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Getting the Most Out of Judicial Settlement Conferences

Many courts, including the Northern District of California, offer parties the opportunity to attend a settlement conference with a magistrate judge. In the Northern District's multi-option ADR program, which features an array of different options including mediation and early neutral evaluation, litigants value settlement conferences with magistrate judges. Magistrate judges spend as much as a third to half their time conducting settlement conferences, in addition to handling civil cases on consent of the parties through trial, and other matters. This commitment allows us to spend the time necessary to reach a resolution of your case, whether it takes a few hours or many.

Hon. Elizabeth D. Laporte

With proper advance planning on your part, settlement conferences offer you and your client the valuable opportunity of meeting with a judge and the opposing parties at the courthouse to explore settlement options. Talking about the case with a judge may help satisfy a client's need for its "day in court," or give the client a

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Also in this Issue

E-Discovery Amendments to the Federal Rules of Civil Procedure

The proliferation of electronically stored information in today's world has created an array of new challenges for business litigators. Discovery is now often far more time-consuming and costly than it once was, since electronic information (such as e-mail) — which is unquestionably discoverable — tends to be retained in exponentially greater quantities than hard copy documents and is often stored in formats that make retrieval difficult and costly. Because federal and state discovery rules do not expressly address issues related to electronically stored information, a fair amount of uncertainty exists concerning such issues as the format in which electronically stored information should be produced, whether inaccessible data such as back-up tapes must be searched and/or produced, and the extent to which the cost of producing such information should be shifted to the requesting party. On December 1, 2006, the Federal Rules of Civil Procedure were amended to provide guidance on these issues and hopefully bring order to what can seem like chaos under the previous rules. The amendments (hereinafter, the "Amendments") modify Rules 16, 26, 33, 34, 37 and 45, as well as Form 35, of the Federal Rules of Civil Procedure, which all deal in one way or another with discovery. Lawyers and parties who are involved in federal litigation need to comply with the new rules effective December 1. This article provides a summary of the Amendments and makes some observations about how the new rules might apply in practice.

Tony Schoenberg

"Reasonably Accessible" Electronic Information

The Amendments make explicit what was already established through case law: parties are permitted to

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clearer picture of what pretrial rulings or a trial may really entail. Often, the magistrate judge has presided over similar cases in his or her own courtroom. If the opposing party is refusing to engage in meaningful settlement discussions or is taking an unrealistic approach to settlement, having to explain its position to a judicial officer may have a salutary effect. And, for more cost-conscious cases, the process provides a good alternative to private mediation.

Here are some tips about how to have a successful settlement conference.

Requesting a Settlement Conference

The ADR program in the Northern District of California includes a variety of options: court-sponsored nonbinding arbitration, early neutral evaluation or mediation, to private mediation or to a settlement conference with a magistrate judge. ADR L.R. 3-4. You are required to discuss this issue in advance with your opposing counsel. If you cannot agree or both want an early settlement conference, you must participate in a telephone call with the court's ADR staff about the best option for your case; the staff will then make a recommendation to the trial judge. ADR L.R. 3-5(d)-(f).

At the initial case management conference, be prepared to explain your choice of an ADR method. ADR L.R. 3-5(g). Usually you will be ordered to participate in one of the other ADR options before being referred to a settlement conference with a magistrate judge. If you think your case would especially benefit from a settlement conference in lieu of any other type of ADR, however, let the trial judge know.

Be prepared to address with the trial judge the best window of time to hold a settlement conference. Ideally, you and opposing counsel will have discussed and agreed on timing. Sometimes you may persuade the judge that a limited amount of targeted discovery needs to occur first, or perhaps a threshold motion needs to be decided; sometimes the judge will conclude that the conference should be earlier.

If your case is in San Francisco or Oakland, it may be assigned either randomly to one of the magistrate judges in that venue, or referred by the trial judge to a particular magistrate judge. If your case is in San Jose, it is ordinarily assigned at the time the case is filed to a specific magistrate judge for both settlement and discovery. All the magistrate judges are experienced with the full range of cases. If you believe that a particular magistrate judge would be most suited to handling your case, such as when you've participated in a prior settlement conference with that judge involving similar issues or parties, try to reach agreement with opposing counsel and make the request to the trial judge.

The Settlement Conference Order

The assigned magistrate judge will send out an order setting your settlement conference. That order or the judge's standing order for settlement conferences posted on the Court's website sets out steps that you need to take leading up to the conference. Unless the trial judge orders a specific time frame, settlement conferences are usually scheduled at least 60-90 days from the date of the referral. If you need a settlement conference sooner, the court will endeavor to expedite your conference.

Who Should Attend

Ensuring that the right people from both sides of the dispute attend the conference is crucial to its success. Indeed, one advantage of a judicial settlement conference is that the court can order that the people necessary for effective settlement negotiations participate. Settlement conference orders always require lead trial counsel to attend in person. Attendance of client and insurance representatives with full authority to settle is also required. Selecting the appropriate client representative(s) is critical. Full authority means much more than just the appearance at the courthouse of a warm body connected to a cell phone. To the contrary, it generally means the ability to negotiate and settle without consulting someone who is not present, unless the decision must be approved by a governing body such as a Board of Directors. In that case, usually a high level executive whose recommendation to the Board is likely to be followed should attend. In general, if a representative comes with a cap on the amount that can be offered (or accepted) in settlement, that does not constitute full authority. The client and insurance representatives must participate in person unless excused by the court upon written request and made available by telephone. Attendance is rarely excused, because experience shows that participation in person almost always makes for a more productive conference. A serious, unanticipated conflict such as a health emergency may lead the settlement judge to excuse personal attendance of the client or insurance representative; merely having to travel, even from afar, almost never will.

