question. If you can do so easily, then do so. But you need not explain each error in the examiner's convoluted misstatement of your testimony. This is not the purpose of a deposition. If the question was too lengthy or convoluted for you to easily answer or explain, then say so. You may ask the questioner to rephrase the summary question so that you can easily understand it, analyze it, and answer it.

DEALING WITH CONFUSING QUESTIONS

As a witness you are entitled to refuse to answer questions which you do not understand. For many reasons, lawyers have a tendency to ask confusing questions. A sampling of five different types of confusing questions and how to deal with them follows.

THE GIBBERISH QUESTION: Attorneys are highly educated, but they trip over the English language just like everyone else. If you hear a question which you don't understand, say so. The questioner will rephrase it.

Example:

QUESTIONER: Proud to be your bud?
RESPONSE: I'm sorry, I don't understand your question. Could you rephrase that question?

You must not answer any question you do not understand. You may ask that a question be repeated or rephrased if that helps you.

COMPOUND QUESTIONS: A compound question is really two or more questions combined into one. These questions are improper and often occur through carelessness by the questioner.

Example:
QUESTIONER: Tell me who you work for and what you do.

If your attorney does not object to this question, you have several options:

Answer both questions.
Ask the questioner which question you should answer first and answer only that question. Wait to see if the second question gets asked again.
Ask the questioner to repeat the question because you heard more than one question and you don't know which one to answer.
The latter two approaches are most consistent with the "volunteer nothing" rule.

MULTIPLE NEGATIVES: Many attorneys are indirect or evasive in speaking. These attorneys often lace their questions with multiple negatives. Ask for the question to be restated if it confuses you.

Example:
QUESTIONER: Do you deny that you don't categorically oppose the conclusions rejected in this report?

RESPONSE: Can you rephrase that question and simplify it for me?

QUESTIONER: Oh, okay. Do you agree with what is said in this report?

LOADED QUESTIONS: QUESTIONS WITH BUILT-IN ASSUMPTIONS: The most famous question with a built-in assumption is "When did you stop beating your wife?" You have sufficiently answered such a question if you simply deny that you beat your spouse. Modern versions of the classic question "tack-on" offensive elements to an otherwise innocent question.

Example:
QUESTIONER: Isn't it true that you drove straight to work from home this morning after abandoning your starving children?

You need not answer such a question. You can simply say that you do not agree with the assumptions stated in the question. Then wait for the examiner's next question. If you answer the innocent part of the question, you must still make clear that you do not agree with the tacked-on assumptions.

Example:
RESPONSE: I did not leave my children starving at home, but I did drive straight to work from home this morning.

It is usually safer not to answer this type of question at all. Simply say that you do not agree with the assumptions in the question. Any answer you give will probably violate the volunteer nothing rule. You can ask the examiner to break down the question into its various parts so that you can easily identify those parts which are true from those which are not.

THE LONG QUESTION: THE "NICKEL AND DIME" RULE: Some attorneys just seem to enjoy listening to themselves. Their questions show it by their length. Use the unofficial "nickel and dime" or "5 and 10" rule to measure objectionable length:

Any question that takes more than 10 seconds to ask is almost always too long. You can ask the questioner to simplify it. Questions that are too long are usually objectionable because they are gibberish, compound, contain too many built-in assumptions or multiple negatives.
Any question that takes between 5 and 10 seconds to ask may be too long. Pause and think before you respond.

Any question that takes less than 5 seconds to ask is not too long.
The "5 and 10" rule also applies to your answers. If you think that your answer to a question will take more than 5 or 10 seconds, you should pause an extra few moments before answering. Your answers should not normally take that long. Be brief! Summarize. Volunteer nothing.

STATEMENTS AND SPEECHES AS QUESTIONS

Frustrated attorneys sometimes resort to giving long statements or speeches which are often insulting and intended to provoke you. At the end of the speech they turn to you as if it was your turn to say something in reply. If this happens, your only reply should be "what is your question?"

Speak only in reply to a proper question. Don't make speeches. Don't let yourself be provoked.

INTERRUPTIONS

Interruptions of your testimony come from three main sources: the opposing attorney, your own attorney, or the reporter. Your response is different for each type of interruption.

The opposing attorney: The examiner should not interrupt your answers with a new question. In order to discourage this conduct your attorney (or you, if your attorney doesn't notice the interruption) should point out the interruption to the examiner.

Your attorney: Stop speaking when your attorney interrupts.
Your attorney probably intends to object to the question. Listen to your attorney's objection. Your attorney is not allowed to tell you what to say, but each objection has that effect anyway. Take the hint if you can. But wait to see if your attorney allows you to answer the question. Sometimes your attorney will object and then "instruct" you not to answer a question. Follow your attorney's advice.

The reporter: Stop speaking whenever the reporter interrupts. The reporter interrupts only when two people speak at once or when one person speaks too fast. You must stop to allow the reporter to record everything. Then, slow down if necessary.

BREAKS

As a witness you are entitled to be reasonably comfortable so that you can think clearly and give accurate answers to the questions. If you want to stop briefly to eat, drink, smoke, get fresh air, go to the bathroom, make a phone call, talk privately to your attorney, or for any other reason, just ask for it.

"OFF THE RECORD"

At any time the deposing attorney may ask to go "off the record." This means that the court reporter will stop typing until the attorney asks to "go back on." Off the record conversations do not appear in the transcript, but when you "go back on" the opposing attorney may ask you questions about conversations which occurred off the record (except private conversations with your attorney). Stay alert, even when "off the record." The sharks are still circling.

MISSTATEMENTS AND INCONSISTENCIES

No matter how certain you are in the truth of your testimony, misstatements and inconsistencies will occur. If the examiner confronts you with an inconsistency in your testimony, do not fear that your case is lost. State, if asked, your present recollection. State, if asked, the reason for any inconsistency if you know it. You may ask to meet

privately with your attorney so you can think about your responses. Let your attorney advise you on how to correct your testimony, if that is necessary. Stay calm.

QUESTIONS BY YOUR ATTORNEY

Your attorney is entitled to ask you questions when the opposing attorney finishes. Usually your attorney will not ask any questions. This is consistent with the volunteer nothing rule. Sometimes, however, your attorney will ask you questions. The most common reason for doing so is to correct or clarify your testimony. If you will not be available for trial, then your attorney may question you so that your entire story will be available at least in transcript form for the trial.

REVIEW/SIGNING THE DEPOSITION

You receive still one more chance to correct errors after the deposition is over. When the transcript is prepared you are given 30 days to review, correct and/or make written changes to your testimony. You will also be asked to sign the final version of the transcript. If you make changes, then both the original version and your corrections become part of the official record. At trial the opposing attorney may ask you about any changes you have made.

You are not required to review, correct or sign your transcript. Some attorneys advise their clients not to correct the transcript or sign it. Discuss this with your attorney.

III. FINAL CONSIDERATIONS

COMPARING TRIAL AND DEPOSITION TESTIMONY

Your approach to testifying in a trial will differ from the approach you take at your deposition. That is because you have different objectives. At trial you want your full story to come before the judge or jury. At your deposition you want to say the minimum necessary in order to avoid attacks on your story. These differing goals should never be inconsistent with your duty to tell the truth.

Your opportunity to tell your story at trial will typically be during your attorney's examination of you. You must discuss with your attorney the important parts of your story which were not covered at your deposition. You need not be concerned that your deposition focused only on things unfavorable to you because you can tell your whole story at trial.

BREAKING THESE RULES

Following the rules in this guide will not guarantee that you will win your lawsuit. Following these rules is not even an assurance that you will make the best possible presentation of your story. Experience, good judgment and common sense must sometimes override these rules. When there are no other considerations, however, following the rules in this guide will usually be your best course.

Testifying, like storytelling, is an art, not a science. The only absolutely unbreakable rule is rule number 1: you must tell the truth. All other rules are merely guidelines. You can ignore the

guidelines and sometimes you should do so, but you should have a good reason for doing so.

FORGETTING THESE RULES

At your deposition you will not remember all that you have learned in this manual. You will make mistakes and violate even the rules you remember. When all else fails you must remember at least the two basic rules for deposition testimony:

1. Tell the truth; say only what you know. 2. Be brief; volunteer nothing. You can do well with just that much.

Records? We Don't Need No Stinking Records.