Do your homework on who should attend. Also, talk to opposing counsel about who should appear on behalf of their client. It is important to have sufficiently high level decision-makers present, and to avoid the situation where one side sends a top executive and the other side does not. For example, if one side sends a key executive only to be met on the other side by a low level manager or in house counsel, the prospects for meaningful settlement discussions are likely to be damaged. To explore the possibility of a business solution, the representative(s) attending the conference must be knowledgeable about the relevant issues confronting the business now and in the foreseeable future which a settlement may affect. For example, in a complex business dispute, a business may need to send a decision-maker not only from the department who is footing the bill for the litigation, but also from the department whose business might be involved in any creative business solution with the opposing party, if they differ. In "bet the company" cases, top management should attend. In appropriate cases it may also be advisable to bring experts to the conference.

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Not only will you be wasting a valuable opportunity if the right people are not present at the settlement conference, but you will have to explain why not to a settlement judge. And you will probably have to return with the missing parties to another settlement conference at a time not of their choosing. In egregious cases, you may face an order to show cause why sanctions should not be imposed. Most importantly, you will be wasting a valuable opportunity to resolve the case.

Take advantage of the fact that the settlement process permits, even encourages, *ex parte* contacts with the assigned magistrate judge. For example, if you have any concern that the other side is not bringing the right people, talk the issue over with your opponent and, if the issue is not resolved, write to or call the assigned magistrate judge's chambers before the settlement conference.

Preparing the Case for Settlement

The settlement conference presents an excellent opportunity for you to get your client's attention focused on the case and engaged in the settlement process. Do not wait until the last minute to prepare your client. Explain the judge's role as a neutral who can help facilitate discussions with the other side and, if appropriate, serve as a sounding board as to how the trial judge or juries in the district may view the case. Alert your client to the possibility that the judge may have questions for the client, depending on the nature of the dispute and the possible bases for settlement. For example, the judge may inquire about what investigation the company has conducted, the significance of the litigation to the business now and in the foreseeable future, damage calculations or past settlement efforts. Also, explain that the settlement conference will continue for as long as the judge believes is appropriate, so the client should not schedule an early flight back.

Explore with your client whether settlement is not merely a zero sum game but offers the opportunity for a creative business solution. Make sure the right people at the company are in the loop and do the advance work needed to make the settlement conference productive. Also, make sure that all avenues for insurance contributions have been explored and that the insurance representatives will attend. Involve coverage counsel if necessary. If the carrier indicates an unwillingness to attend, you should alert the settlement judge.

In a case with a protective order under which key information relevant to settlement, such as financial information critical to assessing damages, has been restricted to "attorneys eyes only," discuss with the client whether certain information can be revealed to the opposing party to facilitate settlement. And discuss with opposing counsel what information you would like to be able to share with your client for purposes of settlement.

To make the settlement conference productive, you also may need to gather basic information, either about

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The Role of Private Litigation in Worldwide Antitrust Enforcement

In 2004, the European Commission ("EC" or "Commission") examined the role of private enforcement in cases of EC competition rules infringement. The Commission concluded that private enforcement of the EC competition rules lagged dramatically behind public enforcement, negatively impacting compliance incentives and ultimately the efficiency of the EC competition rules. In December 2005, the Commission produced a Green Paper ("Paper") identifying obstacles to competition law enforcement. The purpose was to determine how to facilitate exercising the right to claim damages for breach of competition law. The Paper addressed the key issues and outlined chief obstacles to a more effective system of damages actions for breach of EC antitrust rules. The Commission concluded that enhanced private enforcement would improve deterrence and incentivize companies to engage in competitive business agreements.

Bruce Simon

This article outlines the EC's findings. It concludes that the alliance between public and private enforcement has been an effective deterrent in combating anticompetitive behavior, and addresses how public agencies and private litigants could improve their complementary antitrust enforcement roles.

Extending Discovery Rights to Private Enforcers. The Commission recognized that antitrust cases require extensive investigation of a broad set of facts, that relevant evidence is often not easily available, and that in many circumstances such evidence is held by the party committing the anticompetitive behavior. Obtaining evidence to prove an alleged antitrust violation constitutes one of the major obstacles to damages actions for private litigants. That is particularly the case when there is no prior decision from a competition authority establishing the violation. Moreover, the proof of the actual damage and the quantification of damage can be very difficult in competition cases.

Finding that access by claimants to such evidence is the key to effective damages claims led the Paper to conclude that a system of discovery more analogous to the U.S. system, with increased obligations to produce documents or provide access to evidence, should be introduced.

Discovery Obligations Regarding Documents Held by a Competition Authority. The Commission investigated what defendants' disclosure obligations should be to private litigants following disclosure to competition authori-

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Worldwide Antitrust Enforcement

ties. U.S. plaintiffs frequently seek and obtain disclosure of materials provided to competition authorities upon the private lawsuit's initiation. In comparison, EC private litigant access to discovery is currently much more limited. The Paper underscored that in cases in which the EC, or a competition authority of a member state, undertakes an investigation, the enforcer likely possesses relevant evidence which could be important for a claimant in follow-on cases. Access to those materials in subsequent civil actions could be helpful in proving damages claims and limiting the administrative burden on competition authorities.

The Role of a Collective Consumer Action. The Paper recognized that given the costs of litigation and the low value of individual claims, it is unlikely that individual consumers would bring a damages action against the infringer. Nevertheless, the Paper recognized the value in fostering the recovery of losses suffered by consumers. In determining how to produce a form of collective consumer redress, the Paper asked two related questions: "Should special procedures be available for bringing collective action actions and protecting consumer interests? If so, how could such procedures be framed?"

In the United States, a group of consumers can seek damages in a representational capacity on behalf of other similarly-situated consumers in a class action. If a goal of the Commission is to ensure that all individuals or entities, regardless of the size of loss, are entitled to redress, then the Commission may find that the American class action system is the most economically appropriate methodology. The Commission may also find that the representative class action will serve as a deterrent against anticompetitive behavior because firms will not be able to assume that their actions result in too small a loss for litigation to ensue.

How to Improve the Coordination Between Private Litigants and Competition Authorities. The Paper recommended an affirmative obligation on any party to the proceedings before a competition authority to produce to a civil litigant all documents previously submitted to the authority, with the exception of leniency applications. Issues relating to disclosure of business secrets and other confidential information as well as rights of the defense would be addressed under the law of the forum.