ACC Corporate Counsel University:

Records and Discovery

San Francisco May 23, 2008

Joseph J. Catalano
Chair of San Francisco Bay Area Litigation Committee of ACC Corporate Counsel University

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Before Written Language…

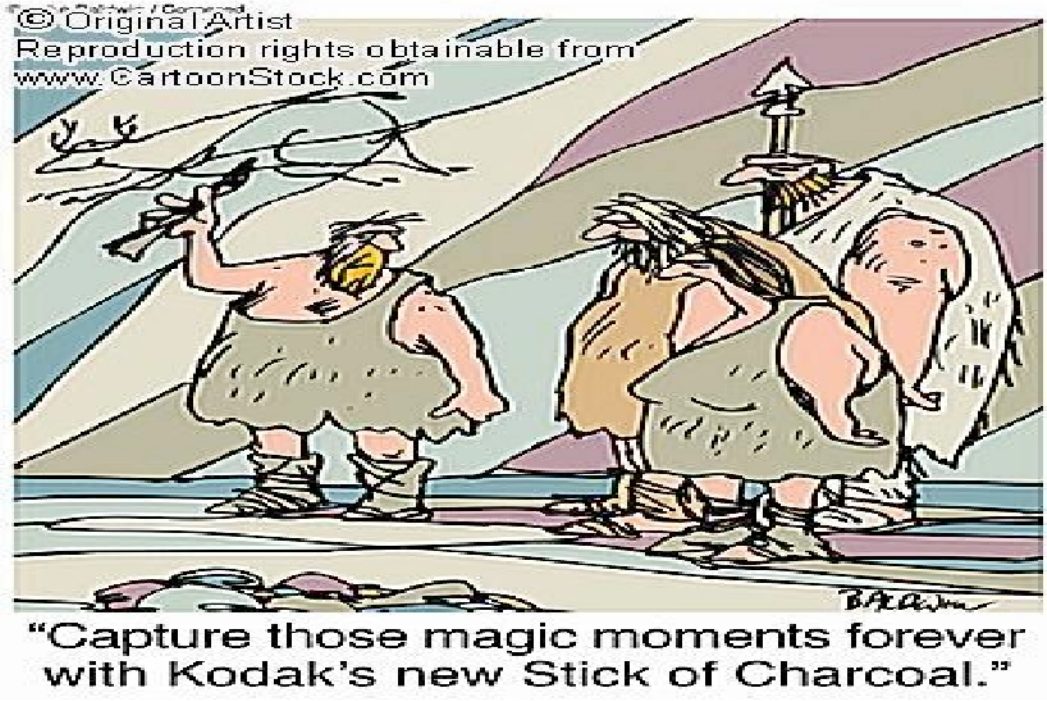
Records? We Don't Need No Stinking Records.

Litigation and Compliance Pointers In Light Of Amendments to the Federal Rules of Civil Procedure

Records? We Don't Need No Stinking Records.

Litigation and Compliance Pointers In Light Of Amendments to the Federal Rules of Civil Procedure

But We've Always Had Vendors



3

Hieroglyphics…Hard to Produce in Litigation

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Litigation and Compliance Pointers In Light Of Amendments to the Federal Rules of Civil Procedure

Records Just Won't Go Away.

Records? We Don't Need No Stinking Records.

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And we thought paper was bad…

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Litigation and Compliance Pointers In Light Of Amendments to the Federal Rules of Civil Procedure

Records? We Don't Need No Stinking Records.

Litigation and Compliance Pointers In Light Of Amendments to the Federal Rules of Civil Procedure

ESI Associated Costs

- **eDiscovery costs staggering:**
  - Estimated costs in U.S. commercial litigation:
    - 2006 $1.923B
    - 2007 $2.865B

    www.sochaconsulting.com/2005surveyresults.htm
  - Unavoidable services expense for litigant, especially when outsourced by law firm.

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Records? We Don't Need No Stinking Records.

Litigation and Compliance Pointers In Light Of Amendments to the Federal Rules of Civil Procedure

Paper or ESI?

The Sedona Principles - authority on best practices and principles for addressing electronic document production, identify six ways in which ESI differs from paper documents:

1. the enormous volume and duplicability of ESI;
2. its persistence (ESI survives many efforts to "delete" it);
3. its dynamic and changeable content;
4. metadata associated with electronically stored "documents";
5. the environment-dependence and obsolescence of ESI;
6. the dispersion and searchability characteristics of ESI.

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Records? We Don't Need No Stinking Records.

Litigation and Compliance Pointers In Light Of Amendments to the Federal Rules of Civil Procedure

Before You're "Served"…

1. **Know your systems.**
   Talk to the IT department and learn about the different systems that create, maintain and destroy electronically stored information (ESI) at your company.

2. **Think ahead.**
   Think ahead about ways to reduce the expense of reviewing and producing ESI. If you wait until the last minute, it will be harder to ensure that all privileged and confidential information will be protected.

3. **Update company policies to specifically address ESI retention.**
   See The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age, published by Pike & Fischer.

4. **Have a plan for implementing a "litigation hold" for ESI once litigation is potentially likely.** But having in place a document retention policy is not enough. Counsel should put in place a procedure for the establishment of a "litigation hold" before litigation strikes.

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Litigation and Compliance Pointers In Light Of Amendments to the Federal Rules of Civil Procedure

Document Retention and Destruction Policy

- **Information Gathering**
  - Current records retention schedules, policies and procedures;
  - Internal audit reports;
  - Identify the computers and servers that are relevant and diagram where the information resides;
  - Collect organizational charts;
  - Identify categories of the company's records and determine applicability of federal and state laws and regulations;
  - Available statistics on records use.

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Litigation and Compliance Pointers In Light Of Amendments to the Federal Rules of Civil Procedure

Document Retention and Destruction Policy

- **Determine Statutory/Regulatory Periods, Examples:**
  - Statute of Limitations Periods;
  - Environmental and Safety Statutes (EPA/OSHA);
  - Employment and Labor ;
  - Audit Docs re: Public Companies;
  - Tax Laws, *e.g.* I.R.C. § 8038A(a).

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Litigation and Compliance Pointers In Light Of Amendments to the Federal Rules of Civil Procedure

Document Retention and Destruction Policy

- **Determine Business Needs:**
  - Emails/Correspondence – retention based upon content;
  - Contracts (until performance end dates plus SOL?);
  - Contractually imposed requirements (audit rights);
  - Claims correspondence (patents);
  - Intellectual Property;
  - Records for defense/enforcement of rights;
  - Corporate historical means.

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Litigation and Compliance Pointers In Light Of Amendments to the Federal Rules of Civil Procedure

Creating Litigation Hold

Information gathering that you, as a party, will want to conduct and should seek to discover from opposing side.

- Electronic records management policies and procedures;
- Number, types, and locations of computers currently in use/no longer in use;
- Past and present operating system and application software (e.g., email);
- File-naming and location-saving conventions;
- Backup and archival disk or tape procedures, inventories, programs, or schedules;
- Instant messaging and voicemail system usage, policies, and procedures;
- Most likely locations of records relevant to the subject matter of the action;
- Corporate policies regarding employee use of company computers and other equipment;
- Identities of personnel who had access to data, network(s) and system operations.

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Litigation and Compliance Pointers In Light Of Amendments to the Federal Rules of Civil Procedure

Helpful Considerations Regarding Production of ESI

- Become knowledgeable about production format options.
- When selecting a format consider:
  - Volume;
  - Sophistication of software to search and eliminate duplicative or irrelevant information;
  - Associated review & production expenses;
  - In what form want to producing ESI – Native format or TIFFs / PDFs?
- Where potentially "relevant" ESI is voluminous: Utilize the "testing" and "sampling" options under Rule 34 to reduce expense.

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Discovery Production Options

- ESI production takes five (5) principal forms:
  - Hard copies
  - Paper-like (digital) images of data, e.g. Portable Document Format (PDF) or Tagged Image File Format (TIFF).
  - Data exported to "reasonably usable" electronic formats like Access databases or load files.
  - Native Data
  - Hosted Data
- One of the biggest mistakes a requesting party can make in e-discovery is requesting or accepting electronic evidence ill-suited to their needs.

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Litigation and Compliance Pointers In Light Of Amendments to the Federal Rules of Civil Procedure

Production Formats

- **Hard Copies** – paper may still have its place, but can be costly and cumbersome.
- **Image Production (PDF's and TIFF's)** – fine if electronically searchable but otherwise will not contain metadata or formula embedded in spreadsheets.
- **Exported Formats** – some electronic evidence adapts to multiple production formats so you may want it exported in a format compatible with the application of your choice, e.g. importing ESI into Microsoft Excel or Access databases.
- **Native Production** – duplicates of the actual data files including links and metadata; however, native applications required to view the data may be expensive or difficult to operate requiring extensive training; data also is alterable.
- **Hosted Data** – information produced resides on a controlled-access website.

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Other Resources

- www.sedonaconference.org
- www.discoveryresources.org
- www.law.com
- www.aba.com - records working group
- www.montague.com - taxonomy resource
- www.arma.org
- www.lexisnexis.com/applieddiscovery

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ACC Corporate Counsel University: "What You Should Know About Litigation"

San Francisco May 23, 2008

Legal Hold Policy

Joseph J. Catalano: Chair of San Francisco Bay Area Litigation Committee of ACC Corporate Counsel University

LEGAL HOLD POLICY

EVIDENCE PRESERVATION, RETENTION AND RETRIEVAL SUSPENSION OF DOCUMENT DESTRUCTION SCHEDULES

1.0 PURPOSE AND SCOPE

1.1 _____-, its subsidiaries and affiliates ("the Company") has a business and legal obligation to preserve all evidence relevant to actual or reasonably anticipated litigation, governmental investigation or audit and certain business events including mergers, acquisitions, technology reviews, and bankruptcy. This preservation duty is referred to herein as a "legal hold." The purpose of this policy is to define and describe the implementation of a legal hold. **A LEGAL HOLD OVERRIDES ALL COMPANY RECORD DESTRUCTION POLICIES AND PROCEDURES APPLYING TO EVIDENCE SUBJECT TO THE LEGAL HOLD.**

1.2 The failure to preserve documents when required may have serious legal consequences for the Company, including civil or criminal sanctions, and serious employment consequences for employees, up to and including termination. The implementation and maintenance of an organized legal hold policy will help maintain the Company's commitment to consistent, efficient and ethical business conduct.

1.3 This policy applies to all employees, consultants, agents and contractors of business units, divisions, subsidiaries and operations centers of the Company.

2.0 DEFINITIONS

2.1 **Counsel.** "Legal Division - Litigation Section"

2.2 **Document.** The term "Document(s)" may be more specifically defined in a legal hold notice, but includes relevant Records in hard copy/paper format or electronic format. Examples of electronic documents include e-mail and attachments, Electronic Document Management System files, word processing, spreadsheet and presentation formats, CAD files, video and sound recordings (voice mail), and databases located on any Company server, Company or home PC or laptop, thumb drives, handheld devices (Blackberry, Palm, smart phones), floppy or optical disks or other removable electronic storage devices.

2.3 **Electronic Record.** The term "Electronic Record(s)" means information recorded in a form that requires a computer or other machine to process it and that otherwise satisfies the definition of a record.

2.4 **Employee.** The term "Employee(s)" includes employees, contractors, subcontractors, suppliers, agents, consultants and third parties who are employed or under contract to the Company and its subsidiaries and affiliates.

2.5 **Event.** The term "Event(s)" means actual or reasonably anticipated litigation, governmental investigation or audit and certain business events including mergers, acquisitions, technology reviews, and bankruptcy. Some Examples of Events which may trigger an Legal Hold are:

- Government investigations and subpoenas
- Accidents causing death or serious injury
- Contract defaults or terminations
- Contract disputes
- Audits
- Bankruptcy (debtor and creditor claims)
- Mergers and Acquisitions (due diligence)
- Subpoenas served on the Company by any third party
- Requests for Equitable Adjustment or project level claims
- Arbitrations
- Administrative or regulatory disputes and investigations (e.g. EEOC, OSHA, MSHA, bid protests)
- Preservation orders issued in active litigation
- Service of complaints or petitions commencing litigation

2.6 **Evidence.** The term "Evidence" is every type of proof legally presented at trial (allowed by the judge) which is intended to convince the judge and/or jury of alleged facts material to the case. It is very broad and can include oral testimony of witnesses, including experts on technical matters, Records, Documents, public records, objects, photographs, physical matter, video and depositions (testimony under oath taken before trial).

2.7 **Legal Hold.** The term "Legal Hold" means a communication issued as a result of current or anticipated litigation, audit, government investigation or other such matter that suspends the normal disposition or processing of records.

2.8 **Legal Division- Litigation Section.** The term "Legal Division-Litigation Section" means all legal personnel, including lawyers and paralegals, assigned to the Litigation Division of the Company's Legal Department.

2.9 **Record.** The term "Record(s) "means information, regardless of medium or format that has value to an organization. Collectively the term is used to describe both documents and electronically stored information.

3.0 EMPLOYEE OBLIGATION UPON RECEIPT OF A LEGAL HOLD

3.1 A Legal Hold mandates the preservation of all evidence which is relevant to the Event identified in the Legal Hold with the employee's control or knowledge. The duty to preserves applies to all Employees, custodians of records, or other persons who have received a notice of a Legal Hold or who have knowledge that a Legal Hold has been

issued and have evidence, records or documents which would be relevant to the Event described in the Legal Hold.

3.2 Upon the receipt of, or the obtaining of knowledge of a Legal Hold, the Employee will:

- 3.2.1 Preserve all Evidence with in the Employee's possession or control
- 3.2.2 Identify and list the Evidence and locations where stored
- 3.2.3 Wait until notified by Legal Department or the Legal Hold Team and or its delegates on how to collect the relevant Evidence.
- 3.2.4 Continue to preserve Evidence Records, and Documents created after the date of receipt in accordance with the Legal Hold
- 3.2.5 Sign the acknowledgement of receipt and return to Counsel

3.3 A Legal Hold applies until the employee receives a written notice terminating the Legal Hold from the Legal Division- Litigation Section.

3.4 Evidence should be retained in any format in which it exists at the time a legal hold is implemented. Evidence, Records, Documents created after the legal hold is implemented should be retained in the format in which they are created and maintained in the ordinary course of business.

3.5 Printing a hard copy of electronic data does not constitute preservation. Similarly, preserving a Document in electronic form does not allow the destruction of hard copies.

3.6 Legal hold notices may be updated and redistributed, or reminders sent to affected individuals, as deemed necessary and appropriate by Counsel.

3.7 Legal hold notices will be written and may be distributed in hard copy or electronic format (including e-mail) as deemed most expeditious and appropriate by Counsel. The content and form of a Legal Hold will vary from Event to Event but the obligation to preserve relevant evidence never varies.

4.0 EMPLOYEES DUTY TO NOTIFY LEGAL DEPARTMENT OF AN EVENT

4.1 Employees with knowledge of an Event or combination of Events have an obligation to promptly notify their supervisor, the corporate legal department, and the Vice President – Litigation and Claims of such Events.

4.2 When in doubt, as to whether an Event should be reported, an employee should always report the Event. If unsure contact Counsel for clarity.

5.0 AUTHORITY TO IMPLEMENT AND TERMINATE A LEGAL HOLD

5.1 The Legal Division- Litigation Section has the authority to issue and terminate a Legal Hold. Counsel will promptly review the circumstances of each individual case and determine in his/her discretion whether a legal hold should be implemented.

5.2 Counsel will communicate a Legal Hold to those Employees or agents of the Company determined as necessary to preserve relevant information and Evidence. Counsel will determine based upon the particular circumstances and after consulting with the Legal Hold Team how broadly the legal hold notice will be distributed within the Company. In most circumstances the Legal Hold will not be distributed company wide.

5.3 Counsel will terminate a legal hold when the Company's obligation to retain or preserve data, information, evidence or documents has ended.

5.4 Counsel will notify individuals, in writing, affected by the legal hold when their preservation/retention duty has ended. The termination notice will also outline the process for data destruction and/or retention in accordance with previously established Company retention and destruction schedules and procedures.

ACC Corporate Counsel University: "What You Should Know About Litigation"

San Francisco May 23, 2008

Guideline for Handling Government Subpoenas and Requests for Information

Jeremy Kashian: **Assistant General Counsel, NEC Corporation of America**

GOVERNMENT SUBPOENAS AND REQUESTS FOR INFORMATION

While it is the responsibility of the Company to cooperate with any governmental investigation where the Company may have information relevant to the investigation, certain controls should be maintained to insure that the Company's rights are protected prior to providing such cooperation. Contact by a governmental investigative agency e.g. FBI, DOJ, SEC can come in many forms including phone calls, letters requesting information and subpoenas (including Grand Jury Subpoenas). Whenever the Company is contacted by an enforcement arm of a governmental entity or other governmental investigative agency the following procedures should be followed:

- **The person receiving the communication should immediately notify the in-house attorney responsible for their business unit and provide a hard copy of the document received, or if contacted by phone provide a summary of the conversation or voice mail message.**
- **The attorney receiving the information and the General Counsel should review the information received and confer, in most instances, with outside counsel experienced in such investigations to assess the circumstances surrounding the request and determine the proper response to the government's request. No substantive discussions should occur with representatives of the investigative agency until the General Counsel authorizes such discussion.**
- **Primary attorney must notify executive of Company or business unit advising of the matter.**
- **Records hold notice, if required, should be drafted and sent to all relevant parties.**

"Life" of a Litigation Matter

- What steps can you take to prepare for the potentiality of a lawsuit?
- How should you respond if the litigation process is triggered?
- This presentation is designed around the "life" of a typical litigation matter.
- This presentation reflects the input of all 5 panelists.