In answer to whether a claimant's burden of proving the antitrust violation in damages actions should be alleviated in light of parallel enforcement actions, the Paper offered the following options:

- Antitrust violation decisions by competition authorities would bind civil courts or, alternatively, would reverse the burden of proof.
- Findings of a violation would shift or lower the burden of proof in cases of information asymmetry between the claimant and defendant with the aim of redressing that asymmetry. This rule could, to a certain extent, make up for the non-existent or weak disclosure rules available to the claimant.
- Unjustified refusal by a party to turn over evidence could have an influence on the burden of proof, varying between a rebuttable presumption or an irrebuttable presumption of proof and the mere possibility for the court to take that refusal into account when assessing whether the relevant fact has been proven.

Commission's Views on the Advantages of Private Actions for Damages. The Commission summarized the advantages for companies and consumers. Some of the specific advantages for private parties are identified below:

- The victims of illegal anticompetitive behavior are compensated for loss suffered. Damages claims are a particularly important way to privately enforce competition law, as they serve not only the general function of providing for better enforcement of the law in general, but also for the recovery of losses suffered by those who have been the victims of anti-competitive behavior.
- Courts can decide a competition-related point in the context of the resolution of a wider-ranging commercial dispute between the parties.
- Courts are obliged to hear cases brought before them, while an enforcement agency has discretion to decline to prosecute claims.
- Private actions will further develop a culture of competition amongst market participants, including consumers, and raise awareness of the competition rules.
- The Commission and the national competition authorities do not have sufficient resources to deal with all cases of anticompetitive behavior.
- Deterrence against anticompetitive behavior and compliance with the law will increase. In essence, private enforcement of the EC Treaty competition rules in parallel to public enforcement by the Commission and the Member States' national competition authorities should lead to greater enforcement of the EC Treaty competition rules by an increased number of enforcers. This in turn should contribute to the competitiveness of European industry.

The Paper stated that private enforcement should complement public enforcement, emphasizing that private litigation should not be confined to cases already dealt with by the public authorities. The Paper concluded that damages actions could complement public enforcement activities by providing additional financial sanctions against the infringer and by providing compensation for those who have suffered losses.

The EC is trying to determine a way to enhance private enforcement of EC antitrust rules. It should look to the system in the United States for the synergies created by parallel government and private enforcement. In the United States, the alliance between public and private enforcement has been an effective deterrent in combating anticompetitive behavior. This alliance could be strengthened with improved cooperation between private litigants and public enforcement agencies on a worldwide basis.

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the litigation or about creative business resolutions of the case. For example, you may need some basic financial information from your opponent and/or your client to get a handle on the likely range of potential damages that your client is exposed to or could obtain if the case does not settle. Or you may conclude that you need to assess how a key witness will hold up under cross-examination. Sometimes, the necessary information can be obtained informally from your opponent or another source. In other instances, the parties may need to engage in limited formal discovery. Be careful not to insist on more time-consuming and expensive discovery than necessary, however, or any benefit to the settlement process may well be outweighed by the negative fallout, whether to the settlement dynamics because the other party has become more alienated or entrenched in its position, or to the bottom line. For example, if a defendant is insured under a wasting policy, the more money spent litigating, the less left to fund a settlement.

Lodging Settlement Conference Statements

Parties are required to lodge (but never to file) settlement conference statements in advance. Read the assigned judge's standing order carefully regarding what to include in the statement and whether to exchange it with opposing counsel. Some judges do not allow the statements to be shared with the other side; others allow or require service but also permit you to lodge a confidential supplemental statement for the judge's and law clerks' eyes only that is not served on the other side. Take advantage of this opportunity to alert the judge candidly before the conference about any issues or obstacles affecting settlement or potential opportunities for creative solutions. Also, explain the history of prior negotiations. Occasionally, parties decide to share portions of their statements with the opposing parties, especially when they have not had a chance to communicate their views fully. But usually you should seize this opportunity to communicate confidentially with the judge.

Use your settlement conference statement to point out obstacles and avenues to settlement. While you should certainly explain the strengths of your case in your statement, avoid being overzealous in your advocacy and, where appropriate, acknowledge risk. The statement is not a brief to persuade the trial judge, or a closing argument to the jury, but a chance to explain the real issues in the case from a settlement perspective. The judge will be looking to see whether your side is viewing its case with any degree of realism. Ignoring major vulnerabilities will raise a red flag. (The same applies, of course, to your participation in the settlement conference itself, especially when you are talking confidentially with the judge outside the presence of your opponents.)

Be succinct, but be sure to address all the topics that the settlement conference order requires. Of course, you should get your statement to the judge by the deadline, so that the judge can devote the time necessary to be prepared for your conference. Occasionally, litigants appear to treat these deadlines as optional. Not only can unexcused delays expose you to sanctions, but late statements cut short the judge's time to prepare for your conference. Keep in mind that the magistrate judges engage in considerable preparation before your conference. For example, if I spot a critical legal issue that may be pertinent to settlement, I will do some research on that issue if I am not already familiar with it. If you believe you have a crucial piece of evidence, point it out and, if practical, attach it to your statement. It can be frustrating for the judge to read different parties' conflicting characterizations of a particular email or a witness's deposition testimony without being able to see it. At the same time, do not bury your main points in needless details.

Prior to the settlement conference, some judges require the plaintiff to make a demand, if it has not done so already, and the defendant to respond. This exchange is meant to get the parties thinking and talking about settlement and help lay the groundwork for a serious effort to settle the case at the conference.

Some judges require in certain cases, such as patent cases, that the principals meet in person well in advance of holding any settlement conference, to explore possible business resolutions of the litigation.

The Settlement Conference Itself

A settlement conference may last anywhere from a couple of hours to all day. It may be a one time event. Or the magistrate judge may hold two or more conferences, depending on the needs of the case. In the Northern District of California, we have the luxury of being able to devote the necessary time, especially with appropriate advance planning. For example, a high stakes, complex, multiparty case may require several sessions, with the magistrate judge monitoring follow-up by the parties in between.