1

Common Types of Litigation

- Intellectual Property (IP) Infringement
- Theft of Trade Secrets
- Unfair Competition, Unfair Business Practices
- Breach of Contract
- Employment (Single Plaintiff and Class Actions)
- Securities Litigation

2

Arrival of the Complaint / Claim

- Courtesy Copy (Filed But Not Served)
- Service of Summons and Complaint
  - Proper (and improper) methods of service
  - Agent for service of process
  - Practice tips regarding training of the mail room, receptionists, administration
- Deadlines for Responding to the Complaint
  - Extensions of deadline to “respond” (as opposed to “answer”)
  - Court permission needed?
- Applications for TRO or Preliminary Injunctive Relief
- Notification of Internal Clients

3

Insurance and Indemnification

- What Policies (Multiple) May Cover Your Claim
  - What to look for in the policy
  - Types of coverage
- Timing for the Tender of Your Claim
- How to Submit Tender
- Duty of Cooperation, etc.
- Notification to Third Parties and Indemnity Clauses

4

Retention of Outside Counsel

- Use Current Outside Counsel?
- Pitches
- Referrals
- Insurance Panel Counsel
- Role of Outside and Inside Counsel

5

Litigation "Hold" Directive

- What Is a "Document"?
- Why Is a Litigation "Hold" So Important?
  - Duty to retain potentially responsive documents
- Who Should Be Involved?
  - Could involve current employees who are putative class members
- Make Sure Record Retention Policy Is Current
  - Records management, archiving, and repository
- Prepare Litigation "Hold" Directive (See Exemplar)

6

Public Relations / Media Issues

- Fielding Questions From The Media
- Press Releases
- Hiring Public Relations Firms
- Designated Corporate Spokesperson
- Websites, Blogs, Internet Postings

7

Investigation of the Subject Matter

- Attorney-Client Privilege (Managers vs. Non-Managers)
- Confidentiality
- Due Diligence and Information Gathering (Documents and Witnesses)
- Business Units Involved (Goals)
- Prior Related Matters / Cases / Incidents

8

Early Case Evaluation

- Exposure Analysis
- Business Distraction
- Economics of Case
  - Evaluate as stand alone case or as part of larger strategy
- Settlement (Can Come at Any Stage)
- Precedent

9

Case Budgets

- Client's Goals
- Litigation Strategy and Case Plan
- Staffing and Estimated Expenses
- Projected Timeline
- Budget at Outset and Ongoing
- Unexpected Events

10

Reporting and Disclosure Requirements

- Public vs. Private Company
- Board of Directors
- Securities and Exchange Commission Filings
- Auditors
- Reserves

11

Discovery

- Protective Order for Confidential Information and Trade Secrets
- Rule 26 Conference (Discovery Planning)
- Depositions of Officers and Employees
- Sanctions for Inadequate Production (*Qualcomm*)

12

E-Discovery

- Preservation, Collection, and Production
- Native Format vs. Tagged Image Filed Format (TIFF)
- Hard Copies
- Data Exported to “Reasonably Usable” Formats
- Retention vs. Destruction

13

Alternative Dispute Resolution ("ADR")

- Court Litigation vs. Arbitration
- Difference Between Mediation and Arbitration
- Pros and Cons, Different Uses
- Court Ordered vs. Voluntary ADR
- Selection of the Mediator / Arbitrator
- Choice of Arbitral Regimes
- Key Dispute Resolution Provisions

14

Dispositive Motions

- Motion to Dismiss
  - Standard: Plaintiff fails to state a claim upon which relief can be granted. Well-pleaded factual allegations are assumed true for purposes of the motion.
- Motion for Summary Judgment
  - Standard: No genuine dispute exists as to any material fact
  - Usually made after the close of discovery
  - Timeline

15

Trial

- Cost and Time
- Publicity
- Management Distraction
- Unpredictability of Juries and Ways to Mitigate Risk
- Selection of Company's Witnesses
- Role of Experts and Consultants

16

Appeal

- Company's Decision-Making Process Regarding Whether to Appeal Judgment / Order
- Timeline
- Cost
- Company's Business Conduct While Awaiting Decision

17

International Disputes

- Service Issues
- Foreign Courts vs. International Arbitration
- Local Counsel vs. U.S. Based Firms
- Enforcement of Foreign Court Judgment
- Enforcement of International Arbitral Award

18

NOW, NEVER OR IN BETWEEN?: SOMEWHERE

The Nuts and Bolts of Setting Reserves

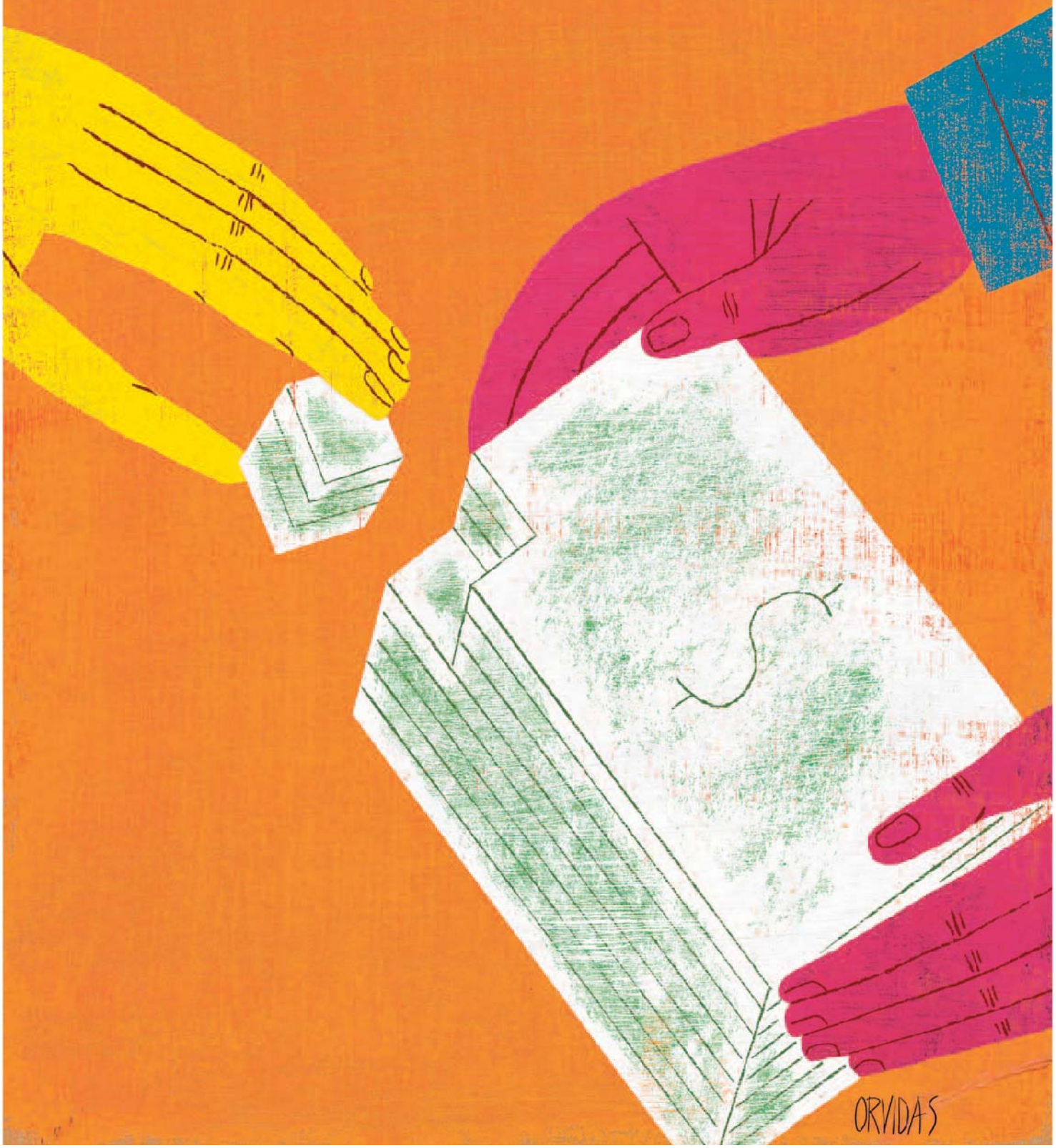
Your company has received word from the head of one of your business divisions that a former customer is alleging your company supplied millions of dollars of defective product and the former customer now wants its money back. Although you have been assured that the product met all industry standards and was manufactured properly, you, as in-house counsel, are now faced with a myriad of questions. Does the suit have merit? Is settlement a viable option, or should the case be vigorously defended?