The conference offers the opportunity for the judge, the parties and their counsel to meet in different combinations, from a joint session to separate caucuses with one or more parties and/or insurers. The process is confidential from the rest of the world, including your trial judge. ADR L.R. 7-5. Listen to the judge's ground rules for the participants in the conference, including under what circumstances information that you convey in any separate meeting with the judge may be shared with the other side. Some judges will explain at the outset that you need to specifically identify information that you convey in separate session that you do not want conveyed to the other side to ensure its confidentiality; other judges may use a different default rule. If you are not sure, ask; do not assume. We will, of course, respect your confidences.

While the magistrate judge will have thought about how to proceed during the conference, your input can be helpful, either at the conference itself or in advance. For example, you may be concerned that the other side's attorney or client has seriously underestimated your side of the case or has an inflated view of its own case, impeding the prospects for settlement. In those circumstances, a joint session in which counsel get an opportunity to advo-

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cate their position to the other side's decision-maker may sometimes be useful. But in cases with sophisticated parties and counsel on both sides, that approach may be unnecessary or even backfire, getting the adversarial juices flowing, rather than focusing the participants on reaching a resolution. The settlement judge may be better able to convey the message in a separate caucus in a way the other side can really hear and absorb. By the same token, if you are having difficulty convincing your own client to be realistic, find a way to let the settlement judge know. (If necessary, do this before the conference.)

Similarly, if the principals have not had an opportunity to talk face to face, or could benefit from another opportunity, let the settlement judge know. Sometimes, the principals need to talk together without the lawyers, but may or may not need the judge to be present to ensure that they really hear each other and avoid needless flare-ups.

Settlement judges use different approaches to help move the parties toward settlement. For example, the facilitative method focuses on enabling the parties to communicate more effectively with each other and generate their own solutions to the conflict, rather than on the merits of the litigation. By contrast, the evaluative method involves the judge giving the parties feedback on the risks in their case, usually in separate caucuses. Depending on the case and the judge, the judge may emphasize one approach, or combine them.

As noted above, the settlement conference is usually not the place to engage in heated advocacy, even when in joint session. While not always possible, an atmosphere of mutual respect and collaboration in working toward a solution is generally more productive. Indeed, while you want to assure your client that you are an ardent advocate of its cause, be careful when doing so that you are not so effective in your advocacy that you give your client an inflated view of its prospects for victory. Also, if you are serious about trying to settle the case, do not engage in so much posturing about your settlement position that you actually send the wrong signal to the settlement judge that further efforts are futile.

Be open-minded and flexible, and encourage your client to do the same. You may learn something at the settlement conference that should cause you to reevaluate your position, whether about the evidence or the law or about a creative approach to settling the case. Sometimes, you have lived with your case so long and are so immersed in its glorious details that it helps to hear a fresh perspective from someone in a position similar to the decision-maker in your case. Even if the case does not settle at the conference, you and the other litigants may gain new insight into what needs to be done both to better prepare the case for trial if necessary and to better position the case for a negotiated resolution in the future.

Follow-up After the Settlement Conference

If the case settles, the magistrate judge will let the trial judge know. If it does not, the magistrate judge will usually engage in follow-up with the parties. Further developments in the litigation or changes in the business may create a new window of opportunity for settlement. The judge may arrange for the parties to conduct limited additional discovery, explore certain business solutions or take other steps and report back. The judge may keep in touch with the parties through telephone or faxed updates to chambers, sometimes separately and confidentially, sometimes jointly, as warranted. The settlement judge may schedule a further conference, or the trial judge may order one. If appropriate and with the parties' permission, the settlement judge may communicate with the trial judge not on the substance of the negotiations but on relevant procedural matters, such as whether a stipulated order to continue a particular motion to allow more time for settlement discussions is warranted. Of course, the trial judge may not agree to modify the schedule, especially the trial date. For example, Judge Alsup's case management order cautions litigants against seeking extensions based on settlement discussions, and his guidelines for civil trial and final pretrial conference similarly warn that a settlement "in principle" but not in fact does not by itself halt the proceedings.

Finalizing the Settlement

If possible, bring a draft of the settlement agreement that you would like to enter into at the settlement conference, preferably on a laptop computer so you can edit as needed. Then, if settlement is reached, you may be able to leave with a signed settlement agreement. But if this is not possible, take advantage of the valuable opportunity to memorialize the essential terms on the record in open court before working out all the wording of final settlement documents. The terms stated in court should usually include the provision that the settlement is binding and effective as recited on the record, whether or not the parties succeed in further reducing it to writing. This procedure provides insurance against the settlement coming unraveled by creating an enforcement mechanism. *See Doi v. Halekulani Corp.*, 276 F.3d 1131 (9th Cir. 2002). If the terms include confidentiality, the record will be sealed. If the parties are truly concerned that a dispute may arise over details yet to be negotiated, they may agree, if the settlement judge is willing, to submit the dispute to the judge for a binding decision.

As we all know, settlement is an art, not a science. While some cases are destined for trial for a variety of reasons, sometimes good ones, others may fail to reach a favorable settlement that avoids the costs and uncertainty of litigation, due to missed opportunities. And your client, perhaps previously elated at the prospect of crushing its opponent, might have come to share Judge Learned Hand's sentiment that "as a litigant, I should dread a lawsuit beyond almost anything short of sickness and death." Following these suggestions may help you and your client make your settlement conference a success.

Magistrate Judge Elizabeth D. Laporte is a United States Magistrate Judge for the Northern District of California, and is a member of the ABTL Northern California chapter Board of Governors.

JAMES YOON

On PATENTS

Patent cases frequently involve complex technology and difficult legal issues. Lacking both technical and legal training, jurors are overwhelmed by the demands these cases pose. To cope, jurors may simplify the case to a single question — "who had the more credible expert?" This question changes the focus of the trial from the patent issues to basic human perceptions regarding the qualifications, integrity, and likeability of the expert. And, it elevates the expert deposition to one of the key events in the case. The deposition provides the patent litigator with a unique opportunity to obtain the ammunition she needs to shape the jurors' perceptions of the opposing expert.