Apart from those purely legal considerations, you also must help determine whether the company is required to recognize the potential loss contingency in the financial statements and disclose the existence of the potential suit to shareholders. How you go about making that decision is often a convoluted task, and one that must be undertaken in coordination with the accounting and financial department of your company. If you reach the wrong decision, your company could be required to restate its financial statements, and perhaps face shareholder litigation, SEC enforcement action, or criminal charges.

Before you start digging out your resume, though, take heart. The good news is that there are standards governing what to do in the case of loss contingencies; the bad news is that the standards are less than straightforward. This article will help you gain a firm understanding of the basics of the pertinent rules, and will enhance your understanding by applying those principles to several hypotheticals. By examining the most difficult accounting and financial scenarios, we will provide you practical solutions to those issues, so you will know when—and how—to set a reserve.

BY PETER J. BRENNAN, CHRIS HOLMES, AND BILL PHELAN

This article is drawn from one of ACC's most popular webcasts, "When to Set Reserves," originally offered in June 2003, and moderated by Kathie S. Lee, Litigation Committee Vice Chair. *The authors gratefully acknowledge the assistance of Mary Murphy in transforming the webcast into an article, and for the additional research she provided.*



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Bill Phelan is a Certified Public Accountant with twenty years of experience obtained practicing in both the Corporate Reporting and Public Accounting disciplines. Currently, as the Assistant Controller for Sears, Roebuck and Co., Bill oversees all accounting activities for Sears businesses. He can be reached at bphelan@sears.com.

LOSS CONTINGENCIES: WHAT EXACTLY ARE THEY?

A loss contingency is a loss (i.e., the impairment of an asset or the incurrence of a liability) arising from a past event, the amount of which, if any, will be confirmed by a future event that is not within the company's control.[1] Examples of loss contingencies include, but are not limited to, the threat of or pending lawsuits against the corporation, or its officers if they have been indemnified by the company.[2] Such a contingency can, in certain cases, obligate the corporation to record a reserve in anticipation of a judgment against the corporation or a settlement, or perhaps disclose the existence of the contingency in its financial statements. In such circumstances, it is essential that members of the in-house counsel and accounting staff work together to assess the corporation's obligations and evaluate what if any disclosure must be made, and the amount, if any, of the loss contingency that must be recognized.[3]

The uncertainty surrounding the reporting and disclosure obligations is due in large part to the standards established by the Financial Accounting Standards Board (FASB) that require the exercise of judgment in applying the standards' basic principles. In particular, FAS 5, which establishes standards for financial accounting and reporting for loss contingencies, dictates in paragraph eight that a loss contingency must be recognized as a charge to income if both of the following standards are met:

a. Information available prior to issuance of the financial statement indicates that it is *probable* that an asset had been impaired or a liability had been incurred at the date of the financial statements. It is implicit in this condition that it must be *probable* that one or more future events will occur confirming the fact of the loss; and
b. The amount of loss can be *reasonably estimated*.[4] (Emphasis added.)

FAS 5 was one of the initial standards adopted (in March 1975) by the FASB. While the passage of time has seen the adoption of over 140 additional standards, there has been little modification to the basic principle of this particular rule—that a loss contingency must be recognized as an expense if the loss is probable and the amount can be estimated.

The first of those two conditions—the probability of the loss—is often difficult to assess because the threshold for recognition is not established in terms of numerical probability.

FAS 5 recognizes a range of probabilities that such a future event will occur and uses the terms probable, reasonably possible, and remote to identify the three areas within that range:

- *Probable*: The future event or events are likely to occur;
- *Reasonably possible*: The chance of the future event or events occurring is more than remote, but less than likely; or
- *Remote*: The chance of the future event or events occurring is slight.

This classification is significant, as it determines the company's obligation to make an accrual and/or a disclosure, as discussed below (*see also* "What the Future Holds . . . and How to Account for It," p. 34).

Accrual yes, disclosure. . .perhaps? Accrual no, disclosure . . . maybe?

The initial challenge for in-house counsel and accounting is to accurately assess whether the accrual must be made at all. If an accrual is made,

a disclosure of the nature of the accrual, and in some circumstances the amount accrued, must be set forth in the financial statements if required in order to prevent the statement from being misleading.[5] However, even if in-house counsel and accounting arrive at a consensus that no accrual must be made because the two conditions in paragraph eight have not been satisfied, the corporation may still be required to make a disclosure of the contingency if it is determined to be reasonably possible.[6] In such a case, a corporation must "indicate the nature of the contingency and shall give an estimate of the possible loss or range of loss or state that such an estimate cannot be made."[7]

There are exceptions to this rule, however. A corporation would not always be required to disclose a loss contingency where the claim is unasserted, such as where the potential claimant has not demonstrated an awareness of an entitlement to a claim. If, however, it is probable that a claim will be asserted, and there is a reasonable possibility that the claimant will prevail on such claim,[8] then a disclosure is mandated.

Rolling the Dice

Correctly determining the likelihood of a future event that will resolve a loss contingency under these standards is no simple task, as evidenced by the lengthy appendix to FAS 5 that contains examples of applications of the conditions for accrual of loss contingencies and disclosure requirements. The statement is careful to note that "no set of examples can encompass all possible contingencies or circumstances," and goes on to warn that "accrual and disclosure of loss contingencies should be based on an evaluation of the facts in each particular case."[9]

Nevertheless, FAS 5 provides factors to be considered in determining the required accrual and/or disclosure where there is pending or threatened litigation. They are:

a. the period in which the underlying cause (i.e. the cause of action) of the pending or threatened litigation or of the actual or possible claim or assessment occurred;
b. the degree of probability of an unfavorable outcome; or

What the Future Holds . . . and How to Account for It

A future event confirming the amount a loss contingency is reasonably possible, the statement provides, when "the chance of the future event or events occurring is more than remote but less than likely." On the other hand, such a chance is remote when "the chance of the future event or events occurring is slight." If the loss contingency is determined to be probable, the loss should be recognized, provided it can be reasonably estimated. The chart below sums it up:

Likelihood of Event?	Reasonably Estimable?	Action?
Probable	Yes	Accrue
Probable	No	Disclose
Reasonably possible	Either	Disclose
Remote	N/A	None

c. the ability to make a reasonable estimate of the amount of the loss.[10]

Timing Is Everything

The statement's rule that a corporation must make an accrual only if it had information, prior to the issuance of the financial statements, that indicated that it was probable that a loss had been incurred as of the date of the financial statements seems very straightforward. Thus, an event or condition which occurs after the date of the financial statements but before the statements are issued, and gives rise to a new loss contingency, would not require an accrual; however, it still may require disclosure. For example, a major industrial accident that occurs shortly after the end of the year may require disclosure, but its effects would not be recognized in the annual financial statements of the previous year.

If, however, a corporation—after the date of the financial statements but before the statements are issued—becomes aware of a claim based on an event that occurred on or before the date of the financial statements, accrual might be required. Two conditions in paragraph eight, though, must be met before accrual is required in this circumstance—the likelihood of the future event is probable, and the amount of loss can be reasonably estimated.[11]

In assessing when to set a reserve for an event that occurred before the date of the financial statements, in-house counsel and accounting must work together to determine if the future event—such as a judgment against the company or a settlement—is probable. In making this evaluation, FAS 5 directs that the following factors should be considered:

a. the nature of the litigation, claim or assessment,
b. the progress of the case (including progress after the date of the financial statements but before those statements are issued),
c. the opinions or views of legal counsel and other advisers,[12]
d. the experience of the enterprise in similar cases,
e. the experience of other enterprises,
f. any decision of the enterprise's management as to how the enterprise intends to respond to the lawsuit, claim or assessment (for example, a decision to contest the case vigorously or a decision to seek an out-of-court settlement).[13]

If a lawsuit or claim is filed before the financial statements are issued, it is not an automatic conclusion that an accrual must be recorded. Rather, only if the likelihood of an unfavorable outcome is probable must a loss be recognized as of the balance sheet date. If, after reviewing all relevant facts, you determine that it is reasonably possible but not probable that the claimant will prevail, the statement provides that no accrual need be made. Similarly, no accrual would be required if the amount of loss that could be incurred from the lawsuit or claim cannot be reasonably estimated. In both cases, however, you would still be required to make a disclosure in the financial statement.[14]

IN OTHER CASES WHERE THE CORPORATION KNOWS OF A POTENTIAL CLAIM THAT COULD BE MADE AGAINST IT BUT THERE IS NO EVIDENCE THAT THE CLAIMANT EITHER KNOWS OF THE RIGHT OF ACTION OR INTENDS TO FILE SUCH A CLAIM, YOU MUST DETERMINE IF THE ASSERTION OF THE CLAIM IS PROBABLE.

Claims Down the Pike: Out of Sight, Out of Mind?

If the claim has not yet been filed, you cannot sit tight and hope that it doesn't materialize. Instead, you must determine how likely it is that a suit will be filed, as well as the possibility that the plaintiff will succeed on the claim. Events such as a catastrophe, an accident, or the initiation of a governmental investigation require the evaluation of the possibility of subsequent private suits for redress against the enterprise.[15] In such cases, the probability of a claim being asserted and the likelihood of success must be evaluated on a case-by-case basis.[16] In other cases where the corporation knows of a potential claim that could be made against it but there is no evidence that the claimant either knows of the right of action or intends to file such a claim, you must determine if the assertion of the claim is probable. If it is not, then no accrual or disclosure would be required.[17]

If, however, you determine that it is probable that a claim will eventually be asserted, you must then evaluate the likelihood that the claimant will succeed on

that claim. If your assessment is that an unfavorable outcome against the entity is probable and you determine that the amount of loss can be reasonably estimated,[18] then you must accrue a loss. [19] It is important to recognize that both findings must be made in order for an accrual to be required. Thus, even if you determine that it is likely that the claimant will prevail in the suit or claim against the company, you are under no obligation to make an accrual if you cannot reasonably estimate the amount of the loss.[20] Don't forget the disclosure requirements in such a case, though, as you would still be required to disclose the existence of the claim or lawsuit where the unfavorable outcome can be characterized as probable, and you would be required to disclose that the amount of the probable loss could not be reasonably estimated.[21]

THE CORPORATION MUST ALSO DISCLOSE THE POTENTIAL LIABILITY ON THE OTHER ASPECT OF THE LITIGATION "IF THERE IS A REASONABLE POSSIBILITY THAT ADDITIONAL TAXES WILL BE PAID."

More than Mere Guesswork

FAS 5 requires that the amount of loss be reasonably estimable for an accrual to be required. This requirement "is intended to prevent accrual in the financial statements of amounts so uncertain as to impair the integrity of those statements."[22]

In some cases, however, it may be difficult to determine the exact range of probable loss. For example, an unfavorable judgment in a case on one count could require the corporation to pay a specified sum in taxes, but an unfavorable judgment on other counts that "might be open to considerable interpretation" could result in additional liability. In such a case, the statement directs that accrual of the loss that is likely to be assessed for the specified tax sum is required if that is considered a reasonable estimate of the loss. However, the corporation must also disclose the potential liability on the other aspect of the litigation "if there is a reasonable possibility that additional taxes will be paid."[23]

In 1976, the FASB issued an interpretation of FAS 5 that was to be used in determining the reasonably estimable amount of a probable loss. FASB Interpretation No. 14[24] (FIN 14) indicates that a company should make its best estimate of what that amount is; however, to the extent that there is a range and no amount within the range is a better estimate, the company should accrue the low end or the minimum amount in the range, and then disclose the additional amount that would fall into the reasonably possible category.

When evaluating the potential loss, companies diverge on when to recognize the cost of a legal defense. Since the accounting rules don't address this issue specifically, there are two acceptable accounting policy elections. Many companies expense the costs of defending a legal claim as incurred. Others, however, accrue the costs of their legal defense under the probable and reasonably estimable model in paragraph eight of FAS 5. In either case, the SEC has indicated through an Emerging Issues Task Force announcement that it would expect companies to disclose the costs of a legal defense, if material, and to establish a policy and apply it consistently.

Beyond Disagreement Over Likely Outcomes

Setting a reserve was never an easy task. In the aftermath of Sarbanes-Oxley, however, the stakes are even higher. The impact of the new reporting-up-the-ladder requirements on the reserve-setting process is a complex topic, and indeed could be an article unto itself. You can bone up on Sarbanes-Oxley with these ACC resources:

- Michael Cahn and Michael Scanlon, "Tools You Can Use: Helping the Audit Committee Manage its Relationship with the Outside Auditor," *ACC Docket* vol. 22, no. 5 (May 2004), available on ACCA Online℠ at *http://www.acca.com/protected/pubs/docket/may04/tools.pdf*.
- "In-house Counsel Standards Under Sarbanes-Oxley," an ACC InfoPAK℠, available on ACCA Online℠ at *http://www.acca.com/protected/infopaks/sarbanes.pdf*.

PUTTING THE PRINCIPLES INTO PLAY

One of the greatest challenges in determining whether to set a reserve is defining the probability of loss. While the accounting standard provides general guidance, in application there is no bright-line rule for determining what is probable, reasonably possible, or remote. While, for example, the standard as written defines remote as slight, in practice the estimates from counsel are couched in terms of how likely it is that the entity will lose.

Speaking the Same Language, Reaching a Common Ground

Sometimes those calls are easy, such as when it is apparent that the likelihood of a judgment against the corporation is remote. The more problematic areas, however, arise where the possibility falls in the reasonably possible or probable spectrum. In those cases, you as in-house counsel must decide what you really think about the case, and be able to couch it in terms that will help the financial department make the right accounting and reporting decision.

But be forewarned. Expect pressure from accounting and financial officers to determine the category in which the risk falls. As the case develops and the potential liability increases, in-house counsel assumes increased responsibility to evaluate a case and fit the risk into one of the FAS 5 categories so that the company will know what if any reporting and/or disclosure obligations it has. Typically, in-house counsel's estimates of loss probability are in terms of percentages, so the challenge for financial players is to interpret whether those percentages are probable, reasonably possible, or remote for reporting and disclosure purposes. In short, in-house counsel and the finance department must learn to speak the same language so that a consistent and accurate accounting determination can be made.

RESERVE OR NO RESERVE: YOU BE THE JUDGE

Having tackled the basics, it's time to test your knowledge with some hypothetical scenarios that explore the application of the statement in different situations.

Scenario Number One:

Your company is named as a defendant in a lawsuit and you conclude that on balance you will lose $1 million if a judgment is obtained by plaintiff. However, you also think that there's only a 30 percent chance of losing. In such a case, your company's reserve should be:

A. $300,000
B. Zero
C. $1 million
D. None of the above.

Answer: B. Zero *or* D. None of the Above.

The answer to this question is governed by one of the factors discussed in FAS 5 for determining whether a loss accrual is appropriate when a lawsuit is filed or threatened.[24] That factor—whether the case will be vigorously defended or whether settlement is considered—determines whether or not an accrual should be made. Even though there is a relatively small (30 percent) likelihood that the corporation will lose in the above scenario, if settlement negotiations are undertaken or anticipated and you are likely to settle, then the corporation must accrue the amount of the settlement, presumably something less than the full amount of the claim. Thus, the answer would be "D. None of the above."

However, if you determine that the case is going to be contested, then the figure of a 30 percent likelihood of losing would, in most reasonable people's opinions, not amount to a probable risk that would require the entity to record a loss contingency. Thus, in that case, no amount would need to be accrued, and the answer would be "B. Zero."

But the inquiry is not over, for the entity must then determine whether the 30 percent, although not a probable risk of loss, nevertheless represents a reasonably possible risk that the company will pay out a judgment somewhere in the range of $1 million. If that amount is material to the financial statements, FAS 5 requires that the contingency be disclosed.