Expert Depositions

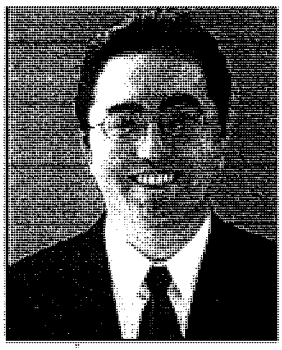
Under any circumstance, an expert deposition is a challenge. The deposition requires an attorney to question an expert regarding the design and operation of the patented invention, the accused products, and the prior art. The deposition further mandates that the attorney implement a strategy that limits, impeaches and/or undermines the opinions of the opposing expert. Today, the one-day, seven-hour time limit most courts impose on expert depositions makes the challenge seem impossible.

It is not unusual for a technical expert in a patent case to submit an expert report that covers dozens of issues and runs hundreds of pages. The voluminous nature of the report makes it impossible for the attorney to question the expert on all the statements in the report. Don't try. The effort will frustrate, not advance, your goals at trial. The following are guidelines I have found useful in expert depositions.

Know Rule 26(a)(2)(B) of the Federal Rules. Rule 26 requires an expert to submit an expert report that contains "a complete statement of all opinions to be expressed and the basis and reasons therefore" and identifies "the data or other information considered by the witness in forming the opinions." Limit the expert to the report. At trial, you can impeach the expert by demonstrating that she based her opinion on a false assumption ("Dr. Smith, your opinion on infringement was based on the belief that the defendant's product was reprogrammable, correct?") or formed her opinion without considering all the relevant facts ("When you formed your opinion in this case, you did not consider the fact the reprogrammable version of the defendant's product was a prototype that was never sold, correct?"). Additionally, Rule 26 (in combination with Rule 37) protects you from any attempt by the expert to offer a new opinion at trial or cite "new" facts to cure deficiencies in her opinion.

Don't Waste Time on Qualifications. Judges typically respond to objections to an expert by ruling that the objection goes to the weight, not the admissibility, of the expert's testimony. Unless her report clearly indicates that the expert is unqualified, limit your questions regarding the expert's qualifications to (1) identifying missing credentials such as relevant work experience ("prior to this lawsuit, is it fair to say that you never designed a widget?") or (2) demonstrating that your expert is more qualified than the opposing expert ("Are you aware that defendant's expert, Dr. Jones, was the design manager for the team of engineers that built the world's first widget?" "Prior to this lawsuit, you never worked on the design of a widget, correct?").

Elicit Areas of Agreement. The battle between experts is often one regarding their interpretation of facts, not the actual facts. If a question is directed to facts, an adverse expert witness will typically concede helpful facts even though she will disagree with your interpretation of the facts. Take full advantage of this opportunity. Before the deposition, identify the facts that you want to emphasize in your closing argument. Use the deposition to get the expert to acknowledge such facts. At trial, it can be incredibly powerful to argue to the jury that the opposing expert "admitted" the key fact in the case on cross-examination.



James Yoon

Identify the Gaps. Identify "common sense" gaps in an expert's analysis. Many experts form opinions in the case without ever operating the device at issue or reading depositions of key witnesses. These experts, who rely on their personal experience, do not think it necessary to actually operate the device or hear the view of other witnesses. Juries disagree. It is amazing what testimony you can get with the following types of questions: "Dr. Smith, have you ever operated the defendant's widget?" "Have you ever seen it in operation?" "Have you ever held one in your hand?" "Did you ever read the testimony of the inventor?" At trial, you will be able to enhance the credibility of your expert and diminish the credibility of the opposing expert by showing that, unlike the opposing expert, your expert operated (and tested) the product and carefully studied the testimony of the inventor.

Don't Argue with the Expert. Don't waste your limited deposition time arguing with the witness. If the expert gives you a clear, responsive answer to your question, don't argue. You are not going to change the expert's opinion. Instead, identify the basis for the answer (and, perhaps, limit the scope of the response to a narrow circumstance) and move on.

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E-Discovery Amendments

discover "electronically stored information." The Committee Note states that the term "electronically stored information" is "expansive and includes any type of information that is stored electronically" and "is intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments."

Significantly, however, under amended Rule 26(b)(2)(B) (and amended Rule 45(d)(1)(D), which addresses third party subpoenas), electronically stored information is presumptively not discoverable if it comes from sources that the responding party identifies as "not reasonably accessible because of undue burden or cost." This changes the basic ground rules of discovery, which previously required production of all relevant, non-privileged documents. Under the new regime, electronically stored information is discoverable only if it is relevant, non-privileged and reasonably accessible (unless the requesting party can establish good cause, as discussed below). Although the Amendments do not specify what "not reasonably accessible" means (other than to say that it must be because of "undue burden or cost"), the drafters stated in their formal submission to the Judicial Conference that such information would include (and this is not meant to be an exhaustive list) "back-up tapes intended for disaster recovery," "legacy data that remains from obsolete systems and is unintelligible on the successor systems," data that was "deleted" but remains in fragmented form requiring forensic restoration, and "databases that were designed to create certain information in certain ways and that cannot readily create very different kinds or forms of information."

If sources of electronically stored information are not reasonably accessible, the requesting party can still obtain discovery from such sources if it can show "good cause, considering the limitations of Rule 26(b)(2)(C)." This issue can be raised with a court either by the requesting party (through a motion to compel) or the responding party (through a motion for protective order or, in the case of a third party subpoena, motion to quash). In either case, the responding party has the burden of showing that the information sought is not reasonably accessible, and the requesting party has the burden to establish "good cause."

The Amendments provide some guidance on the "good cause" determination. First, as noted above, the "good cause" determination is expressly tied to Rule 26(b)(2)(C), which provides that a court may limit discovery if it is unreasonably duplicative or obtainable from a better source, if the party seeking discovery has had ample opportunity in the litigation to obtain the information sought, or if the burden or expense of the discovery outweighs its likely benefit. Furthermore, the Committee Note sets forth a series of factors that might go into a court's consideration of whether "good cause" exists to order production, including: (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.

Cost Shifting Is Contemplated But Not Required

Cost shifting has increasingly become an area of dispute in cases involving electronic discovery. The Amendments contemplate the possibility of cost shifting when a party is required to provide discovery from inaccessible sources, although the Amendments provide no guidance as to how a court should determine whether and to what extent to shift costs. Instead, amended Rules 26(b)(2)(B) and 45(d)(1)(D) generically empower the trial court to "specify conditions for the discovery [of inaccessible information]," which "conditions" the Committee Note states might include shifting part or all of the cost of production from the responding party to the requesting party. Given this lack of guidance, it is likely that courts will continue to look to the factors discussed by Judge Shira Scheindlin in *Zubulake v. UBS Warburg* LLC, 217 F.R.D. 309 (S.D.N.Y. 2003), which is often cited as the leading case addressing electronic discovery. Those factors — which were used in *Zubulake* to determine whether to shift the costs of producing inaccessible electronic data from the responding party to the requesting party — are largely duplicative of the "good cause" factors listed in the preceding section. Given the convergence of these factors, it seems likely that in many cases where a court orders production of inaccessible electronically stored information — particularly in disputes between businesses that have the financial means to pay for the discovery — some degree of cost shifting will be ordered.

Framework for Addressing the Form of Production

The form in which electronically stored information must be produced has become an increasingly prominent topic in the discussion over electronic discovery. The Amendments have attempted to provide a framework for addressing the form of production. Under amended Rules 34(b) and 45(a)(1), the requesting party may, but is not required to, specify the form in which electronically stored information is to be produced. The responding party can object to producing electronically stored information in the requested form but must state the reason for the objection. If necessary, the question of form can be raised in a motion to compel.

In the event that the responding party objects to the requested form of production, or if no form is specified in a request for production, it must state in its written response the form it intends to use. If no form is specified in the request, it can choose to produce the information either in the form in which it is ordinarily maintained or in a form that is reasonably usable. However, this gives rise to several questions. First, can a responding party

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MICHAEL W. SOBOL

On CLASS ACTIONS

An opinion from the Second Circuit has the class action bar, plaintiffs' and defendants' attorneys alike, buzzing about certifying discrete issues for class treatment under Federal Rule of Civil Procedure 23 (c)(4)(A). Although courts have recognized so-called "issues classes" for some time, in *Augustin v. Jablonsky*, 461 F.3d 219 (2d Cir. 2006), the Second Circuit became the first Court of Appeals to fully champion issue certification by addressing a question avoided by most courts — whether an analysis of Rule 23(b)(3)'s predominance requirement can focus on specific issues and not on the claim as a whole. This closely-watched development will likely breathe renewed interest into single-issue certification.

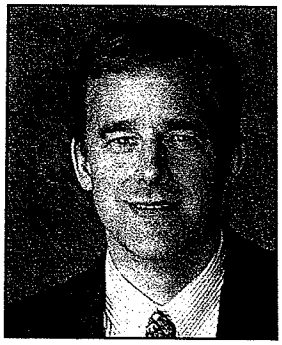
Rule 23(c)(4)(A) states that "an action may be brought or maintained as a class action with respect to particular issues." Wright & Miller's civil procedure treatise comments that under this rule particular issues can be determined on a representative basis, "even though a court decides that common questions do not predominate for purposes of Rule 23(b)(3)." In 1996, however, the Fifth Circuit in *Castano v. American Tobacco Co.*, 84 F.3d 734, 745-746 n.21 (5th Cir. 1996), stated that the cause of action as a whole must satisfy the predominance requirement. Although expressed in a footnote, the ruling has, as one court observed, "gained a following."

Then along comes *Augustin v. Jablonsky*. There, plaintiffs alleged that officials in Nassau County, New York conducted unconstitutional strip searches pursuant to a uniform policy without the requisite individualized suspicion. Four years of wrangling over class certification ensued. The district court twice denied certification of particular liability issues, ruling that the action as a whole must satisfy Rule 23(b)(3)'s predominance requirement. Plaintiffs kept honing their class theory to eliminate individual issues, but defendants had conceded that the strip searches were unconstitutional. As a result, the district court again denied class certification, reasoning that defendants' concession removed all common liability issues from the predominance analysis, leaving nothing to certify except individual issues.

Noting a split in the circuits, the Second Circuit held that the plain language of Rule 23 mandates courts to *first* identify issues potentially appropriate for class certification "*and...then*" apply the balance of the rule, including the predominance test, to those issues. Thus, specific issues may be singled out for class treatment regardless of whether the entire claim meets the predominance test. The common issues conceded by defendants in *Augustin*, the court held, bear on the cohesiveness of the class, so must also be considered in assessing predominance. The decision is consistent with the Ninth Circuit's decision in *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996), which reversed class certification because of a lack of findings, but generally approved the severing of common and individual issues under Rule 23(c)(4)(A).

Permitting issues classes doesn't weaken the full predominance and superiority analyses required by Rule 23(b)(3). It just means the analysis is done on an issue-by-issue basis. Issues classes must still be "sufficiently cohesive" to meet predominance standards, and the certification of limited common issues must be shown to materially advance a fair resolution of the overall controversy. Judges will balance the issues triable on a classwide basis with those left for individual adjudication to measure the benefits and efficiencies gained from issue certification. Rigorous predominance and superiority analyses should dispel the concern expressed in *Castano* that allowing issue classes under Rule 23(c)(4)(A) will result in "automatic certification in every case where there is a common issue."

The Fifth and Seventh Circuits have suggested that issue certification may offend the Seventh Amendment's prohibition against juries re-examining previously decided issues. To avoid this pitfall, as part of their superiority showing, plaintiffs should be prepared to establish that evidence need only be heard either in a common issues trial or an individual trial, but not both. To avoid potentially duplicative findings, parties should also carefully craft jury ballots that allow for detailed factual findings.