In addition to disclosure requirements contained in FAS 5, public companies must also disclose significant legal proceedings under SEC Regulation S-K Item 103. That regulation requires disclosure in both the annual report on Form 10-K and the quarterly report on Form 10-Q of material legal proceed-

ings, unless the claim(s) are less than 10 percent of the company's current assets.[25] Thus, in scenario number one, if the company had current assets of less than $10 million, S-K Item 103 may require the company to describe the pending legal proceedings, unless it is ordinary, routine litigation incidental to the business—even though it represents only a 30 percent likelihood of loss.

Scenario Number Two:

Your company is named as a defendant in a lawsuit and you conclude that on balance you will lose $1 million if a judgment is obtained by plaintiff. You also think that there's a 75 percent chance of losing. In such a case, your company's reserve should be:

A. Zero
B. $750,000
C. $1 million
D. None of the above.

Answer: C. $1 million.

In a case where the likelihood exceeds 50 percent (i.e., 50.1 percent), most would conclude that the risk of loss is "more likely than not." Whether the risk ultimately falls into the probable range is in large part dependent upon whether the company has a policy establishing a standard that any risk greater than *x percent* is probable for reporting and disclosure purposes. This will vary from company to company. The figure of a 75 percent likelihood of losing would, in most reasonable people's opinions, represent a probable risk that would require the entity to record a loss contingency. Thus, their answer would be C. $1 million.

However, there is no clear numerical demarcation between "reasonably possible" and "probable." For example, some might conclude that a 65% likelihood is "probable" and record an accrual, while others might conclude that it is only "reasonably possible"—somewhere between remote and probable—and conclude that while no accrual is required, disclosure considerations would apply.

This highlights one of the most important points in applying what is essentially a subjective accounting judgment: *establish a company policy and apply it in a consistent fashion over time.*

The key is to develop a policy and document its application, so that if your decision not to make an accrual is ever challenged, you can demonstrate that you have applied a reasoned policy consistently over time. Recent events have seen companies finding themselves at the center of SEC investigations because they have been too opportunistic in setting and maintaining reserves. It is best to avoid establishing a track record that in a good year a company accrues a loss at 65 percent, while in a tough quarter it applies an 80 percent threshold for determining whether or not to accrue a loss. Consistency is the key.

Scenario Number Three:

Your company is named as a defendant in a lawsuit and you conclude that on balance you will lose

From this point on . . .
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$1 million if a judgment is obtained against the company. You are unable to evaluate your company's chance of success if the case goes to trial. In such a case, your company's reserve should be:

A. Zero
B. $1 million
C. $500,000
D. None of the above

Answer: A. Zero.

If you find yourself in the predicament of not being able to evaluate the company's chance of success in litigation—which generally happens in the early stages of the litigation—you should expect to experience some serious pressure from accounting and financial officers when you declare that you simply can't make a call on this one. In such a case, your experienced judgment as a litigator takes on enhanced significance because if you can't make a call on the chance of success, it follows that you can't set a reserve on it either. In that case, the company would set no reserve, and the answer would be A. Zero.

From a controller's standpoint, however, in-house counsel's inability to assess such a case does not resolve the company's accounting and disclosure requirements, and counsel should expect to be asked to conclude in which category the legal exposure falls: remote, reasonably possible, or probable.

What is the threshold at which you are deemed to have enough information to be able to make an evaluation? The answer to that question will vary from case to case, and will require you to re-evaluate the litigation as it evolves. Facts change, testimony changes, and documents reveal information not previously known to the parties; thus, a case initially thought to be troublesome turns out not to be much of an issue at all. Sometimes, however, the reverse is true; that nuisance case that came in the door has taken on a life of its own, and at second glance promises to be a nightmare.

This situation will engender significant discussion between financial and legal departments, as they work together to evaluate the likelihood of an unfavorable outcome and explore where the case falls—more towards probable (and thus requiring an accrual) or more towards remote (for which no accrual or disclosure would be necessary). Such a case highlights the importance of establishing a company policy that defines the ranges of risks and eliminates speculation in complying with accrual and disclosure regulations.

As the defense strategy develops, your ability to make an evaluation increases. If the case involves allegations about your company's conduct, your own investigation might yield enough facts to allow you to make an evaluation rather quickly. Sometimes, however, if the facts are beyond your control, you may have to wait until discovery develops to have a basis to make an evaluation. The challenge is clear communication with accounting as you develop the necessary information to make an informed judgment.

No Accrual, but What About Disclosure?

As a practical matter, however, if you are unable to evaluate the chances of success, then by necessity you cannot say that the case falls into the remote

Giving a Practical Assessment

Among all the lawyers that service a company, in-house counsel play a very special role in the reserving process.

In general, opinions of outside counsel will follow the procedures set forth in the ABA Statement of Policy regarding Lawyers' Responses to Auditors' Requests for Information. Those responses often will not be very satisfying to those in the financial reporting organization of a company, because the responses frequently will say that the litigation is ongoing and that the outcome is difficult to predict. That is where in-house counsel become critical.

The in-house lawyer needs to give the financial reporting organization a very practical assessment of what he or she thinks is going to happen with a particular piece of litigation. For example, suppose a company gets hit with a jury verdict for compensatory damages and substantial punitive damages. The in-house lawyer will need to make a judgment about whether some, all, or none of the compensatory and punitive damages will be upheld either by the trial court or on appeal. Armed with a practical assessment of the likelihood of getting relief from that jury verdict, a good financial reporting organization will then be able to use that assessment to make the required reserving and disclosure opinions.

If the numbers are very large on any particular piece of litigation, in-house counsel can expect to be asked to put his or her bottom line assessment into writing.

category—which is significant as it is the sole category that excuses companies from making a disclosure.

In a case where you cannot evaluate the chance of success, most practitioners would agree that the case most likely falls into the reasonably possible category, and would thus have to be disclosed under FAS 5. Moreover, under S-K Item 103, if the case is material to the organization as the possible loss represents more than 10 percent of the company's current assets, it must be disclosed.

In practice, many public companies have some sort of legal proceedings disclosure in their financial statements that puts the financial statement user on notice that as a normal course of business, the company is subject to suit on occasion and such cases are being worked or are in various stages of evolution. If none of those cases are thought to be very significant or to expose the company to serious potential liability, many companies would typically assert that the resolution of legal contingencies would not be expected to have a material effect on the financial statements. A company should carefully assess, however, whether it is reasonably possible that an unfavorable outcome could materially affect its financial position (including compliance with loan covenants), operations, or cash flows (including liquidity) in assessing whether a general disclosure of this nature is appropriate.

Scenario Number Four:

Your company is named as a defendant in a lawsuit and you think that there's a 75 percent chance of losing, but are unable to estimate the amount of the loss (it could fall anywhere between zero and $1 million). In such a case, your company's reserve should be:

A. Zero
B. $750,000
C. $1 million
D. None of the above

Answer: A. Zero.

The first task at hand is determining whether the likelihood of losing falls into the probable or reasonably possible category. Once you determine that the percentage puts the case into the probable category for which an accrual would be required, you must then determine the appropriate dollar amount of that reserve. If you don't really have an idea, but know that the loss could be anywhere between zero and $1 million, what do you do?

FIN 14 requires that if you have a claim or loss that is probable and you have a range of outcomes, you must record the best estimate in that range. If there is no best estimate in that range, you are required to record only the low end of the range. In either case, FAS 5 also requires disclosure of the amount of any additional reasonably possible exposure above the amount accrued.

In this scenario, then, if our range is zero to $1 million, you would be required to only accrue the low end of that range—zero—in this case. However, there would still be disclosure requirements associated with this situation, so you would have to disclose the case and the range of the reasonably possible loss.

This very scenario occurs frequently in real life. There are small cases that stem from an event where you know that the company is at fault. Thus, while it is probable that a judgment will be assessed against the company if a claim is brought, the value of a potential settlement or judgment will be minimal. However, it is also possible that while the initial assessment yields a particularly minimal estimation, it may be uncertain whether the case will escalate in size. Examples of such cases include those that begin as an individual case and are elevated to a nationwide class action suit, or cases that have the potential to yield a significant punitive award. Thus, while you may be certain that the outcome will not be favorable for the corporation, the magnitude of the loss is very difficult to estimate. The role of in-house counsel in such a situation is to explain your view of the case and allow accounting to make a judgment about the appropriate accounting treatment.

While FAS 5 would not require an accrual if the loss is not capable of estimation,[26] it would still require a disclosure if the estimate of loss is either probable at least reasonably possible. Thus, you would be required to disclose the nature of the claim as well as the fact that the company is unable to determine the amount of the loss. S-K Item 103 would also require a disclosure if the claim is material to the company.