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In addition, because much of class action litigation focuses on defendants' conduct and policies as they affect entire classes, once these issues are determined, they do not need to be revisited. For example, the issue of the legality of a discriminatory lending practice may be determined for the whole class, while the issue of a class member's financial eligibility to participate in such lending can be determined individually. *See Chiang v. Veneman*, 385 F.3d 256 (3d Cir. 2004). And, in a negligence claim, it may be appropriate to certify issues regarding defendant's duty to the class and whether it breached that duty, while reserving issues of individual causation and damages for a separate trial. *See In re Tri-State Crematory Litigation*, 215 F.R.D. 660 (N.D. Ga. 2003).

Issues classes exhibit the dynamism needed in class action procedure. In *Augustin v. Jablonsky*, the court reasoned that the rights of the majority of the victims of the unconstitutional strip searches would go unaddressed, but for certification of the issues class. Thus, issues classes present a flexible mechanism that serves a fundamental purpose of class actions: ensuring that individuals who would otherwise go unrepresented have a fair opportunity to protect their rights. For these reasons, we can expect to see more Rule 23(c)(4)(A) issues classes.

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E-Discovery Amendments

choose to produce electronically stored information in the form in which it is ordinarily maintained even if it is not reasonably useable? According to the Committee Note, the answer is found in the Rule 34(a), which provides that electronically stored information must be translated, if necessary, into reasonably usable form.

Another question is whether a responding party is free to convert electronically stored information from the form in which it is ordinarily maintained to a different form that, although reasonably usable, is more difficult for the requesting party to use. According to the Committee Note, this would be improper. The Committee Note states, "But the option to produce in a reasonably usable form does not mean that a party is free to convert electronically stored information from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation. If a party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature." This arguably means that producing e-mails in hard copy form may no longer be proper, since most e-mail programs have at least limited searching capabilities. This would be a surprising result, since hard copies of e-mails would seem to be "reasonably usable" and are commonly produced in paper format.

Changes to Initial Case Management Process

The Amendments make several important changes to Rule 26 that will force attorneys to address potential e-discovery issues early, before costly and time consuming searches and production occur. The initial discovery plan that the parties must submit to the court must now address "any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced," as well as "any issues relating to claims of privilege or of protection as trial-preparation material, including — if the parties agree on a procedure to assert such claims after production — whether to ask the court to include their agreement in an order." The parties are also required to discuss, prior to the first case management conference, "any issues relating to preserving discoverable information." Furthermore, a party's initial disclosures must now include any "electronically stored information" that the party intends to use to support its claims or defenses.

As a practical matter, these changes will force parties to develop quickly a thorough understanding of the sources of a party's electronically stored information and the formats in which such information is maintained. While it was already advisable to develop such an understanding early in a lawsuit, the Amendments make it a practical necessity to do so.

Inadvertent Production of Privileged Material

Because the risk of privilege waiver, and the time and effort to avoid it, can be substantial where large volumes of electronically stored information are involved, the Amendments create a procedure — sometimes referred to as a "claw back" provision — that allows a producing party to assert privilege and work-product claims after production. The new provisions, found in Rules 26(b)(5)(B) and 45(d)(2)(B), provide that if information is produced in discovery that is subject to a claim of privilege or work-product, the producing party must notify any party receiving the information of the claim and the basis for it. The receiving party then must either (1) return, sequester, or destroy the protected material, or (2) present the material to the trial court under seal and ask the court to rule on the privilege claim.

Safe Harbor Against Sanctions for Accidental Destruction of Electronic Files

Amended Rule 37 contains a limited safe-harbor against sanctions to protect a party that destroys relevant documents as a result of routine data destruction procedures. The safe harbor provides that "absent exceptional circumstances," a court may not impose sanctions on a party "for failing to provide electronically stored information lost as a result of routine, good-faith operation of an electronic information system." Thus, to qualify for the safe harbor, electronically stored information must be lost due to data destruction procedures that are "routine" and that were operated in "good faith." In several high profile cases in recent years, courts have imposed significant sanctions against parties for destroying relevant documents after the commencement of litigation. This provision should provide some level of comfort to parties that, like most businesses today, have computer systems that engage in routine, periodic data destruction.

There are limitations on the safe harbor, however. It only prevents a court from imposing sanctions "under these rules." Thus, as the Committee Note points out, "it does not affect other sources of authority to impose sanctions or rules of professional responsibility." Furthermore, the Committee Note explains that "good faith" might require a party, once litigation is anticipated, to modify or suspend routine operation of systems to avoid loss of relevant information. The failure to do so could potentially preclude a party from relying on the safe harbor in the event that relevant information is destroyed.

Electronic information systems have already had a tremendous impact on the way litigation is conducted. That impact will increase as the world becomes more and more "paperless." The Amendments provide some needed ground rules for courts and attorneys to follow when dealing with the discovery of electronically stored information.

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HOWARD M. ULLMAN

On ANTITRUST

The United States Supreme Court has granted *certiorari* in two important antitrust cases to be decided this Term. In *Twombly v. Bell Atlantic Corp.*, the Supreme Court will determine whether a plaintiff in an antitrust conspiracy case needs to plead "plus factors" to survive a motion to dismiss, or whether it is sufficient merely to make general allegations of a conspiracy. In *Weyerhaeuser v. Ross-Simmons Hardwood Lumber*, the Supreme Court granted *certiorari* to decide whether predatory buying claims (where a large downstream buyer of materials is alleged to have abused its market power to buy materials at higher-than-competitive prices in order to harm a competing downstream purchaser) should be evaluated under the restrictive standard the courts routinely apply to predatory pricing claims.

In *Twombly v. Bell Atlantic Corporation*, 425 F.3d 99 (2d Cir. 2005), *cert. granted*, No. 05-1126, the Second Circuit arguably relaxed the pleading standard for antitrust conspiracy cases and rejected the argument that an antitrust plaintiff must plead certain "plus factors" to avoid a motion to dismiss. "Plus factors" are evidentiary factors that an antitrust plaintiff in a conspiracy case must generally establish to avoid summary judgment, such as a common motive to conspire, evidence that parallel acts were against the apparent individual economic self-interest of the alleged conspirators, and evidence of a high level of inter-firm communications.