ANSWERS TO THOSE THORNY QUESTIONS

As helpful as these scenarios are, there are still some particular issues that are worth exploring. The following questions represent common inquiries

from in-house counsel regarding reporting and disclosure requirements.

1. Settlement offers: Can they come back to haunt you?

In general, no. Companies may make settlement offers as business decisions because it is possible to settle for less than the anticipated cost of the litigation. Such cases, as well as those where a company makes an offer to dispose of a meritless or nuisance case, evidence that there are incentives to settling a case that have nothing to do with the probability of loss for the company based on the merits of the case if litigated.

Disclose, But Don't Tip Your Hand to Plaintiffs

The following disclosures offer a guide to meeting disclosure requirements without broadcasting your valuation to plaintiffs' counsel:

For cases in which no reserve is established:

On July 17, 2004, an action was filed in U.S. District Court against the Company by a former customer which purchased product manufactured by the Company in 2002 and 2003. The complaint alleges that the product, as manufactured, was defective and as such the plaintiff is seeking approximately $5 million for full refund of the purchase price, plus treble damages. *The Company believes that this claim lacks merit and intends to defend itself vigorously against it.*

Alternate ending if a reserve has been established:

The Company believes that the allegation is without merit and is preparing to defend itself vigorously. Based on a review of the current facts and circumstances with counsel, management has provided for what is believed to be a reasonable estimate of the loss exposure for this matter. While acknowledging the uncertainties of litigation, management believes that the ultimate outcome of this matter will not have a material effect on its earnings, cash flows, or financial position.

Alternate ending if reasonable estimate of the likely loss cannot be established and outcome may be material:

As of this date the Company is still in the process of reviewing the plaintiff's allegation and as such no provision has been recorded for it. Should the Company ultimately be determined to be liable for this matter, the Company could be subject to a loss of as much as $20 million.

However, in the accrual arena, the treatment of settlement offers reveals a different mindset between legal and accounting departments. In a lawyer's eyes, a settlement offer may be tactical and may not reflect a company's belief that the loss is probable or estimable. Accounting may have a different view, however, believing that a company would not have made an offer unless in-house counsel truly believed that there was a chance the company was going to lose. As a result, you need compelling reasons to overcome the presumption that a settlement offer has established the low end of a range of probable loss that should be accrued. That presumption would be difficult to overcome if the settlement offer remains outstanding at the date the financial statements are issued.

2. Are disclosures about loss contingencies a wise idea?

The obligation of a company to disclose the existence of the suit and related exposure in the financial statements when the loss is reasonably possible poses some unique questions for in-house counsel. There is often a tension between financial reporting and defending a company's financial interests.

This tension is the product of a perception that public disclosures compromise a company's position in litigation. Thus, the natural tendency is to be reluctant to include specific disclosures in the company's financial statements or SEC filings concerning specific pieces of litigation, believing that doing so is an acknowledgment of liability.

In reality, however, that concern is misplaced. Still, it is a challenge to craft a disclosure in a way that adheres to the disclosure requirements while at the same time not tipping your hand and alerting the plaintiff to the company's valuation of the case.

3. Do financial statements tip your hand in litigation matters?

This question focuses on whether the fact that a company has recorded a reserve can be discovered by a competitor or plaintiff and used as an admission of liability. The short answer is no, for two reasons.

One, the reserve is "baked into" all of the financial statements so it would be difficult for a competitor or party to discern the figure from the basic financial statements. Typically, financial statements contain a great deal of financial information, not just pertaining to litigation reserves. It would be difficult for a

reader to discern the specific sum set aside for a particular piece of litigation because the litigation reserve would not be a specific line item in the financial statements. Rather than being called out on a case-by-case basis, such sums would be included with other liabilities and reserves.

While the SEC had considered adopting rules that would have significantly expanded the requirement for supplemental information in SEC filings, requiring an analysis of changes in liability accounts (including liabilities related to litigation and other loss contingencies), the uproar over the potential competitive damage that could be achieved through the disclosure of such information caused the SEC to abandon that proposal.

Secondly, disclosure about the nature and amount of a contingency for which the company has accrued a loss is required only as needed to keep the financial statements from being misleading. Thus, in most cases, disclosure of the specific amount reserved is not required in the financial statements. More frequently, the SEC's rules on MD&A (Management's Discussion and Analysis of Financial Condition and Results of Operations, Regulation S-K Item 303) will require a company to disclose that an accrual for a loss contingency (or the adjustment of reversal of a previous accrual) had a material effect on reported results. Consequently, in most cases the risk that accruing a legal reserve could be used successfully against a company is diminished.

4. Should all potential and existing cases be treated the same for FAS 5 purposes?

Theoretically, the answer is yes; FAS 5 applies equally to all loss contingencies. However, in practice the materiality of the contingency affects the amount of analysis to be performed. For example, companies can establish internal policies and practices regarding

claims that are not material, either individually or in the aggregate. Similarly, a company may establish a policy as to the minimum amount of a reserve that it would record. This is because accounting rules do not have to be applied to items that are not material.[27]

Furthermore, what some companies have done in practice is to stratify cases into two populations: one being cases that individually are not material, and the other for material cases where the threshold is material or for a significant amount of money (e.g., $1 million.) For the smaller cases, companies evaluate what the historical settlement rate has been for such cases and then record a figure based upon the number of cases multiplied by the average settlement rate for those cases. This prevents the legal and accounting departments from having to expend excessive time conducting a case-by-case analysis of these numerous smaller matters. For the more material cases, an individual analysis as outlined in the FAS 5 rules would be appropriate.

5. How do you account for insurance coverage of claims for which reserves are taken?

The likely amount of insurance coverage for the loss does not play a role in making a determination of the reasonably estimable amount of loss. That is because the SEC staff's position is that there must be separate evaluations of the likelihood of loss to the primary obligor, and then the likelihood of insurance recovery. Although the net impact on income may be minimal, the full loss needs to be recorded as its probable and estimable amount, and then to the extent that the company could substantiate that receipt of an insurance recovery is probable, it should be recorded separately as an asset. It would be inappropriate to offset the receivable for a probable insurance recovery against the accrued loss contingency in the company's balance sheets. These transactions would have to be recorded separately because they involve two different parties: a payment to one party, and a receivable from a different party.

Knowing how and when to set a reserve—and when to make a disclosure—is an important and often intimidating task for in-house counsel. One of the most important tasks is to ensure that the company establishes a realistic policy for evaluating the likelihood of loss contingencies from potential claims and lawsuits, and that the policy is applied consistently over time. A coordinated effort between legal and accounting departments to arrive at realistic estimates and mutual assessments of the consequent accounting and disclosure will go a long way to assuring that the company maintains high quality and transparent financial reporting.

NOTES

1. Statement of Financial Accounting Standards No. 5, Accounting for Contingencies, Financial Accounting Standards Board, March 1975), paragraph 1, p. 4, *www.fasb.org/st/sumary/stsum5.html.*
2. FAS 5, paragraph 4 lists the other examples of loss contingencies.
3. This subject was the topic of a ACCA Conference Call June 2003, entitled "When to Set a Reserve: Now, Never, or Somewhere In-between." The conference call was moderated by Kathie Lee, Vice Chair of the Litigation Committee of ACC. Panel members included Peter Brennan, Chair of the Litigation Committee of the ACC and Associate General Counsel for Litigation with Sears Roebuck and Company, Chris Holmes, a partner at Ernst and Young where he also serves as National Director of SEC Matters, and Bill Phelan, Assistant Controller for Sears, Roebuck and Co.
4. FAS 5 paragraph 8 (a) and (b).
5. Id. at paragraph 9.
6. Id. at paragraph 10.
7. Id.
8. Id.
9. Id. at Appendix A, paragraph 21.
10. Id. at paragraph 33.
11. Id. at paragraph 35.
12. However, the statement makes clear, the inability of legal counsel to render an opinion that the corporation will prevail in the litigation or claim does not mean that the conditions in paragraph 8(a) have been met and that an accrual for loss should be made.
13. Id. at paragraph 36.
14. Id. at paragraph 37.
15. Id. at paragraph 38.
16. Id.
17. Id.
18. Id. at paragraph 8.
19. Id. at paragraph 38.
20. Id.
21. Id.
22. Id. at paragraph 59.
23. Id. at paragraph 39.
24. See footnote 13, infra.
25. SEC Reg. 229.202 Subpart 229.103.
26. FAS 5 paragraph 8(b).
27. However, it is important to remember that materiality must be judged, in both quantitative and qualitative terms, based on the importance that a reasonable investor would place on the matter.