Plaintiff Twombly alleged that the defendant "Baby Bell" phone companies had conspired to collectively keep competitors from entering their respective local telecommunications markets. Twombly also alleged that the Baby Bells agreed to refrain from attempting to enter each other's markets. Twombly claimed that most of the Baby Bells are dominant in particular geographic areas that surround small pieces of territory controlled by other defendants, yet none has attempted to compete meaningfully in the surrounded territories. Twombly further alleged that the Baby Bells have conceded that competing in each other's areas would be profitable. Twombly also pointed to an article quoting a carrier's CEO that "competition might be a good way to turn a quick dollar but that doesn't make it right." Finally, Twombly alleged that defendants have frequent opportunities to organize and conduct their conspiracy through industry organizations, and a common incentive to do so. (This latter allegation probably constitutes a "plus factor," but the Second Circuit's opinion indicates it would have decided the case the same way even if this factor had not been pled.)

On these alleged facts, the Second Circuit held that the pleaded factual predicate need only include conspiracy among the realm of "plausible" possibilities. To rule that allegations of parallel anticompetitive conduct fail to support a plausible conspiracy claim, a court would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallel conduct at issue was the product of collusion rather than coincidence. Plus factors may strengthen the plaintiff's case, the court held, but plus factors are not required to be pleaded for a viable antitrust claim based on parallel conduct.

The Supreme Court's decision in *Twombly* will resolve a split of authority in the lower courts on this issue. Some lower court cases dismiss antitrust conspiracy complaints for failure to allege evidence inconsistent with independent conduct, while others decline to impose such a requirement at the pleading stage.

The U.S. Supreme Court also granted *certiorari* this summer to decide whether predatory buying claims should be analyzed under the same standard as predatory selling claims. *See Confederated Tribes of Siletz Indians of Oregon v. Weyerhaeuser Co.*, 411 F.3d 1030 (9th Cir. 2005), *cert. granted sub nom., Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, No. 05-381.

Howard M. Ullman

Weyerhaeuser, a company that cuts and processes raw logs into lumber, was accused by its competitor of artificially increasing sawlog prices to drive the plaintiff out of business. The jury returned a verdict for plaintiff after the trial court instructed the jury that it could regard it as an anticompetitive act if it found that Weyerhaeuser had paid higher prices than necessary for sawlogs.

On appeal, the Ninth Circuit held that the predatory pricing standard articulated in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), should not apply to predatory buying claims. Under *Brooke Group*, to make out a predatory pricing claim, a plaintiff must establish (1) prices complained of are below an appropriate measure of costs, and (2) a dangerous probability exists that the predatory firm would later recoup its investment in below-cost pricing once it stops such pricing. *Brooke Group* established a high threshold for predatory pricing claims because of its concerns with the facts that consumers benefit from lower prices and that cutting prices usually promotes competition. The Ninth Circuit found *Brooke Group* not to control in the predatory buying situation, because benefit to consumers and stimulation of competition do not necessarily result from predatory bidding the way they do from predatory pricing.

The Solicitor General urged a grant of *certiorari*, arguing that the Ninth Circuit's decision threatens to chill procompetitive conduct by companies that bid aggressively to ensure access to inputs. Whatever the Supreme Court decides, the decision should clarify the standards for analyzing predatory buying claims, offering guidance to companies in numerous industries on where the line of anticompetitive behavior in the purchase of raw materials and manufacturing inputs is likely to be drawn.

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Letter from the President

2006 was a remarkable year for our Northern California ABTL Chapter.

We have record membership — over 1700 Bay Area lawyers are members in our chapter, making us the largest ABTL chapter in the state by far.

We have had exceptional programming, with subjects as varied as peremptory challenges, a look at developments in our local Bay Area courts, prognosticating how the Roberts Supreme Court will impact business litigation, and a behind the scenes look at the *NTP v. Research in Motion* patent case, one of the largest (and most controversial) patent cases on the books.

We also saw the successful launch of the Leadership Development Committee programs, a series of free afternoon or evening educational events that are developed by and directed toward our next generation of top trial lawyers. This program has been so successful that two other ABTL Chapters, those in Los Angeles and San Diego, are developing programs based on our LDC model.

Claude M. Stern

These accomplishments are the result of the dedication of an enormously talented group of ABTL local leaders, including Benjamin Riley (your 2007 President), Steven Lowenthal (your 2007 VP), Steven Hibbard (your 2007 Treasurer), Sarah Flanagan (your 2007 Secretary), Lawrence Cirelli (your 2007 Dinner Program Chair), Karen Kennard (your 2006 Membership Chair), Mary Jo Shartsis (your 2006 Annual Seminar Representative and 2007 Membership Chair), and Evette Pennypacker (your first LDC Chair). I thank each of these colleagues for their time, talents and commitment to our Chapter.

I also want to thank Tom Mayhew and Howard Ullman, for their seamless transition as the new editors of our Northern California *ABTL Report*, which remains an invaluable source of legal information and news for our community.

I owe a special thanks to our Chapter Executive Director, Michele Bowen, who has been so helpful in facilitating the work of all of our ABTL Chapter officers and chairs.

And, last but not least, I want to thank each and every one of the lawyers and judges on our Chapter's Board of Governors, who have so unhesitatingly contributed time and attention to make our Chapter as successful as it has become.

The ABTL has been and continues to be the premier educational forum for California's judges and best business trial lawyers. It has been my distinct honor and privilege to serve on our Northern California ABTL Board of Governors for 9 years, and as the 2006 Northern California Chapter President. Under the dedicated stewardship of our Chapter's 2007 officers and chairs, we can expect to continue to see superior dinner programs and LDC events that enhance the practices of California's civil trial lawyers and judges.

Claude Stern is a partner at Quinn Emanuel Urquhart Oliver & Hedges, LLP, and is the President of the Northern California ABTL.

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